No. 25-378

IN THE

Supreme Court of the United States

DONALD OLSEN,

Petitioner,

v.

AARON SALTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should this Court deny the petition for writ of certiorari where the Sixth Circuit held, consistent with this Court's prior decisions, that an individual's right to due process is violated where the police fail to produce evidence the exculpatory value of which is apparent without showing that the police acted in bad faith?

II. Should this Court deny the petition for writ of certiorari where, consistent with this Court's prior decisions, the Sixth Circuit held that a circuit court may decline to exercise appellate jurisdiction over a defendant's interlocutory appeal where the district court concluded that questions of fact preclude the grant of summary judgment based on qualified immunity and the defendant declines to accept the facts as established by the plaintiff?

III. Should this Court deny the petition for writ of certiorari where the Sixth Circuit held, consistent with this Court's prior decisions, that the obligation of police officers under the due process clause to disclose exculpatory evidence was clearly established law prior to 2003, as required to overcome defendant's qualified immunity claim?

IV. Should this Court deny the petition for writ of certiorari where the Sixth Circuit properly held, consistent with this Court's precedent, that a plaintiff may pursue a section 1983 claim against a police officer for unduly suggestive identification procedures?

V. Should this Court deny the petition for writ of certiorari where the Sixth Circuit also properly held that the right to be free from unduly suggestive identification procedures was clearly established in 2003?

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STATEMENT OF THE CASE

In the early morning hours of August 6, 2003, three individuals—Jamar Luster, Kimberly Allen, and Michael Payne—were sitting, drinking, and "getting high" on the front porch of a house located on Parkgrove Street in Detroit. They were ambushed and shot by two men who emerged from the darkness. A fourth individual, Willie Thomas, who was standing near the porch, was fatally shot.

At approximately 5:20 a.m. that morning, Donald Olsen (hereinafter "Olsen"), the Detroit Police Department (DPD) officer in charge of the homicide investigation, interviewed Luster in a hospital room where he was being treated. Luster identified one of the shooters as "Rob" whom he described as a black male, 26-27 years old, 5'7", 150-170 pounds. Luster further indicated that he had never seen the other shooter, and could only describe the second shooter as "thin firing a gun." Luster also informed Olsen during this interview that a man nicknamed "E," shot up the same house one month earlier.

Luster gave a second statement to another DPD officer at the hospital that morning. Luster described the first shooter as "Rob," a black male in his 20s, 5'7", thin build. He described the second shooter as a black male in his 20s, 6'0", thin build, white t-shirt, "N.O.D. [no other description]."

There is no dispute that Aaron Salter, the plaintiff in this action, at the time of the shooting was approximately 6'4" tall and weighed 250 pounds.

Later that same morning, after Luster was discharged from the hospital, Olsen visited him at his home. Based only on what he described as a "hunch" after "doing some research at the precinct," Olsen brought with him to this interview a single photograph of Aaron Salter. In showing Luster the photograph of Mr. Salter, Olsen told Luster something that was not true—that "the police had picked up the guy with the rifle." Olsen asked Luster if he recognized the person in the photograph as the person he had earlier identified as "Rob." Luster answered in the affirmative.

After showing Luster the single photograph of Mr. Salter, Olsen showed him an array of six photographs. Mr. Salter's photograph was not included in this photo array. Luster later testified that he identified two more individuals as shooters in the photo array. One of the two individuals whom Luster identified was Earland "E" Collins.

Based solely on Luster's identification of Mr. Salter from the single photograph shown to him by Olsen, Olsen sought a warrant for Mr. Salter's arrest. Mr. Salter was arrested and charged with first degree murder.

At Mr. Salter's preliminary examination, Luster testified that there were two shooters involved in the August 6, 2003 incident, and that Mr. Salter looked like the tall shooter with the long gun. Luster indicated that the shooters were approximately 35 to 40 feet away and it was dark, but he saw the shooters under a streetlight. He testified he identified Mr. Salter "and the other guy, Rob, or whatever" from photographs shown to him by the police.

Olsen also testified at the preliminary examination. He testified that Luster was unable to identify anyone from the six photo array that Olsen had shown him as one of the shooters.

The charges against Mr. Salter proceeded to trial in December 2003. At that trial, Luster testified that he picked out *three* individuals whom he believed looked like the shooters from the photographs shown to him. Luster admitted at the trial that, although he signed a statement identifying Mr. Salter as "Rob," that was a "mistake" because he did not in fact identify Mr. Salter as "Rob" because "Rob is way smaller than [Mr. Salter]." Luster maintained, however, in his trial testimony that Mr. Salter was one of the men involved in the August 6, 2003 shooting.

Olsen testified at both the preliminary examination and at trial that Luster identified Mr. Salter as one of the shooters from the single photograph shown to him. Olsen denied that Luster identified any of the individuals depicted in the photo array as having any connection to the shooting.

On December 8, 2003, Mr. Salter was convicted of one count of first-degree murder and was sentenced to life in prison without the possibility of parole.

Throughout the years that his conviction was appealed, Mr. Salter maintained that he was innocent of the crime. His case was assigned to the Federal Defender Office in Detroit.

In early 2018, shortly after the Wayne County Prosecutor's Office formed a Conviction Integrity Unit

("CIU"), the CIU began investigating Mr. Salter's claims of innocence. The CIU discovered new evidence that had not been revealed to the prosecutor or to Mr. Salter's attorney.

One piece of new evidence in the police file was a closeup photograph of Earland "E" Collins that was not turned over to the defense. The photograph and accompanying information indicated "'E' Earland, tall dark-skinned. Pelkey/Linnhurst. 3 houses off corner Moross on Peerless." An Offender Tracking Information System described Collins as 6'2", 200 pounds.

The CIU investigators interviewed Olsen during their investigation. Olsen admitted that he believed the case against Mr. Salter was weak. Olsen's overall impression of the case is that "[t]he case stinks. It always stunk," and of all the cases he handled in the Homicide Unit between 2002 to 2016, "this case 'stunk the worst.'"

As a result of the CIU investigation and newly-discovered evidence, Mr. Salter's criminal convictions were vacated and all charges against him were dismissed on August 15, 2018. As a result of his vacated conviction, Mr. Salter was released after spending nearly 15 years in prison.

Mr. Salter filed a complaint in March 2020 alleging that Olsen violated his constitutional rights. He alleged Fourth Amendment violations for fabrication of evidence, false arrest, and malicious prosecution, and he alleged Fifth Amendment violations for withholding exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963) and for an unduly suggestive identification.

The parties took the depositions of various witnesses including Luster and Olsen. Luster testified that he did not get a good look at the shooters' faces and could only see their figures at the time of the shooting. He testified that when Olsen came to his house the morning of the shooting, Olsen told him that the police had already "picked up a guy on that street with a rifle." Only after advising Luster that they had already apprehended someone in connection with the shooting did Olsen show Luster the single photograph of Mr. Salter. Luster then identified Mr. Salter as "Rob" and informed Olsen that Mr. Salter "looked like the guy" who was shooting at him. Luster testified, however, that if he had known that Mr. Salter was 6'4" and 250 pounds when he was shown the photograph, he would not have picked him as "Rob" because "he don't fit the description."

Luster testified that he later discovered after Mr. Salter's trial and conviction that Mr. Salter was not the man who shot him. Luster testified that he saw Earland Collins in the same neighborhood weeks after Mr. Salter's trial and he determined that Collins was actually the shooter. Notably, and contrary to the testimony twice offered by Olsen during the criminal proceedings, Luster testified that he had identified Collins in the six-photo array shown to him by Olsen and he informed Olsen at that time that Collins also was one of the shooters.

Olsen testified at deposition that he could not recall how he came to use Mr. Salter's photograph after Luster indicated that one of the shooters was "Rob." Olsen could only say that "we came up with this picture and he [Mr. Salter] got picked out as the person who shot." Although Olsen believed at that time that Mr. Salter was the shooter "Rob," he testified that he did not know that Mr. Salter

was 6'4" and 250 pounds at the time he showed Mr. Salter's photograph to Luster. Olsen admitted that if he had known Mr. Salter's actual height and weight, he would not have shown Mr. Salter's photograph to Luster because "that doesn't match. He's way too big." In fact, Olsen admitted that no reasonable officer would have shown Mr. Salter's photograph to Luster if the officer knew Mr. Salter was 6'4" and 250 pounds.

Olsen also testified at deposition that he could not say why he did not ask additional questions of Luster regarding Collins. Olsen admitted that, despite Luster having discussed Collins in his first police statement, he did nothing in terms of investigating Collins because "I went with the identification that he [Luster] gave us." Olsen also admitted that had Luster identified Collins and another individual as possible shooters, that information should have been included in the police file and forwarded to the prosecutor.

Mr. Salter also obtained during discovery the DPD policies on eyewitness identification and lineups. The Department policies in effect in 2003 provided that witnesses should be shown five or six photographs "including that of the suspect" and directed that "[w]itnesses should never be shown only a photograph of the suspect."

After the close of discovery, Olsen filed a motion for summary judgment seeking dismissal of all of Mr. Salter's claims. Following briefing and oral argument, the district court issued an written opinion on June 2, 2022 granting in part and denying in part Olsen's motion. Pet. App. B at 54a-96a. The district court denied summary judgment

on Mr. Salter's *Brady* claim and his unduly-suggestive-identification claim, but dismissed all other claims.

As to Mr. Salter's *Brady* claim, the district court held that Mr. Salter presented sufficient evidence to create a question of fact both as to whether the closeup photograph of Collins was improperly withheld from the defense and whether that photograph was material. *Id.*, at 77a-83a. The district court found that the defense not only did not have the larger photograph of Collins, but also lacked the "important context provided by Luster's testimony—that he did identify Collins as one of the shooters from the photo array." *Id.*, at 82a. The district court further held that, viewed in the light most favorable to Mr. Salter, the evidence supported a reasonable probability that the outcome of the trial would have been different had the larger photograph of Collins been turned over and had Luster's identification of Collins as one of the shooters been provided to the defense. *Id.*, at 82a-83a.

The district court noted that the limited facts that were known to Mr. Salter and his counsel during his criminal proceedings—that Collins was involved in two other shootings—"are simply not the same as the evidence that Luster identified Collins as one of the shooters at the house on Parkgrove Street on the night in question." *Id.* The court further noted that Olsen did not dispute that it was clearly established at the time of the events in question that Mr. Salter had a right to not have exculpatory or impeachment evidence withheld from him. *Id.*, at 83a, n. 5.

As to Mr. Salter's unduly-suggestive-identification claim, the district court held that the single-photo identification was unnecessarily suggestive and that

questions of fact remained as to whether the evidence was reliable despite the impermissible suggestiveness of the identification procedure. *Id*., at 87a-92a. The court further held that Olsen was not entitled to qualified immunity because the right to be free from unduly suggestive identification procedures was clearly established because "a reasonable officer in 2003 would be on notice that the use of a single-photo identification along with the remarkable discrepancy between the witness's description of the perpetrator and the perpetrator's actual characteristics would be unconstitutional." *Id*., at 92a-95a.

Olsen appealed the denial of his motion for summary judgment. On March 21, 2025, a two person majority of the Sixth Circuit issued an opinion affirming the district court's decision. *Salter v. City of Detroit*, 133 F.4th 527 (6th Cir. 2025), Pet. App. A at 1a-53a. Judge Rachel Bloomekatz authored the majority opinion and Judge John Nalbandian concurred in that opinion. Judge Alice Batchelder dissented.

In its decision, the Sixth Circuit declined to consider Olsen's argument that *Brady* claims against police officers were not clearly established because Olsen did not raise this argument in the district court. Pet. App. A at 13a-14a. In fact, as noted by the panel majority, Olsen had conceded in the district court that he had an "obligation to disclose" materially exculpatory evidence to the prosecutor based on the Sixth Circuit's decision in *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009). Pet. App. A at 14a. The panel majority noted that the district court, relying on Olsen's concession, agreed that Mr. Salter satisfied the clearly established prong of his *Brady* claim and was under no obligation to consider Olsen's contrary argument

raised for the first time in his motion for reconsideration. Pet. App. A at 14a. The panel majority therefore rejected Olsen's "attempt to reverse course on appeal." *Id.*

As for the merits of Mr. Salter's *Brady* claim, the panel majority concluded that it did not have jurisdiction to review Olsen's arguments that Mr. Salter failed to satisfy his burden at summary judgment on the elements of his claim. Pet. App. A at 12a-13a. The panel majority also rejected Olsen's legal argument that Mr. Salter must show that he withheld evidence in "bad faith," holding that the Court's prior decision in *Moldowan* did not require such a showing. Pet. App. A at 13a.

The panel majority also rejected Olsen's arguments that he was entitled to qualified immunity as to Mr. Salter's suggestive identification claim. Pet. App. A at 16a-25a. The panel majority noted that Olsen did not dispute that the single-person show-up was unduly suggestive and instead argued that the identification was reliable even if the procedure was unnecessarily suggestive. Pet. App. A at 17a. The panel majority concluded, however, that Luster's identification of Mr. Salter was not reliable. Pet. App. A at 17a-22a. The panel majority further held that the district court properly held that it was clearly established in 2003 that the single-person show-up of Mr. Salter was constitutionally impermissible. Pet. App. A at 22a-25a.

In his concurring opinion, Judge Nalbandian recognized that the Sixth Circuit first allowed a §1983 suit against a police officer for a suggestive identification procedure in *Gregory v. City of Louisville*, 444 F.3d 725, 745-746 (6th Cir. 2006), but noted his belief that this Court's recent decision in *Vega v. Tekoh*, 597 U.S. 134

(2022) undermined §1983 suits based on unduly suggestive identification procedures. Pet. App. A at 26a-29a. Judge Nalbandian concluded, however, that Olsen did not raise the argument that *Vega* casts doubt on *Gregory* and therefore "it lies outside the scope of our review." Pet. App. A at 29a.

As for Mr. Salter's *Brady* claim, Judge Nalbandian questioned whether the law was clearly established as of the events in this case, but conceded that *Moldowan* "continues to bind this panel." Pet. App. A at 30a. Judge Nalbandian also expressed concerns whether a plaintiff should have to show bad faith on the part of the officer and whether the Court possessed jurisdiction to review *Brady*'s materiality element as part of the qualified immunity inquiry, but admitted that "precedents require us to answer no as to both questions." Pet. App. A at 31a-34a.

Olsen filed a petition for rehearing and a petition for rehearing *en banc*. On May 15, 2025, the petition was denied. Pet. App. C at 97a-98a.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PANEL MAJORITY CORRECTLY CONCLUDED THAT SUMMARY JUDGMENT WAS NOT APPROPRIATE ON THE *BRADY* CLAIM.

The panel majority correctly concluded that the district court properly denied summary judgment as to Mr. Salter's claim of a constitutional violation for Olsen's failure to disclose exculpatory evidence.

A. There Is No Merit to Olsen's Contention That the Sixth Circuit Has Adopted a No-Fault or Negligence Standard for *Brady*-Derived Claims Against Police Officers.

Olsen first argues that his petition should be granted because the Sixth Circuit improperly adopted a "negligence" standard for determining whether a police officer violated the plaintiff's constitutional rights for the nondisclosure of material exculpatory evidence. Petition, at 1-2, 14-20. Olsen contends that the panel majority improperly imposed liability in *Brady*-derived due process claims without the necessary showing of "bad faith." *Id.* Olsen's argument, however, is incorrect.

The panel majority based its decision on the Sixth Circuit's holdings in *Moldowan* and *Clark v. Louisville-Jefferson Cnt. Metro. Gov't*, 130 F.4th 571 (6th Cir. 2025), which plainly rejected a negligence standard. In fact, the *Moldowan* Court acknowledged that it was bound to reject a negligence standard because this Court had previously held that mere negligence cannot support a §1983 due process claim. 578 F.3d at 382-383.

The Court in *Moldowan* acknowledged that a number of courts, including this Court, require a showing of "bad faith" to prevail on a claim that the police deprived a defendant of due process by concealing or withholding evidence that is only "potentially useful." 578 F.3d at 383. But the *Moldowan* Court specifically held that a showing of bad faith is *not* required where the police fail to disclose evidence that they know or should know is material and exculpatory for the simple reason that, where the police have in their possession evidence that they know or should

know might play a significant role in the suspect's defense, the concealment of that evidence can *never* be done in good faith:

> The only difference in the requisite inquiry is that, where the police are concerned, the "exculpatory value" of the evidence must be "apparent." *Trombetta*, 467 U.S. at 489, 104 S.Ct. 2528. This additional burden, however, merely reflects that materiality is a legal question that the police are not trained to make, and thereby accounts for the practical concern that the police cannot be held accountable for failing to divine the materiality of every possible scrap of evidence. See *Youngblood*, 488 U.S. at 58, 109 S.Ct. 333. It does not imply, however, that the police are entirely shielded from liability unless a defendant shows "bad faith." Where the exculpatory value of a piece of evidence is "apparent," the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of the [sic] whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in "bad faith." The reason no *further* showing of animus or bad faith is required is that, where the police have in their possession evidence that they know or should know "might be expected to play a significant role in the suspect's defense," *Trombetta*, 467 U.S. at 488, 104 S.Ct. 2528, the destruction or concealment of that evidence can never be done "in good faith and

> in accord with their normal practice," *Killian v. United States*, 368 U.S. 231, 242, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961). Consequently, requiring a criminal defendant or § 1983 plaintiff to show a "conscious" or "calculated" effort to suppress such evidence would be superfluous.

578 F.3d at 388-389 (emphasis in original, footnotes excluded). Based on this analysis, the Sixth Circuit in *Moldowan* affirmed the denial of summary judgment for one officer for whom the exculpatory value of the undisclosed evidence was apparent, but reversed the denial of summary judgment as to another officer who had "no knowledge whatsoever about the nature of the evidence." 578 F.3d at 392.

In the concurring opinion filed in *Moldowan*, Judge Raymond Kethledge acknowledged that the majority "to its credit, does not simply extend *Brady*'s absolute duty of disclosure to police officers" and instead limited "the scope of that duty to evidence whose materially exculpatory value was known to the particular officer sued." 578 F.3d at 406-407 (Kethledge, J., concurring). And Judge Kethledge, although advocating for a "bad faith" standard for officers, admitted that the standard adopted by the majority "will probably operate as the functional equivalent" of the "bad faith" standard. *Id.*

Notably, after the Sixth Circuit denied rehearing and rehearing en banc in *Moldowan*, this Court denied the defendant's petition for writ of certiorari in that case. *City of Warren, Michigan v. Moldowan*, 561 U.S. 1038 (2010).

Further proving that *Moldowan* is not a no-fault or negligence standard as Olsen contends, jury instructions in the Sixth Circuit read *Moldowan* to require that a defendant "knowingly or recklessly concealed evidence." See e.g., Jury Instructions, *Gillispie v. Miami Township*, 3:13-cv-00416-TMR (S.D. Ohio), R.472, PageID#15546 (requiring the jury find the defendant "knowingly or recklessly concealed from the prosecutor readily apparent exculpatory and/or impeachment evidence during the criminal case and/or during Gillispie's appeal. . . ."); *Id.*, R.404-1, PageID#13849 and R.404-2, PageID#13858 (requiring a finding that the defendant acted "intentionally or recklessly" and were not "merely negligent.").

Here, Mr. Salter did not argue that a negligence standard applied to Olsen, nor did the panel majority apply a negligence standard. Rather, Mr. Salter demonstrated that the exculpatory value of the undisclosed evidence was apparent, such that no *additional* showing of bad faith was required. The panel majority's decision is consistent with *Moldowan* and therefore does not constitute an opinion that directly conflicts with this Court or Sixth Circuit precedent.

There also is no merit to Olsen's assertion that the Sixth Circuit "stands alone" in holding that a police officer may be civilly sued for a *Brady* violation absent a showing of "bad faith." Petition, at 1-2, 15-18. The standard adopted in *Moldowan* is consistent with the law in other circuits, holding that officers can be liable for suppressing evidence despite its apparent exculpatory value. See *Tennison v. City and County of San Francisco*, 570 F.3d 1078, 1088 (9th Cir. 2009) (holding that §1983 plaintiff is not required to show that officers acted in bad faith in withholding

material, exculpatory evidence from prosecutors, but rather must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence); *Johnson v. City of Cheyenne*, 99 F.4th 1206, 1232-1233 (10th Cir. 2024) (holding that, in a §1983 context, an investigator must not knowingly or recklessly cause a *Brady* violation).

Although Olsen argues that some further showing of bad faith is required, the cases he relies upon for this proposition are inapposite. For example, the Fourth Circuit in *Owens v. Balt. City State's Atty's Off.*, 767 F.3d 379, 396, 398 (4th Cir. 2014) found the requisite mens rea was present where a witness's story continued to evolve but the police officers "chose not to disclose" the multiple revisions to the witness's earlier statement, which they knew were inconsistent with the final version disclosed to the prosecutor. This is precisely the rule of *Moldowan*: officers can be held liable when they suppress evidence even though its exculpatory or impeaching nature is apparent.

Similarly, in *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004), the evidence at issue in that case "had neither exculpatory nor impeachment value." Under those facts, the Eighth Circuit concluded that not even the prosecutor committed a *Brady* violation because the defendant serologist could not have been "aware" of the exculpatory value of the evidence since none existed. The Eighth Circuit therefore held that some further evidence of bad faith was required. 368 F.3d at 979. This again is wholly consistent with *Moldowan*, which held that some other showing of bad faith was required when the evidence is not apparently exculpatory but merely "potentially

useful." *Moldowan*, 578 F.3d at 383-387. Had the evidence in *Villasana* been exculpatory, however, the same rule set forth in *Moldowan* would have applied: "a conscious effort to suppress exculpatory evidence" would have satisfied the standard. *Villasana*, 368 F.3d at 980.

Because the Sixth Circuit's holding faithfully followed the standard announced in *Moldowan* and does not impose a no-fault or negligence standard as Olsen claims, there is no compelling basis for review of the Court's holding in *Salter*.

B. There Similarly Is No Merit to Olsen's Argument That the Sixth Circuit Has Established a Categorical Prohibition Against Interlocutory Review of *Brady*-Derived Due Process Claims.

Olsen next argues that the decisions of the Sixth Circuit prevent meaningful interlocutory review of whether the withheld evidence was material and exculpatory, and whether the exculpatory value of that evidence would have been readily apparent to a reasonable officer. Petition, at 2, 21-23. Olsen argues that the Sixth Circuit improperly declines to review these mixed fact/law questions in the context of *Brady*-derived claims by concluding that such questions are beyond the Court's jurisdiction in an interlocutory qualified immunity appeal. *Id*. Olsen argues that these decisions of the Sixth Circuit therefore "eliminate" qualified immunity for *Brady* claims. Olsen's arguments are without merit.

Pursuant to this Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), "federal appellate courts have jurisdiction to hear interlocutory appeals

considering 'the legal question of qualified immunity, *i.e.*, whether a given set of facts violates clearly established law.'" A district court's determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

Consistent with this Court's holding in *Mitchell* and *Johnson*, the Sixth Circuit has repeatedly held that it lacks jurisdiction to review factual disputes in an interlocutory qualified immunity appeal. The Sixth Circuit has instead held that in considering the denial of a defendant's claim of qualified immunity, "jurisdiction is limited to resolving pure questions of law." *Moldowan*, 578 F.3d at 369; *Gregory*, 444 F.3d at 742-743. In *Moldowan*, the Sixth Circuit addressed the implications of this Court's decisions in *Mitchell* and *Johnson* in the context of a *Brady*-derived claim in which the district court determined that factual issues remained as to the question of the materiality of the evidence that was withheld:

> In light of this jurisdictional limitation, "a district court's determination that there exists a triable issue of fact cannot be appealed on an interlocutory basis, even when the finding arises in the context of an assertion of qualified immunity." *Gregory v. City of Louisville*, 444 F.3d 725, 742 (6th Cir.2006). To permit an appeal in such circumstances "would interject appellate review into a district court's determination that the evidence is sufficient for trial, a nonfinal adjudication for purposes of 28 U.S.C. § 1291." *Id.* at 743. "Under *Johnson*,

> therefore, a determination that a given set of facts violates clearly established law is reviewable, while a determination that an issue of fact is 'genuine' is unreviewable." *See v. City of Elyria*, 502 F.3d 484, 490 (6th Cir. 2007).

578 F.3d at 369-370. In *Williams v. Mehra*, 186 F.3d 685 (6th Cir. 1999), the Court held en banc that it had jurisdiction over what would have been "a mixed question of law and fact" specifically because the defendant conceded the facts, leaving only the legal question. 186 F.3d at 690. The Sixth Circuit has consistently held, however, that a defendant may not dispute a district court's conclusion that "the pretrial record sets forth a genuine issue of material fact for trial" nor "challenge the inferences that the district court draws from those facts." *Gillispie v. Miami Twp., Ohio*, 18 F.4th 909, 918 n.2 (6th Cir. 2021). Instead, "to bring an interlocutory appeal of a qualified immunity ruling, the defendant must be willing to concede the plaintiff's version of the facts for purposes of the appeal." 18 F.4th at 917; see also *Clark*, 130 F. 3d at 583-586 (Stranch, J., concurring).

As held in *Gillispie*, the Sixth Circuit has consistently enforced the jurisdictional bar established in *Johnson* in cases where the defendant's qualified immunity appeal is based solely upon a disagreement with the disputed facts that were the basis for the district court's denial of summary judgment. *Id.*, at 916. If disputed factual issues are "crucial" to a defendant's interlocutory qualified immunity appeal, the Sixth Circuit has held that it is obliged to dismiss the appeal for lack of jurisdiction. *Id.* Even in circumstances where a defendant asserts arguments about whether the law was clearly established,

if he "fails to concede the most favorable view of the facts," the Sixth Circuit has held that it cannot consider those arguments. *Id.*, at 917.

In *Gillispie*, the defendant refused to accept the plaintiff's version of the facts and disagreed with the district court's determinations that multiple genuine disputes of material fact existed. *Id.*, at 918. The Sixth Circuit noted that the factual disputes raised by the defendant served as the sole bases for his arguments about clearly established law, and were "crucial" to the defendant's contentions that, because the district court erred in finding certain facts, the law was not clearly established. *Id.* The Sixth Circuit held in *Gillispie* that the defendant's failure to accept plaintiff's version of the facts was "fatal" to his appeal. *Id.*

In *Gregory*, a case concerning a series of rapes, the defendants similarly failed to concede the plaintiff's version of the facts. The district court denied qualified immunity on plaintiff's allegation that the defendant officer withheld exculpatory evidence—the existence of a fourth rape, which suggested someone else other than plaintiff was the serial rapist—in violation of *Brady*. 444 F.3d at 743-744. The district court held that there existed a question of fact with respect to whether the failure to disclose the fourth rape was material. The *Gregory* Court held that it lacked jurisdiction to entertain the defendant officer's appeal from the district court's denial of qualified immunity for plaintiff's claim of *Brady* violations, given the disputed questions of material fact. *Id.*

Notably, the *Gregory* Court applied this same analysis to a different defendant, medical examiner Dawn Katz,

who argued for qualified immunity against plaintiff's fabrication of evidence claim. 444 F.3d at 744-745. The Sixth Circuit in *Gregory* held that it could not entertain Katz's arguments for qualified immunity as to this claim because the record demonstrated that the parties "dispute what the evidence shows." The *Gregory* Court held that, by arguing that the evidence "establishes at most a negligent performance of her duties, Katz is arguing disputed issues of fact to this Court. We cannot entertain Katz's arguments going to disputed issues of material fact on this interlocutory appeal." *Id.*, citing *Johnson*, 515 U.S. at 313.[1]

As in *Gillispie* and *Gregory*, Olsen's version of the facts set forth in his petition—indicating that the *Brady* violation only involved a failure to disclose a "duplicate" photograph of Collins—differs significantly from the facts cited by the district court in denying his motion for summary judgment. Petition, at 22-23. Most importantly, defendant's argument ignores the important fact that, as held by the district court, the *Brady* violation that was established here does not simply involve the failure to turn over to the defense a closeup photograph of Collins. Pet. App. B at 82a-83a. Olsen not only did not turn over the closeup photograph of Collins, he also did not disclose the fact that, as testified to by Luster at his deposition, Luster *specifically identified Collins as one of the shooters* on the day of the shooting. *Id.* As held by the district court, the evidence established that Mr. Salter "did not have either the larger photo of Collins or the important context provided by Luster's testimony—that he did identify

1. After the Sixth Circuit in *Gregory* denied rehearing and rehearing en banc, this Court denied defendant's petition for writ of certiorari. *Tarter v. Gregory*, 549 U.S. 1114 (2007).

Collins as one of the shooters from the photo array." *Id.*, at 82a. As properly held by the district court, these facts "point directly to Collins being the taller shooter with the rifle instead of Salter." *Id.* The district court therefore correctly recognized in its decision denying summary judgment that this evidence created a question of fact for the jury as to whether Olsen withheld evidence that was material to the defense. *Id.*

Contrary to defendant's argument, the Sixth Circuit does not have an "unduly constricted view" of its jurisdiction in the context of *Brady* claims that mixed fact/law questions are not subject to review. Nor did the panel majority hold here that the legal question of whether a constitutional violation occurred cannot be reviewed because the Court lacks jurisdiction over "materiality." The panel majority instead merely followed long-standing precedent established in *Gregory* and *Johnson* and consistent with this Court's decisions in *Mitchell* and *Johnson* that an appellate court lacks jurisdiction to entertain an appeal from a district court's denial of qualified immunity where the arguments raised by the defendant take issue with the district court's determination that there exists a genuine issue of material fact for trial.

The decision in this case does not therefore directly conflict with this Court's precedent, sufficient to warrant review by this Court. Nor has Olsen alleged a circuit split on this issue. Instead, because Olsen refused to concede the facts as established by the plaintiff, such that the mixed question of law and fact for the jury remained "mixed," this divested the Court of jurisdiction. *Johnson*, 515 U.S. at 313.

C. The Sixth Circuit Properly Held That The Obligation of Police Officers under the Due Process Clause to Disclose Exculpatory Evidence Was Clearly Established Law Prior to 2003, as Required to Overcome Defendant's Qualified Immunity Claim.

There is no merit to Olsen's argument that the panel majority wrongly concluded that *Brady* claims against police officers were clearly established at the time Mr. Salter was prosecuted in 2003. Petition, at 24-26.

1. This issue was conceded below by Olsen.

It initially bears noting that the panel majority declined to consider Olsen's argument that *Brady* claims against police officers were not clearly established as of 1993 because Olsen did not raise this argument in the district court. Pet. App. A at 13a-14a. Indeed, as noted by the panel majority, Olsen conceded in his briefing before the district court that he had an "obligation to disclose" materially exculpatory evidence to the prosecutor based on the Sixth Circuit's decision in *Moldowan*.

The panel majority noted that the district court, relying on Olsen's concession, agreed that Mr. Salter satisfied the clearly established prong of his *Brady* claim, and held that the district court was under no obligation to consider Olsen's contrary argument raised for the first time in his motion for reconsideration. *Id*.

2. Olsen's arguments should be rejected on the merits.

Even if this Court were to reach the merits of Olsen's "clearly established" *Brady* arguments despite his failure to raise this issue below, his arguments should be rejected on the merits. In his petition, Olsen recognizes the Sixth Circuit's decisions in *Moldowan* and *Clark*, which hold that a police officer's obligation under *Brady* was clearly established prior to 1990. *Moldowan*, 578 F.3d at 378-382; *Clark*, 130 F.4th at 582. Defendant contends, however, that the Sixth Circuit's decision in *Moldowan* is a "questionable" decision and that there is an absence of "a robust consensus of cases" supportive of its holding. Petition, at 25.

Olsen initially contends that this Court has suggested that a clearly established right must be based solely on Supreme Court precedent and cannot be based on circuit precedent. Petition, at 24-25. The difficulty with this argument, however, is that there is no authority requiring application of the strict standard Olsen advocates here. Olsen admittedly indicates that his argument is based on statements made by this Court that merely "questioned" whether circuit court precedent would suffice. Petition, at 24-25. Olsen's argument, however, fails to account for this Court's precedent holding that a right can be clearly established based not only on Supreme Court precedent, but also based on "cases of controlling authority in their jurisdiction at the time of the incident with clearly established the rule on which they seek to rely" as well as "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617

(1999). Olsen therefore has provided no authority for his argument that clearly established law must be based on Supreme Court opinions only, and this Court should continue to apply the precedent it set in *Wilson*.

Pursuant to *Wilson*, and as recognized by the Sixth Circuit in *Moldowan*, a robust consensus of cases of persuasive authority existed in 2003, which is sufficient to defeat qualified immunity. In *Moldowan*, the plaintiff filed a §1983 claim alleging a number of violations of his constitutional rights arising out of his 1990-1991 criminal prosecution and conviction, a conviction that was ultimately overturned in 2002. The plaintiff alleged that a police detective, Donald Ingles, failed to disclose exculpatory evidence in violation of his constitutional rights. *Moldowan*, 578 F.3d at 376. Ingles appealed the district court's denial of his motion for summary judgment, arguing on appeal that plaintiff "cannot demonstrate that the Due Process Clause imposes on the police a clearly established obligation to disclose exculpatory information." *Id.*, at 377.

The *Moldowan* Court confirmed that the due process guarantees recognized in *Brady* as applicable to a prosecutor also imposed "an analogous or derivative obligation on the police" to disclose potentially exculpatory evidence. 578 F.3d at 378-381. After determining that such an obligation exists under *Brady*, the Sixth Circuit in *Moldowan* turned to the question of whether that obligation was "clearly established" as of the date of Ingles' alleged violation of that duty in 1990. The Court noted that decisions from other circuits recognized that this right was clearly established prior to 1990, with some dating as far back as 1964:

> Decisions from other circuits recognizing the type of "*Brady*-derived" claims that Moldowan asserts here date back as far as 1964. *See Barbee*, 331 F.2d at 846. In fact, at least three circuits recognized prior to August 1990, the earliest possible date for Detective Ingles' involvement in the case, that this right was clearly established. *See*, *e.g.*, *id.; Geter*, 882 F.2d at 171; *Jones*, 856 F.2d at 995. Although our recognition of this type of a claim is more recent and less specific, the overwhelming number of decisions from other circuits recognizing this type of claim satisfies us that any reasonable police officer would know that suppressing exculpatory evidence was a violation of the accused's constitutional rights.

578 F.3d at 382. The panel majority in this case, following the holding in *Moldowan*, affirmed the district court's finding that it was clearly established at the time of the events in question in 2003 that Mr. Salter had a right to not have exculpatory or impeachment evidence withheld from him. Pet. App. A at 13a-14a. As held in *Moldowan*, it was well established long before 2003 that the duty to disclose evidence falls on the state as a whole, and applies to police as well as prosecutors. 578 F.3d at 382. Review of this issue, even if this argument had been preserved, is not warranted where the panel majority's decision does not conflict with this Court's precedent and is supported by "robust" authority.

Olsen's contention that there is an absence of cases supportive of the Sixth Circuit's holding in *Moldowan* also ignores the many decisions of this Court and the

Sixth Circuit holding that the *Brady* disclosure obligation extends to police officers. See *Strickler v. Greene*, 527 U.S. 263, 280-281 (1999) (holding that the *Brady* rule "encompasses evidence 'known only to police investigators and not to the prosecutor," citing *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)); *Gillispie*, 18 F.4th at 918 n.2 (noting that it has long been clearly established law that prosecutorial withholding of exculpatory evidence violates a criminal defendant's Fourteenth Amendment right to due process, with the obligation to disclose extending to police officers); *Jackson v. City of Cleveland*, 925 F.3d 793, 823-824 (6th Cir. 2019); *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015). Contrary to defendant's argument, the Sixth Circuit's decision in *Moldowan* is therefore supported by "robust" authority.

The deposition testimony of Olsen further supports that a police officer's obligation under *Brady* was clearly established in 2003. Although Olsen testified at his deposition that he did not recall showing Luster the photo array on August 6, 2003, he admitted in his deposition that if Luster had identified Collins and another individual as possible shooters based upon the photo array, that information should have been included in the police file and forwarded to the prosecutor. Additionally, even though Olsen did not know where the closeup photograph of Collins came from or how it ended up in his file, he also admitted that the photograph "should have been turned over" to the prosecutor. Given this testimony, the Sixth Circuit did not err in concluding that it was clearly established at the time of the events here in 2003 that it was the obligation of police to disclose exculpatory evidence to Mr. Salter.

For all of these reasons, this Court should deny Olsen a writ of certiorari.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PANEL MAJORITY CORRECTLY CONCLUDED THAT THE DISTRICT COURT PROPERLY DENIED SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIM OF A CONSTITUTIONAL VIOLATION FOR OLSEN'S UNNECESSARILY SUGGESTIVE SINGLE-PHOTO IDENTIFICATION PROCEDURE .

The panel majority also correctly concluded that the district court properly denied summary judgment as to Mr. Salter's claim of a constitutional violation for Olsen's unnecessarily suggestive single-photo identification procedure.

A. The Sixth Circuit Properly Held That a Plaintiff May Pursue a Section 1983 Claim Against A Police Officer for Unduly Suggestive Identification Procedures.

A criminal suspect has a constitutional right to be free from identification procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" that the identification's use violates due process of law. *Stovall v. Denno*, 388 U.S. 293, 302 (1967), abrogated on other grounds by *United States v. Johnson*, 457 U.S. 537 (1982); *Perry v. New Hampshire*, 565 U.S. 228, 238-239 (2012) (holding that a suggestive identification procedure violates due process when law enforcement officers use an identification procedure that

is both suggestive and unnecessary.). This Court noted in *Stovall* that the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, "has been widely condemned." 388 U.S. at 302. See also *Simmons v. United States*, 390 U.S. 377, 383-384 (1968) (holding that the danger that a witness may make an incorrect identification is increased if the police show the witness "only the picture of a single individual who generally resembles the person he saw."). Moreover, police actions such as "indicat[ing] to the witness that they have other evidence that one of the persons pictured committed the crime," which the Sixth Circuit found occurred here, can meet this standard. *Simmons*, 390 U.S. at 383-384.

The Sixth Circuit first allowed a §1983 claim against a police officer who conducted a suggestive identification in *Gregory*. 444 F.3d at 745-747. Relying on this Court's holding in *Stovall*, the *Gregory* Court concluded that criminal suspects have a constitutional right to be free from identification procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" that the identification's use violates due process of law. 444 F.3d at 745-746, citing *Stovall*, 388 U.S. at 301-302.

In issuing this holding, the Sixth Circuit in *Gregory* rejected the defendant's argument, similar to the argument raised by Olsen here, that the defendant officer's procurement of the identification itself did not lead to the plaintiff's injury. 444 F.3d at 747. The *Gregory* Court held that while the unduly suggestive identification does not, in and of itself, violate constitutional rights, the prosecutor's decision to use the identification did not shield the defendant officer from liability if he reasonably should

have known that the use of the identification would lead to a violation of the right to a fair trial:

> It is true that an unduly suggestive identification does not, in and of itself, violate constitutional rights. *See Manson v. Brathwaite*, 432 U.S. 98, 113, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). It is also true that the prosecution's use of the identification at trial is a necessary intervening act for injury to occur and liability for any party to attach. *Id.* It is not true, however, that the prosecutor's discretion to control the state's case at trial is such an intervening act to excuse [a police officer] from the "natural consequences" of his actions and therefore any tort liability. In constitutional-tort cases, "a man [is] responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). This principle led the Supreme Court in *Malley v. Briggs* to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (footnote omitted). The Supreme Court's reasoning is directly applicable here. The prosecutor's decision to use the identification does not shield Tarter from liability if he reasonably should have known that use of the identification would lead to a violation of Plaintiff's right to a fair trial.

444 F.3d at 747. This is precisely the argument raised by Olsen in his petition. Petition, at 28-30. Olsen relies upon the holding in *Manson* and this Court's holding in *Vega v. Tekoh*, 597 U.S. 134, 150 (2022), in which this Court held that a violation of *Miranda* rights "does not necessarily constitute a violation of the Constitution," for the proposition that the obligation to exclude identification based on unduly suggestive identification procedures does not constitute a violation of Constitutional rights sufficient to merit damages under §1983.

To the extent Olsen relies on this Court's decision in *Vega* as a basis for this Court's review, this again represents an issue that he did not raise below. As Judge Nalbandian noted in his concurring opinion, Olsen did not make an argument in opposition to Mr. Salter's due process claim in either the district court of the Sixth Circuit based on *Vega* and, as a result, "it lies outside the scope of our review." Pet. App A, at 29a.

But, even if an argument predicated on *Vega* had been preserved, it would be unavailing. While this Court held in *Vega* that a violation of a prophylactic rule, without a violation of a constitutional right, cannot give rise to a claim under §1983, it notably did *not* hold that a violation of a prophylactic rule cannot give rise to a claim under §1983 if it *does* lead to a violation of a constitutional right. And that is precisely what happened here.

Mr. Salter did not merely establish that Olsen performed an unduly suggestive single-person show-up; he established that Olsen violated his constitutional right to a fair trial and did so by presenting evidence of an unduly suggestive photo identification. The essence of the claim

is the constitutional right to a fair trial under the Due Process Clause and that right was violated by Olsen's use of an unduly suggestive identification procedure. Pet. App. A at 21a-22a ("Because the unreliable single-person show-up appeared in evidence at Salter's criminal trial, it can form the basis of Salter's suggestive identification claim."). As outlined in the Sixth Circuit's opinion in *Gregory*, when a suggestive identification procedure interferes with the right to a fair trial, this is actionable. Olsen has cited no authority providing any basis for departing from this rule.

B. The Sixth Circuit Also Properly Held That the Right to Be Free from Unduly Suggestive Identification Procedures Was Clearly Established in 2003.

Finally, Olsen argues that qualified immunity applies to Mr. Salter's claim based on an unduly suggestive photo identification because no clearly established law would have told reasonable officers that a single-photo identification procedure violated the constitution. Petition, at 30-32. Olsen's argument should be rejected.

A constitutional right is "clearly established" if it is sufficiently clear that every reasonable official "would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). To demonstrate that a right is clearly established, a plaintiff need not provide a case directly on point, but "existing precedent must have placed the . . . constitutional question beyond debate." *Id.* The dispositive question is whether the officer had notice that the "particular conduct" violated the Constitution. *Id.*

Relying on this Court's holding in *Stovall*, the Sixth Circuit in *Gregory* specifically rejected a defendant's argument that there was no well established constitutional right in 1992 to be free of impermissibly suggestive identification procedures. *Gregory*, 444 F.3d at 745-746; see also *Gillispie*, 18 F.4th at 918, n.2 (noting that, as early as 1967, it was clearly established that a person the police suspected of committing a crime had a constitutional right to be free from identification procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" that the identification's use violates due process of law.). Moreover, the *Gregory* Court found that it had entertained allegations of suggestive identification procedures as viable constitutional tort claims as far back as 1993. 444 F.3d at 746, citing *Hutsell v. Sayre*, 5 F.3d 996, 1003-1005 (6th Cir. 1993). While Olsen contends that the Sixth Circuit in *Hutsell* ultimately found that the plaintiff's allegation about the identification procedure in that case failed to state a claim, there is no doubt that the *Hutsell* Court identified a possible cause of action under §1983 for an unduly suggestive identification procedure that violates the "core right" to a fair trial. *Hutsell*, 5 F.3d at 1005.

Reviewing the facts that were established below, a reasonable officer in 2003 would be on notice that the identification procedure utilized here would be unconstitutional. In *Gregory*, the Sixth Circuit held that "this Court has never found that an identification arising from a suggestive format was anything but *unreliable* when the witness' prior description of the suspect was significantly inconsistent with the suspect's actual appearance." *Gregory*, 444 F.3d at 756 (emphasis in original). Luster described the shooter "Rob" as 5'7"

and 150 to 170 pounds. Mr. Salter, however, is 6'4" tall and weighs approximately 250 pounds, and therefore did not at all match the suspect's description. Although Luster's description of "Rob" was significantly inconsistent with Mr. Salter's actual appearance, Olsen presented Luster with a single photograph of Mr. Salter and asked if the person depicted in the photograph was "Rob." Olsen testified that he provided the single photograph based solely upon what he described as an unexplained "hunch."

Olsen also conceded that if he had known Mr. Salter's height and weight, he would not have shown Mr. Salter's photograph to Luster because "that doesn't match. He's way too big." In fact, Olsen admitted that no *reasonable* officer would have shown Mr. Salter's photograph to Luster if the officer knew Mr. Salter was 6'4" and 250 pounds. Luster also confirmed that if he had known that Mr. Salter was 6'4" and 250 pounds when he was shown the photograph, he would not have picked him as "Rob" because "he don't fit the description."

Given these facts, there is no legitimate legal basis for Olsen's contention that a reasonable investigator would not know that such actions—showing the photograph of a suspect whose actual appearance is significantly inconsistent with the witness's prior description of the suspect—were inappropriate and in violation of an individual's constitutional rights. *Gregory*, 444 F.3d at 745-746. As held by the panel majority, a reasonable officer in 2003 would be on notice that the use of a single-photo identification procedure, given the significant discrepancy between the witness's description of the suspect and Mr. Salter, would be unconstitutional. Pet. App. A at 22a-24a.

Not only did the evidence establish that Mr. Salter's description was significantly inconsistent with Luster's description of the suspect, but Luster's deposition testimony established that he identified Mr. Salter only after Olsen advised Luster that the police had already detained someone in connection with the shooting. As held by this Court in *Simmons*, 390 U.S. at 383-384, the chance of misidentification of a suspect is increased "if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."

Additionally, as the panel majority concluded here, the holding in *Stovall* is consistent with the Detroit Police Department's own policies in 2003, which provided that "[w]itnesses should never be shown only a photograph of the suspect." Pet. App. A at 25a. While the panel majority acknowledged that the policy was not dispositive of the qualified immunity inquiry, the *Salter* Court noted that the policy provided further proof that Olsen was on notice that his actions were unlawful. *Id.*

Based upon this authority, the panel majority correctly concluded that a reasonable officer would have known that, under these circumstances, the single-person photograph would not produce a reliable identification and its admission at trial would violate due process rights. Olsen's petition should be denied because he has failed to provide compelling reasons for the grant of the petition.

CONCLUSION

Based on the foregoing, this Court should deny Olsen's petition for a writ of certiorari.

Respectfully submitted,

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