No. 25-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Circuit Courts of Appeals are in conflict on the question of whether and when a police officer may be held liable under 42 U.S.C. § 1983 for a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Circuits are also in conflict on the question of whether and when a police officer may be held liable for a fair trial violation based on a criminal court's admission of a witness's in-court identification of the defendant, when it follows an overly suggestive pretrial witness identification procedure, in violation of *Manson v. Brathwaite*, 432 U.S. 98 (1977).

While criminal court judges and prosecutors enjoy absolute immunity from damages for claimed violations of such fair trial rights, police officers do not. Petitioner Donald Olsen, a retired Detroit police detective, investigated a 2003 shooting and was sued in 2018 for $75 million. The district court denied qualified immunity. On interlocutory appeal, a divided Sixth Circuit panel affirmed, with three separate opinions including a full dissent and a lengthy concurrence that questioned the result and identified a conflict with this Court's decision in *Vega v. Tekoh*, 597 U.S. 134 (2022). This petition presents an opportunity to resolve these important questions, which routinely spawn exceedingly costly claims:

I.

Is a police officer liable under 42 U.S.C. § 1983 for the nondisclosure of material exculpatory evidence, absent a showing of bad faith, and was such a right clearly established in 2003 with respect to a police officer who was

investigating a shooting, and who inadvertently did not disclose to the prosecutor a larger version of a mugshot photo of an individual whom the defendant already knew and believed to be the "real shooter"?

II.

Is a police officer liable under 42 U.S.C. § 1983 for violating the fair trial right of a criminal defendant when a criminal court permits a witness to make an in-court identification of the defendant following the officer's overly suggestive pretrial witness identification procedure, and was such a right clearly established in 2003 with respect to a police officer conducting a single-photo show-up where: the identifying victim already knew the defendant he was identifying, neither the prosecutor nor trial judge expressed any constitutional concern, defense counsel did not object at trial to the identification evidence, and a three-judge panel ruled on direct appeal that even if the defendant had objected, the witness's in-court identification of the defendant still would have been admissible without violating Salter's constitutional rights?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioner Donald Olsen is an individual and a retired Detroit police detective.

2. Respondent Aaron Salter is an individual.

3. The City of Detroit was a defendant in the district court but was dismissed, was not a party to the appeal to the Sixth Circuit, and is not a party to this petition.

4. No corporations are parties to the proceedings.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *People of the State of Michigan v. Aaron Terrell Salter*, Wayne County Circuit Court Case No. 03-010860-01-FC (sentenced Jan. 7, 2004);

- *People v. Salter*, No. 253401, 2005 WL 954961 (Mich. Ct. App. Apr. 26, 2005);

- *People of the State of Michigan v. Aaron Terrell Salter*, Wayne County Circuit Court Case No. 03-010860-01-FC (Stipulated Order Vacating Convictions and Sentences, Dismissing Charges, and Ordering Defendant Released from the Michigan Department of Corrections entered August 15, 2018).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Donald Olsen ("Olsen") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

This petition presents two important questions about whether and when a police officer may be held liable for a violation of an accused's fair trial rights—questions on which the circuits are split.

1. *Brady v. Maryland*, 373 U.S. 83 (1963) held that a State violates due process when its prosecutor fails to disclose all material exculpatory evidence to the accused. *Id.* at 87. See also *Strickler v. Greene*, 527 U.S. 263, 280 (1999). The State can violate *Brady* regardless of any particular individual's fault, because it is the State that owes the accused a fair trial, and that means sharing with the accused any exculpatory evidence the State has. See *Brady*, 373 U.S. at 87. Indeed, in *Kyles v. Whitley*, 514 U.S. 419 (1995), this Court held that the State prosecutor has a duty to learn about all exculpatory evidence known to investigating police officers. But there is no civil damages remedy against a prosecutor who breaches this duty, even in bad faith, because prosecutors enjoy absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Police, however, do not. And, notwithstanding that this Court has never imposed the State's *Brady* obligation on individual police officers, several Courts of Appeals have done so, imposing a conflicting hodgepodge of

liability rules (and frequently holding such rules were clearly established). The Third, Fourth, Fifth and Eighth Circuits have permitted claims where police act in bad faith, analogous to *Arizona v. Youngblood*, 488 U.S. 51 (1988), wherein this Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. The Seventh, Ninth, and Tenth Circuits hold that "reckless" nondisclosure of exculpatory evidence is sufficient, with recklessness inferable from apparent exculpatory value. While the Eleventh Circuit rejected a no-fault standard for *Brady* claims against police officers, it has not settled on the liability standard. The First Circuit imposed liability for an intentional or reckless nondisclosure, without settling on the precise standard. And the Second Circuit has suggested, without concluding, that a civil *Brady* claim requires intentional non-disclosure.

But the Sixth Circuit stands alone in holding that a police officer may be civilly sued for a *Brady* violation based on a merely inadvertent nondisclosure. The Sixth Circuit first extended *Brady* duties to police in *Moldowan v. City of Warren*, 578 F.3d 351, 379-81 (6th Cir. 2009), and the decision below dramatically expanded that duty by imposing a negligence standard on police officers. Not only that, the Sixth Circuit held a court of appeals is jurisdictionally barred from considering the core *Brady* legal questions of whether the evidence at issue was material and exculpatory, and whether the exculpatory value would have been readily apparent to a reasonable officer—questions also crucial to assessing qualified immunity. The combined effect of these decisions is to eliminate qualified immunity for *Brady* claims. Indeed,

at the same time the Sixth Circuit ruled Olsen was not entitled to qualified immunity because the law governing his conduct was clearly established more than 20 years ago, the three-judge panel issued three different opinions, with two of the three judges concluding Sixth Circuit law conflicted with this Court's recent decisions.

2. Like its *Brady* ruling, the Sixth Circuit's treatment of Salter's unduly suggestive photo identification also conflicts with precedent from other circuits, including the Second, Seventh, Eighth, and Tenth.

It stands to reason that the Sixth Circuit is an outlier on whether police officers can be held liable under Section 1983 for how a witness identification occurs. This Court has stated that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Manson v. Brathwaite*, 432 U.S. 98, 113 n.13 (1977). Indeed, criminal courts, not police, are responsible for the admissibility of a witness identification. A court determines whether the circumstances of a pretrial identification were so suggestive that it would offend due process to permit the jury to even hear the witness identify the defendant at trial—or whether due process is satisfied by an adversary proceeding in which the identifying witness undergoes vigorous cross-examination, counsel argue about suggestion and reliability, and a jury weighs the evidence and renders a unanimous verdict beyond a reasonable doubt. If a busy trial judge errs in making that due process ruling, the police officer is not the cause. And, where the learned judge erred in that legal judgment, the law was hardly clearly established to the police officer. Indeed, here, a three-judge panel ruled on direct appeal that the witness's

in-court identification was admissible. Nevertheless, after the ruling below, Olsen is subject to trial for damages for having failed to recognize a supposedly clear legal error overlooked by four Michigan judges. Moreover, the reasoning that would permit a constitutional claim against a police officer has been undermined by this Court's decision in *Vega v. Tekoh*, 597 U.S. 134 (2022).

3. These questions are of great importance because of the astronomical damages typically awarded in reverse conviction lawsuits. Many defendants are forced into *in terroram* settlements, and their immunity rights are never vindicated. And there is a fundamental mismatch between the nature of these rights—broad fair trial rights ultimately regulated by prosecutors and the courts—and placing liability on police officers.

OPINIONS AND JUDGMENTS BELOW

On June 2, 2022, the United States District Court for the Eastern District of Michigan entered an opinion and order granting in part and denying in part Olsen's motion for summary judgment. *Salter v. Olsen*, 605 F. Supp. 3d 987 (E.D. Mich. 2022). The district court's opinion and order is reproduced in the appendix. (Pet. App. B).

On March 21, 2025, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming in part and dismissing in part for lack of jurisdiction. *Salter v. City of Detroit*, 133 F.4th 527 (6th Cir. 2025). The Sixth Circuit denied rehearing en banc on May 15, 2025. Both the March 21, 2025 opinion that is the subject of this petition and the order denying rehearing en banc are reproduced in the appendix. (Pet. Appx. A and C).

STATEMENT OF JURISDICTION

The opinion of the Sixth Circuit was originally entered on March 21, 2025. Olsen filed a timely petition for rehearing en banc, which the Sixth Circuit denied on May 15, 2025. On August 11, 2025, Justice Kavanaugh extended the time for filing this petition to September 27, 2025. This Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Aaron Salter ("Salter") seeks damages pursuant to 42 U.S.C. § 1983 for alleged violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution. The relevant constitutional and statutory provisions are reproduced in the appendix to this petition.

STATEMENT OF THE CASE

1. In the early morning hours of August 6, 2003, James Luster, Kimberly Allen, and Michael Payne were sitting on the front porch of a home located on Parkgrove Street in Detroit, Michigan. Pet. App. B at 3-4. Luster heard a gunshot. *Id.* at 4. He saw two men approaching, one with a pistol and the other with a long gun. *Id.* Luster and Payne were both hit and taken to the hospital with gunshot wounds. *Id.* A third nearby victim, Willie Thomas, died from his wounds. See *id.*

Petitioner Detective Donald Olsen of the Detroit Police Department responded to the scene. He later spoke to Luster at the hospital. *Id.* at 4-5. Luster identified one of

the shooters as "Rob," who Luster said was 5'7", 150 to 170 pounds, light brown complexioned, with a thin beard and low-cut hair, and wearing dark clothes. *Id.* at 5. Luster had never seen the other shooter, but he knew Rob from the neighborhood because of "'all the shit he be starting.'" *Id.* Luster explained that earlier in the day, he saw Rob waving a gun as he drove past the Parkgrove home. *Id.* Luster also said that a man named "E" (Earland Collins) had "shot up the house" about a month earlier. *Id.*

After speaking with Luster, Olsen went to the 9th Precinct to do some research on the case, and he pulled Salter's mug shot. *Id.* at 6. Over 15 years later, Olsen did not recall how and why he concluded that Salter was the person—"Rob"—referred to by Luster. See *id.* After Luster was released from the hospital, Olsen visited Luster at home and showed him Salter's mug shot. *Id.* Luster identified Salter's mug shot as Rob and said this was the person who shot him. *Id.*

After Luster identified Salter, Olsen showed Luster a separate photo array with six mug shots. *Id.* At the preliminary examination, Luster testified he picked two people from the array as shooters. *Id.* at 7-8. Luster testified: "'the two people I picked out was him [that is, Salter, whom he had identified in the courtroom] and the other guy, Rob, or whatever[.]'" *Id.* at 8.

Based on Luster's identification of Salter, Olsen filled out an investigator's report and submitted it, along with the homicide file, to the prosecutor's office. *Id.* at 7. The Assistant Prosecuting Attorney in Wayne County recommended an arrest warrant for Salter, and on September 9, 2003, a judge issued a warrant for Salter's arrest. *Id.*

The court conducted a preliminary examination, and both Luster and Olsen testified. *Id.* During the examination, Luster again identified Salter as the shooter. *Id.* According to Luster, Salter looked like the shooter using the long gun. *Id.* Consistent with his witness statement, Luster testified he had seen Salter once or twice before the shooting, including when Salter drove by the house earlier on the day of the shooting waiving a gun. *Id.* And, as noted above, Luster described how he selected two shooters from the six-photo array, Salter and "Rob." *Id.* at 7-8.

At the end of the preliminary examination, Salter's attorney moved to suppress the photo identification of Salter because Olsen showed him the photo "'without doing a photo show-up.'" *Id.* at 8. Salter's counsel argued Olsen should have done a photo array with Salter's picture in it. *Id.* In response, the prosecutor explained Luster said he knew Salter and had "'seen him in the past.'" *Id.* The court denied the motion, holding "'[t]here is no constitutional right to have [an identification] done in a certain way.'" *Id.*

At the criminal trial, both Luster and Olsen testified, and Luster again identified Salter as the shooter. *Id.* In Michigan, a trial court has the discretion to allow a renewed motion to suppress at trial. See *People v. Olajos*, 397 Mich. 629, 635; 246 N.W.2d 828, 830 (1976). A defendant can also object at trial to identification testimony, and failure to do so amounts to a failure to preserve the error. See *People v. Mann*, 89 Mich. App. 511, 514–15; 280 N.W.2d 577, 578–79 (1979). But Salter's attorney did not object at trial. See *People v. Salter*, No. 253401, 2005 WL 954961, at *2 (Mich. Ct. App. Apr. 26, 2005).

On direct examination, Luster testified he picked three people who looked like the shooters from the photos Olsen showed him. Pet. App. A at 27. Luster repeated this on cross examination, insisting four separate times that he picked three people from the photo array. *Id.* But Salter's attorney never asked Luster to re-identify those photos, "so which three of the six Luster claimed to have picked remains unknown." *Id.*

On December 8, 2003, the jury convicted Salter of first-degree murder, two counts of assault with intent to murder, and one count of felony-firearm. Pet. App. B at 8-9. Salter was sentenced to life in prison without parole. *Id.* at 9.

Right after his conviction, Salter drafted a letter to his mother and a letter to the judge who presided over his criminal trial, setting forth his views about the events surrounding the shooting for which he was convicted. In his letter to the judge, Pet. App. F, Salter explained that "Rob" was his cousin and that he knew "E." See *id.* at 1-2. Salter knew the material facts, including that his cousin Rob had been in a shooting altercation with "E." *Id.* at 4-5. Well before his criminal trial, Salter learned "E" was the shooter because his cousin Rob told him. *Id.* at 7; see also Pet. App. A. at 26. Salter's letter to the judge stated: "I happen[ed] to see [R]ob on Sept 29 or 30 he told me not to worry because, he kn[e]w it couldn't be me because 'E' did it[.]" Pet. App. F at 7. Salter also learned from another inmate that "E" Collins was the shooter. *Id.* at 8. Although Salter realized Luster had misidentified him as "E," Salter either did not reveal this to his trial counsel, or his counsel chose not to introduce that evidence in Salter's defense at trial. Pet. App. A at 24. Salter admitted in his letter

that "E" was in the lineup presented to Luster. Pet. App. F at 8. Salter told the judge his lawyer had "given up on" him. *Id.* at 9.

Although the trial judge entered the letter into the record, Salter's appeal did not refer to that information. Pet. App. A at 24. Salter's appeal raised only one issue—ineffective assistance of counsel for failure to exclude Luster's in-court identification. *Id.* at 28. On direct appeal, the Michigan appellate court rejected Salter's claim that the single-photo mugshot violated his constitutional rights. *Id.* at 29.

Nearly fifteen years after Salter's conviction and sentencing, the Conviction Integrity Unit started reviewing Salter's claims of innocence. Pet. App. B at 9. As a result of the investigation, the state court vacated Salter's conviction and dismissed the case pursuant to a stipulation by the parties. *Id.* at 10.

2. Salter then filed a lawsuit against the City of Detroit and Olsen, *id.* at 3, citing 28 U.S.C. §§ 1331 and 1343 as the basis for jurisdiction. In his complaint, Salter raised constitutional claims under 42 U.S.C. § 1983, alleging Fourth Amendment violations for fabrication of evidence, false arrest, and malicious prosecution, *id.*, and due process claims for: (1) failing to turn over evidence pointing to another suspect in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) using a single-photo show-up during the criminal investigation (i.e., by presenting Luster with a single-person show-up consisting only of Salter's black-and-white mug shot). Pet. App. A, at 5, 7, 10. Salter also raised a state law malicious prosecution claim. Pet. App. B at 3. Salter demanded $75 million. Pet. App. A at 29.

Salter's *Brady* claim was premised on his allegation that a larger closeup photo of "E" Collins was in the Detroit Police Department file but never disclosed to the prosecutor by Olsen. Pet. App. B at 9. The photo array had already included a smaller photo of "E" Collins. See *id.* at 27. Salter acknowledged at deposition that he and his lawyer received a discovery pack from the prosecutor in the criminal case, which contained Luster's witness statements, police reports, autopsy reports, a mugshot of Salter, and a six-picture photo array, but disputed receipt of the larger photo. Pet. App. E at 86-87.

After discovery, Olsen moved for summary judgment and invoked qualified immunity. Pet. App. A at 5. The district court granted summary judgment in Olsen's favor on all but two of Salter's claims: his *Brady* claim and his unduly-suggestive-identification claim. Pet. App. B at 44.

3. On Olsen's interlocutory appeal of the denial of immunity, the Sixth Circuit affirmed in part and dismissed in part in three different opinions: the majority, a concurrence, and a dissent. Pet. App. A.

a. As to Salter's *Brady* claim, the court held Salter need only show Olsen withheld the evidence inadvertently and an officer's *Brady* violation does not require bad faith. *Id.* at 8-9. The court also held a "*Brady*-derived" duty to disclose applied to police officers even before 1990, making the right clearly established. *Id.* at 9. The court held it lacked jurisdiction to consider whether it would have been clearly established to police in 2003 that the particular evidence at issue was favorable and material in the context of Salter's case, on the ground that those determinations "present 'mixed' questions of law and fact." *Id.* at 9.

As for the suggestive identification claim, the court held the single-person show-up supported Salter's suggestive identification claim because the show-up "appeared in evidence at Salter's criminal trial." *Id.* at 14. The Court agreed with the district court that it was "clearly established" in 2003 that a single-person show-up was "constitutionally impermissible." *Id.* at 15. The court then held Olsen was not entitled to qualified immunity on Salter's suggestive identification claim. *Id.* at 17.

b. Judge Nalbandian concurred. Pet. App. A at 18-23. Judge Nalbandian stated his disagreement with Sixth Circuit precedent regarding police liability for *Brady* violations, *id.* at 18, and with the Sixth Circuit's crabbed view of its jurisdiction on interlocutory review of qualified immunity, *id.* at 21-22, which "has undermined the effectiveness of [the court's] review of qualified immunity." *Id.* at 18.

Judge Nalbandian explained that while "[a] review of materiality is essential to determine whether the plaintiff has alleged a constitutional violation[,]" the majority's refusal to consider the materiality question "insulate[d] the district court's decision from review at the only time that matters for qualified immunity—that is, before the official has endured a suit." *Id.* at 23. According to Judge Nalbandian, if the court truly lacks jurisdiction, then the court's review of denials of qualified immunity in *Brady*-derived claims "is rendered toothless." *Id.* As for the clearly established element of qualified immunity, Judge Nalbandian explained that *Moldowan* "only cited cases from three circuit courts holding that the police's *Brady*-derived obligations were clearly established by 1990. To my mind, three circuits doesn't represent a consensus, much less a robust one." *Id.* at 20-21 (citation omitted).

As for the suggestive identification claim, Judge Nalbandian observed that "recent Supreme Court precedent fatally undermines 42 U.S.C. § 1983 suits based on unduly suggestive identification procedures. These protections, like *Miranda*, are prophylactic rules that do not create a right to sue under § 1983." Pet. App. A at 18. Citing this Court's recent decision in *Vega v. Tekoh*, 597 U.S. 134 (2022), Judge Nalbandian explained that *Vega*'s reasoning—that a failure to follow *Miranda* is not a constitutional violation that gives rise to a claim under § 1983—applies to suggestive identification claims. Pet. App. A at 19.

In addition, Judge Nalbandian pointed out the majority based its conclusion about unduly suggestive photo identifications on *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006), but that decision rested on shaky grounds. *Id.* at 18. Namely, *Gregory* erroneously imposed liability on police officers, where "the Supreme Court has only required *courts* to conduct such an inquiry to determine whether an identification is reliable despite being tainted by a suggestive procedure." *Id.* at 18-19, citing *Perry v. New Hampshire*, 565 U.S. 228, 239 (2012).

c. Judge Batchelder dissented. Pet. App. A at 24-34. Her dissent pointed out that based on the undisputed facts, the claimed undisclosed evidence was not material. See *id.* at 31-32. Judge Batchelder explained that Salter and his counsel "'were aware of the essential facts' that allowed them to take advantage of the exculpatory evidence (i.e., that Collins was the shooter), so the larger picture of Collins was not *Brady* material." *Id.* at 30. Well before trial, "Salter learned from both his cousin and an inmate

he met in prison that E Collins was the shooter, and Salter realized that Luster had misidentified him as E Collins, or had falsely accused him." *Id.* at 24. Yet this information was not introduced at trial. *Id.* at 27. Since Luster testified at trial that he identified three individuals from Olsen's photo array, Judge Batchelder explained: "Had Salter's attorney simply asked Luster, 'Who?'," Luster would have identified "E" Collins. *Id.* at 31-32.

On the suggestive identification claim, Judge Batchelder reasoned either the use of a single-photo identification in these circumstances was not a clearly established violation (since the prosecutor, trial court, and appellate court used the identification, did not exclude it from trial, and did not reverse the conviction on that basis), or, even if it was, there was a causation problem. *Id.* at 32-33. Judge Batchelder stated: "Even if Det. Olsen had made a clear and unmistakable constitutional error, the third parties' (i.e., prosecutor, trial court, appellate court) failure to admit and remedy that obvious error was the proximate cause of Salter's injury[.]" *Id.* at 34.

Judge Batchelder emphasized that because the material facts are not contested, the court had jurisdiction to decide the interlocutory appeal and Olsen "is entitled to qualified immunity on the plain law and uncontested facts." *Id.* at 34.

ARGUMENT

I. The Sixth Circuit's *Brady* decision conflicts with decisions from this Court and other circuits in an area of exceptional importance to the public

The Sixth Circuit: entered a decision in conflict with the decisions of other United States Courts of Appeals on the same important matter, and decided a federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(a) and (c).

A. The Sixth Circuit's ruling that a police officer may be held liable for an inadvertent nondisclosure of *Brady* evidence exacerbates a circuit split about police duties regarding exculpatory evidence

A prosecutor is the "architect" of the criminal proceeding and must "comport with standards of justice" when acting on behalf of the state. *Brady*, 373 U.S. at 88. In *Kyles*, this Court stressed that this responsibility obligates the prosecutor to learn about material exculpatory evidence known to the police, and to turn over that evidence to the accused—and that the State violates due process when that duty is breached, regardless of fault. *Kyles* did not, however, impose any *Brady* duty on individual police officers. That said, this Court has allowed that police have some obligations respecting exculpatory evidence. In *Youngblood*, this Court stated that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58. *Youngblood*'s bad faith

requirement is consistent with this Court's repeated holdings that negligence by a state actor is not actionable as a due process violation under 42 U.S.C. § 1983. *Daniels v. Williams*, 474 U.S. 327 (1986); *Allen v. Cooper*, 589 U.S. 248, 261 (2020). And it is a far cry from *Brady*'s no-fault regime.

In the face of the divergent culpability standards of *Brady* and *Youngblood*, and *Kyles*' command to the prosecutor to learn about exculpatory evidence known to the police, the Circuit courts have adopted conflicting rules about when police officers may be held liable for a nondisclosure of exculpatory evidence, with the Sixth Circuit below adopting the most extreme view that police may be held liable for a negligent nondisclosure of material exculpatory evidence. *Salter*, 133 F.4th at 536; *Moldowan*, 578 F.3d at 388–89.

Several other circuits expressly require evidence of bad faith. In *Villasana v. Wilhoit*, 368 F.3d 976, 979-980 (8th Cir. 2004), the Eighth Circuit relied on *Youngblood* to conclude that the "few decisions in other circuits purporting to extend '*Brady* liability' to police officers have involved claims of intentional or bad faith failure to disclose *Brady* material to the prosecutor or to the defense." *Id.* at 980. Thus, the Eighth Circuit rejected a *Brady*-derived claim against a lab technician absent a conscious effort to suppress exculpatory evidence. *Id.*, citing *California v. Trombetta*, 467 U.S. 479, 488 (1984). The Eighth Circuit also recognized "[t]he Supreme Court has never imposed th[e] absolute duty [under *Brady*] on law enforcement officials other than the prosecutor." *Villasana*, 368 F.3d at 979. See also *Helmig v. Fowler*, 828 F.3d 755, 760 (8th Cir. 2016) ("an investigating officer's

failure to disclose exculpatory evidence does not constitute a *Brady* violation in the absence of bad faith.").

Likewise, the Fourth Circuit requires bad faith on behalf of a police officer to make out a *Brady* claim. See *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 396–97 (4th Cir. 2014). In *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000), a plurality of the en banc Fourth Circuit explained that "[a] *Brady* violation that resulted in the overturning of the § 1983 plaintiff's conviction is a necessary, but not a sufficient, condition for § 1983 liability on the part of the police." *Id.* at 663 (Wilkinson, J., concurring). The *Brady* violation is not a sufficient condition for imposition of liability because the *Brady* duty:

> is a no fault duty and the concept of constitutional deprivation articulated in both *Daniels* and *Youngblood* requires that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial. This is what is meant by "bad faith." *Id.*

Similarly, the Fifth Circuit has identified the standard for police officers as one of deliberate concealment. See *Brown v. Miller*, 519 F.3d 231, 237–38 (5th Cir. 2008) ("The Supreme Court held in *Brady v. Maryland* that a criminal prosecutor's failure to disclose exculpatory evidence . . . violates a defendant's right to a fair trial. A police officer's deliberate concealment of exculpatory evidence violates this same right, and can give rise to liability under § 1983."). The Third Circuit holds police are liable "when they affirmatively

conceal material evidence from the prosecutor." *Gibson v. Superintendent of NJ Dep't of L. & Pub. Safety-Div. of State Police*, 411 F.3d 427, 443 (3d Cir. 2005) (overruled on other grounds).

Meanwhile, the Seventh, Ninth, and Tenth Circuits require only a "reckless" nondisclosure. See *Moran v. Calumet City*, 54 F.4th 483, 493 (7th Cir. 2022) ("negligent conduct does not offend the Due Process Clause. . . . evidence is considered suppressed in a § 1983 suit only if a police officer acted intentionally or at least recklessly in failing to turn it over to the prosecution" (quotations omitted)); *Tennison v. City & Cnty. of San Francisco*, 570 F.3d 1078, 1089–90 (9th Cir. 2009) ("a § 1983 plaintiff 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 from prosecutors. . . . Plaintiffs are not required to establish that the Inspectors acted in bad faith"); *Tiscareno v. Anderson*, 639 F.3d 1016, 1023 (10th Cir. 2011) (vacated in part on other grounds) ("in a § 1983 context, all that is clearly established is that an investigator must not knowingly or recklessly cause a *Brady* violation.").

Without precisely defining the requisite culpability, the Eleventh Circuit has held "a negligent act or omission cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a *Brady* violation." *Porter v. White*, 483 F.3d 1294, 1308 (11th Cir. 2007); *id.* at 1308 n.11 (declining to consider whether "'something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.'"). In *Bellamy v. City of New York*, 914 F.3d 727 (2d Cir. 2019), the Second

Circuit explained it has suggested, without concluding, "that a civil *Brady* claim requires a showing that the non-disclosure was intentional." *Id.* at 751 n.23. And the First Circuit affirmed a jury verdict of liability where an officer "'intentionally or recklessly withheld exculpatory evidence,'" *Drumgold v. Callahan*, 707 F.3d 28, 45 (1st Cir. 2013), while commenting that "[n]on-disclosure [by a law enforcement officer] with a less culpable state of mind [than deliberate suppression] might suffice" and that "[t]his is a difficult question that has engendered a range of views." *Id.* at 43 n.10, citing *Tennison*, *Porter*, and *Villasana*.

But the Sixth Circuit is the only circuit to have held that an "inadvertent[]" nondisclosure of material exculpatory evidence is sufficient to hold a police officer liable under Section 1983. Pet. App. A at 8; *id.* at 9 ("we have rejected the proposition that an officer's *Brady* violation requires 'bad faith.'"). In the decision below, the Sixth Circuit extended its earlier holding in *Moldowan*, that where the exculpatory value of a piece of evidence is "apparent," "no further showing of animus or bad faith is required[.]" *Moldowan*, 578 F.3d at 388 (emphasis omitted). See also *Clark*, 130 F.4th at 579.

In his concurrence in *Clark*, Judge Murphy recognized the "circuit split on this intent element." *Clark*, 130 F.4th 590 (Murphy, J., concurring). See also 37 Champion 58, 62, 37-MAY Champion 58, 62 (discussing *Brady* claims against police officers and stating "[t]he circuit courts disagree over the level of culpability necessary to establish[] a *Brady* violation for § 1983 purposes.").

The better view is the standard adopted by the Third, Fourth, Fifth, and Eighth Circuits, requiring

proof that a police officer concealed evidence in bad faith. This is congruent with the standard this Court adopted in *Youngblood*, 488 U.S. at 58. That view also aligns with this Court's established precedent that "[l]iability for negligently inflicted harm is categorically beneath the constitutional due process threshold[.]" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998).

A bad faith standard for police liability is especially appropriate given that the right at issue is a due process right to a fair trial—and the institutional guarantors of that right are prosecutors and the courts, not police. This Court has refused to "substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, 514 U.S. at 438. A prosecutor is the "architect" of the criminal proceeding and must "comport with standards of justice" when acting on behalf of the state. *Brady*, 373 U.S. at 88. "[P]olice officers . . . do not make . . . intentional prosecutorial decisions." *Clark*, 130 F.4th at 592 (Murphy, J., concurring). Rather, the absolute duty under *Brady* is uniquely tailored to prosecutors—it is the prosecutor, not police officers, who is trained to determine whether a piece of evidence is material and exculpatory (and unknown to the defense). It makes sense to impose *Brady*'s absolute duty on the government official "who will present the State's case at trial, who can be expected to gather material evidence from law enforcement agencies, and who is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense." *Villasana*, 368 F.3d at 979. It is inappropriate to impose a duty on police to evaluate and determine whether certain evidence is exculpatory or material because "their job of gathering

evidence is quite different from the prosecution's task of evaluating it." *Jean*, 221 F.3d at 660 (Wilkinson, J., concurring in the judgment). This is especially true "because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context." *Id.*

Broadening the reach of the no-fault duty to include police officers also is not necessary. Police officers "already have an independent duty—though not a *Brady* duty—not to conceal materially exculpatory evidence in bad faith." *Moldowan*, 578 F.3d at 402 (Kethledge, J., concurring in the judgment in part and dissenting in part). The Circuit courts' expansion of that standard beyond bad faith has produced a flood of lawsuits against police officers, who have become the natural and exclusive targets of these fair trial claims, given police do not share the absolute immunity that shields prosecutors and judicial officers. Imposing a "one size fits all" absolute duty on both prosecutors and police, while simultaneously affording only prosecutors absolute immunity, "would multiply exponentially litigation against even conscientious officers[,]" *Jean*, 221 F.3d at 661 (Wilkinson, J., concurring in the judgment)—and it has.

Review is needed to resolve the circuit split and ensure the circuits are not requiring police officers, rather than prosecutors and the courts, to be the insurers of a fair trial.

B. Review is needed to address the Sixth Circuit's flawed qualified immunity analysis on the *Brady* issue

1. Review by this Court is needed to consider whether a court of appeals categorically lacks jurisdiction on an interlocutory appeal to review the materiality and favorability elements of a *Brady* claim

This Court has repeatedly made clear—especially to the Sixth Circuit—that jurisdiction on a qualified immunity interlocutory appeal extends to making rulings about what law would be clearly established to a reasonable officer, given the factual record with all evidentiary disputes resolved in favor of the plaintiff. *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014); *Scott v. Harris*, 550 U.S. 372, 380–81 (2007). Nevertheless, the Sixth Circuit again held below that jurisdictional concerns prevented it from ruling on the dispositive question for qualified immunity: whether it was clearly established to a police officer that, given the specific facts he faced, he was violating the Constitution. See *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." (quotations and citations omitted)). Whether evidence was material or exculpatory under *Brady*—including whether it was already known to the defense—depends very much on the factual context of the case. See *Skinner v. Switzer*, 562 U.S. 521, 536 (2011) ("*Brady* evidence is, by definition, always favorable to the defendant and material to his guilt or punishment."). The fact that certain constitutional

rulings, like *Brady* rulings, are fact-bound does not support *denying* immunity; it supports *granting* it. See *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (explaining that in "an area of the law 'in which the result depends very much on the facts of each case,' . . . police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."). A court cannot decide whether a constitutional duty to disclose evidence was clearly established without considering the factual context.

Thus, the Sixth Circuit's jurisdictional concern was misplaced. The court mistook the fact-bound nature of a *Brady* ruling (a mixed issue of law and fact) for the type of factual dispute this Court held unreviewable in *Johnson v. Jones*, 515 U.S. 304 (1995). But *Plumhoff* held *Johnson* concerned appellate jurisdiction over mere questions of evidentiary sufficiency; it did not prevent review of legal issues of the sort that are "a core responsibility of appellate courts[.]" *Plumhoff*, 572 U.S. at 765–66. Even for fact-bound rulings, a court simply resolves evidentiary disputes about the historical facts in favor of the plaintiff and then makes a legal ruling whether then-clearly established law prohibits the conduct. *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996) ("*Johnson* surely does not mean that every such denial of summary judgment is nonappealable.").[1]

Had the Sixth Circuit done that, it would have found immunity on this record. As Judge Batchelder's dissent

1. Other circuits identify the materiality inquiry as one of law. See *United States v. Cloud*, 102 F.4th 968, 979 (9th Cir. 2024); *United States v. Pettiford*, 627 F.3d 1223, 1227 (D.C. Cir. 2010).

pointed out, based on the undisputed facts, the claimed undisclosed evidence was not material. See Pet. App. A at 34. The evidence (i.e., the larger photo of "E" Collins) was not exculpatory or material because it was a duplicative photo of a suspect known to Salter.

The Sixth Circuit's unduly constricted view of its jurisdiction resulted in entirely omitting consideration of materiality even when, as here, it is a legal determination based on the undisputed facts, and crucial to assessing whether a constitutional obligation was clearly established in this context.[2] That creates real-world problems for government officials appealing the denial of qualified immunity. The decision deprives officials of relief in all cases where a district court erred about whether alleged *Brady* evidence was exculpatory or material, "insulat[ing] the district court's decision from review at the only time that matters for qualified immunity[.]" Pet. App. A at 23.

The Sixth Circuit is not the only circuit that would benefit from review. "*Johnson* has created persistent confusion as courts of appeals . . . have struggled to reconcile its apparent holding with the purpose of qualified immunity. [Citing cases.] The confusion in our sister circuits is matched in our own circuit." *Estate of Anderson v. Marsh*, 985 F.3d 726, 737 (9th Cir. 2021) (Fletcher, J., dissenting).

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2. The Sixth Circuit's decision also "conflicts with [this] Court's approach to excessive-force claims[,]" wherein this Court "has treated as a 'legal issue[ ]' the question whether the evidence about a state actor's conduct (interpreted in the plaintiff's favor) violates the Fourth Amendment." *Clark*, 130 F.4th at 587 (Murphy, J., concurring).

2. Review by this Court is needed to consider whether it was clearly established in 2003 that *Brady* imposed any obligation on police officers—let alone for an inadvertent nondisclosure on facts like these

This Court's case law has not clearly established any *Brady* obligation on police, even today. *Kyles* did not impose any duty on police. Instead, this Court explained in *Kyles* that to comply with *Brady*, "*the individual prosecutor* has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437 (emphasis added). Even *Youngblood* did not concern disclosure of exculpatory evidence, but rather, the failure to preserve evidence in bad faith. Circa 2003—at the time of the events in this case—anything less than bad faith could not be actionable.

And no precedent from this Court clearly established that on the specific facts here, the evidence (a duplicative photo of an individual already known to Salter) was material or exculpatory. This Court has repeatedly emphasized that government actors are protected by qualified immunity unless "existing precedent" has placed the unconstitutionality of their actions "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

This Court has not definitively stated whether anything other than this Court's own decisions can clearly establish the law for purposes of qualified immunity. At least seven times in the last fifteen years this Court has questioned whether circuit court precedent would suffice. See *D.C. v. Wesby*, 583 U.S. 48, 66 n.8 (2018);

Carroll v. Carman, 574 U.S. 13, 17 (2014); *City & County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 614 (2015); *Kisela v. Hughes*, 584 U.S. 100, 106 (2018); *City of Escondido, Cal. v. Emmons*, 586 U.S. 38, 43 (2019); *Reichle v. Howards,* 566 U.S. 658, 665-666 (2012); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021).

Yet here the Sixth Circuit cited no Supreme Court precedent holding *Brady* applied to police officers as of 2003—and there was none. Instead, the court relied on two Sixth Circuit decisions, *Moldowan* and *Clark*. But *Moldowan*—the first Sixth Circuit case stating such a duty could exist—was not issued until 2009. And *Clark* was issued in 2025. But when Detective Olsen engaged in the complained-of conduct in 2003, a constitutional duty based on mere inadvertence was not clearly established. There was no such "existing precedent." *al-Kidd*, 563 U.S. at 741 The court in *Clark* even acknowledged that "*Brady* and the Supreme Court cases applying it have imposed the disclosure duty on 'prosecutors,' not investigators like police officers or forensic scientists." *Clark*, 130 F.4th at 582.

To the extent a "'robust consensus of cases of persuasive authority' could itself clearly establish" a *Brady* obligation on police officers, *Sheehan*, 575 U.S. at 617, no such consensus existed here as of 2003. The Sixth Circuit below relied on its previous 2009 *Moldowan* decision to hold otherwise—but *Moldowan* cited cases from just three circuits to hold that the police's *Brady*-derived obligation was clearly established as of August 1990. See *Moldowan*, 578 F.3d at 382. Three circuits is hardly "robust," nor were the three cited decisions in "consensus" that a police officer's *Brady* violation could flow from mere

inadvertence. One case discussed the *Brady* obligation in the context of *deliberate* concealment, holding: "attempts to circumvent the rule of that case [*Brady*] by retaining records in clandestine files *deliberately concealed* from prosecutors and defense counsel cannot be tolerated." *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988) (emphasis added). And the cited decision *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), involved a failure-to-disclose claim against a prosecutor, not a law enforcement officer. See *id.* at 1349.

Other circuits have correctly ruled no such consensus existed regarding police having *Brady*-derived constitutional obligations and have recognized qualified immunity. See *Gibson*, 411 F.3d at 444 ("Because such a right was not clearly established in this Circuit at the time of Gibson's conviction [in 1994], Troopers Pennypacker and Reilly are entitled to qualified immunity with regard to their failure to inform the prosecutor of *Brady* material.").

Review by this Court is needed because Salter has not shown that Olsen violated his due process rights under clearly established law. If *Brady* applies to police officers at all, at a minimum, something more than mere inadvertence is required to support a *Brady*-derived claim. There is no indication that any case as of 2003 clearly established that a police officer was bound to disclose as material exculpatory evidence the type of evidence involved here—i.e., a larger mugshot of an alternative perpetrator already known to a criminal defendant.

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

A. The circuits are split on whether Section 1983 bars claims against police officers based on unduly suggestive identification procedures

Like its *Brady* ruling, the Sixth Circuit's holding that a police officer may be sued under Section 1983 for an unduly suggestive identification procedure that precedes an in-trial identification also conflicts with precedent from several other circuits, including the Second, Seventh, Eighth, and Tenth. See *Wray v. City of New York*, 490 F.3d 189, 193 (2d Cir. 2007) ("[i]n the absence of evidence that Officer Weller misled or pressured the prosecution or trial judge, we cannot conclude that his conduct [related to the use of an unduly suggestive show-up identification] caused the violation of Wray's constitutional rights"); *Blackmon v. Jones*, 132 F.4th 522, 526 (7th Cir. 2025) ("Blackmon has not cited, and we have not found, any appellate decision holding police officers liable in damages when judges allowed prosecutors to introduce suggestive identifications into evidence at trial"); *Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir. 1987) ("[t]he rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under § 1983"); *Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000) ("The jurisprudential doctrine . . . against the admission of unduly suggestive lineups is only a procedural safeguard, and does not establish a

constitutional right to be free of suggestive lineups"); *Johnson v. City of Cheyenne*, 99 F.4th 1206, 1220 (10th Cir. 2024) ("[n]either the Supreme Court nor this Court has decided that a one-photo array . . . is unduly suggestive per se.").

In conflict with the above decisions in other circuits, here the Sixth Circuit held that "[b]ecause 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." Pet. App. A at 14; see also *Caldwell v. City and Cnty. of San Francisco*, 889 F.3d 1105, 1113-1114 (9th Cir. 2018) (permitting a "fabrication of evidence" claim to proceed against an officer based on an alleged single-person show-up).

B. The Sixth Circuit's decision conflicts with this Court's decisions holding that the obligation to exclude identifications based on unduly suggestive pre-trial identification procedures is a prophylactic rule enforced by the *courts*

The Sixth Circuit's decision also conflicts with this Court's precedent. In *Perry v. New Hampshire*, 565 U.S. 228 (2012), this Court explained that even if the police use an unnecessarily suggestive identification procedure, it is the job of the *court* to consider whether the identification procedure "so tainted the resulting identification as to render it unreliable and therefore inadmissible." *Id.* at 235. This Court in *Perry* cited to *Neil v. Biggers*, 409 U.S. 188 (1972), wherein this Court stated that "the admission of evidence of a showup without more does not violate due process." *Id.* at 198.

Criminal courts, and not the police, are responsible for the admissibility of a witness identification. It is the court that determines whether a pretrial identification was so suggestive that it offends due process to allow the jury to hear the witness identify the defendant at trial. An error by a busy trial judge is not caused by the police officer. A court may determine that even where a suggestive pretrial identification procedure was used, due process may still be satisfied by an adversary proceeding where the identifying witness is subject to vigorous cross-examination, counsel argue about suggestion and reliability, and a jury weighs the evidence and renders a verdict. Here, Salter's attorney argued to the jury that Luster's identification was unreliable because of the identification procedure used. *People v. Salter*, No. 253401, 2005 WL 954961, at *2 (Mich. Ct. App. Apr. 26, 2005). But the jury disagreed and convicted. No due process violation by Olsen could have occurred.

This Court's more recent decision in *Vega v. Tekoh*, 597 U.S. 134 (2022) confirms the prophylactic nature of the judicially created rule against admitting an in-court identification that follows unduly suggestive identification procedures. In *Vega*, this Court held a plaintiff may not bring an action against a police officer under § 1983 "based on the allegedly improper admission of an 'un-*Mirandized*' statement in a criminal prosecution." *Id.* at 138. This Court explained that the *Miranda* rules are "prophylactic rules" used to protect the right under the Fifth Amendment against self-incrimination. *Id.* at 149. Thus, "a violation of *Miranda* does not necessarily constitute a violation of the Constitution[.]" *Id.* at 150.

Vega's reasoning applies in suggestive identification cases. This Court's statement in *Manson v. Brathwaite*,

432 U.S. 98 (1977) is proof. In *Manson*, this Court explained that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113 n.13. Like *Miranda*, the judicially created protection against suggestive identification procedures, is a "prophylactic rule," and—contrary to the Sixth Circuit's holding in this case—violation of the rule does not necessarily violate the Constitution.

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

Detective Olsen should have been protected with qualified immunity as applied to Salter's claim based on a purportedly unduly suggestive identification, because no clearly established law would have told all reasonable officers the single photo identification procedure violated the law. As Judge Batchelder said in her dissent, either the use of a single photo identification was not a clearly established constitutional violation, or Olsen's use of it was not the proximate cause of any constitutional injury. Pet. App. A at 32-33 ("[w]hile it is more likely that the premise is not true (i.e., it was *not* clearly established to a reasonable officer in 2003 that this single-photo identification was unconstitutional), even if that premise were true, there is a causation problem here[.]").

The Sixth Circuit here relied on *Gregory*, which in turn relied on *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993), to purportedly clearly establish the law. But *Hutsell* rejected claims based on allegedly suggestive identification procedures absent extraordinary circumstances. See *id.* at 1005 ("plaintiff is not challenging a violation of the core right to a fair trial, but merely the purported violation of a

prophylactic rule . . . Nor has he alleged any extraordinary circumstances which would give rise to a constitutional violation.").

The Sixth Circuit also relied on *Stovall v. Denno*, 388 U.S. 293 (1967). But *Stovall* specifically held that the use of a one photo show-up, while suggestive, did *not* deprive the plaintiff of due process. See *id.* at 301–02. Nor did *Webb v. Havener,* 549 F.2d 1081 (6th Cir. 1977) clearly establish the law, where the identifying witnesses in *Webb* never indicated they knew the assailant from previous contacts, and the assailant had already been arrested. *Webb* also had a dissent and concurrence disfavoring application of a strict exclusionary rule precluding evidence of unnecessarily suggestive confrontations.

Neither *Stovall* nor *Webb* clearly established a rule that police cannot do a one photo show-up. Numerous courts before 2003 and since have upheld the use of one person show-ups when the witness indicates they know the person. See, e.g., *Heltzel v. Cowan*, 518 F.2d 851 (6th Cir. 1975) (one-on-one show-up did not constitute abuse of constitutional rights where circumstances involved "assailant previously known to the victim and a shooting at close range in broad daylight[,]" *id.* at 853); *Cooley v. Lockhart*, 839 F.2d 431, 432 (8th Cir. 1988) (due process rights not violated by victim's in-court identification of defendant, even where pre-trial identification occurred as a result of one person show-up, where victim had earlier encounters with assailant); *United States v. Hefferon*, 314 F.3d 211 (5th Cir. 2002) (one-on-one show-up did not violate due process where victim had prior knowledge of assailant); *Wallace v. State*, 249 N.E.3d 648, 655 (Ind. Ct. App. 2024) (no due process violation as a result of one person show-up where victim recognized assailant).

It defies logic to hold the accused's fair trial rights were clearly established here—such that every reasonable police officer would be aware he was violating those rights with a faulty identification procedure—where four Michigan judges reviewed this identification procedure and found no violation of Salter's constitutional rights.

III. These questions are of great importance because of the enormous liability at stake for wrongful conviction claims

The above questions are of great importance because of the enormous liability at stake in civil lawsuits that often follow reversed convictions. See, e.g., *McCann II v. Fuller*, 2023 WL 11015109 ($14,500,000 verdict in favor of plaintiff in civil lawsuit against state trooper alleging violation of due process under Fourteenth Amendment after the plaintiff's conviction was vacated; in the civil lawsuit, the police officer asserted entitlement to qualified immunity). Many defendants in these cases are forced into *in terroram* settlements. See Elliott Averett, An Unqualified Defense of Qualified Immunity, 21 Geo. J.L. & Pub. Pol'y 241, 265–66 (2023) ("Local governments routinely settle Section 1983 cases filed against the officers they employ for purely financial reasons. . . . for defendants, a settlement offer is often the only fiscally responsible choice when qualified immunity is denied."). The settlement amounts often total millions of dollars. See *Sierra v. Guevara et al.*, 2025 WL 2331477 ($17,500,000 settlement); *Ezell v. Cassidy et al.*, 2024 WL 5426450 ($12,500,000 settlement); *Bolden v. Pesavento et al.*, 2021 WL 12329312 ($22,000,000 settlement).

The amounts of these settlements can be more reflective of the risks and difficulties of defending

against such claims, than of the merits. Convictions can be reversed for reasons having nothing to do with police misconduct. But any formerly convicted person can then allege misconduct by police, who—lacking the absolute immunity of prosecutors and judges—are the best targets for these lawsuits. See, e.g., *Caldwell,* 889 F.3d at 1108 n.1 (plaintiff whose murder conviction was vacated based on ineffective assistance of counsel filed § 1983 suit alleging investigating peace officers caused his conviction); *Hernandez v. Terrones*, 397 F. App'x 954, 961 (5th Cir. 2010) (after obtaining habeas corpus relief on grounds of ineffective assistance of counsel, plaintiff filed § 1983 suit against several police officers alleging wrongful arrest, prosecution, and conviction); *Montoya v. Vigil*, 898 F.3d 1056, 1061–62 (10th Cir. 2018) (after Montoya filed petition for post-conviction relief, and state confessed error on ineffective assistance of counsel petition in exchange for guilty plea, Montoya brought § 1983 action against detectives claiming Fourth and Fifth Amendment violations). By the time such suits are filed, key witnesses may be deceased or unwilling to testify, creating serious obstacles to officers attempting to defend against such claims. See, e.g., *Caldwell,* 889 F.3d at 1108 n.3 (witness to 1990 homicide, who could have testified whether one-person show-up actually occurred as alleged by plaintiff and disputed by police officers, died in 1998; plaintiff filed suit in 2012).

During the last decade (2014-2025), the City of Detroit handled 46 lawsuits arising out of reverse convictions. All of those lawsuits included *Brady* claims for the suppression of exculpatory evidence. In those cases, the City of Detroit paid out approximately $75.8 million in financial settlements and arbitration awards. A $10 million adverse jury verdict is also pending in the Sixth Circuit.

From 2021-2025, the average payout for a City of Detroit reverse conviction lawsuit settlement has been $8 million. Currently, the City of Detroit has 22 reverse conviction lawsuits in litigation.

The multimillion-dollar settlements and verdicts in these wrongful conviction cases, combined with the obvious circuit split on two key, recurring issues in such cases—*Brady* claims and unduly suggestive identification procedure claims—emphasizes the importance of these issues and the need for guidance from this Court.

CONCLUSION

Wherefore, 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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September 26, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MARCH 21, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1656

AARON SALTER,

Plaintiff-Appellee,

v.

CITY OF DETROIT, MICHIGAN,

Defendant,

DONALD OLSEN,

Defendant-Appellant.

Argued: June 13, 2024
Decided and Filed: March 21, 2025

OPINION

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit
No. 4:18-cv-13136—Victoria A. Roberts, District Judge.

Before: BATCHELDER, NALBANDIAN, and
BLOOMEKATZ, Circuit Judges.

Appendix A

BLOOMEKATZ, J., delivered the opinion of the court in which NALBANDIAN, J., concurred. NALBANDIAN, J. (pp. 542-45), delivered a separate concurring opinion. BATCHELDER, J. (pp. 545-53), delivered a separate dissenting opinion.

BLOOMEKATZ, Circuit Judge. Aaron Salter spent 15 years in prison for a deadly shooting he did not commit. Salter's conviction rested on a single eyewitness's testimony identifying him as one of two shooters. There was no physical evidence or other witness tying Salter to the murder. Instead the eyewitness identified Salter when the lead investigator, Detective Donald Olsen, showed him a single mug shot of only Salter and said that police had already arrested one of the shooters. That same eyewitness testified that he also identified a different man as the shooter from a photo array. And that man more closely resembled the witness's description of the shooter than Salter. The investigator's file also contained a separate closeup photo of that man, suggesting he was a suspect. Salter claims that Detective Olsen failed to disclose any of this information, leading to an unfair trial and his wrongful conviction.

In this civil rights lawsuit, Salter contends that Detective Olsen violated his constitutional rights in two ways: *first,* by withholding favorable evidence pointing to a different suspect, in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); and *second,* by conducting an unnecessarily suggestive identification process that led to the eyewitness's false identification of Salter. Detective Olsen moved for summary judgment

on both these claims, arguing that he was entitled to qualified immunity. The district court denied the motion, and Detective Olsen appealed.

Because we do not have interlocutory jurisdiction over several aspects of this appeal, we dismiss in part. For the parts we review on the merits, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

In the early morning hours of August 6, 2003, Jamar Luster and two of his friends were "hanging out, drinking, and 'getting high'" on a porch in Detroit, Michigan. Op. & Order, R. 44, PageID 1060-61 (citation omitted). Then gunshots rang out. Luster had an obstructed view from the porch, but he managed to get a view of two shooters 35 to 40 feet away from him. One of the shooters was shorter and fired a pistol, and a taller man fired a long gun. Luster escaped by jumping over the porch banister and crawling to safety, though he was wounded. Tragically, a man standing near the porch died of a gunshot wound.

Rookie homicide detective Donald Olsen responded to the shooting and spoke with Luster in the hospital about four hours later. Luster told Detective Olsen that one of the shooters was "Rob," a 5'7" Black man in his mid-20s armed with a pistol whom Luster had seen in the neighborhood. *Id.* at PageID 1062. Luster said he'd

1. We recite the relevant facts in the light most favorable to Salter as we must at this stage. *Berryman v. Rieger*, 150 F.3d 561, 566 (6th Cir. 1998).

never seen the second shooter who fired the long gun but described him as "thin." *Id.* Luster also informed Detective Olsen that a man named Earland Collins had shot up the same house about a month before. Luster described the two shooters in a similar way to another police officer a few hours later: (1) "Rob," a 5'7" Black man in his 20s, weighing between 150 and 170 pounds; and (2) an unknown Black man also in his 20s, standing about 6'0" with a thin build.

Thus far, Aaron Salter had no role in the story. And at 6'4" and 250 pounds, he was much bigger than both suspects Luster described. Yet, with admittedly no articulable basis, Detective Olsen developed a "hunch" that Salter was "Rob." *Id.* at PageID 1062-63. Detective Olsen went to Luster's house that same morning and showed him a single black-and-white mug shot of Salter—that is, not in an array of other suspects. At the time, the Detroit Police Department had a policy that said "[w]itnesses should never be shown only a photograph of the suspect." DPD Policy, R. 36-20, PageID 935. Detective Olsen also told Luster "the police had picked up the guy with the rifle." Op. & Order, R. 44, PageID 1063. Then Luster signed a statement written by Detective Olsen identifying the man in the black-and-white mug shot (Salter) as "Rob."

At the same meeting, after Luster identified Salter, Detective Olsen showed him a six-person photo array that did not include Salter. Luster later testified that he identified two more individuals as shooters from the photo array, one of whom was Earland Collins, the man

Luster said had shot up his house about a month before. Law enforcement records listed Collins at 6'2" and 200 pounds—a close match with Luster's description of the taller shooter.

Detective Olsen did not disclose Luster's identification of Collins as a shooter to Salter or his defense attorney. There was also a large closeup photo of Collins, with some attached handwritten notes, that never made it from the police file to the prosecutor or Salter's lawyer.

Detective Olsen decided to submit the case against Salter to the prosecutor, even though he later explained that he had always thought it "sucked." Interview Mem., R. 36-18, PageID 930. After all, Luster was the only eyewitness, and no physical evidence or other testimony connected Salter to the shooting. Yet Luster's identification of Salter based on the black-and-white mug shot apparently persuaded the prosecutor. The prosecutor sought and obtained an arrest warrant for Salter and initiated a murder prosecution against him in Michigan state court.

At a pretrial hearing, Luster reversed course on a few key details. He identified Salter as the *taller* shooter with "the big gun"—not the shorter shooter named "Rob." Prelim. Exam Tr., R. 36-9, PageID 814. Luster also said that he'd seen Salter "once or twice" before the shooting, which departed from his earlier statement that he'd never seen the taller shooter before. *Id.* at PageID 818. For his part, Detective Olsen testified that Luster didn't identify anyone from the photo array as responsible for

the shooting. He also admitted that he could have put Salter's mug shot in a photo array but inexplicably chose not to. Salter objected to Detective Olsen's single-person show-up as suggestive and moved to suppress Luster's identification at the pretrial hearing, but the judge denied his motion.

At trial, Luster and Detective Olsen testified about Luster's identification of Salter. Luster again identified Salter as the bigger shooter with a "long gun," even though he first identified Salter as the smaller assailant with a pistol. Trial Tr., R. 36-11, PageID 838-39. He said he never meant to label Salter as the shorter shooter named "Rob," and that Detective Olsen had misquoted him in recording his identification. Detective Olsen testified that while he showed Luster a photo array without Salter, the array had "nothing to do" with the shooting and was "directed towards other cases." Trial Tr., R. 36-12, PageID 895. Salter was convicted and sentenced to life without parole. Salter never knew that Luster had identified Collins as a shooter before he was convicted and sentenced.

Salter proclaimed his innocence in a letter to the trial judge in the aftermath of the trial. He also maintained his innocence throughout the post-conviction process, but his appeals and collateral attacks failed. Eventually, one of his attorneys discovered that the closeup photo of Collins had been withheld. An investigation by the Wayne County Prosecutor's Conviction Integrity Unit followed. The CIU investigation yielded evidence that Collins was probably the taller shooter. When a CIU investigator asked Collins who shot Luster, he responded, "If I tell you,

I could get arrested basically." CIU Investigator Dep., R. 36-24, PageID 995. In his CIU interview, Detective Olsen admitted that the case against Salter "sucked" because it depended on Luster's shaky identification. Interview Mem., R. 36-18, PageID 930. Detective Olsen commented, "[I] would not be shocked or upset if the case is overturned, and I hope you do something with it." *Id.* at PageID 931 (cleaned up). In addition, Luster later recanted his identification of Salter.

Based on the findings of the CIU investigation, the Wayne County prosecutor joined Salter's attorneys in moving the trial court to vacate Salter's convictions. Following a stipulation by the parties, the Michigan court that oversaw Salter's trial vacated the judgment against him and ordered him released from prison. Salter had been incarcerated for 15 years.

Salter then filed this suit under 42 U.S.C. § 1983, alleging that Detective Olsen violated his due process rights by failing to disclose exculpatory evidence and conducting an improper identification process. Detective Olsen moved for summary judgment on both claims based on qualified immunity. The district court denied Detective Olsen's motions for summary judgment and reconsideration. He timely appealed.

ANALYSIS

Detective Olsen brought this interlocutory appeal, arguing that we should reverse the district court's decision because: (1) Salter's claims are barred by

the *Heck* doctrine, (2) Salter has failed to overcome Detective Olsen's qualified immunity defense, and (3) Salter is collaterally estopped from pursuing a suggestive identification claim. We address these arguments only to the extent our limited jurisdiction permits.

Generally, an order denying summary judgment is not a "final decision" that we have jurisdiction to review under 28 U.S.C. § 1291. *Plumhoff v. Rickard,* 572 U.S. 765, 771, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014). There are two exceptions to this general rule that allow for interlocutory appeals from a denial of summary judgment: (1) the collateral-order doctrine, and (2) pendant appellate jurisdiction.

We can review an issue under the collateral-order doctrine if it would be "effectively unreviewable" at the end of the case. *Chaney-Snell v. Young,* 98 F.4th 699, 708 (6th Cir. 2024) (quoting *Mohawk Indus. v. Carpenter,* 558 U.S. 100, 106, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009)). One example is qualified immunity: under the collateral-order doctrine, a defendant can immediately appeal the denial of qualified immunity because summary judgment is the last opportunity to assert immunity from trial. *Heeter v. Bowers,* 99 F.4th 900, 908 (6th Cir. 2024). But even then, our interlocutory review of qualified immunity denials is limited. We can generally review "purely legal" questions but cannot resolve quarrels with a plaintiff's record-supported facts. *Id.* at 909 (citation omitted).

If an issue is not subject to the collateral-order doctrine, it may still be reviewable pursuant to our

pendant appellate jurisdiction. For that to be the case, the issue must be "inextricably intertwined" with an appealable one, or its resolution must be necessary to give "meaningful review" to an appealable issue. *Chaney-Snell,* 98 F.4th at 710 (quoting *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995)).

Our limited jurisdiction does not allow us to reach the merits of much of Detective Olsen's interlocutory appeal. We now turn to each of his arguments, sifting through those we must dismiss and resolving the hodgepodge of claims that we can review.

I. The *Heck* Doctrine

Detective Olsen argues that Salter's convictions weren't properly vacated, so under *Heck v. Humphrey,* Salter cannot prevail on either of his due process claims. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The *Heck* doctrine restricts a plaintiff 's ability to bring a civil rights claim under § 1983 if success on that claim would imply the invalidity of the plaintiff 's conviction or sentence. *See Chaney-Snell,* 98 F.4th at 707. To pursue a § 1983 claim under those circumstances, the plaintiff must first show that their conviction or sentence has been favorably terminated. *See Heck,* 512 U.S. at 486-87, 114 S.Ct. 2364. That means that the conviction or sentence must have been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas

corpus." *Id.* at 486-87, 114 S.Ct. 2364. Detective Olsen says that Salter hasn't made that showing.

At this stage, we lack jurisdiction to address Detective Olsen's *Heck* argument. In *Chaney-Snell v. Young,* we held that we have no jurisdiction to review *Heck* challenges on interlocutory appeal from a denial of qualified immunity. 98 F.4th at 708. Unlike qualified immunity, "the denial of a *Heck* claim is not 'effectively unreviewable' at a suit's end," so the collateral-order doctrine does not apply. *Id.* (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). We also lack pendant appellate jurisdiction over *Heck* challenges because the resolution of qualified immunity "says nothing about the merits" of a *Heck* claim. *Id.* at 709-10. Therefore, we do not have jurisdiction over Detective Olsen's *Heck* argument, dismiss that part of his appeal, and express no view on its merits.

II. Qualified Immunity

Detective Olsen also maintains that the district court improperly denied him qualified immunity on Salter's constitutional claims. Salter claims that Detective Olsen violated his clearly established Fourteenth Amendment due process rights in two ways: (1) by failing to turn over evidence pointing to another suspect, in violation of *Brady*; and (2) by using a single-photo show-up during the criminal investigation. The district court concluded that material disputes of fact precluded qualified immunity on both claims.

We review de novo a district court's denial of summary judgment on a qualified immunity defense. *See Helphenstine v. Lewis County,* 60 F.4th 305, 314 (6th Cir. 2023). A public official is entitled to qualified immunity at summary judgment when, viewing the facts in the light most favorable to the plaintiff, the challenged conduct did not violate "clearly established" constitutional rights "of which a reasonable person would have known." *Jackson v. City of Cleveland,* 64 F.4th 736, 745 (6th Cir. 2023) (quoting *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)). The official is entitled to summary judgment unless a "genuine dispute as to any material fact" precludes the defense. Fed. R. Civ. P. 56(a); *see Wilkerson v. City of Akron,* 906 F.3d 477, 481 (6th Cir. 2018). Once the official has asserted qualified immunity, "the plaintiff must show that (1) the official violated his constitutional rights, and (2) at the time of the violation, it was 'clearly established' that the officer's conduct would violate the Constitution." *Heeter,* 99 F.4th at 908 (quoting *Palma v. Johns,* 27 F.4th 419, 428 (6th Cir. 2022)).

We evaluate both the *Brady* claim and the suggestive identification claim under this standard, to the extent our limited jurisdiction permits.

A. Salter's *Brady* Claim

1. *Brady* Violation

To defeat qualified immunity on his *Brady* claim, Salter must first demonstrate that Detective Olsen violated his constitutional rights. The Fourteenth

Amendment requires prosecutors, police officers, and forensic scientists to disclose favorable evidence to a criminal defendant that is material to their defense. *Brady,* 373 U.S. at 87, 83 S.Ct. 1194; *Clark v. Louisville-Jefferson Cnty. Metro Gov.,* 130 F.4th 571, 582-84 (6th Cir. Mar. 7, 2025). Police officers must turn over evidence with "apparent" exculpatory value to the prosecutor, who must then disclose that evidence to the defendant. *Moldowan v. City of Warren,* 578 F.3d 351, 381, 388 (6th Cir. 2009) (quoting *California v. Trombetta,* 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). To sustain a *Brady* claim based on withheld evidence, Salter must show: (1) the government withheld evidence from Salter, "either willfully or inadvertently"; (2) the evidence favored Salter, "either because it is exculpatory, or because it is impeaching"; and (3) the evidence was material, such that its nondisclosure prejudiced Salter. *Jackson v. City of Cleveland,* 925 F.3d 793, 814 (6th Cir. 2019) (quoting *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). The district court concluded that Salter satisfied his burden at summary judgment on each of these elements. Detective Olsen disputes all three elements on appeal but raises arguments that we largely have no jurisdiction to review.

On the first *Brady* element, Detective Olsen argues that he did not withhold evidence pointing to Collins as the shooter. The dissent agrees with him. *See* Dissenting Op. at 550 n.3. But this is precisely the type of factual dispute that we cannot review at this stage. *See Heeter,* 99 F.4th at 908. Indeed, Detective Olsen abandons any factual argument in his reply brief, recognizing that we

don't have jurisdiction to resolve such factual disputes in an interlocutory qualified immunity appeal. Detective Olsen's sole legal argument on this element (which we can review) is without merit. He contends that Salter must show that Detective Olsen withheld the evidence in "bad faith." Appellant Br. at 39. But we have rejected the proposition that an officer's *Brady* violation requires "bad faith." *Clark,* 130 F.4th at 579 (citing *Moldowan,* 578 F.3d at 388).

Nor do we have jurisdiction over Detective Olsen's challenge to the district court's conclusion on the second and third *Brady* elements—that a reasonable jury could find that the withheld evidence favored Salter and was material to his defense. In Detective Olsen's view, and the dissent's, the withheld evidence was either duplicative of other disclosed evidence or available to Salter from other sources. *See* Dissenting Op. at 549-52. So it was neither favorable nor material to Salter's defense. But these arguments present "mixed" questions of law and fact. *Clark,* 130 F.4th at 579-81. And our court recently clarified that, in the *Brady* context, we lack jurisdiction to consider such mixed questions in an interlocutory qualified immunity appeal. *See id.* at 578-81. We therefore cannot reach the merits of Detective Olsen's arguments on the remaining *Brady* elements and dismiss them from his appeal.

2. Clearly Established Law on Withholding Material Evidence

Even if he violated Salter's rights under *Brady,* Detective Olsen contends that he is still entitled to

qualified immunity because, at the time, it was not clearly established that *Brady* applies to police officers. While we have jurisdiction to review this argument, *see id.* at 581-82, we will not consider it because Detective Olsen did not raise it in the district court, *see St. Marys Foundry, Inc. v. Emps. Ins. of Wausau,* 332 F.3d 989, 995-96 (6th Cir. 2003). Indeed, contrary to his argument now, Detective Olsen conceded below that he had an "obligation to disclose" materially exculpatory evidence to the prosecutor based on *Moldowan v. City of Warren,* 578 F.3d 351 (6th Cir. 2009). MSJ, R. 29, PageID 380. And, despite the dissent's contention that *Brady* did not apply to police officers in 2003, Dissenting Op. at 546-47 & n.1, "we have held that pre-1990 cases clearly established that the police also have a '*Brady*-derived' duty to disclose material exculpatory evidence to the prosecution," *Clark,* 130 F.4th at 582. Relying on Detective Olsen's concession, the district court agreed that Salter satisfied the clearly established prong of his *Brady* claim. Op. & Order, R. 44, PageID 1088 n.5. Sure, Detective Olsen tried to reverse course in a motion for reconsideration, but the district court was under no obligation to consider his new argument at that stage. *See McBride v. Skipper,* 76 F.4th 509, 517-18 (6th Cir. 2023). Nor are we, and we reject Detective Olsen's attempt to reverse course on appeal.

In sum, to the extent we have jurisdiction, we reject Detective Olsen's challenge to the district court's denial of qualified immunity on Salter's *Brady* claim. The claim may proceed to the jury.

B. Salter's Suggestive Identification Claim

1. Collateral Estoppel

Salter next claims that Detective Olsen violated his due process rights by conducting an unduly suggestive identification by presenting Luster with a single-person show-up consisting only of Salter's black-and-white mug shot. But before arguing for qualified immunity, Detective Olsen contends that we cannot consider the merits of this claim because Salter is collaterally estopped from pursuing it. In Salter's criminal case, the state court held that the show-up was not impermissibly suggestive, which Detective Olsen argues precludes Salter from challenging the identification procedure in this lawsuit.

To start, we have jurisdiction over this argument because its resolution is necessary to ensure "meaningful review" of the district court's denial of qualified immunity. *Chaney-Snell,* 98 F.4th at 709, 712; *see also Peterson v. Heymes,* 931 F.3d 546, 553 (6th Cir. 2019); *Roberson v. Torres,* 770 F.3d 398, 403 (6th Cir. 2014). If Salter is precluded from raising a suggestive identification claim, then he cannot establish a constitutional violation on that basis under the first prong of the qualified immunity analysis. We therefore consider the merits of Detective Olsen's collateral estoppel argument. On that front, we find his argument unpersuasive.

Federal courts must give a state court judgment the same preclusive effect it would receive in the courts of the rendering state. *See Bus. Dev. Corp. of S.C. v. Rutter*

& Russin, LLC, 37 F.4th 1123, 1129 (6th Cir. 2022). We must therefore look to Michigan law to determine the preclusive effect of the suppression ruling in Salter's criminal case. *Id.* Michigan law allows criminal decisions to bind litigants in subsequent civil cases. *Peterson,* 931 F.3d at 554. But, under Michigan law, a vacated criminal conviction and the interlocutory rulings supporting it have no preclusive effect. *See id.* at 554-55 (suppression ruling underlying a vacated conviction lacks preclusive effect); *Tanner v. Walters,* 98 F.4th 726, 735 (6th Cir. 2024). That is true even if the conviction was vacated by stipulation. *See Sanford v. Russell,* 381 F. Supp. 3d 905, 924 (E.D. Mich. 2019), *aff'd,* 815 F. App'x 856 (6th Cir. 2020). Here, Salter's conviction was vacated, so he is not precluded from pursuing his suggestive identification claim against Detective Olsen.[2]

2. Due Process Violation

Turning to qualified immunity, we now consider whether Detective Olsen violated Salter's due process rights by using an unduly suggestive identification procedure. *See Haliym v. Mitchell,* 492 F.3d 680, 704 (6th Cir. 2007). We analyze suggestive identification claims in two steps. *First,* we assess whether the identification procedure was "unnecessarily suggestive." *Id.* If it was,

2. Detective Olsen relies on *Hatchett v. City of Detroit* to argue that the state court's suppression ruling precludes Salter's claim. 495 F. App'x 567 (6th Cir. 2012). But as we have explained, "*Hatchett* is an unpublished decision in which it was not clear that the criminal judgment had actually been vacated." *Peterson,* 931 F.3d at 554.

we consider whether, despite the suggestive procedure, the identification was "nevertheless reliable." *Id.* We evaluate these prongs based on the totality of the circumstances. *Simmons v. United States,* 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

The district court ruled that Detective Olsen abandoned any argument on the first prong of Salter's suggestive identification claim—whether the identification was unnecessarily suggestive. We agree. Detective Olsen has not disputed that the single-person show-up was unduly suggestive. In his motion for summary judgment, he argued only that Luster "had an independent basis for identification of Mr. Salter apart from the photograph he was shown." MSJ, R. 29, PageID 387. Put differently, Detective Olsen argued that the identification was reliable, not that it wasn't unnecessarily suggestive in the first place. And he pursues the same argument on appeal. Accordingly, we proceed to the second element of Salter's claim—whether the identification was reliable even if the procedure was unnecessarily suggestive.

In assessing reliability, we look at the totality of the circumstances based on five factors: (1) the witness's opportunity to view the suspect, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated by the witness at the time he identified the suspect, and (5) the time between the crime and the identification. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Together, these factors weigh in Salter's favor.

First, Luster didn't have a good opportunity to view the shooters. Luster saw them from 35 to 40 feet away, "at night, with limited lighting." Prelim. Exam Tr., R. 36-9, PageID 814; Interview Mem., R. 36-18, PageID 930. He also didn't get a good look at the shooters' faces in the chaos of the moment.

Second, Luster's attention was compromised. During the criminal proceedings, Luster said he wasn't drinking or smoking marijuana in the leadup to the shooting, but in this civil litigation, he admitted he had been "smoking weed" and drinking Hennessy. Luster Dep., R. 36-7, PageID 778, 780. Luster also testified that his priority was to escape from the shooting, not to identify the people around him.

Third, Luster's description of the shooters bore little resemblance to Salter. Our caselaw strongly indicates that an identification cannot be reliable if there were significant inconsistencies between the witness's description of the suspect and the person identified. *Gregory v. City of Louisville,* 444 F.3d 725, 756 (6th Cir. 2006) (citing *Webb v. Havener,* 549 F.2d 1081, 1086 (6th Cir. 1977)). Luster described a shorter shooter who was 5'7" and thin, and a taller shooter who was 6'0" and also thin. He first said Salter was the shorter shooter, then testified that Salter was the taller one. Either way, neither description matched Salter's 6'4" 250-pound frame. And, according to the testimony of a Detroit Police Department representative, Detective Olsen would have automatically received Salter's weight and height when he pulled Salter's mug shot from the police database and could have seen that they didn't match.

Fourth, Luster told Detective Olsen that he was "not sure" when he identified Salter as one of the shooters from Salter's black-and-white mug shot. Luster Dep., R. 36-7, PageID 786. To make matters worse, Luster identified three different people as the two shooters: Salter based on his single mug shot and two people in the photo array, including Collins. This evidence suggests that Luster was not certain about his identification of Salter.

Fifth, timing is the only factor that works in Detective Olsen's favor. Luster's identification came only a matter of hours after the incident. That length of time between "observation and identification" does not undermine the reliability of an identification. *See Howard v. Bouchard,* 405 F.3d 459, 473 (6th Cir. 2005). That said, timing is only one factor, and the other four factors all weigh against reliability here.

Detective Olsen didn't present an argument on the traditional reliability factors to the district court. Instead, he relied on Luster's purported familiarity with Salter to argue that the single-person show-up was constitutionally permissible. *See Haliym,* 492 F.3d at 706 (providing that a court may consider reliability factors that do not fit within the traditional five-factor analysis). And he reiterates that argument on appeal.

Luster's seemingly limited familiarity with Salter does not outweigh the "corrupting effect" of the single-person show-up. *Manson,* 432 U.S. at 116, 97 S.Ct. 2243. We have held that a witness's familiarity with a suspect increases the reliability of an identification. *Haliym,* 492 F.3d at 706. But Luster said he knew "Rob"—who

later turned out to be Salter's cousin—not Salter. That means Detective Olsen did not show Luster a photo of the person Luster claimed to know. In any event, "problems with identification testimony may exist even where the witness is familiar with the [suspect]." *Id.* Here, multiple problems remain even after we factor in Luster's alleged familiarity with Salter. Even if he knew Salter, Luster still had to "sufficiently observe" the shooters to identify them as persons he knew. *Id.* As explained, he did not have the opportunity to do so. Luster was also uncertain about his identification of Salter. And there were glaring discrepancies between Salter's physical appearance and Luster's description of the shorter shooter—the one Luster identified as Salter in a signed statement during the show-up. We have "never found that an identification arising from a suggestive format was anything but *unreliable* when the witness'[s] prior description of the suspect was significantly inconsistent with the suspect's actual appearance." *Gregory,* 444 F.3d at 756. We won't depart from that course here.

Detective Olsen also exacerbated the unreliability of the single-person show-up by telling Luster that police had already "picked up" the taller shooter—the one Luster *later* claimed he had identified as Salter from the start. Luster Dep., R. 36-7, PageID 799.[3] The risk of a

3. While Luster identified Salter as the shorter shooter (i.e., "Rob") in a written statement taken down by Detective Olsen, he testified in court that he "never said" Salter was "Rob," that his statement was recorded incorrectly, and that he always meant to identify Salter as the taller shooter. Trial Tr., R. 36-11, PageID 867-72.

misidentification increases when "the police indicate to the witness that they have other evidence that . . . the person[ ] pictured committed the crime." *Simmons,* 390 U.S. at 383, 88 S.Ct. 967. And Detective Olsen only increased that risk by showing Luster a single photo of Salter. *Gregory,* 444 F.3d at 755 ("By presenting only a single suspect to a witness, police convey an implicit message that 'this is the guy.'"). Under those circumstances, Luster could have felt pressure to make an identification regardless of his degree of confidence, undermining his identification's reliability.

Detective Olsen further argues that the single-person show-up did not violate Salter's "core right" to a fair trial, and thus cannot support a due process claim. Appellant Br. at 46. "It is true that an unduly suggestive identification does not, in and of itself, violate constitutional rights." *Gregory,* 444 F.3d at 747. But the admission at trial of such an identification, unless harmless, can violate a criminal defendant's core due process rights. *See Webb,* 549 F.2d at 1087. Luster signed a statement identifying Salter as a shooter based on the show-up, and that statement was admitted into evidence at Salter's trial. At trial, Detective Olsen and Luster also testified extensively about Luster's out-of-court identification. Detective Olsen stated that he showed Luster "one single photograph that related to the shooting," a "photograph of Aaron Salter." Trial Tr., R. 36-12, PageID 894. And Luster told the jury that he picked Salter's photo "[b]ecause he fit the description of the person that was shooting." Trial Tr., R. 36-11, PageID 861. During the same testimony, Luster also twice identified Salter as his shooter in court. *Id.* at PageID 839, 883. 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. *See Gregory,* 444 F.3d at 735, 745-47.

3. Clearly Established Law on Single-Person Show-Ups

The district court further held that it was clearly established in 2003 that the single-person show-up of Salter was constitutionally impermissible. Detective Olsen disputes this. We agree with the district court.

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." *Mullenix v. Luna,* 577 U.S. 7, 11-12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam) (quoting *Reichle v. Howards,* 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012)). To show 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.* (quoting *Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). The dispositive question is whether the official had notice that his "*particular* conduct" violated the Constitution. *Id.* (quoting *al-Kidd,* 563 U.S. at 742, 131 S.Ct. 2074).

In 1967, the Supreme Court warned that "showing suspects singly to persons for the purpose of identification has been widely condemned." *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). It allowed a single-person show-up because it was the only

possible identification procedure during an exigency and explained that courts must evaluate "the totality of the circumstances" to determine whether a single-person identification procedure amounts to a violation. *Id.*

In 1977, our court applied *Stovall* and its progeny in *Webb v. Havener.* 549 F.2d at 1083-85. In *Webb,* two robbery witnesses described the robbers to the police "in general terms." *Id.* at 1082-83. The police told the witnesses to wait at the station while they went to get a suspect, and then they presented Webb to the witnesses without arranging for a lineup. *Id.* at 1086. The witnesses identified Webb as one of the robbers, and Webb was convicted of armed robbery with the witnesses' identification as the sole evidence connecting him to the crime. *Id.*

We held that the single-person show-up of Webb was unduly suggestive, and that a subsequent in-court identification was not harmless error because it lacked "an independent basis." *Id.* at 1086-87. We explained that police officers cannot focus a witness's attention on one suspect without an articulable need for employing such a procedure. *Id.* Yet the officers in *Webb* offered "[n]o explanation" for why they failed to arrange a lineup, and there was no reason for a "hurried" process as in *Stovall. Id.* at 1086. We also held that several reliability factors weighed in Webb's favor: the witnesses had observed the robbers for only "a couple of minutes" while at gunpoint; their description of the robbers didn't match Webb's appearance; and their testimony was at times inconsistent. *Id.* The admission of the overly suggestive identification at trial therefore violated Webb's due process rights. *Id.*

at 1086-87; *see also Gregory,* 444 F.3d at 746-47 (denying qualified immunity for a single-person show-up that occurred in 1992).

Detective Olsen's decision to present Luster with a single black-and-white mug shot of Salter was clearly unlawful for the same reasons. Detective Olsen admitted that nothing prevented him from presenting Salter's photo as part of an array. Adding to the suggestive nature of the identification, before showing Salter's photo to Luster, Detective Olsen told Luster that the police had apprehended one of the shooters. That statement could have further influenced Salter's identification by suggesting that Detective Olsen had an independent basis to suspect Salter (he did not). Luster's identification also had the same indicia of unreliability as the one in *Webb:* Luster saw the shooters briefly at night while fleeing from gunfire; his description of the shooters' weight and height did not match Salter's; and his identification was inconsistent—he identified three people as the two shooters.

The dissent counters that Salter's rights could not have been clearly established, otherwise his attorney would have objected more forcefully to evidence of the show-up during trial. Dissenting Op. at 547-49. (The trial court, however, had already denied Salter's pre-trial motion to suppress the show-up as suggestive.) Alternatively, the dissent says the prosecutor would not have relied so heavily on the show-up in seeking an indictment if it were clearly unconstitutional, and the state court would have excluded it. *Id.* at 551-52. But our inquiry is not based on

the actions of Salter's lawyer, the prosecutor, or the now-vacated rulings in the state court criminal proceedings. Based on binding precedent, a reasonable officer would have known that, under these circumstances, the single-person show-up would not produce a reliable identification. So its admission at trial violated Salter's due process rights.[4]

What's more, at the time, the Detroit Police Department's policy also prohibited the show-up, stating that "[w]itnesses should never be shown only a photograph of the suspect." DPD Policy, R. 36-20, PageID 935. That policy is of course not dispositive of our qualified immunity inquiry, but it is further proof that Detective Olsen was on notice that his actions were unlawful. *See Martin v. City of Broadview Heights,* 712 F.3d 951, 962 (6th Cir. 2013). We therefore hold that Detective Olsen was not entitled to qualified immunity on Salter's suggestive identification claim.

CONCLUSION

For these reasons, we affirm in part and dismiss in part for lack of jurisdiction.

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4. Assuming that the unlawfulness of the show-up was clearly established, the dissent posits that the prosecutor's charging decision acts as an intervening cause that insulates Detective Olsen from liability. Dissenting Op. at 551-52. That's not so. *See Gregory,* 444 F.3d at 747 ("The prosecutor's decision to use the identification does not shield [the officer] 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.").

Appendix A

CONCURRENCE

NALBANDIAN, Circuit Judge, concurring. I join the majority opinion in full. But I write separately to note two areas where I question this court's precedents. First, I believe that recent Supreme Court precedent fatally undermines 42 U.S.C. § 1983 suits based on unduly suggestive identification procedures. These protections, like *Miranda,* are prophylactic rules that do not create a right to sue under § 1983. Second, I harbor reservations about this court's imposition of individual liability on police officers for derivative *Brady* violations. Grafting these *Brady*-derived claims onto our constitutional tort jurisprudence has undermined the effectiveness of our review of qualified immunity.

I.

I start with some background. We first allowed a § 1983 suit against a police officer who conducted an allegedly suggestive identification in *Gregory v. City of Louisville,* 444 F.3d 725, 745-47 (6th Cir. 2006). There, the police officer asked Gregory "to agree to a one-on-one show-up with" a rape victim and asked him to "repeat the words uttered by [the victim's] rapist." *Id.* at 733. After being first convicted and then exonerated in state court, Gregory sued the officer under § 1983. *Id.* at 735. The district court denied qualified immunity against Gregory's claim that the officer "used an unduly suggestive show-up procedure in getting [the victim] to identify [him]." *Id.* at 745.

On appeal, the panel concluded that the plaintiff had alleged "the violation of a known constitutional right"—namely, the "right to be free of unduly suggestive identification procedures." *Id.* at 746-47. The panel rejected the officer's argument that the prosecution's use of the identification at trial was the actual violation. So it denied qualified immunity, concluding that the officer could not escape "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." *Id.* at 747.

Even when it was decided, *Gregory* rested on shaky foundations. First, *Gregory* said that "the Supreme Court has held that *police officers* must evaluate the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is impermissibly suggestive or not." *Id.* at 746 (emphasis added) (citing *Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). But the Supreme Court has only required *courts* to conduct such an inquiry to determine whether an identification is reliable despite being tainted by a suggestive procedure. *See Perry v. New Hampshire,* 565 U.S. 228, 239, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012) (citing *Biggers,* 409 U.S. at 201, 93 S.Ct. 375). Nothing in *Biggers* imposed a similar requirement upon investigating officers. So the panel decision dramatically expanded *Biggers*'s scope.

Second, the panel suggested that this "[c]ourt has entertained allegations of suggestive identification procedures as viable constitutional tort claims." *Gregory,* 444 F.3d at 746 (citing *Hutsell v. Sayre,* 5 F.3d 996, 1005

(6th Cir. 1993)). But there we explicitly *rejected* a claim that a police officer had violated a plaintiff 's due-process rights by conducting an allegedly suggestive line-up, even though the identification was "presumably used at trial." *Hutsell,* 5 F.3d at 1005. And we stated that absent "extraordinary circumstances, such as coercion or other police misconduct," allegedly suggestive identifications could not give rise to a cause of action under § 1983. *Id.* So *Hutsell* hardly supports the viability of these claims. Still, *Gregory* is the law in this Circuit.

But after the Supreme Court's recent decision in *Vega v. Tekoh,* 597 U.S. 134, 142 S. Ct. 2095, 213 L.Ed.2d 479 (2022), its continued viability is questionable. In *Vega,* the Supreme Court held that plaintiffs may not bring § 1983 suits against police officers "based on the allegedly improper admission of an 'un-*Mirandized*' statement in a criminal prosecution." *Id.* at 2099. The Court clarified that *Miranda* created "prophylactic rules" to safeguard the right against the introduction of compelled, self-incriminating statements in a criminal proceeding. *Id.* at 2101. And the opinion stressed that *Miranda* did not hold that a violation of its rule "necessarily constitute[s] a Fifth Amendment violation." *Id.* at 2101. So failure to follow *Miranda* is not a constitutional violation that gives rise to a claim under § 1983. *Id.* at 2106, 2108.

Vega's reasoning applies to our suggestive identification cases. As with *Miranda* violations, the Supreme Court has stated that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Manson v. Brathwaite,* 432 U.S.

98, 113 n.13, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Thus, like *Miranda,* the judicially created protection against suggestive identification procedures is only a "prophylactic rule." *Hutsell,* 5 F.3d at 1005. Other circuits have agreed. *See, e.g., Alexander v. City of South Bend,* 433 F.3d 550, 555 (7th Cir. 2006); *Pace v. City of Des Moines,* 201 F.3d 1050, 1055 (8th Cir. 2000). While it is designed to safeguard a constitutional interest, violation of this rule doesn't necessarily violate the Sixth Amendment's guarantee of a fair trial or the Fourteenth Amendment's due-process requirement. So an impermissibly suggestive identification procedure is not itself an independent constitutional deprivation that would support a § 1983 claim.

Although I recognize that *Gregory* ties this panel's hands, I am persuaded that *Vega* casts doubt on our precedent. The protection against unduly suggestive identification procedures is, like *Miranda,* only a prophylactic rule and should not be actionable under § 1983. But Olsen hasn't made this argument, so it lies outside the scope of our review.

II.

The *Brady* claim—or more precisely, the *Brady*-derived claim—doesn't pose the same problem. A *Brady* violation is a constitutional deprivation because the prosecutor's failure to disclose material information violates due process. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). So *Brady* is not a prophylactic rule. Importantly, under our caselaw, a police officer has an "analogous or derivative" *Brady* obligation. *Moldowan v.*

City of Warren, 578 F.3d 351, 379-81 (6th Cir. 2009). This analysis hinges on the *officer* "suppressing exculpatory evidence." *Id.* at 382. So an officer's failure to disclose information must have caused an unconstitutional suppression. And the derivative obligation is inextricable from the constitutional deprivation. But these claims have different problems.

A.

To begin, I question whether the law was clearly established as of the events in this case. Though this court held that *Brady*-derived claims were clearly established as early as 1990, this conclusion rested only on persuasive authority from other circuits. *Id.* at 382. It's true that the Supreme Court has suggested that "absent controlling authority," clearly established law can be supported by "a robust 'consensus of cases of persuasive authority.'" *Ashcroft v. al-Kidd,* 563 U.S. 731, 741-42, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (quoting *Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). But *Moldowan* only cited cases from three circuit courts holding that the police's *Brady*-derived obligations were clearly established by 1990. 578 F.3d at 382. To my mind, three circuits doesn't represent a consensus, much less a robust one. So these citations don't show that by 1990 existing precedent had placed the "constitutional question beyond debate." *al-Kidd,* 563 U.S. at 741, 131 S.Ct. 2074. Still, *Moldowan* continues to bind this panel.

B.

Next, I also share the concerns expressed by Judge Murphy in his recent concurrence in *Clark v. Louisville-Jefferson County,* No. 24-5061, 130 F.4th 571, 574-75 (6th Cir. March 7, 2025). Namely, whether a plaintiff should have to show bad faith on the part of the officer and whether we have jurisdiction to review *Brady*'s materiality element as part of the qualified immunity inquiry. *Id.* at 585-86 (Murphy, J., concurring). The *Clark* decision tells us that our precedents require us to answer no as to both questions. *Id.* at 579-84 (majority opinion). But I am unconvinced that this is correct as a matter of law.

Regardless, the current state of our caselaw artificially limits the scope of our review in these cases when there is any question of materiality. This limitation makes little sense in § 1983 cases based on *Brady*—especially when we are talking about liability for police officers and not prosecutors. And I believe the issue stems from the chimerical nature of the *Brady*-derived claims recognized by *Moldowan.*

Under the *Brady* framework, "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene,* 527 U.S. 263, 288, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Thus, the culpability of the prosecutor is not at issue. A prosecutor can violate Brady even if he acted in good faith or lacked any knowledge of the material evidence that was suppressed. And in most instances of

a *Brady* violation, the remedy for defendants is a new trial—not damages. For this reason, claims under *Brady* have always fallen "within the traditional core of habeas corpus and outside the province of § 1983." *Skinner v. Switzer,* 562 U.S. 521, 536, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011). So *Brady*'s familiar three-step framework of favorability, suppression, and materiality developed to ensure the fairness of a trial—not as a mechanism to punish prosecutorial misconduct. And the *Brady* doctrine's lack of a knowledge or intent requirement as to the suppression is softened by the fact that prosecutors are absolutely immune "from civil liability for the non-disclosure of material exculpatory evidence at trial." *Koubriti v. Convertino,* 593 F.3d 459, 470 (6th Cir. 2010).

But unlike prosecutors, police officers don't have absolute immunity. They must make do with the more ad hoc doctrine of qualified immunity. *See King v. Harwood,* 852 F.3d 568, 584 (6th Cir. 2017). And because qualified immunity is "not just a defense against a damages award but also an '*immunity from suit*'" an officer can appeal the denial of qualified immunity under the collateral-order doctrine. *Chaney-Snell v. Young,* 98 F.4th 699, 708 (6th Cir. 2024) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Without immediate appellate review, the immunity "is effectively lost if a case is erroneously permitted to go to trial." *Himmelreich v. Fed. Bureau of Prisons,* 5 F.4th 653, 662 (6th Cir. 2021) (quoting *Mitchell,* 472 U.S. at 526, 105 S.Ct. 2806). And much of our § 1983 jurisprudence has developed to match the contours of the collateral-order doctrine, which limits our review to resolving questions of law.

So putting it all together, *Brady*'s requirements of favorability and materiality developed free from the constraints imposed by the collateral-order doctrine. But this court's current practice of allowing *Brady*-derived claims against officers, combined with a limitation on what we can review, pits this doctrine against the limitations of the collateral-order rule. And the officer's derivative *Brady* obligation only exists "[w]here the exculpatory value of a piece of evidence is apparent." *Moldowan,* 578 F.3d at 388 (internal quotation marks omitted). So the constitutional violation depends not just on favorability and materiality, but also on the added question of whether the exculpatory value was apparent. But—for better or worse—we have concluded that "materiality under *Brady* is a mixed question of fact and law for the jury" and that "this Court lacks jurisdiction to entertain [such appeals.]" *Gregory,* 444 F.3d at 744. These competing requirements leave us in a jurisdictional bind. We cannot review the legal question of whether there was a constitutional violation because we lack jurisdiction over materiality.

This jurisprudential wrinkle has created real world problems. As Judge Murphy points out, such treatment of materiality is out of step with how we treat other mixed questions of law and fact in the § 1983 context. *Clark,* 130 F.4th at 586-88 (Murphy, J., concurring) (citing *Williams v. Mehra,* 186 F.3d 685, 690 (6th Cir. 1999)). And I believe that this discord springs from the fact that we have superimposed § 1983 liability onto *Brady*—a trial right focused on the actions of prosecutors that does not account for the practicalities of constitutional tort litigation. Since the materiality of suppressed evidence is the key

to *Brady,* we are effectively barred from resolving the central legal question of whether—based on undisputed facts—a constitutional violation occurred.

So we are left with two warring doctrines. A review of materiality is essential to determine whether the plaintiff has alleged a constitutional violation. But our caselaw prevents us from reaching that question on jurisdictional grounds. Thus, it insulates the district court's decision from review at the only time that matters for qualified immunity—that is, before the official has endured a suit. If we truly lack jurisdiction to hear such appeals, our review of denials of qualified immunity in *Brady*-derived claims is rendered toothless. And qualified immunity's protection from *suit* becomes a hollow promise. While we cannot resolve this quandary today, I am unsure how much longer we can avoid it.

Appendix A

DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting. The undisputed facts in this case matter. It is deplorable that Aaron Salter spent 15 years in prison for a murder he did not commit. And there are people to blame, but if Detective Donald Olsen is one of them, he is way down the list. Certainly, Jamar Luster is at the top of that list. As everyone concedes, Luster looked at Salter's photo on the day after the shooting and said Salter was the shooter. At the preliminary examination, Luster looked at Salter in open court, face to face, and—under oath and subject to cross-examination—insisted emphatically and unequivocally that Salter was the shooter. At trial, Luster's testimony convicted Salter: Luster was the State's only eyewitness to the shooting and once again, under oath and subject to cross-examination, Luster testified emphatically, unequivocally, and repeatedly that Salter was the shooter. It would be 15 years before Luster would recant this testimony and tell a new story about what he said and did back in 2003.

But Salter also has himself to blame, followed closely by his trial and appellate counsel. Well before his trial, Salter learned from both his cousin and an inmate he met in prison that E Collins was the shooter, and Salter realized that Luster had misidentified him as E Collins, or had falsely accused him. Either Salter did not reveal this information to his trial counsel or, for reasons unknown, his counsel chose not to introduce this evidence in Salter's defense at trial. But immediately after trial, Salter wrote a letter to the trial court judge, explaining this in detail.

The judge entered that letter into the record, meaning that Salter's appellate counsel had access to it for Salter's appeal, but again for reasons that are unknown and inconceivable, Salter's appellate counsel did not raise that on appeal, even as a claim of ineffective assistance of trial counsel.

Finally, Salter could reasonably blame the prosecutor, who prosecuted the case based on a single witness's allegedly improper photo identification; or the trial court judge who refused defense counsel's motion to suppress the photo identification; or the appellate judges who rejected the claim on appeal that the unduly suggestive photo identification warranted a new trial, holding instead that Luster's in-court identification cured any harm from the photo identification.

But Salter does not blame any of those people. Salter and the lead opinion put all of the blame on Det. Olsen. Neither the record nor the law supports that. There is no *Brady* evidence in this record and, therefore, no *Brady* violation even if *Brady* applied boundlessly to police officers back in 2003, which it did not.[1] Nor did Det. Olsen

1. In 2003, "the duty to disclose exculpatory evidence under *Brady* . . . extend[ed] only to the prosecutor, not the police." *Canter v. Cnty. of Otsego,* 14 F. App'x 518, 521 n.1 (6th Cir. 2001); *see Strickler v. Greene,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) ("In order to comply with *Brady,* . . . the individual *prosecutor has a duty to learn* of any favorable evidence known to the others acting on the government's behalf in this case, including the police." (quotation marks omitted; emphasis added) (quoting *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

knowingly violate clearly established law, circa 2003, when he used the single photo to identify Salter. Qualified immunity protects all but the plainly incompetent and those who knowingly violate the law. Nothing in this record suggests that Det. Olsen was plainly incompetent or knowingly violated the law. Because I disagree with the lead opinion on its reading of both the record and the law, I must respectfully dissent.

I.

Here is what we know now, 20 years later. At a little after 1 a.m. on August 6, 2003, E Collins and another man shot and killed Willie Thomas. Jamar Luster was one of three witnesses caught in the cross-fire. At the hospital, Luster told Det. Olsen that one of the shooters was a man named "Rob," whom he had seen waiving a gun earlier that day, but he had never seen the other shooter before. The next day, Olsen showed Luster a mugshot photo of Salter's face, and Luster identified him as "Rob." Olsen then showed Luster a six-person photo array, which included a photo of E Collins. Luster later (at a deposition in 2019) claimed that he picked E Collins from that photo array and told Olsen that Collins was one of the shooters. But, according to Olsen, Luster did *not* identify any other shooter from the photo array. Either

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It was not until 2009, in *Moldowan v. City of Warren,* 578 F.3d 351 (6th Cir. 2009), that we first imposed a *Brady* duty on police officers, and even that was specifically limited to evidence that was "clearly exculpatory" not just "potentially useful," *id.* at 383-87. The alleged *Brady* materials here were certainly not "clearly exculpatory."

way, we know that Olsen did not pursue anyone else as a shooter and, specifically, he did not investigate or arrest E Collins. Olsen turned the case over to the prosecutor, who charged Salter with Thomas's murder.

But Salter was not "Rob," nor was he one of the shooters. "Rob" was Salter's cousin, Robert Clark—the "Rob" whom Luster saw waiving a gun earlier that day. And Salter had an alibi and at least three alibi witnesses to prove that he was elsewhere at the time of the murder.

At the preliminary examination on September 22, 2003 (seven weeks after the shooting), Luster testified and identified Salter in court as one of the two shooters. Confronted with his prior description of "Rob" as being 5'7", 150 lbs., and light complected, whereas Salter was clearly 6'4", 250 lbs., and dark complected, Luster changed course and said Salter was not "Rob"; "Rob" was the other, smaller shooter. Luster testified that he told Olsen that one shooter was named "Rob," and that "I told him another name too." But Salter's attorney did not ask Luster to give him that other name, he just moved on, leaving it unspoken and unrecorded. Luster also testified that he picked two people from the photo array as shooters, stating "him [meaning Salter] and the other guy, Rob, or whatever." But Salter was not pictured in the photo array. Salter's attorney did not ask Luster to show him which of the two photos he had picked, so that also remains unknown. When Olsen testified, Salter's attorney asked whether Luster had identified anyone in the photo array and Olsen said: "Not as the persons that were responsible for the shooting, but just I [sic] wanted to find out if he

knew any of those people in that picture." At the end of that preliminary examination, Salter's attorney moved to suppress Luster's pretrial photo identification of Salter, arguing that Olsen should have used only a photo array, and not the mugshot, for Luster's identification of Salter. The State argued that Luster "said he knew him [Salter]. He'd seen him in the past. He picked him out and he told [Olsen] that he had seen him in the past and seen him in the neighborhood. He described him and said that's him. [Salter]'s not in custody. His rights were not violated at all." The trial court denied the defense motion, holding that "there is no constitutional requirement to have [the identification] done in a certain way."

About a week later, on September 29 or 30, 2003, Salter's cousin Rob told him that E Collins had committed the murder and "not to worry" about the murder charge, that he would not be convicted because he (Salter) did not do it. Either Salter did not tell his attorney about this information, or his attorney chose not to use it, because this information was not introduced at Salter's trial. Nor was the evidence of his alibi defense.

At that jury trial, in December 2003, Luster was the State's key witness and immediately and unequivocally identified Salter in open court as one of the shooters. On direct examination, Luster said that, from the photos shown to him by Det. Olsen, he had picked *three* people who looked like the shooters. Luster repeated this on cross examination, *insisting four separate times* that he had picked *three* people from the photo array that Olsen showed him. But Salter's attorney never asked Luster to re-identify any of those photos, so which three of the six

Luster claimed to have picked remains unknown.[2] Luster might have—certainly could have—identified E Collins, whose photo was number six in that photo array, and who Luster now claims to have identified for Det. Olsen from that photo array. But Luster did not identify or name E Collins at Salter's trial. The only person Luster did identify at trial was Salter, and Luster identified him several times. Luster admitted that he signed a statement identifying Salter as "Rob," but then said that was a "mistake"; he did not identify Salter as "Rob," because "Rob is way smaller than [Salter]."

Det. Olsen testified that Luster identified Salter as one of the shooters from the mugshot, but denied that Luster had identified anyone else in the photo array as having any connection with the shooting. When Salter's attorney asked Olsen on cross-examination about his showing Luster the mugshot rather than using a photo array, the State argued that a "photo array is not mandated by law" unless the suspect is "in custody," which Salter was not. On re-direct, the State asked Olsen: "As it relates to the photo array, there was nothing legally mandating you to do a photo array," to which Olsen agreed there was not. On re-cross, Salter's attorney pressed Olsen as to whether the mugshot was unduly suggestive:

> Salter's attorney: Don't you think it would have been a little less suggestive had you put

2. At his deposition in 2019 Luster testified that he picked E Collins from the photo array. Putting that together with this 2003 trial testimony, one of the three photos Luster claimed to have identified was presumably Collins.

> Mr. Salter in an array with five other photos as opposed to just showing Mr. Salter's [mugshot] photo to Mr. Luster just by itself, do you think that would have been a little less suggestive?
>
> Det. Olsen: No. Not that in this case.
>
> Salter's attorney: Okay. That's all I have.

This is certainly evidence, arguably dispositive evidence, as to the "clearly established law," circa 2003, about an allegedly "unduly suggestive" identification in this case. Consider it this way. If the law were actually as clearly established as the lead opinion would have us believe, then why didn't Salter's attorney object and say something like: *Wait a minute, that mug-shot identification violates Salter's constitutional rights, and everybody here knows it.*

Salter did not testify at trial, nor did his defense attorney present any affirmative defense. The jury convicted Salter of first degree murder. Within days of that verdict, Salter wrote a letter to the trial judge stating his version of the events on August 5 and 6, that "Rob" was his cousin, and that he (Salter) had an alibi. Salter later attested at a deposition to the truth of that letter. As relevant here, Salter wrote: "I happen to see Rob on Sept 29 or 30 [and] he told me not to worry because he know it couldn't be me because 'E' did it." Also: "One guy [in prison] name William Taylor said 'E' personally told him he did that crime." And: "The reason Jamar Luster pick me is unknown to me. 'E' was in the lineup & Jamar previously statement he stated someone named 'E' shoot

this house up before." The critical takeaway from this letter is that, at the time of his trial, Salter knew, and had witnesses, that E Collins was the shooter, and that Luster had misidentified him (Salter) as Collins. The trial judge entered this letter into the record, but Salter's appeal did not refer to any of this information.

On direct appeal, Salter's appellate counsel raised only one issue, ineffective assistance of trial counsel for the failure to exclude Luster's in-court identification on the basis that "the pretrial identification procedure was improperly suggestive" "because investigators showed Luster only a single photograph." The Michigan appellate court rejected that claim, explaining:

> [I]t is likely that the trial court would have excluded testimony concerning Luster's pretrial identification of [Salter] . . . however, it is also likely that the trial court would have nonetheless allowed Luster's in-court identification of [Salter] as having an independent basis. Indeed, Luster first identified [Salter] only a few hours after the shooting, and testified that he clearly observed [Salter], whom he already knew from the neighborhood, during the shooting. Consequently, we find that [Salter] has failed to establish any prejudice resulting from his trial counsel's failure to seek the exclusion of Luster's identifications.

Michigan v. Salter, No. 253401, 2005 WL 954961, at *1-2 (Mich. Ct. App. Apr. 26, 2005). So, the Michigan

appellate court, like the trial court, rejected Salter's claim that Olsen's use of the single-photo mugshot for the identification necessarily violated his constitutional rights.

In his M.C.R. § 6508 post-conviction motion (in 2010), Salter claimed ineffective assistance of trial counsel for the failure to present his alibi defense and witnesses. The court rejected the claim as trial strategy, and rejected the claim regarding counsel's failure to raise the issue on appeal. Seven years later, Salter filed a second M.C.R. § 6508 motion, asserting two pieces of new evidence: a polygraph test of Salter, which he passed, and an unsworn, unnotarized statement from E Collins asserting that Salter was not the shooter, but rather "DeVaughn Porter" was the shooter. The court said that was not enough and denied the motion.

In August 2018, about 15 years after Salter's conviction, attorneys from the Conviction Integrity Unit (CIU) of the Wayne County (Michigan) Prosecutor's Office and attorneys from the Federal Defenders' Office determined that the conviction was based on "mistaken identification by the main witness in the case," and agreed to dismiss the criminal charges and set aside Salter's conviction. The state trial court accepted the stipulation and vacated Salter's conviction.

So, Salter sued Det. Olsen (who is now retired) under § 1983, for a violation of his constitutional rights, and demanded $75 million. Olsen claimed qualified immunity, which the district court denied as to two of the claims: (1) an alleged *Brady* violation based on Olsen's alleged

failure to include a larger picture of E Collins in the file that he gave to the prosecutor, and (2) the use of the single photo of Salter to obtain the identification from Luster, which Salter claimed was unduly suggestive. This is an interlocutory appeal from the denial of qualified immunity.

II.

Det. Olsen argues that evidence is not *Brady* material if the defendant and his lawyer already knew about it, and the fact was available to them from another source. *See Henness v. Bagley,* 644 F.3d 308, 325 (6th Cir. 2011) ("Since Henness was aware of the essential facts that would enable him to take advantage of the exculpatory evidence, no *Brady* violation occurred."); *Coleman v. Mitchell,* 268 F.3d 417, 438 (6th Cir. 2001) ("The *Brady* rule does not assist a defendant who is aware of essential facts that would allow him to take advantage of the exculpatory evidence at issue."); *United States v. Todd,* 920 F.2d 399, 405 (6th Cir. 1990).

Olsen points out that Salter *knew* (from his cousin Rob and others) that E Collins was the shooter; *knew* that Luster had identified at least two (as he said at the preliminary examination) or even three (as he said at trial) suspects from the six-person photo array; *knew* that E Collins was pictured in the photo array whereas he (Salter) was not; and *knew* that—for reasons "unknown to" Salter—Luster had misidentified him. Therefore, Olsen has shown that Salter and his counsel "were aware of the essential facts" that allowed them to take advantage of the exculpatory evidence (i.e., that Collins was the

shooter), so the larger picture of Collins was not *Brady* material.[3]

For his part, Salter sidesteps whether the larger picture, alone, is *Brady* material. He urges a *Brady* violation based on two "essential facts" working together—two "new facts" that he says were unknown to his attorney at trial because Olsen did not provide them to the prosecutor, and that are known to him now only because Luster has offered new testimony in 2019 and 2020. Fact One: Luster attested that if someone (e.g., Salter's trial attorney) had shown him the other, "larger photo of Collins, he would have identified [E Collins] as the taller shooter with the rifle." R. 36-25, Luster affidavit, Mar. 16, 2020. Fact Two: Luster testified that he identified E Collins to Olsen in 2003, i.e., he "picked 'E' [Collins] out of the photo array as a shooter and told Olsen that 'E' was one of the shooters." R. 36-7, PgID 786, Luster depo., Apr. 26, 2019.

The problems with Luster's two statements are immediately apparent. Conceptually, they contradict

3. Also, the record reveals that the larger photo *was not withheld*; it was in the file that Det. Olsen gave to the Wayne County Prosecutor. Patricia Little, the investigator with the Conviction Integrity Unit (CIU), testified at a deposition in November 2019 that this photograph, labeled Exhibit 21 of Olsen's Deposition, *was in* the Wayne County Prosecutor's file when she received it at CIU in early 2018. *See* R. 36-24, PgID 994; R. 36-13, PgID 910 (photo of E Collins labeled Ex. 21 at Olsen's Deposition). The lead opinion ignores this evidence. Instead, the lead opinion relies on inferences, assumptions, and conjecture to create the impression that the photo must not have been in the file. But this is not competing evidence for a jury to decide between. The *evidence* shows that the photo was in the file.

each other: in the first, Luster says that *if* he had been shown the larger photo, he *would have identified* Collins; in the second, he says that he *did identify* Collins from the smaller photo-array photo. If the second statement (Fact Two) is true, then it renders the first statement meaningless: i.e., because Luster had already identified Collins as a shooter from the photo array, the larger photo was not needed for Luster to identify him. And Fact Two is not "newly discovered" evidence as we ordinarily use that term (i.e., evidence that could not have been discovered through the exercise of reasonable due diligence), given Luster's testimony at the preliminary examination that he had identified another shooter to Olsen by name, and his trial testimony that he had identified three others to Olsen from the photo array. Had Salter's attorney simply asked Luster, "Who?", he would have obtained Fact Two back then, i.e., that Luster had identified Collins. Also, given that Det. Olsen testified at both the preliminary examination and again at trial, and specifically said that Luster did *not* identify *anyone* from the photo array, this Fact Two statement does not constitute *Brady* material. Believing Luster and disbelieving Olsen makes this a claim that Olsen committed perjury, not that he withheld potentially useful evidence (i.e., the larger photo of E Collins) prior to trial.

Regardless, even if we accept that Luster pointed to E Collins in the photo array and told Olsen that Collins was one of the shooters (Fact Two), and assume that Olsen withheld this identification from Salter's trial attorney, it would not violate *Brady* in these circumstances. "[T]here is no *Brady* violation if the defendant knew or should

have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source." *United States v. Graham,* 484 F.3d 413, 417 (6th Cir. 2007) (quotation marks and citation omitted). Given Luster's repeated insistence during his preliminary examination and trial testimony that he had identified others from the photo array, Salter's attorney certainly had the essential facts necessary to show Luster the photo array and ask him to point out the others he had identified to Det. Olsen, whereupon Luster—according to his depositions later—would have identified E Collins. Salter's attorney *should have known* this allegedly missing fact. Moreover, given Luster's claim that he had already identified Collins from the small photo, Salter's attorney did not need the larger photo to take advantage of this information.

The alleged failure to provide these two "new facts" was not a *Brady* violation. The district court erred by finding that these were *Brady* materials and by finding a *Brady* violation.

III.

"[Q]ualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *City of Tahlequah v. Bond,* 595 U.S. 9, 12, 142 S.Ct. 9, 211 L.Ed.2d 170 (2021) (quotation marks and citation omitted). Salter claims that Det. Olsen's use of the single photo was unduly suggestive, in violation of the Constitution, particularly given the severe discrepancy between Luster's physical description of the shooters and Salter's actual appearance. But Olsen's testimony at Salter's trial,

quoted above, makes it clear that Olsen was proceeding on the common understanding of the law, which was that the single photo identification was lawful because Salter was not in custody, Luster knew Salter, and Luster had an independent basis for the identification. Given Olsen's testimony, and the acceptance of that testimony by all parties at trial, including Salter's attorney, there is no reasonable contention that Olsen was plainly incompetent or knowingly violated the law.

But the lead opinion contends that Det. Olsen, as a reasonable officer apprised of the law in 2003, must have known that a single-photo identification was unconstitutional under the circumstances of this case. If it is true that a police officer (who is not a lawyer) necessarily knows that a single-photo identification is unconstitutional, then it stands to reason that the prosecutor (*who is a lawyer*) would know that as well, and would therefore refuse to use that unconstitutional identification and instead demand more investigation before seeking an indictment. But this prosecutor did not; this prosecutor sought an indictment based almost exclusively on that single-photo identification. As I see it, either the premise is not true (i.e., the use of a single-photo identification in these circumstances was *not* a clearly established constitutional violation) and, therefore, the police offer (Det. Olsen) is entitled to qualified immunity, or the prosecutor's equally egregious constitutional violation is an intervening cause that cuts off the officer's liability.

This same concern continues on for two more steps. If that premise is true—that a non-lawyer police officer

(in the heat of a murder investigation) would clearly know that the single-photo identification was unconstitutional—then it stands to reason that the trial court (having time to consider opposing arguments, conduct research, and weigh its decision) would recognize the clear constitutional violation and would therefore exclude that unconstitutional identification from trial. But the trial court did not exclude the identification; the trial court determined—even on sober second thought—that the identification was lawful, and admitted it at Salter's trial. Again, either the premise is not true, or the trial court's constitutional mistake is an intervening cause that cuts off the officer's liability. And taking the last step, if that premise were true, then it stands to reason that the appellate court (and the Michigan Supreme Court which denied further appeal) would certainly have known, and would have reversed the conviction due to that unconstitutional identification. Of course, that did not happen, so either the premise is not true, or the state appellate courts' constitutional violation is an intervening cause that cuts off the officer's liability.

Altogether, if Salter's premise is true, then these participants—police officer, prosecutor, trial judge, appellate judges—all made the same obvious mistake, but only the officer is being held liable for it. While it is more likely that the premise is not true (i.e., it was *not* clearly established to a reasonable officer in 2003 that this single-photo identification was unconstitutional), even if that premise were true, there is a causation problem here that cuts off Det. Olsen's liability.

"Like a tort plaintiff, a § 1983 plaintiff must establish both causation in fact and proximate causation." *Marvaso*

v. Sanchez, 971 F.3d 599, 606 (6th Cir. 2020) (quotation marks and citation omitted); *Imbler v. Pachtman,* 424 U.S. 409, 418, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (holding that § 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them"). "Thus, even if it is foreseeable that a defendant's conduct will lead to the complained of harm, a defendant may be able to avoid § 1983 liability by pointing to the intervening action of a [third-party] as the proximate cause of the plaintiff's injury." *Powers v. Hamilton Cnty. Pub. Def. Comm'n,* 501 F.3d 592, 610 (6th Cir. 2007). This is not novel or unusual.

> In cases arising from criminal proceedings, . . . a judge often commits an intervening act. A judge may, for example, make a finding of probable cause at a preliminary hearing or issue a warrant. Such an intervening act breaks the causal chain when the judge's action is independent from any misrepresentations, omissions, or other wrongdoing by the defendant.

Howell v. Cox, 758 F. App'x 480, 483 (6th Cir. 2018); *DePiero v. City of Macedonia,* 180 F.3d 770, 789 (6th Cir. 1999) (rejecting a § 1983 unreasonable seizure claim against an officer because the mayor's court had issued the improper bench warrant). When the actions of a neutral third-party (indeed, multiple third parties) are the superseding cause of the plaintiff's injuries, "that cuts off the otherwise foreseeable chain of causation" and "proximate cause is lacking." *Marvaso,* 971 F.3d at 615 (Nalbandian, J., dissenting). That is the situation here.

Even if Det. Olsen had made a clear and unmistakable constitutional error, the third parties' (i.e., prosecutor, trial court, appellate court) failure to admit and remedy that obvious error was the proximate cause of Salter's injury, cutting off Det. Olsen's liability for Salter's 15 years of wrongful imprisonment.

IV.

Because the facts material to this analysis are not contested—all of the foregoing facts are established in the record and there is no factual dispute awaiting a jury decision—we have jurisdiction to decide this interlocutory appeal, and because Det. Olsen is entitled to qualified immunity on the plain law and uncontested facts of this case, I respectfully dissent.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1656

AARON SALTER,

Plaintiff-Appellee,

v.

CITY OF DETROIT, MICHIGAN,

Defendant,

DONALD OLSEN,

Defendant-Appellant.

Filed March 21, 2025

JUDGMENT

Before: BATCHELDER, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

This CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/_____
Kelly L. Stephens, Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JUNE 2, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 18-13136

AARON SALTER,

Plaintiff,

v.

DONALD OLSEN,

Defendant.

Filed June 2, 2022

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 29)

I. INTRODUCTION

In 2003, Plaintiff Aaron Salter was convicted of one count of first-degree murder, two counts of assault with intent to murder, and one count of felony-firearm. (ECF No. 1, PageID.8). He was sentenced to serve life in prison

without the possibility of parole. *Id.* at PageID.9. A team of lawyers and investigators from the Federal Defender Office (FDO) represented Salter in his federal habeas proceeding. While they were unable to obtain habeas relief for Salter, they uncovered previously undisclosed evidence and interviewed witnesses who confirmed Salter's alibi at the time of the shooting for which he had been convicted. *See* Press Release dated 8/15/18 from Wayne County Prosecutor Kym Worthy, https://www.waynecounty.com/articles/press-release-august-15-2018-prosecutor-worthy.aspx (last accessed 4/28/22).[1] They also interviewed the sole eyewitness from Salter's trial, who stated that he was never certain Salter was the shooter. *Id.* In 2013, a prisoner contacted the FDO attorneys claiming to have personal knowledge of the shooting. *Id.* The FDO attorneys followed up on that lead, then hired a former FBI polygrapher, to subject Salter to a polygraph examination, which he passed. *Id.* After Salter's requests

1. The press release is cited and quoted in Salter's complaint. (*See* ECF No. 1, PageID.11). The court does not rely on the press release for the truth of the matters asserted therein nor does the court rely on the facts set forth in the press release in the substance of its decision below. Instead, the court refers to the press release only for background and context of the pre-suit procedural history that lead to the overturning of Salter's conviction. *See e.g.*, *Holder v. Enbridge Energy, L.P.*, 2011 WL 3878876, at *5 (W.D. Mich. Sept. 2, 2011) (Court considered newspaper article referenced in the plaintiff's complaint as "helpful background and context to Plaintiff's claims," even if not admissible at trial.); *Yarborough v. City of Warren*, 383 F. Supp. 676, 682 (E.D. Mich. 1974) (Newspaper articles received in evidentiary hearing for purpose of background on the events at issue in civil rights action, not for the truth of the matters asserted therein.).

for habeas relief were denied, the FDO attorneys sought from the Wayne County Prosecutor's Office newly formed Conviction Integrity Unit (CIU). *Id.*

In 2018, both the CIU and Salter's counsel began investigating his claim of innocence. (ECF No. 1, PageID.11). Once the investigation was complete, the criminal charges against Salter were dismissed. *Id.* The Wayne County Prosecutor, issued the following statement:

> The Aaron Salter case has been thoroughly reviewed, investigated, and considered. It has been determined that the case against Mr. Salter was based primarily on mistaken identification by the main witness in the case. I am pleased to announce today that this 15-year old homicide conviction against Aaron Salter will finally be dismissed. The system failed him. Nothing I can say will bring back the years of his life spent in prison. Justice is truly being served today. We will recommend to the Michigan Attorney General's Office that Mr. Salter receive wrongful conviction compensation. We sincerely wish him well.

Id.; *see also* https://www.waynecounty.com/articles/press-release-august-15-2018-prosecutor-worthy.aspx (last accessed 4/28/22).

Subsequently, Salter filed this lawsuit against the City of Detroit and retired police investigator Donald Olsen, who worked for the Detroit Police Department ("DPD").

(ECF No. 1). He raises several constitutional claims under 42 U.S.C. § 1983 and a state law claim. Count I alleges Fourth Amendment violations for fabrication of evidence, false arrest, and malicious prosecution as well as Fifth Amendment violations for withholding exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and an unnecessarily suggestive identification. Count II alleges a Michigan malicious prosecution claim.

Once discovery closed, Olsen filed a motion for summary judgment, (ECF No. 29), which has been fully brief and is now ready for determination. For the reasons set forth in this opinion, Olsen's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

II. FACTS

On August 6, 2003, around 1:20 a.m., Jamar Luster was sitting on the front porch of a home on Parkgrove Street in Detroit, Michigan, with his friends, Kimberly Allen and Michael Payne. (ECF No. 29, PageID.367). The group was hanging out, drinking, and "getting high." (ECF No. 36-7, PageID.780).[2] In the midst of it, Luster heard a gunshot, looked to his right and saw two shooters moving slowly toward them. (ECF No. 29-2, PageID.414, ECF No. 36-11, PageID.841). Although it was dark outside, he noted that at least one of the shooters, whom he later

2. At the preliminary examination, however, Luster testified that he was neither drinking nor under the influence of drugs. (ECF No. 36-9, PageID.824).

identified as Salter, was under a streetlight. (*Id.* at 843). The shooters were about 35 to 40 feet away from Luster. (ECF No. 36-9, PageID.814). One of the shooters was a smaller man with a pistol; the other a taller, thicker man with a long gun. (ECF No. 29-2, PageID.414, ECF No. 36-11, PageID.839). Luster and Payne both suffered gunshot wounds during the melee. After he was shot, Luster jumped over the bannister of the porch, laid down, and then crawled away. (ECF No. 36-11, PageID.841, 843). According to Luster, he "wasn't tryin' to look for nobody, [he] was tryin' to get out the way." (*Id.* at PageID.842). Both Luster and Payne were taken to the hospital. (ECF No. 29, PageID.367). Another man who was near the porch died of his gunshot wound. (*Id.*)

Olsen, who was new to the DPD (ECF No. 36-18, PageID.930), responded to the scene of the shooting. (ECF No. 29, PageID.367). Later, around 5:20 a.m., he spoke to Luster at the hospital. (ECF No. 29-5, PageID.421). Luster gave a statement in which he relayed that one of the guys who shot him was named "Rob." (ECF No. 36-2, PageID.724). He described Rob as a black male, 26 to 27 years old, five feet seven inches tall, 150 to 170 pounds, light brown complexion, with a thin beard and low cut hair, wearing dark clothing. (*Id.*). Luster explained that he knew Rob from the neighborhood because of "all the shit he be starting." (*Id.* at PageID.725). In particular, he said that earlier in the day, Rob was with a group of others who had driven by the house where he was shot, waving a gun at six other men. (*Id.*). Regarding the second shooter, Luster said he had never seen him before; all he could say about him was that "he's thin firing a gun."

(*Id.*). Luster also noted that a guy named "E" (Earland Collins) had shot up the house about a month before. (*Id.* at PageID.726). Luster made a second statement to DPD Officer Joseph Diabliz while at the hospital. In the second statement, he described Rob as "b/m/20's, 5'7", thin build, med. complex., short afro, wearing all black. Known to frequent the area of Pelkey/Linnhurst. Known to drive a 'beat up' peach cutlass." (ECF No. 36-3, PageID.728). He described the second shooter as "b/m/20's, 6'0", thin build, white t-shirt, N.O.D." (*Id.*). Luster was discharged from the hospital after a couple of hours and went home. (ECF No. 29, PageID.367).

At some point after speaking with Luster, Olsen went to the 9th Precinct to do some research on the case. (ECF No. 36-4, PageID.750). Olsen found a photo of Salter, and for reasons he could not recall during his deposition, Olsen selected Salter as the possible "Rob" referred to by Luster. (*Id.*) Notably, at Salter's preliminary examination, which was much closer in time to the events that transpired, Olsen testified that he had a "hunch" that Salter was the shooter because Luster had told him "that he had seen the person before on a few occasions" and, in trying to surmise who he was talking about, Olsen came up with that photo. (ECF No. 36-5, PageID.771-72).

Once Luster was released from the hospital, Olsen went to Luster's home and took yet a third statement. He told Luster that the police had picked up the guy with the rifle. (ECF No. 36-7, PageID.799). Afterward, Olsen showed Luster the single black and white mug shot of Salter that he had retrieved from the station, and Luster

identified Salter as the "Rob" who shot him. (*Id.*; ECF No. 36-6, PageID.774). While Salter was 6'4" tall and 250 pounds (ECF No.36, PageID.683-84), not 5'7" and 150-170 pounds as Luster had described "Rob," Olsen says he was unaware of Salter's height or weight when he showed Luster the photo. (ECF No. 36-4, PageID.751).

After showing Luster the single photo of Salter, Olsen then showed Luster a photo array containing six other mug shots that did not include Salter. (ECF No. 36-5, PageID.770-771). At Salter's preliminary examination after he had been charged criminally, Olsen testified that Luster did not identify any of the six as "responsible for the shooting," (ECF No. 36-5, PageID.771); Luster, on the other hand, testified during that same hearing that he had picked two people from the array as shooters. (ECF No. 36-9, PageID.830). And at his deposition in this case, Luster testified that he picked "E" out of the photo array as a shooter and told Olsen that "E" was one of the shooters. (ECF No. 36-7, PageID.786, p. 38).

Based on Luster's identification of Salter in the single photo show up, Olsen filled out an investigator's report and submitted it along with the homicide file to the prosecutor's office. (ECF No. 29, PageID.369; ECF No. 29-9, PageID.466). The Assistant Prosecuting Attorney in Wayne County recommended an arrest warrant for Salter. On September 9, 2003, a judge issued a warrant for Salter's arrest. (ECF No. 29, PageID.369).

A few weeks later, at the preliminary examination, only Luster and Olsen testified. Luster described the events

surrounding the shooting and again identified Salter as one of the two shooters. (ECF No. 36-9, PageID.813). Luster testified that Salter looked like "the tall one" with the "long gun." (*Id.* at PageID.814). Repeating what he had said to Olsen at the hospital, he also testified that he had seen Salter "once or twice" before, including when Salter drove by the house waiving a gun earlier on the day of the shooting. (*Id.* at PageID.818-19). Luster also testified that he was shown a photo array of five or six photos and picked two people out as the shooters; at the time, Luster testified that "the two people I picked out was him and the other guy, Rob, or whatever" and that "two out of the five [he] picked out are the two people that shot [him]." (*Id.* at 830). Olsen also testified briefly about his process for showing the photos to Luster, explaining that he first showed Luster a single photo of Salter then a six-photo array that did not include Salter. (ECF No. 36-5, PageID.771). He stated that Luster did not identify any of the people in the photo array as having been responsible for the shooting. (*Id.*). He also acknowledged that he could have prepared a photo array with Salter's picture in it. (*Id.*).

At the end of the preliminary examination, Salter's trial attorney, Lyle Harris, moved to suppress Luster's identification because Olsen showed him the photo "without doing a photo show-up." (ECF No. 29-8, PageID.463). Harris argued that Olsen "should have done a photo array with Mr. Salter's picture in there." (*Id.*). The prosecutor responded that Luster said he knew Salter and had "seen him in the past." (*Id.* at PageID.464). The trial court denied the motion to suppress, finding that "[t]here

is no constitutional right to have [an identification] done in a certain way." (*Id.*)

Both Luster and Olsen testified at trial. Luster again identified Salter as the shooter. The jury convicted Salter of first-degree murder, two counts of assault with intent to murder, and one count of felony-firearm on December 8, 2003. (ECF No. 36, PageID.685). He was sentenced to a term of life imprisonment without parole. (*Id.*).

Almost fifteen years later, the Conviction Integrity Unit ("CIU") of the Wayne County Prosecutor's Office began reviewing Salter's claims of innocence. (*Id.*). According to Salter, a new closeup photo of Earland "E" Collins was discovered upon review of his DPD file. (ECF No. 36-13). Attorney Colleen Fitzharris, one of Salter's attorneys from the Federal Defender Office, received attorney Harris' file as part of her appellate investigation and she attested to the fact in her affidavit that the photograph was not part of that file. (ECF No. 36-17, C. Fitzharris affidavit, ¶ 6).[3] Added to that fact is the trial prosecutor's testimony that if the larger photo of Collins

3. Salter also cites paragraphs 5 and 6 of the affidavit of his defense attorney, Harris, in support of this proposition. (ECF No. 36-15). However, the complete affidavit was not submitted; only the third page, which does not includes the paragraphs identified, appears in the record. Nevertheless, in paragraph 8 of the affidavit, Harris seems to allude to an absence of the photos at trial where he states, "Having the large photo of Earland Collins at the trial *would have* allowed me to cross-examine the lead detective . . . more effectively," and "Having the photo of a stronger suspect . . . *would have* called into question the integrity of the homicide investigation in this case." (*Id.*) (emphasis supplied).

had been provided to her, she would have produced it to the defense. (ECF No. 36-16, PageID.924, pp. 27-28). The CIU also interviewed Olsen. (ECF No. 36-18). Olsen said he thought the case "always stunk." (*Id.* at PageID.930). He "just presented what [he] had" and "never thought it would be a conviction." (*Id.*)

As a result of the CIU investigation, the state court vacated Salter's conviction and dismissed the case pursuant to the parties' stipulation on August 15, 2018. (ECF No. 36-22).

III. DISCUSSION

A. Standard of Review

When a party files a motion for summary judgment, it must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d 433,

436 (6th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Furthermore, the evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

Where the movant establishes the lack of a genuine issue of material fact, the burden of demonstrating the existence of such an issue then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). That is, the party opposing a motion for summary judgment must make an affirmative showing with proper evidence and to do so must "designate specific facts in affidavits, depositions, or other factual material showing 'evidence on which the jury could reasonably find for the plaintiff.'" *Brown v. Scott*, 329 F. Supp. 2d 905, 910 (E.D. Mich. 2004). In order to fulfill this burden, the non-moving party only needs to demonstrate the minimal standard that a jury could ostensibly find in his favor. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). However, mere allegations or denials in the non-movant's pleadings will not satisfy this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 251, 106 S.Ct. 2505.

The court's role is limited to determining whether there is a genuine dispute about a material fact, that is,

if the evidence in the case "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Such a determination requires that the court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Id.* at 254, 106 S.Ct. 2505. Thus, if the plaintiff must ultimately prove its case at trial by a preponderance of the evidence, on a motion for summary judgment the court must determine whether a jury could reasonably find that the plaintiff 's factual contentions are true by a preponderance of the evidence. *See id.* at 252-53, 106 S.Ct. 2505. Finally, if the nonmoving party fails to make a sufficient showing on an essential element of its case for which it carries the burden of proof, the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The court must construe Rule 56 with due regard not only for the rights of those "asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," but also for the rights of those "opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327, 106 S.Ct. 2548.

B. Qualified Immunity—Legal Standard

Olsen argues that he is entitled to qualified immunity from Salter's § 1983 claims of constitutional violations. The doctrine of qualified immunity means that "'[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known.'" *Caldwell v. Moore*, 968 F.2d 595, 599 (6th Cir. 1992) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Defendants bear the burden of pleading qualified immunity, but plaintiff bears the burden of showing that the defendant's conduct violated a right so clearly established that a reasonable official in his or her position would have clearly understood that he or she was under an affirmative duty to refrain from such conduct. *Sheets v. Mullins*, 287 F.3d 581, 586 (6th Cir. 2002) (citation omitted) (explaining that "[t]he ultimate burden of proof is on the plaintiff to show that the defendant is not entitled to qualified immunity").

The Supreme Court has established a two-part test to determine whether qualified immunity applies. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The first part of the test involves a determination of whether the facts of the case, viewed in the light most favorable to the plaintiff, "show the officer's conduct violated a constitutional right." *Id.* If the first question is resolved in the affirmative, then the court should decide "whether the right was clearly established." *Id.*

"[C]learly established means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Dist. of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (internal quotations omitted). The right must be defined at the appropriate level of specificity to determine whether it was clearly established at the time the defendants acted.

Wilson v. Layne, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (citing *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Indeed, "courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.'" *Moderwell v. Cuyahoga Cnty., Ohio*, 997 F.3d 653, 660 (6th Cir. 2021) (quoting *Wesby*, 138 S. Ct. at 590). On the other hand, it "defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas)." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012). An official action, therefore, need not have previously been held unlawful, but "in the light of pre-existing law the unlawfulness must be apparent." *Wilson*, 526 U.S. at 615, 119 S.Ct. 1692 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034).

Typically, "[a] clearly established constitutional violation requires on-point, controlling authority or a robust consensus of cases of persuasive authority." *Ortega v. U.S. Immigr. and Customs Enf't*, 737 F.3d 435, 439 (6th Cir. 2013). "In determining whether a right was clearly established, we look first to decisions of the Supreme Court, then to our own precedents, and then to decisions of other courts of appeal, and we ask whether these precedents 'placed the . . . constitutional question beyond debate.'" *Hearring v. Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). In rare circumstances, however, "the Supreme Court has held

that there does not need to be a case directly on point." *Moderwell*, 997 F.3d at 660 (citing *Taylor v. Riojas*, — U.S. —, 141 S. Ct. 52, 53, 208 L.Ed.2d 164 (2020). "[T]here can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Id.* (quoting *Wesby*, 138 S. Ct. at 590).

If both parts of the qualified immunity test are resolved in the affirmative, then the doctrine of qualified immunity does not apply, and the case can proceed. The court may address the two factors in whichever order it deems appropriate based on several factors, not the least of which is judicial economy. *Pearson v. Callahan*, 555 U.S. 223, 227, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). As the Sixth Circuit has observed, "[t]his generally means that 'we are free to consider those questions in whatever order is appropriate in light of the issues before us.'" *Jones v. Byrnes*, 585 F.3d 971, 975 (6th Cir. 2009) (quoting *Moldowan v. City of Warren*, 570 F.3d 698, 720 (6th Cir. 2009)).

C. Fabrication of Evidence

A plaintiff may raise a claim for fabrication of evidence under the Fourth Amendment and Due Process Clause of the Fourteenth Amendment. Salter appears to raise both. "A Fourth Amendment claim for fabrication of evidence lies where a defendant knowingly manufactures probable cause, thereby effecting a seizure." *Robertson v. Lucas*, 753 F.3d 606, 616 n.5 (6th Cir. 2014). "The Due Process Clause of the Fourteenth Amendment is also

'violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury.'" *Jackson v. City of Cleveland*, 925 F.3d 793, 815 (6th Cir. 2019) (quoting *Gregory v. City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006)).

"A claim of fabricated evidence is a constitutional tort distinct from malicious prosecution, and can be shown without proving that the state lacked probable cause." *Morris v. Boyd*, 283 F.3d 422, at *3 (Table) (6th Cir. 2000). "[T]he relevant question is not whether the fabricated evidence was *shown* to the jury; it is whether the statement *affected* the decision of the jury." *Jackson*, 925 F.3d at 816. "For example, a fabricated search warrant affidavit, used to obtain evidence later shown to the jury, can form the basis for a fabrication-of-evidence suit," or "fabricated evidence that 'is used as [the] basis for a criminal charge' can form the basis for a § 1983 claim because, absent that evidence, there would have been no jury." *Id.* (quoting *Halsey v. Pfeiffer*, 750 F.3d 273, 294 n.19 (3d Cir. 2014)).

Olsen does not address Salter's fabrication-of-evidence claim in his motion for summary judgment but instead discusses it for the first time in his reply brief. Typically, issues raised for the first time in a reply brief are waived. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008). This is because "reply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration" and "the non-

moving party ordinarily has no right to respond to the reply brief, at least not until oral argument." *Id.* (quoting *Novosteel SA v. U.S. Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002)). But because Salter addressed his fabrication-of-evidence claim in his response brief and discussed the issue at oral argument, the court will consider Olsen's argument.

In his response brief, Salter argues that Olsen's "illegal photo identification procedure constitutes fabricated evidence that manufactured probable cause for the arrest." (ECF No. 36, PageID.701). Salter also claims that because Olsen showed Luster a photo array with Earland Collins in it and because Salter's physical characteristics "did not come close to Jamar Luster's description of the shooters," a reasonable jury could infer that Olsen "knowingly 'created' evidence that would not have been obtained otherwise and manufactured probable cause for Plaintiff 's arrest and subsequent conviction." (*Id.* at PageID.701-04). Olsen replies that this claim is an "attempt to couch the claim for unduly suggestive photo identification procedures in terms of fabricating evidence." (ECF No. 37, PageID. 1013). Olsen argues that the identification was not unduly suggestive in any event. (*Id.* at 1013-14). He also argues that no evidence supports the inference that Olsen fabricated evidence. (*Id.* at 1014-15).

Salter argues that his "right not to be prosecuted or convicted based on fabricated evidence was clearly established long before August of 2003," under both *Jackson*, 925 F.3d 793, and *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999). While this is an accurate

statement of the law, Salter does not adequately show that a reasonable jury could find that Olsen's actions constituted a fabrication of evidence. That is, Salter does not show that he can satisfy the first prong of the qualified immunity test—that Olsen violated his constitutional rights through a fabrication of evidence. Indeed, the Sixth Circuit has suggested that a single-photo identification may not be the basis for a fabrication-of-evidence claim. *See France v. Lucas*, 836 F.3d 612, 630 (6th Cir. 2016) ("While we disapprove of the officers' use of a single photo labeled with a suspect's name to identify France—particularly a sixth grade photo from years before—the evidence was not fabricated and cannot serve as the basis for a fabrication of evidence claim."). In *France*, the suspect's first name was identified as "Geneva" and the police officer located a sixth grade photo of France, which was not placed in a photo array and may have been captioned with the name "Geneva France" when shown to the witness. *Id.* at 619. The Sixth Circuit found that the officer's only action was to provide an "accurate, if outdated photo" of the suspect and this could not sustain a fabrication of evidence claim. *Id.* Just as in *France*, the photo itself was an accurate depiction of Salter and thus, cannot support a fabrication of evidence claim.

Moreover, the facts in *Jackson* and *Spurlock* are largely inapposite to the present circumstances because they both addressed conduct involving influencing a witness to agree to particular facts based on threats or intimidation. For instance, in *Jackson*, when a 12-year-old witness failed to identify the plaintiffs in a lineup as the perpetrators of a crime, officers "accused [the witness] of

lying, threatened to send his parents to jail for perjury, banged on a table, and used racial pejoratives to describe [him]." 925 F.3d at 804. They then presented the witness a statement that explained that he had failed to identify the perpetrators because he feared their retaliation, which he signed. *Id.* Later, the witness also explained to officers that he had not witnessed the crime; they yelled at him again and threatened to send his parents to jail for perjury. *Id.* at 804-05. The officers' tactics led the child to agree to testify at trial that he had seen the crime. *Id.* at 805. Similarly, in *Spurlock*, officers tampered with a witness; in an alleged scheme to collect reward money in a murder case, officers used threats and promises of release from jail to get an informant to implicate the plaintiffs in the murder. 167 F.3d at 998-99. In both cases, the Sixth Circuit found that officers fabricated evidence through threats and intimidation in violation of clearly established law. In contrast, Salter does not allege any threats or intimidation, rendering his reliance on these cases questionable. Indeed, neither case addressed whether the use of a single-photo identification constitutes fabricated evidence. Nor is Olsen's conduct analogous to the egregious tampering present in those cases. *Cf. Jackson*, 925 F.3d at 825 ("The obvious injustice inherent in fabricating evidence to convict three innocent men of a capital offense put Stoiker on notice that his conduct was unlawful."). Given the Sixth Circuit's admonition that a single photo identification in and of itself does not constitute a fabrication of evidence, the court concludes that a reasonable jury could not find that Olsen fabricated evidence based upon the use of such a method here. Accordingly, Salter has not established the existence of

a genuine issue of material fact as to this claim and it fails. Based on the foregoing conclusion, the court need not address the second prong of the qualified immunity analysis.

D. False Arrest and Malicious Prosecution

Section 1983 claims based on theories of false arrest/false imprisonment and malicious prosecution derive from the Fourth Amendment and turn on the question of probable cause. *France*, 836 F.3d at 626 ("A malicious prosecution claim under § 1983 fails "when there was probable cause to prosecute.") (internal quotation marks and citation omitted); *Stemler v. City of Florence*, 126 F.3d 856, 871-72 (6th Cir. 1997) (finding the existence of probable cause for arrest forecloses false arrest claims); *Gregory v. City of Louisville*, 444 F.3d 725, 748-49 (6th Cir. 2006) (cause of action for "malicious prosecution" under § 1983 is actually a Fourth Amendment claim to be free from pretrial detention without probable cause). The same is true under Michigan law. *See Blase v. Appicelli*, 195 Mich.App. 174, 177-178, 489 N.W.2d 129 (1992) ("[o]ne element that the plaintiff must prove to succeed on an action for malicious prosecution is the absence of probable cause for the proceedings"). Thus, Salter's state law claim for malicious prosecution also turns on the question of probable cause. *Id.*

As the Sixth Circuit has observed, "A [police officer] is entitled to qualified immunity" on a false arrest and false imprisonment claim "if he or she could reasonably (even if erroneously) have believed that the arrest was lawful,

in light of clearly established law and the information possessed at the time by the [police officer]." *Kennedy v. City of Villa Hills*, 635 F.3d 210, 214 (6th Cir. 2011). Probable cause to arrest exists if there are "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *Thacker*, 328 F.3d at 260 ("Insofar as the question of probable cause here is a close one, reasonable officials could disagree as to whether probable cause existed. Thus, the defendant officers are entitled to qualified immunity on Thacker's Fourth Amendment seizure claim.") (internal citations omitted). Accordingly, whether there was a constitutional violation or state law violation giving rise to plaintiff's claims of false arrest/illegal seizure and false imprisonment depends on whether the arresting officer(s) had probable cause to arrest and whether probable cause was found at the preliminary examination hearing. The law in this circuit establishes that "[a]n eyewitness identification—standing alone—is sufficient to establish probable cause unless the officer has some reason to believe at the time of the arrest that the eyewitness is lying or mistaken." *Thomas v. Noder-Love*, 621 F. App'x. 825, 832 (6th Cir. 2015) (citing *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999)); *see also Thacker v. City of Columbus*, 328 F.3d 244, 257 (6th Cir. 2003) (explaining that a victim's accusations alone without a statement from accused was sufficient for probable cause).

Olson argues that Salter's claim for false arrest fails because "[a] valid warrant was issued for plaintiff 's arrest based on probable cause established through the eyewitness identification of plaintiff by Jamar Luster." (ECF No. 29, PageID.376). And, according to Olsen, "[t]here is no evidence that Investigator Olsen intentionally or recklessly made material misrepresentation in the Investigator's Report for the warrant request in an effort to manufacture probable cause." (*Id.* at PageID.376-77). Hence, Olsen contests two elements of Salter's malicious prosecution claims for similar reasons. He first argues that Salter fails to establish the absence of probable cause. (ECF No. 29, PageID.377). Olsen contends that Luster's identification of Salter as the shooter was enough by itself to support probable cause for the arrest warrant. (*Id.* at 376-77). Second, he argues that there is no evidence that he made, influenced, or participated in the decision to prosecute; instead, he participated in a passive and neutral way by merely investigating and submitting a warrant request. (*Id.* at 378). Salter does not seem to directly address Olsen's arguments as to the false arrest claim, but he does dispute probable cause. Accordingly, the court will address this argument as to both the false arrest and malicious prosecution claims.

Relying on *Sykes v. Anderson*, 625 F.3d 294, 312 (6th Cir. 2010), Salter argues that "a police officer violates a person's Fourth Amendment right to be free from illegal seizure and prosecution when the officer makes deliberate or reckless falsehoods in sworn statements or investigatory materials that result in arrest and prosecution without probable cause." (ECF No. 36, PageID.690). In *Sykes*, the

court examined whether probable cause supported the plaintiff's arrest and prosecution. *Id.* "Because an arrest based on a facially valid warrant approved by a magistrate provides a complete defense, *Voyticky*, 412 F.3d at 677, in order to prevail on a false-arrest claim, [the plaintiff] was required to prove by a preponderance of the evidence that in order to procure the warrant, [the defendant] 'knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create[d] a falsehood' and 'such statements or omissions [we]re material, or necessary, to the finding of probable cause.'" *Sykes*, 625 F.3d at 305 (quoting *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)) (internal quotation marks omitted). Based on *Sykes*, Salter is faced with the obstacles of a facially valid warrant and a finding of probable cause at the preliminary examination. To defeat these obstacles, Salter must show that Olsen made false statements that were material to the finding of probable cause. This proves to be a bridge too far under the facts here presented.

The present case is similar to that of *Siggers v. Alex*, 2021 WL 4391170, *16-17 (E.D. Mich. Sept. 24, 2021) in which the court also analyzed whether the plaintiff presented evidence to overcome a finding of probable cause at a preliminary examination hearing. In *Siggers*, the court had first rejected the plaintiff's Fourteenth Amendment fabrication of evidence claim for failure to raise a triable issue of fact. *Id.* And because the plaintiff's malicious prosecution claim was based on the same alleged fabrication of evidence, the court found that his malicious prosecution claim also failed:

> Because Siggers is unable to show that Alex fabricated evidence, he necessarily cannot show that the prosecution lacked probable cause. Absent the requisite showing of a lack of probable clause, Siggers's entire malicious prosecution claim fails.

Id. at *17. Here, Salter's false arrest and malicious prosecution claims are both based on the purported fabrication of evidence relating to the single photo identification. Yet, as discussed above, use of the subject single photo does not constitute a fabrication of evidence in the circumstances presented here. Thus, like *Siggers*, the false arrest and malicious prosecution claims fail because Salter cannot show that Olsen made any false statements that were material to the probable cause finding. Thus, the probable cause findings made at the preliminary examination and by the judge who issued the arrest warrant are not invalidated. Given the court's conclusion on the first prong of the qualified immunity test, the court need not address the second prong of the qualified immunity analysis.

E. Fourteenth Amendment Due Process

1. *Brady*

The Supreme Court has held that the failure to provide exculpatory evidence to the accused violates due process. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). A *Brady* claim has three elements: (1) "the evidence at issue must be favorable to the accused, either

because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "To show prejudice, Plaintiffs must show that the allegedly suppressed evidence was 'material.'" *Jackson*, 925 F.3d at 815. "[I]n other words, 'that there is a reasonable probability that the suppressed evidence would have produced a different verdict.'" *Id.* (quoting *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936). Such a claim is cognizable under § 1983. *See Sykes v. Anderson*, 625 F.3d 294, 319 (6th Cir. 2010) (citing *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6th Cir. 2009)) ("[T]he due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police," and a violation of that obligation can result in civil liability.).

While the facts in *Brady* involved the actions of prosecutors, the Sixth Circuit has also concluded that the "police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material." *Jackson*, 925 F.3d at 814. Yet and still, "*Brady* requires a police officer to disclose evidence to the prosecutor only when its exculpatory value is 'apparent' to the officer." *D'Ambrosio v. Marino*, 747 F.3d 378, 389 (6th Cir. 2014). Exculpatory value is "apparent" when "the officer is aware that the evidence 'could form a basis for exonerating the defendant.'" *Id.* at 390 (quoting *Moldowan v. City of Warren*, 578 F.3d 351, 388 n.14 (6th Cir. 2009)).

Salter argues that a closeup photo of Collins in the homicide file was material evidence that was not turned over to the prosecutor and thus to the defense. (ECF No. 36, PageID.709-19). Salter asserts that the photo is exculpatory because "it demonstrates Olsen had considered an alternate suspect as one of the shooters" and because Collins is six feet two inches and 200 pounds, which is a closer fit to Luster's description of one of the shooters. (ECF No. 36, PageID.714 and ECF No. 36-13 (photo of Collins with height and weight information)). Salter also argues that the photo could have been used to impeach Luster. (*Id.* at PageID.714-17). Salter's federal habeas attorney stated that the photo was not in the files turned over to her from Salter's trial attorney and the trial prosecutor says that if she had the photo, she would have turned it over. (ECF No. 36-17; ECF No. 36-16, PageID.924). Furthermore, Luster states in an affidavit that he would have identified Collins as the taller shooter with the rifle if he had been shown the closeup photo of Collins. (ECF No. 36-25, ¶ 4). Salter also contends that the exculpatory and impeaching character of this evidence is further buttressed by Olsen's own admission that he believed the case against Salter was weak (as he later revealed to the CIU investigator: "The case stinks. It always stunk."). (ECF No. 36, PageID.709, citing ECF No. 36-18).

Olsen argues that Salter's *Brady* claim fails because, "Mr. Salter and his attorney were not only undisputedly aware of every piece of evidence contained in Investigator Olsen's homicide file which had been turned over in a discovery pack, but were aware of who 'Rob' and 'E' were

as depicted in the photo array, and of all Mr. Salter's movements and witnesses thereto up to and past the time of the subject shooting." (ECF No. 29, PageID.381). Olsen also contends that there is "no evidence that the subject photo was not turned over" and that it is also not material because the photo array included a photograph of Collins and because Salter was present when Collins shot his cousin Rob Carter three days before the shooting. (ECF No. 37, PageID. 1016). Based on Olsen's arguments, he appears to challenge the second (whether the State withheld exculpatory evidence) and the third (whether the withheld evidence was material) elements of a *Brady* claim and does not directly challenge the first element (that the evidence at issue was in fact exculpatory). Accordingly, the court will address only those challenged elements.

Salter has presented evidence that the photograph was not produced in discovery. Attorney Colleen Fitzharris, one of Salter's attorneys from the FDO, received attorney Harris' file as part of her appellate investigation and she testified in her affidavit that the photograph was not part of that file. (ECF No. 36-17, C. Fitzharris affidavit, ¶ 6). And, the trial prosecutor, testified that if the larger photo of Collins had been provided to her, she would have produced it to the defense. (ECF No. 36-16, PageID.924, pp. 27-28). Salter's trial attorney also affirmed that having the large photo "would have allowed" him to take certain actions at trial to question the integrity of the investigation amongst other things. (ECF No. 36-15). It is reasonable to infer from the phrasing of Harris's statement that he, in fact, did not have the large photo during Salter's

trial.[4] And based on the combination of evidence from all three attorneys (prosecutor, defense attorney and habeas counsel), a jury could reasonably infer that the larger photo of Collins found in Olsen's file was not provided to the trial prosecutor or the defense. Accordingly, Salter has established that there is a question of material fact regarding whether the photograph was withheld by the State.

The court must now determine whether Salter has created a genuine issue of material fact regarding the materiality of the photograph, or prejudice. "Evidence is material (and so shows prejudice) if there is a 'reasonable probability . . . that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *McNeill v. Bagley*, 10 F.4th 588 (6th Cir. 2021) (quoting *Jells v. Mitchell*, 538 F.3d 478, 501-02 (6th Cir. 2008)). To demonstrate such a reasonable probability, a plaintiff must "sufficiently undermine[ ] confidence in the outcome of the trial." *Id.* (quoting *Jells*, 538 F.3d at 502). The court must "evaluate evidence as a whole, rather than on an individual basis, in order to determine whether it was material." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). However, "there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to

4. As noted in FN3, Salter also relies on statements in Harris's affidavit in which Harris presumably directly asserts that he did not receive the photo. But the paragraphs of Harris's affidavit to which Salter refers the court for this specific assertion are missing from the record, so the court cannot and does not rely on the referenced paragraphs. (*See* ECF No. 36, PageID.686 and ECF No. 36-15).

take advantage of the information in question, or if the information was available to him from another source." *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007). Olsen maintains that Salter had sufficient knowledge of essential facts to develop his theory that Collins was the shooter. He points out that the defense was aware that Luster had given a statement that Collins had shot up the same house about a month before the subject shooting, (ECF No. 36-2, PageID.726) and that Collins shot his cousin, Robert Clark. (ECF No. 29-15, PageID.497-98).

These facts stand in contrast to the facts, if believed by a jury, that are now in the record pointing directly to Collins being the taller shooter with the rifle instead of Salter. Luster has stated in his affidavit that if he had seen the larger photo of Collins, he would have identified him as the taller shooter with the rifle. (ECF No. 36-25). Further, at his deposition, Luster testified that he picked "E" out of the photo array as a shooter and told Olsen that "E" was one of the shooters. (ECF No. 36-7, PageID.786, p. 38). The defense did not have either the larger photo of Collins or the important context provided by Luster's testimony—that he did identify Collins as one of the shooters from the photo array. Viewed in the light most favorable to Salter, this testimony supports a reasonable probability that the outcome of the trial would have been different had the larger photo been turned over and had Luster's identification of "E" as one of the shooters been given to the defense. And the facts known to Salter—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. Hence, knowledge of this evidence is not sufficient to show that Salter "knew or should have known the essential facts permitting him to take advantage of the information in question." *Graham, supra.* Luster's identification of "E" as a shooter also supports the conclusion that the exculpatory nature of the photo of Collins would have been apparent to Olsen, and the exculpatory and impeaching nature of Luster's identification of "E" as a shooter is readily apparent. Given these material questions of fact, Salter's *Brady* claim is entitled to consideration by a jury.[5]

2. Unduly Suggestive Identification

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). To determine whether an identification was admissible, the court performs a two-part analysis. First, the court assesses "whether the identification was unnecessarily suggestive."

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5. Olsen does not dispute that it was clearly established at the time of the events in question that Salter had right to not have exculpatory/impeachment evidence withheld from him. (ECF No. 29, PageID.389). Olsen is correct. *See Strickler v. Greene*, 527 U.S. 263, 280-81, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (internal quotation marks and citation omitted) (*Brady* requires the disclosure to the defense even of "evidence known only to police investigators and not to the prosecutor.").

Haliym v. Mitchell, 492 F.3d 680, 704 (6th Cir. 2007). Second, if so, the court considers "whether the evidence was nevertheless reliable despite the impermissible suggestiveness of the identification procedure." *Id.* The Supreme Court has set forth five factors to consider in determining whether the suggestive identification was still reliable: (1) the witness's opportunity to view the suspect; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the time between the crime and the identification. *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). An officer may be liable for an unduly suggestive identification used by a prosecutor if the officer "reasonably should have known that the use of the identification would lead to a violation of [the plaintiff 's] right to a fair trial." *Gregory v. City of Louisville*, 444 F.3d 725, 747 (6th Cir. 2006).

As a preliminary matter, Olsen argues that Salter is collaterally estopped under Michigan law from challenging Luster's identification as unduly suggestive. (ECF No. 29, PageID.382-87). "Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts are required to 'give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.'" *Peterson v. Heymes*, 931 F.3d 546, 554 (6th Cir. 2019) (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)). The court looks to state law to determine whether a judgment gets preclusive effect. *Id.* "Michigan law allows 'crossover estoppel,' which precludes the relitigation of

an issue from a criminal proceeding in a subsequent civil proceeding, and vice versa." *Id.* "In Michigan, collateral estoppel applies when: (1) an issue has been actually litigated and determined by a valid and final judgment; (2) the same parties have had a full and fair opportunity to litigate the issue; and (3) there is mutuality of estoppel." *Id.* But "mutuality is not required when collateral estoppel is being invoked defensively." *Id.*

Olsen contends that the state court already ruled that Luster's identification was constitutional at Salter's preliminary examination during his criminal proceedings. In support, Olsen points out that, at the end of the preliminary examination, Salter's trial attorney moved to suppress the identification because of Olsen's single photo show-up. (ECF No. 29-8, PageID.463). The prosecutor argued that suppression was not warranted because Luster knew Salter and had seen him in the past. (*Id.* at PageID.464). Thus, use of the single photo was not unduly suggestive. The state court ruled from the bench that the identification was permissible because "[t]here is no constitutional right to have it done in a certain way." (*Id.*)

Olsen relies on *Hatchett v. City of Detroit*, which held that a plaintiff in a § 1983 case was collaterally estopped from relitigating the voluntariness of his confession. 714 F. Supp. 2d 708 (E.D. Mich. 2010), *aff'd* 495 F. App'x 567 (6th Cir. 2012). In that case, the plaintiff had been convicted and sentenced to 25 to 40 years in prison. *Id.* at 710. The plaintiff was released over eleven years later when it came to light that a DNA test was not disclosed to the defense. *Id.* In his later § 1983 lawsuit, the plaintiff alleged, in

part, that his confession had been coerced. *Id.* at 714. The defendant in *Hatchett* made the same argument Olsen does here: that the plaintiff was collaterally estopped from raising the issue of the confession. *Id.* During the plaintiff 's criminal proceedings, the state trial court had held a hearing where it determined that his confession was voluntary, and that ruling was not appealed. *Id.* at 714-15. Even though the validity of his conviction was called into question, the court held that the plaintiff was collaterally estopped from challenging the voluntariness of his confession under § 1983. The Sixth Circuit affirmed, noting that "under Michigan law, a determination of voluntariness is separate from a determination of guilt." 495 F. App'x at 571.

Salter, on the other hand, argues that the vacating of his sentence by stipulation and the dismissal of the charges stripped his conviction and any rulings leading up to it of their preclusive effect. Salter cites *Peterson v. Heymes*, 931 F.3d 546 (6th Cir. 2019) for support. In *Peterson*, the § 1983 plaintiff had been convicted of murder and rape. Based on new DNA test results in 2013, the court vacated plaintiff 's conviction and granted him a new trial; the prosecution dismissed the charges. *Id.* at 552. The court addressed the same argument as that in *Hatchett* but came to the opposite conclusion. The court held that "vacated rulings have no preclusive effect under Michigan law." *Id.* at 554. In responding to the defendant's reliance on *Hatchett*, the court noted that it was an unpublished decision and that "it was not clear that the criminal judgment had actually been vacated." *Id.*

Appendix B

This court is bound by the published decision in *Peterson.* Like the plaintiff in *Peterson*, Salter's conviction has been vacated. (ECF No. 36-22). Therefore, the state court's ruling on the constitutionality of his identification—even if it met all the elements for collateral estoppel—does not have preclusive effect. *See also Siggers v. Alex*, 2021 WL 4391170, *5-6 (E.D. Mich. Sept. 24, 2021) (Pre-trial and post-judgment rulings by a state court do not have any preclusive effect after the criminal conviction on which they are based has been vacated.).

The court thus turns to the constitutionality of Luster's identification. Olsen argues that even if collateral estoppel does not apply, "there was sufficient testimony from Jamar Luster evidencing that he had an independent basis for identification of Mr. Salter apart from the photograph he was shown by Investigator Olsen." (ECF No. 29, PageID.387). To begin with, the court must determine whether a reasonable jury could find that the single-photo identification was unnecessarily suggestive. Because Olsen does not address this prong, the court deems the issue abandoned. *See Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 376 (6th Cir. 1999) (finding that defendants abandoned an issue by failing to address it in its brief). And indeed, the Supreme Court has underscored, "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *see also Gregory*, 444 F.3d at 756 ("By presenting only a single suspect to a witness, police convey an implicit message that 'this is the guy.'"). Although this single photo

of Salter was followed by a six-photo array, (ECF No. 36-5, PageID.771), Salter was not included in the array, thus arguably suggesting to the witness at the outset that he was deserving of singular consideration. Luster also testified that Olsen told him that the police had already "picked up the guy with the rifle" in connection with the shooting *before* showing the single photo. (ECF No. 36-7, PageID.799). Such a statement would exacerbate the suggestive nature of the single photo because "[i]mparting this information to the witness can lead him to assume that a photo of the arrested person will be in the array." *United States v. Saunders*, 501 F.3d 384, 391 (4th Cir. 2007). Nor was there any need to show a single photo; as Olsen admitted at the preliminary examination, he could have used Salter's photo in a photo array. (ECF No. 36-5, PageID.771). As a result, the court finds that Olsen's showing of a single photo of Salter to Luster was unduly suggestive.

Next, the court must examine the *Manson* factors and consider whether a reasonable jury could find that the identification was still reliable—despite being unduly suggestive. But Olsen makes no attempt to apply and analyze the *Manson* factors; he merely argues in general terms that there was an "independent basis" for Luster's identification. (ECF No. 29, PageID. 387; ECF No. 37, PageID. 1013). While it is not for the court to develop and support Olsen's argument for him, *see McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997), Salter has demonstrated that there are genuine issues of material fact in dispute regardless.

First, Luster had some opportunity to view the two shooters because he turned to see them when he heard a gunshot. (ECF No. 36-11, PageID.841). But the shooters were a significant distance away—35 to 40 feet (ECF No. 36-9, PageID.843)—and it was dark (although Luster notes that they were under a streetlight when he first saw them), (*Id.* at PageID.821-22). *Cf. Haliym*, 492 F.3d at 705 (finding the first *Manson* factor favors reliability because the identifier had viewed "the suspect at a reasonably close range for a period of time that was, at the least, long enough for the bulk of the crime to occur"). Furthermore, rather than having a clear, unobstructed view of the shooters, Luster states that he saw the shooters through a "little opening" in a curtain on the porch, (ECF No. 36-19); instead of seeing the shooters completely, he saw their "figures." (ECF No. 36-7, PageID.781). And when asked at his deposition if he had "a very good look at each of their faces," he answered, "no." (*Id.*) Overall, the court finds that the circumstances surrounding Luster's opportunity to view the shooters undermines the reliability of his identification of Salter from the single photo.

Second, and relatedly, Luster was minimally attentive. "To analyze the sufficiency of an eyewitness's degree of attention, we generally examine the circumstances surrounding the witness's encounter." *Howard v. Bouchard*, 405 F.3d 459, 473 (6th Cir. 2005). "Generally, we place greater trust in witness identifications made during the commission of a crime because the witness has a reason to pay attention to the perpetrator." *Id.* As he describes it, once he heard the shot and turned to see the shooters, he immediately jumped off the porch or was pushed off the porch and then laid down on the

side of the brick porch. (ECF No. 36-7, PageID.781; ECF No. 36-11, PageID.841). Therefore, while he may have had heightened attention momentarily, he immediately diverted his attention as he tried to escape. Luster also noted that he "wasn't tryin' to look for nobody, [he] was tryin' to get out the way." (*Id.* at PageID.842). And Luster may have been drinking and smoking marijuana at the time of the shooting, which would have undermined his attentiveness, although at the preliminary examination, he had testified he had done neither. (*Compare* ECF No. 36-7, PageID.780 *with* ECF No. 36-9, PageID.824).

Third, the accuracy of his description was significantly off. Luster stated that one of the shooters was "Rob," whom he described as five foot seven inches and 150 to 170 pounds. (ECF No. 36-2, PageID.725). When he was shown the single photo Salter, he identified him as "Rob." (ECF No. 36-6, PageID.774). Yet, Salter was six feet four inches tall and weighed 250 pounds at the time. (ECF No. 29-8, PageID.453). Hence, as described by Luster, "Rob" was 9 inches shorter than Salter and as much as 100 pounds lighter—significant discrepancies by any reasonable estimation. And as the Sixth Circuit has underscored, "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.

Fourth, there is at least a genuine dispute regarding Luster's level of certainty.[6] On the one hand, Luster

6. Even if the court found that Luster was absolutely certain in his identification, this factor would weigh less in this court's finding

continued to identify Salter as the shooter at both the preliminary examination and the trial. (ECF No. 36-9, PageID.813; ECF No. 36-11, PageID.839, 883). On the other hand, Luster testified at his deposition that he told Olsen that he was not sure that Salter was the guy, but "that's who it looks like." (ECF No. 36-7, PageID.786). Luster also testified that he picked "E" out of the photo array as a shooter and told Olsen that "E" was one of the shooters. (ECF No. 36-7, PageID.786, p. 38), a fact which undermines the identification of Salter from the single photo.

Fifth, the timing weighs in favor of Olsen because Luster identified Salter as one of the shooters within several hours of the shooting. (ECF No. 36, PageID.697). Indeed, courts have found significantly longer lengths of time to be reliable. *See e.g.*, *Howard v. Bouchard*, 405 F.3d 459, 473 (6th Cir. 2005) ("Three months is not a great length of time between an observation and identification.").

Olsen also underscores that Luster was familiar with Salter from before the shooting. Luster testified at the preliminary examination that he had seen Salter once or twice before and knew him from "shooting all the time," (ECF No. 36-9, PageID.818), although it turned out that it was not the same person, (ECF No. 36-7, PageID.792). In

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than the other factors. The Sixth Circuit, while still recognizing the applicability of the certainty factor, have cautioned against the correlation between certainty and accuracy of identification. *See Haliym*, 492 F.3d at 705 n.15 ("We note, however, that empirical evidence on eyewitness identification undercuts the hypothesis that there is a strong correlation between certainty and accuracy.").

particular, Luster had seen Salter that day when he drove past the house with people in two cars. (ECF No. 36-11, PageID.847). The group had waved guns toward another group of people in the front of the house where Luster was sitting. (ECF No. 36-7, PageID.790). Reliability "is judged under the totality of the circumstances" and is "the linchpin in determining the admissibility of identification testimony." 492 F.3d at 706. Thus, in *Haliym*, the Sixth Circuit reasoned that "any prior acquaintance with another person substantially increases the likelihood of an accurate identification." *Id.* The court cautioned, however, that "problems with identification testimony may exist even where the witness is familiar with the defendant." *Id.* Considering Luster's prior acquaintance with Salter, the court finds that this factor weighs in favor of reliability—but only minimally. While Luster did see Salter earlier in the day when a group of people drove by in a vehicle waving guns, it appears to have been a relatively brief encounter. And he may have seen him one other time. Thus, his familiarity with Salter was rather limited and under the totality of the circumstances, a reasonable juror could find that Luster's identification was too unreliable to overcome the unduly suggestive nature of a single phone show-up.

Even if there is a question of fact regarding whether Salter's constitutional right was violated, the court must still determine whether his right was clearly established. Salter argues that it was clearly established that a single photo identification—without any exigent circumstances—is unnecessarily suggestive, citing *Stovall*, 388 U.S. at 302, 87 S.Ct. 1967. (ECF No. 36, PageID.698). And he points

to DPD policy that prohibited the use of single photos, citing *Hope v. Pelzer*, 536 U.S. 730, 744-45, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Tennessee v. Garner*, 471 U.S. 1, 18-19, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); and *Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013). He also claims that it is clearly established that a suggestive identification where a witness's description varies significantly from the plaintiff 's actual characteristics is unreliable, citing *Gregory*, 444 F.3d at 756.

The court finds that Salter has met his burden to show his right was clearly established. As Salter correctly points out, and this court discussed above, courts have found that single-photo identifications are unnecessarily suggestive. *See Stovall*, 388 U.S. at 302, 87 S.Ct. 1967. Olsen does not point to any exigent circumstances that warranted the single-photo identification. Furthermore, a reasonable DPD officer would be on notice that a single-photo identification is problematic because DPD policy at the time stated that "[w]itnesses should never be shown only a photograph of the suspect." (ECF No. 36-20, PageID.935). To be clear, violation of this policy on its own, as Olsen argues, does not create a constitutional violation. But this circuit has held that a department's policy may provide additional evidence—along with precedent—that officers violated clearly established law. *See Martin*, 712 F.3d at 962 (finding police department's policy regarding restraint of individuals exhibiting bizarre or agitated behavior to be "further evidence that the officers were on notice that their conduct exceeded the bounds of permissible force").

While showing a single photo on its own may not be a *per se* constitutional violation, *see Gregory*, 444 F.3d at 755, the court finds that in the totality of circumstances, a reasonable jury could find that Olsen's decision to proceed with the single photo show up was not reasonable in "light of the infirmities of the situation." *Gregory*, 444 F.3d at 746 (The Supreme Court and the Sixth Circuit require law enforcement officers to assess the constitutional restraints on police action in the circumstances of their decision *before* undertaking a show-up.). As Salter underscores, this circuit "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 (citing *Thigpen v. Cory*, 804 F.2d 893, 897 (6th Cir. 1986); *Webb v. Havener*, 549 F.2d 1081, 1086 (6th Cir. 1977); *Marshall v. Rose*, 499 F.2d 1163, 1167 (6th Cir. 1974)). Here, Luster's description was significantly inconsistent. He identified one of the shooters as "Rob," whom he described as five foot seven inches and 150 to 170 pounds. (ECF No. 36-2, PageID.725). After hearing Luster's description and based on "a hunch," (ECF No. 36-5, PageID.771-72), Olson presented him with a single photo show up of Salter who is 6'4", 250 pounds, asking him whether the person in the photo was "Rob." (ECF No. 36-6, PageID.774; ECF No. 29-8, PageID.453).[7] While Olsen testified that he was unaware of Salter's

7. Though Luster's description of the second shooter as 6' with a thin build is somewhat closer to Salter's actual size, even it is a fair ways off. More importantly, Luster specifically picked Salter as "Rob," whose physical description simply cannot be reconciled with Salter's physical characteristics.

height and weight when he showed Luster the photo, (ECF No. 36-4, PageID.751), Salter presents evidence that in 2003, the Detroit Police Department mugshot software allowed an officer to see the height and weight of persons in the database, among other identifying characteristics. (ECF No. 36-8, PageID.804-805). Olsen admits that if he had known Salter's height and weight, he would not have shown his photo to Luster because "that doesn't match. He's way too big" and that a reasonable police officer would not have shown Luster the photo of Salter with such a discrepancy between the description and the suspect. (ECF No. 36-4, PageID.753, 762). A reasonable jury could find that Luster's identification was unreliable due to this significant discrepancy. As a result, the court finds that 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 and thus, Olsen is not entitled to qualified immunity on this claim.

Thus, as to Salter's unduly-suggestive-identification claim, Olsen's motion for summary judgment is **DENIED**.

IV. CONCLUSION

For these reasons, the court **GRANTS IN PART** and **DENIES IN PART** Olsen's motion for summary judgment. Specifically, the court retains Salter's *Brady* claim and his unduly-suggestive-identification claim. All other claims are **DISMISSED**.

IT IS SO ORDERED.

Date: June 2, 2022

/s/_____
Stephanie Dawkins Davis
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-1656

AARON SALTER,

Plaintiff-Appellee,

v.

CITY OF DETROIT, MICHIGAN,

Defendant,

DONALD OLSEN,

Defendant-Appellant.

ORDER

BEFORE: BATCHELDER, NALBANDIAN, and BLOOMEKATZ, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision

of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

* Judge Davis is recused in this case.

APPENDIX D — RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C.A. § 1983
Civil action for deprivation of rights [Statutory Text & Notes of Decisions subdivisions I to IX]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix D

U.S.C.A. Const. Amend. VI
Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix D

U.S.C.A. Const. Amend. XIV
CITIZENSHIP; PRIVILEGES AND IMMUNITIES;
DUE PROCESS; EQUAL PROTECTION;
APPOINTMENT OF REPRESENTATION;
DISQUALIFICATION OF OFFICERS;
PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E — EXCERPT OF DEPOSITION OF AARON SALTER IN *SALTER V. OLSEN*, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN CASE NO. 4:18-CV-13136

[86] Q So, you must have seen it as a function of your lawyer; is that right? You saw the statements that were in the possession of your lawyer, witness statements?

A I got a discovery packet; yes, I did get a discovery packet, I did get that.

Q Okay. Do you remember anything else that was in that discovery pack, besides witness statements?

[87] A Just police reports, autopsy reports.

Q Was there a photo array where there were six guys?

A There was. There was a six-array, a photo array was in there, and it was also a mugshot of me in there.

Q A mugshot of you?

A Yes.

Q Are you sure it was of you?

A Yes, it was.

* * *

APPENDIX F — TWO LETTERS HANDWRITTEN BY AARON SALTER

03-234
03-65164

Dear Moma

I wrote this true statement hoping that something can be done. I talked to this guy he said I have 10 days after the verdict to confirm another court date. I want you to make 7 copies [redaction] take one in court to my judge make sure she read it. The other to channel 4, Homicide Detective & his Boss. If you can one to Kwane Kilpatrick. Try to do all this before Thursday [illegible] 10 days will be up. Call my lawyer tell him to come & see me [2] so I can get him to file a motion. I need to probably arrange another court date ASAP.

I still got hope.

Aaron Salter

Appendix F

Ms Hon. A Berry

This letter is regarding the case of Aaron Terrell Salter. On Dec 8, my verdict was guilty. I did not take the stand at my trial to tell you this side of the story. This situation I'm about to tell you has alot to do with the alleged crime at hand. On Aug 3rd, 2003 I called one of my cousins named Robert Clark (Rob). He came & picked me up on 12760 Longview & I rode with him on Pelkey in Detroit.

This is my first time calling him to pick me up. Rob & Tasha picked me up [2] then went on Pelkey I wanted him to take me over a girl house whom stayed by that area.

At the time Rob was [redaction] selling drugs so I had to wait until he made a certain amount of money. While being over there that short amount of time, I noticed Rob had a gun & most of the other guys had one also. Especially this guy named "E" he had a car beam I know because I asked.

Somehow Rob left & managed to leave me with his car & William Colb with his gun. During that time [redaction]

[3] The police manage to stop & Williams Aaron (me) some guy named Scoot & this girl whom I don't know when we were seating on this abandon porch on Pelkey street. When they walked up Will throw the gun in front of them. It was so dark the police weren't sure which directions the gun came from so they blamed it on Scoot.

Appendix F

Scoot went to jail and the rest of us was let go. Will & I got in Rob car & rode around looking for him. So Will asked "E" if he seen Rob because the police took his gun. [redaction] He replied "No".

[4] Then we drove off & continue looking for Rob. We finally found him & Will told him what had happen far as his gun. Will said "I will pay you for that gun." So Rob said "E" & received a call on his phone it was a customer. The customer said "he was on his way." When the customer pulled up in a cab Rob walked to the cab & so did "E". Rob made the sell & "E" was mad because he felt Rob stole one of his customers they argued about the issue so "E" pulled out his gun. Then Rob said shoot & walked up on "E". Then "E" shot him 4 times [5] with a 38 rob limped towards me & "E" reached to the bushes to get the car beam & chase Will & I away from Rob. So I went around the block & came back to see "E" & Rob talking I started listening & heard "E" say you didn't let me go to the hospital when you pistol whip me, then "E" shot 7 more time which all hit rob. Then I ran off & called a cab & went to my brother house on 11446 Kemmour where I told him what happen & called my mother to pick me up and told her [6] the same, she feared for my life & transported me over my Aunt's house on Northlawn & 8 mile. The next day everybody & my family called asking what happen & I told them.

Everybody in my family told me to tell my probation officer & see what she say of course I didn't do it right away because I couldn't think straight.

Appendix F

On the 5th of Aug 2003 I finally called Ms Ticeo at Greenfield P/O. She told me to call the nearest police so I called the 9th Percinct & speak to a detective McCaffery which took the [7] information down and said come write a statement. I was a little startled knowing the shooter was still out there in that neighborhood. So I didn't go later on that month on the 16th I was arrested.

There was a charge against me for murder. So while I was fighting this case I happen to see Rob on Sept 29 or 30 he told me not to worry because, he knew it couldn't be me because "E" did it because he felt sorry for what he had done to him. ("E" pop Ex pills) before I started talking to Rob he was shot [8] by Willie Thomas which "E" killed. They were at war back & forth shootings. Willie is a member of the Portgrove boys.

While being incarcerated in WCJ I have ran into numerous witnesses that chose to speak up on my behalf. One guy name William Taylor said "E" personally told him he did that crime. The reason Jamar Luster pick me is unknown to me. "E" was in the lineup & in Jamar previously statement he stated someone named "E" shoot this house up before.

[9] So why wouldn't he do it again. My guess is they wanted to kill him they're self so you have the power too save 2 lives "E" & myself and bring a person to Justice & give a family some closure.

Appendix F

P.S. Please help me. My lawyer has given up on me & refuse to show after verdict I wish to file a Motion for reconsideration.

Aaron Salter