JUN 3 - 2010

No. 09-1322

In the
Supreme Court of the United States

KARIM KOUBRITI,

Petitioner,

v.

RICHARD CONVERTINO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves an action brought pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) by a former criminal defendant, Petitioner Karim Koubriti, for a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), seeking monetary damages from Respondent Richard Convertino in his capacity as a former Assistant United States Attorney. The following question is presented:

Whether an Assistant United States Attorney is entitled to absolute immunity for allegedly suppressing *Brady* material at trial that he discovered prior to trial while purportedly acting in an investigatory capacity.

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

Statutes

Other Authorities

Blank Page

STATEMENT

A. Factual Background

Six days after the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, a team of Detroit Joint Terrorism Task Force[1] agents went to an apartment located at 2653 Norman Street in Detroit, Michigan. The agents sought to interview Nabil Al-Marabh, who they believed had knowledge regarding the September 11 terrorist attacks and who they knew was the subject of an outstanding arrest warrant for assault with a dangerous weapon.

The agents knocked on the apartment door and announced their presence. In response, the agents were greeted and invited inside the residence by Petitioner Karim Koubriti, a Moroccan national. The 2653 Norman Street residence listed Al-Marabh's name on the mailbox, but al-Marabh was not at home. Upon entering the premises, the agents conducted a protective sweep and located two other persons, Ahmed Hannan and Farouk Ali-Haimoud. Koubriti and his two companions were living as transients with no furniture to speak of and with their clothing kept in duffel bags, suitcases, and garbage bags. All three men were

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[1] The Detroit Joint Terrorism Task Force is comprised of agents and officers from the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco and Firearms (ATF), the Immigration and Naturalization Service (INS), the Drug Enforcement Administration (DEA), the Internal Revenue Service (IRS), U.S. Customs Service, the State Department, Michigan State Police, and the Dearborn Police Department.

asked whether they were acquainted with and knew the whereabouts of Al-Marabh, and all three men denied knowing him.

Koubriti told the agents that the apartment was his and provided the agents written consent to search the premises. The search yielded a host of suspicious items, including over 100 audio tapes featuring fundamentalist Islamic teachings in addition to a day planner containing notations, some in Arabic, and suspicious drawings labeled the "American base in Turkey," the "American foreign minister," and "Alia Airport" in Jordan. The day planner also contained sketches purportedly depicting airport flight lines, aircraft, and runways. The agents further discovered unfilled blank documents and partially completed documents from Morocco, a bag full of approximately 30 passport-size photographs depicting several different people, fraudulent passports, visas, social security cards, alien registration cards, and two SkyChef/Detroit Metropolitan Airport badges bearing the pictures of Koubriti and Hannan. Koubriti admitted to the agents that all of these documents were fraudulent and that they belonged to a former roommate, Youssef Hmimssa, who had previously lived with Koubriti and Hannan at another apartment in Dearborn, Michigan. Koubriti claimed that Hmimssa had asked him to hold the documents but further maintained that did not know Hmimssa's current whereabouts.

Koubriti, Hannan, and Ali-Haimoud were arrested, and the following day, Koubriti and

Hannan were charged by Complaint with possession of a false identification and/or immigration document. 18 U.S.C. §§ 1028(a)(4), 1546, and 371. The case was assigned to *Respondent Richard Convertino, who was then an* Assistant United States Attorney with the United States Department of Justice.

On September 27, 2001, Koubriti, Hannan, and their former roommate Hmimssa, who had since been arrested in Cedar Rapids, Iowa, were indicted for fraud and misuse of visas, permits and other documents in violation of 18 U.S.C. §§ 1546(a) and § 2; and fraud and related activity in connection with identification documents and information in violation of 18 U.S.C. §§ 1028(a)(6) and § 2. Ali-Haimoud was similarly indicted on March 27, 2002.

On August 28, 2002, Convertino caused a second superseding indictment to be filed, charging Koubriti, Hannan, Ali-Haimoud, Hmimssa, and Abdella Lnu with conspiracy to provide material support or resources to terrorists in violation of 18 U.S.C. §§ 371 and 2339A; (2) conspiracy to engage in fraud and misuse of visas, permits and other documents in violation of 18 U.S.C. § 371; (3) fraud and misuse of visas, permits and other documents in violation of 18 U.S.C. §§ 1546(a) and 2; and (4) fraud and related activity in connection with identification documents and information in violation of 18 U.S.C. §§ 1028(a)(6) and 2.

On February 11, 2003, Convertino caused a third superseding indictment to be filed, charging Koubriti, Hannan, Ali-Haimoud, and Abdel El-

Mardoudi with the same charges as those set forth in the Second Superseding Indictment.

Koubriti's prosecution, dubbed the "Detroit Sleeper Cell" case, became the first terrorist-related prosecution in the aftermath of the September 11th tragedy. The government's theory regarding the terrorism-related charges was that Koubriti and his three co-defendants constituted a Detroit-based cell of an Islamic terrorist organization that operated as a covert underground support unit for terrorist attacks inside and outside the United States as well as a "sleeper" operational combat cell. This organization aimed to assist a transnational network of radical Islamists who were influenced by the Salafiyya religious movement.

The government's theory that Koubriti and his three co-defendants were an intelligence collection cell and a potentially operational combat cell largely depended upon three categories of evidence: (1) expert testimony that the day planner sketches and a videotape seized from Koubriti's residence constituted operational terrorist casing material, (2) Hmimssa's testimony that Koubriti and his co-defendants had terrorist leanings and intentions, and (3) corroborating evidence that Koubriti and his co-defendants had committed acts that were consistent with terrorist activities such as committing document and credit card fraud, attempting to obtain commercial truck licenses with hazardous material specifications, possessing audio tapes of Salafist speakers, and using international wire transfers.

On June 3, 2003, after a lengthy jury trial, Koubriti was convicted of Count I (conspiracy to provide material support or resources to terrorists) and Count II (conspiracy to engage in fraud and misuse of visas, permits and other documents).[2]

On October 15, 2003, Koubriti and his three codefendants filed a Motion for Judgment Notwithstanding the Verdict or New Trial, seeking relief from their criminal convictions on the grounds that Convertino had, among other things, suppressed material evidence contrary to *Brady v. Maryland*, 373 U.S. 83 (1963). On December 12, 2003, the criminal trial court conducted a hearing and found that two previously undisclosed documents constituted exculpatory and impeaching material that Convertino should have disclosed to Koubriti. The trial court ordered the government to conduct a thorough review of every document in the case to determine whether there were any other documents that constituted *Brady* or *Giglio*[3] material.

The government removed Convertino from the case, and on August 31, 2004, responded to Koubriti's motion with a 59-page document entitled Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in

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[2] El Mardoudi was convicted of the same counts as Koubriti. Hannan was convicted of Count II (document fraud conspiracy), and Ali-Haimoud was acquitted on all charges.

[3] *Giglio v. United States*, 405 U.S. 150 (1972).

Support Thereof. This response, authored by then Assistant United States Attorney Craig A. Morford, concurred in Koubriti's request for a new trial and requested dismissal of the terrorist-related count without prejudice. Morford concluded that Convertino had failed to disclose matters that, when viewed in their collective totality, were material to Koubriti's defense and that Convertino had allowed an incomplete or misleading record to be presented with regards to several of his key prosecution theories. Morford concluded that this evidence (1) undermined Convertino's theory that the day planner sketches and videotape seized from Koubriti's residence constituted operational terrorist casing material, (2) impeached Hmimssa's credibility, (3) and undermined Convertino's theory that Koubriti and his co-defendants had committed other acts consistent with terrorist activities.[4] Each of these categories of evidence is addressed *seriatim*.

1. Sketch of Queen Alia Military Hospital in Amman, Jordan

It had been Convertino's theory that drawings contained in a day planner seized from Koubriti's apartment were terrorist casing materials depicting the Queen Alia Military Hospital in Amman, Jordan, and a United States Air Base in Incirlik, Turkey. In support of this theory,

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[4] Although Morford's response set forth a host of errors that he believed justified the government's concurrence in Koubriti's motion, Koubriti's First Amended Complaint pleads only four of these errors.

Convertino presented expert testimony from Federal Bureau of Investigations Supervisory Special Agent Paul George, the Supervisor of the Detroit JTTF, that in his opinion the planner drawings constituted operational terrorist casing sketches of the Queen Alia Military Hospital. Convertino also presented the testimony of Federal Bureau of Investigations Special Agent Michael Thomas, who explained that he had traveled to Amman, Jordan, and after visiting three different locations named after Queen Alia, he believed that the sketch was a depiction of the Queen Alia Military Hospital. Lastly, Convertino presented the testimony of Ray Smith, a Regional Security Officer with the United States State Department assigned to the United States Embassy in Amman, which was similar to the testimony of Special Agent Thomas.

Convertino introduced no photographs at Koubriti's criminal trial to reinforce the testimony regarding the identification of the Queen Alia Military Hospital, and testimony remained on the record, which purportedly gave the impression that the government had no photographs of the hospital due to diplomatic red tape involved in photographing foreign military or quasi-military installations. However, as a result of the government's file review in response to Koubriti's post-conviction motion, electronic mail communications were disclosed, which indicated that Ray Smith had previously claimed that neither he nor other government officials who had visited the Queen Alia Military Hospital could positively identify the hospital as the same landmark

depicted in the day planner sketches. This evidence was allegedly contrary to the impression left on the record at trial that there was a consensus among investigators that the sketches depicted the Queen Alia Military Hospital.

2. Testimony of Youseff Hmimssa

Convertino's case-in-chief against Koubriti further consisted of testimony by Koubriti's former roommate Hmimssa that Koubriti and his three co-defendants were Islamic fundamentalists involved in terrorist activities. Hmimssa offered this testimony while portraying himself as secular, loyal to the United States, and entirely forthcoming.[5] Evidence was subsequently discovered, however, that allegedly would have undermined Hmimssa's testimony, namely a letter to another Assistant United States Attorney from an inmate who claimed that Hmimssa had expressed anti-American sentiments contrary to his loyalty to the United States that he had professed from the witness stand. There was also other evidence that was not produced that further substantiated Hmimssa's anti-American sentiments. Morford believed that Convertino's failure to disclose this evidence was "compounded" by Convertino's decision to instruct Special Agent Thomas to refrain from taking any notes or preparing any memoranda of his interview sessions with

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5 The original Indictment named Hmimssa as a co-defendant, but the government severed the charges against him because of Hmimssa's agreement to cooperate with the government and testify against his fellow co-defendants.

Hmimssa, thereby limiting Koubriti's ability to cross-examine Hmimssa. Morford further maintained that Hmimssa's statements had evolved over time and that Convertino's directive to Special Agent Thomas to refrain from taking notes during their interview sessions obscured this important fact.

3. Post-Conviction Proceedings

Based upon Morford's response to Koubriti's post-conviction motion, on September 2, 2004, the criminal court granted Koubriti's request to dismiss the terrorist-related charge without prejudice and granted a new trial on the document fraud charge.

On October 12, 2004, Koubriti was released on bond, and on December 15, 2004, the government filed a Fourth Superseding Indictment, charging Koubriti and co-defendant Hannan with Conspiracy to Commit Mail Fraud in violation of 18 U.S.C. § 371.

On September 25, 2006, the government released Koubriti from electronic tether monitoring, and on February 9, 2010, the criminal trial court granted Koubriti's motion to dismiss the Indictment on the grounds that Koubriti had successfully completed a pretrial diversion program.

4. The Criminal Case against Convertino

On March 29, 2006, the government charged Convertino and Regional Security Officer Ray Smith in a four-count Indictment for conspiracy to obstruct justice and to make false declarations in

violation of 18 U.S.C. § 371, obstruction of justice in violation of 18 U.S.C. § 1503 and § 2, making a materially false declaration before a court in violation of 18 U.S.C. § 1623 and § 2, and obstruction of justice in violation of 18 U.S.C. § 1503. On October 31, 2007, after a highly publicized trial, both Convertino and Smith were acquitted of all four counts.[6]

B. The Procedural Background

On August 30, 2007, almost two years after Morford filed his response to Koubriti's post-conviction motion, Koubriti filed a Complaint and Jury Demand pursuant to 42 U.S.C. § 1983 in which he alleged that Convertino, Smith, and Thomas had maliciously prosecuted him. Koubriti's First Amended Complaint alleges that Convertino violated Koubriti's Fifth Amendment due process rights by "maliciously and intentionally withholding exculpatory evidence and fabricating evidence contrary to *Brady v. Maryland*, 373 U.S. 83, 87 (1963) . . . ." Koubriti alleged four specific instances in which Convertino, while allegedly acting in an investigative role, (1) failed to disclose photographs of the Queen Alia Hospital or ordered that they not be turned over to Koubriti or presented to the Grand Jury, (2) failed to disclose

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[6] On December 12, 2008, the Michigan Attorney Grievance Commission closed its investigation and declined to bring disciplinary charges against Convertino for his conduct during Koubriti's criminal trial. This case is the last proceeding regarding Koubriti's conviction that remains unresolved.

that Convertino, Smith, and Thomas could not establish which landmarks that the sketches depicted after their trip to Jordan, (3) ordered or directed Special Agent Thomas to refrain from memorializing interviews of Hmimssa prior to the Second Superseding Indictment being issued, and (4) failed to disclose to Koubriti or the grand jury that United States Air Force Office of Special Investigations Special Agent Goodnight had reservations whether the suspected terrorist sketch depicted a United States Air Force installation in Incirlik, Turkey.

On May 10, 2008, Convertino filed a motion to dismiss the First Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. Specifically, Convertino argued that no *Bivens*-type remedy is available for a *Brady* violation and that, even if such a claim did exist, Convertino's actions would be shielded by the bar of absolute prosecutorial immunity.

On December 3, 2008, the district court ruled that a *Bivens* action was available to enforce the alleged *Brady* violations but that Convertino was entitled to absolute immunity with regards to Koubriti's claims that Convertino (1) failed to disclose that Convertino, Smith, and Thomas could not establish which site or sites the sketches depicted after their trip to Jordan and (2) failed to disclose to Koubriti or the grand jury that Special Agent Goodnight had reservations regarding the sketch suspected to be a United States Air Force installation in Incirlik, Turkey. The district court

further held that Convertino was not entitled to absolute immunity with regards to Koubriti's claims that Convertino (1) directed Special Agent Thomas to refrain from memorializing interviews with prosecution witness Hmimssa, and (2) failed to reveal a difference of opinion amongst investigators regarding whether or not a suspected terrorist casing sketch actually depicted the Queen Alia Military Hospital in Amman, Jordan.

Convertino immediately appealed the district court's ruling to the Sixth Circuit Court of Appeals pursuant to the collateral order doctrine. On February 3, 2010, the Sixth Circuit affirmed that portion of the district court's ruling that found Convertino was entitled to absolute immunity, reversed that portion of the district court's ruling that found that Convertino was not entitled to absolute immunity, and remanded the matter to the district court for entry of a judgment of dismissal with respect to Convertino.

On April 27, 2010, Koubriti filed the present Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION DOES NOT WARRANT THIS COURT'S REVIEW

A. The Question Presented Regarding a Substantive Due Process Violation for *Fabrication* of Evidence Is Not Properly Preserved Where the Issue Below

Pertained to a *Brady* Violation for *Suppression* of Evidence

The district court found that Convertino was absolutely immune with regards to two of Koubriti's claims, so the Sixth Circuit addressed only the two remaining claims, namely that Convertino violated *Brady* while acting in an investigatory capacity when he (1) directed Special Agent Thomas to refrain from memorializing interviews with prosecution witness Hmimssa, and (2) failed to reveal a difference of opinion amongst investigators regarding whether or not a suspected terrorist casing sketch actually depicted the Queen Alia Military Hospital in Amman, Jordan.

Having lost his bid in the lower courts, Koubriti now reframes his Question Presented as:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's substantive due process rights by *procuring false testimony during the criminal investigation*, and then (2) introduced that same testimony against the criminal defendant at trial.

Pet. App. i (emphasis added).

In an attempt to capitalize on the Court's expressed interest in *Pottawattamie County, Iowa v McGhee*, __ U.S. __, 129 S. Ct. 2002 (2009), Koubriti copied his Question Presented directly from the Petition for Certiorari in *Pottawattamie County*.

Cf. Pet. App. i *with* Petition for a Writ of Certiorari at i, *Pottawattamie County, Iowa v McGhee*, __ U.S. __, 129 S. Ct. 2002 (2009) (No. 08-1065). The question addressed by the Eighth Circuit in *Pottawattamie County* was identical to the question presented to this Court in that case. *Cf. McGhee v Pottawattamie County, Iowa*, 547 F3d 922, 932 (8th Cir. 2008) (characterizing issue as one of "obtaining, manufacturing, coercing and fabricating evidence before the filing of the True Information") *with* Petition for a Writ of Certiorari at i, *Pottawattamie County, Iowa v McGhee*, __ U.S. __, 129 S. Ct. 2002 (2009) (No. 08-1065) (accord). However, that question is not the same as the one that the Court of Appeals for the Sixth Circuit addressed in this case.

The Sixth Circuit, quoting directly from Koubriti's First Amended Complaint, noted that Koubriti alleged four specific *Brady* violations, two of which the district court resolved favorably to Convertino. *Koubriti v. Convertino*, 593 F.3d 459, 465 (6th Cir. 2010). The Sixth Circuit further rejected the district court's attempt to recharacterize Koubriti's claims as one for "a general due process violation." *Koubriti*, 593 F.3d at 468 n.11 ("Plaintiff's complaint does not allege a due process violation aside from the *Brady* violations."). In an effort to refashion his complaint in the vein of *Pottawattamie County*, Koubriti treats the *suppression* of evidence synonymous with the *fabrication* of evidence despite the fact that each of these distinct acts presents a different legal question requiring a different legal analysis. All of the cases that Koubriti claims create a "deep

division" among the circuits addressed only the *fabrication* of evidence prior to the existence of probable cause, not the suppression of *Brady* materials. That the circuit courts have reached this conclusion should come as no surprise because this Court held as much in *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) (refusing to immunize pre-probable cause fabrication of evidence because "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested") (footnote omitted). However, Koubriti cites no precedent in which liability has ever been imposed for the pre-probable cause *suppression* of *Brady* materials.

The importance of the distinction between the fabrication of evidence and the suppression of evidence is underscored by *Zahrey v. Coffee*, 221 F.3d 342 (2d Cir. 2000), which held that "there is a constitutional right not to be deprived of liberty as a result of the *fabrication* of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty." *Zahrey*, 221 F.3d at 344 (emphasis added). See also *Pottawattamie County, Iowa*, 547 F.3d at 933. The *Zahrey* court noted that "[a] prosecutor's manufacture of false evidence might well subject the prosecutor to criminal penalties, *see, e.g.*, 18 U.S.C. § 1622 (subornation of perjury), or disciplinary sanctions, see N.Y. Comp. Codes R. & Regs. tit. 1200, § 33(a)(6) (2000) (DR 7-102(a)(6))." *Zahrey*, 221 F.3d at 348 fn.3. Throughout the opinion, the *Zahrey* court characterizes the defendant prosecutor's fabrication

of evidence as "misconduct" and "unlawful action." *Zahrey* then employs a causation analysis to hold that a prosecutor is liable for his initial misconduct of fabricating evidence that he subsequently introduces at trial where he can reasonably foresee that the initial misconduct will subsequently contribute to a defendant's deprivation of liberty. *Zahrey*, 221 F.3d at 353-54.

Zahrey's reliance upon a causation analysis makes the fabrication/suppression distinction paramount because, as the *Zahrey* court noted, fabrication constitutes professional misconduct and general culpable wrongdoing. Conversely, precedent is clear that failing to disclose *Brady* material months before trial is neither misconduct nor unlawful action. This Court has held that *Brady* material may be concealed by the government until after the conclusion of plea negotiations, *United States v Ruiz*, 536 U.S. 622 (2002), and has upheld the government's nondisclosure of a defendant's own confession until five days before the defendant rested his case. *Leland v. State of Or.*, 343 U.S. 790, 801-02 (1952). All but one of the federal circuit courts agree that due process is satisfied so long as disclosure is made in time for the defendant to make effective use of the evidence at trial.[7] Such

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[7] *See e.g. United States v. Hemmer*, 729 F.2d 10, 14 (1st Cir. 1984) (citation omitted), *cert. denied sub. nom, Randazza v. United States*, 467 U.S. 1218 (1984); *United States v. Ikezi*, 353 Fed. Appx. 482, 484 (2nd Cir. 2009); *United States v. Higgs*, 713 F.2d 39, 43-44 (3rd Cir. 1983); *United States v. Ensley*, 161 F.3d 4 *2 (4th Cir. 1998) (table); *United States v. Campagnuolo*, 592 F.2d 852 (5th

a rule does not require disclosure of exculpatory evidence months before trial, and all of the federal circuit courts except one have approved of the government disclosing *Brady* material *during* trial so long as the defendant is able to use the evidence effectively at trial.[8] Convertino's acts of nondisclosure months before Koubriti's trial even began cannot state a valid *Brady* claim because Convertino had until trial to disclose the materials. The negative implication of Koubriti's claim is that prosecuting officials must disclose *Brady* materials months before trial or else forfeit the absolute

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Cir. 1979); *United States v. Blackwell*, 459 F.3d 739, 759 (6th Cir. 2006), *cert. denied*, 549 U.S. 1211 (2007); *United States v. Kimoto*, 588 F.3d 464, 474 (7th Cir. 2009), *cert. denied*, __ U.S. __, 2010 WL 752433 (March 29, 2010); *United States v.* Jones, 101 F.3d 1263, 1272 (8th Cir. 1996); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985); *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984); *United States v. Darwin*, 757 F.2d 1193, 1201 (11th Cir. 1985), *cert. denied*, 474 U.S. 1110 (1986).

[8] *See e.g. United States v. Misla-Aldarondo*, 478 F.3d 52, 63-64 (1st Cir. 2007); *United States v. Ikezi*, 353 Fed. Appx. 482, 484 (2nd Cir. 2009); *United States v. Johnson*, 816 F.2d 918, 924 (3rd Cir. 1987); *United States v. Anderson*, 481 F.2d 685, 690 fn 2 (4th Cir. 1973); *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997); *United States v. Blackwell*, 459 F.3d 739, 759 (6th Cir. 2006), *cert. denied*, 549 U.S. 1211 (2007); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985); *Evans v. Circuit Court of Cook County, Ill.*, 569 F.3d 665, 667 (7th Cir. 2009); *United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 997 (2009); *United States v. Manning*, 56 F.3d 1188, 1198 (9th Cir. 1995); *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984); *United States v. Beale*, 921 F.2d 1412, 1426 (11th Cir. 1991).

immunity that typically protects the suppression of evidence at trial. Just as the absolute immunity that shrouds trial advocacy functions should not relate back to protect otherwise unprotected pretrial functions, so too, liability for unprotected pretrial functions should not extend so far as to render prosecutor's civilly liable for otherwise immunized advocacy functions at trial. This is clearly not the current state of the law and presents an extremely slippery slope that this Court should not needlessly attempt to climb in the present case.

In sum, the Court of Appeals for the Sixth Circuit addressed Koubriti's two remaining *Brady* claims for Convertino's alleged suppression of evidence, but the Court of Appeals for the Eight Circuit in *Pottawattamie County* addressed the "obtaining, manufacturing, coercing and fabricating evidence before the filing of the True Information . . . ." *Pottawattamie County,* 547 F.3d at 932. Moreover, *Zahrey* framed his claim as one regarding "the deprivation of his liberty without due process of law," *Zahrey*, 221 F.3d at 348, a claim that Koubriti did not allege in this case. *See Koubriti*, 593 F.3d at 468 n.11 ("Plaintiff's complaint does not allege a due process violation aside from the *Brady* violations."). As articulated above, these are two distinct legal theories requiring two different legal analyses. It is axiomatic that contentions not raised in the appellate court will not be considered by this Court. *See e.g. Rogers v Lodge*, 458 U.S. 613, 628 n.10 (1982) (citation omitted). The Question Presented in the Petition was not preserved in the lower

courts, and it should not now be reviewed for the first time in this Court.

B. There Is No Conflict among the Circuit Courts as to This Issue

1. As developed more fully below, this Court held in the seminal decision of *Imbler v. Pachtman*, 424 U.S. 409 (1976) that the suppression of alleged exculpatory evidence at trial is an activity that is intimately associated with the judicial phase of the criminal process and thus protected by the aegis of absolute immunity. This case presents no distinguishable facts or any argument asking the Court to overturn *Imbler*. Koubriti's reliance upon *Pottawattamie County* and *Zahrey* is misplaced because these decisions ignored *Imbler*'s ruling and therefore present issues more akin to simple reversible error than they represent evidence of any true conflict among the circuits.

2. *Zahrey*'s causation analysis, holding that a prosecutor is liable for pre-probable cause fabrication of evidence where it is reasonably foreseeable that such fabrication will contribute to a defendant's deprivation of liberty, was expressly rejected by this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). *Buckley* established that "the *Imbler* approach *focuses on the conduct for which immunity is claimed*, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley*, 509 U.S. at 271 (Emphasis added). *Zahrey*'s causation analysis requires an analysis of both the conduct for which immunity is claimed (*i.e.*, fabrication of evidence) as well as the harm that the conduct caused (*i.e.*, deprivation of

liberty) in order to state a claim upon which relief can be granted. Such an analysis belies *Buckley*'s mandate and again is more akin to mere reversible error than it is evidence of a true conflict among the circuitspresenting a true conflict among the circuits.

3. Assuming *arguendo* that *Zahrey*'s analysis comports with *Imbler* and *Buckley*, there still would be no conflict relevant to this case because *Pottawattamie County* and *Zahrey* are clearly distinguishable. This case presents a question regarding absolute prosecutorial immunity; however, in *Zahrey* the prosecuting official "conceded, for purposes of this appeal, that the alleged misconduct concerning his fabrication of evidence entitled him, at most, only to qualified immunity." *Zahrey*, 221 F.3d at 347. It is axiomatic that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Thus, *Zahrey*'s holding adds nothing to an absolute immunity analysis, which is the only issue presented in this case.

4. Koubriti cites only three cases in support of his conclusion that a "deep division" exists among the circuits, and even then, the cases cites address only the pre-probable cause fabrication of evidence, not the suppression of *Brady* materials. Koubriti has shown no circuit conflict regarding his *Brady* claims.

5. Any nascent conflict that might exist has not in any event percolated for a sufficient period so as to allow the lower courts to explore the implications of this Court's rulings before this Court revisits the issue. Subsequent decisions may make clear that *Pottawattamie County* and *Zahrey* are a minority view that may ultimately harmonize with the remaining circuits. This Court will benefit from the numerous perspectives that will be brought to bear during the interim upon the legal question presented by this case. Because *Pottawattamie County* and *Zahrey* are the only decisions that support Koubriti's position, any perceived conflict is capable of resolving itself if the lower courts are given additional opportunity to ruminate further upon the issue. Accordingly, the question presented should wait until another day.

C. The Question Presented Is a Fact Bound Issue of Little General Application

The question presented regarding a prosecutor's civil liability for the admission of evidence at trial that was fabricated at the pre-probable cause stage is an inherently fact bound issue of little general application. The district court made a clear distinction between Convertino's conduct overseas and his conduct within the United States. That court found Convertino enjoyed absolutely immunity from liability for suppressing evidence regarding the divergence of opinions surrounding the purported sketch of the Incirlik Air Base but further found that Convertino did not enjoy absolutely immune for suppressing evidence regarding the divergence of opinions surrounding

the sketch purported to depict the Queen Alia Hospital. The only distinction between these two sketches is that Convertino learned of the divergence of opinions regarding the Queen Alia Hospital while in Jordan but learned of the divergence of opinions regarding the Incirlik Air Base sketch while in the United States. The unique facts of this case will confine the application of any decision by this Court to those extremely rare occasions when prosecuting officials travel overseas to review and evaluate evidence, which makes for an opinion extremely limited in its practical application. The dearth of authority on the issue is a testament to the fact that the issue arises infrequently and has minor practical importance in the day-to-day administration of Justice. The Court should reserve its scarce resources to address questions that will have a more general practical significance.

D. Any Perceived Conflict is Immaterial to the Outcome of this Case

Assuming *arguendo* that a true conflict of any significance exists among the circuits, that conflict is immaterial to the outcome of this case. The Sixth Circuit held that Convertino is entitled to qualified immunity in any event. *Koubriti*, 593 F.3d at 471-72. Petitioner has not challenged this aspect of the Sixth Circuit's ruling in this Court, so a remand to the lower courts would result only in a perfunctory dismissal mandated by the Sixth Circuit's qualified immunity analysis. The Court can await a case where resolution of the conflict

makes a practical difference and is not effectively stillborn upon issuance.

II. THE COURT OF APPEALS' DECISION IS CORRECT.

A. The Court of Appeals' Correctly Applied *Imbler v. Pachtman*

1. The issue raised in Koubriti's Petition was expressly rejected by this Court over thirty years ago in its seminal decision, *Imbler v. Pachtman*, *supra*. The petitioner in *Imbler* was a criminal defendant who had been tried for murder and sentenced to death based upon weak identification testimony piecemealed from the testimony of four eyewitnesses. Imbler ultimately obtained habeas relief based upon eight instances of prosecutorial misconduct. *Imbler v. Craven*, 298 F. Supp. 795, 798 (C.D. Cal. 1969), *cert. denied sub. nom., California v. Imbler*, 400 U.S. 865 (1970). Six instances of this misconduct consisted of the prosecution's use of misleading or false testimony. 424 U.S. at 444-45 (White, J., concurring in judgment). See also *Imbler*, 298 F. Supp. at 799-809. The remaining two instances of prosecutorial misconduct consisted of the suppression of evidence favorable to the defendant. 424 U.S. at 444-45 (White, J., concurring in judgment). See also *Imbler*, 298 F. Supp. at 809-12.

The two pieces of evidence that were suppressed in *Imbler* consisted of exculpatory fingerprint evidence and the exculpatory testimony of a coworker. With regards to the fingerprint evidence, the prosecution presented expert testimony at trial

that two partial fingerprints on a razor case found in the killer's coat could not exclude Imbler as a suspect thereby implying to the jury that the two partial fingerprint impressions on the razor case might have been left by Imbler. *Imbler*, 298 F. Supp. at 810. However, the prosecution suppressed evidence that a third complete fingerprint also found on the case affirmatively excluded Imbler. *Id.* With regards to the coworker's exculpatory testimony, prior to trial police displayed to one of Imbler's coworkers a coat that belonged to the killer, and the coworker told police that he had never seen Imbler wear such a coat or anything similar to it. *Imbler*, 298 F. Supp. at 811. This evidence was also suppressed by the prosecution. Citing *Brady v. Maryland*, *supra*, the district court granted habeas relief for the suppression of these two items of evidence. *Imbler*, 298 F. Supp. at 811.

Having successfully obtained habeas relief, Imbler brought an action against the prosecutor and police pursuant to 42 U.S.C. §1983. The district dismissed the complaint as to the prosecutor on the basis that prosecuting attorneys enjoy immunity from suit for acts committed in the performance of their duties that constitute an integral part of the judicial process. *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974). The Court of Appeals for the Ninth Circuit agreed with the district court's analysis. *Id.*

This Court, also agreeing with the lower courts' analyses, held "that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §

1983." 424 U.S. at 431. This Court expressly "agree[d] with the Court of Appeals that [the prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U.S. at 430 (footnote omitted). The *Imbler* Court thus held that prosecutors are absolutely immune for using misleading or false testimony *as well as suppressing evidence favorable to the defendant.* See also *Burns v. Reed*, 500 U.S. 478, 486 (1991) ("Each of the charges against the prosecutor in *Imbler* involved . . . the alleged knowing use of false testimony at trial *and the alleged deliberate suppression of exculpatory evidence*") (emphasis added).

The *Imbler* ruling was reaffirmed by this Court as recently as *Van de Kamp v. Goldstein*, __ U.S. __, 129 S. Ct. 855 (2009), where the Court addressed "whether [absolute] immunity extends to claims that the prosecution failed to disclose impeachment material . . . ." *Van de Kamp*, 129 S. Ct. at 858. The Court's ruling concluding that such activity is shrouded by the aegis of absolute immunity could be no clearer:

> Suppose that Goldstein had brought such a case, seeking damages not only from the trial prosecutor but also from a supervisory prosecutor or from the trial prosecutor's colleagues – *all on the ground that they should have found and turned over the impeachment material about [the prosecution's key witness].* Imbler *makes*

> *clear that all these prosecutors would enjoy absolute immunity from such a suit.* The prosecutors' behavior, taken individually or separately, would involve "[p]reparation . . . for . . . trial," 424 U.S., at 431, n. 33, 96 S.Ct. 984, and would be "intimately associated with the judicial phase of the criminal process" because it concerned the evidence presented at trial. *Id.*, at 430, 96 S.Ct. 984. And all of the considerations that this Court found to militate in favor of absolute immunity in *Imbler* would militate in favor of immunity in such a case."

Van de Kamp, 129 S. Ct. at 862 (emphasis added).

There is no material distinction between this case and *Imbler*. Convertino learned of the difference of opinions amongst investigators regarding the suspected terrorist casing sketches fifteen months before the inception of Koubriti's trial. In *Imbler*, the razor case was discovered on same day as the murder, *Imbler*, 298 F. Supp. at 798, which was at least one year prior to trial. See *People v. Imbler*, 371 P.2d 304, 308 (Cal. 1962). The coat at issue was also shown to Imbler's coworker "[p]rior to trial." *Imbler*, 298 F. Supp. at 811. Thus, both the prosecutor in *Imbler* and Convertino knew of the evidence prior to trial and failed to disclose it to the defense. This Court characterized such activities in *Imbler* as "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U.S. at 430 (footnote omitted).

Koubriti's claims begin and end with this Court's ruling in *Imbler*, and the Court of Appeals for the Sixth Circuit wholly agreed:

> We fail to see how *Imbler* and *Jones* [*v. Shankland*, 800 F.2d 77 (6th Cir. 1986)] are distinguishable in any functional way from Koubriti's claim in the instant case that Convertino failed to disclose the lack of consensus among government officials as to what the sketches depicted. In the relevant portion of Koubriti's complaint, Koubriti alleges that he is entitled to *Bivens* relief because "Defendant Convertino . . . withheld exculpatory evidence . . . by: . . . B. Failing to disclose that [Convertino, Thomas, and Smith] could not establish which site or sites the sketches established (if either) after their respective trips to Jordan." As stated, this is nothing more than an accusation that Convertino failed to disclose exculpatory evidence. As such, the claim fits squarely in the framework set out by *Imbler* and *Jones* and is thus covered by absolute immunity.

Koubriti, 593 F.3d at 468 .

Koubriti has posed no challenge to this Court's ruling in *Imbler*, so there is no good reason to visit this unpreserved issue presented by Koubriti's Petition.

2. Koubriti's claim regarding Convertino's directive to Special Agent Thomas months before trial not to memorialize interviews with prosecution witness Hmimssa was also expressly

rejected in *Imbler*. There the prosecutor requested that the police refrain from questioning a prosecution witness about a pending bad-check charge until after the witness had completed his testimony. Imbler characterized such conduct as "police-related" or "investigative activity" "because it was a direction to police officers engaged in the investigation of crime." 424 U.S. at 430 n.32. This Court squarely rejected this characterization: "Seen in its proper light, however, respondent's request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Id.*

This Court was correct in *Imbler*, and the Court of Appeals for the Sixth Circuit was correct in its application of *Imbler*. There simply is no compelling reason to grant the Petition.

B. Convertino did not Perform Investigatory Functions, and Shifting the Timeline Does not Render Convertino's Conduct Investigatory or Otherwise Affect the *Imbler* Analysis

1. Convertino did not perform an investigatory function when he traveled to Jordan or instructed Special Agent Thomas to cease memorializing his interviews with Hmimmsa. This Court employs a "functional approach" when determining whether a prosecuting official enjoys absolutely immunity. *Burns*, 500 U.S. at 486. Using this approach, courts must look to "the nature of the function performed, not the identity of the actor who

performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). Functions that serve as an "integral part of the judicial process" or that are "intimately associated with the judicial process" are absolutely immune from civil suits. *Imbler*, 424 U.S. at 430. Functions that are more "investigative" or "administrative" in nature, because they are more removed from the judicial process, are subject only to qualified immunity. *Burns*, 500 U.S. at 486.

This Court has recognized "that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 fn. 33. "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Id.* Convertino had obtained and reviewed the suspected terrorist sketches long before he departed from the United States on his journey to Jordan, so his conduct was not investigatory in the traditional sense because the government had already discovered this evidence. Rather, Convertino's trip to Jordan served the purpose of further reviewing and evaluating the evidence, a function that *Imbler* clearly considers intimately associated with the judicial process and thus shielded from civil liability.

2. Koubriti attempts to escape *Imbler*'s fatal grasp by shifting the focus from when the purportedly exculpatory evidence was suppressed at trial to a point in time fifteen months earlier when Convertino discovered the divergence of

opinions regarding the suspected terrorist sketches and to a point in time months before trial when Convertino directed Special Agent Thomas to refrain from memorializing interviews with Hmimssa. This temporal shifting approach has already been presented to and rejected by this Court.

This Court made clear in *Buckley v. Fitzsimmons*, *supra*, that "the *Imbler* approach *focuses on the conduct for which immunity is claimed*, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley*, 509 U.S. at 271 (emphasis added). It is imperative at the threshold to clarify the conduct for which immunity is claimed, *i.e.*, the conduct for which Koubriti seeks to impose liability upon Convertino. *Burns*, 500 U.S. at 487. The federal Court of Appeals for the Sixth Circuit correctly analyzed Koubriti's claims as follows:

> The argument made by Koubriti and the district court fails to recognize that Koubriti is not requesting relief for some alleged violation that took place during Convertino's trip to Jordan. There is nothing in the complaint to suggest that Koubriti is arguing that he is entitled to relief here because of some due process violation Convertino committed while he investigated the case in Jordan. That would be a different claim, one that would no doubt *not* need to rely on *Brady*. Instead, what we have in the instant case is an allegation that relies on *Brady* – a case dealing with the non-disclosure at trial

> of exculpatory information – and is based on the non-disclosure of a pertinent fact, not the underlying investigation itself. There is no claim here of evidence fabrication, and it is not the evidence that resulted from the trip of which Koubriti complains. Indeed, it was that evidence which, when finally disclosed, *benefited* Koubriti in obtaining dismissal of his conviction. It was the failure to produce this favorable evidence resulting from the trip so that Koubriti could have relied on it at trial to undermine the government's claim that is the alleged violation underlying this claim.

Koubriti, 593 F.3d at 468-69 (all emphasis in original).

The only conduct for which Convertino claims immunity pertains to Koubriti's two remaining claims that Convertino failed to disclose a divergence of opinion amongst investigators regarding suspected terrorist casing sketches and that he directed Special Agent Thomas not to memorialize interviews with prosecution witness Hmimssa. As the Sixth Circuit rightly noted, Koubriti did not allege that Convertino's *discovery* of the divergent opinions somehow constituted misconduct or wrongdoing. If Convertino never discovered this evidence, then Koubriti would most likely be serving a lengthy prison term. The conduct for which immunity is claimed is the alleged *suppression* of *Brady* material, not its discovery. The concern articulated in *Zahrey* and shared by the district court in this case that a

prosecutor's absolute immunity as an advocate should not "relate back" to the investigatory phase does not apply in this case because, unlike the fabrication of evidence, it is neither misconduct nor wrongdoing to *discover Brady* material during the investigatory phase of a criminal prosecution, so the need to shield such conduct with immunity does not arise in the first instance.

3. Assuming *arguendo* that Koubriti's focus upon Convertino's pretrial conduct is appropriate, Koubriti's *Brady* claim necessarily fails to state a claim upon which relief can be granted. As noted above, there is no legal obligation to disclose *Brady* materials months before trial nor is there any resultant liability for failing to do so. Koubriti faces a formidable dilemma insofar as suppressing evidence during trial could possibly violate his *Brady* rights, but such conduct is protected by absolute immunity. Conversely, suppressing evidence prior to trial might not be protected by absolute immunity, but it does not give rise to a *Brady* violation. Thus, although shifting the focus of the timeline backwards may aid Koubriti's immunity analysis, it is fatal to his *Brady* claim.

4. This Court recently rejected a similar time shifting argument made in an attempt to avoid the bar of absolute immunity. In *Van de Kamp v. Goldstein*, *supra*, the petitioner attempted to avoid the bar of absolute immunity by claiming that the prosecution's failure to disclose impeachment material at trial was the result of the prosecution's pretrial failure to train and supervise Deputy District Attorneys regarding the disclosure of

impeachment material and failure to create a system for Deputy District Attorneys to access information pertaining to impeachment information. *Van de Kamp*, 129 S. Ct. at 861. The Court acknowledged that the petitioner's claims "attack[ed] the office's administrative procedures," *.id*, but nonetheless concluded "that the very reasons that led this Court in *Imbler* to find absolute immunity require a similar finding in this case." *Id.* at 863-64. Koubriti's Petition presents no new question in this regard, and there is no good reason for the Court to revisit this issue, which was recently resolved in *Van de Kamp*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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