No. _____

# In the Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

FLOYD RUSSELL GALLOWAY, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The exclusionary rule, which bars the admission of ill-gotten gains, exists for the sole purpose of deterring intentional, egregious police misconduct in the collection of evidence. *Davis* v. *United States*, 564 U.S. 229, 231–32, 246 (2011). But in applying the exclusionary rule, courts must weigh the deterrence benefit against the steep societal costs of excluding reliable, probative evidence of guilt and the defendant's potential evasion of prosecution. *United States* v. *Leon*, 468 U.S. 897, 907 (1984). The rule is not effective when deterrence is only marginal, especially when the officers acted in good faith. *Id*. at 918–19. And the justification for exclusion is attenuated when it results from the actions of someone outside the prosecution team. Indeed, federal courts consistently hold that the prosecution is not held responsible for an outside officer's possession of exculpatory information. See, e.g., *United States* v. *Hunter*, 32 F.4th 22, 35 (2d Cir. 2022) (citing *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995)). The questions presented are:

1. Is exclusion of reliable, probative evidence of guilt warranted to deter an outside officer's misconduct where there are other deterrents that do not deprive the jury of critical evidence, and where the investigative team operated in good faith?

2. Does a rule holding the State responsible for an outside officer's conveyance of an *inculpatory* tip, where the officer failed to disclose that the tip came from a privileged source, conflict with the rule that the prosecution is *not* liable for an outside officer's possession of *exculpatory* information?

## PARTIES TO THE PROCEEDING

Petitioner is the People of the State of Michigan, who, through the Michigan Attorney General, have charged Floyd Galloway, Jr., with first-degree murder.

## RELATED CASES

- Oakland Circuit Court, *People* v. *Floyd Russell Galloway*, *Jr.*, No. 2019-272265-FC, Opinion issued November 16, 2022 (suppressing evidence).

- Michigan Court of Appeals, *People* v. *Floyd Russell Galloway*, *Jr.*, No. 364083, Order issued February 9, 2023 (granting application for leave to appeal).

- Michigan Court of Appeals, *People* v. *Floyd Russell Galloway*, *Jr.*, No. 364083, Opinion issued September 21, 2023 (affirming suppression order).

- Michigan Supreme Court, *People* v. *Floyd Russell Galloway*, *Jr.*, No. 166366, Order issued June 14, 2024 (denying leave to appeal; two justices dissenting).

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## JURISDICTION

The Michigan Supreme Court entered its order on June 14, 2024. The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides identical prohibitions for the States.

## INTRODUCTION

The exclusionary rule is a prophylactic deterrent for *bad* police officers. But what if an investigative team, acting in good faith, is misled by the misconduct of an officer *outside* of the team? In that case, should the team lose all its virtuously collected evidence?

Charles Nebus, chief of the Farmington Hills Police Department (FHPD), was misled in that manner. In December 2016, his team investigated the disappearance of 28-year-old Danielle Stislicki. Danielle was last seen leaving her office with defendant Floyd Galloway, Jr. Since then, no one—not her family, friends, coworkers, or the police officers diligently investigating her disappearance—has heard from or found her. She has now been declared deceased.

One week after Danielle vanished, Gary Mayer, chief of a *different* police department, called Nebus with a tip about this case from a source who wished to remain anonymous. Nebus, believing the tip was legitimate, sent his officers to investigate. They verified nearly every facet of it. Danielle's Fitbit and keys were found discarded by a road. Security footage showed Galloway walking past a gas station and into a Tim Hortons restaurant near Danielle's apartment. And Galloway had taken a cab back to Danielle's office.

As it turns out, Nebus was duped by Mayer. Long after the tip evidence was recovered, Nebus and his team learned that Mayer's source was James Hoppe, a retired FBI agent turned polygrapher for defense attorneys. Mayer figured Hoppe got his information from a polygraph and yet still passed the tip to Nebus *without* flagging that the tip was likely privileged.

The trial court has excluded the tip evidence, finding that Mayer and the FHPD violated due process by breaching Galloway's attorney-client privilege. The Michigan Court of Appeals affirmed based on *Mayer*'s actions. The Michigan Supreme Court denied leave to appeal, but two justices dissented.

Consistent with the dissent's reasoning, the State seeks certiorari from this Court on two grounds. First, the exclusionary rule should not apply where the investigative team acted in good faith and was deceived by an outside officer. Here, Nebus did nothing wrong in need of deterrence. The only officer to act wrongly was Mayer, who was not part of the team. And the needed deterrence can be accomplished without sacrificing the evidence collected by the unwitting FHPD officers acting in good faith. An officer such as Mayer could be disciplined, prosecuted, or sued for his actions. But all-out exclusion does more harm than good.

Second, punishing the investigative team for an outside officer's disclosure of inculpatory information, with the fact of privilege withheld, conflicts with *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, which holds that the prosecution team is *not* liable for undiscovered exculpatory information from an outside officer. These principles sprint in opposite directions. If the Constitution is not offended when an outside officer has even *exculpatory* information—that which is most coveted by the criminal justice system—it cannot be offended when that same officer has *inculpatory* information and withholds its privileged nature.

The Court should thus grant this petition or, alternatively, peremptorily reverse.

## STATEMENT OF THE CASE

### The evidence *before* the tip

Galloway knew Danielle. She worked at MetLife in Southfield, where Galloway had been a security guard until October 2016. (9/9/19 Prelim. Exam. Tr. at 74–75.) He flirted with her and had even sent her flowers as a secret admirer. (*Id*. at 44, 46, 56, 225–27.)

Danielle disappeared on December 2, 2016. She had dinner plans with her best friend that night, but Danielle never made it, and she uncharacteristically failed to answer her phone. (*Id*. at 13–14, 16, 22–24.) By the next morning, Danielle's parents reported her missing to the FHPD. (*Id*. at 17, 40.) Despite years of personal and professional search efforts, Danielle has never been found. (*Id*. at 49, 233–38.)

Before looking at Danielle's movements the day she disappeared, it is important to first examine Galloway's. By that day, Galloway had long since been assigned to a different work location. (*Id*. at 83.) Yet, at 11:14 a.m., his cellphone pinged the tower near MetLife and Grodan Drive. (9/10/19 Prelim. Exam. Tr. at 72–73.) Twelve minutes later, Galloway's phone pinged near his home in Berkley, where he lived with his wife. (*Id*.) His phone tracked back towards MetLife at 3:48 p.m. and stopped registering on the network eight minutes later. (*Id*. at 75.)

Danielle's coworkers were the last people to see her alive as she left work around 5:00 p.m. (9/9/19 Prelim. Exam. Tr. at 58, 67.) One person saw her run into Galloway in the MetLife parking lot with the hood of his dark-colored Buick Regal propped up, indicating

car trouble. (*Id*. at 60.) Another person next saw Galloway in the passenger seat of Danielle's car as Danielle drove them out of the parking lot. (*Id*. at 69.)

Cellphone record data showed Danielle's phone travel east from MetLife to Galloway's home from 4:47 p.m. to 5:07 p.m. (9/10/19 Prelim. Exam. Tr. at 76–79.) A business security camera captured Danielle's vehicle driving east at 5:03 p.m. (9/9/19 Prelim. Exam. Tr. at 157–58.) From 6:20 p.m. to 7:38 p.m., Galloway's and Danielle's phones pinged the same tower near Galloway's home. (9/10/19 Prelim. Exam. Tr. at 78–79.) Galloway's phone again stopped registering with his network at 7:38 p.m., but Danielle's phone remained connected. (*Id*. at 79.)

At 7:53 p.m., Danielle's phone began traveling west from Galloway's home, as captured on the previous business security camera. (9/9/19 Prelim. Exam. Tr. at 160; 9/10/19 Prelim. Exam. Tr. at 79.) Her phone tracked to her apartment at 8:16 p.m. and then continued just further west, when her phone ceased communicating with her network. (9/9/19 Prelim. Exam. Tr. at 95; 9/10/19 Prelim. Exam. Tr. at 79–81.)

After she was reported missing, and having learned of her recent interaction with Galloway, FHPD officers interviewed Galloway at his new work location on December 6. (9/9/19 Prelim. Exam. Tr. at 97–100.) The officers noticed Galloway's Buick in the parking lot. (*Id*. at 98–99.) When the officers asked Galloway if he knew Danielle, he responded, "Yeah, I did," and said he last saw Danielle "several months ago." (*Id*. at 101.)

The following day, December 7, the FHPD executed a search warrant at Galloway's home. (*Id.* at 103.) They found a patch of recently replaced carpet in the master bedroom. (*Id.* at 108–09.) The officers cut the carpet a little wider than the patch itself and took it into evidence. (*Id.* at 110–11.) They also found carpet scraps in the kitchen garbage. (*Id.* at 108.) A forensic analysis found touch DNA from Danielle on the fringes of the bedroom patch; the odds that the DNA belonged to anyone else were 32 septillion to 1. (9/10/19 Prelim. Exam. Tr. at 17–18.)

Then the tip came in.

**The tip**

Gary Mayer, then-chief of the Troy Police Department, received a call from his friend, James Hoppe, on Friday, December 9, 2016, one week after Danielle disappeared. (5/3/22 Evid. Hr'g Tr. at 9–10.) Mayer knew Hoppe personally, meeting when their children played soccer, and professionally, as Hoppe was a retired FBI agent turned private-practice polygrapher, including for defense attorneys. (*Id.* at 10–11, 45.) Hoppe told Mayer "he had information on the security guard and the homicide, and he said that he wanted to relay it, it was very important, but he couldn't relay it unless [Mayer] could keep his identity confidential." (*Id.* at 11–12.) Hoppe mentioned an impending snowstorm and concern that evidence could be lost or destroyed. (*Id.* at 12.) As Hoppe spoke, Mayer took notes that he kept in an "assist other departments staff inspection" file. (*Id.* at 13, 38.)

Mayer first tried to relay the tip up the command chain at the FHPD, to no avail, so Mayer finally called

Charles Nebus, then-chief of the FHPD. (*Id*. at 20–21.) Mayer read his notes to Nebus. (*Id*. at 22.) He did *not* identify the source because "the source wanted to remain confidential." (*Id*. at 23.) Mayer did not recall Nebus asking about the source. (*Id*. at 22–23.)

Nebus confirmed Mayer's account. (*Id*. at 80–81.) Galloway had already been a suspect in Danielle's disappearance, so Nebus knew this was the case to which the tip referred. (*Id*. at 80–81, 254–55.) To document the tip, Nebus wrote notes and transferred them to a FHPD tip sheet, stating:

> A caller said the security guard did it. He drove the victims [sic] car from his house in Berkley to her apt., then walked to Tim Horton's at 10 and Halsted where he called Shamrock cab or something that sounds like Shamrock where he received a cab ride to within walking distance from his work where his car was parked. There should be evidence on or in the victims [sic] car. The subject threw the victims [sic] keys in a grassy area by the freeway while walking to Tim Horton's [sic]. The fitbit should be near the keys. The victims [sic] cell phone was placed in the trash inside Tim Horton's [sic]. The victims [sic] body should be inside a beige and brown comforter. Upon further questioning, the caller had no further information and wished to remain anonymous.

App. 9a. The tip sheet did not mention Mayer. (5/3/22 Evid. Hr'g Tr. at 84–87.) But Nebus identified Mayer as the caller to two or three people in his office that night. (*Id*. at 90–91.)

Mayer spoke with Nebus again the following Monday, asking if the source had other information. (*Id*. at 24, 27.) Mayer called Hoppe, who repeated the same information. (*Id*. at 29–30.) Mayer called Nebus back and reiterated the information. (*Id*. at 30–31.) Nebus did not recall anything more. (*Id*. at 164.)

**The evidence after the tip**

FHPD officers immediately investigated the tip. Within one mile west of Danielle's apartment, there is a gas station, the M-5 freeway entrance ramp, and a Tim Hortons restaurant. (6/13/22 Evid. Hr'g Tr. at 146; 9/9/19 Prelim. Exam. Tr. at 113.) Security video at the gas station depicted a person appearing to be Galloway the night Danielle disappeared. (6/13/22 Evid. Hr'g Tr. at 146.)

Walking westward from the gas station to the Tim Hortons, the officers located Danielle's Fitbit and keys in a fielded area. (*Id*.) The keys were recovered closest to the gas station, on the east side of the M-5 entrance ramp, while the Fitbit was found on the west side of the ramp. (9/9/19 Prelim. Exam. Tr. at 139–41.)

At the Tim Hortons, security video from December 2 showed Galloway entering at 8:38 p.m., placing an order, paying with cash, and asking to use the business phone. (6/13/22 Evid. Hr'g Tr. at 145; 9/9/19 Prelim. Exam. Tr. at 117, 119.) This was twenty-two minutes after Danielle's phone stopped registering on her network just west of her apartment after returning from Galloway's home. (9/10/19 Prelim. Exam. Tr. at 79–81.)

This map shows the full evidentiary picture[1]:


The Tim Hortons phone records showed that a call had been placed to the Michigan Green Cab Company. (6/13/22 Evid. Hr'g Tr. at 35.) This was consistent with the Tim Hortons video, which showed that Galloway retrieved a yellow piece of paper from his pocket and then dialed a number on the business phone. (9/9/19 Prelim. Exam. Tr. at 119.) The video showed the cab pulling up at 9:05 p.m. and Galloway exiting the restaurant at 9:09 p.m. (6/13/22 Evid. Hr'g Tr. at 35; 9/9/19 Prelim. Exam. Tr. at 123.)

The cab driver and company records indicated that Galloway was dropped off at 9:20 p.m. at an apartment building on Grodan Street in Southfield—the same street where his phone had pinged at 11:14 a.m. that morning. (9/9/19 Prelim. Exam. Tr. at 87–89, 161.) This was only about 1,000 feet from

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[1] This map was generated using Google Maps and a police sketch. The sketch was admitted as an exhibit at the preliminary examination, but the map was not. (9/9/19 Prelim. Exam. Tr. at 139.) This Court may take judicial notice of satellite images from Google Maps. See, e.g., *Pahls* v. *Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013); Fed. R. Evid. 201(b)(2).

MetLife, where Galloway had left his vehicle before leaving with Danielle that day. (*Id.* at 150.) Security footage from the apartment building showed Galloway begin to walk toward the entrance but then turning around and heading toward MetLife. (*Id.* at 144–45, 147.).

At 9:37 p.m., the same business security camera that showed Danielle's vehicle driving to and from Galloway's home earlier that evening also caught a dark-colored Buick Regal with a temporary plate—identical to Galloway's vehicle—traveling east towards Galloway's home. (*Id.* at 161.) Galloway's phone resumed network communication at his home at 9:39 p.m. and continued until 3:58 a.m. (9/10/19 Prelim. Exam. Tr. at 82.)

Also consistent with the tip's reference to the body wrapped in a comforter, records showed that Galloway purchased a new comforter at Bed, Bath, and Beyond on December 4, two days after Danielle's disappearance. (9/9/19 Prelim. Exam. Tr. at 165.)

**Privilege discovered and disclosed**

Even well after the FHPD had investigated the tip, Hoppe's identity as the tipster and his privileged status were known only to Mayer. Mayer knew that Hoppe conducted polygraphs for defense attorneys, and while Hoppe never told Mayer that his December 9 information came from a polygraph, Mayer "figured it." (5/3/22 Evid. Hr'g Tr. at 40.) But Mayer did *not* convey this to Nebus. (*Id.* at 83, 92.) At the time, Nebus thought the tipster was someone close to Galloway such that the tipster might be in danger of reprisal if the tipster's identity was revealed. (*Id.* at

109–10.) Until the media reports on this topic in 2022, Nebus did not know the original source was the polygrapher. (*Id*. at 88, 103, 108–09, 196.) No one else at the FHPD knew, either. (*Id*. at 209–10, 217, 238–39, 258–59; 6/13/22 Evid. Hr'g Tr. at 99–100, 147–48.)

The notion of a privileged source was not even contemplated until early 2017, after Nebus met with the Oakland County Prosecutor. (5/3/22 Evid. Hr'g Tr. at 94.) Nebus told the prosecutor and her chief deputy that he received the tip from Mayer. (*Id*.) Initially, the prosecutors took no action, but when Nebus contacted them a week or two later (after he consulted with an attorney because he was concerned about finding the source), the prosecutors asked Nebus to have Mayer contact them. (*Id*. at 95–100.) Nebus passed the message along when he and Mayer were at a police chiefs' conference on February 8, 2017. (*Id*. at 34, 100–02.)

When Mayer called the prosecutors, without Nebus on the call, the prosecutors asked Mayer to identify his source. (*Id*. at 33–35, 40.) Mayer declined, saying that the "source wanted to remain confidential." (*Id*.) The prosecutors discussed whether Mayer "could be compelled to give them the information." (*Id*.) Mayer presented a hypothetical, querying, "[W]hat if this person worked for the defense attorney." (*Id*. at 35, 42.) The chief deputy then speculated "you got the polygrapher or private investigator." (*Id*. at 42.) Mayer did not respond. (*Id*.) The chief deputy "deduced" that the tip came from attorney-client privilege, but Mayer did not tell him this.[2] (6/24/22 Evid.

[2] The chief deputy testified that *Nebus* identified the tipster as a "polygraphist," (6/24/22 Evid. Hr'g Tr. at 9), but Nebus said that was not possible because he did not know. (5/3/22 Evid. Hr'g Tr.

Hr'g Tr. at 11.) On February 14, 2017, after the prosecutors had spoken with Mayer, the chief deputy told Nebus the tip "likely" came from a privileged source. (5/3/22 Evid. Hr'g Tr. at 175–76.)

But identification of Hoppe did not come until 2019, when the Michigan Attorney General initiated an investigative subpoena to force Mayer's hand. The Attorney General needed to confirm that the source was not an accomplice. (8/5/22 Evid. Hr'g Tr. at 11.) Neither Nebus nor his officers knew the source's identity. (*Id*. at 9–11, 80–81.) Mayer refused to identify the source until a court ordered him to do so. (*Id*. at 10–11, 14.) The investigative-subpoena proceedings were promptly disclosed to every one of Galloway's defense attorneys. (8/5/22 Evid. Hr'g Tr. at 25–26, 28, 34.)

In March 2019, the Attorney General charged Galloway with first-degree murder. At the preliminary examination (Michigan's probable-cause hearing), neither party discussed the tip; Galloway did not challenge it and the State did not offer it as evidence. (*Id*. at 27–28.) The State did, however, admit all relevant evidence, including the evidence recovered from the tip. (See, e.g., 9/9/19 Prelim. Exam. Tr. at 114–23.) At the end of the exam, the district court concluded that there was "overwhelming evidence" to send the case to trial. (9/10/19 Prelim. Exam. Tr. at 94.)

**Tip evidence suppressed**

Despite full disclosure of the tip, Galloway did not challenge it until October 2021, more than two years

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at 102–03.) The Michigan Court of Appeals found the trial court's conclusion that Nebus knew to be "tenuous." App. 15a.

after the Attorney General made Galloway's defense team aware of it. At that time, he filed a consolidated motion to suppress evidence, quash the information, and dismiss the case. Following multiple evidentiary hearings, briefing, and oral argument, the trial court issued a 64-page opinion and order suppressing the tip evidence. App. 26a–113a.

The court found that the government knowingly intruded into Galloway's attorney-client privilege and thus violated due process. App. 81a. The court applied the test from *People* v. *Joly*, 970 N.W.2d 429 (Mich. Ct. App. 2021), which largely rested on *United States* v. *Voigt*, 89 F.3d 1050 (3d Cir. 1996). App. 64a. The test is three-fold: (1) the police were objectively aware of an ongoing privileged relationship between the defendant and a confidant, (2) the police deliberately intruded into that privileged relationship, and (3) actual prejudice resulted from the intrusion. App. 68a.

For the first and second prongs, the trial court grouped Mayer and the FHPD together. App. 81a, 88a–89a. The trial court found that Mayer *and* the FHPD (Nebus) knew or should have known that the tip came from a privileged source. Mayer had "figured" the information was privileged based on his familiarity with Hoppe, and Nebus's actions in essence indicated a guilty conscience, such as omitting Mayer's name from the tip sheet and consulting with counsel. App. 75a–81a. The trial court further found that the FHPD (again, Nebus) knowingly intruded into Galloway's attorney-client privilege by seeking out and recovering evidence from the tip. App. 81a–89a. Finally, for the third prong, the court found

prejudice because the State used the evidence at the exam and intended to use it at trial. App. 89a–94a.

As a result, the trial court suppressed:

> Danielle Stislicki's Fitbit, keys, and telephone and forensic data retrieved therefrom; the testimony of persons working at Tim Horton's [sic] who observed the Defendant; surveillance footage and phone records from Tim Horton's; surveillance footage from the gas station near Tim Horton's [sic]; and information obtained from the Green Cab company.

App. 112a. The court further stated that it "will consider additional evidence that falls in this category." App. 112a.

The court denied the motions to quash and to dismiss without prejudice and called for further briefing. App. 112a–113a. This included Galloway's motion under *Franks* v. *Delaware*, 438 U.S. 154 (1978), which argued for further suppression because the evidence recovered from the tip was cited in subsequent search warrants. App. 94a–98a. The additional briefing will further concern Galloway's claim that the case should be dismissed due to the Attorney General's handling of the privileged information.[3] App. 112a–113a.

[3] Out of an abundance of caution, the Attorney General established an internal isolation wall on November 29, 2022.

**Michigan Court of Appeals**

In an unpublished opinion, a panel of the Michigan Court of Appeals affirmed the trial court's decision. App. 8a. The Court of Appeals declared Mayer a government actor with objective knowledge that the tip was privileged. App. 14a–15a.

The State had argued that Mayer's knowledge and actions should not be attributed to the prosecution because he was an outside actor, consistent with the *Brady* "team" principle wherein the prosecution is not liable for undiscovered exculpatory information possessed by someone outside the investigative team. App. 13a–14a. The Court of Appeals recognized that Mayer "had no formal affiliation with the investigation" and that "Mayer's own police department was otherwise uninvolved," but rejected the *Brady* framework and imputed Mayer's misconduct to the prosecution because Mayer "intentionally interjected himself into the matter when he conveyed Hoppe's tip to the FHPD." App. 13a–14a, 19a. The Court of Appeals held that because Mayer was a "high-ranking law-enforcement officer with many decades of experience and at least some knowledge of attorney-client privilege," he should have "simply held his silence" and not relayed the tip to the FHPD. App. 12a, 18a. But he did, so the court ruled that Mayer deliberately intruded into Galloway's attorney-client privilege. App. 18a.

On the other hand, the court largely absolved the FHPD. The court characterized the trial court's conclusion that Nebus knew or should have known the tip was privileged as "tenuous," because a tipster wishing to remain anonymous or confidential is not at all unusual in law enforcement. App. 15a–16a. The reasons

for anonymity abound, the court explained, including that "the tipster might fear retribution, feel a degree of guilt about implicating a loved one, believe he or she might be implicated in the crime, or wish to avoid being labeled a 'snitch.' " App. 16a. So, "the request for anonymity was not inherently suggestive of an ongoing attorney-client relationship or other form of privilege." App. 16a. Rather, the record "impl[ied] only that Nebus *suspected* the tip was privileged," which was not enough to impute knowledge, i.e., "there is a significant distance between mere suspicion that there was something suspicious about the tip and objective awareness that the tipster was an agent of defense counsel." App. 16a (emphasis added). But because *Mayer* knew (or effectively knew), that was enough according to the Court of Appeals. App. 16a.

The Court of Appeals also rejected the State's argument that the FHPD acted in good faith and that suppression of the evidence would therefore not have any deterrent effect on law enforcement. App. 20a. The court again focused on Mayer. App. 22a. The court said that failing to apply the exclusionary rule in this case "could actually encourage misconduct" by promoting ignorance. App. 23a.

Finally, the Court of Appeals "agree[d] with the prosecution that the trial court's ruling regarding the extent of evidence to be excluded was over expansive" by barring Danielle's phone and "forensic data retrieved therefrom." App. 23a. Danielle's phone was never recovered, and her phone data was obtained *before* the tip. App. 23a. Thus, the Court of Appeals remanded for amendment of the opinion and order to that extent. App. 23a–24a.

**Michigan Supreme Court**

The State sought review in the Michigan Supreme Court, stressing that the FHPD's good faith rendered exclusion of the tip evidence imprudent and inhibitive. The State also reiterated that the Michigan Court of Appeals' decision conflicted with the *Brady* "team" principle. The Court denied leave. App. 1a–2a.

Two justices dissented. App. 1a, 6a. They would have granted leave on *both* "jurisprudentially significant" issues. App. 2a. First, with respect to the exclusionary rule, Justice Viviano identified alternative deterrents for Mayer. App. 3a–5a. For instance, state law prohibits and even criminalizes disclosure of polygraph statements.[4] Mich. Comp. Laws §§ 338.1728(3), 338.1729. App. 3a–4a. One could also sue under 42 U.S.C. § 1983. App. 4a. Conversely, "suppression carries substantial societal costs," including loss of "reliable and probative" evidence that "will certainly impair the jury's truth-finding ability." App. 5a.

Second, Justice Viviano thought it prudent for the Court to consider potential conflict with *Brady*. App. 5a. He contrasted *Brady*'s absolution of an outside officer in possession of *exculpatory* information against *Joly*'s damning of the same outside officer in possession of *inculpatory* information. App. 5a. He believed the Court should have harmonized the rules. App. 5a.

The State asks this Court to take up that mantle.

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[4] Mayer has not been charged, and the six-year statute of limitations has run. See Mich. Comp. Laws § 767.24(10).

## REASONS FOR GRANTING THE PETITION

### I. The exclusion of evidence is a windfall remedy designed solely to deter police misconduct, not the unwitting, good-faith efforts of an investigative team that was pursuing an anonymous tip and was misled by a single officer who was not part of the team.

This case weighs the deterrence effect of the exclusionary rule on two distinct players. The first is a lone, outside officer guilty of misconduct (Mayer). The second is the investigative team (the FHPD), which received and in good faith investigated an anonymous tip from the outside officer, who withheld the fact that the tip came from a privileged source. The total exclusion of evidence collected from the tip punishes the latter for the sins of the former. That is not how the exclusionary rule was intended to or should operate.

Rather, there are effective civil and criminal remedies to deter the type of misconduct committed by Mayer without inordinately punishing the FHPD, the prosecution, and society by depriving the jury of reliable, probative evidence of guilt. This Court should therefore grant certiorari and hold that exclusion is not warranted under these circumstances. "[B]oth the truth and the public safety" hang in the balance. *Davis*, 564 U.S. at 231.

#### A. The exclusionary rule is to be employed as a last resort, not a first impulse.

The exclusionary rule is a creature of the Fourth Amendment's prohibition against unreasonable

searches and seizures. *Davis*, 564 U.S. at 231. Because the Constitution was "silent about how this right is to be enforced," this Court "supplement[ed] the bare text" by creating the exclusionary rule. *Id*. The rule "bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Id*. at 231–32. The rule has also been applied in the Fifth Amendment context. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

The rule is not to be applied "reflexive[ly]," however. *Arizona* v. *Evans*, 514 U.S. 1, 13 (1995). It is "not an automatic consequence" of a constitutional violation. *Herring* v. *United States*, 555 U.S. 135, 137 (2009). While the rule finds its roots in the Fourth Amendment, it is "not a personal constitutional right" or a "self-executing mandate." *Davis*, 564 U.S. at 236–37 (quoting *Stone* v. *Powell*, 428 U.S. 465, 486 (1976)). See also *Leon*, 468 U.S. at 905–06 (exclusion is not a "necessary corollary" to or "required" by the Constitution). Instead, the rule is "a prudential doctrine, created by this Court to compel respect for the constitutional guaranty." *Davis*, 564 U.S. at 236 (cleaned up). As such, application of this judicially created remedy "has *always* been our last resort, not our first impulse." *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006) (emphasis added).

The rule's *sole* purpose is exceedingly narrow: deterrence of police misconduct. *Davis*, 564 U.S. at 246. "And not just any misconduct," but " '*intentional* conduct that was *patently* unconstitutional.' " *Lange* v. *California*, 594 U.S. 295, 317 (2021) (Thomas, J., concurring) (quoting *Herring*, 555 U.S. at 143) (emphasis added in concurrence). The rule was not "designed to

redress the injury occasioned by an unconstitutional search." *Davis*, 564 U.S. at 236 (cleaned up). It is "to prevent, not to repair." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Exclusion turns on weighing the benefits against the costs. *Leon*, 468 U.S. at 907. The "benefits" side of the scale asks whether exclusion will serve the singular purpose of deterring police misconduct. *Davis*, 564 U.S. at 237. This Court has therefore "limited the rule's operation to situations in which this purpose is thought most efficaciously served." *Id*. (cleaned up). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct," requiring analysis of the "flagrancy" of the police misconduct. *Herring*, 555 U.S. at 143. At a minimum, the police must have known, or should have known, that their conduct was unconstitutional. *Id*. From there, the exclusionary rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id*. at 144.

Conversely, the "costs" are those paid by "the judicial system and society at large." *Davis*, 564 U.S. at 237. There are two. First, the rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Id*.; see also *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) (recognizing "the public interest in having juries receive all probative evidence of a crime"). That is, it effectively bars the jury "from considering all the evidence." *Herring*, 555 U.S. at 137. This "undeniably detracts from the truthfinding process," *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U.S. 357, 364 (1998), with an

"unbending" application "unacceptably" so, *Leon*, 468 U.S. at 907 (cleaned up). Second, if juries are deprived of reliable, inculpatory evidence, the justice system risks "setting the guilty free and the dangerous at large." *Hudson*, 547 U.S. at 591. This Court has been clear that "the criminal should not go free because the constable has blundered." *Herring*, 555 U.S. at 148.

The rule's "bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." *Davis*, 564 U.S. at 237. These "substantial social costs . . . have long been a source of concern." *Leon*, 468 U.S. at 907. Though these costs are "worth bearing in certain circumstances, . . . the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Scott*, 524 U.S. at 364–65. Indeed, "any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness." *Illinois* v. *Gates*, 462 U.S. 213, 257–58 (1983) (White, J., concurring). "[T]he prosecution is not [to be] put in a worse position simply because of some earlier police error or misconduct." *Nix*, 467 U.S. at 443.

To put it bluntly, "society must swallow this bitter pill when necessary, but only as a 'last resort.' " *Davis*, 564 U.S. at 237 (quoting *Hudson*, 547 U.S. at 591).

### B. Exclusion sweeps too broadly when used to deter a single, outside officer's misconduct, where the unwitting investigative team acted in good faith.

The consequences of applying the exclusionary rule here will reverberate across all law enforcement. It implicates the way officers must investigate anonymous tips by scrupulously ensuring they did not come from a privileged source, even if there is no objective indication to the investigative team that they did. There is no deterrent effect to be had on law enforcement for good-faith conduct such as the FHPD exhibited here. And there are much narrower state and federal mechanisms to deter the *one*, *outside* officer actually in need of deterrence—Mayer.

Exclusion under these circumstances may require *every* law enforcement agency to vet *every* purported anonymous tip for potential privilege, with devastating effect. Entities such as Crime Stoppers—created to encourage witnesses to report crimes without fear of recognition or retribution—would be a thing of the past. Crime Stoppers explicitly tells citizen tipsters, "You do not have to give your name and Crime Stoppers does not utilize caller ID," and that "Citizens Witnesses are identified by Tip Numbers, not names." Crime Stoppers – About, How it Works.[5] Such a vetting requirement could affect the whole investigation. In a case as expansive as this with hundreds of tips, it could bring the investigation to a screeching halt. (See 5/3/22 Evid. Hr'g Tr. at 91 ("[W]e had tips pouring in all over the place."); 6/13/22 Evid. Hr'g Tr. at 49

[5] https://www.crimestoppersofmidmichigan.com/index.php/how-it-works (last accessed on Aug. 15, 2024.)

(positing that there were approximately 500 tips in this case).) Delay could be fatal where, as here, the victim was originally reported missing.

Anonymous tips are commonplace and crucial for law enforcement. While they must be reliable, "such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.' " *Gates*, 462 U.S. at 237–38. This Court has expressly rejected any "standard that leaves virtually no place for anonymous citizen informants" due to their centrality in public safety. *Id.* at 238. And a desire for anonymity is not an automatic red flag for privilege. "There are any number of reasons a tipster might wish to remain unknown," including that "the tipster might fear retribution, feel a degree of guilty about implicating a loved one, believe he or she might be implicated in the crime, or wish to avoid being labeled a 'snitch.' " App. 16a. Nebus had those very concerns. (5/3/22 Evid. Hr'g Tr. at 109–10; 8/5/22 Evid. Hr'g Tr. at 11.)

To be sure, the State does not condone Mayer's cognizant breach of Galloway's polygrapher- and attorney-client privileges. But to use the exclusionary rule to deter his personal misdeeds would disproportionately punish the innocent actions of the FHPD. Instead, there are more focused alternative deterrents available. "[T]his Court has recognized the effectiveness of alternative deterrents such as state tort law, state criminal law, internal police discipline, and suits under 42 U.S.C. § 1983." *Collins* v. *Virginia*, 584 U.S. 586, 609 n.6 (2018) (Thomas, J., concurring). Suppression is not the only available deterrent for police misconduct. See *Hudson*, 547 U.S. at 596.

Michigan Justice Viviano made that same observation in this case. He identified other deterrents short of all-out exclusion of evidence. Michigan law not only bars the disclosure of polygraph results under § 338.1728(3), but it even *criminalizes* such disclosure as a misdemeanor, § 338.1729(1). App. 3a–4a. "Those statutory provisions expose an officer who conveys confidential information gained from a polygrapher to criminal liability, which is certainly a strong deterrent and reduces the incremental deterrence that the exclusionary rule would provide." App. 4a.

Federal law provides a deterrent as well: civil-rights lawsuits under § 1983. App. 4a. This Court has acknowledged this "effective deterrent" as an alternative to the scorched-earth approach of excluding evidence. *Hudson*, 547 U.S. at 596–97. Because § 1983 suits are now widely available to remedy constitutional violations by the police, whereas they were not when the exclusionary rule was first developed, "[r]esort to the massive remedy of suppressing evidence of guilt is unjustified." *Id*. at 599.

These alternative deterrents are much more apt where, as here, a single actor in a unique circumstance—rather than law enforcement at large—is the one in need of deterrence. Mayer, acting alone, in bad faith, and outside of the investigative team, violated Galloway's privilege and did *not* convey the fact of privilege to the FHPD.

Conversely, the investigative team—the FHPD—acted in objectively *good* faith. This is a necessary corollary to the exclusionary rule, where application "varies with the culpability of the law enforcement conduct." *Herring*, 555 U.S. at 143. "When the police

act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way." *Davis*, 564 U.S. at 238 (cleaned up). This is because "the officer is acting as a reasonable officer would and should act in similar circumstances." *Leon*, 468 U.S. at 920 (cleaned up). "Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Id.* (cleaned up). Justice White foreshadowed the good-faith exception in 1983, noting, "It would be surprising if the suppression of evidence garnered in good-faith, but by means later found to violate the Fourth Amendment, did not deter legitimate as well as unlawful police activities." *Gates*, 462 U.S. at 258 (White, J., concurring).

In this case, the privileged nature of the tip was discovered long after the evidence from the tip had been collected. Nothing about the tip as reported to Nebus suggested any form of privilege, as the Michigan Court of Appeals credited. See App. 16a. Instead, the tip pointed more toward an accomplice or lay confidant. See App. 16a. Moreover, the laws regarding confidentiality of polygraphs and attorney-client communications are so strict, and the latter especially sacred, that the chances that the tip came from a breach of either privilege were staggeringly low.

Given the good faith of Nebus and his team, the exclusionary rule's application in this and similar cases will not "instill in those particular officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447. On the contrary, exclusion will fail to deter police

misconduct —and even worse, it will collaterally deter *good* police work. Suppose the tip in this case would have led the police to find Danielle, whether deceased or clinging to life. It cannot be that the police must refuse to follow such tips where they lead unless and until they thoroughly vet the tip to ensure no privilege is involved. That cannot be the correct incentive to give police, especially in a missing person case such as this. Exclusion in this case would do nothing more than "discourage police from reasonable and proper investigative actions, [and] hinder[ ] the solution and even the prevention of crime." *Gates*, 462 U.S. at 258 (White, J., concurring). It will chill investigations.

The FHPD's "official action" was "pursued in complete good faith" when they investigated what they legitimately and reasonably believed to be an anonymous tip. *Tucker*, 417 U.S. at 447. The "official action" at issue was *not* the conveyance of the tip from Mayer to Nebus. As more fully discussed in Argument II below, Mayer was not a member of the investigative team. He was a passthrough for what appeared to Nebus to be an anonymous tip, despite the later discovery of privilege. And even if Mayer's conveyance of the tip could be considered an official act under *Tucker*, the bad faith of it lay solely with Mayer. Nebus received the information in *good* faith because it was not apparent that the tip came from a privileged source. Indeed, the Michigan Court of Appeals found the trial court's conclusion that Nebus knew or should have known the tip was privileged to be "tenuous". App. 15a. The state appellate court's statement that Nebus "suspected" it might be privileged does not indicate that he failed to act in good faith. App. 15a. Nebus simply believed it to be anonymous, and

anonymity by no means invariably indicates privilege. See App. 16a. "It is one thing for the criminal to go free because the constable has blundered," but "[i]t is quite another to set the criminal free" when "the constable has scrupulously adhered to governing law." *Davis*, 564 U.S. at 24.

Notably, this Court's good-faith cases involve good but mistaken faith, whereas this case involves *pure* good faith. See *Davis*, 564 U.S. at 231 (reliance on appellate precedent that is later overturned); *Herring*, 555 U.S. at 145–46 (reliance on erroneous warrant in system); *Evans*, 514 U.S. at 14–15 (same); *Illinois* v. *Krull*, 480 U.S. 340, 349–50 (1987) (reliance on subsequently invalidated statute); and *Leon*, 468 U.S. at 922 (reliance on facially valid but later invalidated warrant). And *even if* Nebus and the FHPD were negligent—which the State strongly contests—that still would not be enough for exclusion. See *Davis*, 564 U.S. at 238. The law "cannot realistically require that [a] policeman investigating serious crimes make no errors whatsoever." *Tucker*, 417 U.S. at 446. "The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Id*.

In sum, the circumstances of this case place negligible weight on the exclusion side of the scale compared to the much heavier societal costs. To impute the misconduct of an outside officer to the investigative team would give defendants a windfall with marginal deterrent benefit.

### C. The societal costs paid by exclusion are too great to bear where the jury's evidentiary picture will be significantly skewed and a murderer may go free.

The costs to be paid in this case cannot be overstated. Both those to the truth-seeking process and those to the society at large will come due.

Begin with the jury's deprivation of reliable, highly probative evidence of Galloway's guilt. There is no doubt about its reliability: it ultimately came from Galloway himself. The FHPD validated the tip by finding most of the items in the locations mentioned. Not only that, but they obtained security footage of Galloway walking along the road near Danielle's apartment where her items were found, further reinforcing the tip's validity. The footage additionally showed Galloway in a nearby Tim Hortons restaurant, where he used the business's phone (to avoid cell-phone tracking) to call a cab. A cab arrived (as described in the tip and verified by the driver) and took him to an apartment building that was, not so coincidentally, across the street from MetLife where Galloway had left his allegedly dysfunctional car earlier that day. The veracity of the tip is unassailable.

This evidence inexorably inculpates Galloway in Danielle's disappearance and murder. The level of planning and sophistication in his plot would be impressive if it were not so chillingly devious. As Michigan Supreme Court Justice Viviano noted, "This evidence is both reliable and probative, and its suppression will *certainly* impair the jury's truth-finding ability." App. 5a (emphasis added).

Undoubtedly, the pre-tip evidence also inculpates Galloway. This includes his infatuation with Danielle, him last being seen with her, their cell phones tracking together, his failed attempt to remove her DNA from his bedroom, and his lie to police about seeing her months prior. But without the post-tip evidence, the jury will not see the true lengths to which Galloway went to target, abduct, and murder Danielle. The post-tip evidence shows not only the consciousness of guilt but also why Danielle has never been found and is, in fact, deceased: Galloway laboriously planned his movements and his disposal of Danielle's body.

Critically, with the admission of only the pre-tip evidence, Galloway could manipulate the evidence to make it seem like Danielle simply went home after they were together in Berkley. After *both* their phones pinged at Galloway's house, Danielle's tracked back to her apartment, where her vehicle was found. But the post-tip evidence reveals the truth—that it was not Danielle but *Galloway* who drove her car (with her phone) back to her apartment, left it there, and then walked to the Tim Hortons to catch a cab back to his car, bringing his plan full circle. The trial court has even indicated that this ruling could affect the admissibility of additional evidence collected from post-tip search warrants, further gutting the evidence of guilt. App. 112a. Accordingly, to withhold the post-tip evidence from the jury would considerably distort the truth of what happened to Danielle.

There are also broader societal costs. Without the post-tip evidence, this crime may "go unsolved" and Galloway "unpunished." *Montejo* v. *Louisiana*, 556 U.S. 778, 796 (2009). This "jackpot" would be

"enormous," amounting to "a get-out-of-jail-free card." *Hudson*, 547 U.S. at 595. Galloway is only 37 years old, leaving him plenty of years and youth to attack—and even kill and make vanish—more women.[6]

In the end, the costs of exclusion in this case are much weightier than any potential deterrent effect on a single outside officer. Thus, "the rule does not pay its way." *Montejo*, 556 U.S. at 797 (cleaned up). The trial court's order should be reversed.

## II. By holding the State responsible for *inculpatory* information withheld by an officer outside the prosecution team, this case conflicts with *Brady* v. *Maryland* and its progeny, which absolve the prosecution of responsibility for even *exculpatory* information held by an outside officer.

There is an additional cost to the justice system if exclusion stands in this case. State and federal courts agree that the prosecution's duty to discover and disclose exculpatory evidence under *Brady* reaches only as far as the "team" involved in the case and not to outside officers. Here, however, the prosecution was held responsible for the actions and knowledge of an outside officer who possessed *inculpatory* information and withheld the fact that the information was privileged. Both principles cannot be true. Either the prosecution is liable for the information held by officers

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[6] Galloway is already serving a prison sentence of 16 to 35 years for the kidnapping and assault of another woman approximately three months prior to Danielle's disappearance. See Michigan Dept. of Corr., https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=442572 (last accessed on Aug. 15, 2024).

outside the investigative team, or it is not. Thus, certiorari is required to conform this case with the longstanding principle of team-only liability.

### A. Liability for undisclosed exculpatory evidence is limited to the prosecution "team."

This Court has long held that "the core of our criminal justice system" is "the injustice that results from the conviction of an innocent person," such that "it is far worse to convict an innocent man than to let a guilty man go free." *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995) (cleaned up). Yet, the incongruent principles at play here contravene that fundamental ethic.

The government has an "affirmative duty to disclose evidence favorable to a defendant," whether exculpatory or impeaching, requested or not, and irrespective of good or bad faith. *Kyles*, 514 U.S. at 432–33 (citing *Brady*, 373 U.S. at 87, *United States* v. *Agurs*, 427 U.S. 97 (1976), and *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The rule applies to "evidence known only to police investigators and not to the prosecutor." *Id*. at 438. "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id*. at 437.

The contours of the latter holding have been debated since its announcement nearly thirty years ago. See, e.g., *Hunter*, 32 F.4th at 35 ("But who is 'acting on the government's behalf' in a case?"). But the federal and state courts have reached a unanimous

conclusion: the government's *Brady* obligation extends only to the prosecution or investigative "team." See, e.g., *Sutton* v. *Carpenter*, 617 F. App'x 434, 441 (6th Cir. 2015) (citing cases from the Second, Fifth, Seventh, and Eleventh Circuits); and *Hall* v. *State*, 283 S.W.3d 137, 170 (Tex. App.—Austin 2009) (noting "the concept of a 'prosecution team' that has developed in the case law to define the universe of prosecutors and investigators extending beyond the prosecutor's office whose knowledge of *Brady* material should be imputed to the prosecutor.").

The prosecutor's duty under *Kyles* does not proceed *ad infinitum*. *Kyles* cannot "be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue." *United States* v. *Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). An "unlimited duty" on the prosecution "would inappropriately require us to adopt a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *United States* v. *Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (cleaned up). For instance, operation "under the same sovereign" is not enough. *Hall* v. *Mays*, 7 F.4th 433, 445 (6th Cir. 2021).

Federal courts apply the team-based principle to this day. See, e.g., *United States* v. *Mitrovich*, 95 F.4th 1064, 1071 (7th Cir. 2024).

### B. This "team" principle must apply equally to an outside officer's withholding of inculpatory, yet privileged, information.

The law developed from *Kyles* holds that even if a government agent *outside* the investigative or prosecution team possesses *exculpatory* information, the prosecution is not held responsible for the failure to discover and disclose that information. In conflict with *Kyles*, in this case, if that same outside officer instead possesses *inculpatory* information but withholds the fact of privilege, due process is violated.

These opposing principles cannot coexist. As the law stands right now, an outside officer in possession of exculpatory evidence is punished *less* harshly—that is, not at all—than when that same officer possesses inculpatory evidence obtained from a privileged source. Yet, in both situations, the investigative team lacks any knowledge of the offending act. Those are parallel situations with perpendicular remedies.

In the *Brady*/*Kyles* context, the law recognizes the difficulty in holding the team responsible for information possessed by those to whom they have no connection. Conversely, the law does *not* hold the team to that same standard with respect to whether sources of information are potentially privileged. While *Brady* and *Kyles* do not require the prosecution to seek out all exculpatory information from all sources, this case turns that principle on its head with respect to inculpatory information. The police and prosecution must now exhaustively investigate every piece of information and evidence they encounter to ensure none of it came from a privileged source—even where they have no reason to suspect such a source.

Alternatively, the undisclosed, privileged nature of a piece of information could be considered exculpatory or impeachment information under *Brady*. There, the *Kyles* rule should control and absolve the investigative team of any responsibility for the information being privileged. In that way, the two principles at issue would not be in competition but would be a straightforward application of the *Brady*/*Kyles* principles. Either way, the team would not be liable.

### C. The State was held to a different standard than the well-established "team" principle, conferring liability for an outside officer's withheld knowledge of a breached privilege.

Because Mayer was *not* part of the team in this case, his misdeeds should not be imputed to the prosecution under *Kyles*. A hypothetical is instructive. Say the Troy Police arrested someone who said he had exculpatory information about the Galloway case. The arresting officer then puts that information in a police report, and that is where it stays. The prosecution team for this case does not learn of that information until after Galloway is convicted at trial. The Troy report then surfaces and becomes the subject of a post-conviction hearing, at which it is determined that the information was material under *Brady*. Under the *Kyles* team principle, there would *not* be a constitutional violation even though the defense could have used that information at trial to argue that Galloway *did not commit the crime*.

In this case, however, Mayer, as an outside actor, had not exculpatory information but *inculpatory*

information and failed to disclose to the FHPD that it was privileged. Mayer was not "acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437. The Troy Police, over which Mayer presided, was not the investigating agency. Mayer himself did not investigate the tip, nor did he assign any of his officers or detectives to do so. While he did create a "staff inspection file" to store his notes from his call with Hoppe, it was under an "Assist Other Departments" heading. (5/3/22 Evid. Hr'g Tr. at 38.) This reflected a relaying of information from an outside agency to the investigative team. The Michigan Court of Appeals acknowledged that "Mayer's own police department was otherwise uninvolved in the investigation . . . ." App. 19a.

Despite Mayer's disconnect from this investigation, the prosecution was held responsible for the failure to discover his deceit even though the evidence tended to show *guilt* rather than innocence. The exoneration of an innocent person with the disclosure of exculpatory evidence is certainly of utmost importance, even more so than vindicating the attorney-client privilege. See *Schlup*, 513 U.S. at 325. Even so, federal constitutional law under *Brady* and its progeny distinguishes between those police officials who are *inside* the investigative team and those *outside* the investigative team. The Michigan courts misapplied this constitutional principle to the privileged materials in this case.

At the end of the day, *Kyles*' team-only liability should apply equally to inculpatory information as it does to exculpatory information. The Michigan courts' failure to harmonize these principles requires this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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