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

REPLY BRIEF

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INTRODUCTION

Olsen's petition presents the following questions: (1) is a police officer liable under 42 U.S.C. § 1983 for the nondisclosure of materially exculpatory evidence absent a showing of bad faith, (2) does Section 1983 permit claims against police officers based on unduly suggestive identification procedures, and was either right clearly established in 2003.

The thrust of Salter's argument on the first question is that *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009) did not adopt a negligence standard—an argument that ignores the Sixth Circuit's holding in this case which expanded *Moldowan* and flatly rejected any showing of bad faith. The Sixth Circuit's decision conflicts with decisions of nearly every other circuit, many of which Salter does not address.

As for the second question, Salter ignores the circuit split and instead makes arguments highlighting that the responsibility for admission of a witness identification lies with the *court*.

ARGUMENT

I. The Sixth Circuit's *Brady* decision conflicts with decisions from this Court and exacerbates a long-standing circuit split

A. Since *Moldowan*, many more circuit courts of appeals have weighed in on the issue of when police officers may be held liable for a nondisclosure of exculpatory evidence, and the circuit split is ripe for this Court's review

Salter argues the Sixth Circuit did not adopt a no-fault or negligence standard by focusing on *Moldowan*, rather than the Sixth Circuit's decision in *this case*. Brief in Opposition to Petition ("Brief in Opposition") at 11-14. In this case, the Sixth Circuit held Salter can maintain his *Brady* claim if Olsen withheld evidence "'either willfully or inadvertently[,]'" Pet. App. A at 12a, flatly rejecting any showing of bad faith. *Id.* at 13a. By contrast, in *Moldowan*, the court held a showing of bad faith is not required if "the exculpatory value of a piece of evidence is 'apparent,'" *Moldowan*, 578 F.3d at 388, but a showing of bad faith is required if the evidence "is merely 'potentially useful.'" *Id.* at 392.

The Sixth Circuit's decision in this case thus extended *Moldowan* even further by rejecting a showing of bad faith outright, without evaluating whether the exculpatory value of the evidence is "apparent." Pet. App. A at 13a ("we have rejected the proposition that an officer's *Brady* violation requires 'bad faith.'").

Salter argues he "demonstrated that the exculpatory value of the undisclosed evidence was apparent, such that no *additional* showing of bad faith was required." Brief in Opposition at 14. Under that view, bad faith is presumed if the evidence is material and exculpatory—a position that conflicts with the Third, Fourth, Fifth, and Eighth Circuits, which expressly require evidence of bad faith or deliberate or affirmative concealment. Petition for Writ of Cert. ("Petition") at 15-17.

Salter points out that this Court denied the defendants' petition for a writ of certiorari in *Moldowan*. Brief in Opposition at 13. But when the defendants filed the petition in *Moldowan* in March 2010 (nearly 16 years ago), the circuit split was not as mature as it is now. The *Moldowan* petition argued the Sixth Circuit's decision conflicted "with rulings of four other circuits[,]" *City of Warren v. Moldowan*, 2010 WL 1049407, at *11, including the Fifth, Eighth, Ninth, and Eleventh. *Id.* at *17–19. Since *Moldowan*, the circuit split has significantly matured, with nearly every circuit court of appeals in the nation weighing in on the issue, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. Petition at 15-18. The *Moldowan* petition also did not involve the other significant issue raised here—whether Section 1983 permits claims against police officers based on unduly suggestive identification procedures.

While Salter briefly addresses the circuit split, he does so by only addressing decisions of the Fourth, Eighth, Ninth, and Tenth Circuits, and he ignores the First, Second, Third, Fifth, Seventh, and Eleventh Circuits. Brief in Opposition at 14-16. Salter's analysis

of those four circuits also supports Olsen. Salter admits the Ninth and Tenth Circuits require, at minimum, a reckless nondisclosure, *id.* at 14-15, which conflicts with the Sixth Circuit's holding that inadvertent nondisclosure suffices. Pet. App. A at 12a. Salter also compares *Owens* and *Villasana v. Wilhoit, 368 F.3d 976* (8th Cir. 2004) to *Moldowan*, rather than to the Sixth Circuit's holding in this case. Brief in Opposition at 15. In doing so, Salter ignores that *Owens* specifically held that a showing of bad faith is required. *Owens*, 767 F.3d at 396 ("To make out a claim that the Officers violated his constitutional rights by suppressing exculpatory evidence, Owens must allege, and ultimately prove, that . . . the Officers suppressed the evidence in bad faith[.]"). As for *Villasana*, Salter admits that "[t]he Eighth Circuit . . . held that some further evidence of bad faith was required." Brief in Opposition at 15. That holding directly conflicts with the Sixth Circuit's decision in this case flatly rejecting any showing of bad faith. Pet. App. A at 13a.[1]

B. Salter does not dispute the Sixth Circuit's narrow view of jurisdiction—a key issue calling out for this Court's review

Salter's brief rehashes the Sixth Circuit's view of jurisdiction, Brief in Opposition at 16-20, without correctly analyzing the facts and circumstances of this case. Salter states the Sixth Circuit enforces a jurisdictional bar

1. Salter also references Olsen's statement in the Conviction Integrity Unit interview years later that the case against Salter was weak. Brief in Opposition at 4. That does not show a *Brady* violation. The prosecutor makes the decision to convict, not the police. Salter's attempt to fault Olsen for a decision police officers do not make emphasizes why the petition should be granted.

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 18. But that is not the case here, which is why the Sixth Circuit's holding—that it lacks jurisdiction to consider the favorability and materiality elements of a *Brady* claim—is so problematic.

Salter argues Olsen's "version of the facts"—namely, that the *Brady* violation involved a failure to disclose a duplicate photo of Collins—"differs significantly from the facts cited by the district court[.]" *Id.* at 20. This is incorrect. The district court's opinion cites Luster's deposition testimony that he picked Collins out of the photo array presented by Olsen. Pet. App. B at 60a. This confirms that the larger photo of Collins was duplicative. The district court also cited Luster's testimony during the preliminary examination that he picked two people from the photo array as shooters. *Id.* And at trial, Luster testified he picked three people who looked like the shooter from the photos Olsen showed him. Pet. App. A at 39a. Thus, the defense had what it needed under *Brady*. Had Salter's attorney simply asked Luster "who?", Luster could have testified to the jury that he had identified Collins. See *id.* at 46a.

Because Salter and his attorney were aware of the essential facts, the closeup photo of Collins is not *Brady* material as a matter of law. *Id.* at 44a-45a. As the district court observed, Luster testified that he picked Collins out of the photo array, Pet. App. B at 60a, so "the larger photo was not needed for Luster to identify him." Pet. App. A at 46a. And well before Salter's criminal trial—at the preliminary examination—Luster testified he identified

two people from the photo array (which did not contain Salter). Pet. App. B at 60a. That testimony gave Salter any notice *Brady* required that Luster's testimony could be helpful to him at trial. While Olsen recalled Luster's response to the array differently, *id.*, a plaintiff cannot bootstrap a *Brady* violation onto a credibility dispute between a witness and a police officer. *Brady* is a fair trial right concerning notice about exculpatory testimony—not a guarantee that every witness at a criminal trial will agree with it.

Salter's argument that the petition does not identify a circuit split on this issue is incorrect. See Petition at 22 n.1 (citing decisions of other circuits identifying the materiality inquiry as one of law). Salter is also wrong to argue the Sixth Circuit's decision does not conflict with this Court's precedent. Here, the materiality inquiry is a legal determination based on the undisputed facts, and this Court's precedent is clear that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision[.]'" *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

C. This Court's case law has not clearly established any *Brady* obligation on police, Olsen did not concede that *Brady* claims against police were clearly established in 2003, and *Moldowan* was not decided until 2009

Olsen's summary judgment motion properly acknowledged *Moldowan*'s holding because an attorney has a "duty to 'disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not

disclosed by opposing counsel.'" *Lumaj v. Gonzales*, 462 F.3d 574, 576 n.1 (6th Cir. 2006). The summary judgment motion argued Olsen is entitled to qualified immunity on the *Brady* claim. Motion for Summary Judgment at 24.

Olsen did not concede in his motion for summary judgment that *Brady* claims against police officers were clearly established in 2003. Olsen stated generally that "it is clearly established that people have a right . . . not to have exculpatory/impeachment evidence withheld from them[.]" *Id.* at 23. Such a broad statement does not admit that the right at issue was clearly established, since "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense[.]" *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). While Olsen also acknowledged that under *Moldowan*, police have an "obligation to disclose" *Brady* evidence to the prosecutor and that *Moldowan* held "[p]olice officers can be held liable for withholding material exculpatory or impeachment evidence from the prosecutor[,]" Motion for Summary Judgment at 14, *Moldowan* was not decided until 2009—years after the events at issue in this case.

Salter points to *Moldowan* and *Clark v. Louisville-Jefferson Cnty. Metro Gov't*, 130 F.4th 571 (6th Cir. 2025) to argue a police officer's obligation under *Brady* was clearly established in 2003. Brief in Opposition at 23. But both of those cases were decided years later—in 2009 and 2025, respectively.[2] And regardless, *Moldowan* only

2. Salter also cites *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450 (6th Cir. 2015), *Jackson v. City of Cleveland*, 925 F.3d 793, 823 (6th Cir. 2019), and *Gillispie v. Miami Twp., Ohio*, 18 F.4th

identified cases in three other circuits to support the police's *Brady*-derived obligation. *Moldowan*, 578 F.3d at 382. "[T]hree circuits doesn't represent a consensus, much less a robust one." Pet. App. A at 30a.

Salter is also wrong to argue the Sixth Circuit's decision in this case does not conflict with this Court's precedent. This Court's case law has not clearly established any *Brady* obligation on police, even today. Petition at 24. Contrary to Salter's argument, *Strickler v. Greene*, 527 U.S. 263 (1999) did not hold the *Brady* disclosure obligation extends to police. See Brief in Opposition at 26. *Strickler* involved the nondisclosure of evidence by the *prosecutor*. *Strickler*, 527 U.S. at 296 ("Petitioner has satisfied two of the three components of a constitutional violation under *Brady*: exculpatory evidence and nondisclosure of this evidence by the prosecution."). And *Kyles v. Whitley*, 514 U.S. 419 (1995) did not impose any duty on police. Petition at 24.

While Salter claims Olsen's deposition testimony supports a police officer's obligation under *Brady*, Brief in Opposition at 26, a witness's testimony cannot "clearly establish" the law in the absence of existing precedent. See *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) ("existing precedent must have placed the statutory or constitutional question beyond debate.").

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909 (6th Cir. 2021), but those cases were all decided after *Moldowan*. Salter relies on in language in footnote 2 of *Gillispie* that the obligation to disclose extends to police, Brief in Opposition at 26, but *Gillispie* relied on *Moldowan* and two other cases decided in 2015 and 2019 when making that statement. *Gillispie*, 18 F.4th at 918 n.2.

II. Review is needed to answer the question whether Section 1983 permits claims against police officers based on unduly suggestive identification procedures

A. Salter ignores the circuit split on this issue and makes arguments highlighting that the responsibility for admission of a witness identification lies with the court

Salter agrees with Olsen that the Sixth Circuit permits suggestive identification claims against police officers under Section 1983. Brief in Opposition at 28-29. But Salter provides *no response* to Olsen's argument that the Sixth Circuit's view conflicts with precedent from several other circuits, including the Second, Seventh, Eighth, and Tenth. Petition at 27-28. The circuit split provides a strong basis for this Court's review under Sup. Ct. R. 10(a).

While Salter cites *Perry v. New Hampshire*, 565 U.S. 228 (2012), the *Perry* Court refused to enlarge the domain of due process after considering the "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." *Id.* at 245. Salter also cites *Simmons v. United States*, 390 U.S. 377 (1968), but in that case, this Court refused to prohibit the use of photo identification as a matter of constitutional requirement, again emphasizing procedural safeguards: "The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." *Id.* at 384. And in

Stovall v. Denno, 388 U.S. 293 (1967), this Court held that the use of a single person show-up did not deprive the defendant of due process.

Salter is wrong that Olsen's argument—that the judicially created protection against suggestive identification procedures is a prophylactic rule—was not preserved below. Brief in Opposition at 30. In Olsen's motion for summary judgment, he specifically argued that "[i]t is not enough to allege a violation of the rule against admitting evidence from unnecessarily suggestive lineups, which is simply a 'prophylactic rule' designed to protect the core right to a fair trial." Motion for Summary Judgment at 16. Olsen made this same argument again in his brief on appeal. Olsen's Brief on Appeal at 46.

Salter then argues that even in light of *Vega v. Tekoh*, 597 U.S. 134 (2022), he can maintain his unduly suggestive identification claim under Section 1983 because Olsen "presented evidence" of an unduly suggestive photo identification. Brief in Opposition at 30. But it was not Olsen who "presented evidence" at Salter's trial. The *prosecutor* presents evidence on behalf of the state, and criminal *courts*, not the police, are responsible for the admissibility of a witness identification. This argument by Salter highlights the need for review by this Court.

B. The right to be free from an alleged unduly suggestive identification procedure was not clearly established on these facts in 2003

Confusingly, Salter argues the right to be free from unduly suggestive identification procedures was clearly established in 2003 by relying on two cases decided years *after* the events in this case—*Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006) and *Gillispie* (decided in 2021). Brief in Opposition at 32. Salter also defines the law at a high level of generality, *id.*, and ignores the cases cited in Olsen's petition upholding the use of one person show-ups when, as in this case, the witness indicates they know the person. Petition at 31. Contrary to Salter's arguments, this Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Salter argues a reasonable officer would be on notice that the identification procedure used by Olsen was unconstitutional because Salter's height and weight did not match Luster's description of Rob. Brief in Opposition at 32-33. But Olsen did not know Salter was 6'4 and 250 pounds when he showed Salter's photo to Luster. Pet. App. B at 60a. Salter acknowledges this. Brief in Opposition at 33 ("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[.]" (emphasis added)). A police officer does not violate the constitution by not knowing a suspect's height and weight. Salter does not identify a constitutional violation, let alone a clearly established one.[3]

3. Salter also admits that Luster testified at trial in 2003 that Rob is "way smaller" than Salter. Brief in Opposition at 3. So that information was known to the jury.

III. Salter does not address the significance of these questions and the extraordinary burden the Sixth Circuit's decision places on local governments and the police

Olsen's petition emphasizes the significance of the questions presented because of the enormous liability at stake in civil lawsuits following reverse convictions, the fact that many defendants are forced into *in terrorem* settlements, and the targeting of police officers due to prosecutorial immunity. Petition at 32-33. The amicus brief also highlights the burden and expense of *Brady* lawsuits on local governments, which can "cripple local budgets" and divert public funds from essential services such as education, infrastructure, and public safety. IMLA Amicus Brief at 2-3, 5. The personal liability risk for police officers also has a "corrosive effect on morale and recruitment[,]" and the systems used to mitigate exposure for *Brady* violations "can detract from core law enforcement functions[.]" *Id.* at 6.

These are serious concerns exacerbated by the Sixth Circuit's ruling. But Salter does not address any of them.

CONCLUSION

Petitioner, Donald Olsen, respectfully requests that this Court summarily reverse the Sixth Circuit's decision denying qualified immunity, or alternatively, issue a writ of certiorari and grant all relief to which Petitioner is entitled in law and equity.

Respectfully submitted,

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