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By Mary Massaron and Briana Combs

Reverse Conviction Claims and the Shifting State of Qualified Immunity Law on *Brady* Claims

Defendants should carefully analyze pertinent precedent to determine whether *Brady* claims are properly applied to the defendant based on the date of the alleged conduct.

Governments across the country have increasingly created conviction integrity units to search out persons who have been wrongfully convicted. And of course, no one wants an innocent person to remain in jail after serving time for a crime they did not commit. But those who are released often search for the persons or governmental bodies that were involved in their conviction so they can bring a suit under 42 U.S.C. § 1983. The obvious potential defendant is the prosecutor—but as those handling Section 1983 litigation know, prosecutors have absolute immunity. See Koubriti v. Convertino, 593 F.3d 459, 470 (6th Cir. 2010), citing Imbler v. Pachtman, 424 U.S. 409, 431 n 34 (1976) ("absolute immunity protects a prosecutor from civil liability for the non-disclosure of material exculpatory evidence at trial.").

As a result, those representing plaintiffs target other individuals—such as police officers and lab technicians. Plaintiffs whose convictions have been reversed typically sue police officers or lab technicians who were involved in the investigation of the crimes for which they were convicted. These investigations may have taken place decades before the conviction was reversed and the lawsuit filed. Memories will have faded. Police files, evidence, and witnesses may no longer be available. Thus, an easy claim to bring is one that argues some piece of evidence or information that the police officer or lab technician once had was not turned over to the prosecutor and would have changed the outcome. In other words, the lawsuits raise claims under Brady v. Maryland, 373 U.S. 83 (1963).

Brady claims in reverse conviction cases are notoriously difficult to defend. As a practical matter, juries have great sympathy for a plaintiff who they are told is innocent but was incarcerated (often for years and even decades). Defense trial lawyers regularly report that juries may compensate reverse-conviction plaintiffs even though the jury does not think the individual defendant did anything wrong. Given these difficulties, the qualified immunity defense is even more important than in other cases. Plaintiffs (and their lawyers) often seek multi-million dollar amounts to settle even weak suits. So, what is the defense lawyer to do?

The Qualified Immunity Doctrine Is Key to Any Defense

Qualified immunity protects public officials from civil liability "when their conduct does not violate the plaintiff's 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Jackson v. City of Cleveland, 64 F.4th 736, 745 (6th Cir. 2023), citing Pearson v. Callahan, 555 U.S. 223, 231 (2009). In other words, qualified immunity shields federal and state officials from money damages "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011). As summarized by the Supreme Court, "qualified immunity protects all but the plainly incompetent or those who knowingly violate the law."

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City of Tahlequah, Oklahoma v. Bond, 595 U.S. 9, 12 (2021) (quotations omitted). This essentially offers a defendant three potential arguments to defeat a claim. First, in appropriate cases, defendants can and should argue that the official did not violate a constitutional right. Second, defendants can often succeed by arguing that although some courts have recognized a constitutional right, no Supreme Court case nor any robust consensus of cases shows that it was clearly established. Plaintiffs routinely point to a constitutional right at a high level of generality. But Anderson v. Creighton, 483 U.S. 635 (1987), holds that the analysis must be based on the concrete right in the particular circumstances. Do not overlook this aspect of the argument. Often, the facts and circumstances of your case diverge in material ways from past precedent and give you a strong argument that the law is not clearly established. Third, an officer acting under a reasonable but mistaken view of the facts or the law is still protected. Don't forget this point. It can be especially compelling in the hazy areas of whether nondisclosed evidence was material or exculpatory. If a reasonable officer could have believed that the document or witness was not material or exculpatory, he may still invoke immunity.

The Supreme Court Has Repeatedly Signaled That the Plaintiff Must Make a Strong Showing of High-Level Authority to Show That the Law Is Clearly Established

The Supreme Court has not definitively stated what constitutes clearly established law beyond its own decisions—if anything. But the Court has repeatedly questioned whether binding circuit precedent constitutes clearly established law for qualified immunity purposes or whether it requires a decision from the Supreme Court. When making qualified immunity arguments, defendants should urge courts to adopt this stricter standard to clearly establish the law.

At least six times in the last fifteen years the Supreme Court has strongly suggested that circuit court precedent does not constitute clearly established law for qualified immunity purposes. In Reichle v. Howards, 566 U.S. 658 (2012), the court stated: "Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here." Id. at 665–66. Two years later, in Carroll v. Carman, 574 U.S. 13 (2014), the Court stated: "Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, [citing Reichle] Marasco does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights." Id.

at 17 (explaining that a single case, Estate of Smith v. Marasco, 318 F.3d 497 (3rd Cir. 2003), could not clearly establish the law). A year later, in City & County of San Francisco, Calif. v. Sheehan, 575 U.S. 600 (2015), the Court again stated: "But even if a controlling circuit precedent could constitute clearly established federal law in these circumstances, [citing Carroll], it does not do so here." Id. at 614 (quotations omitted). See also Kisela v. Hughes, 584 U.S. 100, 106 (2018); City of Escondido, Cal. v. Emmons, 586 U.S. 38, 43 (2019).

Even more recently, in Rivas-Villegas v. Cortesluna, 142 S. Ct. 4 (2021), the Supreme Court reiterated its skepticism that circuit precedent can constitute clearly established law for purposes of qualified immunity: "Neither Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the Court of Appeals relied solely on its precedent... Even assuming that Circuit precedent can clearly establish law... [it] is materially distinguishable[.]" Id. at 8.

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What Is a *Brady* claim?

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court recognized a claim against a prosecutor for deliberately suppressing evidence. The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Thus, "the Brady duty, as stated by the Brady Court, was imposed on the prosecutor[.]" Moldowan v. City of Warren, 578 F.3d 351, 401 (6th Cir. 2009) (Kethledge, J., concurring in the judgment in part, and dissenting in part) (emphasis added). Brady did not involve police conduct; Brady concerned efforts by a criminal defendant to obtain a new trial based on newly discovered evidence suppressed by the prosecutor. Brady, 373 U.S. at 84.

Although Brady did not involve police conduct, in Arizona v. Youngblood, 488 U.S. 51 (1988), the Supreme Court held a criminal defendant can establish that a police officer violated due process based on the failure to preserve potentially useful evidence if the defendant "can show bad faith on the part of the police[.]" Id. at 58. In other words, if an officer deliberately suppresses or destroys favorable evidence, his actions create a potential due process violation. The Youngblood court was careful not to limit any police obligation absent bad faith because police are not lawyers and cannot be expected to make lawyer-like analysis of evidence that a prosecutor would. The Court was unwilling to "read the 'fundamental fairness' requirement of the Due Process Clause... as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." Id. The Court emphasized the importance of the bad faith requirement, stating:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.

Id. But not all courts have followed the Supreme Court's approach. And often, in litigation, plaintiffs pushing their claims cite decisions on Brady in the criminal context—when they are largely directed at whether the government violated due process in the criminal trial. If the duty of police or lab technicians or other non-lawyers in the investigation process is less, then criminal cases involving Brady challenges may not be appropriate authorities on which to rely.

The State of the Law on *Brady's* Application to Non-Prosecutors

The Circuits are split on the extent of Brady's reach when applied to non-prosecutors. For example, in Moldowan, the Sixth Circuit "extend[ed] Brady's duty of absolute disclosure to police officers, but limit[ed] the scope of that duty to evidence whose materially exculpatory value was known to the particular officer sued." Moldowan, 578 F.3d at 407 (Kethledge, J., concurring in the judgment in part, and dissenting in part). In reaching its holding, the Moldowan Court reasoned that "virtually every other circuit has concluded either that the police share in the state's obligations under Brady, or that the Constitution imposes on the police obligations analogous to those recognized in Brady[,]" id. at 381, citing the following cases: Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999); Hart v. O'Brien, 127 F.3d 424, 446–47 (5th Cir. 1997); McMillian v. Johnson, 88 F.3d 1554, 1569 (11th Cir. 1996); Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992); Geter v. Fortenberry, 882 F.2d 167, 171 (5th Cir. 1989); Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988).

Yet other Circuits have refused to extend Brady's absolute duty to police or other non-prosecutors. In Villasana v. Wilhoit, 368 F.3d 976 (8th Cir. 2004), the Eighth Circuit held that the imposition of liability on crime lab officials required a showing of bad faith: "even if the undisclosed documents were materially favorable to the defense under Brady, Villasana failed to establish the bad faith required under Youngblood to recover § 1983 damages from the Crime Laboratory officials." Id. at 980–81. Similarly, 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 in the judgment). The Brady violation is not a sufficient condition for imposition

of liability, the plurality explained, 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.

Other cases have employed similar reasoning. See Porter v. White, 483 F.3d 1294, 1306 (11th Cir. 2007) ("We hold that the no-fault standard of care Brady imposes on prosecutors in the criminal or habeas context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process"); Helmig v. Fowler, 828 F.3d 755, 760 (8th Cir. 2016) ("Brady extends to the actions of other law enforcement officers, including investigating officers, but an investigating officer's failure to disclose exculpatory evidence does not constitute a Brady violation in the absence of bad faith"); Johnson v. City of Cheyenne, 99 F.4th 1206, 1218 (10th Cir. 2024) ("we hold that the district court did not err in granting summary judgment... because, among other reasons, Mr. Johnson did not establish... Officer Spencer or Detective Stanford... acted with bad faith in destroying or otherwise losing this evidence.").

Advocating for a Bad Faith Standard

Consistent with Youngblood, a strong argument for defendants in this context is that Brady should not apply to non-prosecutors absent a showing of bad faith. See Moldowan, 578 F.3d at 404–05 (6th Cir. 2009) (Kethledge, J., concurring in the judgment in part, and dissenting in part), citing Youngblood, 488 U.S. at 55 ("The standard that I would apply—and the one the Eighth and Eleventh Circuits apply—is the one that the Supreme Court has so far always applied to determine officer liability in the 'area of constitutionally guaranteed access to evidence': namely, bad faith.").

In advocating for a bad faith standard, defendants can look to Supreme Court precedent holding that negligence claims may not be converted into constitutional torts under 42 U.S.C. § 1983. See Daniels v. Williams, 474 U.S. 327, 328 (1986) ("We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."). In Youngblood, the Supreme Court specifically 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." Youngblood, 488 U.S. at 58.

Also, even if precedent within the Circuit holds that Brady's absolute duty of disclosure extends to the police, the inquiry does not end there. As explained by the Court in Moldowan, the next determination that must be made is whether the obligation was "clearly established" as of the date of the police officer's alleged violation of the obligations imposed under Brady. See Moldowan, 578 F.3d at 381. In evaluating the pertinent case law, the court must determine "whether the right has been recognized 'in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Id. at 382, quoting Anderson, 483 U.S. at 640. In other words, "the unlawfulness must be apparent." Anderson, 483 U.S. at 640.

For example, in a recent decision of the Sixth Circuit in Salter v. City of Detroit, 133 F.4th 527 (6th Cir. 2025), Judge Nalbandian's concurrence questioned whether the law was clearly established as of the events in that case, which occurred in 2003. See id. at 543–44 (Nalbandian, J., concurring) ("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."). And in Judge Batchelder's dissent in Salter, she concluded that Brady did not apply boundlessly to police officers back in 2003. Salter, 133 F.4th at 546 (Batchelder, J., dissenting), citing Canter v. Cnty. of Otsego, 14 F. App'x 518, 521 n 1 (6th Cir. 2001). In Canter, decided in 2001, the district court "agreed with the magistrate judge's conclusion that the duty to disclose exculpatory evidence under Brady... extends only to the prosecutor, not the police." Canter, 14 F. App'x at 521 n 1.

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Qualified Immunity, Interlocutory Appeals, and the Collateral-Order Doctrine

Qualified immunity is an important defense. To get around it, plaintiffs argue that jurisdiction for the court to consider the defense on interlocutory appeal is narrow. They insist that the defendants are veering into factual questions over which the appellate court lacks jurisdiction. They seek to defeat qualified immunity, either because the law was clearly established or because the qualified immunity defense requires the court to decide fact questions. This strategy, if successful, often results in government defendants being forced to settle the lawsuit to avoid the risk of a crushing judgment. But strategies exist to try to address these tactics.

In general, under 28 U.S.C. § 1291, a district court's order denying summary judgment is not a "final decision" over which the courts of appeals have jurisdiction.

**It has also been held that Brady applies to forensic examiners. See, e.g., Horn v. Stephenson, 11 F.4th 163, 172 (2d Cir. 2021) ("Our conclusion, based on Walker, that Brady applies to forensic examiners in state crime laboratories is reinforced by decisions of our sister circuits that by 1999 had reached the same conclusion.").*

However, there are two exceptions to this rule—the collateral-order doctrine and pendant appellate jurisdiction—which permit interlocutory appeals from a district court's denial of a summary judgment motion. The court of appeals can review an issue under the collateral-order doctrine if the issue would be "effectively unreviewable" were the appellate court to wait to hear the issue until the completion of the case. Chaney-Snell v. Young, 98 F.4th 699, 708 (6th Cir. 2024), citing Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009). An example of a decision that meets the collateral-order doctrine test is an order denying qualified immunity. Chaney-Snell, 98 F.4th at 708, citing Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985). This is because when a defendant is entitled to qualified immunity, "it means they are entitled to not stand trial for their actions [,]" and as a result, "[a] summary-judgment order denying this immunity from suit is essentially a final order as to that entitlement." Heeter v. Bowers, 99 F.4th 900, 908 (6th Cir. 2024). Without immediate appellate review, qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." Mitchell, 472 U.S. at 526.

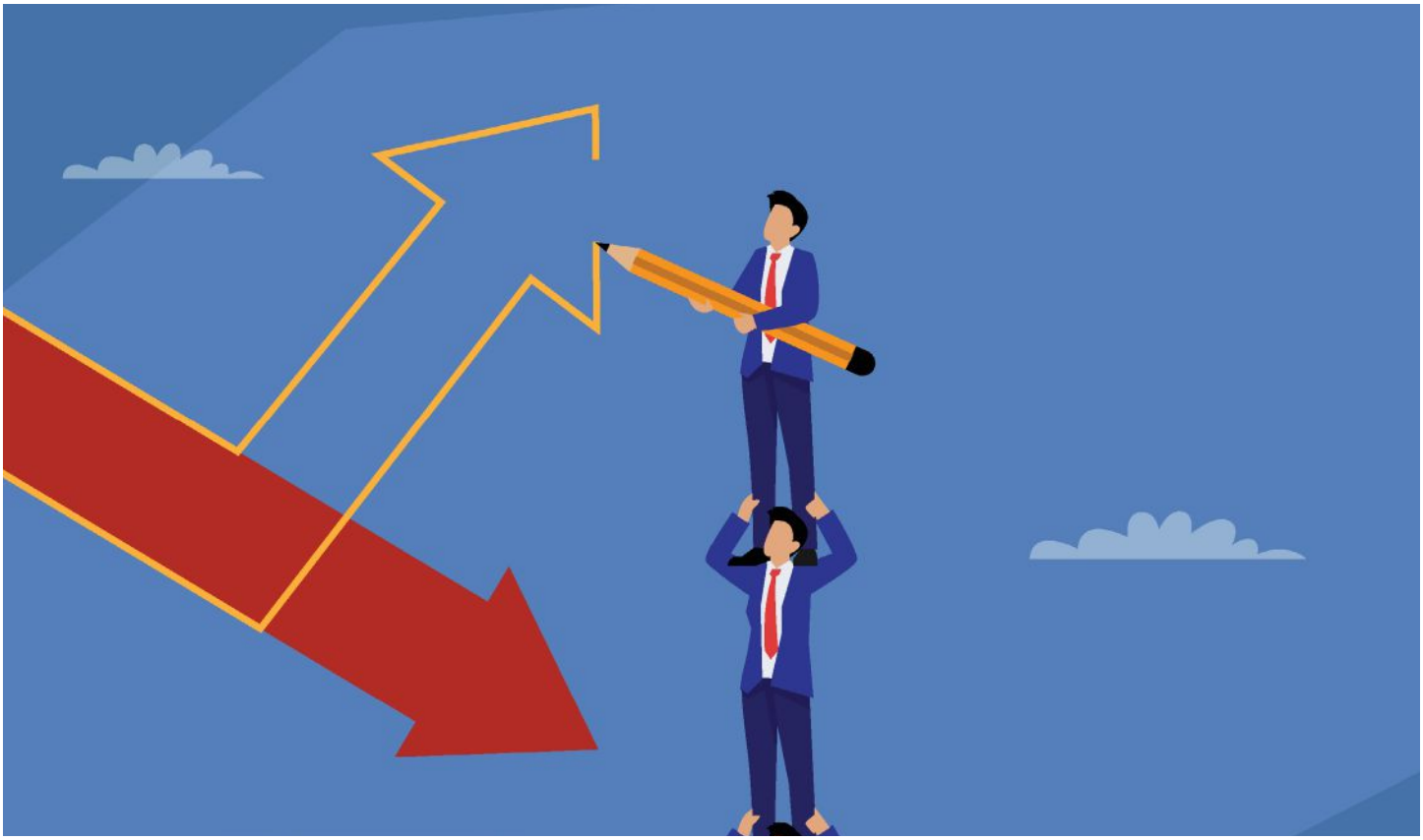
In their effort to narrow the issues on appeal, plaintiffs routinely argue that the appellate court should look only at their allegations. But the Supreme Court has issued some important tools to help in cases where video evidence or documents make a fact indisputable even when the plaintiff alleges the opposite. As explained by the Supreme Court in Scott v. Harris, 550 U.S. 372 (2007), when an opponent's version of events "is so utterly discredited by the record that no reasonable jury could have believed him[,]" the court should not adopt that version of the facts but instead should "view[] the facts in the light depicted by the videotape." Id. at 380–81. In qualified immunity cases, it has been held that videos can even be considered at the motion-to-dismiss stage "to the degree the videos are clear and 'blatantly contradict' or 'utterly discredit' the plaintiff's version of events." See Bell v. City of Southfield, Michigan, 37 F.4th 362, 364 (6th Cir. 2022). And videos, of course, are a powerful tool on summary judgment. See Smith v. Finkley, 10 F.4th 725, 730 (7th Cir. 2021), citing Scott, 550 U.S. at 380 ("Although we view the facts in the light most favorable to the nonmovant on summary judgment, qualified immunity precedent provides that a factual account is not to be credited if it is 'blatantly contradicted' by the video evidence"); Bailey v. Ramos, 125 F.4th 667, 684 (5th Cir. 2025) ("Because the video evidence is clear that bringing Bailey to a seat with a leg sweep was not an objectively unreasonable use of force, Ramos is entitled to qualified immunity"); Est. of Taylor v. Salt Lake City, 16 F.4th 744, 757 (10th Cir. 2021) ("the general proposition that we accept plaintiff's version of the facts in the qualified-immunity summary-judgment setting 'is not true to the extent that there is clear contrary video evidence of the incident at issue.'"). Thus, the increasing use of video recording by police officers can offer powerful help in some cases.

In the Brady Context, a Split of Authority Exists About Whether Appellate Courts Have Jurisdiction to Consider Whether the Evidence Was Material and Exculpatory

Many defendants will want to argue that evidence was neither material nor exculpatory as part of their qualified immunity motions. But some Circuits have held that these are outside the court's interlocutory collateral order jurisdiction because they involve mixed fact and law questions. In Salter, the Sixth Circuit held that it lacked jurisdiction to consider mixed questions of law and fact, including materiality, in a qualified immunity appeal, relying on Clark v. Louisville-Jefferson Cnty. Metro Gov't, 130 F.4th 571 (6th Cir. 2025). See Salter, 133 F.4th at 536 ("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.... these arguments present 'mixed' questions of law and fact."). Judge Stranch's concurrence in Clark acknowledged "the apparent inconsistency in [the Sixth C]ircuit's precedent on the extent of [its] jurisdiction over mixed questions of fact and law in the context of appeals of denial of qualified immunity[.]" Clark, 130 F.4th at 583 (Stranch, J., concurring). Judge Murphy's concurrence also questioned the Clark majority's jurisdictional holding: "I know of no other area in which we lack jurisdiction over 'mixed' questions about whether the record evidence (interpreted in the plaintiff's favor) would meet the legal test for a constitutional right." Clark, 130 F.4th at 587 (Murphy, J., concurring). Citing to Williams v. Mehra, 186 F.3d 685, 690 (6th Cir. 1999) (en banc), Judge Murphy explained that the en banc Court in that case "described these 'mixed questions as legal questions rather than as factual questions' for purposes of the collateral-order doctrine." Clark, 130 F.4th at 587 (Murphy, J., concurring). Notably, the majority's approach in Clark also "conflicts with the Supreme Court's approach to excessive-force claims." Id.

Other circuits, unlike the Sixth Circuit in Salter, view the "materiality" inquiry as one of law. In United States v. Cloud, 102 F.4th 968 (9th Cir. 2024), the Ninth Circuit held that the "materiality" inquiry under Brady is "a legal matter" that is reviewed de novo. Id. at 979. See also United States v. Pettiford, 627 F.3d 1223, 1227 (D.C. Cir. 2010) ("[T]he assessment of the materiality of... evidence under Brady is a question of law reviewed de novo." (quotations omitted)).

Declining jurisdiction to consider whether the evidence was material and exculpatory under Brady creates real world problems for government officials appealing the denial of qualified immunity. Such a determination deprives government officials of relief in the many cases where the district court erred about whether the Brady evidence on which the claim was based was exculpatory or material. As Judge Batchelder's dissent in Salter points out, where all of the facts material to the analysis "are established in the record and there is no factual dispute awaiting a jury decision[,]" the court should not decline to exercise jurisdiction over the interlocutory appeal. Salter, 133 F.4th at 553 (Batchelder, J., dissenting). The majority's decision to decline jurisdiction in Salter effectively "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 545 (Nalbandian, J., concurring). It is important for defendants to challenge determinations that the court lacks jurisdiction to hear qualified immunity



appeals in the Brady context, because if the court lacks jurisdiction to consider such appeals, the court's "review of denials of qualified immunity in Brady-derived claims is rendered toothless." Id. In other words, qualified immunity's protection from suit will become "a hollow promise." Id.

These issues are ripe for seeking en banc review or certiorari. Decisions of the Supreme Court emphasize the importance of interlocutory appellate review of orders denying qualified immunity. See Plumhoff v. Rickard, 572 U.S. 765, 772 (2014) ("this immunity issue is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost"); Scott, 550 U.S. at 376 n 2 ("'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'"). And the dissenting and concurring opinions of several judges in the Sixth Circuit underscore the inconsistency in judicial decisions addressing the scope of jurisdiction.

Practical Effects of a Court's Refusal to Review Key Elements of a *Brady* Claim Before Trial

An appellate court's exercise of jurisdiction over interlocutory qualified immunity appeals in civil rights cases raising Brady claims is critical. Absent interlocutory review by appellate courts, law enforcement personnel will be forced to undergo the rigors of discovery and trial (with the chilling effect and distractions that flow from this), despite a strong qualified immunity defense. Brady-derived claims are often based on decades-old law enforcement conduct, and as a result, it may be difficult to sort out facts going back decades regarding what was turned over and when. Yet legal questions about whether the claimed Brady evidence was exculpatory and material are readily resolved by analysis of the criminal jury trial and related proceedings. The problems arising from an appellate court's refusal to exercise jurisdiction may also be compounded by the adoption of a negligence or reckless disregard standard for determining whether the official violated the plaintiff's constitutional rights.

Defendants should carefully analyze pertinent precedent to determine whether Brady claims are properly applied to the defendant based on the date of the alleged conduct. If Brady does apply, defendants should advocate for a bad faith standard to avoid the improper conversion of negligence claims into constitutional torts. And in cases where the district court denies summary judgment based on qualified immunity, defendants should not back down from the position that interlocutory review is critical to avoid the improper deprivation of the officer's immunity defense.

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