No. 14-887

IN THE

Supreme Court of the United States

BALTIMORE CITY POLICE DEPARTMENT, GARY DUNNIGAN, JAY LANDSMAN, and THOMAS PELLIGRINI,

Petitioners,

v.

JAMES OWENS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

CHARLES N. CURLETT, JR.
Counsel of Record
SARAH F. LACEY
LEVIN & CURLETT LLC
201 North Charles Street
Suite 2000
Baltimore, MD 21201
(410) 685-4444
ccurlett@levincurlett.com

JOSHUA R. TREEM
LAURA G. ABELSON
BROWN, GOLDSTEIN & LEVY, LLP
120 East Baltimore Street, Suite 1700
Baltimore, MD 21202
(410) 962-1030

Counsel for Respondent

March 2015

QUESTIONS PRESENTED

1. Was the court of appeals correct that the statute of limitations for the § 1983 claim in this case, which was based on *Brady* violations that could have recurred if the plaintiff had been retried, did not begin to run until the state dropped all charges against the plaintiff?
2. Was the court of appeals correct to deny qualified immunity to police officers who withheld from a murder suspect's defense the fact that the state's lead witness changed his story multiple times in the middle of trial?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

During James Owens's trial for burglary, rape, and murder in 1988, the investigating officers failed to disclose to the defense that the state's star witness changed his story five times in speaking with the officers during the trial. Owens was convicted and spent more than twenty years in prison before he was granted a retrial based on DNA evidence. The state later dropped the charges against him.

Owens sued the officers and the Baltimore police department under 42 U.S.C. § 1983 for (among other things) violating his right under *Brady v. Maryland*, 373 U.S. 83 (1963), not to have exculpatory and impeachment evidence withheld from his defense. The court of appeals rejected the defendants' argument that the case was untimely, and the court denied qualified immunity to the officers.

The timeliness issue does not warrant review because the courts of appeals are in agreement on the applicable standard and its application to these circumstances, and because the decision below followed this Court's instructions for discerning when the statute of limitations begins to run. Petitioners' suggestion that the circuits are divided relies on an incomplete account of the case law, elevates dicta over holdings, and mischaracterizes cases as having resolved disputes they never considered, much less addressed. No court of appeals has held that, in a § 1983 case based on a constitutional violation in prior criminal proceedings against the § 1983 plaintiff, the statute of limitations began to run where (as here) there remained pending criminal proceedings against the plaintiff in which the claimed constitutional violation could be repeated.

Neither does the qualified immunity issue warrant review. Petitioners do not dispute that the court of appeals correctly focused on whether Owens claimed a violation of a clearly established right. Petitioners do not identify any legal question concerning qualified immunity over which the circuits are divided. Therefore the issue petitioners would like this Court to decide is quite narrow: whether a criminal defendant's right not to have exculpatory or impeachment evidence withheld from him *by the police* had been established, *in the Fourth Circuit*, *prior to 1988*.

The answer to that question, moreover, is yes: the court of appeals here identified three Fourth Circuit decisions squarely holding that police officers' withholding of exculpatory or impeachment evidence violated a criminal defendant's constitutional rights. Petitioners' attempt to distinguish those decisions relies on implausibly narrow readings of the cases. In any event, this Court's resources are not best deployed in adjudicating a dispute over the meaning of lower court decisions from the 1960s and 1970s. Additionally, this case is a poor vehicle to rule on the qualified immunity question that the petitioners raise because the state of Fourth Circuit law in 1988 is not outcome-determinative: the constitutional violation in this case was so egregious that even had there been no case directly on point, no reasonable officer could have believed that the conduct of the officers here was lawful.

Finally, the interlocutory posture of the case counsels against review. The problems with review at this early stage of the case are exemplified by the attempt of one of the parties below (a defendant who did not join in the petition for certiorari but filed a

brief as a respondent supporting the petition) to introduce extra-record evidence on issues not considered or raised below.

The petition should be denied.

STATEMENT OF THE CASE

1. Because the decision below concerned an appeal from a dismissal for failure to state a claim, the court of appeals based its decision on the facts in the complaint, accepting as true all well-pleaded facts. Pet. App. 3a.[1]

In August 1987, Colleen Williar was raped, robbed, and murdered in her Baltimore apartment. *Id.* The next day, Williar's neighbor James Thompson contacted the police to claim a reward offered for information about the crime; Thompson said he had found a knife outside Williar's apartment. *Id.* In response to questioning by Baltimore police officers Thomas Pelligrini, Gary Dunnigan, and Jay Landsman (collectively, "the officers"), Thompson changed his story and asserted that he had retrieved the knife at the behest of his friend James Owens. *Id.* at 4a. The officers searched Owens's home and found no physical evidence linking Owens to the crime. *Id.* Nonetheless, on the basis of Thompson's statement, police arrested Owens, and a grand jury indicted him for burglary, rape, and murder. *Id.*

---

[1] Prosecutor Marvin Brave, a defendant in the case but not a petitioner here, filed a brief as a respondent in support of certiorari attaching additional documents not submitted as part of the record below. *See* Br. of Resp. Marvin Brave in Support of Cert. ("Brave Br."). Although these documents might prove relevant at a later stage of the case if offered as evidence, they do not affect how the facts are viewed on a motion to dismiss.

Prior to trial, Thompson changed his story again. This time he claimed that the knife belonged to him, that it had gone missing after Owens was at Thompson's home, and that Owens returned the knife, now blood-stained, the day after the murder. *Id.* At Owens's murder trial, Thompson presented this third version to the jury. *Id.* The state did not inform defense counsel how many times Thompson had changed his story already. *Id.*

Mid-trial, the prosecutor, Marvin Brave, arranged to test a pubic hair found on the victim. *Id.* at 5a. The hair matched Thompson, not Owens. *Id.*

Brave then instructed the officers to interrogate Thompson again. *Id.* During the mid-trial round of questioning, Thompson told the officers yet five more versions of events. *Id.* at 5a-6a. Thompson first claimed that he and Owens had broken into Williar's apartment but found her already dead. *Id.* at 5a. In response to the officers' skepticism, Thompson then contended that Owens had raped and murdered Williar in her upstairs bedroom while Thompson waited downstairs. *Id.* After the officers said there was evidence placing Thompson upstairs, Thompson said that he went upstairs but hid in the bathroom during the crimes. *Id.* at 6a. The officers told Thompson that evidence indicated he was in the bedroom; Thompson then said that he was in the bedroom while Owens raped and killed Williar but he, Thompson, refused to participate. *Id.* Finally, the officers told Thompson that his pubic hair had been found on Williar, and Thompson claimed that he and Owens broke into Williar's home intending to steal jewelry, and when they encountered her, Owens raped and murdered her while Thompson masturbated at the foot of the bed. *Id.*

Officer Landsman told Thompson's final version of events to prosecutor Brave. *Id.* The officers did not disclose that Thompson had told four different and inconsistent stories after his initial testimony and before his final account, and so the defense could not cross-examine Thompson about all his different versions. *Id.* at 6a-7a. The state recalled Thompson as a witness, and Thompson told the jury his final version of the story. *Id.* at 6a. The jury convicted Owens of burglary and felony murder, and he was sentenced to life in prison without parole. *Id.* at 7a.[2]

2. In 2006, a state court granted Owens's request for DNA testing, and the result revealed that Owens's DNA did not match blood and semen evidence from the crime scene. *Id.* On June 4, 2007, a state court granted Owens's petition to reopen his post conviction proceeding and ordered a new trial. *Id.* Neither the court's order, nor any of the docket entries leading up to it, mentioned the withholding of *Brady* material from the original trial. *See* Jt. App'x, *Owens v. Balt. City State's Attys. Office*, No. 12-2173 (4th Cir.) ("4th Cir. JA"), at 133 (order); *id.* at 127 (final two docket entries); *id.* at 128 (all entries).

---

[2] Owens also alleges that prosecutor Brave withheld exculpatory evidence about another witness and lied to defense counsel about the result of the hair test. *Id.* at 7a & n.1. The court of appeals did not address these allegations in detail.

Although the transcript attached to the brief that prosecutor Brave submitted to this Court appears aimed at calling into question whether some of this information was withheld, it does not cast any doubt on the fact most relevant to the claim at issue in this petition: that the officers withheld from the defense the fact that Thompson changed his story five times when the officers re-interviewed him mid-trial.

Owens remained in prison for another sixteen months awaiting retrial. Pet. App. 7a.

In advance of his retrial, Owens learned that the state intended to present the original testimony that Thompson provided at Owens's first trial because Thompson was refusing to testify again and was therefore an unavailable witness. *See* 4th Cir. JA 144. Owens moved to exclude the prior testimony of Thompson because (among other grounds) the withholding of exculpatory and impeachment evidence from the defense made the admission of Thompson's original testimony unfair without a new opportunity to cross-examine him based on the withheld *Brady* material. *See id.* at 150-53. On July 15, 2008, the Circuit Court for Baltimore City denied that motion. *Id.* at 129 (first two entries).

On October 15, 2008, the state entered a *nolle prosequi*, dropping the charges against Owens. Pet. App. 7a-8a. He was released that day, having spent more than twenty years in prison. *Id.* at 8a.

3. On October 12, 2011, Owens sued the officers and the Baltimore City Police Department (petitioners here) under 42 U.S.C. § 1983 for intentionally and in bad faith withholding exculpatory and impeachment evidence from his defense. *Id.*[3] The district court dismissed the suit as untimely, holding that the three-year limitations period for Owens's claim commenced when the state court granted him a new trial in June 2007, not when the state entered a *nolle prosequi* in October 2008.

---

[3] Owens also sued prosecutor Brave and other defendants involved in his conviction, *id.* at 8a; none of them is a petitioner here.

Id. at 8a-9a. As relevant here, the district court also held in the alternative that the officers were entitled to qualified immunity. *Id.* at 9a.

4. The court of appeals reversed the dismissal of Owens's claims against the officers and the Baltimore City Police Department.

The court first held that the suit was timely. The parties agreed that Maryland's three-year statute of limitations for personal injury actions governed, but they disagreed as to when the limitations period began to run. *Id.* at 10a. The court followed this Court's instruction in *Wallace v. Kato*, 549 U.S. 384 (2007), to apply the accrual rules applicable to the common-law tort most analogous to the § 1983 claim at issue and to consider any "distinctive rule" particular to that type of claim in determining when the statute of limitations begins to run. Pet. App. 11a-12a. Therefore, the court of appeals looked to rules applicable to actions for malicious prosecution, which the parties here agreed was the tort most analogous to Owens's claim. *Id.* at 13a. The court relied on several tort-law treatises to discern the timing rules governing malicious prosecution claims at common law. *Id.* Under those rules, the limitations period commences when the underlying criminal proceedings against the plaintiff are "resolved in his favor" "in such manner that they cannot be revived." *Id.* (citations, internal quotation marks, and source's alteration marks omitted). The court relied on the same tort-law treatises to distinguish between a *nolle prosequi*, which satisfied the favorable-termination requirement at common law, and a grant of a new trial, which did not. *Id.* at 13a-14a. Therefore, the court held, the three-year statute of limitations for Owens's claim did not begin

to run until the entry of the *nolle prosequi* in October 2008, and so Owens's October 2011 lawsuit was timely. *Id.* at 14a-15a.

Following this Court's lead in *Wallace*, the court distinguished between the date on which Owens could have filed suit (that is, when the claim accrued), and when the statute of limitations began to run. *Id.* at 15a & n.2 (citing *Wallace*, 549 U.S. at 390 n.3). Relatedly, the court noted that *Heck v. Humphrey*, 512 U.S. 477 (1994), barred Owens's § 1983 claim up to the time his conviction was set aside in June 2007, but the court recognized that *Heck* does not govern the statute-of-limitations issue because courts must follow the law governing the most analogous common-law tort. Pet. App. 15a.

The court of appeals also denied qualified immunity to the officers. First, the court had "little difficulty concluding that Owens's allegations state a plausible § 1983 claim" for the violation of his rights under *Brady v. Maryland*. *Id.* at 29a. Next, the court held that Owens's rights were clearly established because Fourth Circuit jurisprudence as early as 1964 held that a police officer's suppression of exculpatory or impeachment evidence, no less than a prosecutor's, violates the constitutional rights of the accused. *Id.* at 26a-27a, 32a-33a (discussing *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964)). The court of appeals noted that two Fourth Circuit cases from 1976 reaffirmed the rule and clarified that it also applies to concealment of impeachment evidence by law enforcement officers. *Id.* at 33a (discussing *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976), and *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976)). Finally, the court relied on a 1989 case holding that a criminal defendant's right not to have

Brady evidence withheld by police officers had been clearly established at least by the year 1983. *Id.* (discussing *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989)). Although the officers' conduct at issue here occurred in 1988, the court of appeals made clear it was relying on the 1989 case not to establish the substantive right, but as precedent for the proposition that the right *had already been clearly established* prior to 1988. *Id.* at 36a.

The court of appeals rejected the officers' argument that they were not on notice of the law because the pre-1988 cases established only that "a police officer's knowledge of exculpatory evidence will be imputed to the prosecutor for *Brady* purposes," as contrasted with the proposition that police withholding of such evidence violates constitutional rights. *Id.* at 34a-35a. As the court of appeals explained, the 1964 and 1976 cases each held

> that if a police officer suppresses material exculpatory evidence, courts will invalidate a defendant's criminal sentence as unconstitutional. A police officer acting after the issuance of these decisions, like each of the Officers here, could not have thought that the suppression of material exculpatory evidence would pass constitutional muster.

Id. at 35a. Moreover, the court explained, the focus of the qualified immunity inquiry is whether the *right* in question has been clearly established, not whether the law clearly establishes the plaintiffs' right to the precise *remedy* sought. *Id.* at 31a. "Thus, a right does not become clearly established only if a plaintiff has successfully enforced it through a § 1983 action. On the contrary, a right may be clearly established by

any number of sources, including a criminal case[.]" *Id.* Accordingly, the court vacated the dismissal of Owens's case against petitioners.[4]

Judge Traxler concurred in part but dissented from the timeliness and qualified immunity holdings. He argued that the "majority adhere[d] a bit too rigidly to the common-law analogue" in determining what qualifies as favorable termination, *id.* at 46a; he would have held that the order for retrial constituted favorable termination, *id.* at 48a. On qualified immunity, Judge Traxler did not dispute the existence of the right asserted by Owens, but he argued that it was not clearly established by 1988. *Id.* at 51a-52a.[5]

The court denied panel and en banc rehearing, with no judge requesting a vote on the en banc petition. *Id.* at 78a.

REASONS FOR DENYING THE WRIT

I. The Timeliness Of Owens's Suit Does Not Warrant Review.

Petitioners (supported by defendant and nominal respondent Brave) claim that the courts of appeals are divided on when the statute of limitations for a *Brady* claim begins to run. This argument does not

---

[4] In rulings not challenged here, the court also held that Owens had stated a claim for municipal liability against petitioner Baltimore City Police Department, and that the Baltimore City State's Attorney's Office was not amenable to suit. *Id.* at 24a, 42a.

[5] Judge Wynn also dissented in part, only on the issue of whether the Baltimore City State's Attorney's Office was amenable to suit. He joined the majority opinion as to all of the issues presented in the petition. *See id.* at 56a.

withstand scrutiny. No court of appeals has held that the statute of limitations on a *Brady* claim begins to run while the plaintiff remains subject to pending criminal proceedings in which the *Brady* violation may recur through the introduction of evidence tainted by the violation. Moreover, the decision below correctly applies this Court's decision in *Wallace*.

A. Petitioners' argument that the circuits are divided is incorrect.

Petitioners' attempt to demonstrate a circuit split fails. Each one of the circuits petitioners identify as supposedly disagreeing with the decision below either has indicated that it would reach the same result as the decision below on similar facts, or has not addressed the distinction at issue in this case.

1. Petitioners rely chiefly on *Smith v. Gonzales*, 222 F.3d 1220 (10th Cir. 2000), but that case is distinguishable. In *Smith* (as here), a former criminal defendant sued officers for failing to disclose exculpatory evidence. *Id.* at 1221. However, unlike in this case, the defendant-turned-civil-rights-plaintiff in *Smith* had had his conviction vacated on *Brady* grounds, so "the prosecution was effectively prevented from withholding the same exculpatory evidence if the State decided to retry Smith. As a result, a [new] trial necessarily could not have implicated the constitutional violations at issue in Smith's [previous] trial." *Id.* at 1222. The Tenth Circuit therefore held that the statute of limitations began to run for Smith's § 1983 claim when his tainted conviction was vacated on *Brady* grounds. *Id.*

Here, Owens's conviction, unlike Smith's, was vacated based on DNA evidence, not *Brady*. Therefore, unlike in *Smith*, even after Owens's

conviction was set aside, he still faced the possibility of retrial with testimony tainted by the *Brady* violation. Indeed, before the *nolle prosequi*, the state court had *denied* Owens's motion to bar the introduction of the original Thompson testimony from Owens's pending retrial, even though that testimony was tainted by the *Brady* violations and corresponding absence of full opportunity for Owens to cross-examine Thompson. *See* 4th Cir. JA 129, 144, 150-53. Petitioners' claim that "there [was] no risk that the original *Brady* violation [would] recur" here, Pet. 14, is thus incorrect. Because Smith's order for a new trial, unlike Owens's, insulated Smith from a replay of the constitutional violation that occurred at his original trial, the Tenth Circuit's decision in *Smith* is distinguishable from the decision below.

More apposite to this case is a case petitioners did not cite, *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990), which suggests that the Tenth Circuit would reach the same result as the decision below on these facts. In *Robinson*, the plaintiff alleged that law enforcement officers conspired to violate his constitutional rights by knowingly permitting false testimony to be used against him in a murder prosecution. *Id.* at 650-51. Robinson's first trial resulted in conviction but was overturned on appeal for prosecutorial errors that did not foreclose the use of the same false testimony against Robinson at his retrial. *See id.* at 653. Robinson was acquitted at his second trial. *Id.* The Tenth Circuit held that the limitations period did not begin to run until the acquittal in the second trial, because even after "[t]he earlier reversal of his prior murder, armed robbery and conspiracy convictions for trial error . . . Robinson remained subject to those serious charges

and went on trial for his life again . . . when the malicious prosecution conspiracy again resulted in presentation of the false case against him." *Id.* at 655 (citation omitted).

Thus, the Tenth Circuit recognizes that a favorable termination must remove the possibility that the constitutional violation will be repeated in order to begin the running of the limitations period. Indeed, *Smith* expressly distinguished *Robinson* on this basis. *See Smith*, 222 F.3d at 1223 ("In contrast to the plaintiff in *Robinson*, after we vacated Smith's conviction based on the *Brady* violation, Smith was not subject to a [new] trial fraught with the same constitutional violations."). This case does not raise the question whether the Tenth Circuit was correct on the facts of *Smith*, because those facts are not presented here. Rather, Owens, like Robinson, remained vulnerable to the constitutional violation at his second trial. Therefore, the holding of the court of appeals that Owens's proceedings did not favorably terminate until the *nolle prosequi* ended the state's prosecution does not conflict with the Tenth Circuit's jurisprudence. Indeed, *Robinson* shows that the Tenth Circuit would come out the same way on the facts of this case.

2. Petitioners' argument that the Sixth Circuit's decisions conflict with the decision below fares no better. *D'Ambrosio v. Marino*, 747 F.3d 378 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 758 (2014), on which petitioners rely, considered the timeliness of a *Brady*-based civil rights action brought by a former criminal defendant whose habeas petition had resulted first (in 2008) in the granting of a conditional writ that permitted retrial and later (in 2010) in the granting of an unconditional writ that barred retrial. *Id.* at

382. The court held that, because the plaintiff's state conviction was not vacated before the grant of the *unconditional* writ, the civil rights suit was timely. *Id.* at 385-86. Petitioners note that the court said it did not agree with the plaintiff that no favorable termination occurred as long as the state retained the ability to retry him. Pet. 9 (citing *D'Ambrosio*, 747 F.3d at 384). But that point is pure dicta: the holding was that the suit was timely based on the date the plaintiff received an *unconditional* writ (barring retrial). 747 F.3d at 385-86.

Petitioners also rely on *Harrison v. Michigan*, 722 F.3d 768 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1023 (2014), but that case did not address the distinction between the invalidation of the prior conviction and the dropping of all charges. Harrison, a former criminal defendant, brought a civil rights action for a period of unlawful confinement he suffered because he had received *consecutive* sentences for crimes that under state law were subject to *concurrent* sentencing only. *Id.* at 769. Petitioners misleadingly suggest that what *Harrison* held to be a favorable termination was a reversal of the defendant's sentence and "remand[] for re-sentencing," Pet. 9 — thus implying that the favorable termination had left the issue of sentencing open to a repetition of the unlawful sentence. In fact, Harrison's favorable termination was a state appellate decision that "held that Harrison had been improperly sentenced and *ordered that a corrected judgment be issued*." 722 F.3d at 769 (emphasis added); *see also id.* at 772. Thus, there was no possibility that the violation of Harrison's rights would be repeated, and the appellate decision effectively terminated the

unlawful imprisonment, leaving only a ministerial action to be performed on remand.

A more relevant decision, not cited by petitioners, suggests that the Sixth Circuit would reach the same result as the Fourth Circuit did on the facts here. In *Ruff v. Runyon*, 258 F.3d 498 (6th Cir. 2001), the court considered the timeliness of a civil rights action by former postal service employees who had been indicted on state drug charges based on fabricated evidence and as a result pleaded guilty to lesser offenses. *Id.* at 499. The defendants moved to withdraw their pleas in April 1995, and the state court granted their motions and ordered new trials. *Id.* at 499-500. The charges were dismissed in March 1996. *Id.* at 500. The civil rights suit was filed in August 1997; the statute of limitations was two years. *Id.* As here, the question was when the statute of limitations began to run, and, as here, the court of appeals answered that the correct date was when the charges were finally dismissed (1996). *Id.* at 504. Although the court's reasoning (coming as it did before *Wallace*) is not the same as that of the decision below, the result is. Fourth and Sixth Circuit law do not conflict.

3. Likewise, Fourth and Seventh Circuit law do not conflict. In *Johnson v. Dossey*, 515 F.3d 778 (7th Cir. 2008), the court held that a civil rights complaint for *Brady* violations in the plaintiff's prior prosecution for arson was timely under a two-year statute of limitations because it was filed within two years of plaintiff's acquittal on retrial. *Id.* at 780, 782. Any tension with the decision here is confined to *Johnson*'s dicta regarding accrual (as opposed to the commencement of the limitations period). *See* Pet. 10. Even if this Court granted review to correct stray

dicta in opinions other than the one presented for review, the instant case is a poor vehicle for addressing the Seventh Circuit's dicta because the decision below is about commencement of the limitations period, not accrual, *id.* at 13a-15a & n.2, and the result here would not change even if the *Johnson* dicta were adopted.

Julian v. Hanna, 732 F.3d 842 (7th Cir. 2013), is also in accord with the result here: the court held that a civil rights action based on a conviction secured with fabricated evidence was timely because it was filed within two years of when the state finally dropped the charges. *Id.* at 844-45. The court specifically rejected defendants' argument that the limitations period began when the plaintiff's conviction was reversed. *Id.* at 845 ("Until the retrial was held, and ended favorably to him, or the charges against him were dropped without a retrial, which is what happened, the criminal case had not terminated in his favor."). Again, any tension between *Julian* and the decision below is confined to dicta, as petitioners admit. Pet. 10. Like the jurisprudence of the Tenth and Sixth Circuits, the Seventh Circuit's decisions are consistent with the result here.

4. Finally, petitioners' citations to cases from the Ninth and Eleventh Circuits are inapposite, because those decisions did not consider whether a criminal defendant necessarily receives a "favorable termination" on the date his conviction is vacated. In *Rosales-Martinez v. Palmer*, 753 F.3d 890 (9th Cir. 2014), the issue before the court was whether a *Brady* claim accrued when the criminal defendant first learned that his rights had been violated or when his conviction was vacated. *Id.* at 893, 895-96.

The case did not involve an order granting the state an opportunity to retry the plaintiff, so the question at issue here did not arise there. The footnote petitioners cite from *Porter v. White*, 483 F.3d 1294 (11th Cir. 2007), was also about accrual rather than the commencement of a limitations period. *Id.* at 1304 n.6. Additionally, *Porter* presented no occasion to address the distinction between when a prior conviction is vacated and when the proceedings are entirely terminated, because there the plaintiff's claim was timely counting from either date. *See id.* (conviction set aside in 2002, case filed in 2004, statute of limitations four years); *id.* at 1297 (plaintiff was retried and acquitted in 2002, the same year his conviction was set aside). Because those cases do not address the issue presented in this case, they cannot conflict with it.

B. The decision below was correct.

In *Wallace v. Kato*, 549 U.S. 384 (2007), the Court explained that the date when the statute of limitations begins to run on a § 1983 action is determined by analogy to common-law tort principles. *Id.* at 388-92. The Court additionally instructed that the application of general common-law rules is subject to "refinement" based on the "common law's distinctive treatment of the torts" that "provide the closest analogy" to the claims at issue. *Id.* at 388 (citation, internal quotation marks, and source's alteration marks omitted). In order to determine what "refinement[s]" applied in *Wallace*, which involved a claim for an allegedly unconstitutional arrest, the court relied on common-law treatises for the rules governing the most analogous torts, false arrest and false imprisonment. *Id.* at 388-90. The Court distinguished between the

accrual date and the date on which the statute of limitations begins to run: the cause of action for false imprisonment accrues as soon as the wrongful detention occurs, *id.* at 388, 390 n.3, but under the common law the statute of limitations does not begin to run until the false imprisonment ends, *id.* at 389. Thus, *Wallace* made clear that (contrary to petitioners' argument) the accrual date does not dictate when the statute of limitations begins to run. Finally, the Court explained the role of *Heck v. Humphrey*, 512 U.S. 477 (1994), in determining timeliness: *Heck* "delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn." *Wallace*, 549 U.S. at 393 (emphasis removed). The Court did not, however, suggest that *Heck* determines when the statute of limitations begins to run, a question resolved by analogy to the common law.

Applying *Wallace*, the court of appeals followed the "common law's distinctive treatment," *id.* at 388, of the tort that the parties agreed was the closest common-law analogue for Owens's claim: malicious prosecution. Pet. App. 13a. Relying (as *Wallace* did) on leading tort treatises, the court of appeals concluded that the limitations period for malicious prosecution does not begin to run until the proceedings against the former-defendant-turned-plaintiff have been "favorably terminated," and the court further found that the meaning of that standard at common law incorporated the requirement that the proceedings could not be revived. *See id.* at 13a-15a. Like *Wallace*, the court recognized that *Heck* delays accrual of the cause of action but does not determine when the statute of

limitations begins to run. *See id.* at 15a. Thus, the court held that the removal of the *Heck* bar by the setting aside of Owens's original conviction did not affect the running of the statute of limitations, whose commencement is governed by the "favorable termination" standard of the common law. *Id.* The court followed *Wallace* to the letter.

Petitioners' argument that the decision below is inconsistent with *Heck* is disproved by *Wallace*, which treated *Heck* just as the court of appeals did here: as a bar to the commencement of a § 1983 suit when it would impugn the validity of an extant conviction or sentence but not as the determinant of when the statute of limitations begins to run once such a suit is permitted. *See Wallace*, 549 U.S. 388-89, 390 n.3, 393. For that, *Wallace* teaches, the common law governs. Thus, *Heck* and *Wallace* answer two different questions. Whereas *Heck* determines when a § 1983 suit is premature, *Wallace* shows courts how to determine when such a suit is dilatory. Because no one here contends that Owens's suit was barred by *Heck*, that case is not relevant. Even petitioners themselves appear to understand that *Heck* addresses a different question than the one presented here. *See* Pet. 7 ("Petitioners grant that the question of accrual and the question of the statute of limitations are not necessarily in all cases the same question."). Accordingly, their reliance on *Heck* to try to answer the statute of limitations question is misplaced.

Defendant Brave chastises the court of appeals for applying equitable tolling, Brave Br. 11, 13, but the court did no such thing. In fact, the words "equitable tolling" appear nowhere in the decision below.

In addition to its fidelity to *Wallace*, the decision below is consistent with the distinction other courts of appeals have drawn between post-conviction relief that forecloses the recurrence of the constitutional violation at issue in the § 1983 claim and relief that leaves open the possibility that such a violation could recur. *See supra* Part I.A. Although the court of appeals was not called upon to draw that distinction in this case, the result and reasoning here are consistent with it.

Petitioners argue that the "favorable termination" standard is difficult to apply, Pet. 10-12, but they give no reason why it would be harder to apply in this context than in the context of a common-law malicious prosecution claim. That a standard requires a fact-specific inquiry does not mean it is the wrong standard.

Finally, contrary to petitioners' contention, the decision below does not undermine any statutes of limitations. Petitioners suggest that some § 1983 plaintiffs will never have their limitations periods start to run under the decision below because after a conviction is overturned, the defendant might be reconvicted or plead guilty, in which case (petitioners argue) there would never be a favorable termination. *See* Pet. 12-14. But the cases that petitioners themselves cite make clear that a § 1983 claim can proceed only as to a conviction that was favorably terminated; where a conviction is overturned but the defendant subsequently pleads guilty or is convicted anew, that result circumscribes a § 1983 claim. In such circumstances, courts differentiate between an earlier conviction that is overturned in such a way that the constitutional violation cannot be repeated

(in other words, "favorably terminated") and a subsequent conviction that was not so concluded.

For instance, the plaintiff in *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc), cited by petitioners, had his conviction for attempted murder and related crimes overturned on *Brady* grounds but then pleaded guilty to attempted robbery. *Id.* at 124. The court held that, because the absence of favorable termination defeats a § 1983 claim, *id.* at 131, the plaintiff's § 1983 claim was limited to the harms of his original conviction and excluded damages flowing from his subsequent guilty plea, *id.* at 136. The court also noted that the favorable-termination requirement limited the plaintiff to claims for the violations of his *Brady* rights — the basis of his successful challenge to his first conviction. *Id.* The two other cases petitioners cite are to similar effect: both distinguish between a prior, tainted conviction that was set aside in a manner that foreclosed repetition of the constitutional violation and a subsequent "clean conviction" or adjudicated by plea. *See Jackson v. Barnes*, 749 F.3d 755, 758, 760-61 (9th Cir. 2014) (permitting § 1983 claim for plaintiff's original conviction, which was reversed for a *Miranda* violation, but noting that damages would likely be "minimal" because plaintiff was convicted at retrial without the tainted evidence), *cert. denied*, 135 S. Ct. 980 (2015); *Olsen v. Correiro*, 189 F.3d 52, 55, 66 (1st Cir. 1999) (after plaintiff's first conviction was set aside, his subsequent nolo contendere plea that resulted in sentence for time served barred plaintiff for recovering damages for his imprisonment). Because a § 1983 action for *Brady* violations cannot be brought absent a favorable termination — which,

at whatever point it occurs, will commence the running of the limitations period — the result here does not eliminate any statutes of limitations.

In sum, the court of appeals correctly applied *Wallace* to reach a result that is in accord with the other courts of appeals. Review is unwarranted.

C. The Court should not grant review to address Maryland law regarding the effect of a *nolle prosequi*.

In passing, petitioners suggest that the court of appeals erred as a matter of Maryland law in identifying the *nolle prosequi* as a favorable termination. Pet. 11. This ancillary question is wholly inappropriate for review.

First, petitioners do not raise as an issue for this Court's review the interpretation of Maryland law by the court of appeals. *See* Pet. *i-ii*. Moreover, an alleged misapplication of state law is not a reason for this Court to grant certiorari. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944).

In any event, the case petitioners cite to support their argument, *Ward v. State*, 427 A.2d 1008 (Md. 1981), does not cast any doubt on the decision below. *Ward* held only that when the state enters a *nolle prosequi* on one of two criminal counts charging the same offense, the defendant can still be tried on the other count and thereafter retried if his conviction on that count is set aside. *See id.* at 1009-10, 1012, 1022. The court in *Ward* noted that its holding did not interfere with the operation of ordinary double jeopardy principles, under which an attempt to prosecute a defendant for a charge resolved by *nolle prosequi* after jeopardy had attached would ordinarily be forbidden. *See id.* at 1016, 1019. And

the court did not address — and in that criminal case had no occasion to address — whether a *nolle prosequi* qualifies as a favorable termination for the purpose of a malicious prosecution claim.

Therefore, the court of appeals did not err here in looking to tort treatises (as this Court did in *Wallace*) to determine the meaning of "favorable termination." *Ward* does not counsel a contrary result nor justify review of this ancillary state-law question.

II. The Qualified Immunity Holding Does Not Warrant Review.

Petitioners focus their qualified immunity argument on whether Owens's right not to have exculpatory evidence withheld by the police was clearly established in the Fourth Circuit in 1988. That narrow question does not warrant review.

A. This Court should not review the Fourth Circuit's application of the proper legal rule.

Petitioners do not disagree with the statement of the qualified immunity standard in the decision below. As the court of appeals correctly explained, "Qualified immunity protects government officials from liability for 'civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known.'" Pet. App. 24a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "For a right to be clearly established, its contours 'must be sufficiently clear [such] that a reasonable official would [have] underst[ood] that what he is doing violates that right.'" *Id.* at 31a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); alterations added by the court of appeals).

These principles are well-settled, and petitioners do not dispute them. The only disagreement is over the application of this standard to a particular right in a particular circuit at a particular point in time: whether Owens's constitutional right not to have exculpatory evidence maliciously withheld by police officers was clearly established in the Fourth Circuit in 1988. Petitioners do not identify any larger implications of this narrow question. Nor do they contend that the decision below conflicts with other circuits regarding either the qualified immunity standard or the underlying constitutional right. And they do not dispute that circuit precedent can "clearly establish" a right for the purpose of qualified immunity. Because this case does not present a dispute regarding the applicable legal standard, this issue does not warrant review.

B. The decision below was correct.

1. The duty was clearly established in the Fourth Circuit by 1988.

As the court of appeals correctly held, the Fourth Circuit recognized as early as 1964 that a criminal defendant's constitutional rights under *Brady v. Maryland* are violated when exculpatory evidence is withheld by law enforcement officers rather than the prosecutor. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) ("[I]t makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." (footnote omitted)). The court of appeals reaffirmed that holding twice — in the context of impeachment evidence — prior to the events at issue here. *See*

United States v. Sutton, 542 F.2d 1239, 1241 & n.2, 1243 (4th Cir. 1976); *Boone v. Paderick*, 541 F.2d 447, 450-51 (4th Cir. 1976).

Petitioners' various attempts to reason their way out of the clearly established law of the Fourth Circuit fail. First, petitioners claim that *Barbee* and its progeny established only that the constitutional duty to disclose exculpatory evidence, which is a duty of "the state and the prosecutor," may be violated when the evidence is in the hands of the police — not that the police officers *themselves* violate constitutional rights by withholding evidence. Pet. 19. That distinction ignores the focus of the qualified immunity inquiry, which is whether the *right* in question has been clearly established, not whether a particular remedy has been granted or whether a particular category of state official has previously been held liable for violating the right. As this Court has explained, "Section 1983 provides a cause of action against *any person* who deprives an individual of federally guaranteed *rights* under color of state law. Anyone whose conduct is fairly attributable to the state can be sued as a state actor under § 1983." *Filarsky v. Delia*, 132 S. Ct. 1657, 1661 (2012) (citations and internal quotation marks omitted, and emphasis added). Thus, for example, after this Court held unlawful a strip search performed by a school nurse, *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 374-77 (2009), that same search would surely violate a student's clearly established rights thereafter if it were performed by a teacher, a probation officer, or a private security contractor employed by the school.

The question before the court of appeals was therefore whether Owens's clearly established right

was violated by the officers, not whether it was clearly established that it was police officers' responsibility in particular not to violate it. To hold otherwise would mark a sea change in qualified immunity law and embroil the courts in the development of fuzzy standards regarding which officers should expect to be held liable for which rights. Petitioners offer no support for their attempt to parse out different types of violators of clearly established rights and thereby reconfigure the law of qualified immunity.

Second, petitioners object to the citation below of *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), on the grounds that a post-1988 case cannot establish the law as it existed in 1988. But petitioners misunderstand the decision below. The court of appeals made clear that it was citing *Goodwin* for the proposition that the Fourth Circuit *had already held the law to be clearly established* as of the time of the events at issue in *Goodwin* (1983), *not* to argue that *Goodwin itself* established the substantive rule of law of which defendants here should have known. Pet App. 36a. That law was established much earlier, in 1964. *Id.* at 26a. Thus, the court of appeals did not require the officers to predict the development of constitutional law.

Finally, petitioners' invocation of various opinions in *Jean v. Collins*, 155 F.3d 701 (4th Cir. 1998) (en banc) ("*Jean I*"), *vac'd,* 526 U.S. 1142 (1999), *on remand*, *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000) (en banc) (per curiam) ("*Jean II*"), is unavailing. There, a criminal defendant whose conviction had been overturned sued police officers for withholding *Brady* material, and the district court granted qualified immunity to the officers. *Jean I*, 155 F.3d at

703. The Fourth Circuit affirmed in *Jean I*, *see id.*, but that holding was vacated by this Court for reconsideration in light of *Wilson v. Layne*, 526 U.S. 603 (1999), another qualified immunity case. *See* 526 U.S. 1142. Petitioners misleadingly characterize *Jean I* as having been "*overruled on other grounds*," Pet. 20; in fact, the entire decision was vacated for reconsideration. 526 U.S. 1142; *see Adams v. Aiken*, 41 F.3d 175, 179 (4th Cir. 1994) (rejecting a party's invitation to draw an inference from a grant/vacate/remand order from this Court that the Court had implicitly approved a portion of the decision it vacated). On remand, the Fourth Circuit issued no substantive holding at all but instead affirmed the original decision of the district court by an equally divided vote. *Jean II*, 221 F.3d at 658 (three-sentence per curiam affirmance). That opinion carries no precedential weight, either. *See Neil v. Biggers*, 409 U.S. 188, 192 (1972).

Even petitioners' substantive attempts to rely on the vacated *Jean I* and the concurring opinion in *Jean II* are unavailing. In *Jean I*, although the majority and dissent disagreed over when, precisely, the rule was clearly established, every judge of the en banc court agreed that a police officer violated a criminal defendant's constitutional rights by withholding material exculpatory evidence from his defense. *See* 155 F.3d at 712 (majority opinion) ("Although this circuit now recognizes that police too may be subject to *Brady* duties, it had not yet recognized such duties in 1982."); *id.* at 716 (Ervin, J., dissenting) ("At least since *Barbee* in 1964, a reasonable police officer in North Carolina would have known that a criminal defendant has a clearly established right to have officers deliver material,

exculpatory evidence to prosecutors."). And in *Jean II*, the six votes for affirmance would have held *neither* that police cannot be held liable under *Brady*, *see* 221 F.3d at 659 (Wilkinson, C.J., concurring in the judgment) ("[a] police officer who withholds exculpatory information from the prosecutor can be liable under section 1983" (citation, internal quotation marks, and source's ellipsis omitted)), *nor* that the right was not clearly established in 1982, the time of the events at issue in that case. Rather, those judges concurred in the result because they viewed bad faith as a necessary element of a *Brady* claim against police officers, and that element was missing from Jean's case. *Id.* at 663.[6] In sum, none of the decisions in *Jean* casts doubt on the existence of the constitutional right that the officers violated here, and *Barbee* shows that the right was well established long before they violated it.

2. Independent grounds justify the denial of immunity.

Even if this Court were inclined to parse the implications of a half-century-old line of Fourth Circuit case law, this case would be a poor vehicle for such an inquiry because it would not change the result here.

The "clearly established" requirement does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful"; rather, qualified immunity is properly denied if "in the light of pre-

[6] The court of appeals here held, and petitioners do not challenge, that Owens has plausibly alleged bad faith. Pet. App. 29a-30a.

existing law the unlawfulness [is] apparent." *Anderson*, 483 U.S. at 640; *accord Hope v. Pelzer*, 536 U.S. 730, 739 (2002). For example, in *Hope*, the Court held that shackling an inmate, shirtless, to a hitching post for seven hours without bathroom breaks in the hot sun violated the Eighth Amendment even though that precise factual circumstance had not been adjudicated. 536 U.S. at 734-35, 741-46.

The same principle applies with equal force here. Withholding from the defense the fact that the prosecution's star witness changed his story five times was so outrageous, so obviously offensive to any notion of fair play and substantial justice, that its unlawfulness was clear with or without a case on point. Under *Brady* itself, it should have been "apparent," *id.* at 739, to reasonable officers that they were violating Owens's constitutional rights by systematically covering up vital impeachment evidence against the state's star witness.

C. The question whether Owens's rights were violated is not properly before the Court and in any event does not warrant review.

The petition's second question presented, although mainly about the "clearly established" prong of qualified immunity, includes a phrase asking whether the court of appeals erred in holding "that individual police officers had an independent *Brady* duty to bring forward exculpatory evidence in 1988." Pet. *ii*. But other than a handful of conclusory phrases in the brief, petitioners do not make any substantive argument that police are not capable of violating *Brady* rights — only that it was not clearly

established in 1988 that they could do so. Even the statement in the question presented includes a temporal reference ("in 1988"), demonstrating that the real issue presented is whether the right was clearly established. Petitioners' attempt to raise the existence of the right as an issue before this Court fails because they do not argue the point. See S. Ct. R. 14.1(h).

Even if petitioners' efforts to present the question here are sufficient, petitioners waived the question by failing to present it to the court of appeals. This Court does not decide questions "not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). Petitioners made two arguments to the Fourth Circuit on qualified immunity: first, that Owens's right was not clearly established, *see* Br. of Appellees 29-41 (4th Cir. filed May 10, 2013), and second, that Owens's rights were not violated because a necessary element of a § 1983 claim for *Brady* violations is the prior reversal of the plaintiff's conviction *on that basis*, *see id.* at 41-42. Neither argument questions the existence of the right, and so petitioners have waived the argument that the police are not capable of violating Owens's *Brady* rights.

In any event, there is no reason for this Court to consider the question. Petitioners do not explain how the recognition by the court of appeals that police are capable of violating *Brady* conflicts with the decisions of this Court or any other circuit. This Court has noted repeatedly that the scope of the *Brady* obligation encompasses not only material known to prosecutors but also material known to police. *See Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). As

explained above, in determining whether a § 1983 plaintiff's rights have been violated, the Court asks whether the violation was carried out "under color of state law," not whether the particular state actor has a recognized duty not to violate that right. *Filarsky*, 132 S. Ct. at 1661. And as the court of appeals noted, several other circuits have held that the police violate the Constitution when they withhold *Brady* evidence, as the Fourth Circuit held here. *See* Pet. App. 34a n.8. Review of the issue is unwarranted.

III. The Interlocutory Posture Of The Case Counsels Against Review.

The decision below did not end the case, but rather remanded to the district court for further proceedings. Supreme Court review at an interlocutory stage is the exception rather than the rule. *See, e.g.*, *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); Shapiro, Geller, et al., *Supreme Court Practice* § 4.18, at 282 (10th ed. 2013).

Defendant Brave's inclusion of transcripts from outside the record below as an appendix to his brief supporting certiorari, *see* Brave Br. App., exemplifies the problems with review at this stage. Although the decision below concerns only the proceedings on a motion to dismiss, defendant Brave appears to believe that consideration of additional evidence is necessary. That circumstance counsels against review now, because the evidence has not yet been introduced. In fact, discovery has only just commenced. If there is extra-record evidence that bears on the questions in this case, the Court should await its introduction and consideration by the lower courts in the first instance. *Cf. Johnson v. Jones*, 515

U.S. 304, 317 (1995) (barring interlocutory appeals from denials of qualified immunity based on disputes about the underlying facts, because, among other reasons, such an appeal "makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT MICHELMAN
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

CHARLES N. CURLETT, JR.
Counsel of Record
SARAH F. LACEY
LEVIN & CURLETT LLC
201 North Charles Street
Suite 2000
Baltimore, MD 21201
(410) 685-4444
ccurlett@levincurlett.com

JOSHUA R. TREEM
LAURA G. ABELSON
BROWN, GOLDSTEIN & LEVY, LLP
120 East Baltimore Street, Suite 1700
Baltimore, MD 21202
(410) 962-1030

Counsel for Respondent

March 2015