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Hope Emerges From the Shadows: Riojas and McCoy Offer New Tool for Exonorees

Jack Nelson

Comment

HOPE EMERGES FROM THE SHADOWS: *RIOJAS* AND *MCCOY* OFFER NEW TOOL FOR EXONOREES

JACK NELSON*

"Justice delayed is justice denied." – William Gladstone

I. MISCARRIAGES OF JUSTICE: PHILADELPHIA'S RAMPANT WRONGFUL CONVICTIONS

In June 2021, forty-nine-year-old Theophalis Wilson moved into his first apartment since he was a teenager.[1] In 1989, police identified then seventeen-year-old Wilson as a suspect in a North Philadelphia triple murder; four years later he was behind bars, convicted, and sentenced to life without parole.[2] In 2020, Wilson became the twelfth person exonerated by Philadelphia District Attorney Larry Krasner's Conviction Integrity Unit (CIU) after serving twenty-eight years of his life sentence.[3]

Wilson's trial was a "perfect storm" of prosecutorial misconduct, teeming with lying witnesses, ineffective assistance of counsel, and withholding exculpatory evidence.[4] After spending years trying to challenge his conviction, Wilson finally convinced the CIU to review his case, which precipitated his release.[5] However,

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1. Samantha Melamed, *As Philly Tops Two Dozen Exonerations, City May Face Tens of Millions in Civil Liability*, PHILADELPHIA INQUIRER (June 13, 2021) https://www.inquirer.com/news/wrongful-convictions-philadelphia-civil-settlements-lawsuits-20210613.html (detailing that Wilson recently got married and started a nonprofit called "Before It's Too Late"). Wilson also works part-time as a legal apprentice at Phillips Black, the law firm that helped free him. *Id.*

2. *See id.* (noting that Wilson and his twenty-nine-year-old co-defendant were convicted and sentenced in 1993 based solely on the testimony of a criminal informant who gave multiple conflicting statements).

3. *See id.* (detailing how the CIU has uncovered a deep catalog of problems in Pennsylvania's legal system). *See also Theophalis Wilson Exonerated After 28 Years in Pennsylvania Prison*, EQUAL JUSTICE INITIATIVE (Jan. 24, 2020) https://eji.org/news/theophalis-wilson-exonerated-after-28-years-in-pennsylvania-prison/ [hereinafter Wilson Exonerated] ("No words can express what we have put these people through; what we have put Mr. Wilson through; what we have put his family through . . . what we have put our community through," said the judge who exonerated him).

4. *See* Wilson Exonerated, *supra* note 3 (acknowledging that Wilson's trial was infected by serious prosecutorial misconduct, *Brady* violations, a critical witness who supplied false testimony, and ineffective assistance of counsel). For decades, the Philadelphia District Attorney's Office concealed evidence, undisclosed deals in exchange for testimony, corrupt relationships with informants, and inadequate funding of defense counsel that condemned "men to prison for decades." *Id.*

5. *See id.* (citing Philadelphia prosecutors' violation of *Brady v. Maryland*, the CIU moved to withdraw all charges against Wilson). Wilson had been challenging his conviction without legal help for years, however, he finally got his case into court after the Supreme Court struck down mandatory life-without-parole sentences for children in *Miller v. Alabama*, which gave Wilson a

because Pennsylvania offers no compensation to exonerees, he left prison with little more than his legal fees.[6]

Wilson's story is not a singular tragedy: his lawsuit was one of numerous malicious prosecution cases filed against the City of Philadelphia.[7] Additionally, more exonerees are within the two-year statute of limitations to file similar suits, and that doesn't account for the cases currently under review by Krasner's CIU.[8] Undoubtedly, more convictions will be overturned as revelations of prejudicial legal errors and egregious police misconduct–including witness coercion and withholding exculpatory evidence–are unearthed by the CIU.[9]

Unfortunately, remedies are elusive, as prosecutors, judges, witnesses, and juries are all entitled to absolute immunity.[10] In fact, just forty-eight percent of malicious prosecution suits nationwide provide plaintiffs compensation, and in Pennsylvania, that number is only thirty-seven percent.[11] Moreover, settlement amounts range widely depending on an amalgam of factors such as: underlying evidence of actual innocence; strength of legal claims; allegations of misconduct; and personal history of the plaintiff.[12]

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resentencing hearing. *Id.* It was during this resentencing phase that he convinced his newly appointed lawyer to file his innocence claim. *Id.*

6. *See* Melamed, *supra* note 1 ("'You can't put a price on what's lost,' Wilson said. 'You just try to get compensation and move on.'"). Pennsylvania is one of fourteen states that offers no compensation to exonerees. *Id.*

7. *See id.* (noting the thirteen plaintiffs served a combined 365 years in prison). *Id.*

8. *See id.* (highlighting Krasner's steadfast efforts to address prior prosecutorial misconduct, including hiring Texas native, Patricia Cummings, to independently run the unit). Further, if every one of these cases settled at the national average–$305,000 per year of wrongful conviction –the bill to Philadelphia taxpayers would exceed $111 million. *Id.* This is a sharp change from 2017, when acting DA Kathleen Martin asked lawyers for Shaurn Thomas–who was serving a life term for a 1990 murder–for a waiver of civil liability before agreeing not to retry him. *Id.* According to an affidavit by then-Pennsylvania Innocence Project director Marissa Bluestine, Martin said, "You are going to bankrupt the city." *Id.* Thomas was exonerated anyway, and received a $4.15 million settlement. *Id.*

9. *See id.* (predicting that the CIU is at the tip of the iceberg when it comes to uncovering wrongful convictions). However, only forty-eight percent of malicious prosecution suits nationwide yield compensation; in Pennsylvania, only thirty-seven percent are successful for the plaintiffs. *Id.*

10. *See id.* (noting that despite the numerous parties entitled to absolute immunity, many of these civil suits end up settling for millions of dollars). In fact, Philadelphia paid out nearly $40 million on malicious prosecution, false arrest, false imprisonment, and overturned convictions claims between 2010 and 2019. *See* Max Mitchell, *Philadelphia's Civil Payments From Police Abuse Have Been on the Rise. That's Likely to Accelerate*, THE LEGAL INTELLIGENCER (June 22, 2020) https://www.law.com/thelegalintelligencer/2020/06/22/phila-s-civil-payments-from-police-abuse-have-been-on-the-rise-thats-likely-to-accelerate/#:~:text=ANALYSIS-,Phila.'s%20Civil%20Payments%20From%20Police%20Abuse%20Have%20Been%20on,increased%20costs%20for%20local%20governments. This uptick in payments was driven by the exonerations, and those numbers are expected to rise because of Krasner's efforts to review and overturn problematic convictions. *Id.* Indeed, in his first eighteen months on the job, Krasner's office overturned fourteen convictions. *Id.* For instance, in 2020, Shaurn Thomas, who served twenty-four years in prison for a murder he did not commit, was awarded $4.15 million in a civil settlement from the City of Philadelphia, the largest payout ever in a non-DNA exoneration case. *See* Jenna Greene, *Dechert Attorneys Secure Historic Settlement in Philadelphia Wrongful Conviction Case*, THE LEGAL INTELLIGENCER (January 6, 2020) https://www.law.com/litigationdaily/2020/01/06/dechert-team-wins-historic-payout-for-wrongful-conviction/.

11. *See* Melamed, *supra* note 1 (noting that compensation is so difficult because the potential pool of defendants is limited).

12. *See id.* (noting that plaintiffs' lawyers cite subtler factors, such as the fact that the suits must be brought in federal court, which means juries are drawn from across the Eastern District of Pennsylvania, sometimes forming a less sympathetic jury).

Police are entitled to qualified immunity and thus potentially liable, but the doctrine has evolved into de facto absolute immunity.[13] Qualified immunity protects government officials – including police officers – accused of violating constitutional rights.[14] To win a civil suit against police, a plaintiff must show that the officer violated "clearly established law," often by finding factually similar prior cases.[15] Without a previous case on point, officers are protected from liability and granted qualified immunity.[16] While some argue that qualified immunity is necessary so officers can do their jobs without the threat of lawsuits, critics say the doctrine has morphed into a Catch-22: officers are protected even when they violated civil rights because there is no "previously established law."[17]

Indeed, while multiple civil lawsuits launched by exonerated individuals have recently settled for large amounts, these awards do not necessarily prove the cases were actually winnable.[18] If these cases had been fully litigated, those responsible for these wrongful convictions would likely have been granted qualified immunity on certain counts.[19] Instead, "someone in power" altruistically chose to compensate the victims in a gesture of goodwill rather than a concession of liability.[20]

Nevertheless, a recent duo from the Supreme Court's "Shadow Docket," coupled with societal outrage stemming from George Floyd's murder, has prompted questions that qualified immunity is undergoing a "recalibration" which may offer plaintiffs a smoother path in cases involving particularly egregious constitutional violations.[21] This comment analyzes such an egregious constitutional

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13. *See* Kisela v. Hughes, 584 U.S. __ (2018) (Sotomayor, J., dissenting) (explaining the Court's one-sided approach to qualified immunity has transformed the doctrine into an absolute shield for law enforcement officers).

14. *See* Becky Sullivan, *The U.S. Supreme Court Rules in Favor of Officers Accused of Excessive Force*, WHYY (Oct. 18, 2021) https://www.npr.org/2021/10/18/1047085626/supreme-court-police-qualified-immunity-cases.

15. *Id.*

16. *Id.*

17. *Id.* (noting that the doctrine has shielded officers from liability even when accused of destroying property, killing innocent people, or stealing large sums of money).

18. *See* Melamed, *supra* note 1 (suggesting that the settlements are really just a gesture of goodwill).

19. *See, e.g.,* Lewis v. City of Philadelphia, No. CV 19-2847, 2020 WL 1683451, *8–10 (E.D. Pa. Apr. 6, 2020) (holding that the police officer was not covered under *Brady* in 1998, thus granting qualified immunity); Gilyard v. Dusak, No. CV 16-2986, 2018 WL 2144183, *4–5 (E.D. Pa. May 8, 2018) (finding the Third Circuit did not clearly establish police officer's *Brady* violations until 2005, thus granting detectives qualified immunity).

20. *See* Melamed, *supra* note 1 (quoting Villanova Law Professor Teressa Ravenell, who argued the settlements "'don't necessarily prove the point that the cases are actually winnable . . . [i]t's that someone in power has chose[n] to do what I believe to be the right thing and to compensate these victims.'"). Still, these settlements are significant insofar as they make the road a bit smoother for the next plaintiff to bring a claim. *Id.*

21. *See In the Shadows: McCoy v. Alamu*, HARV. L. REV. BLOG (March 13, 2021) https://blog.harvardlawreview.org/in-the-shadows-_mccoy-v-alamu_/ (arguing that while the Court may not be considering a wholesale change of qualified immunity, it may be considering a "recalibration" in light of sustained criticism, inconsistencies in how the doctrine is applied in lower courts, and the lack of certainty that the doctrine is fulfilling its intended role in constitutional litigation). *Id.* The Court's "Shadow Docket" essentially means the issue was not briefed on the merits or argued. *Id.* It is used most often when the Court believes an applicant will suffer "irreparable harm" if its request is not immediately granted. Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket" Explained*, VOX (Aug. 11, 2020) https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman. Because Shadow Docket cases are often released without a majority opinion, they have less impact on legal doctrine than ordinary decisions. *Id.*

violation–detectives intentionally withholding exculpatory evidence in a murder trial–in light of the Supreme Court's decisions in *Taylor v. Riojas*[22] and *McCoy v. Alamu*.[23] Part II discusses facts illustrative of a typical lawsuit involving a police officer's *Brady* obligations, and describes how Eastern District of Pennsylvania trial courts have typically granted qualified immunity to the detectives.[24] Part III offers a background into the nearly impenetrable foundation of qualified immunity.[25] Part IV provides a critical analysis and ultimately argues that lower courts may be more willing to deny qualified immunity in cases involving such blatant constitutional violations following *Riojas* and *McCoy*.[26] Finally, Part V discusses the impact of this potential recalibration, both legislatively and financially.[27]

II. THE TRAGIC COST OF A CONVICTION CHASING CULTURE

According to the Philadelphia Convictions Integrity Unit, ninety-five percent of exonerations have stemmed from suppressed evidence.[28] Since 1963, and the Supreme Court's decision in *Brady v. Maryland*, a prosecutor has been required to turn over exculpatory evidence to defense counsel when the evidence is material to a defendant's innocence.[29] The rule requires prosecutors to "'investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team.'"[30]

Simply put, the *Brady* Rule ensures a fair trial because it demands that prosecutors disclose materially exculpatory evidence to the defense.[31] This includes any evidence favorable to the accused–evidence that would 1) negate the defendant's

22. *See* Taylor v. Riojas, 141 S. Ct. 52 (2020) (dealing with an inmate housed in unsanitary conditions)

23. *See* McCoy v. Alamu, 141 S. Ct. 1364 (2021) cert. granted, vacated and remanded in light of Taylor v. Riojas (concerning the unprovoked use of pepper spray on a prisoner).

24. For a discussion of Lewis' civil lawsuit against the detectives that investigated him, see *infra* notes 39–74 and accompanying text.

25. For a discussion of qualified immunity's legal progression, see *infra* notes 75–128 and accompanying text.

26. For a discussion of how *Taylor v. Riojas* and *McCoy v. Alamu* may offer plaintiffs a new argument to overcome qualified immunity, see *infra* notes 129–179 and accompanying text.

27. For a discussion of the legislative and financial impacts of *Riojas* and *McCoy*, see *infra* notes 180–213 and accompanying text.

28. Samantha Melamed, *Righting the Scales*, PHILADELPHIA INQUIRER (Dec. 16, 2021) https://www.inquirer.com/news/a/philadelphia-pennsylvania-wrongful-conviction-solution-reform-20211216.html (noting that one possible solution is implementing open-file discovery rules, which have already been proposed by the Pennsylvania Supreme Court). Though the court has not acted on this proposal, last October, Philadelphia DA Larry Krasner instituted his own open-file policy–the first in Philadelphia. *Id.* An open-file system would require prosecutors to disclose all evidence–not just what the prosecutor deems material. *Id.*

29. *See* Cadene A. Russell, *When Justice is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of Brady v. Maryland*, 58 HOWARD L. J. 237, 241–42 (2014) (citing Brady v. Maryland, 373 U.S. 83, 87–88 (1963)).

30. *See id.* (quoting Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422–23 (2010)).

31. *See Brady*, 373 U.S. at 87 ("We now hold 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.") Interestingly, even five decades after the rule's inception, some argue *Brady* has not prevented a prosecutor's nearly unchecked discretion. *See* Russell, *supra* note 29, at 241–42.

guilt, 2) reduce a potential sentence, or 3) question a witnesses' credibility.[32] If the prosecutor does not disclose material exculpatory evidence, and prejudice ensues, the evidence is suppressed.[33] The defendant does not have to request this information; the prosecutor must disclose it.[34]

However, when this obligation attaches to *police officers* is less uniform.[35] Indeed, other courts of appeals recognized the police officers' duty as early as 1988 or 1992,[36] but the Third Circuit did not extend *Brady* to police officers until 2005.[37] Thus, during the 1990s–when corrupt investigations were at their apex–police officers' duty to disclose exculpatory evidence was not yet "clearly established."[38]

A. Crooked Investigations Plagued the Philadelphia Police Department in the 1990s

In the 1990s and early 2000s, wrongful convictions and malicious prosecutions ran rampant in Philadelphia, mostly targeting young men.[39] Terrance Lewis's story is illustrative of the nightmare numerous individuals have endured.[40]

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32. *See* Jonathan Kim, *Brady Rule*, LEGAL INFORMATION INSTITUTE (last updated Dec. 2021) https://www.law.cornell.edu/wex/brady_rule (explaining the defendant bears the burden of proof that the undisclosed evidence was both material and favorable).

33. *See id.* ("The evidence will be suppressed regardless of whether the prosecutor . . . intentionally or inadvertently withheld the evidence from the defense.")

34. *See id.* (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)). The defendant must also show there is a "reasonable probability" that the outcome of the trial would have been different had the evidence been disclosed by the prosecutor. *Id.* Furthermore, *Kyles* defined the "materiality" standard, describing the four aspects of materiality as such: 1) reasonable probability of a different result is not a question of whether the defendant would have had a different verdict, but rather the government's evidentiary suppression undermines the confidence of the outcome, 2) it is not a sufficiency of the evidence test, and the defendant only has to show the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict, 3) there is no need for harmless error review, 4) suppressed evidence must be considered collectively, not item by item, looking at the cumulative effect. *Id.* (citing *Kyles*, 514 U.S. at 433–38).

35. See e.g., Outlaw v. City of Philadelphia, No. CV 21-1290, 2021 WL 3471168, at *5 (E.D. Pa. Aug. 6, 2021) (refuting plaintiff's argument that *Brady* extended to police officers as early as 2001).

36. *See* Walker v. City of New York, 974 F.2d 293, 298–99 (2d. Cir. 1992) (finding that police officers have an obligation with respect to exculpatory evidence beyond disclosing that evidence to the prosecutor) and Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988) (finding police officers failed to disclose exculpatory evidence, thereby precluding summary judgment).

37. *See* Gibson v. Superintendent of NJ Dep't of L & Pub. Safety-Div. of State Police, 411 F.3d 427, 444 (3d Cir. 2005) (establishing police officers' *Brady* obligations in the Third Circuit). *See also* Lewis v. City of Philadelphia, No. CV 19-2847, 2020 WL 1683451, *8–10 (E.D. Pa. Apr. 6, 2020) (citing *Gibson* for the proposition that *Brady* was not extended to police until 2005).

38. *See Gibson*, 411 F.3d at 444 (finding that officers' *Brady* obligations were not clearly established at the time of a 1994 conviction) and *Lewis*, 2020 WL 1683451, at *9 (finding *Brady* was not extended to officers in 1997).

39. See Samantha Melamed, *Losing Conviction*, PHILADELPHIA INQUIRER (May 7, 2021) https://www.inquirer.com/crime/a/philadelphia-murder-exonerations-wrongful-convictions-20210507.html (discussing how Philadelphia has accounted for one out of ten homicide exonerations in the country, making the per capita rate twenty-five times higher than the rest of the nation).

40. *See Lewis*, 2020 WL 1683451, at *1 (involving a young man wrongfully convicted of first-degree murder). *See also* Gilyard v. Dusak, No. CV 16-2986, 2018 WL 2144183, *4-5 (E.D. Pa. May 8, 2018) (involving a sixteen-year-old wrongfully convicted of murder) and Outlaw v. City of Philadelphia, No. CV 21-1290, 2021 WL 3471168 at *5 (E.D. Pa. Aug. 6, 2021) (involving a young man wrongfully convicted of first-degree murder despite the victim's dying declaration implicating another man).

In May 1999, seventeen-year-old Terrence Lewis was convicted of various charges related to a 1996 murder and sentenced to life in prison.[41] Lewis' release in 2019 was hastened by the CIU's review, which revealed a strong likelihood Lewis was innocent; after Lewis was awarded a new trial, the Philadelphia DA's office moved to *nolle prosequi*–*"not to wish to prosecute"*–the charges against him.[42] Justice was finally served, but it did not negate the horror that occurred twenty years prior.[43]

The murder of Hulon Howard inside his West Philadelphia home during a robbery in August 1996 led to this miscarriage of justice.[44] Days after the fatal shooting, Terrence Lewis was arrested after the case's sole witness, the victim's girlfriend, Lena Laws, picked him out of a photo lineup consisting of students at Overbrook High School—where Lewis was a senior at the time.[45] The police had a description for one of the armed suspects that entered the victim's home, and only Lewis fit the bill.[46]

Despite choosing Lewis in the line-up, Laws later named a different person as the perpetrator, but that exculpatory evidence was not provided at trial.[47] Moreover, the Homicide Unit's records also revealed that four different detectives met with Laws, and each time Laws provided a different version of events.[48] However, none of these conflicting tales–or even doubt about Laws' credibility–were disclosed as concerning to the prosecution nor the defense.[49]

Further, one of the detectives authored an "activity sheet" outlining the steps taken in the investigation, and these handwritten notes contained information about other suspects and players in the murder investigation.[50] Lewis

41. *See* Lewis, 2020 WL 1683451, at *1 (noting how Terrance Lewis was convicted of various charges related to the 1996 murder of Hulon Bernard Howard and sentenced to life in prison).

42. *See id.* Lewis served time in five state prisons before walking out a free man in May 2019. *See* Aaron Moselle, *Gratitude Mixes With Regret for Philly Man Awarded $6M for Wrongful Murder Conviction*, WHYY (July 1, 2020) https://whyy.org/articles/gratitude-mixes-with-remorse-for-philly-man-awarded-6m-for-wrongful-murder-conviction/. *See also Nolle Prosequi*, LEGAL INFORMATION INSTITUTE (Jul. 2021) https://www.law.cornell.edu/wex/nolle_prosequi.

43. *See* Moselle, *supra* note 42. Lewis missed funerals of several close family members during his incarceration, including those of his sisters. *Id.*

44. *See id.*

45. *See id.* The complaint alleged that an "unnamed source" provided Lewis's name to the detectives, and this information never made its way to the prosecutor's file. *Id.* Lewis alleged that the detectives compiled an "unconstitutionally suggestive photo array that included children [who] did not match the description of Lewis." *Lewis*, 2020 WL 1683451, at *3. Lewis had no prior incidents with law enforcement. Moselle, *supra* note 42.

46. *See id.* The other teenagers in the lineup were either too young or didn't match the complexion of the suspect investigators were after. *Id.*

47. *See id.* (noting this evidence was not made available to Lewis or his legal team until 2017).

48. *See Lewis*, 2020 WL 1683451, at *2 (describing the testimony gathered by Officer John Taggart, Officer Shaun Butts, Sergeant Mariano Maddella, Detective James Hughes).

49. *See id.* at *3. Laws was previously arrested for aggravated assault and weapons offenses by an officer who was later assigned to guard the scene of Howard's murder. *Id.* According to Lewis, this information was in the detective's file, but not part of the prosecution's file. *Id.* Lewis alleged that the detectives "intentionally suppressed" Laws' arrest record so they could use the threat of arrest to coerce her into cooperating and ultimately fabricating evidence against Lewis. *Id.* Moreover, evidence of Laws' previous arrest would have undeniably linked to her credibility insofar as she denied familiarity with guns at trial. *Id.*

50. *See id.* (noting that the handwritten notes were not provided to Lewis's trial counsel).

alleged the detectives "intentionally and maliciously" suppressed this potentially exculpatory information "in an attempt to secure a conviction."[51]

At trial, Laws testified that Lewis was one of the three men who were present in the victim's home at the time of the robbery and murder.[52] A common thread throughout the investigation, Laws' testimony was inconsistent with many of her prior statements: she falsely testified that Lewis sold drugs out of the basement of the victim's home; she incorrectly stated that she saw Lewis at the victims' home frequently; she inaccurately opined that two men were looking for the victim on the day of his murder; and she masked her familiarity with guns, even though she had been previously arrested on weapons charges.[53]

Ultimately, Lewis based his assertion that he was denied a fair trial on three investigative errors: the police coerced Laws into making false statements in her testimony at trial, the police intentionally staged an unconstitutionally suggestive photo array, and the police suppressed possibly exculpatory and inconsistent evidence from both the prosecution and the defense.[54]

After serving twenty-one years of his sentence, Lewis was released after a review by the CIU.[55] Following his release, Lewis sued two Homicide Unit police officers who were involved with his investigation, as well as the City of Philadelphia, asserting claims under 42 U.S.C. § 1983 and Pennsylvania law.[56] Lewis alleged various police practices violated his constitutional rights, including the coercion and suggestion of false statements, suppression of material exculpatory evidence, use of unduly suggestive tactics in the procurement of photo arrays, and fabrication of evidence.[57]

Accordingly, Lewis' complaint set out six claims to relief: 1) malicious prosecution against the detectives in violation of the Fourth and Fourteenth Amendments; 2) deprivation of liberty without due process of law and denial of fair trial by fabricating evidence, coercing false identifications, and deliberately conducting an investigating that disregarded constitutional rights; 3) civil rights conspiracy; 4)

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51. *See id.* According to the CIU, police misconduct was the result of cultural and institutional practices. *See Philadelphia District Attorney's Office, Overturning Convictions–And an Era: Philadelphia CIU*, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE 36 (2021). These wrongful convictions came on the heels of Philadelphia's "39th District Corruption Scandal," where officers raided drug houses, stole money from dealers, and beat anyone who got in their way. *See* Mark Fazlollah, *From Prison, Ex-cops Call Offenses Routine*, PHILADELPHIA INQUIRER (May 12, 1996), at 1.

52. *See Lewis*, 2020 WL 1682451, at *2 (describing that three young men entered the victim's home and argued over money before the victim was shot and killed).

53. *See id.* (according to Lewis, since detectives coerced Laws into making false statements, Lewis was unable to cross-examine Laws).

54. *See id.* Ultimately, the jury convicted Lewis of felony murder, robbery, and criminal conspiracy, and he received an automatic sentence of life in prison without parole. *Id.* A month after his incarceration, his son was born. *See* Moselle, *supra* note 42.

55. *See Lewis*, 2020 WL 1683451, at *1.

56. *See id.*

57. *See id.* As Marissa Boyers Bluestine of the University of Pennsylvania Law School said, "As a single-bullet measure, open-file discovery has the ability to eliminate issues that have led to 23 out of 26 exonerations in Philadelphia alone . . . by eliminating that aspect you eliminate the possibility that anything exculpatory is withheld." Melamed, *supra* note 28. Some believe police disciplinary records should also be part of the disclosure–including all citizen complaints. *Id.* However, a major hurdle to open-file policies is coordinating the work with the Philadelphia Police, which pushed back on the DA's disclosure requests in the past. *Id.*

failure to intervene; 5) municipal liability; and 6) malicious prosecution pursuant to Pennsylvania state law.[58]

The defendants sought dismissal of the § 1983 claim as it related to "withholding material exculpatory evidence," and further asserted qualified immunity defenses for the various claims levied against them. [59]

B. Rights Violated, But Not Vindicated: Trial Court Grants Qualified Immunity for Officers' Brady Violation

In *Lewis*, the District Court granted the detectives qualified immunity as applied to the officers' alleged *Brady* violations.[60] In doing so, the court merely followed existing precedent from the Third Circuit as well as sister courts in the Eastern District of Pennsylvania.[61]

The dispositive question was whether the detectives' obligation "to submit exculpatory evidence to the prosecutor (and the corresponding right of Lewis to receive this information under *Brady*) was 'clearly established' at the time of the 1997 investigation."[62] If the right was not clearly established, then the detectives were entitled to qualified immunity.[63]

To determine whether the right was clearly established at the time of Lewis's trial, the court started with *Brady*'s general requirements and, to understand the rule as it applied to police, one must understand the rule as it applied to prosecutors.[64] While other circuits recognized that "police officers and other state actors may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor" at the time of Lewis's investigation, the Third Circuit did not clearly establish that right until 2005 with *Gibson*–eight years after Lewis' investigation.[65] Because

58. *Lewis*, 2020 WL 1683451, at *1 (noting defendants moved for "all Plaintiff's underlying claims against the moving Defendants be dismissed with prejudice except for his Fourth Amendment and state-law claims for malicious prosecution and his Fourteenth Amendment claim for fabrication of evidence").

59. *See id.* (noting the defendants also moved for dismissal of claims relating to Fourteenth Amendment malicious prosecution, unconstitutional identification procedures, deliberately conducting an investigation that disregarded constitutional rights, and claims of municipal liability based on violations of rights that were not "clearly established" at the time of the Lewis's investigation and prosecution).

60. *See id.* at *8–10 (reasoning that because the state of law regarding Brady and police officers was "not so clearly established that every reasonable officer would have understood that what he was doing violated that obligation," the detectives were entitled to qualified immunity).

61. *See* Gilyard v. Dusak, No. CV 16-2986, 2018 WL 2144183, at *4–5 (E.D. Pa. May 8, 2018) ("Based on our court of appeals holding the right is not clearly established in 2000 . . . detectives are entitled to qualified immunity for allegedly affirmatively concealing exculpatory evidence from the prosecutor under *Brady*."). Further, a more recent case, *Outlaw v. City of Philadelphia*, also relied on *Gilyard's* and *Lewis's* rationales. No. 21-1290, 2021 WL 3471168, at *6 (E.D. Pa. Aug. 6, 2021) ("Defendants Detectives' evidence withholding was not a 'constitutional question beyond debate' between 2000 and 2004, just as it was not 'beyond debate' in 1997 or 1998.").

62. *See Lewis*, 2020 WL 1683451, at *8 (citing Fields v. City of Philadelphia, 862 F.3d 353, 361 (3d Cir. 2017)) ("To determine whether the right is clearly established, we look at the state of the law when the investigation occurred.").

63. *See id.*

64. *See id.* at *9 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)) ("[T]he 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.").

65. *See id.* (citing Gibson v. Superintendent of NJ Dep't of L. & Pub. Safety-Div of State Police, 411 F.3d 427, 443 (3d Cir. 2005)).

the right was not clearly established at the time of the investigation, the detectives were entitled to qualified immunity.[66]

For further support, the *Lewis* court cited to *Gilyard v. Dusak*, a 2018 case where a sister court similarly granted qualified immunity to detectives for withholding exculpatory evidence during a 1990s homicide investigation.[67] The *Gilyard* court confronted a case with similar facts and "nearly identical timeline" as *Lewis*, and focused on the Third Circuit's precedent in *Gibson*. The court held that the police officers' duty to disclose exculpatory evidence was not clearly established in the late 1990s.[68] So, the defendants were entitled to qualified immunity for their alleged withholding of evidence.[69]

Lewis argued that *Gibson* should not control because police officers' *Brady* obligations were established by the Supreme Court in 1995 with *Kyles v. Whitley*—an assertion the court refuted.[70] In *Kyles*, the Supreme Court addressed the role of *prosecutors*, and "held that evidence in the hands of the police can be attributed to the prosecution team for *Brady* purposes."[71] Since *Kyles* did not concern the police officers' obligations, its holding was inapplicable to Lewis' situation.[72] The Third Circuit's decision in *Lewis* was handed down in a time where other courts of appeals consistently recognized police officers' *Brady* obligations during 1980s and

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66. *See id.* ("Here, too, the Detective Defendants cannot be held liable under Section 1983 for their alleged withholding of evidence because that conduct occurred in 1997, approximately eight years before the right was 'clearly established' by the Third Circuit in *Gibson*.").

67. *See id.* (citing Gilyard v. Dusak, No. 16-cv-2986, 2018 WL 2144183, at *4-5 (E.D. Pa. May 8, 2018)) ("Based on our court of appeals holding the right is not clearly established in 2000 . . . detectives are entitled to qualified immunity for allegedly affirmatively concealing exculpatory evidence from the prosecutor under *Brady*."). In December 1998, Eugene Gilyard was just sixteen when he was convicted of first-degree murder and sentenced to life in prison. *Gilyard*, 2018 WL 2144183, at *1. While Gilyard was denied a remedy as to his *Brady* claim against the police officers, his lawsuit against the city settled for $3 million in 2018. *See* Maurice Possley, *Eugene Gilyard*, THE NATIONAL REGISTRY OF EXONERATIONS (Sept. 23, 2018) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4447.

68 See Lewis, 2020 WL 1683451, at *9 (noting the similarities between this case and Gilyard); see also *Gilyard*, 2018 WL 2144183, at *4–5 (citing *Gibson*, 411 F.3d at 443). In *Gilyard*, the court traced the development of officers' *Brady* obligations. *Id.* While other courts of appeals had recognized the obligation as early as 1988 and 1996, the Third Circuit could only–at best–assume the right was established in 2000. *Id.* If the right could only be assumed, then it was not clearly established. *Id.*

69. *See Gilyard*, 2018 WL 2144183, at *4-5 (reasoning that if the right was not clearly established in 2000, then, by definition, it could not be clearly established in 1998).

70. *See Lewis*, 2020 WL 1683451, at *9–10 (citing Kyles v. Whitley, 514 U.S. 419, 433 (1995)) (recognizing that *Kyles* held the prosecutor does not even have to know about the evidence that must be disclosed because the prosecutor has the duty to inquire about such information). A similar argument was made by the plaintiff in *Gilyard*. *See Gilyard*, 2018 WL 2144183, at *4–5. Since 1995, the Supreme Court held that a prosecutor has the duty to find and assess any favorable evidence known to the prosecution and others acting on the government's behalf to determine whether the collective effect of the evidence rises to the reasonable-probability standard requiring disclosure. *See Kyles*, 514 U.S. at 434.

71. *See Lewis*, 2020 WL 1683451, at *9–10 (citing *Kyles*, 514 U.S. at 437) ("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."); *see also Gibson*, 411 F.3d at 442 (noting that *Kyles* stands for the proposition that a prosecutor's duty to disclose includes both information they possess and information the police possess).

72. *See Lewis*, 2020 WL 1683451, at *9–10. Lewis also referred to various Pennsylvania state court cases that concerned the duties of prosecutors under *Brady*, and the district court found them immaterial for the same reason. *Id.* (citing Commonwealth v. Abu-Jamal, 720 A.2d 79, 92 n.17 (Pa. 1998)) ("[N]oting that *Brady* and *Kyles* prevent 'the prosecution's deliberate suppression of evidence favorable to the defense.'").

1990s.[73] The Third Circuit, however, did not clearly establish the obligation until *Gibson* in 2005.[74]

III. HEADS THE GOVERNMENT WINS, TAILS THE PLAINTIFF LOSES: A BACKGROUND INTO THE MODERN QUALIFIED IMMUNITY DOCTRINE

Qualified immunity protects state and local officials from individual liability, unless the official violated a clearly established right.[75] The genesis of qualified immunity traces back to 1871, when Congress adopted 42 U.S.C. § 1983, a civil rights statute that holds government officials financially liable for the violation of a person's constitutional rights.[76] In the early days, good faith and probable cause were defenses engrained in tort law, and police could similarly assert them in Section 1983 claims.[77] However, since the 1960s, the Supreme Court has unmoored the doctrine from its common law underpinnings, and qualified immunity's sweeping scope has corralled Section 1983's power.[78]

A. Remedy in Theory

Enacted in 1871, 42 U.S.C. § 1983 provides a federal civil remedy to persons deprived of a constitutional right against the state government official responsible for the deprivation.[79] Intended to provide victims with compensation for abuse,

73. *See* McMillian v. Johnson, 88 F.3d 1554, 1567 (11th Cir. 1996), amended 101 F.3d 1363 (11th Cir. 1996); Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988).

74. *See Gibson*, 411 F.3d at 444 (quoting Smith v. Holtz, 210 F.3d 186, 197 n.14 (3d Cir. 2000)).

75. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11–12 (2017) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)) (arguing qualified immunity is meant to balance "'the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly.'").

76. *See id.* at 71; *see also* Tower v. Glover, 467 U.S. 914, 920 (1984) (noting the Supreme Court has consistently construed § 1983 in light of the common law principles well settled at the time of its enactment); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (first quoting Malley v. Briggs, 475 U.S. 335, 342 (1986); and then quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpreting the intent of Congress enacting' the Act . . . [o]ur qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choices' that we have previously disclaimed the power to make.").

77. *See* Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (concerning common law and Section 1983 claims against police officers, the Court held that because the defense of good faith and probable cause were part of the background of tort liability, they were also available to police in § 1983 actions).

78. *See* Schwartz, *supra* note 75, at 58 (explaining that qualified immunity "puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated."). Further, the Court first announced law enforcement officers were entitled to qualified immunity as a means of protecting government defendants from financial burdens when acting in good faith in legally murky areas. *Id.* at 13. *See also* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (quoting *Malley*, 475 U.S. at 342) ("Our immunity doctrine is rooted in historical analogy, based on the existence of common law rules in 1871, rather than 'freewheeling policy choices.'").

79. 42 U.S.C. § 1983 (1996).

> 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,

the statute deters future constitutional violations by "interpos[ing] the federal courts between the States and the people, as guardians of the people's federal rights . . . ."[80] However, the Supreme Court's trend has been to squash civil rights lawsuits—at least those implicating police.[81] Qualified immunity is the magic eraser; defendants raise it and courts grant it so frequently it is "such a powerful shield for law enforcement that people whose rights are violated . . . often lack means of enforcing those rights."[82]

B. An "Escherian Stairwell:" Why is Qualified Immunity so Difficult to Overcome?

Supreme Court precedent has rendered qualified immunity an "increasingly insurmountable" obstacle for individuals seeking redress for the constitutional violations committed against them.[83] Indeed, the burden on plaintiffs is quite onerous: 1) there must be a case with nearly identical facts to their own situation; 2) the prior case must have been decided by the Supreme Court or the applicable appellate court.[84] If plaintiffs clear those hurdles, then the court identifies the relevant legal rule at the time of the alleged conduct, and applies it to the current case to

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shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Originally designed to protected slaves who were freed in the Civil War, the statute has grown to protect all those deprived of constitutional rights. University of Minnesota Law School, *Civil Rights in the United States*, UNIVERSITY OF MINNESOTA LAW SCHOOL, (Sept. 14, 2021) https://libguides.law.umn.edu/c.php?g=125765&p=2893387. Section 1983 provides an individual the chance to sue state government employees and others "acting under the color of state law" for civil rights violations. *Id.* Moreover, Section 1983 only applies to local state governments. A "*Bivens* action" is the federal analog. *See* Bivens v. Sox Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

80. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (alteration in original) (noting that the legislative history makes clear Congress knew it was altering the relationship between states and the nation with respect to the protection of federally created rights; it was concerned the state could not protect those rights).

81. *See* Schwartz, *supra* note 75, at 6 ("The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal.").

82. *See id.* (quoting Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015)) (noting the foremost experts on Section 1983 litigation–Karen Blum, Erwin Chemerinsky, and Martin Schwartz, have concluded the modern doctrine leaves little hope for plaintiffs).

83. *See* James A. Wynn Jr., *As a Judge, I have to Follow the Supreme Court. It Should Fix this Mistake*, WASHINGTON POST (June 12, 2020) https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ (citing 42 U.S.C. § 1983) (providing a civil action for a deprivation of rights). Commentators and justices from across the ideological spectrum contend qualified immunity has wandered far afield from the intent of the Civil Rights Act. *Id.*

84. *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 139 (2007) (arguing that when evidentiary burdens are applicable in qualified immunity cases, the defendant should bear the burden of proof).

assess whether the law was "clearly established."[85] Put bluntly, it's really hard to win these cases.[86]

How did this happen? Initially, this judge-made doctrine protected government officials acting in good faith from financial ruin.[87] In 1982, those policy goals expanded to protect against 1) "the diversion of official energy from passing public issues," 2) the deterrence of those interested assuming public office and 3) a public official's fear of being sued impeding his or her discharge of duties."[88] Most recently, the Court has emphasized a desire to shield government officials from the burdens of litigation, namely, discovery and trial.[89] As this policy interest expanded, so too did the doctrine's power; today, the doctrine's armor is "stronger than ever," shielding "all but the plainly incompetent or those who knowingly violate the law."[90]

When a defendant asserts qualified immunity, courts ask two questions: 1) has the plaintiff asserted the violation of a constitutional (or statutory) right under current law? 2) if so, was that right clearly established at the time of the challenged conduct?[91] Initially, judges were required to address the questions in order, first asking whether the plaintiff asserted the violation of a constitutional right, and *then* determining whether that right was clearly established at the time of the challenged conduct.[92] However, the Court rejected this "rigid order of battle" in 2009 with *Pearson v. Callahan* and permitted courts to jump to the second prong without deciding the merits of the alleged constitutional violation.[93] Indeed, courts have

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85. *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987). The Court has held that a "reasonably competent official should know the law governing his conduct." Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

86. *See* Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020) https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure ("Qualified immunity is a legal, practical, and moral failure.").

87. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1803–04 (2018) (citing Pierson v. Ray, 386 U.S. 547, 555 (1967)) ("[A] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

88. *See id.* (internal quotation marks omitted) (citing Harlow, 457 U.S. at 814).

89. *See id.* (citing Schwartz, *supra* note 75, at 15). However, this often does not achieve its intended goal insofar as multiple claims are usually brought against the government official, many of which are not dismissed. *Id.* Additionally, at the motion to dismiss phase, it's difficult to cast away a claim when the factual record has not been developed, especially in a fact specific inquiry like qualified immunity. *Id.*

90. *See id.* at 1798 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)) (noting the Supreme Court devotes an "outsized" portion of its docket to reviewing and almost always reversing denials of qualified immunity). *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018) (noting that, as of 2018, the Supreme Court has decided thirty qualified immunity cases since 1982, and has only denied the defense twice). The Court often remarks about the doctrine's "importance to society as a whole." Schwartz, *supra* note 87, at 1798 (internal quotation marks omitted) (quoting White v. Pauly, 137 S. Ct. 548, 551-52 (2017)).

91. *See Harlow*, 457 U.S. at 818 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

92. *See, e.g.,* Saucier v. Katz, 533 U.S. 194, 194–95 (2001) ("A qualified immunity defense must be considered in the proper sequence.").

93. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("[W]e conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory."). The Court reasoned that the rigid two-step analysis results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the overall outcome. *Id.* at 237. Moreover, the compulsory two-step approach "disserves the purpose of qualified immunity" when it forces parties to endure the burdens of suit, namely, litigating constitutional questions, when the

happily avoided thorny constitutional questions now that the Supreme Court has offered an "escape route."[94] Addressing constitutional questions devours precious judicial resources, and constitutional doctrine is not furthered by holdings "so factbound that the decision provides little guidance for future cases."[95] Thus, courts have been content to grant qualified immunity by answering the second prong alone.[96]

C. A Sisyphean Task: Problems with the Court's Post-Pearson Analysis

Two major problems have surfaced since the Supreme Court has made the two-step analysis discretionary: "constitutional stagnation," and the murky meaning of "clearly established."[97] First, because the Supreme Court has allowed (and even encouraged) lower courts to dismiss claims once they determine the law enforcement officer's conduct was not clearly established, lower courts then opt to skip a "knotty constitutional inquiry." Ultimately, this leads to a lack of development in constitutional jurisprudence because fewer courts are establishing law at all, much less *clearly* doing so.[98] Put another way, public officials can avoid liability as long as they were the *first* to behave badly, and just proving a constitutional violation will not suffice.[99] To win, plaintiffs usually must cite nearly identical precedent that places the legal question "beyond debate" to every reasonable officer, but that has become harder post-*Pearson* because courts are rarely establishing new law.[100] It is immaterial that a constitutional violation occurs if no prior case held such misconduct to be unlawful, and this "yes harm, no foul" system often leaves victims violated but not vindicated.[101]

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suit could otherwise be disposed more easily. *Id.* (quoting Brief for National Association of Criminal Defense Lawyers as Amici Curiae, *Pearson*, 555 U.S. at 237).

94. *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1893 (2018) (citing *Pearson*, 555 U.S. at 236). The Supreme Court laid out additional reasons for skipping part one: it is senseless for lower courts to decide a constitutional question that is pending in a higher court or before an en banc panel; it does not advance constitutional precedent to mandate a decision that depends on "an uncertain interpretation of state law;" requiring constitutional decisions at the pleading stage based on barebones fact allegations, or one at summary judgment stage resting on "woefully inadequate" briefs, creates a risk of bad decision-making; the mandated two step analysis often shields constitutional decisions from appellate review when the defendant loses on the merits but prevails on the clearly established law part of the analysis; the approach requires unnecessary determinations of constitutional law and departs from the general rule of constitutional avoidance. *Id.* at 1894 (citing *Pearson*, 555 U.S. at 238–41).

95. *See id.* at 1894 (citing *Pearson*, 555 U.S. at 237).

96. *See, e.g.*, Mayfield v. Currie, 976 F.3d 482, 488-89 (5th Cir. 2020) (Willett, J., concurring) ("The court begins (and ends) its immunity analysis on 'clearly established' grounds, declining to address–let alone determine–whether Officer Currie violated the Fourth Amendment in the first place.").

97. *See id.* (referring to qualified immunity as an "Escherian Stairwell. Heads the government wins, tails plaintiff loses").

98. *See id.* (explaining that Section 1983 has a double-edged sword insofar as plaintiffs must produce precedent even as few courts are producing precedent, and important constitutional questions go unanswered because no one answered them before).

99. *See* Zadeh v. Robinson, 928 F.3d 457, 478–79 (5th Cir. 2019) (Willett, J., concurring) (calling qualified immunity a "legal deus ex machina" insofar as many violations go unvindicated). Further, Judge Willett explained that it's "immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful." *Id.*

100. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality.").

101. *See Zadeh*, 928 F.3d at 478–479 ("Wrongs are not righted, and wrongdoers are not reproached."). Judge Willett also acknowledged that constitutional litigation increasingly involves cutting-edge technologies. *Id.* If courts continue to jump over the constitutional merits of the

Second, judges are torn over what degree of factual similarity must exist.[102] On the one hand, the Supreme Court has said caselaw "does not require a case directly on point for a right to be clearly established."[103] However, the Court also says that clearly established law must be particularized to the facts of each case.[104] More often than not, a plaintiff must demonstrate that the law enforcement officer's challenged conduct was "virtually identical" to the facts of a previous Court of Appeals decision which found a constitutional violation; the slightest variation can render the constitutional right not clearly established and the plaintiff without recourse.[105] As one district judge put it, "the Supreme Court has crafted their recent qualified immunity jurisprudence to effectively eliminate § 1983 claims by requiring an indistinguishable case and encouraging courts to go straight to the clearly established prong."[106]

In response, judges on both ends of the philosophical spectrum have recently critiqued the doctrine.[107] Justice Thomas—arguably the Supreme Court's greatest critic—lambasted the modern version of Section 1983 for bearing little resemblance to the common law at the time the Civil Rights Act of 1871, which allows judges to make "'freewheeling policy choice[s]' that [the courts] have previously disclaimed the power to make."[108] In 2015 and 2018, Justice Sotomayor lamented that the Court's qualified immunity decisions contributed to a culture of police violence.[109] Beyond the Marble Palace, circuit court judges have noted the

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case, the constitutional clarity will become "exasperatingly elusive." *Id.* at 480. Or, to provide a pithier statement, "gauzy constitutional guardrails as technology innovation outpaces legal adaptation." *Id.*

102. *See id.* at 479 (explaining that the "clearly established" standard is neither clear nor established among lower courts).

103. *See id.* (citing Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018)). *See also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

104. *See Zadeh*, 928 F.3d at 479 (Willett, J., concurring) (internal quotation marks omitted) (citing White v. Pauly, 137 S. Ct. 548, 552 (2017)). It is unclear how to square these abstractions, but it is apparent the meaning of "clearly established" is neither clear nor established. *Id.*

105. *See* Wynn, *supra* note 83 (discussing that "the Supreme Court has ratcheted up the standard a plaintiff must meet to bring a claim by requiring the plaintiff to show that the violation of his or her constitutional rights was 'clearly established'").

106. *See* Blum, *supra* note 94, at 1889 (citing Nelson v. City of Albuquerque, 283 F. Supp. 3d 1048, 1107 n.44 (D.N.M. 2017)). Additionally, Judge Robert Pratt noted that since every case will entail at least nominal factual distinctions, qualified immunity, in a sense, acts more like absolute immunity. Easley v. City of Riverside, 890 F.3d 851, 866 (9th Cir. 2018) (Pratt, J., dissenting).

107. *See* Schwartz, *supra* note 87, at 1798 (noting Justice Thomas' rebuke of the doctrine, namely, that it gives judges a license to make freewheeling policy choices). In 2015 and 2018, Justice Sotomayor argued the Court's qualified immunity decisions contributed to a culture of police violence. *Id.* at 1799 (first citing Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); then citing *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting)). Furthermore, the conservative think tank, Cato Institute, has launched a "full blown assault" on the doctrine. *See* Blum, *supra* note 94, at 1889.

108. *See id.* (citing Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring)). Further, Justice Thomas said that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id.* (citing *Ziglar*, 137 S. Ct. at 1872).

109. *See Mullenix*, 577 U.S. at 26 (Sotomayor, J., dissenting) (discussing how qualified immunity all too often "renders the protections of the Fourth Amendment hollow"); *Kisela,* 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (explaining the Court's "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment").

"clearly established" requirement lacks any basis in the text or original understanding of Section 1983, and that its imposition is unfairly onerous on plaintiffs.[110]

D. Cut Down, It Grows Back Stronger: Qualified Immunity Largely Remains Rock-Solid Despite Criticism

Despite the stinging rebukes, the Supreme Court has vigorously upheld the doctrine, often in unanimous or *per curiam* decisions.[111] Since 1982, the Court has analyzed over thirty qualified immunity cases—and plaintiffs have only won three times.[112] However, outliers like *Hope v. Pelzer* in 2002 are significant insofar as the Court has—at least once—rejected the interpretation that official action will never be unlawful unless the identical scenario has been ruled on previously and found unconstitutional: "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[113] In other words, some constitutional violations are so blatantly obvious that any reasonable officer would know it was wrong.[114]

Sometimes, a case directly on point is unnecessary.[115] In *Hope*, Alabama prison inmate Larry Hope was twice handcuffed to a hitching post for disruptive conduct.[116] Both times, the prison guards handcuffed Hope above shoulder

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110. *See* Horvath v. City of Leander, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring) ("There is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases.").

111. *See* Schwartz, *supra* note 87, at 1800 (arguing the most likely explanation for this trend is that the Justices fear the elimination or alteration of the doctrine would harm government individuals and society more generally).

112. *See* McCoy v. Alamu, 141 S. Ct. 1364 (2021) cert. granted, vacated and remanded in light of Taylor v. Riojas (concerning the unprovoked use of pepper spray on a prisoner); Taylor v. Riojas, 141 S. Ct. 52 (2020) (dealing with an inmate housed in unsanitary conditions); Groh v. Ramirez, 540 U.S. 551 (2004) (involving an unreasonable search under the Fourth Amendment); Hope v. Pelzer, 536 U.S. 730 (2002) (concerning an inmate who was tied to a hitching post for an extended period of time). Notably, *Groh* is different from the other cases insofar as it involved a Fourth Amendment violation rather than an Eighth Amendment violation. *Groh*, 540 U.S. at 554. In *Groh*, a special agent for the U.S. Bureau of Alcohol, Tobacco, and Firearms, applied for a search warrant to search the Ramirez ranch for illegal weapons. *Id.* On the warrant, Groh mistakenly omitted the exact items sought. *Id.* The Ramirezes sued Groh and the law enforcement officers involved in the search in federal court for violating their Fourth Amendment rights. *Id.* They argued that the incorrect warrant violated the Fourth Amendment requirement that any items searched for be described in the warrant. *Id.* The Court held the search was "unreasonable" under the Fourth Amendment, as Groh's warrant was invalid because it did not meet the Fourth Amendment requirement that a warrant was invalid because it did not particularly describe the persons or things to be seized. *Id.* at 563. Because the particularity requirement is stated in the Fourth Amendment's text, "no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid," and therefore, the Court ruled Groh did not have qualified immunity. *Id.*

113. *See Hope*, 536 U.S. at 741 (siding with the plaintiff and denying qualified immunity where plaintiff was an inmate handcuffed to a hitching post without regular water or bathroom breaks).

114. *See id*; *see also Riojas*,141 S. Ct. at 53 (holding that certain situations with fundamentally or materially similar facts are not required so long as the officer had "fair warning" that the conduct was unconstitutional).

115. *See Riojas* 141 S. Ct. at 55 (clearly unconstitutional to house a prisoner in a cell covered from floor to ceiling in feces); see also *McCoy*, 141 S. Ct. at 1364 (denying qualified immunity where inmate was peppered sprayed for no reason).

116. *See Hope*, 536 U.S. 730, 733. Hope was punished for two different reasons. *Id.* at 733-34. The first time the guards used the hitching post, Hope had gotten into an argument with another inmate. *Id.* at 734. The other instance occurred after Hope took a nap during the morning

height, and when he tried moving his arms to improve circulation, the handcuffs cut into his wrists.[117] During the second incident, guards ordered Hope to take off his shirt and he spent seven hours in the sun while chained to the hitching post.[118] He was given minimal water, and no bathroom breaks.[119]

Hope's civil suit against the guards was initially quashed by a magistrate judge, who found that the guards were entitled to qualified immunity.[120] On appeal, the Eleventh Circuit acknowledge that the use of the hitching post for punitive purposes violated the Eighth Amendment, but nonetheless, granted the guards qualified immunity because there was no prior precedent "materially similar" to the facts of the Hope's case.[121]

However, in a 6-3 opinion, the Supreme Court held that qualified immunity was inappropriately granted.[122] The Court acknowledged that government officials are usually shielded from liability when their actions do not violate clearly established law; however, officials can still be on notice that their conduct violates established law even in novel circumstances.[123] Thus, in a rare decision, the Court concluded that a reasonable officer would have known this conduct was unlawful, so qualified immunity must be denied.[124] The egregious conduct itself provided all the notice of unlawfulness necessary to defeat qualified immunity.[125]

Still, in the twenty years following *Hope*, the Supreme Court has an overwhelming track record of defending qualified immunity.[126] It is clear the Court is not interested in drastic overhaul, but it possibly has become sympathetic to victims alleging particularly egregious violations.[127] Indeed, recent decisions from the Court's "Shadow Docket," like *Taylor v. Riojas* and *McCoy v. Alamu*, coupled with the social tensions following George Floyd's murder, indicate *Hope* has not been forgotten.[128]

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bus ride to the chain gang's worksite, and he was "less than prompt in responding to an order to get off the bus." *Id.*

117. *See id.* (noting that, because Hope was only slightly taller than the hitching post, his arms were above shoulder height and grew tired from being handcuffed so high).

118. *See id.* at 735.

119. *See id.*

120. *See id.* (finding that the Magistrate concluded that the guards were entitled to qualified immunity without determining whether the "'very act of placing him on a restraining bar for a period of hours as a form of punishment' had violated the Eighth Amendment").

121. *See id.* at 736. The Eleventh Circuit state that the "federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory." *Id.* It is not to be established by "abstractions," but by cases that are "materially similar" to the facts in the case at bar. *Id.*

122. *Id.* at 738 ("As the facts are alleged by Hope, the Eighth Amendment violation is obvious.").

123. *Id.* at 741 (citing United States v. Lanier, 520 U.S. 259 (1997) ("Our opinion in Lanier thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances.").

124. *Id.* ("The use of the hitching post as alleged by Hope 'unnecessarily and wantonly inflicted pain' . . . and thus was a clear violation of the Eighth Amendment.").

125. *Id.* at 730.

126. *See* Karen Blum, *Overview of Section 1983 and Qualified Immunity*, SUFFOLK LAW SCHOOL (2021) (arguing that while the Supreme Court appears to have little to no interest in modifying or eliminating the doctrine, it has not forgotten that *Hope* still exists).

127. *See id.* (noting that since June 2020, the Court has also denied cert. in eighteen cases where qualified immunity was an issue, indicating little interest in a wholesale makeover).

128. For a discussion of *Riojas* and *McCoy*, see *infra* notes 132-169 and accompanying text.

III. *HOPE* RETURNS: HOW *RIOJAS* AND *MCCOY* OFFER A RECALIBRATION OF QUALIFIED IMMUNITY AND POTENTIAL NEW PATH FOR EXONEREES

District courts in Pennsylvania must follow Third Circuit precedent and extinguish *Brady* claims against detectives for investigations occurring in the 1980s, 1990s, and early 2000s.[129] However, two recent Supreme Court decisions, *Taylor v. Riojas* and *McCoy v. Alamu*, may offer another avenue for not only for *Brady* claims against detectives, but many other Section 1983 claims previously doomed by qualified immunity.[130] These two cases have reignited the spirit of *Hope v. Pelzer*, namely by declaring some constitutional violations are so obvious they do not need to be supported by clearly established law.[131]

A. Watering the Seeds of Hope: The Supreme Court Intervenes in Riojas

The facts of *Riojas* are shocking: the plaintiff entered a psychiatric prison to receive mental health treatment, and for six days, he was confined to a cell covered "nearly floor to ceiling in massive amounts of feces."[132] Fearing his food and water were contaminated, Taylor did not eat or drink for four days before he was moved to a second, frigidly cold cell.[133] The new cell contained only clogged drain to dispose of bodily wastes, so Taylor held his bladder for over a day before he involuntarily relieved himself, causing the drain to overflow and raw sewage to spill out across the floor.[134] Taylor slept naked in the sewage because the cell did not have a bunk.[135] As a result of these conditions, Taylor developed chest pains, burning eyes and throat, and severe bladder pain.[136]

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129. *See e.g., Lewis*, 2020 WL 1683451, *8–10 (E.D. Pa. Apr. 6, 2020) ("Because the state of the law regarding the *Brady* obligations of police officers in 1997 was not 'so clearly established that "every reasonable official would have understood that what he [wa]s doing violate[d] that obligation," ' . . . the Defendants are entitled to qualified immunity."); Gilyard v. Dusak, No. 16-cv-2986, 2018 WL 2144183, *4–5 (E.D. Pa. May 8, 2018) ("Based on our court of appeals holding the right is not clearly established in 2000 . . . Detectives . . . are entitled to qualified immunity for allegedly affirmatively concealing exculpatory evidence from the prosecutor under Brady.").

130. *See* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (holding that "no reasonable correctional officer" could have believed it constitutionally permissible to house the plaintiff in deplorably unsanitary conditions for an extended period of time); McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021) (vacating a Fifth Circuit decision to grant qualified immunity to corrections officers who pepper sprayed a non-resisting inmate).

131. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

132. *See Riojas*, 141 S. Ct. at 53 (detailing the first cell contained feces all over the floor, the ceiling, the window, the walls, and even "packed inside the water faucet."). Taylor alleged that the prison guards knew the cell was covered in feces, but instead of cleaning it, laughed at Taylor. *Id.*

133. *See id.* Taylor was moved to a "seclusion cell," but its conditions were still appalling. *Stevens*, 946 F.3d at 218. It did not have a toilet, water fountain, or a bunk. *Id.* The cell was extremely cold because the air conditioning was always on, and the cell was "anything but clean." *Id.*

134. *See id.* (noting that the drain also smelled strongly of ammonia, which made it difficult to breathe).

135. *See id.* at 218-19 (noting that Taylor stayed in the seclusion cell for two days before guards tried to return him to his first, feces-covered cell).

136. Taylor v. Stevens, No. 5:14-CV-149-C, 2017 WL 11507190, at *2 (N.D. Tex. Jan. 5, 2017). Taylor alleged that he suffered a lasting bladder injury, and urinary incontinence and spasms. *Id.*

Initially, the district court found that the guards did not violate Taylor's Eighth Amendment rights and granted summary judgment to the defendants.[137] The trial court relied on the Fifth Circuit case, *Davis v. Scott*, where no Eighth Amendment violation was found after the plaintiff spent three days in a cell with "blood on the walls and excretion on the floors and bread loaf on the floor."[138] Since the *Davis* plaintiff was confined "for only three days," there was no constitutional violation.[139] In other words, "a filthy, overcrowded cell and a diet of 'grue' might be [constitutionally] tolerable for a few days and intolerably cruel for weeks or months."[140] Applying this same logic, the district court permitted a human being to be imprisoned first in a feces-filled cell, and then in a second cell in frigid temperatures with no bed, toilet, sink, and a hole in the floor overflowing with raw sewage, all because the total confinement "only" lasted for six days.[141]

On appeal, the Fifth Circuit actually did find an Eighth Amendment violation, but still granted qualified immunity to the guards because it was not clearly established that "prisoners couldn't be housed in cells teeming with human waste" for "only six days"; therefore, prison officials did not have "fair warning" their acts were unconstitutional.[142] While the plaintiff pointed to another Fifth Circuit case, *McCord v. Maggio*, which involved an inmate sleeping in filthy water contaminated with human waste for multiple months, to show there was a clearly established violation; though the court distinguished *McCord* from *Riojas* by focusing on the time the plaintiff spent in the cell.[143] Although prisoners could not be housed in cells teeming with human waste for *months*, the Fifth Circuit had not previously held that shorter period violated the Constitution, and that doomed Taylor's claim.[144]

In a 7-1 decision, the Supreme Court reversed the Fifth Circuit, holding that the prison officials were not protected by qualified immunity because "no reasonable correctional officer could have concluded that . . . it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[145] Confronted with these "particularly egregious facts," the Court determined any reasonable officer should have realized Taylor's

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137. *Id.* at *7-8. Despite granting summary judgment, the district court implicitly acknowledged that Taylor spent six days in two obscenely dirty cells, but nonetheless found no Eighth Amendment violation. *Id.*

138. Davis v. Scott, 157 F.3d 1003, 1004 (5th Cir. 1999).

139. *Id.* at 1006.

140. Hutto v. Finney, 437 U.S. 678, 686-87 (1978).

141. *Stevens*, 2017 WL 11507190, at *2, *8.

142. *Stevens*, 946 F.3d at 222 ("Taylor stayed in his extremely dirty cells for only six days. Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end . . . we hadn't previously held that a time period so short violated the Constitution.").

143. *See id.* In *McCord v. Maggio*, the Fifth Circuit found an Eighth Amendment violation where a prisoner was forced, for the tenth month period, to sleep on a wet mattress "in filthy water contaminated with human waste." 927 F.2d 844, 848 (5th Cir. 1991). Accordingly, the Fifth Circuit initially determined that though the law was clearly established that a prisoner could not be housed in cells teeming with waste for months, it was less clear when the prisoner was only kept in the cell for six days. *Stevens*, 946 F.3d at 222.

144. *See Stevens*, 946 F.3d at 219 (citing *McCord*, 927 F.2d at 848). For a deeper discussion of *McCord*, see *supra* note 143.

145. *See* Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (finding no evidence Taylor's conditions were compelled by necessity or exigency). However, Justice Alito observed in his concurring opinion that *Riojas* did not announce a new rule or even clarify an old standard; rather, the Court reversed the Fifth Circuit's decision because it believed it reached the wrong conclusion when applying the right rule. *Id.* at 55.

conditions offended the Constitution.[146] Just as in *Hope*, nearly twenty years prior, the Court recognized that some things are obvious.

Taken by itself, *Riojas* does not spark much hope for doctrinal reform of qualified immunity considering the Court appears to be correcting the Fifth Circuit's poor application of *McCord v. Maggio*.[147] In his concurring opinion, Justice Alito wrote that he opposed the review of *Riojas* and said the "decision adds virtually nothing to the law going forward."[148] After all, the Supreme Court has been reluctant to address qualified immunity head-on, having rejected multiple petitions that broached the issue for the 2020-2021 term.[149] Therefore, one way to understand *Riojas* is to chalk it up as common sense: you do not need to be a legal scholar to realize forcing a prisoner to live in raw sewage and feces for six days is "cruel and unusual punishment."[150] Even if *Riojas* is not the seismic shift some were hoping for, it at least places government officials on notice that they do not have a hall pass in instances of excessive abuse.[151] If nothing else, lower courts and government officials are reminded that the accused are nonetheless human beings and should be treated with dignity.[152]

However, there is another side to this coin; the Court rarely grants *certiorari* when the lower courts misapply the proper rule, yet they did in *Riojas*.[153] Just a few months later, the Court went down this road again and vacated another Fifth Circuit opinion in *McCoy v. Alamu*.[154]

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146. *See id.* at 54. The guards' callousness was apparent: upon placing Taylor in the first feces-covered cell, one said Taylor was "going to have a long weekend." *Stevens*, 946 F.3d at 218. Another, upon placing Taylor in the second cell, told Taylor he hoped Taylor would "fucking freeze." *Id.* at 218 n.9.

147. *See Riojas*, 141 S. Ct. at 54 (noting that although an officer-by-officer analysis will be necessary on remand, the record suggested some of the guards involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells).

148. *Id.* at 55 (Alito, J., concurring).

149. *See* Jay Schweikert, *The Supreme Court's Dereliction of Duty on Qualified Immunity*, CATO INST. (June 15, 2020), https://www.cato.org/blog/supreme-courts-derelictionduty-qualified-immunity (arguing that in the tumultuous wake of George Floyd's murder, this denial of taking on the qualified immunity question could not have come at a worse time). It's tough to know what motivated the Court, but some believe the Justices were looking closely at the developments of Congress–where members of the House and Senate had introduced bills that would have abolished qualified immunity. *Id.*

150. *See* Ilya Somin, *Supreme Court Rejects Qualified Immunity Defense for the First Time in Years*, VOLOKH CONSPIRACY, (Nov. 3, 2020), https://reason.com/volokh/2020/11/02/supreme-court-rejects-qualified-immunity-defense-for-the-first-time-in-years/ (acknowledging that the majority may have simply found these particular facts egregious and so shocking they could not be uncorrected).

151. *See* Zamir Ben-Dan, *Taylor v. Riojas: Anatomy of a Supreme Court Intervention that Should Not Have Been Necessary*, 5 NEV. L.J. FORUM 23, 32 (2021) ("It should put officials at prisons and jails throughout America on notice that there are limits to their authority and consequences for abuse and sadism.").

152. *See id.* at 32–33 ("The Court's decision should make lower courts throughout the nation remember the values they profess to stand by and consider what kind of society America would be to allow citizens to be caged under conditions as plainly horrific as they were here.").

153. *See* Sup. Ct. R. 10 (discussing considerations governing review on writ of certiorari). The Court will rarely grant a petition for a writ of certiorari when the asserted error consists of erroneous factual findings or a misapplication of a properly stated law. *Id.*

154. *See* McCoy v. Alamu, 141 S. Ct. 1364 (2021) (vacating and remanding a Fifth Circuit decision to grant qualified immunity where a prison guard pepper sprayed an inmate, seemingly for no reason).

B. Doubling Down: The Supreme Court Corrects the Fifth Circuit Again in McCoy

Prince McCoy was an asthmatic prisoner in the custody of the Texas Department of Criminal Justice.[155] While in solitary confinement, a corrections officer attacked him with pepper spray, apparently for "no reason at all" after a different prisoner had thrown liquids on one of the guards.[156] Again, although the Fifth Circuit found a constitutional violation of the plaintiff's Eighth Amendment rights, this right—the right to not be pepper sprayed in the face for no reason when one has a known medical condition—was not clearly established at the time of the violation, and, therefore, the corrections officer was entitled to qualified immunity.[157] More specifically, the Fifth Circuit held that the spraying "crossed that line," but that determination was not *beyond debate*, so the law was not clearly established.[158] In a prior case, the Fifth Circuit held that spraying a prisoner with a fire extinguisher "was a *de minimis* use of physical force and was not repugnant to the conscience of mankind."[159] Similarly, it was not beyond debate that the correction officer's single use of pepper spray crossed that *de minimis* threshold.[160]

In response to the Fifth Circuit's decision, the Supreme Court granted *certiorari*, vacated the judgment, and remanded for further consideration in light of *Rojas*.[161] In particular, the Court said that the Fifth Circuit's holding could not be reconciled with the "obvious violation" doctrine—the Supreme Court's rationale in *Hope v. Pelzer*.[162] McCoy's case fell into that rare category where the egregious nature of the conduct itself provided all the notice of unlawfulness necessary to defeat qualified immunity.[163]

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155. *See* Daniel M. Greenfield, *McCoy v. Alamu*, MACARTHUR JUSTICE CENTER (July 10, 2020) https://www.macarthurjustice.org/case/mccoy-v-alamu/ (detailing how McCoy was viciously attacked with a substance so dangerous it is banned for use in war).

156. *See* McCoy v. Alamu, 950 F.3d 226, 229 (5th Cir. 2020). According to McCoy, when the defendant approached the cell of one of McCoy's neighbors, the neighbor threw some water on the defendant. *Id.* Later, the defendant returned to conduct a roster count, and was doused with water again. *Id.* Angered, the defendant grabbed his pepper spray and yelled "where you at?" to McCoy's neighbor, but he had barricaded the front of his cell with a sheet. *Id.* The defendant then rebolstered his pepper spray, walked to McCoy's cell, and as McCoy approach the defendant he was sprayed directly in the face. *Id.* On the other hand, Alamu, the defendant, has a different account. *Id.* According to Alamu, after being "chunked with an unknown liquid," McCoy threw "an unknown weapon" at him, striking him in the face. *Id.* Feeling that his "life was in danger," he says he used the pepper spray in an "involuntary action." *Id.*

157. *See id.* at 233–34. The Court acknowledge how difficult it is to show a particular conduct violated the law. *Id.* Further, the Fifth Circuit thought it was unclear whether a single use of chemical spray was beyond a "de minimis" use of force. *Id.*

158. *See id.* at 233. The Fifth Circuit noted this was an odd result, yet something all too familiar in the qualified immunity inquiry. *Id.* at 233 n.8. What the first prong gives, the second prong often snatches back, and the Supreme Court has often overturned appellate courts who have failed to define the right at issue narrowly. *Id.*

159. *See id.* (quoting Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993)).

160. *See id.* McCoy pointed to the general principle that prison officials cannot act "maliciously and sadistically to cause harm." *Id.* (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992)). However, the Fifth Circuit rejected this argument, explaining that the Supreme Court has admonished courts not to define the relevant law too broadly. *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

161. *See McCoy*, 141 S. Ct. at 1364. The decision was part of the Court's "shadow docket," meaning it was neither briefed on the merits, argued, or accompanied by a written decision. For a further discussion of this, see *supra* note 21 and accompanying text.

162. For a further discussion of McCoy's argument, see *supra* note 156 and accompanying text.

163. *See McCoy*, 141 S. Ct. at 1364.

Again, despite *Riojas* and *McCoy*, the Supreme Court has declined *certiorari* in many qualified immunity cases since June 2020, suggesting the Court is not yet willing to overhaul the doctrine as a whole.[164] However, *Riojas* and *McCoy* are not aberrations; instead, it is possible the Court is "recalibrating" qualified immunity.[165] In light of steady criticism from judges on both ends of the ideological spectrum—perhaps coupled with the public outcry following the murder of George Floyd—the scrutiny may have become too apparent to ignore.[166] Perhaps the Court is sending a message that qualified immunity should no longer be granted in these egregious cases, and *Riojas* and *McCoy* are signals for lower courts to "adopt a modestly less forgiving interpretation" of the current doctrine.[167] While *Riojas* and *McCoy* are not a sea change, trial courts could use them to evaluate qualified immunity claims with greater scrutiny and paint more actions as so "obvious" that no reasonable officer acting in good faith could lack fair warning their conduct violates the Constitution.[168] Both *Riojas* and *McCoy* provide an "essential gloss" on qualified immunity: factually analogous case law may not always be necessary.[169]

C. Intentionally Suppressing Exculpatory Evidence Could be a Particularly Egregious Situation

Ultimately, doctrinal reform is "arduous, often Sisyphean work."[170] Finding faults is easy, developing solutions is hard.[171] Still, some things are obviously wrong, and detectives intentionally withholding and corrupting exculpatory evidence during a murder investigation is such an example.[172] Robbing someone of their right to a fair trial and depriving them of their liberty for over twenty years is

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164. *See* Schweikert, *supra* note 149 (arguing none of the justices on the Court were responsible for creating the doctrine, but they all have a responsibility to fix it).

165. *See* Harvard Law Review, *supra* note 21 (explaining that courts seek the best overall package of substantive rights, remedies, and justiciability in light of social costs when making decisions). Professor Richard Fallon has argued that permutations of official immunity, including qualified immunity, are subject to equilibration to achieve a beneficial overall package of rights and remedies. *Id.* Justices Sotomayor and Thomas have called for a more sweeping reform of the doctrine. *See e.g.,* Kisela v. Hughes, 138 S. Ct. 1148 (2018) (Sotomayor and Ginsberg, JJ., dissenting) (explaining the Court's one-sided approach to qualified immunity has transformed the doctrine into an absolute shield for law enforcement).

166. *See* Harvard Law Review, *supra* note 21 (arguing that these cases are at least a showing the Court is paying attention to public opinion, even if it is only an attempt to preserve the doctrine from Congressional intervention). For more information on how George Floyd's murder changed the nation, *see How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021) https://www.nytimes.com/article/george-floyd.html.

167. *See* Ilya Somin, *Supreme Court Rejects Qualified Immunity Defense for the First Time in Years*, VOLKH CONSPIRACY, (Nov. 3, 2020, 10:21 PM), https://reason.com/volokh/2020/11/02/supreme-court-rejects-qualified-immunity-defense-for-the-first-time-in-years/ (noting it's highly unlikely *Riojas* and *McCoy* represent a true sea change).

168. *See id. See also supra* note 21 and accompanying text (arguing that *Riojas* and *McCoy* may be the Court's attempt to rein in the doctrine and recalibrate rights and remedies in light of the societal costs).

169. *See* Greenfield, *supra* note 155 (arguing that *McCoy* amounts to a clear directive to the lower courts, namely, the absence of factually analogous case law is no defense to the indefensible).

170. *See* Zadeh v. Robinson, 928 F.3d 457, 481 (5th Cir. 2019) (Willett, J., concurring) (acknowledging there is no simple solution to modifying the qualified immunity doctrine).

171. *See id.* (discussing the notion that if qualified immunity is to achieve its intended objectives, it is in desperate need of refinement).

172. *See* Hope v. Pelzer, 536 U.S. 730, 745 (2002) ("The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity . . . . ").

equally as appalling as pepper spraying a prisoner at whim, housing a prisoner in a cell covered in feces, or hitching a prisoner to a post for an extended period of time.[173] Although the "clearly obvious" exception does not apply often, it should play a more prominent role in qualified immunity going forward.[174] This increased application will ensure vindication of the most egregious constitutional violations, especially when requiring on-point precedent leads to perverse results.[175] Recall Judge Willet's "legal deus ex machina."[176] Cases involving the most blatantly unconstitutional conduct will rarely end up in courts of appeals; however, plaintiffs usually require a case directly on point to overcome qualified immunity.[177] Thus, plaintiffs cannot point to "clearly established" law because the courts are not clearly establishing any law.[178] Accordingly, trial courts should, in the future, be more willing to evaluate these qualified immunity claims in light of *Riojas* and *McCoy*.[179]

V. IMPACT: WHAT ARE THE LIMITS AND COSTS OF RECALIBRATION?

Riojas and *McCoy* are not drastic overhauls, but they are useful tools for plaintiffs and judges in especially egregious cases.[180] Major doctrinal change is unlikely to come from the Supreme Court; however, federal and state legislatures are eager to engage in drastic reforms, and *Riojas* and *McCoy* may embolden their efforts.[181] Conversely, if reform occurs, questions about the cost of such change, and the impact on policing and municipalities' willingness to indemnify their officials will certainly follow.[182]

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173. *See* McCoy v. Alamu, 141 S. Ct. 1364 (2021); Taylor v. Riojas, 141 S. Ct. 52, 53 (2020); *Hope*, 536 U.S. at 745.

174. *See* McCoy v. Alamu, 950 F.3d 226, 236 (5th Cir. 2020) (Costa, J., dissenting) ("If a public official knows that using force is unlawful in a given circumstance, there is no reason 'to protect [him for] apply[ing] excessive and unreasonable force merely because [his] means of applying it are novel.'" (quoting Newman v. Guedry, 703 F.3d 757, 764 (5th Cir. 2012)).

175. *See id.* ("But cases involving obvious constitutional violations should be the easiest ones in which to find that an officer was 'plainly incompetent or . . . knowingly violated the law.'" (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

176. *See* Zadeh v. Robinson, 928 F.3d 457, 478–79 (5th Cir. 2019) (Willett, J., concurring) (calling qualified immunity a "legal deus ex machina" insofar as many violations go unvindicated).

177. *See id.* (arguing that any reasonable guard would know that such an unprovoked use of pepper spray violates the Constitution).

178. *See Zadeh*, 928 F.3d at 478–79 (Willet, J., concurring).

179. *See* Erwin Chemerinsky, *SCOTUS Hands Down a Rare Civil Rights Victory on Qualified Immunity*, ABA JOURNAL (Feb. 1, 2021) https://www.abajournal.com/columns/article/chemerinsky-scotus-hands-down-a-rare-civil-rights-victory-on-qualified-immunity (arguing *Riojas* is a response to the criticism hurled by both liberal and conservative judges, and will lead to courts being more willing to rule for plaintiffs when qualified immunity is the issue).

180. *See* Schweikert, *supra* note 149 (suggesting that the Court is serious about reigning in the most egregious excesses of qualified immunity, but also maintains this "clarification" of the doctrine will be as far as it is willing to go).

181. *See e.g.,* Enhance Law Enforcement Integrity Act, Colo. Rev. Stat. Ann. § 13-21-131(2)(b) (2020); New Mexico Civil Rights Act of 2021, HB-4.

182. *See* Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 874 (2017) (stating that the goal of § 1983 litigation is to compensate plaintiffs for the injuries inflicted upon them by government officials, however, if found liable, most police officials would not be able to satisfy the judgment against them).

A. Laboratories of Democracy: State Legislatures Take the Lead

Since May 2020, both national and state legislators have considered qualified immunity reform.[183] The federal government deliberated the issue in March 2021; the House of Representatives vowed to overhaul qualified immunity with the George Floyd Justice in Policing Act, but this measure ultimately stalled in the Senate.[184] While federal efforts may be stuck in the doldrums, twenty-five states have considered the issue, and many have already addressed major concerns surrounding qualified immunity.[185]

In Colorado, plaintiffs may bypass qualified immunity through a new "civil action for deprivation of rights" cause of action that allows Coloradoans to sue officers for damages in *state* court if those officers violate the Colorado Constitution's Bill of Rights.[186] The qualified immunity exception allows Coloradoans to bring individual lawsuits against police officers for alleged civil rights violations, although there is a $25,000 cap on potential judgments.[187] In June 2021, the Colorado legislature expanded its exception on qualified immunity to include Highway Patrol troopers and the Colorado Bureau of Investigation officers.[188]

Other state and local legislatures have similarly broached substantial reforms.[189] For instance, New Mexico passed an extremely broad law, eliminating qualified immunity as a defense to state claims for all government officials; a person now has the right to sue the state, a city, or county when their rights under the state's constitution have been violated, including police misconduct, and qualified immunity will not be an applicable defense.[190] At least one state–Connecticut–passed a law requiring police officers to pay for their own lawsuits (and related

183. Emma Tucker, *States Tackling Qualified Immunity for Police As Congress Squabbles Over the Issue*, CNN (April 23, 2021) https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html (noting that states like Colorado, New Mexico, Connecticut, and Massachusetts have passed legislation to restrict the defense).

184. *See* Nicholas Fandos, Catie Edmondson & Karen Zraick, *The House Passes a Policing Overhaul Bill Named for George Floyd, Whose Death Spurred Nationwide Protests*, N.Y. TIMES (March 4, 2021) https://www.nytimes.com/2021/03/04/us/george-floyd-act.html. This bill stalled in the Senate, and it appears federal lawmakers are no longer considering changes to the doctrine. *Id.*

185. *See* Tucker, *supra* note 183 (noting that not only state legislatures, but local and city governments, such as New York City, are also passing legislation).

186. *See* Colo. Rev. Stat. Ann. § 13-21-131(2)(b) ("Qualified immunity is not a defense to liability pursuant to this section."). Additionally, the new law also banned chokeholds, required body cameras, and tracking use of force incidents. Newsy Staff, *An Inside Look at Colorado's Year-Long Qualified Immunity Ban*, KXLF (July 22, 2021) https://www.kxlf.com/news/national/an-inside-look-at-colorados-year-old-qualified-immunity-ban.

187. *Id.* A woman named Brittney Gilliam filed the first lawsuit in the state since the qualified immunity ban took effect after a video of her and four young girls in her family being handcuffed and held at gunpoint went viral in the summer of 2020. *Id.* Police thought she was driving a stolen car, but she was not. *Id.*

188. *See id.*

189. *See* Tucker, *supra* note 183 (noting that while abolishing the doctrine was a main sticking point between Democrats and Republicans in the George Floyd Justice in Policing Act, several states have gone ahead and overhauled the protection).

190. *See* Daniele Selby, *New Mexico is the Second State to Ban Qualified Immunity*, THE INNOCENCE PROJECT (April 7, 2021) https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability/ (citing New Mexico Civil Rights Act of 2021, HB-4). However, the act does have certain caveats, such as a $2 million liability cap for municipalities, exempts certain infrastructure and water projects, and allows courts to award attorney's fees for prevailing plaintiffs. *Id.*

damages) if a court decides the officer engaged in a "malicious, wanton, or willful act."[191] In New York, state Senator Alessandra Biaggi introduced a bill in summer 2020 that would require local police to carry personal liability insurance, citing her concern for "cash-strapped local governments" that often pay in police misconduct cases.[192]

Reform has come at a substantial cost, however, as officers are quitting in droves and citing the reform efforts as a major reason why.[193] Nationwide, police retirement rates increased by forty-five percent over 2020 and 2021–a development that has coincided with the nationwide discussion on police reform.[194] This puts cities in a bind, particularly when at least twelve major U.S. cities have broken annual homicide records in 2021.[195] In 2021, 521 homicides occurred in Philadelphia, a thirteen percent increase from 2020, and more than both the nation's largest cities, New York and Los Angeles.[196] Among the many reasons for this increase in violence, experts point to strained law enforcement staffing.[197] Police departments are struggling to keep the officers they have and attract new ones to the force.[198] Unfortunately, this crisis has arisen as many cities have begun to grapple with pandemic fallout and a precipitous spike in violent crime.[199]

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191. *See* Cary Aspinwall & Simone Weichselbaum, *Colorado Tried New Way to Punish Rogue Cops,* THE MARSHALL PROJECT (Dec. 18, 2020) https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops. However, when he signed the law, Governor Ned Lemont said "qualified immunity is in place for the vast majority of anything a cop could be doing," and described the chance an officer would have to pay for a lawsuit as "incredibly rare." *Id.* Over the past year, Connecticut, Massachusetts, and New York City have also approved bills limiting qualified immunity, though none are quite as broad as the reforms in Colorado or New Mexico. Nick Sibilla, *New Mexico Bans Qualified Immunity For All Government Workers, Including Police*, FORBES (April 7, 2021) https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=64c9d02479ad. In Massachusetts, for instance, qualified immunity is only revoked for police officers who have been decertified. *Id.* The New York City ordinance is limited to "unreasonable searches and seizures," which includes claims of excessive force. *Id.*

192. *See id.* In the face of intense opposition for police unions, the bill stalled in New York's legislature. *Id.*

193. *See id.* In a statewide survey of Colorado police chiefs and sheriffs, sixty-five percent of officers who left law enforcement in the past year cited concerns about the new police reform bill. *Id.* In El Paso County, Colorado, the attrition rates have doubled since 2019, and the risks of civil litigation are among the top concerns. *Id.*

194. *See* Bill Hutchinson, *"It's Just Crazy," 12 Major Cities Hit All-Time Homicide Records*, ABC NEWS (Dec. 8, 2021) https://abcnews.go.com/US/12-major-us-cities-top-annual-homicide-records/story?id=81466453 (noting that another eighteen percent of officers resigned, and that many departments have been hampered in hiring because of an inability to get large classes into police academies due to the pandemic).

195. *See id.* (noting Philadelphia is among those major cities experiencing a surge in violent crime). Philadelphia had more homicides in 2021 than the nation's two largest cities, New York and Los Angeles. *Id.* Furthermore, the city's 521 homicides was a thirteen percent increase from 2020. *Id.* Experts say one of the reasons for this homicide jump is strained law enforcement staffing. *Id.*

196. *See id.* ("It's terrible to every morning get up and have to go look at the numbers and then look at the news and see the stories. It's just crazy. It's just crazy and this needs to stop," said Philadelphia Mayor Jim Kenney after the city passed 500 homicides for 2021).

197. *Id.* (noting other possible reasons for the spike including a decline in arrests and sustained hardships from the pandemic).

198. Eric Westervelt, *Cops Say Low Morale and Department Scrutiny are Driving Them Away From the Job*, WHYY (June 24, 2021) https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job ("This job has changed . . . nobody wants this job anymore.").

199. *Id.* ("We are in uncharted territory right now . . . policing is being challenged in ways I haven't seen, ever.").

B. "You're Going to Bankrupt the City:" How Recalibration Affects Plaintiffs' Compensation

If *Riojas* and *McCoy* recalibrate the qualified immunity analysis, then it may impact whether municipalities continue to indemnify their officials.[200] Public officials rarely bear the costs of litigation; the employing municipality usually picks up the tab.[201] While much of Section 1983 jurisprudence is premised on the assumption that police officers are personally responsible for the civil judgments against them, that is not exactly true.[202] The decision to indemnify police officials provides plaintiffs with a safety net to receive money damages for their injuries; but if a city refuses to indemnify the defendant, the plaintiff is then likely unable to recover damages, despite a finding that the government official is liable.[203] If the qualified immunity doctrine is restricted, it is unclear if municipalities will be as eager to break out the checkbook.[204]

Therefore, if lower courts soften their stance on qualified immunity—or if the legislature chooses to abolish the defense outright—there may be an accompanying change in whether municipalities continue to indemnify their officials.[205] The cost of these wrongful conviction cases (with more on the way) is already threatening to bankrupt Philadelphia.[206] A compensation law might be the solution, but exonerees would likely see smaller compensation amounts—despite a higher rate of successful petitions.[207] In fact, state lawmakers have unsuccessfully introduced compensation bills in every legislative session for the last decade.[208] Ultimately, if qualified immunity does "recalibrate," plaintiffs may no longer have

200. *See* Teressa E. Ravenell & Armando Brigandi, *supra* note 182, at 874 (stating that one of the primary aims of § 1983 litigation is to compensate plaintiffs for the injuries inflicted upon them by government officials, however, if found liable, most police officials would not be able to satisfy the judgment against them).

201. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (concluding that except in rare cases where an officer faces criminal charges, police are almost always indemnified by their municipalities).

202. *See id.* (discussing how the assumption that officers are personally liable for the judgments against them underlies qualified immunity and municipal liability).

203. *See id.* ("In the absence of indemnification, plaintiffs will often be left with very limited remedies–successful municipal liability claims are rare and most individual defendants will not have the personal means to satisfy such a judgment.").

204. *See* Ravenell & Brigandi, *supra* note 182, at 880–81. Typically, Philadelphia only refuses to indemnify its police officials when the relevant behavior has resulted in a criminal conviction. *Id.* In general, indemnification serves a few goals: incentivize police, reduce constitutional violations, compensate plaintiffs, and spread the costs among community members. *Id.*

205. *See id.* at 876 (positing that municipalities may be less willing to pick up the tab if qualified immunity no longer protects officials).

206. *See* Melamed, *supra* note 1. ("The accountant in the back office is sweating every time Larry Krasner has decided someone should be exonerated and then someone in the solicitor's office has to decide how hard to fight these cases and which ones to settle.").

207. *See id.* (noting that a comprehensive and well-constructed framework in Pennsylvania or Philadelphia would help the wrongfully convicted receive services and financial compensation in a more organized and equitable fashion). According to George Washington University Law Professor Jeffrey S. Gutman, such compensation laws usually offer smaller amounts in light of the higher success rate for plaintiffs. *Id.* Without legislation, however, exonerees can only turn to the judicial system. *Id.*

208. *See id.* (noting, however, that without such a law, the courts are the only remedy).

the municipalities' deep pockets to tap into.[209] Solving one problem, but creating another.

Philadelphia's CIU is a trailblazer; the National Registry of Exonerations lists eighty-five similar offices in the United States, and forty-nine have never recorded an exoneration.[210] Since 2018, Philadelphia has recorded over twenty exonerations, with an "incredibly long" queue of cases still to review.[211] Krasner analogized this exoneration process to a wartime field hospital.[212] More exonerations and civil lawsuits against the city are likely coming.[213] In light of *Riojas* and *McCoy*, perhaps plaintiffs will have an easier time hurdling the qualified immunity barrier, especially as it relates to detectives intentionally withholding exculpatory evidence in a murder trial. What will happen after that is anyone's guess.

209. *See* Ravenell & Brigandi, *supra* note 182, at 874 (noting that despite having a great deal of discretion in the majority of § 1983 cases, Philadelphia indemnifies its police officials in just about every instance except when the relevant behavior results in a criminal conviction).

210. *See* Emily Haavil, *Philadelphia Leads the Charge in Exonerating its Own Convicted Prisoners,* KARE 11 (June 22, 2021) https://www.kare11.com/article/syndication/podcasts/record-of-wrong/philadelphia-conviction-integrity-unit-larry-krasner-patricia-cummings/89-fe603fb4-7532-4093-8245-1ef09b7938a7 (crediting the leadership of Texas native Patricia Cummings in making Philadelphia's CIU so successful).

211. *See id.* ("If you were really looking at them and not having to triage them the way we do, it'd probably take a decade."). The head of the CIU, Patricia Cummings, said an entire team generally looks at each case. *Id.* She added that "if you're going to step foot in a courtroom and ask for a conviction to be vacated or set aside, you'd better be darn confident in what you're asking the court to do." *Id.*

212. *See id.* (describing the hectic nature of each review given the vast volume of requests).

213. *See* Melamed, *supra* note 1 (acknowledging the many cases still under review by the Convictions Integrity Unit).