No. 24-198

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

REPLY BRIEF

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INTRODUCTION

The outcome and implications of the state-court decisions in this case should give this Court pause. Not only because a young woman has been missing for nearly a decade without any justice to speak of—though that is certainly worth more than a moment's reflection—but also because this case strikes at the heart of justice itself.

Both the exclusionary rule and *Brady* v. *Maryland*, 373 U.S. 83 (1963), seek to balance the rights of the accused with the government's access to evidence to prove the truth. Typically, that balance teeters in favor of the accused to protect that person from government malfeasance. But it totters back in the government's (and the victim's) favor, if an outside officer or agency is the one that faltered. And, in the end, effective alternatives to suppression exist to honor *good* faith and to deter *bad* faith.

The State is not alone in recognizing the significance of these issues. Respondent Floyd Galloway, Jr.'s accusations of "strained conflict" and "tortured logic" in the State's petition overlook that two justices of Michigan's highest court appraised these issues as worthy of review. Br. in Opp. 14–15. To be sure, the justices' views do not bind this Court, but they do demonstrate that the issues reach beyond mere error correction, as Galloway argues, and are not relegated to the idiosyncrasies of polygrapher James Hoppe, then-Chief Gary Mayer, or the Farmington Hills Police Department (FHPD). They go much deeper. They touch on first principles of justice, privilege, and law.

The State asks this Court to intervene.

ARGUMENT

I. Galloway's "nothing to see here" approach in opposition to the petition is unavailing.

Galloway stresses—nine times—that the Michigan Court of Appeals' opinion is unpublished and is therefore inconsequential to this Court. Br. in Opp. i, 1, 10, 14, 15, 19, and 26. Yet it is anything but inconsequential.

To begin, the foundational case upon which this one rests, *People* v. *Joly*, 970 N.W.2d 426 (Mich. Ct. App. 2021), *is* published, and despite its relative recency it has already been cited in five other published cases. *Joly* also relied on numerous published federal cases. 970 N.W.2d at 432–36 (citing *United States* v. *Kennedy*, 225 F.3d 1187 (10th Cir. 2000); *United States* v. *Charles*, 213 F.3d 10 (1st Cir. 2000); *United States* v. *Voigt*, 89 F.3d 1050 (3d Cir. 1996); *United States ex rel. Shiflet* v. *Lane*, 815 F.2d 457 (7th Cir. 1987); *United States* v. *Taylor*, 764 F. Supp. 2d 230 (D. Me. 2011); *United States* v. *Segal*, 313 F. Supp. 2d 774 (N.D. Ill. 2004); and *United States* v. *Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991)).

What is more, an unpublished opinion still provides persuasive authority, especially if it is the only case on point. *Miclea* v. *Cherokee Ins. Co.*, 963 N.W.2d 665, 670 (Mich. Ct. App. 2020). In fact, Federal Rule of Appellate Procedure 32.1(a) explicitly allows citation of unpublished federal authorities issued on or after January 1, 2007. In short, just because an opinion is unpublished does not mean it is devoid of significance.

In a similar vein, Galloway argues that this case is "not a good vehicle" for review because it sits in a pretrial, interlocutory posture. Br. in Opp. 26. He says it thus "remains to be seen whether the government even needs the suppressed evidence to convict." *Id.* The issues cannot wait until trial, however, because if Galloway is acquitted, the prohibition on double jeopardy will deprive the State of any other opportunities to challenge these adverse rulings. See *United States* v. *Powell*, 469 U.S. 57, 65 (1984). It is now or never.

Nor is the issue whether the facts of *this* case will repeat, with some other polygrapher or police chief choosing to violate a privilege. See Br. in Opp. 25. The issue is much broader: what an unwitting law-enforcement or prosecution team is to do when receiving seemingly legitimate information from an outside source that later turns out to be privileged. It is about balancing the team's *good* faith against the outside source's *bad* faith without giving the criminal defendant an utter windfall. See *United States* v. *Soto*, 799 F.3d 68, 81 (1st Cir. 2015) ("The exclusionary rule is not meant to be a windfall for a defendant.").

As shown below, Galloway's rebuttals fall short.

II. Any challenge to the manner and means of evidence collection necessarily triggers an inquiry into the exclusionary rule, including its benefits and costs.

Indiscriminate application of standards in criminal law, rather than assuring the public of their equity and necessity, "may well have the opposite effect of generating disrespect for the law and the administration of justice." *Stone* v. *Powell*, 428 U.S. 465, 491

(1976). "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant … is contrary to the idea of proportionality that is essential to the concept of justice." *Id.* at 490. These notions hold true for *Brady* disclosures and the exclusionary rule, both of which were indiscriminately applied in this case.

Start with good faith and exclusion.

A. Good faith rebuffs the need for exclusion.

Galloway first claims a factual dispute over the FHPD's good faith, but that issue has been effectively settled. Br. in Opp. 21. The Michigan Court of Appeals found the trial court's conclusion that then-FHPD Chief Charles Nebus knew of the privilege from the start as "tenuous," because "[w]ithout knowledge that the source was a private polygraph operator, the request for anonymity was not inherently suggestive of an ongoing attorney-client relationship or other form of privilege."[1] App. 15a–16a. Galloway asserts that Nebus "plainly suspected" that Mayer's source was privileged, but that came months after the tip

[1] Galloway is incorrect that Nebus told his officers not to investigate the tip. Br. in Opp. 22 n.4 (citing App. 58a). The portion of the trial court's opinion that Galloway cites reads, "All of the investigating officers who testified stated that they did not attempt to follow up on obtaining the source of the tip to Mayer because Nebus resolutely told them there was no more information to be had from the source." App. 58a. Galloway's representation of the quotation was thus inaccurate. The officers did not investigate the tip further not because Nebus ordered them not to, implying an invidious attempt to obscure the truth, but because the tipster had been exhausted of all information.

evidence had been collected, when the then-Oakland County Chief Deputy Prosecutor proffered it. (5/3/22 Evid. Hr'g Tr. at 175–76.) Moreover, the Michigan Court of Appeals reasoned that "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. Nebus did not know and thus acted in good faith.

Accordingly, "[r]esort to the massive remedy of suppressing evidence of guilt [was] unjustified." *Hudson* v. *Michigan*, 547 U.S. 586, 599 (2006). Use of the exclusionary rule in this case has all the trappings of "the rule's costly toll upon truth-seeking and law enforcement objectives," because it deprives an eventual jury of a large swath of inculpatory evidence *and* punishes the FHPD for doing their jobs to investigate violent crimes. *Id*. at 591 (cleaned up). Galloway could hit the "jackpot" this Court warned of in *Hudson*, where suppression may amount to "a get-out-of-jail-free card." *Id*. at 595. Justice demands more.

Galloway proposes that "exclusion [here] serves a critical purpose beyond the deterrence of willful government misconduct: preserving the sanctity of 'one of the oldest recognized privileges in the law.' " Br. in Opp. 24 (citing *Swidler & Berlin* v. *United States*, 524 U.S. 399, 410 (1998)). But his proposal disregards this Court's insistent admonition that the "*sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis* v. *United States*, 564 U.S. 229, 246 (2011). The Court has "repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct." *Id*. Hence,

exclusion cannot be used for enforcement and preservation of a privilege.

A review of deterrence follows. Looking to deterrence, and to deterrence alone, the benefits must be weighed against the societal costs. *Herring* v. *United States*, 555 U.S. 135, 141 (2009).

B. The benefits of exclusion do not outweigh the societal costs in the face of death.

The failure to suppress evidence collected from breach of a privilege raises the inevitable question of what else could suffice to deter other officers. Galloway, like the Michigan Court of Appeals, avers that anything short of suppression would unjustly reward and could even encourage police misconduct. See Br. in Opp. 22–23; App. 22a–23a.

The State understands these concerns. Suppression may well be the most obvious and effective deterrent if, as in *Joly* and similar federal cases, the investigating agency directly encounters and knowingly uses the privileged information. That is, when there is no intermediary. But this case is different because an *outside* actor intervened and withheld the fact of privilege from the investigating agency, which received and acted on the information in good faith. This is not the typical one-sided scenario contemplated by most straightforward exclusionary cases.

Under this dynamic, the societal repercussions of suppression must be weighed. See *Herring*, 555 U.S. at 141. Primary among them is the loss of reliable evidence of guilt. In this case, the tip evidence fills in the

gaps of Danielle's and Galloway's movements on the night of her disappearance and reinforces the premeditation and deliberation Galloway used against Danielle. True, a jury could *infer* those actions from other evidence, but direct evidence will always trump indirect evidence.

These costs easily extend to other situations as well. To wit: *what if the victim is still alive*? Would the law truly prioritize a legal privilege over someone's life, tying the police's hands if they knew or even suspected their information was privileged? Indeed, the law already recognizes exceptions to the therapist-patient and attorney-client privileges for credible future threats against third parties. *Jaffee* v. *Redmond*, 518 U.S. 1, 18 n.19 (1996) (therapist-patient); *Nix* v. *Whiteside*, 475 U.S. 157, 174 (1986) (attorney-client). The same rationale applies to someone who is *presently* in danger. Danielle had been missing for only one week when the tip came in. Even if her prognosis had been bleak, it was plausible that she could have been alive. In that scenario, the standard cannot be that privilege holders and police must "simply hold their silence," as the Michigan Court of Appeals proposed. App. 18a (quotation modified for tense and subject). "No system of justice worthy of the name can tolerate a lesser standard." *Whiteside*, 475 U.S. at 174 (noting that the duty of confidentiality does not extend to "plans" for "future criminal conduct").

Besides, all is not lost for defendants in the absence of suppression. There are other deterrents that strike a much more equitable balance between the defendant's rights and the truth-seeking process—a critical point the state courts failed to consider here.

C. The well-recognized alternatives to exclusion better balance the equities at play.

Galloway contends that the petition's proposed alternative deterrents to exclusion are "illusory if not wholly fanciful." Br. in Opp. 23. But were they illusory or fanciful when two justices of the Michigan Supreme Court endorsed them? App. 3a–5a. What about when *this* Court has endorsed them? *Collins* v. *Virginia*, 584 U.S. 586, 609 n.6 (2018) (Thomas, J., concurring) ("[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"); *Hudson*, 547 U.S. at 596–98 ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.") (citing *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 70 (2001), and *Nix* v. *Williams*, 467 U.S. 431, 446 (1984)).

In any event, Galloway offers two retorts without explaining either. He first argues that a suit under § 1983 would be barred by *Heck* v. *Humphrey*, 512 U.S. 477 (1994). Br. in Opp. 23. Not so. *Heck* precludes a § 1983 suit if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," and, if so, the plaintiff must "demonstrate that the conviction or sentence has already been invalidated" by a court. 512 U.S. at 487. Suits challenging the collection of evidence, such as under the Fourth Amendment, however, "may lie" because "such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7. As long as the plaintiff can point to an "actual, compensable injury" other than

conviction—such as, here, breach of a privilege—the suit may proceed. *Id*. See also *Hudson*, 547 U.S. at 598 (noting that knock-and-announce suits went "forward, unimpeded by assertions of qualified immunity.").

Galloway's second retort to any alternative deterrents (again, without explanation) is that a suit would be barred under the second prong of the qualified-immunity doctrine. Br. in Opp. 23. Wrong again. "[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia* v. *Wesby*, 583 U.S. 48, 62–63 (2018) (cleaned up). "Clearly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Id*. at 63 (cleaned up). This standard, while robust, does *not* protect "those who knowingly violate the law." *Id*. (cleaned up). And Galloway contends that *Mayer knowingly* violated " 'one of the oldest recognized privileges in the law.' " Br. in Opp. 24 (citing *Swidler & Berlin*, 524 U.S. at 410). His unexplained quibble is therefore meritless.

To be clear: the State does not defend Mayer's or Hoppe's actions, though their intentions were noble to find Danielle or, if she was deceased, to catch a killer. The State only explains that there are other deterrent and punitive measures available besides all-out exclusion of inculpatory evidence derived from a then-secreted breach of a privilege. The trial court and the Michigan Court of Appeals viewed suppression as the only viable remedy. Contrary to this Court's directive,

it was their "first impulse," not their "last resort." See *Hudson*, 547 U.S. at 591.

One more thing. Galloway apparently doubts that Mayer could be charged under the polygraph-confidentiality statute, Michigan Compiled Laws § 338.1728(3). Br. in Opp. 23 n.5. His reasoning is striking: because "Hoppe never explicitly informed Mayer that the information he was conveying derived from a polygraph examination," it is "*unclear that Mayer would qualify as a 'recipient of information from a polygraph examiner*,' " assuming, as Galloway does, that the statute requires "actual knowledge." *Id.* (emphasis added). But if that is true, then this case should be reversed at once, as Mayer's objective knowledge of the privilege undergirds Galloway's entire claim and the resultant suppression. Galloway has maintained from the get-go that Mayer was objectively aware of the privileged nature of the tip information. If that is *not* the case, however, then the *Joly*/*Voigt* test fails, and Galloway's claim unravels.

Consequently, for any number of reasons, suppression was not warranted.

III. The disparate treatment of a non-team member's withholding of exculpatory information versus privileged yet inculpatory information confounds this Court's conception of justice under *Brady* v. *Maryland* and its progeny.

Galloway's only true dispute with the State's *Brady* argument is that the outside-officer principle "has no bearing on the due process issue here" because

Mayer essentially made himself part of the "team" by conveying information to it. Br. in Opp. 15. That is the same reasoning the Michigan Court of Appeals applied. See App. 14a. Both miss the mark.

Far from "blind[ing] itself" to the alleged incongruence of the circumstances in *Brady* and its progeny and this case, the State avows a contradiction of the team-based principle when an outside actor provides not exculpatory information, as in *Brady*, but inculpatory yet privileged information. Br. in Opp. 16.

The criminal-justice system covets exculpatory information to protect potentially innocent defendants. See *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995). *Brady* ensures that the prosecution discloses information tending to show that the defendant may not have committed the crime charged, and the prosecution risks reversal if the defendant is convicted in its absence. But if evidence of potential innocence lies in the hands of someone, somewhere outside the investigative or prosecution team, the Constitution does not penalize the team for it. See, e.g., *Goff* v. *Bagley*, 601 F.3d 445, 476 (6th Cir. 2010) (prosecutor has no duty to discover information possessed by uninvolved agencies). So, exculpatory information is hallowed, but to a point.

Yet, in situations such as here, if a non-team member conveys *inculpatory* information but withholds that it came from a privileged source, the team *is* punished for pursuing and using that information. In both scenarios, though, the outside actor possesses information undivulged to the team. This results in identical misconduct but yields divergent, incoherent consequences: absolution for withholding exculpatory evidence but *not* for privileged inculpatory evidence.

As a matter of justice, however, one would expect the opposite result. That is, one expects the strongest remedy to vouchsafe the innocent and permit a lesser remedy for the guilty. The law should not insulate the guilty while it condemns the innocent.

The regime created by this case is the antithesis of *Brady* and its progeny and thereby creates a conflict, contrary to Galloway's contention. See Sup. Ct. R. 10(c); Br. in Opp. 15. This dichotomy in approaches is what caught the attention of two Michigan Supreme Court justices, who identified a need for harmonization. App. 5a. The State asks for certiorari to do just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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