No. 01-1444

In the Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether petitioner, a police officer, is entitled to qualified immunity in a lawsuit under 42 U.S.C. § 1983 alleging that his interrogation of respondent was unduly coercive, in violation of the Fifth and Fourteenth Amendments, where no statement made by respondent has ever been used against him in a criminal case and the officer's undisputed purpose was to obtain evidence from an individual, shot by police, before that individual's anticipated imminent death.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b), petitioner Ben Chavez states that there were no parties in the court of appeals who are not parties in this Court. In the trial court, the defendants in addition to Chavez were the City of Oxnard, the Oxnard Police Department, Chief Art Lopez, in his official and individual capacities, Chief Harold Hurtt, in his individual capacity, and Officers Maria Peña, Andrew Salinas, and Ron Zavala, in their official and individual capacities. Defendants Lopez and Hurtt were both dismissed from the case by the trial court before the entry of judgment. See J.A. 3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 270 F.3d 852. The order denying rehearing (Pet. App. 31a-32a) is unreported. The district court's opinion granting in part and denying in part respondent's motion for summary adjudication (Pet. App. 15a-30a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on October 30, 2001, and rehearing was denied on December 26 (Pet. App. 1a, 31a). The petition for certiorari was timely filed on March 26, 2002, and granted on June 3. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part: "No person * * * shall be compelled in any criminal case to be a witness against himself." Section 1 of the Fourteenth Amendment provides in part: "No State shall * * * deprive any person of life, liberty, or property without due process of law." 42 U.S.C. § 1983 provides in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *."

STATEMENT

This case arises from the aftermath of a tragic struggle between respondent Oliverio Martinez and two police officers who were investigating suspected narcotics activities. In the course of a search and subsequent altercation, respondent apparently took control of a firearm from one of the officers. The second officer fired several shots at respondent, causing him severe injuries.

Petitioner Ben Chavez, a patrol supervisor, arrived on the scene thereafter and accompanied respondent to the hospital. There, intermittently over the course of about 45 minutes,

petitioner questioned Martinez about the officer-involved shooting. None of respondent's statements, however, was ever used against him in a criminal case. Even so, the Ninth Circuit, relying on its previous en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220, cert. denied, 506 U.S. 953 (1992), held that petitioner's interrogation violated respondent's rights under the Compulsory Self-Incrimination Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, and that a defense of qualified immunity could not be invoked in respondent's lawsuit under 42 U.S.C. § 1983.

1. On November 28, 1997, police officers Maria Peña and Andrew Salinas were investigating suspected narcotics activity near a vacant lot in a residential area of Oxnard, California. Pet. App. 2a. The officers had previously received information that narcotics were being sold from a shed located on the property. C.A. App. 171.[1] While questioning one individual, Salinas and Peña heard a bicycle approaching on the darkened path that traversed the lot. Salinas ordered the rider, respondent Martinez, to stop, dismount, spread his legs, and place his hands behind his head. Respondent complied. Pet. App. 2a-3a.

As Salinas approached Martinez to perform a search, respondent began to run, fearing that Salinas would discover a knife that he had concealed in the back of his trousers. C.A. App. 38-39, 308. A struggle ensued. According to Peña's deposition testimony, respondent reached behind him as if to draw his knife; Peña grabbed the knife and threw it some distance from the combatants. C.A. App. 180-181. At some point in the mêlée, Martinez apparently obtained control of Salinas's handgun. C.A. App. 39, 209.

According to the two officers, there was a struggle for control of the weapon, with Martinez pointing the barrel multiple times in the direction of both Salinas and Peña. C.A. App. 184-85, 211. Salinas, convinced that Martinez was going

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[1] "C.A. App." refers to the Excerpts of Record filed in the court of appeals.

to kill him (C.A. App. 209), cried out, "He's got my gun." Pet. App. 3a. Peña drew her weapon and fired several times. One bullet penetrated respondent's left eye and damaged the optic nerve of his other eye, rendering him blind. Another bullet fractured a vertebra, paralyzing respondent's legs. Three more bullets hit respondent's leg. *Ibid*.

Petitioner Chavez, a patrol supervisor, arrived on the scene minutes later with paramedics. Pet. App. 3a. After speaking with the two officers, Sergeant Chavez accompanied respondent to the hospital. *Id*. at 3a-4a. There, in the presence of medical personnel, petitioner sought to learn from respondent precisely what had happened in the incident. C.A. App. 98-99, 111-113, 228, 270. The interview lasted only 10 minutes and 7 seconds of actual conversation, spread out over a 45-minute period, with Chavez remaining outside the emergency room for periods of time to permit medical personnel to attend to Martinez. Pet. App. 4a; C.A. App. 451.

In response to petitioner's questions, respondent acknowledged that he had been shot because he was fighting with the police (J.A. 11); that he had "pulled" Salinas's gun (J.A. 15; see also J.A. 16); that he had "pointed" the gun at Salinas (J.A. 16; see also J.A. 17); that he used heroin every day, including that very evening (J.A. 18); and that he had been drinking that day as well (J.A. 17-18). Martinez also stated that he was in enormous pain, thought he was dying, and wanted treatment. J.A 20-22; see also J.A. 11-12. Based on his observations of Martinez's condition and respondent's statements, Chavez believed that respondent would die from his injuries. C.A. App. 38, 114, 452-453; J.A. 11-12, 20-22.

2. Respondent thereafter filed a complaint under 42 U.S.C. § 1983 alleging that the officer defendants had violated his constitutional rights by stopping him without probable cause (in violation of the Fourth Amendment), using excessive force (also in violation of the Fourth Amendment), and subjecting him to a coercive interrogation while he was receiving medical care (in violation of the Fifth, Eighth, and Fourteenth Amendments). Pet. App. 4a-5a.

The defendants (including petitioner) asserted a qualified immunity defense, contending that they could not reasonably have known, at the time of the events in question, that their conduct violated "clearly established" constitutional rights. In that connection, defendants drew particular attention to the purpose of petitioner's interrogation: "to preserve the key non-police witness's account of events before the individual expires." C.A. App. 445. Defendants asserted that a "careful reader" of the governing case law would not have known that this interrogation, "designed to preserve a dying witness's account," would be unconstitutional. C.A. App. 447-448.

The district court granted partial summary judgment in respondent's favor, holding that petitioner could not invoke a qualified immunity defense to respondent's Fifth and Fourteenth Amendment challenges to the interrogation. Pet. App. 15a-30a.[2] The court first addressed the question whether a constitutional violation had been established at all. Although respondent had not been prosecuted, nor had his statement been offered into evidence at any criminal trial, the district court held that "[t]he test" for purpose of a Section 1983 claim under both the Fifth and Fourteenth Amendments was "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Id*. at 19a. Examining "the totality of the circumstances in this case," the district court held that respondent's "statement was not voluntarily given," in violation of both the Fifth and Fourteenth Amendments. *Id*. at 22a-23a.

The district court next rejected Chavez's defense that he had not violated any "clearly established" right. Pet. App. 25a-29a. The court recognized that "[p]ublic officials exercising

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[2] The district court denied respondent's motion insofar as it sought summary adjudication of respondent's Eighth Amendment challenge to his interrogation and Fourth Amendment challenge to his stop and detention. Pet. App. 23a-25a. No issue under the Fourth or Eighth Amendment was before the court of appeals or is before this Court.

discretionary authority are entitled to qualified immunity from suit where their actions '[do] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id*. at 26a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (brackets by the district court)). Nevertheless, the court explained, "[t]he law against coerced confessions was clearly established at the time of [respondent's] interview," and "no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible." Pet. App. 29a.

The court noted Chavez's contention that he was not "trying to build a criminal case" against Martinez when he questioned him, but rather was seeking "to preserve a dying witness's account" of an officer-involved shooting. Pet. App. 28a-29a; C.A. App. 447-448. The district court dismissed that distinction, however, because Chavez "had no knowledge of whether or not a prosecutor would charge [Martinez] if he survived." In any event, the district court added, Chavez "was clearly trying to obtain information that could clear the officers of wrong-doing." Pet. App. 29a.

3. The Ninth Circuit affirmed. Pet. App. 1a-14a. The court first held that respondent had "stated a *prima facie* claim that Chavez violated one of his constitutional rights." *Id*. at 6a (citing *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001)). With respect to the Fifth Amendment claim, the court ruled that "Chavez's coercive, custodial questioning violated [respondent's] substantive Fifth Amendment right against compulsory self-incrimination." Pet. App. 8a. Relying on its own en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220, cert. denied, 506 U.S. 953 (1992), the Ninth Circuit stated (Pet. App. 8a, 9a) that "a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody," even if those statements are never "used against" the suspect "in a criminal proceeding." The panel "recognize[d]" (*id*. at 10a n.3) what it termed "dicta to the contrary" in this Court's decision in *United States* v. *Verdugo-Urquidez*, 494

U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.") (citation omitted). The Ninth Circuit considered it appropriate, however, "to follow [its] own binding precedent rather than Supreme Court dicta." Pet. App. 10a n.3.

The court of appeals next reached the same result under the Due Process Clause of the Fourteenth Amendment. Pet. App. 10a-11a. Quoting from *Cooper*, the court held that "coercive behavior of law-enforcement officers in pursuit of a confession" is sufficient, without more, to constitute a due process violation. *Ibid.*

Finally, the panel held that the rights in question were clearly established. Pet. App. 11a-14a. The court acknowledged that, to overcome a claim of qualified immunity, "[t]he contours" of the constitutional right at issue "'must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.'" *Id*. at 11a (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added)). The panel recognized, as well, that such an inquiry necessarily turns on "the specific facts of this case." Pet. App. 12a. Nevertheless, the Ninth Circuit concluded that "[a] reasonable officer, questioning a suspect who had been shot five times by the police and then arrested, who had not received *Miranda* warnings, and who was receiving medical treatment for excruciating, life-threatening injuries that sporadically caused him to lose consciousness, would have known that persistent interrogation of the suspect despite repeated requests to stop violated the suspect's Fifth and Fourteenth Amendment right to be free from coercive interrogation." *Ibid.* In that connection, the panel asserted that this Court in *Mincey* v. *Arizona*, 437 U.S. 385 (1978), had held "a virtually indistinguishable interrogation" to be unconstitutional. Pet. App. 12a-14a. Indeed, the panel held, "[t]o the extent Sergeant Chavez's conduct differs from that of the officers in *Mincey*, it is more egregious" (Pet. App. 13a) –

notwithstanding petitioner's contention that, unlike *Mincey*, the interrogation in this case was undertaken "to preserve the account of a moribund key witness," not "to obtain incriminating statements." C.A. Opening Br. 18, 19.

SUMMARY OF ARGUMENT

A. In deciding whether a defense of qualified immunity may be overcome, courts must "determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, only then should a court ask whether the right allegedly implicated was clearly established at the time of the events in question." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998). Respondent's constitutional claims fail at this threshold: Neither the Compulsory Self-Incrimination Clause of the Fifth Amendment, nor the Due Process Clause of the Fourteenth Amendment, provides a basis for respondent's challenge to the interrogation in this case.

1. As this Court explained in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990), "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." That statement – which the court below erroneously disregarded as mere "dicta" – follows naturally from the text of the Compulsory Self-Incrimination Clause, which protects a declarant *only* from being "compelled *in any criminal case* to be a *witness* against himself." U.S. CONST. Amend. V (emphasis added).

This Court's cases reflect that fundamental limitation: As long ago as *Brown* v. *Walker*, 161 U.S. 591 (1896), and as recently as *United States* v. *Balsys*, 524 U.S. 666 (1998), the Court has made clear that the Fifth Amendment is not violated merely by coercive questioning – or even questioning that elicits otherwise incriminating statements – so long as none of the compelled statements is used against the witness in a criminal case. Because none of respondent's statements to Chavez

has ever been used against him in a criminal case, there was no violation of respondent's Fifth Amendment rights.

2. Nor does coercive questioning, without more, violate the Fourteenth Amendment. This Court has never concluded that an interrogation alone can give rise to a claim under the Fourteenth Amendment. Instead, for the past 70 years, this Court has repeatedly explained that the prohibition against use of coerced confessions is grounded in the right to a fair trial. See *Brown* v. *Mississippi*, 297 U.S. 278, 285-287 (1936); *Dickerson* v. *United States*, 530 U.S. 428, 435 n.1 (2000). Thus, the Fourteenth Amendment right that has been discussed in this Court's "voluntariness" cases, like the Fifth Amendment privilege against compelled self-incrimination, is irrelevant when there has been no use of a compelled statement in a criminal trial.

There may well be a "substantive" due process right to be free of particularly brutal forms of police questioning, regardless of whether the resulting statement is used in a criminal trial. For three independent reasons, however, respondent has failed to assert a sustainable claim under a traditional substantive due process analysis. First, contrary to the Ninth Circuit's conclusion below and in *Cooper*, 963 F.2d at 1248, there is no "right to silence." As the Seventh Circuit has correctly concluded, for purposes of substantive due process analysis "[t]he relevant liberty is not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation." *Wilkins* v. *May*, 872 F.2d 190, 195 (1989).

Second, respondent has not alleged that petitioner intended to injure respondent, as is required to establish a substantive due process claim under *County of Sacramento* v. *Lewis, supra*.

Third, not only must a high threshold be met before substantive due process analysis applies at all, but also the governmental interests at stake must be weighed against the liberty infringed before it can be concluded that an officer's conduct "shocks the conscience." That is true in this as in any other

category of substantive due process cases, indeed any category of due process cases. Respondent's interest in avoiding Chavez's questioning was outweighed by the competing governmental interests at stake in the exigent circumstances of this case. Chavez had entirely legitimate interests in obtaining respondent's version of the facts before respondent's anticipated imminent death. Chavez engaged in no particularly egregious behavior to aggravate the unpleasantness inherent in trying to obtain information from a person in urgent need of medical attention and thought to be dying. For those reasons, there was clearly no violation of substantive due process.

B. In all events, respondent cannot plausibly maintain that the interrogation in this case violated a right under the Fifth or Fourteenth Amendments that was "clearly established" at the time of the interrogation. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

1. With respect to the Fifth Amendment, all that was "clearly established" at the time of the interrogation is that coercive questioning, without an actual "use" of the compelled statements, does *not* violate the Fifth Amendment. But even if the Ninth Circuit's contrary understanding of the Fifth Amendment is correct, surely that contrary view was not "clearly established" as of November 28, 1997. Rather, seven years before the interrogation in this case, this Court had stated in *Verdugo-Urquidez* that the Fifth Amendment is *not* violated unless and until there is an adverse use of a compelled statement at a criminal trial. Petitioner cannot be held liable in damages for taking an action *permitted* by this Court's case law, simply because a court of appeals later characterizes this Court's statement as "dicta." What is more, the basis for the panel's contrary ruling – the Ninth Circuit's en banc decision in *Cooper* – had been rejected by every other circuit to have considered the issue. Thus, even if petitioner had consulted a law library while en route to the hospital, it is not "clear" that

he reasonably should have discerned the Fifth Amendment standard adopted by the Ninth Circuit in this case.

2. The Ninth Circuit's holding that the Fourteenth Amendment prohibits all coercion of statements, regardless of subsequent use in a criminal trial, is just as wrong as its Fifth Amendment holding. At a minimum, that controversial holding finds no support in this Court's cases and thus cannot be "clearly established." Nor was it "clearly established" that conduct such as that of Chavez violates the Fourteenth Amendment under a "shocks the conscience" analysis. Given the fact-intensive nature of the test, such a conclusion is highly implausible from the outset.

Numerous police invasions of bodily integrity for the purpose of preserving evidence have been held *not* to shock the conscience, making it at the very least unclear that non-invasive questioning for the same purpose would do so. *Cooper*, though it did involve non-invasive questioning, depended on highly unusual and distinguishable facts, including the conceded absence of any exigency. Numerous courts of appeals have rejected due process claims involving police questioning less justified and more aggressive than the questioning in this case. No case has ever held that a police officer violated substantive due process in circumstances materially similar to this case.

3. *Mincey* v. *Arizona* did not hold that the suspect should have a civil rights claim against his interrogators, but only that his statement could not be used at a criminal trial. It was thus categorically inappropriate to cite *Mincey* as a decision putting Chavez on notice that his conduct violated substantive due process. In any event, even if *Mincey* and other admissibility cases are regarded as defining the contours of the substantive due process right, there are important distinctions between *Mincey* and this case. Most particularly, the non-exigent interrogation of a witness (Mincey) who was not even able to speak is wholly different from the exigent interrogation of an articulate, though severely injured, witness (Martinez). Chavez's effort to obtain a dying declaration from a witness to a police shooting violated no clearly established constitutional right.

ARGUMENT

PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY FROM BOTH THE FIFTH AND FOURTEENTH AMENDMENT CLAIMS ARISING FROM HIS INTERROGATION OF RESPONDENT

A. Petitioner's Interrogation Of Respondent Did Not Violate The Fifth Or Fourteenth Amendment

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2513 (2002); accord *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001); *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999); *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Only if respondent has made out a constitutional claim in the first place need the Court consider whether that claim was "clearly established" at the time of the interrogation. As we show below, neither the Fifth Amendment's Compulsory Self-Incrimination Clause, nor the Fourteenth Amendment's Due Process Clause, was violated by the interrogation in this case.

1. Because Respondent's Statements Were Never Used Against Him In A Criminal Case, There Was No Infringement Of His Privilege Against Compulsory Self-Incrimination

a. The Ninth Circuit held that, "[e]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's Fifth Amendment rights." Pet. App. 9a-10a. In the panel's view, "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are 'destructive of human dignity.'" *Id*. at 9a. Accordingly, the court concluded, "a Fifth Amendment violation occurs when a police officer coerces self-incriminating statements from a suspect in custody." Pet. App. 8a.

The panel based that ruling on the en banc decision in *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir. 1992). *Cooper* – proof positive that hard cases make bad law – was a Section

1983 action against officers of the Tucson Police Department. The officers set out to obtain confessions from anyone they suspected of being the so-called "Prime Time Rapist," without regard to *Miranda* and through interrogation techniques calculated to break the witnesses down. The plaintiff was one such suspect, who – despite conclusive evidence that he was *not* the perpetrator of the rapes – was held incommunicado for some 24 hours and subjected to highly aggressive questioning, even after he asked (repeatedly) for counsel. The court of appeals – evidently frustrated by a perceived pattern of misconduct by the Tucson Police Department (see *id*. at 1241 (citing *Edwards* v. *Arizona*, 451 U.S. 477 (1981)), and 963 F.2d at 1245 (citing *Mincey* v. *Arizona*, 437 U.S. 385 (1978))) – held that the plaintiff could press both Fifth and Fourteenth Amendment claims against the police officers.

In addressing the Fourteenth Amendment claim, the court of appeals in *Cooper* asked this central question: "Can the coercing by police of a statement from a suspect in custody ripen into a full-blown Constitutional violation only if and when the statement is tendered and used against the declarant?" 963 F.2d at 1244. "We think not," was the court's answer. *Ibid.* Relying on this Court's decision in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), the court of appeals stated that "[t]he due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself." *Id*. at 1244-1245. The court's Fifth Amendment analysis (*id*. at 1238-1244) assumed likewise that a constitutional violation could be complete without use of the statement at trial, but offered no reasoning to support that assumption.

Judge Brunetti, joined by Judges Leavy and Alarcón, dissented. 963 F.2d at 1253-1256.[3] After canvassing this Court's case law, Judge Brunetti observed that "it is the *use* of coerced statements that constitutes a Fifth Amendment violation." *Id*. at 1254 (emphasis in the original). Here, the dissent

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[3] Judge Leavy, joined by Judges Alarcón and Brunetti, also wrote a separate dissent. 963 F.2d at 1256-1258.

explained, Cooper "faced no trial and accordingly none of his statements were offered against him. The language of the amendment, then, suggests that there was no violation of the Fifth Amendment." *Id*. at 1254-1255. The dissent also concluded that Cooper's substantive due process rights had not been violated. *Id*. at 1255-1256.

b. Judge Brunetti was exactly right in his *Cooper* dissent: The Ninth Circuit's understanding of the Fifth Amendment cannot be squared either with the text of the Amendment or with this Court's case law.

The Compulsory Self-Incrimination Clause provides that "[n]o person * * * shall be compelled *in any criminal case* to be a *witness* against himself." U.S. CONST. Amend. V (emphasis added). The Clause does not forbid all compulsion, or even such compulsion that elicits potentially incriminating statements. Only if and when an individual is compelled to be a "witness" against himself "in a[] criminal case" is there a violation of the Compulsory Self-Incrimination Clause. And that final but crucial step occurs only if the compelled statement is used, either directly or derivatively, in an actual prosecution.

True, a person may *invoke* the Fifth Amendment before use is made of the statement. "It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973)). But while an early invocation of the Fifth Amendment may guard against a compromise of the privilege at a subsequent criminal proceeding, it is not until there is a *use* of the compelled statement "in a criminal case" that the Fifth Amendment has actually been breached. As this Court summarized the point in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990):

> The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.

See also *Oregon* v. *Elstad*, 470 U.S. 298, 306-307 (1985) (emphasis added and deleted) ("[t]he Fifth Amendment prohibits *use* by the prosecution in its case in chief * * * of compelled testimony"); *id*. at 316 (characterizing a violation of the Fifth Amendment as "introducing an inadmissible confession at trial"); *United States* v. *Hubbell*, 530 U.S. 27, 41 (2000) (making "derivative use" of compelled testimony "in obtaining the indictment against respondent and in preparing its case for trial" constitutes Fifth Amendment violation); *Estelle* v. *Smith*, 451 U.S. 454, 464-465 (1981) (using "as evidence against [the defendant] the substance of his disclosures during the pretrial psychiatric examination" constitutes Fifth Amendment violation); *Culombe* v. *Connecticut*, 367 U.S. 568, 581 (1961) (opinion of Frankfurter, J.) (Fifth Amendment protects witness against being made "'the deluded instrument of his own conviction'") (quoting 2 W. HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)).

The court below "recognize[d]" this Court's description of the privilege in *Verdugo-Urquidez*, but disregarded the statement as merely "dicta to the contrary." Pet. App. 10a n.3. That is a debatable account even of *Verdugo-Urquidez* itself; after all, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [lower courts] are bound." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 67 (1996). The Ninth Circuit has elsewhere defined "dictum" as a statement in an opinion that is "peripheral" and that as a result "may not have received the full and careful consideration of the court that uttered it." *Ponderosa Dairy* v. *Lyons*, 259 F.3d 1148, 1155 (2001), petitions for cert. pending, Nos. 01-950 and 01-1018. That is an odd way to describe a portion of the *Verdugo-Urquidez* opinion that this Court introduced with the remark "we think it

significant to note" (494 U.S. at 264). And even statements that are "'technically dicta'" but are "'an important part of the Court's rationale for the result that it reache[s]'" are "'entitled to greater weight.'" *Seminole Tribe*, 517 U.S. at 67 (quoting *Sheet Metal Workers*, v. *EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring)).

In any event, *Verdugo-Urquidez* simply summarized the meaning of the Fifth Amendment as elaborated in numerous other decisions of this Court. Those cases have made abundantly clear that the privilege against compulsory self-incrimination is not violated without the actual use of compelled testimony against the witness in a criminal case. The Court's testimonial immunity cases make the point most emphatically. Indeed, the Court in *Verdugo-Urquidez* cited the leading testimonial immunity case, *Kastigar* v. *United States*, 406 U.S. 441 (1972), in support of its description of the metes and bounds of the Fifth Amendment. See 494 U.S. at 264.

The question in *Kastigar* was whether a witness who was compelled to testify before a grand jury under a grant of use immunity pursuant to 18 U.S.C. § 6002 could invoke the privilege against compulsory self-incrimination. The Court held that he could not. "[I]mmunity from use and derivative use" of compelled testimony, the Court reasoned, "is coextensive with the scope of the privilege against self-incrimination." 406 U.S. at 453. Accordingly, the Court explained, use immunity, once conferred on a witness, "is sufficient to compel testimony over a claim of privilege." *Ibid.* The "*sole* concern" of the privilege, the Court made clear, "is to afford protection against being forced to give testimony *leading to the infliction of penalties affixed to * * * criminal acts.*" *Ibid.* (emphasis added and internal quotation marks omitted).[4]

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[4] See also *Wilkins* v. *May*, 872 F.2d 190, 194 (7th Cir. 1989) ("The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case – otherwise, immunity statutes would be unconstitutional."); Mark A. Godsey, Miranda's *Final Frontier – The*

Kastigar confirms that mere coercion, even when it succeeds in eliciting otherwise incriminating statements, does not violate the Fifth Amendment without the actual use of the statements against the witness in a criminal case. *Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) – on which *Kastigar* relied (406 U.S. at 455-459) – makes the same point in a slightly different context.

In that case, witnesses who had been subpoenaed to testify in certain state proceedings invoked the Fifth Amendment and refused to answer questions, despite the grant of immunity under state law. The witnesses contended that, while the immunity grant might protect them from *state* prosecution, nothing in the applicable state immunity statutes purported to relieve them of *federal* prosecution. This Court held that the witnesses could be compelled to answer the Waterfront Commission's questions.

The Court explained that, even if the state immunity statutes did not cover federal prosecution, the Fifth Amendment itself ensured that the witnesses would be immune from federal prosecution. "This exclusionary rule," the Court stated, "while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness

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International Arena: A Critical Analysis of United States v. Bin Laden*, And a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1724 (2002) ("[I]f a law enforcement officer were to use brute force and torture to extract an involuntary confession from a suspect, the officer would not at that time have violated the privilege because the suspect would not yet have testified against himself at trial. * * * This distinction is made clear in the line of federal cases dealing with governmental grants of immunity to witnesses."); Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. ___, ___ (forthcoming December 2002) (Section I.A.2) ("Immunity doctrine thus demonstrates that the privilege permits compulsion; it only imposes later restrictions on the government when it compels answers.").

had claimed his privilege in the absence of a state grant of immunity." 378 U.S. at 79.

The "coercion" in the immunity cases derives from a subpoena backed by the power of contempt, rather than from acts of physical or psychological intimidation. But that is if anything *more* reason why the immunity cases preclude any argument that the government violates the Fifth Amendment when compelling testimony without using it. After all, as the Court has explained, "[t]estimony given in response to a grant of * * * immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

Time and again, the Court has made the same point: So long as the government makes no use (direct or derivative) of a compelled statement in a criminal case, a witness's Fifth Amendment rights have not been violated. This Court's Fifth Amendment "penalty cases" (*Minnesota* v. *Murphy*, 465 U.S. at 434) illustrate the proposition as well. "In each of the so-called 'penalty' cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Ibid.* (quoting *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977)).[5] The Court has generally struck down the penalties as violations of the Fifth Amendment. See, *e.g.*, *Lefkowitz* v. *Cunningham*, 431 U.S. at 806-809 (invalidating state law that divested attorney of a state political office for declining to waive Fifth Amendment protections); *Lefkowitz* v. *Turley*, 414 U.S. at 82-85 (invalidating state law that precluded government contractors from secur-

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[5] See also Clymer, *supra*, 112 YALE L.J. at ___ (Section I.A.3).

ing future awards in the event of a refusal to waive Fifth Amendment protections).

In each instance, however, the Court emphasized that, so long as the witness is immunized against the use of his statements in a subsequent prosecution, neither compulsion nor penalties would violate the Fifth Amendment:

> We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, *the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use*. *Kastigar* v. *United States*, [406 U.S. at 446]. Furthermore, the accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused. This is recognized by the power of the courts to compel testimony, after a grant of immunity, by use of civil contempt and coerced imprisonment.

Lefkowitz v. *Turley*, 414 U.S. at 84 (emphasis added).

The Court has made the same point in many other cases. In *Baltimore City Department of Social Services* v. *Bouknight*, 493 U.S. 549, 561-562 (1990), the Court held that a witness could not decline, on Fifth Amendment grounds, to answer questions about the whereabouts of a child, but that the Fifth Amendment was available in the event she was later prosecuted, at which point there may be "limitations upon the direct and indirect use of that testimony." See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 316 (1976) ("if inmates are compelled in [prison disciplinary] proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplant the privilege' and may not be required to 'waive such immunity'") (quoting *Lefkowitz* v. *Turley*, 414 U.S. at 85); *McKune* v. *Lile*, 122 S. Ct. 2017, 2025 (2002) ("[i]f the State of Kansas offered

immunity, the self-incrimination privilege would not be implicated"); cf. *Simmons* v. *United States*, 390 U.S. 377, 393-394 (1968) (because a criminal defendant is effectively "compelled" to testify at a suppression hearing, for fear that not doing so will prejudice his chances to vindicate Fourth Amendment rights, any testimony he gives at such a hearing will be immunized against use at the subsequent criminal trial).

The Ninth Circuit's construction of the Fifth Amendment – according to which it may be violated by coercive questioning alone – simply cannot be squared with these testimonial immunity cases and penalty cases. Nor can the panel's novel ruling be reconciled with this Court's recent decision in *United States* v. *Balsys*, 524 U.S. 666 (1998).

The witness in that case was subpoenaed by the Office of Special Investigations of the Department of Justice. That Office was investigating whether the witness had participated in Nazi persecution during World War II and was therefore subject to deportation. The witness resisted the subpoena, contending that his answers would subject him to foreign prosecution, allegedly in violation of the Fifth Amendment.

This Court agreed with the witness that he was being "compelled" to testify and that he would thereby become a "witness against himself." 524 U.S. at 671. The Court held, however, that prosecution by another country does not constitute a "criminal case" for Fifth Amendment purposes. Because there was therefore no "risk that [the witness's] testimony will be used in a proceeding that is a 'criminal case'" (*ibid.*), the Fifth Amendment could not be invoked.

Significantly, the Court rejected the very rationale on which the Ninth Circuit relied in this case. In the court of appeals' view, the Fifth Amendment must be broadly construed in order to guard against interrogation practices that are "'destructive of human dignity.'" Pet. App. 9a (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 457-458 (1966)). The defendant in *Balsys* made the same claim: that "'our respect for the inviolability of the human personality'" requires that the Fifth Amend-

ment be construed to encompass fear of foreign prosecution.

This Court emphatically disagreed. Were this "inviolability" rationale correct, the Court reasoned, then a violation of the Fifth Amendment – like a violation of the Fourth Amendment – would be "complete at the moment of illicit intrusion, whatever use may or may not later be made of their fruits." 524 U.S. at 692.[6] "The Fifth Amendment tradition, however, offers no such degree of protection. If the Government is ready to provide the requisite use and derivative use immunity, * * * the protection goes no further: no violation of personality is recognized and no claim of privilege will avail." *Ibid.* In short, the Court stated (quoting *Verdugo-Urquidez*), "'the Fifth Amendment is a fundamental *trial right* of criminal defendants.'" *Id.* at 692 n.12. Not until a compelled statement is used against the witness in a (domestic) criminal trial has the Fifth Amendment been violated.

Indeed, precisely because the Fifth Amendment privilege is a *trial right* – designed to promote the fairness of criminal trials – this Court declined to extend the rule in *Stone* v. *Powell*, 428 U.S. 465 (1976), to allegations that a statement was obtained in violation of *Miranda*. See *Withrow* v. *Williams*, 507 U.S. 680 (1993). *Stone* precludes the raising of Fourth Amendment claims in federal habeas review, recognizing that the exclusionary rule is designed simply "to deter future Fourth Amendment violations." 507 U.S. at 686. If, however, a constitutional claim addresses "'the fairness, and thus the legitimacy, of our adversary process'" (*id.* at 688), the rule in *Stone* will not apply.

Unlike the Fourth Amendment, which protects privacy, the Fifth Amendment does *not* "serve some value necessarily divorced from the correct ascertainment of guilt." *Withrow*, 507 U.S. at 692. Rather, the privilege against compulsory self-incrimination "serves to guard against 'the *use* of unreliable state-

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[6] For this proposition, the Court cited the very passage of *Verdugo-Urquidez* that the Ninth Circuit disregarded as "dicta." See 524 U.S. at 692.

ments *at trial*.'" *Ibid.* (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966) (emphasis added)). Thus, because the Fifth Amendment, including the "prophylactic" rules of *Miranda*, "safeguards 'a fundamental *trial* right'" (*id*. at 691 (quoting *Verdugo-Urquidez*; emphasis in *Withrow*)), *Stone* does not bar the raising of Fifth Amendment claims in federal habeas review. This is further proof – if any were needed – that the *Verdugo-Urquidez* "dictum" correctly summarizes this Court's entire self-incrimination jurisprudence and shows that the Constitution really does mean what it says when it requires that a person be compelled "in a[] criminal case" to be a "witness" before there can be any Fifth Amendment violation.

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In short, as the Court explained more than 100 years ago in *Brown* v. *Walker*, 161 U.S. 591, 600 (1896), this Court's Fifth Amendment cases "proceed upon the idea that the prohibition against [a witness's] being compelled to testify against himself presupposes a legal detriment to the witness arising from the exposure." In the absence of such a "detriment" – the actual *use* of a compelled statement against the witness in a criminal case – all the coercion in the world will not violate the Compulsory Self-Incrimination Clause. The Ninth Circuit's contrary view cannot be sustained.

2. The Interrogation Did Not Violate Respondent's Due Process Rights

a. The court of appeals held that "a police officer violates the Fourteenth Amendment when he obtains a confession by coercive conduct, regardless of whether the confession is subsequently used at trial." Pet. App. 10a. That holding is wrong.

The Due Process Clause of the Fourteenth Amendment serves as a "protection of the individual against arbitrary action of government." *County of Sacramento* v. *Lewis*, 523 U.S. at 845. It therefore imposes various limits on a State's right to act. *Collins* v. *City of Harker Heights,* 503 U.S. 115, 125-127 & n.10 (1992). Of particular relevance here are two ways in

which the Fourteenth Amendment restricts governmental power and correspondingly protects individual rights.

First, the Fourteenth Amendment helps to ensure that an individual will not be deprived of liberty without a fair trial. *Brown* v. *Mississippi*, 297 U.S. 278, 285 (1936). That right includes a prohibition on the use at a criminal trial of involuntary confessions that largely overlaps with the protections of the Fifth Amendment privilege.

Second, under the doctrine known as "substantive due process," the Fourteenth Amendment limits the government's ability to infringe "fundamental liberty interests." *Reno* v. *Flores*, 507 U.S. 292, 301 (1993). That doctrine can include limitations on police brutality that shocks the conscience, *Rochin* v. *California*, 342 U.S. 165 (1951), perhaps including limitations on the infliction of physical or mental suffering through improper questioning techniques. Substantive due process, however, *permits* an imposition on protected interests when "'competing state interests * * * outweigh'" them. *Washington* v. *Harper*, 494 U.S. 210, 220 (1990) (quoting *Mills* v. *Rogers*, 457 U.S. 291, 299 (1982)).

The prohibition against the use of an involuntary confession is one of the guarantees inherent in the State's duty to conduct a fair criminal trial. The Ninth Circuit's error in this case, and in *Cooper* (see 963 F.2d at 1248), is that the court of appeals has transformed that protection into an independent "right to avoid coercive questioning," guaranteed by substantive due process. The Fourteenth Amendment, however, does not go so far. True, it prohibits (as does the Fifth Amendment) the use of an involuntary confession in a criminal case. *Dickerson* v. *United States*, 530 U.S. at 434 ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."); see also *Colorado* v. *Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). But the Fourteenth Amendment does not give an individual a freestanding

– let alone an unqualified – "substantive right to silence." *Cooper*, 963 F.2d at 1248; see also Pet. App. 11a (referring to right "to be free from police coercion in pursuit of a confession").

In the seminal case of *Brown* v. *Mississippi*, this Court explained that the prohibition on coerced confessions is grounded in the State's duty to conduct a criminal trial in a manner consistent with traditional notions of justice. The question there was whether convictions that rested on confessions "extorted * * * by brutality and violence" were consistent with due process. 297 U.S. at 279. The Court began its analysis by noting:

> The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

Id. at 285 (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)). Thus, the Court reasoned, "the rack and torture chamber may not be substituted for the witness stand." *Id*. at 285-286. Nor may "an accused * * * be hurried to conviction under mob domination." *Id*. at 286. Turning to the admissibility of an involuntary confession, the Court concluded that "the trial is equally a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." *Ibid.* The *use* of the confessions therefore "was a clear denial of due process." *Ibid*.

The Ninth Circuit in *Cooper* v. *Dupnik* cited *Brown* for just the opposite of the proposition for which it actually stands. According to the Ninth Circuit, this Court "in 1936 established clearly and beyond anyone's misapprehension the proposition that the Constitution, as a limit on the behavior of government officials, flatly prohibits coercion in the pursuit of a statement from a person suspected of a crime." 963 F.2d at 1244. Yet the passage the court immediately proceeded to quote, supposedly in support of that statement, says: "'Coercing the supposed state's criminals into confessions *and using such confessions so coerced from them against them in trials* has been the curse of

all countries.'" *Brown*, 297 U.S. at 287 (emphasis added) (quoting *Fisher* v. *State*, 145 Miss. 116, 134, 110 So. 361, 365 (1926)), *quoted in Cooper*, 963 F.2d at 1244. Inexplicably, the Ninth Circuit claimed it to be "clear in this passage" that "the due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself." 963 F.2d at 1244-1245.

Subsequent decisions of this Court have confirmed that the constitutional concern is the effect of coerced confessions on the criminal trial process. The Court has therefore framed the issue as "whether there has been a violation of the due process clause of the Fourteenth Amendment *by the introduction* of an involuntary confession." *Reck* v. *Pate*, 367 U.S. 433, 435 (1961) (emphasis added). And recently, in *Dickerson* v. *United States*, the Court discussed its "cases based on *the rule against admitting coerced confessions*." 530 U.S. at 433 (emphasis added); see *id*. at 435 n.1 (noting that they are based on the right to "a fair trial free from coerced testimony"). See also *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964) ("It is now inescapably clear that the Fourteenth Amendment forbids *the use* of involuntary confessions * * *.") (emphasis added); *Beecher* v. *Alabama*, 408 U.S. 234, 237 (1972) ("Under the due process clause, *no conviction tainted by a confession* so obtained can stand.") (emphasis added). This Court has therefore described the defendant's interest *not* as the right to be free of coercive interrogation, but instead as the "right to be *free of a conviction* based upon a coerced confession." *Jackson*, 378 U.S. at 377 (emphasis added) (invalidating New York procedure for determining voluntariness of confession because it could not "withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment").

Consistent with these precedents, *every* authority on which the Ninth Circuit relied both here and in *Cooper* for the proposition that coercive interrogation alone violated the Fourteenth Amendment (see Pet. App. 7a-8a, 10a-11a; 963 F.2d at 1244-1249) addressed the use at a criminal trial of a coerced confession, not a freestanding right to be free from police

questioning.[7] Indeed, in every case but one we have found in which this Court has addressed the voluntariness of a confession, the issue was whether that confession could be used against the defendant at a criminal trial.

The one exception is Justice Brandeis's opinion for a unanimous Court in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923), which addressed the admissibility of an involuntary confession in a *civil* trial. Far from supporting the Ninth Circuit's thesis that a due process violation occurs without the introduction of an involuntary confession in a criminal trial, *Bilokumsky* undermines that thesis by holding that the Constitution *permits* the introduction of involuntary confessions in civil trials: "since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application." *Id*. at 157; accord *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation proceeding.") (citing *Bilokumsky* and other cases).

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[7] See *Brown*, 297 U.S. at 279 (discussing whether conviction may be based on confession "extorted" by "brutality and violence"); *Miller* v. *Fenton*, 474 U.S. 104, 109-110 (1985) (discussing admissibility of involuntary confession); *Mincey* v. *Arizona*, 437 U.S. 385, 396 (1978) (holding that involuntary statements could not be used against defendant at criminal trial); *Davis* v. *North Carolina*, 384 U.S. 737, 752-753 (1966) (observing that coerced confessions are "constitutionally inadmissible in evidence"); *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (addressing admissibility of involuntary confession); *Lynumn* v. *Illinois*, 372 U.S. 528, 537-538 (1963) (reversing conviction secured by admission of coerced confession as violative of due process); *Blackburn* v. *Alabama*, 361 U.S. 199, 211 (1960) (holding that admission of involuntary confession violates due process); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959) (reversing conviction based on introduction of coerced confession); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 155 (1944) (reversing conviction based on coerced confession).

Accordingly, this Court's voluntariness cases stand only for the limited proposition that the Fourteenth Amendment bars the use at a criminal trial of a confession that is the product of coercion. They do not, as the Ninth Circuit claimed, hold that an individual has a right "to be free from police coercion in pursuit of a confession." Pet. App. 11a.

The constitutional right at issue is a fair-trial right, not a freedom-from-interrogation right. It is both facile and quite wrong to think of suppression of evidence as merely a "remedy" for the constitutional violation (Pet. App. 8a n.2), rather than – as required by this Court's decisions – to think of admission of evidence in a criminal case as an indispensable part of the constitutional violation itself.

Nor – those precedents aside – would it make any sense to say that the Due Process Clause of the Fourteenth Amendment forbids all governmental coercion of involuntary statements, aside from the use to which the compelled statements are put. *Kastigar* v. *United States* and the other testimonial immunity precedents would become dead letters under such a holding, no less than they would under a holding that the Fifth Amendment privilege against compelled self-incrimination operates in this manner.

If the Fourteenth Amendment forbids all coercion at the state and local level, then the Fifth Amendment's Due Process Clause forbids all coercion at the federal level too, and a grant of testimonial immunity cannot solve the problem. All a federal witness needs to do to avoid testifying despite a grant of use immunity, then, is to invoke the Due Process Clause rather than the Compulsory Self-Incrimination Clause of the Fifth Amendment. But that cannot possibly be the right analysis, especially in light of the open-ended and flexible analysis typical of due process. See *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997); *Medina* v. *California*, 505 U.S. 437, 443 (1992); *Poe* v. *Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

One can easily imagine a situation in which a rational conception of the Due Process Clause – and one entirely consistent

with this Court's precedents – would require suppression of a confession from the criminal trial as "involuntary" and yet would not condemn, under substantive due process analysis, the police officers who coerced the confession. Suppose John Doe suspect has been arrested for kidnaping a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out on his life. A police officer (without physical violence) threatens, cajoles, and pressures John Doe into confessing to the kidnaping and disclosing the whereabouts of the child. His will overborne, John Doe confesses and the child is rescued.

May John Doe's confession be used in his subsequent criminal trial? No. It is involuntary, and due process will not permit the trial to be "tainted by a confession so obtained." *Beecher*, 408 U.S. at 237.[8] May John Doe sue the government under Section 1983 for a Fourteenth Amendment violation? The answer should also be no. He has no liberty interest in inhibiting the investigation of a serious crime and, even if he did, that interest is outweighed by the government's interest in solving the crime and saving the victim. Nothing in this Court's due process jurisprudence even remotely suggests that the child's life must be sacrificed to protect some interest of John Doe's beyond his right not to have an involuntary confession *used* against him.

b. The foregoing analysis shows that the Ninth Circuit was misguided in concluding that any action that requires suppression of evidence must necessarily constitute a due process violation even when there is no attempt to introduce a confession at a criminal trial. But we need not and do not argue in this

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[8] But cf. *Leon* v. *Wainwright*, 734 F.2d 770, 773 & nn.5-6 (11th Cir. 1984) (although police used physical force to learn where a suspect was hiding the victim of his kidnaping, a subsequent statement, made after a sufficient "break in the chain of events," was admissible), *cited in* A. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 135, 247 n.3 (2002).

case that the Fourteenth Amendment places absolutely *no* limits on police questioning in the absence of use of the statements thereby obtained. Rather, this Court's substantive due process jurisprudence is broad enough to condemn certain police questioning tactics outright – but *only* if they are intentional, brutal, and unjustified by legitimate state interests. See *Wilkins* v. *May*, 872 F.2d at 195 ("We do not undertake to specify a particular threshold, a task that may well exceed our powers of articulation. But it is a high threshold, and to cross it Wilkins and plaintiffs like him must show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience, and that is calculated to induce not merely momentary fear or anxiety, but severe mental suffering, in the plaintiff.").

i. The "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right." *Flores*, 507 U.S. at 301. See also *County of Sacramento* v. *Lewis*, 523 U.S. at 841 n.5. It protects only a narrow category of rights: As Justice Stevens observed for a unanimous Court, "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. In other words, "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.*; accord *Flores*, 507 U.S. at 302. This Court's "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense, thereby recognizing the point made in different circumstances by Chief Justice Marshall, that it is a *constitution* we are expounding." *County of Sacramento* v. *Lewis*, 523 U.S. at 846 (internal quotations and citations omitted, emphasis in original).

What right, then, is respondent claiming was violated by Chavez's interrogation? There is no evidence that petitioner hit, beat, or otherwise caused any physical harm to respondent. Nor is there any evidence that petitioner's conduct exacerbated

respondent's injuries, or prolonged his stay in the hospital. To the contrary, the Ninth Circuit found it undisputed in the record that emergency personnel treated respondent and that petitioner ceased his questioning to permit tests and other procedures to be performed. Pet. App. 4a.[9]

Indeed, the record is devoid of any evidence that petitioner's conduct had any tangible effect on respondent other than eliciting answers to questions. Instead, the right asserted by petitioner encompasses nothing more than respondent's wish to be left alone as he suffered from preexisting injuries. As described by the Ninth Circuit, it is simply the "right to be free of police coercion" (Pet. App. 11a), or the "right to silence." *Cooper*, 963 F.2d at 1248.

In concluding that such a "right" is one of the categories of interests protected by the Fourteenth Amendment, the Ninth Circuit broke new ground. This Court has never held that police questioning alone – whether wanted or not, whether coercive or not – infringes a fundamental liberty interest protected by the Fourteenth Amendment. And to do so would extend the reach of the Due Process Clause far beyond anything this Court has ever considered appropriate.

Although it has been held that an extreme act of physical violence to a person, such as pumping a suspect's stomach to obtain evidence, will violate due process if it "shocks the conscience" (*Rochin*, 342 U.S. at 172), not every police action that may harm or offend an individual implicates the Fourteenth Amendment. See *Schmerber* v. *California*, 384 U.S. 757, 760 (1966) (distinguishing *Rochin*); *Breithaupt* v. *Abram*, 352 U.S. 342, 436-437 (1957) (same).[10] Rather, "[t]he relevant liberty is

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[9] Although respondent alleged in his pleadings that petitioner interfered with his medical treatment, the record establishes otherwise (see, *e.g.*, C.A. App. 90, 115, 271, 272), and both the district court and the court of appeals recognized that medical personnel treated respondent throughout Chavez's questioning. Pet. App. 4a, 18a.

[10] In a different context, the Court unanimously reiterated in *Collins* v. *Harker Heights*, 503 U.S. at 128, that what matters for purposes of

not freedom from unlawful interrogations but freedom from severe bodily or mental harm inflicted in the course of an interrogation." *Wilkins* v. *May*, 872 F.2d at 195 (emphasis added).

In *Bowers* v. *Hardwick*, this Court rejected the argument that the Due Process Clause includes a fundamental right to engage in homosexual sodomy. 478 U.S. 186, 191 (1986). The Court noted that, when announcing rights not readily identifiable from the Constitution's text, "the Court has sought to identify the nature of the rights qualifying for heightened judicial protection" including only those "that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" *Id*. at 191-192 (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937)). "[F]undamental liberties" comprise only "those liberties that are 'deeply rooted in this Nation's history and tradition.'" *Bowers*, 478 U.S. at 192 (quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977)).

The "right" to be free of police questioning is not "deeply rooted in this Nation's history and tradition." Indeed, quite the opposite is true. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U.S. at 477-478. See also *New York* v. *Quarles*, 467 U.S. 649, 665 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (describing duty to aid law enforcement as a "deeply rooted social obligation"). It is therefore permissible to consider, as one factor in sentencing, a defendant's refusal to cooperate with a criminal investigation. "This deeply rooted social obligation [to report criminal behavior] is not diminished when the witness to [the] crime is involved in the illicit activities himself." *Roberts* v. *United States*, 445 U.S. 552, 558 (1980). "Unless his silence is protected by the privilege against self-

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substantive due process is whether the conduct at issue "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."

incrimination * * * the criminal defendant no less than any other citizen is obliged to assist the authorities." *Ibid.* Indeed, the first Congress of the United States made it a crime for any person "who, 'having knowledge of the actual commission of [certain felonies,] shall conceal, and not as soon as may be disclose and make known the same to [the appropriate] authority." *Ibid. (*quoting Act of Apr. 30, 1790, § 6, 1 Stat. 113) (brackets in original). See also *id*. at 558 n.5 (discussing modern version of statute, 18 U.S.C. § 4).

Accordingly, what is deeply rooted in this tradition is *not* the right to be silent in the face of police questioning, but instead the duty to respond to those questions. It would be anomalous to hold that an individual has a "fundamental right" under the Fourteenth Amendment to refrain from engaging in conduct described by this Court as a "deeply rooted social obligation" of every citizen.

ii. Even if the Ninth Circuit were correct that respondent had been deprived of a cognizable liberty interest in being free of police questioning, there is no allegation here that petitioner acted with the requisite level of intent.[11] In *County of Sacramento* v. *Lewis*, this Court held that there was no Section 1983 claim based on a violation of the Fourteenth Amendment against an officer involved in a high-speed police chase, which resulted in the death of a passenger, unless it was shown that the officer acted with the intent to harm the victim. The Court rejected the contention that it would be sufficient to show "deliberate indifference." 523 U.S. at 851.

Contrasting a police chase with prison administration (as to which the "deliberate indifference" standard does apply), the Court recognized that "the police on an occasion calling for fast

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[11] In this respect, the Ninth Circuit went far beyond even its own *Cooper* v. *Dupnik* precedent, which cited and relied on abundant evidence of harmful intent by the questioning officers and noted that they made no claim of exigency to justify their questioning. 963 F.2d at 1223, 1224, 1225, 1226, 1229, 1232, 1236, 1237, 1238, 1243, 1248, 1249, 1250.

action have obligations that tend to tug against each other." 523 U.S. at 853. "They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *Ibid.* (quoting *Whitley* v. *Albers*, 475 U.S. 312, 320 (1986)). Accordingly, "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Ibid.* (quoting *Daniels* v. *Williams*, 474 U.S. 327, 332 (1986)).

Like the officers involved in a high-speed police chase (or prison guards attempting to quell a riot (see *Whitley*, 475 U.S. 312)), petitioner here was dealing with a fast-moving situation, in haste, and under pressure. He was questioning the only non-police witness to an officer-involved shooting, who he thought (as did the witness) would die, and would do so soon. C.A. App. 452-453. Yet there is no allegation that petitioner intended to harm respondent.

The complaint states only that petitioner "with deliberate indifference interfered with the medical assistance to [respondent]." Am. Cplt. ¶ 13;[12] see also *id.* ¶ 17 (defendants, "with deliberate indifference," subjected respondent to cruel and unusual punishment). The only motive or intent alleged is petitioner's "motive to extort a statement from [respondent]" (*id.* ¶ 13) and petitioner's "motive to conspire with and protect" the officers. *Id.* ¶ 17. Under *County of Sacramento* v. *Lewis*, however, the requisite intent is the intent *to harm the victim.*[13] There is no

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[12] Although the complaint alleges that petitioner interfered with respondent's medical treatment, there is no evidence in the record to that effect, nor did the Ninth Circuit rely on an interference with medical treatment as the basis for a due process claim.

[13] The Court also briefly noted that an intent "to worsen [a suspect's] legal plight" might suffice to show a violation of the Fourteenth Amendment. 523 U.S. at 854. This phrase, it seems, is explained later in the opinion where the Court stated that the

allegation or evidence of such an intent here. Accordingly, petitioner did not have the mental state required to commit a violation of the Fourteenth Amendment.

iii. There is still a third infirmity (and this one may be the gravest) with respondent's Fourteenth Amendment claim. In every substantive due process case, the infringement of a liberty interest must be balanced against the governmental interest in engaging in the infringing conduct. "[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg* v. *Romeo*, 457 US. 307, 321 (1982)); see also *Washington* v. *Glucksberg*, 521 U.S. at 767-770 (Souter, J., concurring in the judgment).

For example, although there is indisputably a liberty interest in bodily integrity (see *Ingraham* v. *Wright*, 430 U.S. 651, 674 & n.14 (1977)), that right cedes to the State's interest in collecting evidence in certain situations (see *Schmerber*, 384 U.S. at 770) as well as to the State's interest in protecting a mentally ill prisoner from himself and others. See *Washington* v. *Harper*, 494 U.S. 210, 223-225 (1990) (medicating prisoner against his will). Because both the district court and the Ninth Circuit believed that the precedents addressing the use of a coerced confession in a criminal proceeding dispositively resolved the Fourteenth Amendment claim (see Pet. App. 10a-11a, 23a), however, neither court addressed the governmental interest involved in Chavez's conduct.

"officer's instinct was to do his job as a law enforcement officer, *not to induce [the suspect's] lawlessness*." *Id*. at 855 (emphasis added). Here, too, Chavez's instinct was to do his duty as a law enforcement officer to gather evidence (see C.A. App. 452), not to "induce" any "lawlessness" on the part of respondent, who was of course incapacitated.

But the legitimate and compelling state interests in questioning respondent are readily apparent. Petitioner was investigating an officer-involved shooting. He was attempting to obtain a statement from the only non-police witness to that shooting – the victim – who everybody believed was about to die. Chavez therefore believed (and quite reasonably so) that, if he did not take respondent's statement immediately, the statement would be permanently lost.

Of course, there is an "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973); see also *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963) (same). And that need sometimes overrides a suspect's desire not to be interrogated.

In *In re Groban*, 352 U.S. 330 (1957), the appellants raised a due process challenge to an Ohio statute governing the investigation of fires. The statute was designed to allow "the expeditious and expert ascertainment" of the cause of a fire by "the chief guardian of a community against the hazards of fires." *Id*. at 336 (Frankfurter, J., concurring). One aspect of the statute was to permit the Fire Marshal to conduct private hearings excluding any person, including lawyers for the witnesses. *Id*. at 331.

The Court rejected the appellants' claim that the statute violated the Due Process Clause by depriving them of the assistance of their counsel. Analogizing the case before it to grand jury proceedings, where a witness has no right to counsel, the Court held that "[t]here is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire." 352 U.S. at 333. *Groban*, then, teaches that the government's interest in investigating a crime or threat to public safety may override an individual's interest in not cooperating with that investigation.

So too does *New York* v. *Quarles*, *supra*. There, a police officer followed a rape suspect into a supermarket and, upon apprehending the suspect, frisked him and discovered that his gun holster was empty. The officer asked the suspect where the

gun was. The suspect told him, and, at the subsequent criminal trial, the suspect's statement was excluded because the officer failed to give *Miranda* warnings before asking for the location of the gun. This Court held that the evidence was admissible:

> [I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. * * * Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

467 U.S. at 657. The Court therefore concluded that "the need for answers" in that situation "outweigh[ed]" the need for *Miranda* warnings. *Ibid.*

Chavez had every legitimate interest in investigating whether there had been police misconduct in the shooting of Martinez. See, *e.g.*, *Driebel* v. *City of Milwaukee*, 298 F.3d 622, 644 (7th Cir. 2002) ("A police officer may be guilty of committing a battery by using unreasonable force in the apprehension of a suspect. * * * [W]e are convinced that the [Police] Department conducted a legally adequate inquiry by interviewing the victim, Joshua Schmidt, as well as numerous witnesses * * *."); *Moran* v. *Clarke*, 296 F.3d 638, 647-648 (8th Cir. 2002) (en banc) ("the serious business of weeding out police abuses" and the officers' interest in accurate factual determinations are both of constitutional significance). See generally *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976) (recognizing importance of, and lack of warrant for federal interference with, "the internal procedures of the Philadelphia police department" to investigate possible police misconduct). Indeed, Martinez asserts – in the claims that remain pending in the district court – that there *was* police misconduct. There is no reason why the constitutional analysis should entirely disregard the legitimate interest in gathering evidence that could support or refute that assertion.

This interest in investigating crime and possible police misconduct is particularly compelling when – as was the case here

– there is a serious risk that evidence will be lost. In the Fourth Amendment context, an otherwise unconstitutional search may be permissible when there is a risk that evidence will be destroyed. A blood test may be taken – even against the suspect's will – if the "officer * * * might have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Schmerber*, 384 U.S. at 770 (internal quotation omitted). And the police may conduct a search without a warrant when there is a risk that the suspect will destroy the evidence of illegality. See *Ker* v. *California*, 374 U.S. 23, 41-42 (1963); see also *Mincey*, 437 U.S. at 394 (recognizing that risk that evidence might be lost or destroyed constitutes "exigent circumstances").

Just like the substantive due process component of the Fourteenth Amendment, the Fourth Amendment requires "a careful balancing of the nature and quality of the intrusion on the individual's * * * interests against the countervailing governmental interests at stake." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (internal quotation marks omitted). If the risk of destruction of evidence is a sufficient justification to render an otherwise unreasonable search permissible under the Fourth Amendment, it logically follows that is a sufficiently compelling reason to outweigh any interest respondent may have had in resisting police questioning for purposes of the Fourteenth Amendment. There can be no doubt that petitioner "reasonably believed" (*Schmerber*, 384 U.S. at 770) that evidence might be lost: all indications were that respondent would die, and, unless Chavez took his statement in the emergency room, respondent's account of what happened would die with him. Accordingly, respondent's challenge to petitioner's conduct does not allege a violation of the Fourteenth Amendment.

B. If Respondent Sustained A Constitutional Deprivation At All, The Constitutional Rights At Stake Were Not "Clearly Established" At The Time Of The Interrogation

If, despite the foregoing analysis, respondent has made out a Fifth or Fourteenth Amendment violation in this case, "the next, sequential step is to ask whether the right was clearly established." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.* It is simple enough to say, for example, that police behavior that "shocks the conscience" violates the Due Process Clause, but "that is not enough." *Saucier*, 533 U.S. at 202. Rather, as the Court emphasized in *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) (emphasis added), "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right."

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 533 U.S. at 202 (emphasis added); accord *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"). Even if, as a "general proposition," it was clear that the Fifth or Fourteenth Amendment could *sometimes* be violated without actual use of a compelled statement or extreme police brutality, respondent would still have to show that, "in light of the specific context of the case," petitioner violated a "clearly established" right. *Saucier*, 533 U.S. at 202.

In the absence of a precedent precisely on point, that hurdle is especially difficult for a plaintiff to surmount in this context because no police officer can be expected to predict with perfect accuracy the after-the-fact judgments of courts. "The line

between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, especially in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused." *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963). See also *Dickerson*, 530 U.S. at 444 (quoting *Haynes*).

As we show below, respondent has utterly failed to show that petitioner's interrogation violated "clearly established" rights under either the Fifth or Fourteenth Amendments.

1. There Is No "Clearly Established" Fifth Amendment Right to Be Free From Coercive Questioning

For the reasons stated in Section A.1, it was "clearly established" at the time of Chavez's interrogation that – unless a compelled statement is actually used against the witness in a criminal case – coercive questioning is *not* a violation of the Fifth Amendment. But if we are wrong about that, surely the *opposite* proposition was not clearly established at the time. To the contrary, fully seven years before the interrogation in this case, this Court had said quite plainly that "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. * * * Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Verdugo-Urquidez*, 494 U.S. at 264.

True, this may arguably have been "dicta" in *Verdugo-Urquidez*, as the panel pointed out. But see pages 14-15, *supra*. That legal nicety, however, is apt to elude police officers who, like petitioner, are charged with taking quick action in high-pressure environments. Such officers "are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *County of Sacramento* v. *Lewis*, 523 U.S. at 853. "Police officers are ill-equipped to pinch-hit for counsel" (*Oregon* v. *Elstad*, 470 U.S. at 316) and cannot be expected to discern whether a statement by this Court was essential to its holding, much less determine that Supreme

Court dicta should be ignored in favor of "binding precedent" of the court of appeals. Pet. App. 10a n.3.[14]

What is more, if petitioner had had an entire law library at his disposal, he might also have discovered that some circuits accord significant weight to this Court's dicta.[15] Indeed, Judge Calabresi has opined that "lucid and unambiguous dicta

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[14] In this case, petitioner's task would have been all the more daunting because, had he somehow thought to consult the en banc decision in *Cooper*, he would have found that only in connection with the substantive due process claim – but not in regard to the Fifth Amendment – did the majority consider whether the constitutional right "matur[es]" before any use is made of the compelled statement. Compare 963 F.2d at 1238-1244 (Fifth Amendment discussion) with *id*. at 1244-1250 (Fourteenth Amendment discussion).

[15] See, *e.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holding, particularly when the dicta [are] recent and not enfeebled by later statements"); *McCoy* v. *MIT*, 950 F.2d 13, 19 (1st Cir. 1991) (same); *Nichol* v. *Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("[t]his Court should respect considered Supreme Court dicta"). See also *Stone Container Corp.* v. *United States*, 229 F.3d 1345, 1349-1350 (Fed. Cir. 2000) ("[a]s a subordinate federal court, we do not share the Supreme Court's latitude in disregarding the language in its own prior opinions"), cert. denied, 532 U.S. 971 (2001); *Natural Resources Def. Council* v. *Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1189 (D.C. Cir. 2000) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative"); *In re McDonald*, 205 F.3d 606, 612 (3d Cir.) ("we should not idly ignore considered statements the Supreme Court makes as dicta" since the Court "uses dicta to help control and influence the many issues it cannot decide because of its limited docket"), cert. denied, 531 U.S. 822 (2000). Indeed, petitioner might have discovered that the Ninth Circuit itself – at least in the absence of "binding" circuit precedent – accords "due deference" (*United States* v. *Baird*, 85 F.3d 450, 453 (9th Cir. 1996)) to Supreme Court dicta and does not "lightly ignore" such portions of this Court's decisions (*Staacke* v. *United States Secretary of Labor*, 841 F.2d 278, 281 (9th Cir. 1988)).

concerning the existence of a constitutional right can without more make that right 'clearly established.'" *Wilkinson* v. *Russell*, 182 F.3d 89, 112 (2d Cir. 1999) (concurring opinion). Whether or not that is so, surely lucid and unambiguous dicta concerning the *non*existence of a constitutional right must without more *preclude* a holding that the right is "clearly established."

What is more, had petitioner taken time to Shepardize or KeyCite the *Cooper* case, he would have discovered that the Ninth Circuit's ruling had been uniformly rejected by other circuits. See, *e.g.*, *Wiley* v. *Doory*, 14 F.3d 993, 996 (4th Cir. 1994) (Powell, J., sitting by designation) (sustaining a defense of qualified immunity in a Section 1983 case founded on a Fifth Amendment claim and noting that the dissenters in *Cooper* made "persuasive arguments that the privilege against self-incrimination is not violated until the evidence is admitted in a criminal case"); *Riley* v. *Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (rejecting Fifth Amendment claim, noting that, "[w]hile Fifth Amendment concerns can certainly be implicated prior to trial, the Supreme Court has declared that a Fifth Amendment violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself'"); *Giuffre* v. *Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994) (sustaining a defense of qualified immunity in Section 1983 case founded on a Fifth Amendment claim, noting that "[t]he dissenting judges in *Cooper* presented a persuasive argument that the Fifth Amendment privilege against self-incrimination is not violated until evidence is admitted in a criminal case"); *Wilkins* v. *May*, 872 F.2d at 194 ("The Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted in a criminal case – otherwise, immunity statutes would be unconstitutional."); *Mahoney* v. *Kesery*, 976 F.2d 1054, 1061-1062 (7th Cir. 1992) (characterizing the rule embraced by the *Cooper* majority as "more capacious" than the Seventh Circuit had previously articulated); *United States* v. *Palomo*, 80 F.3d 138, 142 (5th Cir. 1996) (where defendant "has not

demonstrated that the Government has used any statements against him in these proceedings," he could not "demonstrate[] an actionable violation of his right against self-incrimination"). "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. at 603.

2. There Is No "Clearly Established" Fourteenth Amendment Right To Be Free From Coercive Questioning, In General Or In The Circumstances Of This Case

As we showed above, if this Court were to conclude that it is a violation of the Fourteenth Amendment for a police officer to conduct an interrogation it would "break new ground" (*Flores*, 507 U.S. at 302), something this Court is "reluctant" to do when asked to recognize a new substantive due process right. *Collins*, 503 U.S. at 125. This Court has never held that a coerced confession, in and of itself, violates due process; to the contrary, it has found coerced confessions problematic *only* in the context of their admission into evidence. Against this backdrop – and especially in light of this Court's repeated statements emphasizing a citizen's duty to cooperate with a police investigation (see *Miranda*, 384 U.S. at 477-478) – it could not possibly be "clearly established" that the interrogation of respondent violated the Fourteenth Amendment.

Equally unthinkable is that it was "clearly established" that Chavez would shock the judicial conscience, and thereby violate the Fourteenth Amendment, by questioning respondent in the exigent circumstances of this case. Extreme police brutality – specifically, forcible stomach pumping to extract evidence – has been held to be so arbitrary and egregious that it "shocks the conscience." *Rochin* v. *California*, 342 U.S. at 172. But even the *Rochin* decision has not been extended to incidents of bodily injury, including blood tests on an unconscious suspect (*Breithaupt*, 352 U.S. at 436-437 (distinguishing *Rochin*)) and on a suspect who refused to consent (*Schmerber*, 384 U.S. at 760 (same)).

The Ninth Circuit also has limited the application of *Rochin*, holding that inserting a tube through a suspect's nose and forcing liquid through the tube into the suspect's stomach, so as to induce vomiting of narcotics, does not violate the Fourteenth Amendment. *Blefare* v. *United States*, 362 F.2d 870, 875-876 (9th Cir. 1966). Thus, what *was* "clearly established" at the time Chavez questioned respondent was that the battery of a suspect (unless extremely egregious) did not violate the Fourteenth Amendment. How then could a reasonable official know that conduct that does not even involve touching a suspect violates the Fourteenth Amendment under a "shocks the conscience" test?

The only precedent of which we are aware that could have alerted petitioner to particular circumstances in which interrogation alone *would* be held to violate the Fourteenth Amendment is *Cooper*, *supra*. But the coercive behavior referred to in that case was dramatically different from petitioner's conduct here in at least two material respects. First, the officers in *Cooper* were acting pursuant to a preconceived plan designed to keep the suspect off the witness stand at trial (rather than run the risk that his stationhouse statements would be used against him): "The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense * * *." 963 F.2d at 1249; see also *id*. at 1224. Second, it was conceded that the officers were not facing exigent circumstances. *Id*. at 1236.[16]

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[16] There are other marked differences between *Cooper* and this case. The interrogation in *Cooper* lasted four hours (963 F.2d at 1243), during which at least one of the interrogating officers determined that the suspect was in fact innocent. *Id*. at 1231-1232. And, perhaps particularly relevant for the inquiry into the existence of a due process right, Cooper *did* allege that he was deprived of a recognized property interest under the Fourteenth Amendment: he lost his job and was evicted from his residence. Cooper also established that he was traumatized by the encounter and later suffered post-traumatic stress syndrome. *Id*. at 1231.

Petitioner was operating in a fundamentally different environment than the officers in *Cooper*. Without a doubt, there were exigent circumstances here; respondent stated that he was dying and in fact appeared to be mortally wounded, so Chavez had no choice but to take the statement at the hospital or risk losing any chance for petitioner's version of events ever to be recorded. And Chavez could not possibly have been acting with a motive to keep respondent from testifying, as neither Chavez nor respondent believed that respondent would survive his injuries such that he would be able to testify in court. *Cooper* therefore did not give a reasonable officer acting "in haste [and] under pressure" (*Whitley* v. *Albers*, 475 U.S. at 320), attempting to obtain a dying declaration from a seemingly moribund witness with no preconceived plan to keep the witness from testifying, fair notice that his conduct could violate substantive due process.

Instead, a reasonable officer would have understood that "*Cooper* was decided under a highly-unusual set of facts." *Giuffre*, 31 F.3d at 1256. Ample precedent at the time of the events at issue here rejected – on facts involving far less justification for police questioning than Chavez had, and often far more aggressive questioning – the idea that police statements to, questions of, or even threats to an individual violated the Fourteenth Amendment.

Just 15 days before the Ninth Circuit en banc decided *Cooper*, for example, the Eighth Circuit rejected a Section 1983 claim based on a police officer's threat to knock the plaintiff's teeth out if the plaintiff refused to answer the officer's questions while he was placed alone in the back seat of a police car. "Although such conduct is not to be condoned, [the officer's] alleged conduct failed to rise to the level of a brutal and wanton act of cruelty." *Hopson* v. *Fredericksen*, 961 F.2d 1374, 1379 (8th Cir. 1992) (internal quotations omitted).

A reasonable officer reading *Cooper* and *Hopson* together would conclude either that *Cooper* turned on its unusual facts, or that the law in this area was so unsettled that *no* substantive due process right to be free of coercive police questioning could

predictably be applied to any particular factual setting. Either way, the officer who chose to go ahead with questioning, with justifications of exigency not present in *Cooper* (or *Hopson*) and without the aggravating factors of *Cooper* (or *Hopson*), could hardly be said to be on notice that he was violating "clearly established" substantive due process rights. See *Wilson* v. *Layne*, 526 U.S. at 603.

In *Yanez* v. *Romero*, 619 F.2d 851, 854-855 (10th Cir. 1980), the Tenth Circuit held that a threat to use a catheter if the defendant did not "voluntarily" produce a urine sample did not violate substantive due process. See *id*. at 854 ("[T]he *Rochin* decision pretty much stands by itself and is limited to its particular facts."). In *Robertson* v. *Plano City*, 70 F.3d 21 (5th Cir. 1995), two police officers went to a 16-year-old suspect's home, obtained his confession to a car burglary without giving him *Miranda* warnings, and admonished him – despite the alleged knowledge that the admonition was inaccurate – that he would face adult felony penalties even though he was a juvenile. *Id*. at 22. The 16-year-old committed suicide the next morning. *Ibid*.

Nevertheless, the court held that the complaint did not even state a claim for violation of substantive due process because the officers' alleged conduct "did not rise to the level of a 'brutal' and 'wanton act of cruelty.'" 70 F.3d at 25 (quoting *Hopson* v. *Fredericksen*, 961 F.2d at 1379). Again, no officer who studied the case law would conclude that a "clearly established" substantive due process right precluded questioning respondent to obtain what might be his dying declaration.

The Seventh Circuit reassured police officers in 1989 that in substantive due process analysis it would "*not* * * * suggest that the federal courts should or will undertake to monitor the details of police interrogations, and to award damages whenever the police cross the line that separates coercive from non-coercive interrogation." *Wilkins* v. *May*, 872 F.2d at 195 (emphasis added). Rather, "calculated" efforts to inflict "severe mental suffering" would be required before that court would recognize a substantive due process claim for police questioning

not involving the infliction of bodily harm. *Ibid.*[17] Thus, this Court's admonition in *Wilson* v. *Layne* is as relevant to respondent's claim under the Fourteenth Amendment as it is to his claim under the Fifth: when judges cannot agree on the constitutionality of a police practice, an officer cannot be held liable for misconstruing the law.

3. *Mincey* v. *Arizona* Did Not Clearly Establish That All Hospital Interrogations Constitute Fifth Amendment Or Substantive Due Process Violations Or That The Interrogation In This Case Constituted A Violation

The panel recognized that it was required to assess "the specific facts of this case" (Pet. App. 12a). In its view, however, petitioner should have known that he was violating respondent's constitutional rights since his interrogation of Martinez was, if anything, "more egregious" than the "virtually indistinguishable" interrogation that led this Court to exclude the confession in *Mincey* v. *Arizona*, 437 U.S. 385 (1978). But even if Chavez had had the time to engage in a "color-matching of cases" (*Reck* v. *Pate*, 367 U.S. 433, 442 (1961)) it is by no means "clear" that he should have determined that his interrogation landed on the wrong side of the line.

First and foremost, the holding of *Mincey* was that "statements obtained as these were cannot be *used* in any way against a defendant *at his trial*." 437 U.S. at 402 (emphasis added). As we have shown, it is not correct – and certainly not "clearly established" – that every precedent requiring exclusion of a statement from evidence on Fifth or Fourteenth Amendment grounds *ipso facto* requires the conclusion that the police violated the Constitution by obtaining such a statement. It is not to the exclusion cases, but to the civil actions asserting civil rights

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[17] *If* the decision in *Cooper* v. *Dupnik* was at all reconcilable with the larger body of federal case law, it is only because of the "shock the conscience" strand of analysis (963 F.2d at 1248-1250) and only because it *did* involve a calculated effort to inflict severe mental suffering. The present case does not share those characteristics.

claims, that a reasonable officer or the Ninth Circuit should have turned for guidance, and those cases as discussed above do not support the Ninth Circuit's conclusion. For that reason alone, *Mincey* should not have been deemed to place Chavez on notice that his interrogation violated the Constitution.

In any event, even if it were appropriate to read *Mincey* and other exclusion-of-statement cases as stating absolute standards for police conduct rather than prerequisites to admissibility, the Ninth Circuit's conclusion that this case is indistinguishable from *Mincey* would be wrong. Not only are there distinctions, but also those very distinctions have played a major role in the development of post-*Mincey* case law in the lower courts. And that is as it should be, considering that the relevant branch of analysis is the "open-ended" doctrine of substantive due process (*Collins*, 503 U.S. at 125) and the necessarily fact-specific "shocks the conscience" test.

Martinez was severely injured, just as Mincey was. But Mincey was subjected to "virtually continuous questioning" over a four-hour period. 437 U.S. at 396, 401. Here, respondent was questioned intermittently over a 45-minute time frame. Mincey was only occasionally coherent in his answers to questions, all of which he had to write down because tubes had been inserted in his throat and nose, making him unable to speak. *Id*. at 398-399. To make matters worse, Mincey's "responses" were especially unreliable because the officer "reconstructed" the interrogation by filling in the questions after the interview, with the answers already in front of him. *Id*. at 396 n.11. Martinez, though horribly injured, was responsive in his answers, showed no evident signs of coma, and was fully able to speak, albeit with great pain. In *Mincey*, even medical personnel had been impressed into urging Mincey to talk to the police. *Id* at 399. Respondent was questioned only by petitioner, without the involvement of medical attendants, who were present and treating him throughout the interrogation. Thus, it cannot truly be said that, compared to *Mincey*, it was "clearly established" that this interrogation violated substantive due process or the Fifth Amendment.

Court of appeals decisions rendered after *Mincey* (but before Chavez's investigation) would have given a reasonable officer even more reason to doubt that questioning respondent ran afoul of clear law. In at least four cases – three of which expressly distinguish *Mincey* – courts had held that statements made by suspects hospitalized for injuries were voluntary (and therefore admissible in court proceedings).

The Ninth Circuit held that the statements made by a defendant while he was in an emergency room, in critical condition, suffering from a drug overdose, and having recently recovered consciousness were admissible. *United States* v. *George*, 987 F.2d 1428, 1431 (9th Cir. 1993). The court distinguished *Mincey* because, among other things, Mincey was unable to speak and his answers were sometimes incoherent. *Ibid.* The Second Circuit concluded that statements made by a hospitalized defendant in significant pain, with "tubes running in and out of his body" and a "poor command of the English language," who was dizzy and subject to relentless questioning, were not the product of coercion. *Campaneria* v. *Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989). That court found *Mincey* inapplicable because, among other things, Mincey was unable to speak. The Ninth Circuit also concluded that statements made by a hospitalized patient in pain and under the influence of a pain-killing drug were admissible. *United States* v. *Martin*, 781 F.2d 671 (9th Cir. 1985). The *Martin* court distinguished *Mincey*, noting that Mincey could not talk, had received various drugs, and was questioned continuously for four hours. And in *United States* v. *Lewis*, 833 F.2d 1380, 1384-1385 (1987), the Ninth Circuit held that statements made by a suspect who had recently returned from surgery, and had just come out of a general anaesthetic, were voluntary.

On top of those distinctions, no one thought Mincey was dying and would therefore be unavailable for later questioning. On the contrary, after an afternoon shooting, and after Mincey's treatment, Detective Hust of the Tucson Police Department went to the intensive care unit "[a]t about eight o'clock that evening" and "continued to question him until almost mid-

night." 437 U.S. at 396. Mincey protested "that he could answer more accurately the next day." *Id*. at 400-401. "Let's rap tomarrow [*sic*]," Mincey wrote. *Id*. at 401 n.17. That is hardly a record suggesting exigency, in marked contrast to this case, in which respondent "told [Chavez] he believed he was dying eight times." Pet. App. 4a.

Persistent questioning of a seemingly dying witness may make judges (and many other people) squeamish, but that is not a constitutional violation, and unquestionably the possibility of the witness's imminent death creates a legitimate law enforcement interest in the preservation of evidence that was not present in *Mince*y. If petitioner indeed violated the Constitution, it can only be because that legitimate governmental interest does not outweigh respondent's liberty interest under a substantive due process analysis – *not* because the distinction is unworthy of *any* consideration in the analysis. Nor should a reasonable officer be expected to forecast that the courts would completely disregard this major distinction between Martinez's situation and Mincey's.

How, then, could Chavez have known in late 1997 that his questioning of respondent in an emergency room in an effort to preserve evidence was unconstitutionally "coercive," let alone brutal enough to "shock the conscience"? True, respondent was in pain. So were the defendants in *George*, *Campaneria*, and *Martin* – yet *none* of their statements was held to be involuntary. According to the *Martin*, *Campaneria*, and *George* courts, it was important that Mincey could not speak; respondent could. Respondent, like the defendant in *George*, was coherent; the *George* court distinguished *Mincey* on the ground that Mincey was not. Indeed, respondent was not under the influence of any medication that could affect his judgment or render his responses to questions particularly unreliable. The defendant in *Martin* was under the influence of a pain-killing drug, and the defendant in *Lewis* had just emerged from anaesthesia. But the Ninth Circuit ruled that both of their statements were voluntary. And respondent was questioned in his native language, Spanish; the defendant in *Campaneria*, on

the other hand, had little command of the English language, yet his statements, too, were held not to be the product of coercion.

In other words, even a "color-matching" of cases, and even one conducted under the Ninth Circuit's mistaken belief that admissibility precedents fully determine the constitutional issues in this case, would not have provided Chavez with clear guidance as to what constitutes permissible questioning in a hospital setting in exigent circumstances. It does not matter, for these purposes, whether a case could be made that respondent's statements were, in fact, involuntary. The relevant issue is whether petitioner, in his effort to obtain a dying declaration from a witness to a police shooting, violated a clearly established constitutional right. We submit that he did not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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