Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CITY OF WARREN ET AL.,
Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What standard governs the civil liability of a police officer on a claim that he violated a criminal defendant's right to due process by withholding exculpatory evidence?

2. In an interlocutory appeal, when a court of appeals awards qualified immunity to the only individual municipal defendant, does the court have jurisdiction to recognize that the municipality will be entitled to summary judgment on that basis?

PARTIES TO THE PROCEEDING

Petitioners are the City of Warren, Michigan, and Donald Ingles. Respondent, Jeffrey Michael Moldowan, was the plaintiff-appellee below. Michael Schultz, Alan Warnick, and Maureen Fournier, defendant-appellants below, are not parties to this petition.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. B, *infra*) is reported at 578 F.3d 351. The district court's orders (Pet. App. C and D, *infra*) granting in part and denying in part summary judgment are unreported.

JURISDICTION

The Sixth Circuit entered its decision on August 18, 2009. Pet. App. 3a. The court of appeals denied petitioners' timely petition for rehearing en banc on October 23, 2009. *Id.* 1a. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 19, 2010. App.

09A655. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

Section 1983 of Title 42 of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1291 of Title 28 of the United States Code provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT OF THE CASE

Respondent Jeffrey Moldowan sued petitioners – a city and one of the city's police officers – under 42 U.S.C. § 1983 for allegedly violating respondent's

constitutional rights. A divided panel of the Sixth Circuit held that a police officer violates the Constitution and may be held civilly liable when he fails to provide a prosecutor with any evidence with apparent exculpatory value, even if the officer acts in complete good faith. Separately, although the court dismissed respondent's claim that a police officer had unconstitutionally destroyed evidence relating to the case, the majority nonetheless held that it lacked jurisdiction to award the city summary judgment on the same basis.

1. In 1990, officers of the City of Warren Police Department investigated a kidnapping and brutal sexual assault. The victim advised the investigating officers "that, while she was walking down the street [in the City of Warren], she was approached by [respondent] Moldowan, who was her ex-boyfriend, thrown into a white or light-colored van, and brutally beaten and raped by three of the four assailants." Pet. App. 6a. At a pre-trial hearing, evidence confirmed that, "prior to the attack, Moldowan had been abusive toward [the victim] and threatened her." *Id.* 7a. Further, the victim's sister testified that she had been told by Moldowan that "he was going to get" the victim and that, after the assault, the victim was "at the morgue." *Id.* 8a.

In 1991, a jury convicted Moldowan and a co-defendant of kidnapping, assault with intent to commit murder, and two counts of criminal sexual conduct in the first degree. In 2002, however, the Michigan Supreme Court (with the agreement of the prosecution) awarded respondent a new trial because the testimony of the prosecution's expert witnesses, who had testified about certain bite-mark evidence,

had been called into significant question. *People v. Moldowan*, 643 N.W.2d 570 (Mich. 2002). Respondent was acquitted in the ensuing retrial.

2. Moldowan subsequently filed this suit under 42 U.S.C. § 1983 against various parties. This petition involves his claims against the city and individual police officers.

First, respondent alleges that petitioner Donald Ingles (a detective in the city's police department) unconstitutionally failed to provide prosecutors with evidence having apparent value to the defense. "Moldowan's allegations, although asserted under various constitutional provisions, present claims under *Brady v. Maryland*, 373 U.S. 83 (1963)." Pet. App. 36a. Specifically, respondent contends that Ingles failed to provide prosecutors with a statement which a witness named Jerry Burroughs alleges that he made to an unidentified police officer prior to the first trial. Burroughs claims that he observed four African-American men stand over a naked woman in a street in Detroit, then drive off in a light-colored van, several hours after the abduction and assault allegedly commenced in neighboring Warren. (Moldowan is white.) Coincidentally, Burroughs states that he heard two of the same men bragging about the assault a week later and moreover had seen the victim frequent a neighborhood crack house.

Respondent asserts that petitioner Ingles is liable under Section 1983 because – although Burroughs himself does not so contend – Burroughs must have made this alleged statement to Ingles, who failed to provide it to prosecutors. Respondent also asserts that the city is liable for failing to train its officers to

act consistently with an asserted constitutional duty to provide prosecutors with any exculpatory evidence.

Respondent separately alleges that Michael Schultz (a city police officer) violated his right to due process by destroying the evidence from his first trial after the final criminal judgment in the case, in the eleven-year-period prior to the Michigan Supreme Court's order awarding respondent a retrial. Respondent also alleges that the city is in turn liable for adopting a policy or practice authorizing such destruction.

3. After the district court denied petitioners' motions for summary judgment, in which the individual defendants alleged that they were entitled to qualified immunity, Pet. App. 113a-14a, petitioners appealed. The Sixth Circuit issued a series of three amended opinions, ultimately affirming by a divided vote.

a. Preliminarily, the court of appeals recognized that it had jurisdiction over petitioners' appeals. *Id.* 15a-31a. It is settled that jurisdiction exists to hear an appeal of the denial of a motion for summary judgment on grounds of qualified or absolute immunity. *Id.* 19a-20a (citing *Abney v. United States*, 431 U.S. 651, 659 (1977)). In this case, the Sixth Circuit recognized that:

> the district court implicitly concluded that *Brady* could support a claim against a police officer who fails to disclose exculpatory materials to the prosecutor's office, as that question of law lay at the heart of those claims. That conclusion obviously has implications that reach beyond the unique

> circumstances of this case. Accordingly, this Court has jurisdiction to consider Detective Ingles' appeal.

Pet. App. 26a n.4. More broadly, "subjecting these particular Defendants to civil proceedings implicates substantial public interests." *Id.* 29a.

b. Turning to the merits of respondent's failure-to-disclose claim against petitioner Ingles, the majority recognized that "the Supreme Court [in *Kyles v. Whitley*, 514 U.S. 419, 438 (1995),] placed the responsibility to manage the state's disclosure obligations *solely* on the prosecutor despite acknowledging that 'no one doubts that police investigators sometimes fail to inform a prosecutor of all they know.'" Pet. App. 37a (quoting *Kyles*) (emphasis in original). Notwithstanding this Court's precedents, the majority held that respondent could assert "a concomitant or derivative duty under the [C]onstitution [for police officers] to turn potentially exculpatory material over to the prosecutor." *Id.* 38a. The court reasoned: "As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same." *Id.* 41a. Moreover, in the majority's view, the obligation of the police to retain apparently exculpatory evidence under *California v. Trombetta*, 467 U.S. 479 (1984), "inexorably" also "preclude[s] [them] from concealing that exact same information from the prosecutor, the defense, and the courts." Pet. App. 44a.

The majority recognized that the Sixth Circuit had never before announced such a due process right. Relying on three prior rulings from other circuits, however, it concluded that the right was nonetheless clearly established, such that petitioner Ingles was not entitled to qualified immunity. Pet. App. 47-49a (citing *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964)).

c. The majority separately addressed, and rejected, Ingles's contention that – at the very least – a police officer's good faith or negligent failure to disclose evidence does not violate the Constitution. The court acknowledged the categorical holdings of the Eighth and Eleventh Circuits that to bring a suppression-based claim, "a defendant-turned-plaintiff must demonstrate that the police acted in 'bad faith.'" Pet. App. 50a (citing *Porter v. White*, 483 F.3d 1294 (11th Cir. 2007); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004)). But the majority was persuaded by the contrary reasoning of the Fourth Circuit's 1964 ruling in *Barbee*, *supra*, which granted habeas corpus relief to a defendant on the basis of evidence that was in the possession of the police but not provided to the defendant, reasoning that "[t]he police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." 331 F.2d at 846.

According to the Sixth Circuit majority, "[w]here the exculpatory value of a piece of evidence is 'apparent,' the police have an *unwavering* constitutional duty to preserve and ultimately

disclose that evidence. The failure to fulfill that obligation constitutes a due process violation, regardless of the [sic] whether a criminal defendant or § 1983 plaintiff can show that the evidence was destroyed or concealed in 'bad faith.'" Pet. App. 63a-64a (emphasis in original). "[T]he police have an *absolute* duty to preserve and disclose that information." *Id.* 52a (emphasis in original).

The majority recognized that its holding established a "difference in the requisite inquiry" governing the disclosure obligations of prosecutors and police: the prosecution's duty is limited to "material" exculpatory evidence; police, according to the Sixth Circuit, are subject to the "additional burden" of more broadly disclosing all evidence for which any "exculpatory value" is "apparent." Pet. App. 62a.

The majority finally noted that respondent could also pursue a claim that Ingles had in fact acted in bad faith. As noted, Burroughs does not even assert that he made his statement to Ingles, and there is moreover no evidence that Ingles had any motivation to act with ill will in this case. But without elaboration, the majority stated: "Burroughs' testimony, taken as a whole, provides sufficient evidence for Moldowan's claims to survive summary judgment because a jury could reasonably conclude that Detective Ingles acted in bad faith." Pet. App. 65a.

d. Separately, the Sixth Circuit addressed respondent's claim arising from the destruction of the evidence from his first trial after his conviction became final. After full discovery, respondent named

only Officer Schultz as the city employee involved in the destruction. The court of appeals held that Schultz was entitled to qualified immunity, however, because his role was "entirely ministerial" and he thus could not have intended to destroy valuable evidence. Pet. App. 72a.

The majority nonetheless held that it lacked jurisdiction to award the city summary judgment on the same basis. Pet. App. 77a. The majority did not doubt that the city is *entitled* to summary judgment. To the contrary, it acknowledged that after "extensive discovery" the state of the record is as follows: respondent has not "identif[ied] the individual responsible for ordering the destruction"; he "has not introduced any evidence of an official policy directing officers to withhold exculpatory evidence"; "[n]or has he alleged a 'clear and persistent pattern' of such conduct"; and the city has presented "deposition testimony and sworn statements" that "no such pattern or custom exists." *Id.* 75a n.19. But the majority reasoned that, given its limited jurisdiction, "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." *Ibid.*

4. Judge Kethledge concurred in the judgment in part and dissented in part. With respect to respondent's failure-to-disclose claim against Detective Ingles, Judge Kethledge explained that "the Supreme Court [in *Kyles*] specifically refused to impose the *Brady* duty directly upon the police." Pet. App. 95a. *Kyles* thus held that prosecutors have a duty to secure material exculpatory evidence from officers and to disclose that evidence to the defense.

The majority's extension of the *Brady* obligation to police officers, Judge Kethledge explained, will produce "a significant increase in lawsuits against police officers," who unlike prosecutors lack "absolute immunity for actions taken in their official capacities." *Id.* 96a. "But if an officer bears an absolute duty to disclose materially exculpatory evidence, *all* of the information thus filtered by an officer's judgment, even in the purest good faith, potentially becomes the basis of a lawsuit against him." *Id.* 97a (emphasis added).

Like the majority, Judge Kethledge recognized that the Eighth and Eleventh Circuits "have addressed the issue directly; and both of them pointedly refused" to extend *Brady* to police officers. Pet. App. 98a. By contrast, the appellate decisions cited by the majority in denying petitioner Ingles qualified immunity "find liability for precisely the sort of bad-faith conduct that would give rise to liability under virtually any standard." *Id.* 99a.

Judge Kethledge did agree with the majority that respondent could pursue a claim that Ingles had in fact withheld Burroughs's statement from prosecutors in bad faith. Judge Kethledge relied on Burroughs's testimony that he had told "my story" to an unidentified officer: "Burroughs' testimony could be read to mean that he told Ingles that two men had essentially admitted to committing the crime Ingles was investigating." Pet. App. 103a. "[U]nder the circumstances present here, a jury could infer bad faith from Ingles' failure to disclose Burroughs' statement—whose existence, to be fair, Ingles disputes—to the prosecutor." *Id.* 104a. The concurrence concluded that the two rules could

"operate as the functional equivalent" of each other. *Id.* 105a.

Judge Kethledge separately dissented from the majority's refusal to hold that petitioner City of Warren is entitled to summary judgment on respondent's destruction-of-evidence claim. Because all members of the panel agreed that Officer "Schultz did not violate Moldowan's constitutional rights when he disposed of the evidence from Moldowan's first trial," Judge Kethledge would have reached the obvious conclusion that the city "cannot be liable under § 1983 on this claim." Pet. App. 106a.

5. The full Sixth Circuit denied rehearing en banc. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This Court's review of the Sixth Circuit's ruling is essential. By holding that police officers are liable in damages for even the innocent failure to provide prosecutors with every bit of evidence with any apparent exculpatory value, the decision below conflicts with the precedents of this Court and with rulings of four other circuits. The decision below will also open the floodgates to suits by criminal defendants against municipalities and their employees, which have to date largely avoided the significant burdens of such litigation because the absolute duty to disclose exculpatory evidence has until now rested on prosecutors, who have absolute immunity from civil liability. Review is also warranted of the court of appeals' holding that it lacked jurisdiction to consider the city's appeal of respondent's destruction-of-evidence claim once it held that the only individual municipal defendant

was entitled to summary judgment. The Sixth Circuit's narrow reading of its "pendent jurisdiction" over the city's appeal is the subject of a square three-to-two circuit split that arises from irreconcilable interpretations of this Court's precedents.

I. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S HOLDING THAT DETECTIVE INGLES IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A. The Sixth Circuit's Holding That A Police Officer Acting In Good Faith Violates A Defendant's Right To Due Process By Withholding Evidence That Has Any Apparent Exculpatory Value Conflicts With This Court's Precedents And With Rulings Of Four Circuits.

The Sixth Circuit held that a police officer violates the Constitution, and is in turn liable for damages in civil litigation, if he fails to provide prosecutors with any piece of evidence that a jury later determines has "apparent" exculpatory value. On that view, the officer's good or bad faith is irrelevant. Certiorari should be granted because that ruling conflicts with this Court's precedents and is the subject of a significant and widely acknowledged circuit conflict.

1. The ruling below conflicts with two lines of this Court's decisions. *First*, this Court has rejected the central premise of the Sixth Circuit's ruling: that negligent conduct by governmental officials violates due process. In *Daniels v. Williams*, the Court addressed "when tortious conduct by state officials

rises to the level of a constitutional tort," squarely holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 474 U.S. 327, 328, 329 (1986) (emphasis in original). *Daniels* explained that "the word 'deprive' in the Due Process Clause connote[s] more than a negligent act," and that the constitutional guarantee has accordingly "been applied to *deliberate* decisions of government officials." *Id.* at 330, 331 (emphasis in original). Indeed, on that question, *Daniels* expressly overruled in relevant part the contrary holding of *Parratt v. Taylor*, 451 U.S. 527 (1981), that negligence could give rise to a due process violation.

More recently, this Court revisited the issue in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Reiterating the Court's holding in *Daniels* that mere negligence does not "wor[k] a deprivation in the *constitutional sense*," 474 U.S. at 330 (quotation omitted), *Lewis* explained that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Lewis*, 523 U.S. at 849 (citing *Daniels*, 474 U.S. at 328) (alteration and emphasis in original). *See also, e.g., Fla. Prepaid Postsecondary Educ. Exp. Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999) ("Such negligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment."). Directly contrary to the holding of *Daniels*, reiterated in *Lewis*, the Sixth Circuit held in this case that mere negligence by police officers in failing to provide prosecutors with exculpatory evidence violates due process.

Second, the ruling below conflicts with this Court's square holding that the government's responsibility to secure and disclose exculpatory evidence from investigatory agents lies with the prosecution, not the police. As the dissenting opinion below explained, and the majority itself recognized, *see* Pet. App. 38a-39a, 95a, this Court ruled in *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), that the duty instead lies with "the individual prosecutor," who "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." The Sixth Circuit's extension of the disclosure obligation to police officers "amount[s] to a serious change of course from the *Brady* line of cases." *Id.* at 438. This Court's precedents instead establish "the special role played by the American *prosecutor* in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasis added).

The Sixth Circuit's decision cannot be reconciled with *Kyles*. The majority below adopted precisely the extension of *Brady* to police officers that this Court rejected. Remarkably, the court of appeals avowedly imposed a *more onerous* requirement on police officers than the standard applied to prosecutors under *Brady* and its long-settled progeny. The majority below recognized that its newly minted duty to disclose any "apparently" exculpatory evidence is broader than the prosecutor's obligation to provide defendants only with "material" exculpatory evidence. Pet. App. 62a. Of course, the majority failed to explain how the police could violate a defendant's right to due process by withholding immaterial exculpatory evidence when the

prosecution has no obligation to provide that evidence to the defense.

The consequences of the Sixth Circuit's holding that police officers may be held liable for even innocently withholding exculpatory evidence cannot be overstated. Federal, state, and local police officers annually conduct hundreds of thousands of investigations involving millions of pieces of evidence. Criminal defendants targeted by the police regularly institute civil rights litigation based on officers' supposed failure to provide prosecutors with evidence that is assertedly exculpatory. Until the ruling below, governments and their individual employees were largely protected from vexatious litigation. Under *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), such claims cannot be brought against prosecutors, who have absolute immunity. As to police officers, the requirement that a putative plaintiff demonstrate "bad faith" – rather than simply file suit regarding an officer's treatment of a single piece of evidence – is a central bulwark holding back an avalanche of litigation that if permitted to proceed to discovery and trial would distract and financially strain already burdened police departments. For proof of that fact one need look no further than the numerous district court rulings around the country dismissing similar claims on precisely that basis.[1]

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[1] For cases decided in just the past two years, see *Whitley v. Allegheny County*, No. 07-403, 2010 U.S. Dist. LEXIS 21262, at *104 (W.D. Pa. Mar. 9, 2010) (standard to avoid dismissal: claim must establish "more than mere negligence"); *McLain v. City of Ridgeland*, No. 3:06-cv-00534 HTW-FKB, 2010 U.S. Dist. LEXIS 17498, at *22-*23 (S.D. Miss. Feb. 28, 2010) ("deliberately and intentionally concealed and withheld evidence"); *Rosales v.*

2. Certiorari is also warranted to resolve the circuit conflict avowedly created by the ruling below. "Circuit courts disagree . . . about what level of culpability is required to find police officers personally liable under § 1983 for *Brady* violations." *Elkins v. Summit County*, No. 5:06-CV-3004, 2009 U.S. Dist. LEXIS 36077, at *16 (N.D. Ohio Apr. 28, 2009). "There is a split in the circuits." *Stoll v. County of Kern*, No. 1:05-CV-01059, 2008 U.S. Dist. LEXIS 86535, at *33 (E.D. Cal. Sept. 8, 2008). But "[t]he great weight of circuit authority agrees" that a

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Kikendall, No. 08-CV-6113L, 2010 U.S. Dist. LEXIS 673, at *15 n.2 (W.D.N.Y. Jan. 6, 2010) ("intent of denying plaintiff a fair hearing"); *Glass v. City of Gainesville*, No. 4:09-cv-189, 2009 U.S. Dist. LEXIS 75392, at *11 (E.D. Tex. Aug. 25, 2009) ("deliberately ignored exculpatory evidence or conducted a reckless investigation"); *Friedman v. New York City Administration for Children's Servs.*, No 04-3077, 2009 U.S. Dist. LEXIS 62175, at *14 (E.D.N.Y. July 21, 2009) ("deliberately failed to disclose facts that he knew were material"); *Hernandez v. City of El Paso*, 662 F. Supp. 2d 596, 615 (W.D. Tex. 2009) ("deliberately ignores exonerative evidence or conducts a reckless investigation"); *Smith v. Short*, No. 07-515-KI, 2008 U.S. Dist. LEXIS 96267, at *12 (D. Or. Nov. 21, 2008) ("deliberately withheld exculpatory evidence"); *Windham v. Graham*, No. 9:08-cv-1935-PMD-GCK, 2008 U.S. Dist. LEXIS 72996, at *21 (D.S.C. Aug. 14, 2008) ("Plaintiff has failed to state a claim under § 1983 based on an allegation that the police negligently failed to include the evidence Plaintiff seeks."); *Moore v. Higgins*, No. 4:06-CV-00973 SNL, 2008 U.S. Dist. LEXIS 42608, at *13 (E.D. Mo. May 29, 2008) (claim requires "*a showing of bad faith*" (emphasis in original)); *Ihekoronye v. City of Northfield*, No. 07-CV-1642, 2008 U.S. Dist. LEXIS 26386, at *20 (D. Minn. Mar. 31, 2008) ("Ultimately, there is a total lack of any bad faith, as required for a procedural due process violation. There is no showing whatsoever of behavior which shocks the conscience, as required for a substantive due process violation.").

failure-to-disclose claim requires proof of bad faith. Martin A. Schwartz, *Section 1983 Brady Claims*, N.Y.L.J., Apr. 18, 2008. Indeed, every federal court of appeals to consider the question – four in all – rejects the rule adopted by the Sixth Circuit in this case.

a. The Sixth Circuit acknowledged a square conflict between its decision and the precedent of the Eighth Circuit. *See* Pet. App. 50a. In an uninterrupted line of five decisions, that court has held that a police officer may be sued for withholding evidence – including evidence with obvious exculpatory value – only upon proof that he affirmatively acted in bad faith and "intended to deprive the defendant of a fair trial." *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008) (withholding of evidence of officer's own affair with victim's mother, as well as victim's diary that did not corroborate molestation allegations) (quoting *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004) (bad faith standard applies to "materially favorable evidence")). *See also Clemmons v. Armontrout*, 477 F.3d 962, 966 (8th Cir. 2007) (discussed *infra* at 21); *Reasonover v. St. Louis County*, 447 F.3d 569, 585-86 (8th Cir. 2006) (bad faith standard applies to failure to disclose tape recording showing defendant's belief in her own innocence); *Flynn v. Brown*, 395 F.3d 842, 845 (8th Cir. 2005) (bad faith standard applies to failure to disclose video tape demonstrating that prosecution's central witness gave false testimony).

The ruling below equally conflicts with the precedent of the Fifth Circuit, which holds that an evidence-suppression claim lies only against a police

officer "who, after learning of 'patently exculpatory evidence,' deliberately fails to disclose it to the prosecutor." *Hart v. O'Brien*, 127 F.3d 424, 446-47 (5th Cir. 1997) (applying *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992)).

The Ninth Circuit takes yet another approach. That court holds that a claim that officers withheld "material, exculpatory evidence from prosecutors" does not require a showing of "bad faith" – expressly recognizing its disagreement with the Eighth Circuit – but nonetheless requires the plaintiff to prove that the officer "acted with deliberate indifference to or reckless disregard for the accused's rights or for the truth." *Tennison v. City & County of San Fran.*, 570 F.3d 1078, 1088 & n.5 (9th Cir. 2009).

The Sixth Circuit also recognized that its decision conflicts with the precedent of the Eleventh Circuit. *See* Pet. App. 44a. That court has not specified a precise standard for stating a claim alleging police suppression of exculpatory evidence, but it has expressly rejected the Sixth Circuit's holding that mere negligence is sufficient. *Porter v. White*, 483 F.3d 1294, 1307-08 (11th Cir. 2007).

Although the balance of circuit authority is distinctly lopsided against the holding of the Sixth Circuit, the substantial debate over the question in the lower courts – and hence the need for this Court's guidance – is vividly illustrated by the Fourth Circuit's disposition of *Jean v. Collins*, 155 F.3d 701 (4th Cir. 1998) (en banc), *vacated and remanded for further consideration*, 526 U.S. 1142 (1999), *and aff'd by an equally divided court*, 221 F.3d 656 (4th Cir. 2000). There, the en banc court of appeals adopted a "bad faith" requirement by a six-to-five vote. After

this Court vacated and remanded the case for further consideration in light of *Wilson v. Layne*, 526 U.S. 603 (1999), the Fourth Circuit divided evenly on the issue by a five-to-five vote. *Jean*, 221 F.3d 656. The Fourth Circuit itself regards its ruling in *Jean*, which affirmed the dismissal of the claims against the officer, as imposing a "bad faith" requirement. *See Smith v. McCarthy*, No. 09-6200, 2009 U.S. App. LEXIS 23861, at *14 n.10 (4th Cir. Oct. 28, 2009).

b. There is no merit to the suggestion of the concurrence below that the circuits' conflicting standards for finding police officers liable might ultimately amount to the same standard. In fact, the stark contrast between the competing rules is obvious. The Sixth Circuit permits the imposition of liability when the police operate in complete good faith and merely inadvertently fail to provide prosecutors with evidence with apparent exculpatory value. Four other circuits hold that liability does not arise in that recurring scenario.

Take this very case, and make the ambitious assumption that Burroughs even spoke with petitioner Ingles or that Ingles otherwise came to possess Burroughs's alleged pre-trial statement. In the Sixth Circuit, respondent contends that Ingles's liability follows automatically from the failure to provide the statement to prosecutors. But in the Fifth, Eighth, Ninth, or Eleventh Circuits, respondent would have to go much further to prove his case: he would have to establish that Ingles acted in bad faith or (in the Ninth Circuit) with reckless disregard for the truth. That would be a significant hurdle, given that there is no evidence that Ingles harbored any malice or did anything other than

perform his job. Nor would an inference of bad faith logically arise. Among many possibilities, the jury could find that Ingles in good faith concluded that Burroughs (who did not witness the assault) was not credible. Or the jury could conclude that the failure to disclose the statement was a result of good faith miscommunication between police officers.

For the same reason, the court of appeals' statement that respondent alternatively could pursue a claim that Ingles acted in bad faith does not undercut the basis for this Court's review. The Sixth Circuit's legal holding that bad faith is not required to establish a due process violation conflicts with this Court's precedent and decisions of other courts of appeals and, because it will control later litigation in that circuit, merits certiorari. In the event this Court adopts the overwhelming majority view that such a claim requires a showing of bad faith, it can then determine whether to remand the case for further proceedings under that significantly stricter standard.

Importantly, absent this Court's intervention, the trial in this case will *not* proceed under the "bad faith" standard applied by every other circuit. Respondent specifically will not be required to put on evidence of Ingles's intent, and the jury will not be required to make findings on that issue. Thus, the judgment that would arise if the case proceeded directly to trial without this Court's intervention is not likely to present a later vehicle to decide the question presented. Rather, this is the single opportunity for the Court to resolve the significant conflicts created by the ruling below.

Further, the Sixth Circuit's ruling that petitioners are not entitled to summary judgment under a "bad faith" standard itself gives rise to a circuit conflict that warrants this Court's review. Other circuits hold plaintiffs to a significantly more rigorous standard and would have held that Ingles is entitled to qualified immunity. Thus, in *Clemmons v. Armontrout*, *supra*, an officer did not advise prosecutors of a statement by a witness to a murder that two men other than the defendant had actually committed the assault. 477 F.3d 962, 966 (8th Cir. 2007). The Eighth Circuit granted the defendant a writ of habeas corpus on the basis of that evidence, *Clemmons v. Delo*, 124 F.3d 944, 947 (8th Cir. 1997), and he was acquitted on a retrial, *see Clemmons v. Armontrout*, 477 F.3d at 965. In the defendant's subsequent civil rights suit, however, the Eighth Circuit held that the officer's failure to disclose the statement to prosecutors did not state a due process claim because there was "no evidence [that the officer] consciously sought to suppress exculpatory evidence by failing to disclose [a report of the statement] to the prosecutor." 477 F.3d at 966-67. *See also ibid.* ("Even allegations of gross negligence fail to establish a constitutional violation.").

Porter v. White, 483 F.3d 1294, *supra*, reached the same conclusion on similarly indistinguishable facts. There, the defendant was convicted of numerous offenses, including rape, and was sentenced to life without parole. The Eleventh Circuit subsequently granted him a writ of habeas corpus based on the failure to disclose favorable police reports. *Porter v. Moore*, 31 Fed. Appx. 940 (11th Cir. 2002). At his retrial, the defendant was acquitted. *See Porter v. White*, 483 F.3d at 1297. But

in the defendant's subsequent civil rights suit, the Eleventh Circuit held that the officers who failed to disclose the reports were entitled to summary judgment. *Id.* at 1311. The court explained that there was "no evidence – beyond the evidence as summarized in Porter's own brief and beyond his conclusory allegations – to bolster Porter's assertion that [the officer] intentionally withheld the [police] report from the prosecution," *id.* at 1310:

> The strongest permissible inference that one might conceivably draw from these facts is that the [police] report failed to reach the State Attorney's Office on account of some negligent act or omission properly attributable to Fairbanks, the official charged with the duty to deliver the police reports to the prosecution. . . . Even assuming that the Hendrickson report was misplaced by negligence in Fairbanks's office, however tenuous that assumption, there is no evidence of ill-will or motive on the part of Fairbanks. Indeed, there is absolutely no evidence from which a jury could reasonably infer intent to withhold, recklessness, or anything more than mere negligence.

Id. at 1310-11.

Here, as in both *Clemmons* and *Porter*, respondent was acquitted on the basis of newly discovered evidence. But given that there is no evidence that petitioner Ingles himself acted in "bad faith," summary judgment would have been awarded by the circuits that follow this Court's precedents and

hold that mere negligence does not give rise to a due process violation.[2]

B. Even If The Sixth Circuit's Holding Represents A Correct Statement Of The Law, That Rule Was Not Clearly Established At The Time Of The Events Of This Case, And Detective Ingles Is Entitled To Qualified Immunity.

Certiorari is independently warranted because the ruling below conflicts with this Court's decisions establishing the contours of qualified immunity and with decisions of other circuits faithfully applying those precedents. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citing *Malley v. Briggs*, 475 U.S. 335,

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[2] The Sixth Circuit held that the city could be held liable on the same theory as Detective Ingles:

> Because we already have determined that the police have a duty to preserve and turn over to the prosecutor evidence that the police recognize as having exculpatory value or where the exculpatory value of the evidence is apparent, [precedent] dictates that the City has a corresponding obligation to adequately train its officers in that regard.

Pet. App. 74a-75a. The city's liability accordingly rises or falls with the liability of petitioner Ingles under the first question presented by the Petition.

341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). The qualified immunity inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

The Sixth Circuit held that petitioner Ingles was not entitled to qualified immunity, and permitted respondent's claim to proceed to trial, on the theory that prior out-of-circuit precedent had established that police officers may not suppress exculpatory evidence. Pet. App. 35a-66a. The court of appeals' analysis was deeply flawed. The majority below was unable to identify any precedent – because none exists – supporting the "*absolute*" and "*unwavering*" rule it adopted, Pet. App. 52a, 63a-64a (emphases in original): that civil liability arises from police officers' failure to produce any evidence with apparent exculpatory value. The three appellate decisions cited by the majority below, *see* Pet. App. 47a-49a, are either irrelevant or instead hold far more narrowly that the police may be held liable only for the purposeful suppression of exculpatory evidence:

- *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964), held that a criminal defendant was entitled to a writ of habeas corpus on the basis of evidence possessed by the police that had not been disclosed to the defendant. *Barbee* says nothing about the civil liability of police officers, and is completely consistent with this Court's subsequent holding in *Kyles*,

supra, that the government's obligation to disclose material evidence under *Brady* is borne by prosecutors.

- *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988), holds precisely the opposite of the Sixth Circuit in this case. The Seventh Circuit there ruled that "negligence is no longer culpable under section 1983. Gross negligence is not enough either." *Id.* at 992.
- *Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989), holds that a Section 1983 suit may proceed against a police officer who "procures false identification by unlawful means or deliberately conceals exculpatory evidence." *Id.* at 170 (citation omitted). Absent those allegations, the court of appeals held, the officer would be entitled to qualified immunity. *Ibid.*

The holding of these courts that the *purposeful* concealment of evidence by police violates the Due Process Clause is not a basis for the Sixth Circuit's decision to withhold qualified immunity for *innocent* conduct. Even where prior precedent establishes a legal principle as a "general proposition" – for example, that officers may in some circumstances be held liable for withholding evidence – "that is not enough":

> Rather, we emphasized in *Anderson* [*v. Creighton*], "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a

> reasonable official would understand that what he is doing violates that right." 483 U.S. [635,] 640 [(1987)]. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier v. Katz, 533 U.S. 194, 201-02 (2001). Ingles is entitled to qualified immunity precisely because, "prior to the [Sixth] Circuit's decision in the present case, no court of appeals had issued a contrary decision" holding that good faith actions by police officers in failing to produce evidence would violate due process. *Pearson*, 129 S. Ct. at 823.

The conclusion that Detective Ingles is not subject to suit for his conduct taken in good faith is significantly reinforced by the substantial body of case law that has emerged in recent years. As discussed above, far from a consensus emerging in support of the Sixth Circuit's holding, the ruling below conflicts with the near-uniform view of the courts of appeals. "In *Wilson,* we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that '[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'" *Pearson*, 129 S. Ct. at 823 (quoting 526 U.S. at 618). At the very least, the cases rejecting the Sixth Circuit's standard "are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that that [the courts] were sufficiently clear in the prior statement of the law" to deprive Ingles of

qualified immunity. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2644 (2009).[3]

This Court's intervention is furthermore warranted because the ruling below conflicts with the precedent of two other circuits. The Third Circuit has held that police officers are entitled to qualified immunity on evidence-suppression claims that arose prior to this Court's 1995 decision in *Kyles*, *supra*, at the earliest. That court explained that "the Supreme Court did not settle" that evidence possessed by police was subject to *Brady* until *Kyles*; further, as of 2000, that circuit had only "assume[d]" that the police had a duty to disclose exculpatory evidence. *Gibson v. Superintendent*, 411 F.3d 427, 444 (3d Cir. 2005) (citing *Smith v. Holtz*, 210 F.3d 186, 197 n.14 (3d Cir. 2000)).

The Eighth Circuit takes a different approach. That court holds that an officer is entitled to qualified immunity *unless* the plaintiff proves that the officer "deliberately" failed to provide exculpatory evidence. *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008). Although unable to point to precedent on the precise issue, the Eighth Circuit reasons that a "reasonable officer" would recognize that he could not

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[3] Similarly, to the extent that respondent contends that the cases implicated by the circuit conflict over whether officers may be held liable for the good faith failure to produce evidence turn on their particular facts, that assertion only supports the conclusion that Ingles is entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (In an "area . . . in which the result depends very much on the facts of each case," with no ruling that "squarely governs the case here," then the existing precedent "by no means 'clearly establish' that [the officer's] conduct violated" the Constitution).

"deliberately misrepresent" the evidence in his possession. *Ibid.*

Petitioner Ingles would be entitled to qualified immunity under the approach of either the Third or Eighth Circuits. The events in this case occurred prior to this Court's decision in *Kyles*. So too, the Sixth Circuit had never held before this case (much less prior to the events giving rise to the case two decades ago in 1990) that the police had an independent duty to disclose exculpatory evidence. But at the very least, qualified immunity is appropriate with respect to respondent's allegation that Ingles violated due process by withholding Burroughs's alleged statement in good faith. There is no support for the Sixth Circuit's ruling that Ingles's liability rests upon "clearly established" law.

In sum, certiorari is warranted because the Sixth Circuit's holding that respondent may pursue his evidence-suppression claim against Detective Ingles conflicts with this Court's precedents and decisions of other circuits.

II. THIS COURT SHOULD REVIEW THE SIXTH CIRCUIT'S HOLDING THAT IT LACKED JURISDICTION TO AWARD SUMMARY JUDGMENT TO THE CITY OF WARREN.

In challenging the failure to preserve evidence from his initial trial, respondent identified only Officer Schultz as an individually responsible city employee. The Sixth Circuit correctly held, however, that Schultz was entitled to qualified immunity on that claim because there was no evidence that he intended to destroy valuable evidence. Pet. App. 72a.

The court of appeals recognized that there similarly was no evidence either that some other city official had ordered the destruction of the evidence or that there was a city policy authorizing the inappropriate destruction of evidence. *Id.* 75a n.19. The city is accordingly entitled to summary judgment under the holding of *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), that a municipality may only be held liable if one of its agents acted unlawfully. Judge Kethledge thus would have reached the city's appeal and held that it was automatically entitled to summary judgment. Pet. App. 106a. But the majority held that "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." *Id.* 75a n.19.

The determination whether a court of appeals has jurisdiction over a municipality's appeal in these circumstances turns on the proper interpretation of *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). In that case, individuals appealed from the district court's holding that they were not entitled to qualified immunity on summary judgment. *Id.* at 40. The Eleventh Circuit decided that appeal and furthermore exercised "pendent jurisdiction" over the county's appeal that an individual defendant was not its "policymaker" for purposes of establishing municipal liability. *Id.* at 40-41. The substance of the two appeals was unrelated: "The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama." *Id.* at 51. This Court held that the court of appeals lacked jurisdiction over the county's appeal in that

circumstance. *Ibid.* But the Court declined to "definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable." *Id.* at 50-51. It specifically left open whether jurisdiction would exist when the disposition of the municipality's "summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 51.

The Sixth Circuit's holding that it lacks jurisdiction in the recurring circumstances of this case – where a municipality asserts that the absence of any individually liable employee entitles the municipality to summary judgment – is consistent with that court's prior decision in *Crockett v. Cumberland College*, 316 F.3d 571, 578-79 (6th Cir. 2003). It is also consistent with the settled precedent of the Second and Eleventh Circuits, both of which have considered this precise question in multiple cases and concluded that jurisdiction does not exist in light of *Swint*. *Deters v. Lafuente*, 368 F.3d 185, 188 n.3 (2d Cir. 2004); *Munafo v. Metropolitan Transp. Auth.*, 285 F.3d 201, 215 (2d Cir. 2002); *Johnson v. NewBurgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001); *Harris v. Board of Educ.*, 105 F.3d 591, 595 (11th Cir. 1997) (per curiam); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995); *Haney v. City of Coming*, 69 F.3d 1098, 1102 (11th Cir. 1995). *See also Cunningham v. Gates*, 229 F.3d 1271, 1285-86 & n.20 (9th Cir. 2000) (reaching the same conclusion based on that court's "very narrow"

application of pendent appellate jurisdiction, in conflict with rulings of another circuit).

Those decisions squarely conflict, however, with the precedent of the Eighth and Tenth Circuits, which have similarly extensive bodies of precedent reading *Swint* to permit a federal court of appeals to exercise "pendent jurisdiction" over a municipality's appeal, and awarding the municipality summary judgment, when as here the relevant individual municipal employee is entitled to qualified immunity. *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 813 (8th Cir. 2008) ("[W]e have jurisdiction to consider the City's appeal of the denial of summary judgment on Sherbrooke's allegation that a municipal policy caused a violation of his constitutional rights, because the merits of the City's appeal is inextricably intertwined with the question whether the officers violated Sherbrooke's rights."); *Smook v. Minnehaha County*, 457 F.3d 806, 813 (8th Cir. 2006) ("Because Minnehaha County's appeal regarding liability for the search of Smook is inextricably intertwined with the appeal of the individual defendants, we have jurisdiction to consider the county's appeal on that point."); *Avalos v. City of Greenwood*, 382 F.3d 792, 801 & n.1 (8th Cir. 2004); *Green v. Post*, 574 F.3d 1294, 1310 (10th Cir. 2009) ("In light of our reversal of the district court's decision, and the necessity that summary judgment be granted to Deputy Post on the ground of qualified immunity, we exercise pendent appellate jurisdiction over the constitutional claims against the PCSD. We have held that a municipality may not be held liable where there was no underlying constitutional violation by any of its officers. We accordingly reverse the district court's denial of the motion for dismissal/for summary judgment filed by

the PCSD and remand for entry of summary judgment for the PCSD." (citing *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (citing *Heller*, 475 U.S. at 799) (quotation marks omitted))); *Cruz v. City of Laramie*, 239 F.3d 1183, 1190-91 (10th Cir. 2001) ("The *Swint* court held that pendent appellate jurisdiction allows review of an otherwise nonappealable decision that is 'inextricably intertwined' with an appealable decision. That situation exists here because plaintiff's claim of inadequate training relates directly to the objective reasonableness of the officers' conduct, the issue involved in the appealable order. We therefore may consider whether the district court erred in denying the City's motion."); *Deanzona v. City & County of Denver*, 222 F.3d 1229, 1234 (10th Cir. 2000) ("We exercise pendent jurisdiction over the substantive due process claims against Brooks and Denver because the review of Brooks's qualified immunity necessarily resolves these otherwise unappealable claims.").

This Court's intervention is required not only because the conflict is well developed and recurs frequently, but also because it arises directly from irreconcilable interpretations of this Court's ruling in *Swint*, *supra*. Only this Court can determine which reading of *Swint* is correct. Further, the Eighth and Tenth Circuits' holding that jurisdiction exists in these recurring circumstances represents the better reading of the federal jurisdictional statutes, which are intended to ensure the economical disposition of litigation. There is no basis for allowing the district court's denial of summary judgment to stand, given that the court of appeals' holding that Officer Schultz is entitled to qualified immunity should

automatically dispose of respondent's claim against the city as well. *See City of Los Angeles v. Heller*, *supra*.

CONCLUSION

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

Respectfully submitted,

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