No. 24-198

IN THE
Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

FLOYD RUSSELL GALLOWAY, JR.,

Respondent.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a panel of the Michigan Court of Appeals, in an unpublished opinion, appropriately affirmed the suppression of evidence obtained as a result of a deliberate governmental intrusion into Respondent's attorney-client privilege—a case-specific, nonprecedential decision that does not conflict with any decision of this Court, a United States court of appeals, or another state court of last resort?

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INTRODUCTION

In this ongoing criminal prosecution, the State of Michigan sought to introduce evidence that it obtained after a Michigan Chief of Police, with over 40 years of law enforcement experience, "took intentional steps to exploit" information that he recognized to be attorney-client privileged. Pet. App. 19a, 28a. After a four-day evidentiary hearing, the trial court concluded that the government's conduct was "outrageous" enough to "rise to the level of a due process violation" because (1) the government had objective awareness that the information was attorney-client privileged; (2) it nevertheless deliberately intruded on that privilege; and (3) Respondent suffered actual and substantial prejudice. Pet. App. 68a, 81a, 88a-89a. The court also concluded that suppression of the evidence derived from the violation of Respondent's due process rights was an appropriate remedy. Pet. App. 93a-94a. The Michigan Court of Appeals affirmed both rulings in an unpublished opinion, Pet. App. 12a-24a, and the Michigan Supreme Court denied leave to appeal, Pet. App. 1a-2a.

Petitioner the State of Michigan now asks for this Court's review. Petitioner does not allege that the unpublished decision below conflicts with another state court of last resort or a federal circuit court. Instead, Petitioner attempts to manufacture a conflict between the unpublished decision below and this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), a case that had nothing to do with intrusions on attorney-client privilege. But there is no such conflict, and Petitioner's strained argument reflects little more than a disagreement with the Michigan court's conclusion that, under the totality of the circumstances here, the

government actor who exploited Respondent's attorney-client privilege must be deemed part of "the government" for due process purposes—a fact-bound, case-specific determination that was clearly correct and, even if not, would not warrant this Court's review. Pet. App. 12a, 14a. At bottom, Petitioner simply seeks error correction in a non-precedential, *sui generis* case. But there was no error here. This Court should deny certiorari.

STATEMENT OF THE CASE

I. The Government's Use of Privileged Information

In early December 2016, the Farmington Hills Police Department (FHPD) was investigating the disappearance and suspected homicide of Danielle Stislicki. Respondent Floyd Galloway, a former security guard at Stislicki's workplace, was a person of interest in that investigation—he was the last person seen with her, evidence suggested she had been in his home, and, when questioned, he appeared nervous and lied about his whereabouts. Pet. App. 19a. By early December, FHPD officers had applied for and received eleven search warrants, eight of which focused on Respondent. Pet. App. 95a, 98a.

Then, on December 9, 2016, Gary Mayer, the Chief of Police for the nearby City of Troy, received a phone call from his friend, retired FBI agent Jim Hoppe. Pet. App. 8a. Hoppe relayed to Mayer that he had information about "the security guard and the homicide," but could not share the information unless his identity was kept confidential. *Id.* Mayer understood that Hoppe was referring to the Stislicki case and told Hoppe that he would do his best to maintain Hoppe's

confidentiality. *Id.* Hoppe then communicated to Mayer detailed information about Stislicki's murder: he told Mayer that Respondent had wrapped Stislicki's body in a beige brown comforter, driven her car back to her apartment, gone to a Tim Hortons and disposed of Stislicki's car keys, Fitbit, and cellphone, and then called a cab from the Tim Hortons to take him within walking distance of his work. Pet. App. 29a-30a.

Mayer understood that Hoppe was sharing information he had learned in his role as a polygraph operator for defense attorneys. Pet. App. 8a; Pet. App. 31a. Mayer also understood that Hoppe was sharing that information with Mayer so that Mayer would relay it to the FHPD. *See* Pet. App. 13a (only "rational conclusion" was that Hoppe called Mayer because he was in a position to do something"); 5/3/22 Evid. Hr'g Tr. at 20 (Mayer testifying his conversation with Hoppe was "pretty quick" so they could be "sure that Farmington Hills was able to get there and get the evidence" before an impending snowstorm). And Mayer, a member of law enforcement for over 40 years, Pet. App. 82a, likewise understood that when an individual like Hoppe is hired by a defense attorney, the information he learns in the course of his employment is protected by attorney-client privilege, Pet. App. 12a, Pet. App. 31a.

Despite recognizing that "perhaps the information couldn't be used" because it qualified as "fruits of the poisonous tree," Mayer immediately called FHPD, ultimately reaching their Chief of Police, Charles Nebus. Pet. App. 32a. Mayer relayed all of Hoppe's information about Respondent to Nebus, but "made it very clear" to Nebus "that he had a source he couldn't

reveal." Pet. App. 8a-9a; Pet. App. 35a. Although the information was "extremely specific," Nebus testified that it "never crossed [his] mind" that Mayer got the information from an accomplice. Pet. App. 79a.

When Nebus got off the phone with Mayer, he called members of the FHPD into his office. Pet. App. 37a. He let them know that "Mayer had gotten some information from a confidential source" who was "reliable" and passed on what he had heard from Mayer to his team. Pet. App. 37a-38a, 40a. Nebus and two of these officers—Nebus's Assistant Chief and a Commander—all later testified "that the information was extremely specific, causing them to consider whether it came from a privileged source." Pet. App. 37a, 79a. And although "[v]irtually every member of the FHPD who testified" admitted that the specificity of the information would normally prompt investigation into the source "to determine if the information was coming from the perpetrator or an accomplice," none of the investigating officers "attempt[ed] to follow up on obtaining the source of the tip to Mayer." Pet. 57a-58a.

Instead, FHPD investigators immediately acted on the privileged information that Hoppe provided to Mayer, and Mayer to Nebus. Pet. App. 41a. Based on that information, officers obtained surveillance footage of Respondent from the night of Stislicki's disappearance. Pet. App. 9a. They also were able to recover Stislicki's Fitbit and keys. *Id.*; Pet. App. 43a. It was only after FHPD officers investigated and retrieved the evidence based on the privileged information Mayer had passed along that Nebus typed up his notes from his call with Mayer on an official tip sheet. Pet. App. 37a n.2. But instead of identifying Mayer as the caller on the tip sheet, Nebus wrote: "Upon further

questioning, the caller had no further information and wished to remain anonymous." Pet. App. 37a.

Approximately five weeks later, Nebus met privately with Oakland County Prosecutor Jessica Cooper and Chief Assistant Paul Walton to discuss the circumstances surrounding how he received the information from Mayer. Pet. App. 46a. Nebus testified that he "felt the need" to disclose to the prosecutors how he received the information. *Id.*; Pet. App. 15a. After this meeting, Nebus consulted with a private attorney. Pet. App. 47a. When pressed at the evidentiary hearing to answer what the purpose of that consultation was, Nebus asserted attorney-client privilege. *Id.* Nebus subsequently spoke again with Cooper and Walton and discussed his "concern" that they needed to find out who provided the information to Mayer, which Cooper and Walton shared. At Cooper and Walton's behest, Nebus called Mayer and told him to contact the Oakland County Prosecutor's Office. *Id.*

Mayer attempted to continue to shield Hoppe and refused to disclose where he got the information he had passed along to Nebus. *Id.* But in a phone conversation with Cooper and Walton, Mayer "gave a hypothetical" wherein he asked "what if this person worked for the defense attorney." Pet. App. 48a-49a. Walton immediately guessed that Mayer's source was "the polygrapher or private investigator." Pet. App. 49a. Although Walton testified that he then told Nebus to isolate the information he had received from Mayer, Pet. App. 50a, Nebus denied the prosecutor's office ever gave him that instruction, Pet. App. 53a. Still, Nebus testified he was aware the information was "likely privileged" and that it was "possibl[e] that

[the information] came from someone from the [defense] attorney's office." Pet. App. 54a-55a. The question of the source, Nebus noted, was "the elephant in the room." 5/3/22 Evid. Hrg. Tr. at 106. And Nebus "deliberately tried to avoid talking to Chief Mayer about the source of the tip." *Id.* at 109.

The FHPD also became aware that the information they received from Mayer "would be a problem," Pet. App. 55a; but even after "learning that the information came from a privileged source," investigating officers "continued to use the information in affidavits in support of search warrants," Pet. App. 56a-57a.

Indeed, although the FHPD and the Oakland County Prosecutor's Office were aware that the information Mayer provided came from a privileged source, "the issue was all but ignored" until 2019, when Special Assistant Attorney General Jaimie Powell Horowitz took over the case. Pet. App. 9a-10a. FHPD officers presented the case to Powell Horowitz, and at the close of their presentation she had one question: who was the source of the information? Pet. App. 10a; Pet. App. 58a-59a. The officers declined to discuss the source and referred her to Nebus. Pet. App. 59a & n.5.

When Powell Horowitz spoke with Nebus, he revealed that the information had come from Mayer, and that, while he did not know the name of the original source, he had "some sense" that "there may be a privilege involved." Pet. App. 59a-60a. When contacted, though, Mayer refused to cooperate and fought the investigative subpoena that Powell Horowitz issued to compel him to divulge Hoppe's identity. Pet. App. 61a. Eventually, Mayer was forced to testify that the information he gave to Nebus on December 9, 2016, was provided to him by Hoppe, who had been

employed as a polygrapher by Respondent's attorney in an unrelated case. Pet. App. 61a-62a.

II. The Suppression Hearing

On March 4, 2019, the Attorney General filed a complaint against Respondent for first degree murder. Pet. App. 62a. Powell Horowitz provided Respondent's attorneys with all of the information from the investigatory subpoena, including that Hoppe was the source of the information Mayer gave to Nebus and the FHPD. Pet. App. 62a-63a.

Respondent's attorney filed consolidated motions to suppress evidence, quash the information, and dismiss the case against him for violations of his state and federal due process rights when Mayer, Nebus, FHPD officers, and the Attorney General "knowingly intrud[ed] on his attorney client privilege and us[ed] that information to locate evidence and undermine his right to a fair trial." Pet. App. 26a, 64a. The trial court conducted a four-day evidentiary hearing to determine "what various officers and prosecutors knew regarding the source of the tip at any given time." Pet. App. 9a; Pet. App. 26a.

Relying on the three-part test set out by the Third Circuit in *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), and followed by the Michigan Appellate Court in *People v. Joly*, 970 N.W.2d 426 (Mich. Ct. App. 2021), the trial court held that the government's conduct here "[w]ithout question" violated Respondent's due process rights. *See* Pet. App. 71a-93a.

First, the trial court found that that the government—Mayer, Nebus, and FHPD officers—had "objective awareness of an ongoing relationship covered by the attorney-client privilege. Pet. App. 71a-81a; *see*

also Joly, 970 N.W.2d at 401 (citing *Voigt*, 89 F.3d at 1067). The court found that "[t]here can be little question" that Mayer, who was "serving in a governmental capacity," was "objective[ly] aware[]" of an attorney-client privilege in the information he received from Hoppe. Pet. App. 75a-76a. The trial court further noted that Nebus, too, "objectively ascertained that he was receiving information from a privileged source." Pet. App. 77a. And "Nebus [and two other FHPD officers] all testified that the information was extremely specific, causing them to consider whether it came from a privileged source." Pet. App. 79a.

Second, the trial court found that Mayer and Nebus both deliberately intruded into the privileged attorney-client relationship. Pet. App. 81a-89a; *see also Joly*, 970 N.W.2d at 401 (citing *Voigt*, 89 F.3d at 1067). The court found it "deeply troubling" that after receiving clearly privileged information from Hoppe, Mayer immediately passed the information to the FHPD "knowing that he could compromise the evidence that might be obtained as a result." Pet. App. 81a-82a. And Nebus, when confronted with highly specific, detailed information that caused him to suspect the source was privileged, *see* Pet. App. 54a-55a, 79a, "did not put on the brakes and insist that Mayer reveal the source so he could make a rational decision about how to respond to the information, or contact the Prosecutor for advice, or refuse to pass on the information until he knew that it wasn't privileged," Pet. App. 84a. Instead, Nebus immediately shared the information with the investigating officers and, after evidence was seized based on the information, "perpetuated and enabled further use of the privileged

information, while masking its origins." Pet. App. 88a-89a.

Finally, the court found that there was "no question" that Respondent suffered actual and substantial prejudice as a result of the government's intrusion into the attorney-client privilege. Pet. App. 89a-94a. Mayer and Nebus caused the privileged information to be used to collect evidence immediately, and the information was and continued to be used to establish probable cause for search warrants. Pet. App. 56a-57a, 89a. And, "[a]bsent a ruling from [the trial court], the prosecution intend[ed] to introduce the evidence" collected both by those search warrants and directly collected on the day the FHPD initially received the information from Mayer. Pet. App. 90a.

Ultimately, the trial court suppressed the evidence seized as a direct result of the information Mayer passed to Nebus, and directed further briefing on whether evidence seized as a result of the search warrants using the privileged information should be suppressed. Pet. App. 94a, 98a. The court denied the motions to dismiss and to quash.[1] Pet. App. 113a.

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[1] It is worth noting that the motion to dismiss involved additional mishandling of the same attorney-client privileged information. In response to the investigative subpoena, Mr. Hoppe's attorney wrote a memo including "a detailed list of 21 pieces of [privileged] information" Hoppe learned from administering Respondent's polygraph, which prosecutor Powell Horowitz then reviewed and added to her file. Pet. App. 99a-100a. Respondent moved to dismiss the indictment on the ground that Powell Horowitz took no steps to firewall the privileged information—which she "characterized as a confession," Pet. App. 106a—and thus anyone in the AG's office could access the file, and a new AAG and

III. Michigan Court of Appeals

The State appealed, Pet. App. 25a, and the Michigan Court of Appeals affirmed in an unpublished order, Pet. App. 7a-24a. Again following the three-pronged test from *Voigt* as adopted in *Joly*, the court

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at least two AG investigators already had, Pet. App. 100a. Although the trial court found that Powell Horowitz "knew she was dealing with information covered by the attorney-client privilege" and yet "did not take any steps to mitigate the receipt of the privileged information," the court declined to dismiss the indictment because "the record is unclear" how many and which employees in the AG's office had seen the memo, and it was "still possible for the Attorney General's Office to…take steps to mitigate the receipt of that information." Pet. App. 109a-110a.

In October 2024, after Petitioner filed the instant petition for certiorari, Respondent filed a second motion to dismiss in the trial court, citing additional evidence that the AG's office's failure to firewall the privileged information was deliberate. Brief in Support of Motion to Dismiss, 10/08/2024. In response, the government argued, strangely, that the AG's office had set up an "isolation wall" to prevent dissemination of the memo outside the prosecution team—in other words, it had firewalled the privileged information from anyone *outside* the prosecution, not from those *conducting* the prosecution. State's Brief in Support of Response to Motion to Dismiss, 10/22/2024, at 21. The trial court found that, despite the government's "claims to have accomplished the sequestration of the information," the AG's office had yet to assign untainted prosecutors to the case. Opinion and Order, 11/15/2024, at 2. Nevertheless, the court concluded that it would be "more appropriate" to wait to pass the case to an untainted prosecutor until after the court had completed the "substantial amount of work" to resolve "whether it is necessary to suppress other evidence that might have come into the possession of police by the improper use of the" privileged information, *i.e.*, evidence beyond that at issue in the instant petition. *Id.* at 3. Accordingly, the court denied the motion to dismiss, without prejudice to renew if the AG fails to appoint an untainted prosecutor after all suppression motions are resolved. *Id.*

of appeals held that the trial court did not clearly err in finding the government was objectively aware of the attorney-client privilege because "Mayer had objective awareness of an ongoing attorney-client relationship." Pet. App. 14a.

In doing so, the court of appeals rejected the State's argument that the court must separate Mayer's actions from those of Nebus and the rest of the FHPD such that Mayer could not be considered part of "the government" for purposes of the due process analysis. Pet. App. 12a. Noting that it must consider the "totality of the circumstances," the court stated that it could not "simply ignore" the facts that:

- Mayer was not just some "average citizen" but "a high-ranking law-enforcement officer with many decades of law enforcement experience," Pet. App. 12a;

- Hoppe chose to disclose his information to Mayer specifically because he was a government official "in a position to do something to preserve important evidence," Pet. App. 13a;

- Mayer was certainly "aware that use of Hoppe's tip . . . would unlawfully breach defendant's attorney-client privilege," Pet. App. 12a-13a; and

- Mayer, while not formally "affiliated" with FHPD, nevertheless "intentionally interjected himself" into the investigation by conveying the tip to Nebus, Pet. App. 14a.

The court noted that while "Nebus suspected the tip was privileged," that suspicion might not rise to "objective awareness" that the information came from "an agent of defense counsel." Pet. App. 16a. "Nonetheless," the court concluded, the fact that Mayer clearly had objective knowledge "was sufficient" to meet the first prong of the *Voigt/Joly* test. *Id.*

The court of appeals also agreed with the trial court that the second prong of the *Voigt/Joly* test—deliberate intrusion into the attorney-client relationship—was met because Mayer was objectively aware of the relationship and turned the information over to Nebus and the FHPD with the intent they would immediately use the information to discover evidence. Pet. App. 16a, 18a. Again, the State argued that Mayer's knowledge and actions must be considered separately from Nebus's and FHPD's in evaluating the second prong. "But," the court recognized, "Mayer's involvement is the precise problem in this case." Pet. App. 18a. Regardless of whether or not Nebus or FHPD had reason to believe the information came from a privileged source, the court observed, "the plain reality is that a government actor recognized a breach of the attorney-client privilege and then took intentional steps to exploit it and thereby obtain incriminating evidence." Pet. App. 19a.

Although the State did not contest the third prong—prejudice—the court of appeals held that it was "readily apparent" that the government misconduct in this case resulted in actual and substantial prejudice to Respondent. *Id.* And "[b]ecause each prong of the *Voigt/Joly* test is satisfied, [Respondent] demonstrated outrageous government conduct that violated his right to due process." Pet. App. 20a.

Finally, the court of appeals rejected the State's argument that suppression of evidence was not an appropriate remedy because FHPD acted "in good faith." *Id.* The court first noted that the good-faith exception is unique to the Fourth Amendment search-and-seizure context—entirely distinct from the due process violation at issue here—and as such its application here is "uncertain." *Id.* The court further noted that the purpose of the exclusionary rule is not to compensate a defendant for violation of a right, but rather to prevent misconduct by removing any incentive for the government to use unlawful means. *Id.* But allowing FHPD to use the information received from Mayer based on a "good faith" argument would "actually encourage misconduct"—as long as a government actor like Mayer kept his source of privileged information secret, officers could use privileged information he obtained and improperly shared with them with impunity. Pet. App. 22a-23a. The court of appeals did find the extent of evidence the trial court suppressed was overbroad and ordered the trial court to amend its order, but in all other respects it affirmed the trial court's choice of remedy. Pet. App. 23a-24a.

IV. Michigan Supreme Court

The State petitioned for review in the Michigan Supreme Court, and the court denied leave. Pet. App. 1a. Two justices dissented, arguing that "the civil and criminal liability" potentially available for such officer misconduct raised questions as to whether the exclusionary rule should apply, Pet. App. 2a-5a, and questioning whether the lower courts' application of *Joly* to the facts here conflicts with *Brady v. Maryland*, 373

U.S. 83 (1963), Pet. App. 5a. Petitioners now seek certiorari.[2]

REASONS FOR DENYING THE PETITION

I. There Is No Conflict.

The petition does not meet any of this Court's criteria for exercising its certiorari review. The unpublished decision below represents a straightforward application of the three-part test established by the Third Circuit in *Voigt*, and adopted by the Michigan Court of Appeals in *Joly*, to determine whether governmental intrusions into attorney-client privilege rise to the level of a due process violation.

Notably, the petition does not take issue with the *Voigt/Joly* test itself or identify any alternative test for resolving the due process question. Nor does the petition allege that the court of appeals' application of the *Voigt/Joly* test to the facts of this case "conflicts with the decision of another state court of last resort or a United States court of appeals." S. Ct. R. 10(b). And while the petition disagrees with suppression as a remedy for the due process violation in this case, it does not contend that the lower courts' choice of remedy conflicts with the decision of another state court of last resort or any federal circuit.

Instead, the petition attempts to manufacture a strained conflict between the unpublished decision below and this Court's landmark decision in *Brady v.*

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[2] The State of Michigan moved to stay further proceedings pending resolution of this petition, but the trial court denied that motion, and the parties proceeded to pretrial motions. *See* Docket, *People v. Galloway*, No. 2019-272265-FC. Respondent remains detained pending trial, and is already serving a lengthy term of incarceration for a prior offense. *See* Pet. 30 & n.6.

Maryland, 373 U.S. 83 (1963). But *Brady*—a case about prosecutors withholding exculpatory information from the defense—has no bearing on the due process issue here, and the unpublished decision below does not conflict with either *Brady* or its progeny.

Although *Brady* did not in any way concern the issue in this case—deliberate governmental intrusions on a defendant's attorney-client privilege—Petitioner contends that the unpublished decision below somehow "conflicts with *Brady v. Maryland* and its progeny." Pet. 30. As Petitioner explains it, *Brady* and its progeny require prosecutors to disclose exculpatory evidence within the possession of the investigative team, but do not impute knowledge to the prosecutor of exculpatory information possessed by actors *outside* the investigative team. *Id.* But here, Petitioner claims, the Michigan Court of Appeals imputed to the FHPD investigative team an "outside actor's" (*i.e.*, Mayer's) knowledge of "*inculpatory*, yet privileged," information—*i.e.*, the attorney-client privileged information that Hoppe had provided Mayer. Pet. 33.

Putting aside, again, that this case does not involve the withholding of information from the defense—*i.e.*, a *Brady* issue—the problem for Petitioner's tortured logic is that the Michigan Court of Appeals here did *not* impute Mayer's knowledge onto FHPD's investigative team. Rather, the court of appeals held that Mayer, in effect, made himself *part of* FHPD's investigative team when he chose to relay the privileged information Hoppe had provided him directly to FHPD's Chief of Police. Pet. App. 12a-14a, 18a. As such, the court expressly rejected Petitioner's strained reliance on *Brady* "imputation" case law as

"unavailing." Pet. App. 13a. As the Michigan Court of Appeals explained:

> This is not a case in which the FHPD is being charged with knowledge or misconduct of a person without any known connection to the investigation—the very problem is that Mayer *was* involved in the investigation. He intentionally interjected himself into the matter when he conveyed Hoppe's tip to the FHPD. Mayer's involvement was certainly not a mystery to Nebus, the chief of the investigating agency and recipient of the second-hand tip, at any time.

Pet. App. 14a; *see also* Pet. App. 18a ("The prosecution . . . urges this Court not to impute Mayer's knowledge or conduct to the FHPD. But Mayer's involvement is the precise problem in this case.").

Thus, Petitioner's claimed "conflict" with *Brady* is not a conflict at all but simply a disagreement with the Michigan Court of Appeals' conclusion that Mayer, although "not affiliated with the FHPD," must nevertheless be deemed part of the "government" for purposes of the due process analysis because of the role he played in the investigation. Pet. App. 12a. Petitioner's repeated, *ipso facto* assertion that Mayer was an "outside officer," Pet. *i*, 2, 3, 17, 18, 22, 27, 30, 33, 34, simply blinds itself to the Michigan Court of Appeals' contrary conclusion that Mayer was no longer an "outside officer" because he intentionally interjected himself into FHPD's investigation.

Indeed, even if *Brady* case law were somehow relevant here, the Michigan courts' treatment of Mayer as part of "the government" for due process purposes is wholly consistent with the functional approach

courts, including this one, have taken to determining the scope of a prosecutor's *Brady* obligations. As even Petitioner recognizes, a prosecutor's disclosure obligations under *Brady* are not limited to information in his own files but extend to "any favorable evidence known to the others *acting on the government's behalf*." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (emphasis added); *see* Pet. 31. Thus, what matters is not the "formal agency relationship" of the actor but whether the actor "assisted in the government's investigation" of the case. *Brocamantes v. Superior Court*, 42 Cal. App. 5th 102, 116, 117 (Cal. Ct. App. 2019); *see United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (rejecting "rigid distinction" based on formal agency affiliation in favor of "case-by-case analysis of the extent of interaction and cooperation between" investigative agencies). "[T]he relevant inquiry is what the person *did*, not who the person *is*." *United States v. Stewart*, 433 F.3d 273, 298 (2d Cir. 2006).

Applying this functional, case-specific analysis, courts have regularly held that actors not formally affiliated with or employed by the investigating agency were nevertheless part of the "prosecution team" for *Brady* purposes because of their involvement in the investigation—including agents employed by outside jurisdictions as well as completely private actors not employed by any government agency at all. *See, e.g.*, *McCormick v. Parker*, 821 F.3d 1240, 1246-47 (10th Cir. 2016) (sex assault nurse examiner who was "neither a state employee nor under the prosecutor's authority" was part of prosecution team); *Antone*, 603 F.2d at 568-70 (state law enforcement agents deemed part of federal prosecution team); *Brocamantes*, 42 Cal. App. 5th at 116 (private forensic laboratories part

of state prosecution team); *State v. Farris*, 656 S.E.2d 121, 126 (W.Va. 2007) (Kentucky forensic examiner part of West Virginia prosecution team); *Head v. Stripling*, 590 S.E.2d 122, 126-27 (Ga. 2003) ("under the circumstances of this case," state Attorney General's office "became directly involved" in the prosecution and thus "became part of the prosecution team").[3]

The Michigan Court of Appeals employed a similarly functional approach here; that is, it looked to "what the person *did*, not who the person *is*." *Stewart*, 433 F.3d at 298. And what Mayer *did*, it found, was "intentionally interjected himself" into FHPD's investigation, despite having "no formal affiliation" with the FHPD, and "conveyed Hoppe's tip to the FHPD" to "further its investigation in disregard of defendant's rights." Pet. App. 13a-14a, 19a. That conduct, the court concluded, made Mayer part of the investigation—and therefore "the government"—for purposes of the due process analysis. Pet. App. 19a. That conclusion does not implicate *Brady*, much less conflict with it or any of its progeny.

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[3] The *Brady* cases Petitioner cites, Pet. 32, are not to the contrary. Those cases hold simply that a prosecutor's *Brady* obligations do not extend to "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) (emphasis added); *see also Hall v. Mays*, 7 F.4th 433, 445 (6th Cir. 2021) (no *Brady* obligation where no "connection between" actor and investigation or prosecution). But as noted above, courts routinely hold that, where an otherwise outside actor becomes involved in the investigation or prosecution, he becomes part of the prosecution team for *Brady* purposes, regardless of his formal agency affiliation.

II. The Decision Below Is Correct.

Beyond the absence of any conflict with this Court's case law, a federal circuit court, or another state court of last resort, certiorari is also not warranted because the unpublished decision below is correct.

The court of appeals held that: (1) the government had objective awareness that the information Hoppe provided Mayer was attorney-client privileged; (2) it deliberately intruded into that attorney-client relationship when it acted on the privileged information to obtain physical evidence; and (3) Respondent incurred actual and substantial prejudice as a result of that intrusion, a point the State conceded. Pet. App. 12a-20a. The court also held that exclusion of the evidence obtained as a result of the intrusion was the appropriate remedy because it would deter such violations by "removing the incentive" for the government to act on privileged information. Pet. App. 21a.

Petitioner concedes that Mayer—a Chief of Police with over 40 years of law enforcement experience—was aware that the information Hoppe provided him was attorney-client privileged and yet deliberately chose to breach that privilege by sharing the information with the FHPD. Pet. 23 (conceding "Mayer's cognizant breach of [Respondent's] polygrapher- and attorney-client privileges"); Pet. 24 (conceding that "Mayer . . . violated [Respondent's] privilege"). In other words, Petitioner concedes that, if Mayer is deemed part of "the government" for purposes of *Voigt/Joly*'s test, then all three prongs of that test are unquestionably satisfied and Respondent's due process rights were violated. What Petitioner takes issue with is solely the court of appeals' conclusion that

Mayer's "knowing and intentional violation of defendant's attorney client-privilege," Pet. App. 22a, should be attributable to "the government" that is prosecuting him for purposes of the *Voigt/Joly* analysis.

The court of appeals' conclusion on that issue, however, was undoubtedly correct. As the court of appeals noted, Mayer was not some "average citizen" who "unwittingly share[d] privileged information." Pet. App. 13a. He "was a high-ranking law enforcement officer with many decades of experience" who "understood that communications between an attorney and client could not be shared" and thus that FHPD's use of the information Hoppe provided him would "unlawfully breach [Respondent's] attorney client privilege." Pet. App. 12a-13a. And, indeed, the court of appeals found that "the only rational conclusion" was that Hoppe disclosed the information to Mayer precisely because he was a government official "in a position to do something to preserve important evidence from getting lost or destroyed from the snow." Pet. App. 13a.

In short, "the plain reality is that a government actor recognized a breach of the attorney-client privilege and then took intentional steps to exploit it and thereby obtain incriminating evidence." Pet. App. 19a. Instead of taking "mitigating steps" to "avoid deliberate intrusion into defendant's attorney-client relationship," Mayer—an experienced police chief—did the opposite: he "intentionally interjected himself" into FHPD's investigation and shared with them privileged information "to further its investigation in disregard of defendant's rights." Pet. App. 14a, 18a-19a. To artificially excise this government actor's unquestionably outrageous conduct from the due process

analysis simply because he was not formally affiliated with the investigating agency, Pet. App. 12a, would make a mockery of the constitutional guarantee and elevate form over function to the point of absurdity.

Moreover, contrary to Petitioner's characterization, the FHPD were hardly "unwitting" victims of Mayer's misdeeds, acting in "*pure* good faith" to "virtuously collect[] evidence" without so much as an inkling that the detailed information Mayer provided them may have come from a privileged source. Pet. 2, 22, 27. Indeed, the record shows just the opposite: while Nebus did not know for certain that Mayer's source was privileged, he plainly suspected it, as did two of his high-ranking deputies. *See* Pet. App. 46a-47a, 79a. Yet, rather than do what experienced officers acting in "good faith" who suspect they have privileged information would do—isolate the information, attempt to confirm its source, mitigate the breach, and seek legal guidance—Nebus and his team did none of those things. Instead, they immediately acted on the privileged information, exploiting and perpetuating the breach, while Nebus deliberately obscured the source of his information, classifying it as an anonymous tip rather than identifying Mayer, contrary to department protocol. Pet. App. 37a, 78a. And while Nebus eventually—weeks later—alerted his prosecution team that Mayer was his source, the FHPD still continued to use the privileged information to obtain search warrants, and Nebus retained a private attorney, suggesting consciousness of wrongdoing. Pet. App. 78a-79a. Under these circumstances, the FHPD are hardly the innocent victims of Mayer's rogue misconduct that Petitioners attempt to depict.

For that reason, the Michigan courts' choice of remedy—exclusion of the fruits of the due process violation—was also not erroneous. As noted above, Petitioner's claimed "good faith" of FHPD—its principal argument against applying exclusion—is belied by the ample record evidence demonstrating that Nebus and other high-ranking FHPD officials at the very least suspected Mayer's information derived from a privileged source. Their wink-wink-nod-nod approach—acting on the information despite that suspicion and in a way that violated their own protocols—can hardly be described as "good faith."[4]

Regardless, as Petitioner recognizes, the purpose of the exclusionary rule is to deter intentional misconduct, and "it is all but impossible to characterize Mayer's decisions in this case as anything but a knowing and intentional violation of defendant's attorney-client privilege." Pet. App. 22a. If the government here is permitted to use the fruits of that breach, notwithstanding Mayer's knowing and intentional viola-

[4] Petitioner's conjecture that the suppression ruling in this case will somehow result in the obliteration of anonymous citizen tip lines like Crime Stoppers, Pet. 22, is nonsensical. The information FHPD received was not an anonymous tip from a citizen caller but information from a known member of law enforcement (Mayer) who himself knew the identity of the source (Hoppe) but simply concealed it from FHPD. Moreover, "[v]irtually every member of the FHPD who testified" acknowledged that the specificity of the information Mayer provided would have normally prompted investigation into the source "to determine if the information was coming from the perpetrator or an accomplice." Pet. App. 57a-58a. In other words, FHPD's normal practice would have been to "vet" the source of the information Mayer provided, Pet. 22; they simply "did not attempt to" do so here because "Nebus resolutely told them" not to, Pet. App. 58a.

tion, it sends a clear message to law enforcement officers like Mayer: if they come into possession of information they know to be attorney-client privileged, they can spread that information across law enforcement, perpetuating the breach of attorney-client privilege, and the information and its fruits can be used against the defendant with impunity so long as the officer never reveals his source. And it sends the same message to officers in the position of the FHPD here, who suspect they are receiving privileged information: so long as they bury their collective heads in the proverbial sand and don't ask any questions, they can act on that information without consequence.

The "alternative deterrents" Petitioner proposes in lieu of exclusion are illusory if not wholly fanciful. Pet. 24. Petitioner suggests that the prospect of a federal civil-rights lawsuit under 42 U.S.C. § 1983 would deter conduct like Mayer's. But any lawsuit for such conduct would be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), in addition to likely faltering under prong two of this Court's qualified-immunity doctrine. Petitioner's reliance on a state misdemeanor statute is even more tenuous. It is far from obvious that the state-law provision Petitioner cites would even encompass actors like Mayer,[5] and there is no indica-

[5] The provision Petitioner cites, Mich. Stat. § 338.1728(3), prohibits any "recipient of information, report or results from a polygraph examiner" from "disclos[ing] or convey[ing] such information" to a third party. Here, Hoppe never explicitly informed Mayer that the information he was conveying derived from a polygraph examination. Pet. App. 8a. Thus, assuming that the statute is not a strict liability offense but requires actual knowledge,

tion, in any event, that any person has ever been prosecuted under this provision—much less that it has been applied against a law enforcement officer.[6] Regardless, every willful constitutional violation is potentially prosecutable under 18 U.S.C. § 242; yet, the existence of such an "alternative deterrent," Pet. 24, has not precluded this Court and others from employing the exclusionary rule "to promote respect for constitutional rights, deter violations of the same, and preserve judicial integrity." *Joly*, 970 N.W.2d at 437.

Here, exclusion serves a critical purpose beyond the deterrence of willful government misconduct: preserving the sanctity of "one of the oldest recognized privileges in the law." *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998). As this Court recognized more than a century-and-a-half ago, the attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of" skilled lawyers, "which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Yet, as the trial court noted here, "[i]f courts are unwilling to suppress evidence when a breach of the attorney-client privilege results in a violation of due process, then the privilege's role in our adversarial system will be eroded." Pet. App. 94a (quoting *Joly*, 970 N.W.2d at 437). The court of appeals committed no error in ruling that the government could not use the fruits of its deliberate

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it is unclear that Mayer would qualify as a "recipient of information . . . from a polygraph examiner."

[6] Petitioner concedes that Mayer was not charged under this provision and that the statute of limitations has run. Pet. 17 n.4.

breach of Respondent's attorney-client privilege—much less error warranting this Court's intervention.

III. The Issue Will Rarely Reoccur And This Case Is A Poor Vehicle For Resolving It.

Finally, this petition presents a *sui generis* fact pattern that is unlikely to ever reoccur, and this case is a poor vehicle for resolving the issue in any event.

First, it is presumably rare that a polygrapher employed by a defense attorney would choose to violate his ethical, professional, and contractual obligations—putting his career and reputation at risk—by sharing confidential information he obtained via privileged attorney-client communications with law enforcement.[7] Indeed, Mayer testified that Hoppe was "clearly emotional and conflicted about the disclosure" and went through with it only because he feared that certain physical evidence might become lost or destroyed in an impending snowstorm—a unique confluence of circumstances that is highly unlikely to reoccur. Pet. App. 13a.

Moreover, in the unlikely event some future defense employee would make the choice to violate his client's confidentiality and disclose privileged information to the police, the most probable scenario is that he would provide such information directly to the agency investigating the crime at issue. Such a circumstance would not present any of the issues about

[7] As Petitioner notes, Pet. 24, Michigan law makes it a misdemeanor for licensed polygrapher examiners to divulge information acquired during the course of their employment, and violation is also subject to immediate suspension and revocation of one's polygrapher license. Mich. Stat. § 338.1728(2).

an "outside officer" that Petitioner claims create a conflict with *Brady* here. It is only because Hoppe happened to provide his privileged information to the police chief in the next town over (because he happened to have a personal relationship with him), rather than directly to the agency investigating the homicide, that the added wrinkle about whether Mayer's conduct can be attributed to "the government" for purposes of *Voigt/Joly—i.e.*, the entire basis for Petitioner's petition—even exists here. Given the unlikelihood of that unusual circumstance ever arising again, this case is not worth this Court's attention. And in any event whether Mayer's conduct can be attributable to "the government"—a fact-bound, case-specific question—is hardly an "important question of federal law" meriting this Court's intervention. S. Ct. R. 10(c).

Regardless, this case is not a good vehicle for resolving the issue. For starters, it is unpublished and lacks precedential value. Thus, Petitioner's request for certiorari review amounts to little more than an appeal for error-correction in an individual case. Moreover, since this appeal arises in a pretrial posture, it remains to be seen whether the government even needs the suppressed evidence to convict. Indeed, if the government introduces all the evidence it claims to possess, Pet. 4-6, it may well secure a conviction irrespective of the suppression ruling.

Finally, despite Petitioner's hyperbolic rhetoric, Pet. 28-30, declining certiorari will not result in Respondent's release. As Petitioner acknowledges, even if Respondent prevails at his eventual trial in this matter, he is middle-aged and already serving a lengthy term of incarceration for a prior offense. Pet. 30 & n.6. Petitioner's concerns about its ability to

prosecute this particular criminal matter—the result of its own agent's "knowing and intentional violation of defendant's attorney-client privilege," Pet. App. 22a—do not warrant extension of this Court's limited resources.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,

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