NO. 19-0440

The Supreme Court of Texas

TEXAS SOUTHERN UNIVERSITY; DANNYE HOLLEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; EDWARD MALDONADO (A/K/A SPEARIT), IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES; GABRIEL AITSEBAOMO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,

PETITIONERS,

V.

IVAN VILLARREAL,

RESPONDENT.

On Petition for Review from the First Court of Appeals – Houston

No. 01-17-00867-CV

Response to Petition for Review

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STATEMENT OF THE CASE

Petitioners have correctly stated the nature of the case.

ISSUES PRESENTED

1. Whether the inquiry into a cheating scandal presents a purely academic question or a question more akin to a disciplinary dismissal, or something new entirely;
2. Whether the Court of Appeals correctly held that petitioners failed to conclusively negate procedural due process claims where the evidence reflects that petitioners affirmatively avoided providing the information necessary for Villareal to evaluate his situation and the process/objections necessary to raise;
3. Whether the Court of Appeals correctly held that petitioners failed to conclusively negate Villarreal's substantive due process claims because material fact issues must be resolved.

STATEMENT OF FACTS

The Texas Southern University Defendants' (collectively, TSU) petition omits many facts material to the issues presented. Villarreal provides a fuller summary here.

I. Compromised Questions on December 2014 Criminal Law Comprehensive Exam.

a. Smuggled photographs surface

The "uniform" criminal law exam at issue in this case was administered in December 2014. While the Defendants have not disclosed specific dates related to the "investigation" described further below, Defendant Dean Holley stated that Professor April Walker, the Criminal Law professor for Section 1, informed him in January 2015 that Defendant SpearIt had conducted off-campus review sessions during the prohibited period before the exam. C.R. 83. Professor Walker also provided Holley with a set of photographs she had obtained depicting review materials used at one or more of these unauthorized SpearIt sessions. C.R. 82 (answer to Interr. No. 8).

These photographs (C.R.475-86) are comprised of twelve separate images which appear to have been taken by one or more students at one or more of SpearIt's sessions.[1] Each photograph depicts a page with one or more multiple choice questions printed or displayed. Five of these photographs are clearly part of a series taken by the same student; part of his or her hand, and distinctive blue jeans, are visible in the series. *See* C.R. 475, 476, 477, 479, 480, 481. The student appears to be seated, and is deliberately holding each page so as to photograph its contents. In

[1] Respondent filed a copy of these photographs with the Court of Appeals on a CD, because the e-filing process reduced legibility and color distinction.

one image the student is holding a pencil (C.R. 476); in another, he or she is pointing with a finger to an answer choice. C.R. 477. These (C.R. 475-81) are all photographs of hard copy review materials, and the font is Times New Roman.

An additional photograph appears to be of another page of a hard copy document, but the font is different than the printed questions in the previous photos. C.R. 482.

The last three photographs are not of hard-copy review materials, but actually depict multiple choice questions *displayed on someone's computer screen*. C.R. 484-86.

Defendant TSU has not produced the original electronic files of these images, but only scanned images of these photographs. These scanned images bear at least three distinct sets of marks/notations. It appears that at least one set of marks was present on the documents at the time the photographs were taken (namely, the marked answer choices that appear on several pages in a lighter gray color), and it appears that additional notations were made after these photographs were printed and reviewed.

The marks that appear to have been made after the photographs were taken and printed appear in different colors. Someone with a black pen made notations out to the side of numerous questions identifying the question on the actual Criminal Law Comprehensive Exam to which the review question corresponds. Someone

with a red pen wrote "Compromised Questions" at the top of the first page (C.R. 475) and then made various notations as they apparently were comparing these review materials with the actual compromised Exam, noting in several places that the answer choices were exactly the same as they appeared on the actual exam.

Defendants have never indicated who made these marks, but it appears they were made by someone comparing these review materials with the actual test questions, whether that was Professor Walker or someone else in the administration after Walker gave them to Defendant Holley.

b. SpearIt's selective review sessions

Defendant Holley was therefore aware of these photos from SpearIt's review sessions in January 2015. He later solicited an analysis from Dr. Roger Bolus in February, and finally acknowledged the matter to students in March. Those events are discussed further below. But first, it is helpful to relate relevant details as to SpearIt's activities arranging these unauthorized sessions prior to the exam at issue.

Emails reveal that Defendant SpearIt was conspiring in late November 2014 with an as-yet-undisclosed student in Section 2 to organize a series of review sessions for the Criminal Law uniform exam.

Defendant Dean Aitsebaomo wrote on November 26, 2014:

Dear Professor SpearIt:

> Thank you for your request to conduct additional criminal law review teaching sessions for your students on Monday, Tuesday, Wednesday, and Thursday of next week during the final examination period….

> [P]lease be aware that the Reading Period and the Final Examination period are set aside by the Law School for students to reflect and study for all of their examinations without any further classroom teaching interventions. Therefore, our policy precludes any further classroom teaching sessions during the period. If, however, any individual students desire to seek further clarification on particular issues with you, such students may continue to do so with you either electronically or in person while at your office hours.

C.R. 463.

But SpearIt was not deterred, replying: "so by this logic we would be fine as long as we meet OFF campus since this is not a classroom. is (sic) this what it comes to??" *Id.* (TSU 670) (incorrect punctuation supplied by "SpearIt"). Dean Aitsebaomo replied: "Please do not 'meet OFF campus' with the students." *Id.* Aitsebaomo copied Defendant Holley and his administrative assistant, Ms. Pendenque, on the email.

Despite this admonition, SpearIt flouted the rule. An email later on November 26 from an undisclosed Section 2 student, addressed to Section 2, reads:

> I have gotten with SpearIt about extra sessions next week….
>
> These sessions will include MULTIPLE CHOICE QUESTIONS that you MAY see on the comp. Just keep that in mind when you are deciding.
>
> SCHEDULE AS OF RIGHT NOW BETWEEN SPEARIT AND SECTION 2:
> Monday: 12:30pm-2:30pm
> Tuesday: 10:00am-12:00pm
> Wednesday: 11:00am-1:00pm
> Thursday: 11:00am-1:00pm

C.R. 569. However, SpearIt emailed the undisclosed student again on November 29, stating cryptically that things would "ha[ve] to be done smoothly" because he had no permission from the administration. C.R. 462. SpearIt invited the mystery student to discuss arrangement by telephone, and it appears the student called his cell phone. *Id.*

That email exchange occurred at 10 am. A few hours later, SpearIt warned Aitsebaomo in an email: "[P]lease tread cautiously regarding advising me outside these four walls. I pardon the transgression, but it is a mistake to think you have jurisdiction in my private affairs, so please reconsider this before advising me beyond my school duties." C.R. 463.

The next day, November 30, 2014, the mystery student emailed this update to Section 2:

> Due to administration issues, we will NOT be allowed to meet on campus. I've literally jumped through every loop but no budge. **So, we will be meeting outside of school**.
>
> Questions will be given to each of those who attend. I can not put ALL details on here but if you are hesitant about coming because you are not positive if it will be beneficial…please ask [redacted] or [redacted] for some details to help you make a decision. I can't add everything on here for school policy purposes…but please ask them for any further details on this matter.
>
> Because this is all a bit complicated…please be ready to work with the mentality that the location arrangements may change. Things may not run smooth. **However, if getting multiple choice questions that could be seen again on another exam seems beneficial…then the complications will be worth it.**

C.R. 570 (first two emphases in original; third emphasis added).[2]

II. TMSL Cooks, then Covers Up, the Bolus Report.

The appellate opinion describes how Dean Holley instructed Dr. Bolus to treat all questions other than the 13 identified in the disjointed set of photographs as the control group, despite being aware of a "likelihood" that additional questions were compromised.

Bolus returned his analysis the following day (Feb. 11, 2015) in a seven-page report. C.R. 375-82. In the page-one introductory section, Bolus noted that Holley had said, "[t]he remaining 47 items may have been compromised, but there is no proof as such." C.R. 376. Therefore, Bolus treated the 47 items as his control group for comparison with the 13 items Holley had identified as definitely compromised. *See id.* ("[W]e assume that NC items reflect the ability level of the students. We used these items as an independent variable."). Bolus's findings are revealing:

- Page three summarized the students' performance on the 13 "Cheat" items with the performance on the 47 "Non-Cheat" items, and identifies a difference that Bolus wrote was "statistically difference" (apparently meaning "statistically significant difference"), and explained that "It is possible that the 13 items in the C item set are inherently easier or, **possibly that students had access to some information which enhanced performance on them**." C.R. 378.
- Significantly, column four of Table 2 reflects that, of all the sections, Section 2 displayed the greatest difference between performance on the 13 compromised items compared to the 47 other items. *Id.*

[2] The only copy of these emails that TSU even has comes from a complaint filed by another Section 2 student with the Academic Standards Committee. It appears that student may not have submitted the second page of this email, and TSU apparently never asked for it otherwise

- On page five, Bolus listed several conclusions. His first conclusion was that "On average, performance on the suspected compromised 13 item set (C) was higher than on the suspected 47 non-compromised items (NC). The finding is highly statistically significant." *Id.* He also stated that "[i]t is unclear from the data available whether this difference was due to the C item set being inherently easier **or the fact that students received pre-testing information on them which would have enhanced their performance**." *Id.* (emphasis added). Noting that he also observed a difference in the NC items (again, Section 2 performed the highest, although by a much smaller margin than with the 13 compromised items), he stated that "**the NC items themselves may have actually been compromised**." *Id.* (emphasis added).
- Page seven of the report was added later, after Bolus writes that he was informed that the Criminal Comp from 2014 was the same administered in the Fall of 2013. Bolus wrote that "[t]his fact provided the opportunity to examine, in the absence of any identified compromise, whether the items in question were truly easier than the non-compromised items." *Id.* Here, the primary conclusion Bolus highlights is that "the overall mean difference between the C and NC item sets in Fall 2013 students was to be no different from the one observed in Fall 2014." *Id.* Bolus calculated the difference between performance on the cheat and non-cheat items for the 2013 and 2014 classes by section and overall. He highlighted the figure for the difference overall (all four sections combined) in 2013 and 2014, and notes that the figures are "remarkably similar."[3] *Id.*

The Administration expressly represented to the students that the "national expert" had concluded that the compromise had not affected the overall exam scores between sections. C.R. 496.

After requests to release Bolus's actual report, the administration released only the two pages at C.R. 516-17;[4] notably, they did not release the pages with the

[3] However, a quick review of the table shows that while the aggregate difference (all sections together) was similar, there was actually significant movement within each section from 2013 to 2014—that is, except for Section 2, which stayed relatively constant.

[4] Villarreal attests he reviewed these pages when they were released by the administration in 2015, and that these are the only two pages TMSL released to the class. C.R. 431; C.R. 539.

contrary conclusions quoted *supra*. Page five of Bolus's report (C.R. 380), which contained his actual "Conclusions," was not among the two pages released to students.

III. Plaintiff Villarreal is dismissed from TMSL

After his dismissal from school, Villarreal filed petitions with the Academic Standards Committee. On July 21, 2015, the Academic Standards Committee denied Villarreal's petition, writing that "[t]he Committee found that the Office of the Dean had already addressed administratively the issue of the alleged cheating in Criminal Law. Also, the Committee found that it does not have the jurisdiction to entertain petitions for readmission nor the power to waive the 2-year rule." C.R. 523.

Villarreal met with Defendant Holley and told him directly that he believed students in Section 4 had received access to copies of Exam questions before the Exam, and that there was much discussion within the Section to that effect. C.R. 432; C.R. 539.

IV. Trial Court Proceedings

Before any hearing could be held on Villarreal's motion to compel discovery, Defendants filed their plea to the jurisdiction on July 10, 2017. C.R. 300-395. Defendants' plea attached twelve exhibits (A-L), most notably the declarations of each individual defendant—Holley, Aitsebaomo, and SpearIt—containing various factual claims related to SpearIt's unauthorized review sessions, Thurgood's

"investigation" of same, the purported findings of Dr. Roger Bolus's report, and the decision to settle on a remedy limited to thirteen compromised questions. These affidavits contain certain statements and material particularly relevant to the argument below, as follows:

The **Declaration of Dannye Holley** (C.R. 363-81) states:

- "The TMSL administration conducted an investigation to evaluate these concerns." C.R. 364.
- "During the investigation, the TMSL administration reviewed the fact questions which were part of the materials Professor SpearIt provided his Criminal Law section." Id.
- "The investigation revealed that students who attended these review sessions were not informed by Professor SpearIt that certain of the fact questions in the review material that were used were similar to questions that appeared on the 2013 final uniform exam. That investigation further found that the four criminal law professors decided to use the 2013 final uniform exam again in 2014." Id.
- Quotes what Holley refers to as the "key finding" of Dr. Bolus's report, and states that "even if the C items were previewed to a section, they did not impact the examination outcomes for those students, or the students in other sections." C.R. 365 ¶ 7.
- "We gave the first year class in writing the results of the overall review from Mr. Bolus[.]" Id. ¶ 8.
- In a meeting with students, "no…evidence was proffered" that students in SpearIt's section who had prior access to certain questions "knew that certain review questions would appear on the examination. Accordingly, there was no evidence presented that was sufficient to warrant a conclusion that the students cheated." Id.
- "Dr. Bolus's report demonstrates that the 13 compromised questions…did not impact the results[.] The TMSL administration addressed the attempt and appearance of impropriety by proving (sic) a class wide remedy of not including the compromised items as the basis for the students' Criminal Law grade." C.R. 366 ¶ 11.

Holley's declaration also incorporates several attachments, including self-serving emails he sent to the provost (C.R. 370-71, 373-74) and Dr. Bolus's full report (C.R. 375-82).

The **Declaration of SpearIt** states:

- "The review sessions were open to all students that wanted to attend." C.R. 393 (referring to the three unauthorized sessions at issue which SpearIt also lumps together with prior review sessions).
- "During the review sessions, the students were not given answers to the questions." Id.
- "The students that attended the review sessions were not able to remove the review materials from these sessions." Id.
- Professor SpearIt voted, along with the three other Criminal Law professors, to use the 2013 exam in 2014, "and informed the Criminal Law Uniform Exam Coordinator, Professor Walker, of that decision on November 17, 2014." C.R. 394.

ARGUMENT

I. TSU Did Not Conclusively Establish That Villarreal's Dismissal Should be Characterized as Purely Academic for Purposes of Establishing the Applicable Scrutiny.

Defendants rely heavily on the premise that they are entitled in this case to the deference accorded to academic decisionmaking. But this is putting the cart before the horse. The cases on which both parties rely, establishing the standard of review for academic dismissals, only concluded that the challenged decisions were properly characterized as academic after reviewing records of full trials that established the nature of the challenged decisions and the process by which they were made (and, therefore, the nature of the "evaluative inquiry" that would be required should the

court review those decisions). *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214, 217 (1985) (noting "[t]he District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified"); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 80 (1978) (noting that the district court had "conduct[ed] a full trial"). The records of those trials, summarized in great detail by the Supreme Court, reflects and relies upon the "subjective and evaluative" nature of the academic judgments at issue, which the Court contrasted from "the typical factual questions presented in the average disciplinary decision." *Horowitz*, 435 U.S. at 90.

The Court noted that the trial record in both cases reflected a careful and deliberate decisionmaking process, and the absence of evidence of any bad faith or cover-up for impermissible motives. In *Horowitz*, the Court said that "[t]he ultimate decision to dismiss respondent was careful and deliberate." 435 U.S. at 85. *Ewing* reinforced this element, admonishing:

It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

Ewing, 474 U.S. at 225. *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. App.—Houston [1st Dist.] 1989, writ denied), which Defendants relied upon at oral argument, was also decided after a trial, *id.* at 829, in which the student was seeking court review of the same types of subjective academic judgments involved in *Ewing* and *Horowitz*. *See id.* at 830-32.

No such academic policy or subjective-fitness review decision is at issue in this case. Villarreal does not challenge Thurgood Marshall School of Law's decision to impose a 2.0-GPA requirement as a uniform policy; nor does he challenge any professor's subjective grading of any question or portion of any exam. This case, instead, calls for a review of TMSL's "investigation" and claimed remediation of a cheating scandal. On its face, his claim is more akin to the cheating inquiry at issue in *Univ. of Texas Medical Sch. at Houston v. Than*, which the Texas Supreme Court held to be a disciplinary and not academic inquiry over the university's objections. 901 S.W.2d 926, 931 (Tex. 1995). That is, it does not require inquiry into the subjective evaluations of any professors of Villarreal's fitness to be a lawyer, but a disciplinary-type factual inquiry where "there is a significant risk of error because the controlling facts are in dispute and university officials must often rely on circumstantial evidence and reports of others." *Id.*

There is no question that, if Villarreal had been dismissed on the basis that *he* had conspired with a professor to cheat on an exam, the disciplinary-dismissal

standard would apply to his claims. Here, the nature of the factual inquiry required by his claims remains the same—facts related to the scope and effect of a cheating scandal and the school's response—only Villarreal was not a party to the scandal. It would be ironic to hold that he is foreclosed from the more favorable standard of review because he himself was not accused of cheating. Regardless, Defendants have not conclusively established that their "investigation" and response was purely academic. While the First Court did not address this question in detail, it provides another reason the Defendants were not entitled to summary dismissal.

II. The First Court Correctly Held That TSU Failed to Conclusively Negate Villarreal's Procedural Due Process Claims.

Procedural "[d]ue process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Than*, 901 S.W.2d at 930; *see Villarreal's Brief* at 55-59. As Villarreal argued, even this bare minimum was denied Villarreal. At a minimum, as the panel correctly held, TSU failed to conclusively negate Villarreal's argument that the process was deficient.

Villarreal's case presents a direct analogy to *University of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926 (Tex. 1995). Like Than's inability to examine the classroom with the hearing officer, Villarreal was denied the ability to review Dr. Bolus's full report, which contained damning conclusions TMSL was withholding as it effectively told students to move along, there was nothing to see. Similarly, Villarreal had no indication *why* TMSL had believed only 13 Exam questions had

been compromised and what evidence this was based on. He certainly had no way of knowing at the time that TMSL apparently did not even ask SpearIt for a full copy of the review materials, and instead relied only on what turned up in a series of disjointed photographs from a student. Defendants relied on the Bolus report, and relied on their own unjustified conclusion that only 13 questions were compromised, and these two things were material to the decisions that left Villarreal without relief while other students had their grades modified. Without any notice of the basis for TMSL's claim that only 13 questions were compromised, nor the full text of Dr. Bolus's report, among other issues, Villarreal was *denied the opportunity to provide relevant facts or criticism of these decisions*. For that matter, TMSL's failure to identify the students involved and provide that information to Dr. Bolus precluded a proper and precise analysis, violating Villarreal's right to the proper procedural process in which to evaluate and remedy his Criminal Law grade. In other words, procedural due process turns not merely on the number of pro-forma meetings granted, but also on the substance of the "notice" and other information provided to the plaintiff, which determines his ability to respond within the framework provided.

Thus, the record contains overwhelming evidence of deficient and bad faith procedures, which compel the conclusion that TSU has failed to conclusively negate his procedural due course of law claims. The panel opinion cites the correct standard

regarding the elements of procedural due process, slip op. at 11, and summarizes the evidence contributing to the deficiencies. *Id.* at 11-14.

III. The First Court Correctly Held That TSU Failed to Conclusively Negate Villarreal's Substantive Claims.

Defendants' plea must be denied if any disputed issue of material fact exists. Many such issues are already apparent in this case, even without the benefit of the necessary documents and depositions Villarreal has been seeking.

First, Defendants' supposed "class-wide remedy" is demonstrably insufficient. Holley admitted to Dr. Bolus—in a writing that was in the record before the trial court—that there is a "likelihood" that more than 13 questions were compromised, but he nonetheless instructed Bolus to use the remaining 47 questions as the control group. Therefore, Dr. Bolus's analysis is useless, and the "remedy" is insufficient, most obviously because it does not account for the other questions which Holley admitted were "likely" compromised. Holley did his best to avoid undertaking an actual investigation, as he admits he did not even ask SpearIt for a copy of the materials he distributed at the sessions, and never interviewed any students to determine if any further questions were compromised. He was provided a copy of disjointed photos smuggled out of one or more of these sessions, clearly reflecting compromised exam questions, and yet did nothing to ascertain whether any further questions were compromised. These failures are utterly irrational, unless one's aim is to *cover up*, rather than *investigate*, the extent of the compromise.

Second, Dr. Bolus's report is self-contradictory, at best. And Plaintiff has designated an expert, Dr. Pearson, who has already produced a report reflecting the key conclusion that "the analysis presented in this report support the contention that some of the students were given an advantage when taking the [Exam] that the other students were not given." C.R. 536.[5] At this point, Defendants have not even designated Dr. Bolus, or anyone else, as a testifying expert witness who could refute Dr. Pearson's analysis. Therefore, at the present time, Defendants are not even in a position to respond to Plaintiff's expert, much less establish the absence of a fact issue *against* Plaintiff. However, if and when Defendants designate an expert, conflicting expert testimony presents a quintessential issue of fact.

Third, SpearIt claims that he did not give out the answers to the questions he reviewed at the unauthorized sessions. This is contradicted by the photographs Defendants acquired from Professor Walker, which reflect marked answer choices on those same questions.

Fourth, SpearIt claims that he picked up all copies of the review materials distributed at the unauthorized session. While this may or may not be true, the intended conclusion—that copies of the materials were not distributed outside those sessions—is contradicted by the very same photographs. Therefore, it is undeniable

[5] Notably, Professor Pearson states that "a stronger analysis would result from analyzing the known section and students…in question" (requiring the identification of students that Plaintiff has been seeking through discovery since this case was filed).

that at least one student at one or more session was able to take photographs and leave with them, and Villarreal personally informed Holley—purportedly in charge of the "investigation" of this incident—that he and other students in Section 4 believed copies of questions had made their way outside of Section 2.

There are many more disputed material issues of fact, but it is not necessary to catalogue them all here. Any one of the issues identified above alone precludes Defendants' plea.

PRAYER

Only Texas universities that spend tax dollars aiding and abetting, and then covering up, cheating scandals affecting uniform exams, which then contributes to a student's mandatorily-curved score and contributes to his dismissal for failure to meet a mandatory GPA, need worry about being sued. Respondent respectfully submits that the petition for review should be denied.

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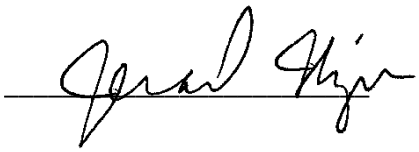

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I hereby certify that a true and correct copy of the foregoing document, along with any accompanying exhibits, has been served by eService on the following counsel of record on November 13, 2019.

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