No. 09-1149

In The
Supreme Court of the United States

CITY OF WARREN, MICHIGAN, et al.,

Petitioners,

vs.

JEFFREY MICHAEL MOLDOWAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should this Court deny the petition for writ of certiorari where the Sixth Circuit held, consistent with the Supreme Court's prior decisions, that an individual's rights to due process are violated where the police fail to produce evidence the exculpatory value of which is apparent without showing that the police acted in bad faith?

II. May a circuit court decline to exercise pendant, appellate jurisdiction over a municipal defendant's interlocutory appeal where its claims are not inextricably intertwined with the individual defendants' interlocutory claims?

PARTIES TO THE PROCEEDING

Petitioners are Defendants-Appellants City of Warren, Michigan, and Donald Ingles. Jeffrey Moldowan is the plaintiff-appellee in this action. Defendants-Appellants below, Michael Schultz, Alan Warnick, and Maureen Fournier, are not parties to this petition.

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JURISDICTION

In an Order dated October 23, 2009, the Sixth Circuit denied Petitioners' petition for rehearing and rehearing en banc. After this Court extended their time to file a petition, Petitioners filed their writ of certiorari on March 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Sixth Circuit's decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Title 42 of the United States Code § 1983 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. . . .

STATEMENT OF THE CASE

This case involves *Brady* claims brought against Petitioners City of Warren and Donald Ingles, one of Warren's now-retired Detectives. In 1991, Respondent Jeffrey Moldowan was convicted of sexually assaulting his former girlfriend Maureen Fournier. Following his conviction, the trial court ordered the preservation of all evidence in the case.

After spending nearly twelve years in prison, the Michigan Supreme Court in 2002 reversed Mr. Moldowan's conviction after it was discovered that one of the prosecution's expert witness odontologist, Dr. Alan Warnick, had fabricated evidence that was key to the government's case. *People v. Moldowan*, 466 Mich. 862, 643 N.W.2d 570 (2002). Sometime during the years following his conviction, Petitioner City of Warren destroyed certain evidence subject to the trial court's preservation order.

After the Michigan Supreme Court overturned his conviction, but before his retrial, Mr. Moldowan also discovered a witness by the name of Jerry Burroughs who saw four African-American men (Respondent Moldowan is Caucasian) standing around a naked female lying in the street (presumably Fournier) on the morning that Fournier was found. Burroughs also said that he later heard two of those

same men talking about the incident and bragging about their participation in the assault. Pet. App. 10a.

During Respondent's retrial, Burroughs was questioned by the prosecutor who asked why Burroughs never came forward with his information concerning the crime. In response, Burroughs told the prosecutor that, several days after the crime (before the preliminary exam), he talked to a white male, plain-clothes officer from Warren who identified himself as a detective. According to Burroughs, he told the detective about the four African-American men and how two of them were later bragging about the crime. Burroughs further testified that the officer with whom he spoke "wasn't really interested" in hearing what he had to say.

Although Ingles admitted that he was the only Detective investigating the crime in Burroughs' neighborhood, he denied ever speaking to Burroughs about the incident. At no time during Mr. Moldowan's first trial did the prosecution ever disclose any notes relating to Burrough's statements exculpating Moldowan. At the conclusion of the retrial, Respondent was found not-guilty and finally released after nearly 12 years in prison.

On January 28, 2005, Respondent filed the instant action under § 1983 asserting the violation of his constitutional rights by, inter alia, Petitioners Ingles and the City of Warren. The crux of Respondent's claims are that Petitioner Ingles violated his

constitutional right to due process by failing to disclose evidence the exculpatory value of which was apparent. Respondent further claims that Petitioner City of Warren is liable for, among other things, failing to train its officers as to their duty to disclose *Brady* evidence and for destroying and/or failing to preserve evidence.

Following extensive discovery, Petitioners moved for summary judgment. Petitioner Ingles claimed that, even assuming he failed to disclose the exculpatory evidence at issue, he cannot be held liable under § 1983 without showing that he acted in bad faith, and that alternatively he is entitled to qualified immunity because the law was not so clearly established at the time of his actions. The district court denied Petitioners' motions for summary judgment finding numerous questions of fact surrounding the nondisclosure of the *Brady* evidence. Both Petitioners Ingles and the City of Warren appealed the district court's rulings to the Sixth Circuit.

On appeal, the Sixth Circuit affirmed the denial of Petitioner Ingles' qualified immunity defense. Relying on this Court's prior decisions, including *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988), the majority held that the law was clearly established that a police officer violates an individual's due process rights by failing to disclose evidence the exculpatory value of which is apparent even without a showing of bad faith on the part of the officer. Pet. App. 52a-64a. Both the majority and the concurrence concluded,

however, that even if bad faith were a requirement, there were sufficient factual disputes surrounding whether Petitioner Ingles acted in bad faith and thus, in any event, Petitioner Ingles was not entitled to qualified immunity. Pet. App. 65a, 92a.

As to the municipal defendant, the majority panel concluded that it lacked pendant, appellate jurisdiction over Petitioner City of Warren's interlocutory appeal because it was not inextricably intertwined with Petitioner Ingles' qualified immunity defense. Pet. App. 74a-77a.

REASONS FOR DENYING THE PETITION

I. Consistent with this Court's decisions, the Sixth Circuit correctly held that where the police fail to disclose material evidence the exculpatory value of which is apparent, a defendant turned plaintiff need not demonstrate bad faith to support a due process *Brady* claim brought under 42 U.S.C. § 1983.

This case deals with the area of law concerning the accessibility of evidence in criminal proceedings. Petitioners contend that the circuit court's opinion conflicts with Supreme Court precedent where the Sixth Circuit ruled that, in the context of a claim brought under § 1983, Respondent Moldowan need not prove bad faith against a police officer who withheld evidence the exculpatory value of which was

apparent. A cursory reading of this Court's prior case law makes clear that the Sixth Circuit's decision is entirely consistent with the law as handed down by this Court, and that contrary to Petitioners' assertion, there is no meaningful split of authority between the circuit courts of appeals.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "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." 373 U.S. at 87 (emphasis added).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court further expounded on its *Brady* holding that bad faith is not required in a claim involving the non-disclosure of evidence the exculpatory value of which is apparent. Specifically, the *Agurs* Court held that:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. (Internal citations omitted). [] If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

Agurs, 427 U.S. at 110.

And while *Brady* and *Agurs* dealt with *Brady* claims against prosecutors, this Court has held that *Brady's* due process protections also prohibit other governmental "authorities" from making a "calculated effort to circumvent the disclosure requirements established by *Brady* [ ] and its progeny," *California v. Trombetta*, 467 U.S. 479, 488 (1984).

In following with this Court's decision in *Trombetta*, the Supreme Court reaffirmed its prior holdings that the government's *Brady* obligations apply to both the prosecution and the police and, depending on the nature of the non-disclosed evidence, irrespective of good or bad faith. For example, in *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court held that:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.

Youngblood, 488 U.S. at 57. As the Sixth Circuit correctly noted, *Youngblood* confirms that "the applicable standard[ ] [depends on] the nature of the evidence at issue, not the title of the government official or whether the challenged conduct relates to the state's failure to disclose evidence rather than its failure to preserve it." Pet. App. 56a. On this point, the Sixth Circuit's holding is completely harmonious with this Court's decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood*.

A. Contrary to Petitioner's contention, the Sixth Circuit's decision is completely harmonious with the Supreme Court's *Brady* line of cases which hold that bad faith is not required where the evidence withheld is 'apparently' exculpatory.

Contrary to Petitioner's assertions, the law is clearly established, as the Sixth Circuit found, that either the prosecution or the police violate an individual's due process rights by failing to turn over material evidence the exculpatory value of which is apparent. Indeed, as this Court reiterated in *Illinois v. Fisher*, 540 U.S. 544, 549 (2004), "the applicability of the bad-faith requirement in *Youngblood* depended . . . on the distinction between 'materially exculpatory' evidence and 'potentially useful' evidence."

Collectively, the Supreme Court's prior decisions make clear that in *Brady*-like claims, the important inquiry is whether the withheld evidence is merely potentially exculpatory, or whether the exculpatory nature of the evidence is apparent. If it is apparent that the evidence is exculpatory, this Court has consistently held that an individual challenging the non-disclosure need not show "bad faith." If the non-disclosed evidence is only potentially exculpatory, then a *Brady*-type claim includes a showing of bad faith. This is exactly how the Sixth Circuit applied the law in this case.

Here, Petitioner conflates the Supreme Court's *Brady* line of cases (*Brady*, *Agurs*, *Trombetta*, and

Youngblood) with the separate and distinct concept involving negligent deprivations of due process. Relying on *Daniels v. Williams*, 474 U.S. 327 (1986), Petitioner suggests that this Court has rejected the central premise of the Sixth Circuit's ruling by holding that negligent conduct by governmental officials violates due process. Pet. at 12.

While Petitioner's contention may be correct as a general statement of the law, *Daniels* does not provide the controlling analysis in a case involving the government's failure to turn over evidence the exculpatory value of which is apparent. Such nondisclosure claims, whether arising in the criminal, habeas, or civil context of § 1983, are controlled by this Court's decisions and analyses in *Trombetta* and *Youngblood*, which in turn rested on this Court's opinions in *Brady* and *Agurs*. Contrary to Petitioners' contention, *Daniels* does not operate to apply a different standard in the context of a 1983 *Brady* claim. Indeed, the Sixth Circuit makes this point well in footnote 17 of its opinion:

> Nor is there any justification for imposing a higher burden because Moldowan asserts his due process claim in the § 1983 context. See *Parratt v. Taylor*, 451 U.S. 527, 534, 101 S. Ct. 1908, 68 L.E.2d 420 (1981) ("Nothing in the language of § 1983 . . . limits the statute solely to intentional deprivations of constitutional rights."); see also id. At 535, 101 S. Ct. 1908 ("[Section] 1983 affords a civil remedy for deprivations of federally protected rights . . . without any express

> requirement of a particular state of mind."). Although the Court's decision in *Daniels* overruled other aspects of *Parratt*, it expressly left undisturbed *Parratt's* holding as to § 1983. See *Daniels*, 474 U.S. at 329-30, 106 S. Ct. 662 ("In *Parratt v. Taylor*, we granted certiorari . . . to decide whether mere negligence will support a claim for relief under § 1983 . . . *We concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. We adhere to that conclusion.*")

Pet. App. 64a n.17 (emphasis added).

The key part of the Court's holding in *Daniels* is found in the above highlighted provision taken from footnote 17 of the Sixth Circuit's opinion; that is, that § 1983 does not require a specific state of mind beyond what is required to prove the underlying constitutional violation. In this case, the underlying constitutional violation is Petitioners' failure to disclose material evidence the exculpatory value of which was apparent.

Thus, Respondent's underlying constitutional claim is that of a *Brady* claim under the Due Process Clause of the Fourteenth Amendment. The task then is to determine whether Respondent must prove bad faith to succeed in his underlying *Brady* claim. Following this Court's *Brady* line of cases, it is clear that Respondent need not demonstrate bad faith to prove

his underlying due process claim because the evidence withheld was exculpatory on its face. This Court need look only to its prior decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood* to confirm the correctness of the Sixth Circuit's decision in this regard. And as the Sixth Circuit correctly noted in footnote 17 of its opinion, *Daniels* did not change the analysis that under § 1983 a court must look at the underlying constitutional claim to determine what, if any, state of mind is required.

Contrary to the Petitioner's suggestion, the Sixth Circuit did not change course, at all, from this Court's prior decisions. In fact, the Sixth Circuit followed with exact precision the law that has been handed down by this Court in *Brady* and its progeny. As the Sixth Circuit aptly noted,

> But, where the police are aware that the evidence in their possession is exculpatory, the Supreme Court's decisions in this area indicate that the police have an absolute duty to preserve and disclose that information. *The critical issue in determining whether bad faith is required thus is not whether the evidence is withheld by the prosecutor or the police, but rather whether the exculpatory value of the evidence is "apparent" or not.* See Pet. App. at 52a (emphasis added).

By relying on *Daniels*, Petitioners miss the mark of the proper analysis under which *Trombetta* and *Youngblood* authoritatively hold that Respondent

need not demonstrate bad faith on his underlying constitutional *Brady* claim because the evidence withheld was exculpatory on its face. By glossing over the nature of the withheld evidence and focusing on *Daniels* rather than *Trombetta* and *Youngblood*, Petitioners erroneously contend that the Sixth Circuit's opinion in this matter conflicts with this Court's precedent. It does not. In fact,

> On the contrary, just like *Brady* and *Agurs*, the Court's decision in *Youngblood* confirms that where "material exculpatory evidence" is concerned, the mental state of the government official withholding that evidence is not relevant to determining whether a due process violation has occurred. 488 U.S. at 57-58, 109 S. Ct. 333. In discussing the scope of the police's duty to preserve evidence, the Court contrasted the state's absolute obligation to disclose "material exculpatory evidence" with its much more limited obligation to preserve "potentially useful evidence," holding that a showing of bad faith was required to show a constitutional violation only in the latter context. Id. at 57-58, 109 S. Ct. 333. Pet. App. 55a.

Because the Sixth Circuit's opinion in this case harmoniously follows this Court's decisions, Petitioners' writ for certiorari should be denied.

B. The Court should also deny Petitioner's writ for certiorari because, regardless of whether bad faith is required, the record contains factual disputes as to whether Petitioner Ingles acted in bad faith by failing to disclose the exculpatory evidence at issue.

Even assuming, *arguendo*, that bad faith is a requirement in Respondent's claim, Petitioner's writ for certiorari should also be denied because, as both the lower court's majority and concurrence highlight, there are factual disputes surrounding whether Petitioner Ingles acted in bad faith by failing to disclose the exculpatory evidence at issue. Given such factual disputes, the question of whether bad faith is required is largely academic because, in any event, it will not change the course of these proceedings. Standing alone, these factual disputes make this case less than ideal for Supreme Court review.

As the Sixth Circuit highlighted,

> In any event, even if we were inclined to believe that bad faith was required, we still would not conclude that Detective Ingles is entitled to summary judgment. Because we must read the record in the light most favorable to Moldowan, we conclude that 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. Although there is no direct evidence that Detective

> Ingles acted intentionally in withholding these exculpatory statements, Burroughs' testimony, at least when viewed in the light most favorable to Moldowan, provides sufficient evidence for Moldowan's claim to survive summary judgment. Despite Detective Ingles' insistence to the contrary, we lack the jurisdiction to consider his claim that Burroughs never made any such statements to the police. Pet. App. 65a.

Significantly, the concurrence below agreed with the majority that, under either analysis, Respondent may proceed to trial on his claims against Petitioner Ingles based on the factual disputes contained in the record. Pet. App. 92a. ("The caveat, as discussed below, may as a practical matter render insignificant the differences between the majority's approach and my own."); see also Pet. App. 104a (J. Kethledge) (concurring) ("my disagreement with the majority may prove larger in theory than in practice."). As recognized by the concurrence below, the dissent's approach versus the majority's approach complained of by Petitioners presents no real case or controversy and is, in large part, an academic discussion that would be better suited for a case more appropriate on its facts.

C. Petitioners have failed to demonstrate a meaningful split of authority between the circuit courts of appeals as to their interpretation of *Trombetta* and *Youngblood*.

Petitioners also overstate the existence of a circuit split on this issue. For example, Petitioners contend that the Sixth Circuit's decision squarely conflicts with the Eighth Circuit decisions in *White v. McKinley*, 519 F.3d 806 (8th Cir. 2008) and *Villasana v. Wilhoit*, 368 F.3d 976 (8th Cir. 2004). Pet. at 17. Contrary to Petitioners' assertions, there is no such split of authority between the Sixth Circuit and the Eighth Circuit's decisions in *White* and *Villasana*. In fact, the Sixth and Eighth Circuits are in agreement as to the question of law presented herein. As the Sixth Circuit pointed out, both *White* and *Villasana* dealt with evidence that was only potentially exculpatory and thus a showing of bad faith was required in those cases. Pet. App. at 60a n.12 ("Even the decisions from the Eighth Circuit . . . involved evidence that was only potentially useful.").

Furthermore, the Eighth Circuit has specifically recognized that the standard to be applied, one of bad faith or not, depends on the nature of the evidence withheld as set forth in *Trombetta* and *Youngblood*. Specifically, the Eighth Circuit correctly noted the different standards to be applied between potentially exculpatory evidence and evidence the exculpatory value of which is apparent. *Villasana*, 368 F.3d at 978 ("In *Brady*, the Supreme Court held that '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.*'") (emphasis added); *White*, 519 F.3d 806 (same). Thus, Petitioners' reliance on the Eighth Circuit's decisions in *White* and *Villasana* to demonstrate a circuit split is unsupported by its cited cases.

Petitioners also contend that the Sixth Circuit's opinion in this matter conflicts with precedent from both the Fifth and Ninth Circuits. Again, Petitioners' contention of a circuit split between the Sixth, and Fifth and Ninth Circuits is without merit, or at least overstated. As the Sixth Circuit pointed out in footnote 11 of its opinion below:

> Our reading of *Youngblood* also finds support in the case law of our sister circuits. In *Olszewski v. Spencer*, 466 F.3d 47 (1st Cir. 2006), for instance, the First Circuit declined to resolve this issue, but observed that "[a] variety of other circuits have considered the relationship between *Trombetta* and *Youngblood* and have concluded that (1) the destruction of 'apparently exculpatory' evidence does not require a showing of bad faith but that (2) if the evidence is only 'potentially useful,' a bad-faith showing is required." Id. at 56, 109 S. Ct. 333 (citing *United States v. Moore*, 452 F.3d 382, 388 (5th Cir. 2006)) ("impermissibly withheld evidence must be either (1) material and exculpatory or (2) only potentially useful, in combination with a

> showing of bad faith on the part of the government"); *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006) (only requiring a showing of bad faith when the evidence is "potentially exculpatory, as opposed to apparently exculpatory"); *Bullock v. Carver*, 297 F.3d 1036, 1056 (10th Cir. 2002) ("A defendant can obtain relief under the Due Process Clause when he can show that a police department destroyed evidence with 'an exculpatory value that was apparent before [it] was destroyed.' . . . Where, however, the police only failed to preserve 'potentially useful' evidence that might have been exculpatory, a defendant must prove that the police acted in bad faith by destroying the evidence." (Internal citations omitted). Although the decisions of the Fifth, Ninth, and Tenth Circuits are not binding, they lend strong support to our interpretation of this passage from *Youngblood*.

Pet. App. 58a n.11.

As footnote 11 of the Sixth Circuit's opinion makes clear, contrary to Petitioners' suggestion, there is no split of authority between the Sixth, and Fifth and Ninth Circuits. Both the Fifth and Ninth Circuits in *Moore* and *Estrada* recognize the different standards depending on the nature of the evidence withheld. And as the Petitioners themselves point out on page 18 of their Petition, the Eleventh Circuit has not specified a standard for the type of claim raised herein, and thus Petitioners' purported circuit split stands on hollow ground. These cases, relied on by

Petitioners, reveal that there is no well-developed split of authority on the relevant question of law presented herein. To the contrary, these cases show that the circuits are correctly applying the law as set forth by this Court in *Trombetta* and *Youngblood*.

Petitioner's also assert that they are entitled to qualified immunity because, even if there is no requirement that Respondent demonstrate bad faith, the law was not clearly established at the time of their actions to impose liability under § 1983. This argument fails for the simple reason that the Supreme Court has held, as long ago as 1984 and 1988 and before Petitioners' acts giving rise to the instant case, that the Due Process Clause of the Fourteenth Amendment applies to police officers for failing to disclose evidence the exculpatory value of which is apparent, irrespective of their good or bad faith. See *California v. Trombetta*, 467 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988).

For purposes of qualified immunity, the Supreme Court's decisions in both *Trombetta* and *Youngblood* clearly established as early as 1988 that police officers violate an individual's constitutional rights to due process by failing to disclose evidence the exculpatory value of which is apparent. Based on Respondent's complaint and the summary judgment record in this case, Petitioners' alleged actions taken in 1990 violated clearly established law. The Sixth Circuit's opinion affirming the denial of Petitioner Ingles' defense of qualified immunity provides no basis for review by this Court.

II. Petitioners' writ of certiorari should also be denied because Petitioner City of Warren failed to demonstrate any meaningful split of circuit authority as to pendant, appellate jurisdiction.

Petitioners also contend that the Sixth Circuit's decision finding that it lacked jurisdiction to consider the municipality defendant's appeal conflicts with decisions from other circuit courts of appeals. Specifically, Petitioners contend that the Sixth, Second, and Eleventh Circuits' treatment of pendant, appellate jurisdiction conflict with the decisions of Eighth and Tenth Circuits. See Pet. at 30-31. Petitioners' assertion of a circuit split is without merit. In his complaint, Respondent alleges that the municipal defendant, City of Warren, failed to adequately train its officers as to their constitutional duty to preserve and/or disclose exculpatory evidence. As to Respondent's claim of inadequate training, the Sixth Circuit held that:

> 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, *Harris* dictates that the City has a corresponding obligation to adequately train its officers in that regard. Pet. App. 74a-75a.

The Sixth Circuit further concluded 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." Pet. App. 75a n.19. On this point, Petitioner City of Warren contests the Sixth Circuit's decision finding that it lacked jurisdiction.

However, this Court's decision in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), makes clear that pendent, appellate jurisdiction is both narrow and discretionary. In *Swint*, this Court vacated the decision of the Eleventh Circuit finding that it did not have jurisdiction to consider the municipal defendant's interlocutory appeal. The Sixth Circuit's ruling in this instance, holding that it lacked jurisdiction over Petitioner City's interlocutory appeal, is entirely consistent with *Swint* and provides no basis for review by this Court.

Furthermore, Petitioners' claim that the circuits are split as to their pendant, appellate jurisdiction is without merit. Petitioners claim that the Sixth, Second, and Eleventh Circuits are split with the Eighth and Tenth Circuits as to the treatment of pendant, appellate jurisdiction in these circumstances. A review of Petitioners' cases reveal, however, that there is no such split.

Petitioners contend that some circuits ask whether the municipalities claims are "inextricably intertwined" with the individual defendants' interlocutory appeal, and if so, pendent, appellate jurisdiction is proper. Petitioners assert that the Eighth and Tenth Circuits follow such a rule, *Sherbrooke v.*

City of Pelican Rapids, 513 F.3d 809 (8th Cir. 2008) and *Green v. Post*, 574 F.3d 1294 (10th Cir. 2009), while the Sixth, Second, and Eleventh Circuits follow a different rule, *Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003); *Deters v. Lafuente*, 368 F.3d 185 (2d Cir. 2004); and *Harris v. Bd. of Edu.*, 105 F.3d 591 (11th Cir. 1997). See Pet. at 28-32.

A review of the above cited cases reveal that, contrary to Petitioners' assertion, there is no such split of authority on this issue. In all of the cases cited, the circuit courts recognized their pendent, appellate jurisdiction over a municipal defendant's interlocutory appeal whose claims were "inextricably intertwined" with the individual defendants' appeal. In other words, the circuit courts decided each case based on the facts presented. It may be true that the Supreme Court in *Swint* declined to settle "whether or when it may be proper for a court of appeals" to exercise its pendant, appellate jurisdiction. But there is no well-developed split of authority between the circuits as to the proper interpretation of this Court's decision in *Swint*.

Instead, the circuits consider the facts of each case, as the Sixth Circuit did here, to decide whether the claims of the municipal defendant are inextricably intertwined with the claims against the individual defendants. In this case, the Sixth Circuit found that the claims were not so inextricably intertwined as to justify the exercise of its pendant, appellate jurisdiction. Specifically, the Sixth Circuit held that:

> We also disagree with the notion that Moldowan cannot make out a claim against the City under Count XXVI because he cannot show any constitutional violation on the part of Officer Schultz. Although Officer Schultz did not violate Moldowan's constitutional rights by destroying the case evidence, Moldowan nevertheless may be able to show that: "the individual with final policy-making authority who directed . . . the destruction of the evidence" was aware of the materiality of the evidence, and thus did violate Moldowan's rights under *Trombetta* and *Youngblood*. Thus, at this stage at least, we are not inclined to grant summary judgment on that basis. Pet. App. 77a.

As the Sixth Circuit makes clear, it did not find that Respondent's failure to preserve claim against Petitioner City was dependent on Respondent's claim against the individual who destroyed the evidence in question. Having so concluded, the Sixth Circuit's decision was proper and consistent with this Court's precedents.

CONCLUSION

There are no compelling reasons to grant the petition for writ of certiorari. Consistent with this Court's decisions in *Brady*, *Agurs*, *Trombetta*, and *Youngblood*, the Sixth Circuit held that a police officer violates an individual's due process rights by failing to disclose evidence the exculpatory value of

which is apparent. The Sixth Circuit's decision on this point is completely consistent with Supreme Court precedent, and contrary to Petitioners' contentions, there is no meaningful or well-developed split of authority between the circuit courts of appeals on this point of law. Furthermore, there is no split of authority as to the circuit courts' pendant, appellate jurisdiction.

For these reasons, Respondent asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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