No. ________

In The
Supreme Court of the United States

KAREN THOMPSON, PETITIONER

v.

KELLY SOO PARK.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that unless the evidence would have been "material" to the defense, government interference with its introduction does not violate the Sixth Amendment right to compulsory process. And in a variety of contexts the Court has explained that evidence is material only if there is a reasonable probability that its introduction would have led to a different outcome at trial. The courts of appeals are divided on whether a criminal defendant who was acquitted can pursue civil damages from an officer who allegedly interfered with the introduction of defense evidence. The Ninth Circuit is alone among the courts of appeals in answering that question in the affirmative. The question presented is:

Did the Ninth Circuit err in holding that evidence can be material for purposes of a Section 1983 claim alleging deprivation of compulsory process or denial of a fair trial when the defendant was acquitted at trial?

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U.S. CONSTITUTION & STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 851 F.3d 910. The opinion of the district court (App., *infra*, 43a-56a) is unreported.

JURISDICTION

The court of appeals entered its judgment on March 14, 2017. Detective Thompson's timely petition for rehearing was denied on May 24, 2017. App., *infra*, 57a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compulsory Process Clause of the Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor * * * .

U.S. CONST. amend. VI.

Section 1983 of Title 42 provides:

> 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 * * * .

42 U.S.C. § 1983.

INTRODUCTION

The courts of appeals are divided on an important question of Section 1983 liability. Can evidence be "material" for purposes of a Section 1983 claim alleging government interference with a criminal defendant's evidence if the defendant was acquitted at trial? Alone among the circuits, the Ninth Circuit has answered that question affirmatively. This petition offers the Court the opportunity to resolve the circuit conflict while correcting the Ninth Circuit's erroneous and unworkable understanding of materiality.

This Court has interpreted the Compulsory Process Clause of the Sixth Amendment to protect a criminal defendant's right to call defense witnesses. Government interference with the appearance of such witnesses can violate that right—but only if their testimony would have been both favorable and material to the defense.

The acknowledged conflict in the courts of appeals involves the materiality requirement. In considering compulsory process claims in criminal cases—as well as other claims involving new or withheld evidence—this Court has held that materiality is judged against the outcome at trial. If there is no reasonable probability that the evidence in question would have changed the result, there is no materiality and thus no constitutional violation.

But the Ninth Circuit here held that defense evidence could be material even when the criminal defendant was *acquitted*. In that scenario, there is zero probability that additional defense evidence would have led to a hypothetical different outcome—the acquittal would remain an acquittal. Yet Judge Reinhardt's opinion for the court of appeals held that the acquitted defendant could still collect Section 1983 damages for interference with her right to put on a defense. The Ninth Circuit's theory was that the interference could be material if it affected the "trajectory" of the trial, even if not its ultimate destination.

The Ninth Circuit acknowledged that its holding on this question conflicts with the rule in other courts of appeals. Consistent with this Court's outcome-based test for materiality, every other circuit to have addressed the question categorically declines to impose Section 1983 liability for evidence-based claims after trials won by the criminal defendant. As those courts explain, there is no constitutionally cognizable unfairness in a trial that ends in acquittal. The Ninth Circuit here erred by concluding otherwise and exposing police officers and their departments to civil liability they would not face in any other circuit.

Rejecting the Ninth Circuit's novel and unworkable standard will not leave criminal defendants unprotected from wrongful government conduct. Convicted defendants can still obtain relief under this Court's well-established materiality standard, and acquitted defendants can assert claims for malicious prosecution and false arrest if they can establish the requisites for such claims. Respondent here, however, disclaimed any such claim, and there was no ground to alter well-settled law to allow the ill-fitting claim she did press to proceed.

This Court should grant this petition and reverse, either summarily or with full briefing and argument.

STATEMENT

This case involves two proceedings: respondent Kelly Soo Park's criminal trial, which ended in acquittal, and her subsequent Section 1983 suit against petitioner Detective Thompson.

A. Park's Criminal Trial

Juliana Redding was strangled to death during a violent struggle in her home in Santa Monica, California. App., *infra*, 6a. Petitioner, a detective with the

Santa Monica Police Department, was the lead investigator for the crime. *Ibid*. "After a few months passed without any leads as to who was responsible for Redding's death, Detective Thompson requested permission from [the police department] to continue investigating on her own time." *Ibid*. Detective Thompson ultimately received a medal of merit from the Santa Monica Police Department for her work on the case. ER658.

Detective Thompson matched DNA recovered from Redding's neck, clothing, and apartment to Park. App., *infra*, 6a. The Los Angeles County District Attorney's Office charged Park with Redding's murder. *Ibid*. Park posted bail and remained free pending trial. ER74.

The Santa Monica Police Department had ruled out Redding's boyfriend, John Gilmore, as a suspect because there was no physical evidence linking him to the murder scene and because he had a verified alibi (documented in part by surveillance video). ER439-41, ER447-48. In preparing her defense, Park nevertheless sought to show that Gilmore killed Redding. Park planned to base this claim on allegations that Gilmore had a history of violence and had previously assaulted Redding. App., *infra*, 6a.

In preparation for trial, Park's investigator interviewed Gilmore's former girlfriend, Melissa Ayala, whom Gilmore had begun dating after Redding's death. App., *infra*, 7a; ER2 n.3. Ayala allegedly told the investigator that Gilmore had choked her three times and that on one of those occasions Gilmore stated: "You want to see how she [Redding] felt?" App., *infra*, 7a. On another occasion, Gilmore allegedly stated: "Going to show you how [Redding] felt." ER2; App., *infra*, 7a. Park notified the prosecution of her intent to call Ayala as a defense witness at trial. App., *infra*, 7a.

A week after Park's investigator spoke with Ayala, Detective Thompson called Ayala and recorded their conversation. ER407-32. Detective Thompson's call to Ayala forms the basis of Park's claim that Detective Thompson violated Park's constitutional rights.

Park alleges that Detective Thompson tried to dissuade Ayala from testifying for the defense. App., *infra*, 7a.[1] Detective Thompson allegedly told Ayala that Gilmore was "really upset" about Ayala's statements to Park's investigator. *Ibid*. Detective Thompson explained to Ayala the reasons the police believed Park, not Gilmore, murdered Redding. ER409-14, 421-22, 428-30.

Detective Thompson also explained that the defense "might put you on the stand and ask you to testify about the domestic violence incident." ER423. Ayala asked: "So if these people come like trying to call me or come back again, what am I supposed to—" ER424. Detective Thompson responded: "You are under no legal obligation at all to speak to them."

[1] Although Detective Thompson disputes this characterization (*accord* App., *infra*, 37a-40a (Fernandez, J., concurring in part and dissenting in part)), she does not seek review on that issue.

ER424-25. Detective Thompson explained: "[Y]ou don't have to talk to them if you don't want to. You—if they call you, you don't even need to call back. * * * You're not under any obligation to do anything." ER428; App., *infra*, 8a. Detective Thompson also explained: "[Y]ou are under an obligation to appear if you get a subpoena from the court." ER427. And if subpoenaed, "you have to tell the truth." ER428.

Park also alleges "[o]n information and belief" that Detective Thompson and/or Defendant Does spoke with a different police department (in El Segundo, California) about filing charges against Ayala, based on an earlier incident, for assault and criminal threats against Gilmore. App., *infra*, 8a. Park alleges that Detective Thompson encouraged the filing of those charges so that Ayala would invoke the Fifth Amendment if asked about Gilmore's statements. App., *infra*, 8a-9a. Ayala was charged a few weeks before Park's trial. App., *infra*, 9a; ER594-603.

Before Park's murder trial, the prosecution sought to exclude third-party-culpability evidence—*i.e.*, evidence that Gilmore supposedly murdered Redding. ER436-53. At a hearing on the motion, the defense tried to establish its entitlement to present such evidence by subpoenaing and calling Ayala to testify. ER303-06. Park alleges that before the hearing, "[i]n a discussion outside of the courtroom between Ms. Ayala's criminal defense attorney and the Deputy District Attorney assigned to [Park's] criminal case, the Deputy District Attorney threatened to 'recuse' the defense attorney if he did not instruct Ms. Ayala to invoke

[her] Fifth Amendment right against self-incrimination." ER642; *see* App., *infra*, 9a. At the hearing, Ayala invoked the Fifth Amendment and declined to testify. App., *infra*, 9a. The court ultimately excluded third-party-culpability evidence because the defense had failed to connect Gilmore to the murder. *Ibid*.; ER397-98.

Park moved to dismiss the indictment based on Detective Thompson's supposedly "astonishing and outrageous" conduct. ER523. The court heard testimony from the El Segundo Police Department detective who had investigated the case against Ayala and from the Los Angeles County prosecutor who had filed the charges against Ayala. ER263-82. Both testified they had no contact with Detective Thompson or anyone else at the Santa Monica Police Department concerning Ayala's case. ER267, 279-80. The court also listened to the recording of Detective Thompson's call with Ayala. ER313. The court found that nothing in "the taped interview of Thompson and Ayala rise[s] to the level of some kind of misconduct." ER314-15; *see* ER316 ("I don't find that there was misconduct on the part of Detective Thompson.").

Park was tried and acquitted of all charges. App., *infra*, 9a.

B. Park's Section 1983 Suit For Damages

1. Proceedings before the district court

After her acquittal, Park filed suit under 42 U.S.C. § 1983 against Detective Thompson and "Defendant

Does 1-10," asserting: (1) violation of her right to compulsory process under the Sixth Amendment and her right to a fair trial under the Fourteenth Amendment and (2) conspiracy to commit those same purported violations. App., *infra*, 10a.

Park expressly "seeks no damages for malicious prosecution or for her incarceration pending trial." ER647. Rather, she complains about the process that ended in her desired result: acquittal. App., *infra*, 10a.

In particular, Park "seek[s] damages for the emotional distress caused to her from having her ability to present the most complete defense interfered with." ER647. Park alleges on information and belief that if Ayala had testified at Park's trial, the jury would have more "*quickly* reached a verdict of not-guilty" than it did in her actual trial. ER645 (emphasis in complaint).

The district court granted Detective Thompson's motion to dismiss. App., *infra*, 10a. The court concluded that Park "had not pleaded sufficient facts leading to a reasonable inference that it was [Detective Thompson's] alleged persuasion that caused Ayala not to testify." *Ibid*.; *see* App., *infra*, 53a.

The district court also observed that "[t]o establish a violation of the Sixth Amendment right to compulsory process, the defendant must make a 'plausible showing of how [a witness's] testimony would have been both material and favorable to his defense.'" App., *infra*, 51a (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). The court held that Park failed to show how Ayala's testimony would have been "material": had Ayala testified, Park "would have obtained the same result—she would have been acquitted." App., *infra*, 53a; *see* App., *infra*, 10a-11a. Finally, the district court concluded that Park's conspiracy claim failed for the same reason as her substantive claims. App., *infra*, 55a.

2. Proceedings before the Ninth Circuit

A divided panel of the Ninth Circuit reversed. In an opinion by Judge Reinhardt, the majority concluded that Park stated claims for constitutional violations despite her acquittal. App., *infra*, 22a-33a. The court acknowledged that a plaintiff asserting a compulsory process claim must demonstrate, among other things, that the wrongfully barred testimony would have been "material." App., *infra*, 15a, 22a-23a. The court observed, however, that Ninth Circuit precedent "clearly explains that an acquittal does not bar a Section 1983 action based on a due process violation during an underlying criminal proceeding." App., *infra*, 23a. For that proposition, the court cited *Haupt v. Dillard*, a case that did not involve the right to compulsory process but instead involved allegations that prosecutors "intimidated the [trial] judge into changing his jury instructions." 17 F.3d 285, 287 (9th Cir. 1994). The court reasoned that Ayala's testimony was material under the Ninth Circuit's standard because Detective Thompson's "alleged interference with [Park's] key witness entirely deprived Park of her principal defense, thereby altering the entire trajectory of her criminal trial." App., *infra*, 25a; *see* App., *infra*, 32a ("[W]ere Ayala to have testified that Gilmore choked her while referring to Redding's death, it would have been sufficient to permit Park to present a third party culpability defense under California law.").

The Ninth Circuit acknowledged that its decision conflicts with decisions from other courts of appeals. First, the court "recognize[d] that the Eleventh Circuit has created a conflict with [the Ninth Circuit's decision in] *Haupt* in a subsequent compulsory process case." App., *infra*, 26a-27a (citing *Kjellsen v. Mills*, 517 F.3d 1232, 1239-40 (11th Cir. 2008)). As the Ninth Circuit explained, the Eleventh Circuit's approach "led that circuit to effectively bar all Section 1983 claims by acquitted defendants and thus to create a direct conflict with our precedent in *Haupt*." App., *infra*, 30a. The Ninth Circuit "s[aw] no reason, however, to abandon *Haupt* in favor of the Eleventh Circuit's approach in *Kjellsen,*" and thus applied *Haupt* to the compulsory process claim here. App., *infra*, 27a. The court stated that *Kjellsen* was "not only inconsistent with our binding precedent in *Haupt*, but also fails to recognize the distinction between a criminal prosecution and a Section 1983 action." App., *infra*, 27a-28a; *see* App., *infra*, 28a-30a (extended critique of Eleventh Circuit's approach in *Kjellsen*).

Second, the Ninth Circuit also recognized that "in the *Brady* context, the Sixth and Tenth Circuits have held Section 1983 claims are barred when the plaintiff was acquitted." App., *infra*, 27a n.16 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)); *see* App., *infra*, 31a-32a n.19 (calling this an "analogous question").

Judge Fernandez concurred in part and dissented in part. App., *infra*, 36a-42a. He reasoned that Detective Thompson did not act improperly and that Park's complaint did not sufficiently plead a nexus between Detective Thompson's conversation with Ayala and Ayala's refusal to testify. App., *infra*, 39a. Judge Fernandez did not reach the materiality question but stated he did "not disagree in principle" "that an acquittal may or may not ultimately preclude a constitutional claim; that will depend on the facts and circumstances of the particular case." App., *infra*, 41a.

The Ninth Circuit denied Detective Thompson's timely petition for rehearing en banc. App., *infra*, 57a.

REASONS THE PETITION SHOULD BE GRANTED

The Compulsory Process Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Court has interpreted this provision to embody a "right to offer the testimony of witnesses, and to compel their attendance, if necessary." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see id.* at 17-19 (right made applicable to States under the Fourteenth Amendment's Due Process Clause). But merely showing that government action prevented introduction of defense testimony does not establish a violation of this right. *See Valenzuela-Bernal*, 458 U.S.

at 867. Instead, there must also be a "plausible showing of how [the] testimony would have been both material and favorable to [the] defense." *Ibid.*

This petition focuses on this materiality requirement. The courts of appeals are divided on whether a criminal defendant who was acquitted can collect civil damages from an officer who allegedly interfered with the introduction of defense evidence. Here, the Ninth Circuit said yes, holding that evidence could be material if it would have "cast some doubt on the government's evidence" at trial, even if it would not have altered the ultimate result. But as the Eleventh Circuit has held (joined by three other circuits in the indistinguishable context of *Brady* claims), materiality must be judged against the trial's *outcome*. And when a trial ended in acquittal, additional defense evidence could not have made any difference. That means the evidence could not have been material, so there was no constitutional violation and thus no claim for civil damages.

A. The Circuits Are Divided On The Materiality Requirement for Claims Involving Access to Evidence

As the Ninth Circuit here expressly acknowledged (App., *infra*, 26a-27a), its decision stands apart from other courts of appeals on whether a criminal defendant's rights to compulsory process and a fair trial may be violated even when her trial ended in acquittal. The Ninth Circuit has answered that question affirmatively, but the Eleventh Circuit has held the opposite.

And in a logically indistinguishable context, the Sixth, Eighth, Tenth, and Eleventh Circuits have likewise held that acquittal is a bar to a Section 1983 claim alleging a *Brady* violation.

1. The Ninth Circuit first held that acquittal was no bar to a fair-trial claim in *Haupt*, a case that did not involve the right to compulsory process. There, the trial judge in the underlying criminal case stated that he intended to give the jury an instruction advising acquittal. 17 F.3d at 287. The prosecutor responded that the victim's blood "would be on the judge's hands" if he gave that instruction, and a detective telephoned the judge to call the jury instruction "ridiculous." *Ibid.* Before charging the jury, the judge stated on the record that he "felt 'threatened' and 'intimidated' " and that he would " 'not dare now give the advisory verdict of acquittal.' " *Ibid.* Yet the jury still acquitted Haupt. *Ibid.*

Haupt brought a Section 1983 claim alleging, among other things, that the prosecutor's and detective's actions had violated his Fourteenth Amendment right to a fair trial. *Ibid.* The district court granted summary judgment to defendants, holding that "the fact that [Haupt] was ultimately acquitted conclusively shows that he received a fair trial." *Ibid.* (brackets in original). The Ninth Circuit disagreed, holding that "the acquittal does not erase all injury." *Ibid.* The court stated that because of defendants' actions, "Haupt did not get the unbiased judge to which he was entitled." *Ibid.* According to the court, "[t]he fact that Haupt ultimately was acquitted speaks only to the amount of damages he suffered; it is irrelevant to whether he has a cause of action." *Ibid.*

Here, the Ninth Circuit adhered to what it viewed as "the established law of [that] circuit," explaining that its "binding precedent clearly explains that an acquittal does not bar a Section 1983 action based on a due process violation during an underlying criminal proceeding." App., *infra*, 23a (citing *Haupt*).[2] Instead of assessing materiality in light of the trial's ultimate outcome, the Ninth Circuit instead asked whether "the state's alleged interference" had altered the "trajectory" of Park's trial. App., *infra*, 25a. Applying that "trajectory" test, the court held that Park adequately alleged constitutional violations based on the alleged suppression of testimony "depriv[ing]" Park of "her principal defense"—"regardless of the fact that she was eventually acquitted." App., *infra*, 25a, 26a.

2. By contrast, the Eleventh Circuit in *Kjellsen* held that a compulsory process claim necessarily fails when the criminal trial ended in acquittal. 517 F.3d at 1238-40; *see* App., *infra*, 26a-27a (Ninth Circuit's recognition of the conflict with *Kjellsen*). There, Kjellsen was arrested and charged with "per se DUI," which

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[2] Although there was no compulsory process claim in *Haupt*, the court of appeals nevertheless found *Haupt* controlling here. App., *infra*, 23a-24a. The court observed that Park asserts a due process/fair trial claim, which "necessarily incorporates her compulsory process claim." App., *infra*, 24a. The court thus held that its "analysis of Park's overlapping compulsory process and due process claim is essentially the same, and her acquittal does not bar either one." *Ibid*. (internal citation omitted); *see* App., *infra*, 13a n.8.

required a blood-alcohol concentration of .10 or higher, and "Less Safe DUI," which did not require any specific blood-alcohol level. 517 F.3d at 1235. Shortly after Kjellsen's arrest, the crime lab performed two tests on Kjellsen's blood samples, yielding results just over .10. *Ibid.*

Kjellsen later asked the crime lab to release the blood samples to his expert for independent testing. Before doing so, the lab performed additional tests, all of which yielded results below .10. *Id.* at 1235-36. But the crime lab did not disclose these new results to the prosecutor or the defense before trial. *Id.* at 1236. Instead, the crime lab toxicologist revealed them for the first time on the stand at trial. *Ibid.*

The trial judge then granted Kjellsen a directed verdict on the per se DUI charge, and the jury acquitted him on the Less Safe DUI charge. *Ibid.* Kjellsen later brought a Section 1983 claim, alleging that the crime lab had violated his Sixth Amendment rights by failing to reveal the retest results, thus depriving him of his right to call witnesses and present that evidence. *Ibid.*

The Eleventh Circuit held that Kjellsen could not establish a constitutional violation because the failure to reveal the test results was not material in light of his acquittal. *Id.* at 1239-40. The court explained that the materiality standard requires a showing of "a 'reasonable probability of a different result,' or, in other words, that the suppression of evidence 'undermines confidence in the outcome of the trial.'" *Id.* at 1239 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). Materiality thus should not be evaluated "at the time of the alleged compulsory process violation" but rather retrospectively: "[o]nly at the post-trial stage can there be a 'result' to be differed from or an 'outcome' to be doubted." *Ibid.* Because Kjellsen was not convicted, "[a]ny additional testimony presented in Kjellsen's favor would not have achieved a better result." *Ibid.* The court thus held that the materiality standard was not met. *Id*. at 1240.

3. As the Ninth Circuit recognized, its decision also conflicts with decisions from other circuits in the indistinguishable *Brady* context—*i.e.*, where the prosecution allegedly failed to turn over potentially exculpatory evidence. App., *infra*, 27a n.16 (citing *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988)); *see Mosley v. City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010) (likewise recognizing the conflict between the Ninth Circuit's decision in *Haupt* and other circuits' decisions barring recovery for alleged *Brady* violations after acquittal).

The Ninth Circuit stated that whether a *Brady* claim survives an acquittal is "an analogous question" to the one here. App., *infra*, 31a-32a n.19. In fact, it is the same question. This Court has explained that both *Brady* and compulsory process claims involve "constitutionally guaranteed access to evidence." *Valenzuela-Bernal*, 458 U.S. at 867. And because of that link, the

Court expressly adopted the *Brady* materiality requirement for compulsory process claims. *See id.* at 868 (citing *Brady* and decisions applying it as rationale for requiring materiality for compulsory process claim). As this Court explained, "[h]aving borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim." *Id.* at 872.

The Ninth Circuit was correct to acknowledge that its decision conflicts with decisions of other courts of appeals holding that the absence of a conviction dooms a *Brady*-based Section 1983 claim.

In *Morgan v. Gertz*, the state had destroyed exculpatory evidence before a criminal trial. 166 F.3d at 1308. Although the jury voted to convict, the trial judge entered a judgment of acquittal based on the state's destruction of the evidence. *Id.* at 1308-09. The acquitted defendant then brought a Section 1983 claim, but the district court dismissed it, holding that the "judgment of acquittal provided [plaintiff] all the remedy to which he was entitled." *Id.* at 1309. The Tenth Circuit affirmed: "[r]egardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial." *Id.* at 1310.

Likewise, the Sixth Circuit held that a criminal defendant is not "injured by the act of wrongful suppression of exculpatory evidence" when "the underlying criminal proceeding terminated in [his] favor." *McCune*, 842 F.2d at 907. And the Eleventh Circuit (consistent with *Kjellsen*) has held that someone "never convicted" could not have "suffer[ed] the effects of an unfair trial" and thus may not recover damages for an alleged *Brady* violation. *Flores*, 137 F.3d at 1278. Finally, although not cited by the Ninth Circuit here, the Eighth Circuit similarly has concluded that there can be "no *Brady* violation" when the Section 1983 plaintiff was "not convicted." *Livers v. Schenck*, 700 F.3d 340, 359 (8th Cir. 2012).[3]

4. The conflict between the Ninth Circuit and the other courts of appeals is now entrenched. The Ninth Circuit adopted its position in *Haupt* more than 20 years ago. Despite Detective Thompson's argument here that *Haupt* is irreconcilable with Supreme Court precedent (Pet. CA Br. 46-53), or should apply only to

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[3] The Seventh Circuit has said it is "doubtful * * * that an acquitted defendant can ever establish the requisite prejudice for a *Brady* violation." *Carvajal v. Dominguez*, 542 F.3d 561, 570 (7th Cir. 2008). But that court has formally "reserve[d]" the question, holding that "if such a claim exists, the plaintiff would need to show that the decision to go to trial would have been altered by the desired disclosure." *Mosley*, 614 F.3d at 397. Park has not alleged that the evidence from Ayala would have avoided a trial. ER647 (disclaiming malicious prosecution). Nor has respondent asserted a Fourth Amendment claim for unlawful seizure based on her evidentiary allegations. ER647 (respondent disclaiming any damages for "incarceration pending trial"); *cf. Manuel v. City of Joliet*, 137 S. Ct. 911 (2017).

particularly egregious conduct (Pet. CA Br. 54), the Ninth Circuit panel unreservedly reaffirmed *Haupt* and extended it to claims involving the right to compulsory process. In doing so, the court provided both an extended defense of *Haupt* and a critique of the Eleventh Circuit's contrary conclusion. App., *infra*, 22a-31a. The Ninth Circuit then denied Detective Thompson's rehearing request, forgoing the opportunity to conform its law to that of other circuits (and this Court). *See* Pet. for Reh'g 2, 10-17 (seeking en banc review in light of the circuit conflict). And there is no reason to believe the courts in the majority would revisit their precedent to align with the outlier Ninth Circuit.

B. The Ninth Circuit's Interpretation Of The Materiality Requirement Is Wrong

The Ninth Circuit's novel materiality standard is incompatible with this Court's precedent.

1. This Court has explained that a criminal defendant "cannot establish a violation of his constitutional right to compulsory process merely by showing" that he was deprived of testimony. *Valenzuela-Bernal*, 458 U.S. at 867. Rather, the defendant "must at least make some plausible showing of how [the] testimony would have been both material and favorable" to the defense. *Ibid.* In particular, a defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony." *Id.* at 871.

The Court has consistently explained that materiality must be assessed against the criminal proceeding's outcome. In *Valenzuela-Bernal*, where the testimony in question would have come from an alien who had been deported, the Court explained that there would be a constitutional violation "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 874. As noted above, the Court in *Valenzuela-Bernal* understood the materiality requirement for a compulsory process claim to be the same as for a *Brady* claim, because both involve "constitutionally guaranteed access to evidence." *Id*. at 867. And to establish a *Brady* violation, *Valenzuela-Bernal* noted, materiality is also result-oriented. *Id.* at 868. The accused must show " 'that the suppressed evidence might have affected the outcome of the trial.' " *Ibid.* (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)); *see Smith v. Cain*, 565 U.S. 73, 75 (2012) ("[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (quoting *Cone v. Bell*, 556 U.S. 449, 469-70 (2009))).

When a defendant is acquitted at trial (or otherwise secures a favorable termination of the criminal proceeding), that materiality standard cannot be satisfied. The result of the proceeding—acquittal—could not have been any different if more defense evidence had been introduced. *See Kjellsen*, 517 F.3d at 1239.

2. Here, the Ninth Circuit applied a starkly different—and incorrect—materiality standard. According to that court, the alleged interference with Ayala's testimony was material because it "deprived Park of her principal defense, thereby altering the entire trajectory of her criminal trial"—regardless of her ultimate acquittal. App., *infra*, 25a. But a "principal defense" does not exist for its own sake; it is a means to an end—acquittal. And when the criminal defendant has already secured that favorable result, no additional defense evidence could possibly be material.

The Ninth Circuit cited no precedent (other than its own decision in *Haupt*) for its novel materiality standard. The absence of decisions illuminating and applying this "trajectory" standard deprives district courts of needed guidance. That opens the door to manipulation and inconsistent results. As this Court explained in rejecting a previous attempt by the Ninth Circuit to water down the materiality standard for compulsory process claims, "[t]o us, the number of situations which will satisfy this test is limited only by the imagination of judges or defense counsel." *Valenzuela-Bernal*, 458 U.S. at 866-67 (discussing Ninth Circuit's conclusion that testimony in question need only have a "conceivable benefit" to criminal defendant to be a basis for compulsory process claim).

For example, Park alleges that, with introduction of the evidence at issue, the jury would have more "*quickly* reached a verdict of not-guilty" than it actually did. ER668 (emphasis in complaint). She does not answer critical questions, however, about this temporal theory of materiality. To be material, how great must the time difference be between the real jury's acquittal and the acquittal reached by the hypothetical jury that heard the testimony in question? And how is a court supposed to calculate how much more quickly acquittal would have come with the hypothetical evidence? Here, Park speculates that with Ayala's testimony, "the jury would have acquitted [Park] the first day of deliberation," rather than taking "one and one half weeks" to do so. ER668-69. But her complaint is silent on how she arrived at that counter-factual.

Such concerns about administrability led this Court to reject a materiality standard for ineffective assistance of counsel claims very similar to the one endorsed by the Ninth Circuit here. When considering the "prejudice" element of an ineffective assistance of counsel claim, the Court rejected the suggestion that an attorney's error could satisfy the prejudice requirement when it had merely "'impaired the presentation of the defense.'" *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (citation omitted). The Court explained that this test "provides no workable principle." *Ibid.* "Since any error, if it is indeed an error, 'impairs' the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding." *Ibid.* Instead, the Court adopted the materiality standard for compulsory process and *Brady* claims: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694 (citing *Valenzuela-Bernal*, 458 U.S. at 872-74; *United States v. Agurs*, 427 U.S. 97, 104, 112-13 (1976)).

The Court has observed that this outcome-oriented standard is a familiar one, frequently applied by lower courts when evaluating a variety of alleged constitutional violations. *See Boyde v. California*, 494 U.S. 370, 380 n.4 (1990) (noting that this standard is used for compulsory process claims, *Brady* claims, ineffective assistance of counsel claims, and when a defendant seeks a new trial based on newly discovered evidence). There is no reason why the constitutional claim at issue here should be the sole one governed by a wholly different materiality standard.

3. The Ninth Circuit further erred by holding that "materiality must have a different meaning" in a criminal case when the defendant seeks reversal of her conviction than in a Section 1983 case when the now-plaintiff seeks compensation for a constitutional deprivation during her earlier criminal trial. App., *infra*, 30a. According to the Ninth Circuit, "[t]he fact that a defendant was acquitted has little to do with whether the trial was fair, and therefore has little to do with materiality in the context of a Section 1983 claim." App., *infra*, 29a (citation omitted).

No basis exists for that distinction. Section 1983 provides a remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. "[T]hat section is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *see Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979) ("[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything. * * * § 1983 does not provide any substantive rights at all."). The first question in any Section 1983 case is thus whether there has been a constitutional violation. *Baker*, 443 U.S. at 140. The answer to that question is answered by the law governing the constitutional provision at issue—not by Section 1983.

In a case involving "constitutionally guaranteed access to evidence," materiality is an element of the constitutional claim (*Valenzuela-Bernal*, 458 U.S. at 867, 873-74), not (as the Ninth Circuit thought) an add-on applicable only in criminal cases. As this Court has explained, "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material.'" *Strickler v. Greene*, 527 U.S. 263, 281 (1999). But that shorthand is incorrect: "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Ibid.*

So too here. Park has no compulsory process or unfair trial claim unless she can establish there was a reasonable probability of a different outcome had she been able to introduce the evidence she claims the government suppressed. And without a constitutional claim, she has no Section 1983 remedy.

4. Finally, there is no policy justification for weakening the materiality requirement to allow acquitted defendants to assert claims involving constitutionally guaranteed access to evidence. The existing requirement is sufficient to deter law enforcement officials from interfering with defense evidence, as such conduct can result in both the setting aside of criminal convictions and potential civil liability to convicted defendants. And government officials can still be held accountable to acquitted defendants, who can bring a malicious prosecution or false arrest claim if wrongfully blocked evidence "caused charges to be brought and maintained against [them], but no conviction has resulted." *Smith v. Almada*, 640 F.3d 931, 944 (9th Cir. 2011) (Gwin, J., specially concurring). Indeed, an acquittal or other favorable termination of the criminal case is a required element of a malicious prosecution claim. *See Heck v. Humphrey*, 512 U.S. 477, 484 (1994). But here, Park has disclaimed any malicious prosecution claim (ER647), leaving her with only a compulsory process claim that is precluded by her acquittal.[4]

[4] Because Park's Section 1983 claim is barred by her acquittal, so too is her conspiracy claim. *Lacey v. Maricopa County*, 693 F.3d 896, 935 (9th Cir. 2012) (en banc) ("Conspiracy is not itself a constitutional tort under § 1983. It does not enlarge the nature of the claims asserted by the plaintiff, as there must always be an underlying constitutional violation.").

C. The Issue Is Important, And The Rule Should Be Uniform Throughout The Nation

Issues concerning civil liability for public officials' acts are exceptionally important—not just to the parties, but to the broader public. "[P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) ("Claims against federal officials often create substantial costs, in the form of defense and indemnification. * * * In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered."). The Ninth Circuit's rule expands public officers' liability, making officers and their departments subject to potential claims and liability for the way they conduct investigations, even when a defendant is acquitted. And it does so in a way that is unworkable, unpredictable, and erroneous.

As a result, public officials in the Ninth Circuit are subject to a civil suit and liability under Section 1983 even where there has been no constitutionally cognizable harm. Officials in no other circuit face liability in these circumstances. That warrants this Court's review.

D. This Court May Wish To Consider Summarily Reversing The Ninth Circuit's Decision

The Ninth Circuit's deviation from this Court's materiality standard is so clear and substantial that this Court may wish to consider summarily reversing. *See Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary reversal is appropriate when "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error"); *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (per curiam) (Scalia, J., dissenting) (same).

As discussed above, this Court has repeatedly pronounced in unmistakable terms that in cases involving a criminal defendant's access to evidence, the materiality requirement mandates a showing "that the suppressed evidence might have affected the outcome of the trial." *Valenzuela-Bernal*, 458 U.S. at 868; *see Cain*, 565 U.S. at 75; *Cone*, 556 U.S. at 469-70; *Kyles*, 514 U.S. at 434; *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Agurs*, 427 U.S. at 104. This Court recently described the materiality standard as "legally simple." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017).

Yet the Ninth Circuit here adopted a completely different materiality standard. Under that "trajectory" test, alleged interference with testimony can be material even when the defendant was acquitted and thus the outcome of the trial could not possibly have changed. And the Ninth Circuit's view that there could be one materiality standard in a criminal appeal and a fundamentally different one for Section 1983 finds no support in this Court's precedent. The Ninth Circuit's decision is so fundamentally at odds with well-settled law that summary reversal would be appropriate.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted, and the Court may wish to consider summarily reversing.

Respectfully submitted,

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AUGUST 22, 2017

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KELLY SOO PARK, *Plaintiff-Appellant,* v. KAREN THOMPSON, *Defendant-Appellee.*	No. 14-56655 D.C. No. 2:14-cv-00330-SJO-RZ OPINION

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted October 4, 2016
Pasadena, California

Filed March 14, 2017

Before: Stephen Reinhardt, Ferdinand F. Fernandez, and John B. Owen, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent
by Judge Fernandez

SUMMARY*

Civil Rights

The panel reversed the district court's dismissal of a complaint and remanded in an action against City of Santa Monica Police Detective Karen Thompson and Doe defendants alleging defendants violated and conspired to violate plaintiff's right to compulsory process and a fair trial by intimidating and attempting to dissuade a key witness from testifying on behalf of the defense.

The panel held that plaintiff adequately alleged misconduct by Thompson that rose to the level of substantial interference with a defense witness in contravention of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The panel further held that plaintiff adequately pleaded that Thompson's misconduct caused the witness to refuse to testify. The fact that plaintiff was eventually acquitted did not render the witness testimony immaterial, nor did it bar plaintiff's Section 1983 action stemming from violations of her rights during the underlying criminal investigation and prosecution. The panel concluded that the witness's testimony was material to plaintiff's defense because evidence of third-party culpability would have

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

cast some doubt on the government's evidence at plaintiff's trial. Finally, the panel held that plaintiff pleaded sufficient facts to state a plausible claim for civil conspiracy under Section 1983.

Concurring in part and dissenting in part, Judge Fernandez stated that the complaint's mere general pleading that there was some sort of nexus between Thompson's action and the witness's decision not to testify was conclusory and insufficient. Judge Fernandez did not think that there was a proper allegation of a substantive violation, and did not believe that a conspiracy was effectively alleged. He agreed with the majority that the issue of qualified immunity should be remanded to the district court for its consideration in the first instance.

COUNSEL

Becky S. James (argued) and Jessica W. Rosen, James & Stewart LLP, Pacific Palisades, California, for Plaintiff-Appellant.

Anthony P. Serritella (argued), Deputy City Attorney; Marsha Jones Moutrie, City Attorney; Jeanette Schachtner, Chief Deputy City Attorney; Santa Monica City Attorney's Office, Santa Monica, California, for Defendant-Appellee.

OPINION

REINHARDT, Circuit Judge:

Kelly Soo Park was tried by the state of California for the murder of Juliana Redding. Before trial, the judge ruled that she would not allow Park to present any evidence of third-party culpability after Park's key witness on that question, Melissa Ayala, invoked her Fifth Amendment privilege and refused to testify. Park was eventually acquitted of all charges.

Park then sued Detective Karen Thompson and Doe Defendants under 42 U.S.C. § 1983. Park alleged in her first claim that Thompson violated her constitutional rights to compulsory process and a fair trial by intimidating and attempting to dissuade Ayala from testifying on behalf of the defense. Park asserted a second claim against Thompson and Doe Defendants for conspiracy to violate her civil rights under 42 U.S.C. § 1983 by orchestrating criminal charges against Ayala with the intention that she invoke the Fifth Amendment and refuse to testify on Park's behalf.[1] The district court dismissed both causes of action for failure to state a claim, and Park appeals.[2]

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[1] Although the two claims as alleged in the pleadings are intermingled and overlapping, we treat them separately for purposes of this opinion. On remand, the parties and the district court may decide to analyze them together should that prove preferable.

[2] The present appeal addresses the dismissal of Park's amended complaint, which she filed after the district court dismissed her original complaint with leave to amend. For the sake

This appeal presents several issues of law. First, we must decide whether Park has adequately alleged misconduct by Thompson that rises to the level of substantial interference with a defense witness in contravention of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Because we hold that Park has adequately alleged such misconduct, we must decide a second issue: whether Park adequately pleads that Thompson's misconduct caused Ayala to refuse to testify. We hold that Park has pleaded a sufficient causal connection between Thompson's misconduct and Ayala's unavailability. Third, we must consider whether Park nonetheless failed to state a claim because Ayala's purported testimony was not favorable and material to her criminal defense. We hold that the fact that Park was eventually acquitted does not render Ayala's testimony immaterial, nor does it bar Park's Section 1983 action stemming from violations of her rights during the underlying criminal investigation and prosecution. Furthermore, we conclude that Ayala's testimony was material to Park's defense because evidence of third-party culpability would have cast some doubt on the government's evidence at Park's trial. Finally, we must make similar determinations with respect to Park's conspiracy claims. Here, we also hold the allegations sufficient.

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of clarity, we hereinafter refer to the amended complaint as "the complaint."

In view of the above, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

On March 15, 2008, Juliana Redding was strangled to death in her home in Santa Monica, California. Detective Karen Thompson of the Santa Monica Police Department ("SMPD") was the lead investigator on the Redding case. After a few months passed without any leads as to who was responsible for Redding's death, Detective Thompson requested permission from SMPD to continue investigating on her own time. She eventually matched DNA found on Redding's body to Park. The Los Angeles County District Attorney's Office ("District Attorney") consequently charged Park with Redding's murder.

Park's murder trial was set for May of 2013. As part of her criminal defense, Park sought to introduce evidence that Redding's killer was actually John Gilmore, the victim's boyfriend at the time of her death. Gilmore had a history of domestic violence and had previously assaulted Redding.[3]

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[3] Most of the facts set forth in this section are historical and not likely to be a subject of dispute. Others may be disputed, but with regard to the first claim, all are adequately pleaded in the complaint and thus sufficient to defeat Thompson's motion to dismiss. For purposes of this opinion only, we deem them all to be true. We consider separately the facts that relate to the conspiracy

On January 31, 2013, Park's investigator interviewed Gilmore's former girlfriend, Melissa Ayala. During that interview, Ayala told the investigator that Gilmore had been violent toward her and had choked her on at least three occasions. According to Ayala, the first of these incidents occurred after Ayala brought up Redding's death and accused Gilmore of murdering Redding. Before choking Ayala, Gilmore responded, "You want to see how she [Redding] felt?" On the second occasion, after Ayala again accused Gilmore of murdering Redding, he stated, while choking Ayala, that he was "[g]oing to show [Ayala] how [Redding] felt." Gilmore was convicted of domestic violence against Ayala. During the interview with Park's investigator, Ayala said she was afraid of Gilmore, but she agreed to testify about his violent behavior and the statements he made about Redding's death.

After learning of this potentially exculpatory evidence, Park gave notice to the District Attorney of her intention to call Ayala as a defense witness at trial. Detective Thompson then contacted Ayala and attempted to dissuade her from testifying for the defense. Among other things, Thompson allegedly told Ayala that Gilmore—who had physically abused Ayala in the past—was "really upset" about her statements. Park also

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claim and are principally alleged on information and belief. As to that claim, we conclude that under all the circumstances, the allegations, with all the inferences that must be drawn in Park's favor, are sufficient to plead a plausible claim for conspiracy. Thus we assume those facts to be true as well, but again solely for the purpose of the motion to dismiss.

alleges that Thompson knowingly made false representations to Ayala about the nature of the evidence against Park.[4] In addition, Thompson allegedly told Ayala, "[Y]ou don't have to talk to them [defense investigators] if you don't want to . . . [I]f they call you, you don't even need to call back. . . . You're not under any obligation to do anything.".

Detective Thompson allegedly admitted that she "had *not* spoken to Ms. Ayala for investigatory purposes," but rather had called Ayala only to "repair the damage the Private Investigators had done to her relationship [with Gilmore]." After speaking with Detective Thompson, Ayala refused any further contact with Park's investigators, although prior to that conversation she had cooperated fully with them. Also, after the conversation, she reneged on her commitment to testify as a witness on Park's behalf.

On information and belief, Park alleges that Thompson and/or Defendant Does, at Thompson's instigation, later spoke with the El Segundo Police Department about filing charges against Ayala for assault and criminal threats against Gilmore based on an incident that had occurred during the previous year. Park alleges that Detective Thompson and/or Defendant Does told the El Segundo Police Department that it was important to file charges against Ayala as soon

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[4] For example, Thompson told Ayala that the police had found "blood on the front door handle . . . so the killer [Plaintiff] was injured during the struggle and she left her blood DNA on the door handle." A transcript of the phone call may be found at pages 407-432 of the excerpts of record.

as possible because the charges would cause her to invoke the Fifth Amendment, thereby precluding her from testifying about Gilmore's statements. Finally, Park alleges that as a result of this conversation, the District Attorney charged Ayala with felony conspiracy, assault, and criminal threats a few weeks before Park's scheduled trial.

On May 9, 2013, Ayala appeared in court pursuant to Park's subpoena to testify at trial. The Deputy District Attorney informed Ayala's defense attorney that if he did not instruct Ayala to invoke her Fifth Amendment right against self-incrimination, then she would move to "recuse" him. Ayala invoked her Fifth Amendment right and declined to testify.[5] After Ayala refused to testify, the judge presiding over the criminal case precluded the presentation of any evidence relating to Park's third-party culpability defense.

Park was tried and acquitted of all criminal charges. Park's defense counsel elicited favorable testimony from the prosecution's DNA expert, who testified that Park's DNA could have been transferred to Redding's body by the actual killer when he wiped down the apartment to eliminate fingerprints or DNA evidence. Park alleges that even though she was ultimately acquitted, her acquittal was far less certain in the absence of Ayala's testimony. Without that testimony, Park was precluded from presenting evidence of

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[5] Park's complaint also alleges that Detective Thompson interfered with two other witnesses, Park's associate Ronnie Case and Park's fiancé (now husband), Thomas Chronister. The district court decision does not mention these allegations.

third party culpability at trial and was limited to presenting solely a failure of proof defense.

II. Procedural History

Park filed her complaint in district court asserting two causes of action against Detective Thompson and Defendants Does 1-10: (1) deprivation of civil rights, 42 U.S.C. § 1983, by violation of the Sixth Amendment's Compulsory Process Clause and denial of her right to a fair trial under the Due Process Clause of the Fourteenth Amendment; and (2) conspiracy to violate civil rights, 42 U.S.C.§ 1983, alleging violation of the same two constitutional rights.[6]

The district court granted Detective Thompson's motion to dismiss the complaint without leave to amend. With respect to Park's claim against Thompson individually: first, the district court's opinion was not entirely clear as to whether the district judge held that Park had not adequately alleged that Thompson's conduct constituted substantial interference. Second, the district court concluded that Park had "not pleaded sufficient facts leading to a reasonable inference that it was Defendant's alleged persuasion that caused Ayala not to testify." Third, the district court concluded

[6] Park's original complaint also asserted a cause of action for declaratory relief, but she later voluntarily dismissed this claim. This appeal deals only with Park's Section 1983 claim against Thompson individually and her conspiracy claim against Thompson and others.

that the complaint failed to establish that Ayala's testimony would have been "material" to Park's third party culpability defense. The district judge reasoned that because Park would have obtained, and did obtain, the same result (acquittal), regardless of whether Ayala's testimony was presented to the jury, her Section 1983 claims were precluded. In addition, because Ayala's testimony was "not actually 'exculpatory evidence,'" the district judge concluded that its exclusion did not materially prejudice Park's defense. For the same reasons, as well as others, the district judge dismissed Park's conspiracy claim without leave to amend.[7]

Park appeals the district court's dismissal of her claim against Thompson individually and her conspiracy claim against Thompson and Doe Defendants.

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[7] Despite the fact that Park's complaint pleads a claim for civil conspiracy under Section 1983, the district court erroneously construed her conspiracy claim as a Section 1985 claim, apparently on the assumption that conspiracy claims must be brought under that section. The law is to the contrary. "[I]t is permissible to state a civil cause of action for conspiracy, based on § 1983." *Cohen v. Norris*, 300 F.2d 24, 27 (9th Cir. 1962). "Hence, the fact that conspiracy is alleged here does not mean that the plaintiff is invoking § 1985(3)." *Id.* The district court was incorrect to treat Park's conspiracy claim as a Section 1985 claim, given that she pleaded this claim under Section 1983 as permitted by our precedents and did not allege any "racially or otherwise 'invidiously discriminatory animus' behind the conspirator's action" as required under Section 1985(2), (3). *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980); *see also Bretz v. Kelman*, 773 F.2d 1026, 1029-30 (9th Cir. 1985) ("[A]n allegation of class-based animus is an essential requirement of a claim under the second clause of § 1985(2).").

STANDARD OF REVIEW

We review *de novo* a district court's dismissal for failure to state a claim under Rule 12(b)(6). *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). We accept the plaintiff's allegations as true and view them in the light most favorable to her. *New Mexico State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). "Conclusory allegations of law . . . are insufficient to defeat a motion to dismiss." *Lee*, 250 F.3d at 679. Moreover, dismissal is appropriate if the complaint fails to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

DISCUSSION

I. Section 1983 Claim for Violation of Sixth Amendment Right to Compulsory Process and Fourteenth Amendment Right to a Fair Trial

"To make out a cause of action under Section 1983, [the] plaintiff[] must plead that (1) the defendant[] acting under color of state law (2) deprived plaintiff[] of rights secured by the Constitution or federal statutes." *Williams v. California*, 764 F.3d 1002, 1009 (9th Cir. 2014) (internal quotation marks omitted). In the present case, it is undisputed that Detective Thompson was acting under color of state law. Consequently, Park's Section 1983 claim must be allowed to proceed if she pleaded sufficient facts to state a claim for violation of her constitutional rights under the Sixth and Fourteenth Amendments.[8]

The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI. The right to compulsory process encompasses "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary." *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). As "a fundamental element of due process of law," the right to compulsory process is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See id.* at 19, 20.

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[8] The analysis under the Sixth and Fourteenth Amendments is "nearly identical." *United States v. Bohn*, 622 F.3d 1129, 1137 n.5 (9th Cir. 2010); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) ("Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim."). "Therefore, we do not unduly concern ourselves with drawing fine distinctions between cases interpreting the Sixth Amendment Compulsory Process Clause and those interpreting the . . . Due Process Clause." *United States v. Juan*, 704 F.3d 1137, 1141 n.1 (9th Cir. 2013).

The Supreme Court has established that the government violates due process when its conduct "effectively dr[ives a] witness off the stand." *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (holding right to present a defense was violated when the trial judge singled out and admonished a defense witness about the risks of perjury in "unnecessarily strong terms"). We have further explained that, under *Webb*, "[i]t is well established that 'substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process.'" *Ayala v. Chappell*, 829 F.3d 1081, 1111 (9th Cir. 2016) (quoting *Earp v. Ornoski*, 431 F.3d 1158, 1170 (9th Cir. 2005)). Although *Webb* dealt only with judicial misconduct, wrongful conduct by prosecutors or law enforcement officers can also constitute "substantial government interference" with a defense witness's choice to testify. *See, e.g.*, *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) ("[T]he conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb.*"); *United States v. Little*, 753 F.2d 1420, 1439-40 (9th Cir. 1984) (analyzing claim of defense witness intimidation by IRS agents); *see also Ayala*, 829 F.3d at 1111 (explaining that allegations of witness intimidation by detective, taken as true, would amount to constitutional violation).

The Supreme Court has also made clear that "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses," but only "*witnesses in his favor*." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasis in original). Consequently, even where there may have been governmental misconduct, a criminal defendant cannot establish a violation of his compulsory process right unless he "make[s] some plausible showing" of how the potential witness's "testimony would have been both material and favorable to his defense." *Id.*; *see also Cacoperdo v. Demosthenes*, 37 F.3d 504, 509 (9th Cir. 1994) (holding Sixth Amendment witness interference claim fails without showing of relevance and materiality).

To state a claim for violation of her fair trial and compulsory process rights, Park must therefore adequately plead (1) that Thompson's alleged conduct amounts to "substantial government interference" with a defense witness; (2) that Thompson's conduct caused Ayala not to testify; and (3) that Ayala's testimony would have been favorable and material. As we have explained previously, because we are reviewing a motion to dismiss, we treat Park's allegations as if they were true and draw all inferences in her favor for the limited purpose of this opinion. *See Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). In this light, we conclude that Park has adequately pled each of the three requisite elements.

I. Substantial Interference

To make out a claim against Thompson, Park must show not only that Thompson engaged in misconduct, but also that such misconduct was causally connected to Ayala's refusal to testify.

a. Misconduct

The "substantial interference inquiry is extremely fact specific" and requires an evaluation of the totality of the circumstances. *United States v. Juan*, 704 F.3d 1137, 1142 (9th Cir. 2013). It constitutes substantial misconduct for a prosecutor or a law enforcement officer to "intimidate[] or harass[] the witness to discourage the witness from testifying." *Bohn*, 622 F.3d at 1138 (quoting *Williams v. Woodford*, 384 F.3d 567, 601 (9th Cir. 2004)); *see also Ayala*, 829 F.3d at 1111 (explaining that it could amount to substantial interference with witnesses if it were proved that detective "threatened, coerced, manipulated, and/or intimidated potential and actual witnesses," including by threatening to investigate witness's wife for smuggling drugs into prison). Although it is permissible for law enforcement to contact potential witnesses before trial for investigatory purposes, *see Little*, 753 F.2d at 1440, we have cautioned that "abuses can easily result when officials elect to inform potential witnesses of their right not to speak with defense counsel." *Cacoperdo*, 37 F.3d at 509 (internal quotation marks omitted).

In the present case, Detective Thompson contacted Ayala after Park gave notice to the District Attorney of her intention to use Ayala as a defense witness at her criminal trial.[9] During the course of the phone conversation, Thompson told Ayala that "John [Gilmore] was

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[9] A simple, investigatory phone call to a potential witness does not amount to misconduct, *see Little*, 753 F.2d at 1440, but Detective Thompson did not call Ayala for investigatory purposes: Thompson stated in a sworn declaration "that the 'only reason' for

really upset about the whole thing because he—he feels like they just made you lose faith in him, I guess." Park asserts that, in light of Gilmore's "history of violence towards Ms. Ayala," Thompson's statements constitute thinly veiled threats that Gilmore might retaliate against Ayala if she were to testify. Accepting Park's allegations as true and viewing them in the light most favorable to her, it is plausible to infer that Thompson intended to intimidate Ayala, a domestic violence victim, by informing her that Gilmore, her abuser, was "really upset" by her potential testimony.

Moreover, Park contends that Thompson's actual motive in asserting Gilmore's innocence, Park's guilt, and the defense team's dishonesty was to dissuade Ayala from testifying. *See Bohn*, 622 F.3d at 1138; *see also Smith v. Baldwin*, 466 F.3d 805, 824 (9th Cir. 2006)[10] (explaining that the intent at issue in evaluating prosecutorial misconduct "is the intent to cause a witness not to testify in a particular manner or not to testify at all," but intent is not at issue where intimidation or coercion is obvious), *vacated by Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007) (en banc). During the phone call in question, Thompson declared, among other things, that Gilmore was certainly innocent and that Park was in fact the killer: "And first, what I want to tell you is that John [Gilmore] is not the

her call to Ms. Ayala was to 'repair the damage [Park's] Private Investigators had done to [Ayala's] relationship with [Mr. Gilmore].' "

[10] Cited not as precedent but for the persuasiveness of its reasoning. *See* 9th Cir. Gen. Order 5.5(d).

killer. . . . But the two people who showed up at your house two weeks ago . . . they are private investigators who were hired by the defense team that is representing the killer [Park] [in] this case."

Park further alleges that Thompson made false representations of the evidence against Park, incorrectly stating, for example, that Park "left her blood DNA on the door handle." Detective Thompson also encouraged Ayala not to "believe what they're [the defense team] saying," because they were "going to tell every lie they can to try and get [Park] off." Thompson described the defense team as "private investigators who are hired by [Park's] defense attorneys to try and shoot holes in—in our prosecution of their—of the bad guy" and stated that they "bent the facts to try to, you know, make you think something else." Taken together, the allegations regarding Thompson's misrepresentation of the evidence against Park, coupled with her statements about Park's guilt, Gilmore's innocence, and the defense investigators' duplicity (as well as her statement that Gilmore was "really upset" with Ayala), can reasonably be interpreted as adequately pleading a deliberate intent on the part of Thompson to intimidate and otherwise attempt to persuade Ayala to refuse to testify on behalf of the defense.[11]

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[11] Because the misconduct alleged above is sufficient, we do not consider in this section the additional conduct that primarily relates to the conspiracy claim involving the Doe defendants. For similar reasons, we do not consider that additional conduct in subsection 2 relating to causation or subsection 3 relating to materiality.

b. Causation

The district judge concluded that Park "has not pleaded sufficient facts leading to a reasonable inference that it was Defendant's alleged persuasion that caused Ayala not to testify." He reasoned that the telephone conversation between Thompson and Ayala was the only fact alleged connecting Thompson to Ayala. In his view, because "various actors," including the deputy district attorney, Ayala's defense counsel, and the trial judge, "were involved in the time between the telephone conversation and Ayala's failure to testify," there was an insufficient causal link between Thompson's phone call and Ayala's choice not to testify. We disagree: Park's complaint alleges sufficient facts to establish a causal connection between Thompson's conduct and Ayala's refusal to testify.

Although our precedent clearly requires some "causal link" between the government's conduct and the witness's decision not to testify, *see Juan*, 704 F.3d at 1142, our cases do not clearly specify how such a requirement may be satisfied. Other circuits to address the issue have articulated a variety of causation standards for claims of witness interference. *See Griffin v. Davies*, 929 F.2d 550, 553 (10th Cir. 1991) ("There must be a plausible showing that an act by the government caused the loss or erosion of testimony that was both material and favorable to the defense."); *United States v. Hoffman*, 832 F.2d 1299 (1st Cir. 1987) ("[A]n accused must, at a minimum, demonstrate some plausible nexus between the challenged government conduct and the absence of certain testimony."); *United States* *v. Weddell*, 800 F.2d 1404, 1412 (5th Cir.), *opinion amended on denial of reh'g*, 804 F.2d 1343 (5th Cir. 1986) (remanding to the district court for an evidentiary hearing on "whether or not [the witness], *except for* the actions of the government, would have indeed testified for her husband and that her testimony would have had any effect on the jury verdict." (emphasis added)); *United States v. Silverstein*, 732 F.2d 1338, 1345-46 (7th Cir. 1984) (concluding that trial judge's misstatements to a witness about the potential for a perjury prosecution were not the "*decisive factor* in [the witness's] decision not to testify" and any error was therefore harmless (emphasis added)); *United States v. Blackwell*, 694 F.2d 1325, 1343 (D.C. Cir. 1982) (where "the witness herself never refuses to testify" because of "the lack of a direct nexus between the judge's and prosecutor's remarks and [the defendant's] loss of [the witness's] testimony.").

To decide the present case, however, we need not adopt any particular causation standard because the complaint in the present case contains sufficient factual allegations to preclude us from affirming on causation grounds under any reasonable standard. Park's defense team made a substantial effort to obtain Ayala's testimony, including serving her with a subpoena. Before Detective Thompson's phone call, Ayala had committed to testifying for the defense and had cooperated with defense investigators. After the phone conversation, however, Ayala refused any further contact with the defense investigators and subsequently declined to testify.[12] In light of all of the allegations taken together, including that Thompson called Ayala

[12] Although it is true, as the district judge noted, that the actions of the trial judge, the prosecutor, Ayala's defense lawyer, and Ayala herself represent contributing causes to Ayala's ultimate refusal to testify, the fact that the actions of other individuals also contributed to Ayala's decision does not mean that Thompson's phone call did not have a sufficient causal connection to Ayala's refusal: the subsequent actions of the prosecutor, judge, and Ayala's lawyer are not, drawing all inferences in Park's favor, unforeseeable intervening causes that would break the chain of proximate causation set in motion by Thompson's acts of persuasion. Causation in this case is, moreover, ultimately a question for the finder of fact to decide. *See Farr v. NC Mach. Co.*, 186 F.3d 1165, 1171 (9th Cir. 1999) ("As the Supreme Court emphasized, '[t]he issues of proximate causation and superceding cause involve application of law to fact, which is left to the factfinder, subject to limited review.' ") (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996)).

Insofar as the dissent suggests that either Supreme Court precedent or our precedent binds us to apply a "but for" causation standard, it misreads both our precedents (as explained above) and those of the Supreme Court. *See* Dissenting Op. at 36 (citing *Burrage v. United States*, ___U.S. ___, ___, 134 S. Ct. 881, 887-89, 187 L. Ed. 2d 715 (2014)). *Burrage* did not provide a causation standard for compulsory process claims, but rather interpreted the phrase "results from" in the Controlled Substances Act to encompass the rudimentary causation principle of actual cause. *See* 134 S. Ct. at 887-88, 892. This statutory interpretation does not control our constitutional analysis here.

Nor does our conclusion that Park has adequately pleaded causation rely entirely, or even partially, on "conclusory information and belief allegations." Dissenting Op. at 36. To the contrary, taking the facts pleaded in the complaint in the light most favorable to Park, we simply conclude that they permit a "plausible" causal connection between Thompson's phone call, Ayala's refusal immediately thereafter to communicate further with Park's defense team, and her subsequent refusal to testify.

for an admittedly non-investigatory purpose, misrepresented the evidence against Park, implicitly suggested that Ayala's former abuser was upset with her, proclaimed Gilmore's innocence and Park's guilt, and maligned the defense investigators, we conclude that Park has adequately pleaded a causal connection between Thompson's phone call and Ayala's decision to renege on her original commitment to testify for the defense.[13]

2. Materiality

Park must also "make some plausible showing" of how the potential witness's testimony "would have been both material and favorable to [her] defense" to establish a violation of her compulsory process and fair trial rights. *See Valenzuela-Bernal*, 458 U.S. at 867. It

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[13] Thompson cites one case, *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986), to support her argument that the prosecutor's actions broke the chain of causation between her phone call and Ayala's refusal to testify. *Smiddy*, however, is inapposite for several reasons. First, that case deals only with post-trial calculation of *damages* rather than the existence of a cause of action. *See id.* at 1473 ("[T]he independent act of the prosecutor four days after Smiddy's arrest, unless shown to have been improperly influenced by the police officers, cut off further liability for damages suffered thereafter."). Second, *Smiddy* applies to "negligent conduct," not to *intentional misconduct* by law enforcement officers. *See id.* at 1471, 1473 (recognizing that "pressure, undue influence, or knowing misstatements by police could . . . extend the chain of causation"). Third, *Smiddy* dealt with a Section 1983 claim for an unconstitutional arrest. *See id.* at 1470. All in all, the causation analysis in that case is not relevant to Park's compulsory process and fair trial claims.

is indisputable that Ayala's testimony would have been favorable to Park's defense, and Thompson does not contest that fact. Park must therefore adequately allege only that Ayala's testimony would have been material. *See id.*

a. Park's acquittal did not render Ayala's testimony immaterial.

Thompson argues that Park's acquittal bars her Section 1983 action, apparently on the theory that Ayala's testimony was rendered immaterial by Park's acquittal. The district judge at one point in his brief order "assum[ed] that [Park's] state court acquittal is not a bar to her Section 1983 claim," although he characterized the question "[w]hether a Section 1983 claim survives absent a conviction in an underlying criminal action" as an open question in our circuit. He nonetheless held that the exclusion of Ayala's testimony would not have been "material" to Park's defense because, even with the testimony, Park "would have obtained the same result."

The district court was incorrect to characterize this issue as an open question, and his order is inconsistent with the established law of this circuit: our binding precedent clearly explains that an acquittal does not bar a Section 1983 action based on a due process violation during an underlying criminal proceeding. *Haupt v. Dillard*, 17 F.3d 285, 287-88 (9th Cir. 1994). In *Haupt*, we held that "acquittal does not erase all injury" but instead "speaks only to the amount of damages." *Id.* at 287. The defendant in *Haupt* was acquitted despite the "egregious behavior" of a detective and a deputy district attorney, who "threatened" and "intimidated" the trial judge to the point "that [he did] not dare . . . give the advisory verdict of acquittal" as he had originally intended. *Id.* (Internal quotation marks omitted) (alteration in original). The defendant then sued the detectives and municipal defendants under Section 1983. Although "there was no conviction" in the underlying criminal trial, we held that "the alleged violation of Haupt's due process rights was complete when the trial judge changed his jury instructions because of [the detective's and prosecutor's] intimidation." *Id.* at 288. Consequently, we held that Haupt's acquittal did not defeat his claim for denial of due process. *Id.*

In addition to her compulsory process claim, Park, like the plaintiff in *Haupt*, claims a violation of her right to a fair trial under the Due Process Clause. This fair trial claim necessarily incorporates her compulsory process claim, as the right to obtain witnesses in one's favor is part of the due process "right to fairly 'present a defense.'" *United States v. Juan*, 704 F.3d 1137, 1141 (9th Cir. 2013) (quoting *Webb*, 409 U.S. at 98). Consequently, our analysis of Park's overlapping compulsory process and due process claims is essentially the same, *see* note 8, *supra*, and her acquittal does not bar either one.

Park was deprived of her principal and apparently sole defense—that a third party was guilty of the murder—due to Thompson's alleged interference with

Ayala's testimony. The circumstances of Park's trial stand in stark contrast to those in *Valenzuela-Bernal*, the Supreme Court's seminal witness interference case, in which the defendant did not know whether the deported witnesses could actually aid in his defense, 458 U.S. at 861, 872-74. Here, the state's alleged interference with her key witness entirely deprived Park of her principal defense, thereby altering the entire trajectory of her criminal trial.

A trial in which the principal defense has been effectively barred cannot be reconciled with the Due Process Clause, which "guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." *Valenzuela-Bernal*, 458 U.S. at 872 (internal quotation marks and citation omitted).[14] The constitutional violation in question here therefore includes not simply the fact that Ayala's testimony was improperly suppressed, but also the consequent elimination of Park's principal (if not her only) defense.[15] Park's allegations thus plausibly

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[14] A defense, of course, must be distinguished from simply punching holes in the prosecution's case by pointing out its weaknesses, which was the basis of Park's acquittal. *See United States v. Spencer*, 981 F.2d 1083, 1086 (9th Cir.) (distinguishing between failure of proof and defense of misidentification), *opinion amended and superseded on denial of reh'g*, 1 F.3d 742 (9th Cir. 1992); *cf. United States v. Scott*, 437 U.S. 82, 98 n.11 (1978) (distinguishing between "acquittal on the merits" and the release of a defendant "for reasons required by the Constitution or laws, but which [reasons] are unrelated to factual guilt or innocence" and noting that the Court has no difficulty in ascertaining such distinctions).

[15] The trial judge explained that Ayala's decision not to testify was dispositive as to the admissibility of Park's third party

establish an "absence of [ ] fairness [that] fatally infected the entire trial," *Valenzuela-Bernal*, 458 U.S. at 872 (internal quotation marks and citation omitted), in violation of her constitutional rights under the Due Process Clause of the Fourteenth Amendment.

Park's acquittal did not erase Park's constitutional injury, *see Haupt*, 17 F.3d at 187, nor does it mean that Ayala's key testimony was not material. It would be a different case if Ayala were one of many witnesses willing to testify to Gilmore's culpability: if other witnesses were available to provide a predicate for Park's third-party culpability defense, then Ayala's suppressed testimony might not have been material, and Park's trial would have been "fair." Given that Park's principal defense was completely suppressed, however, Ayala's testimony was not somehow suddenly rendered immaterial at the moment of Park's acquittal. *See id.* at 288. Thus, under *Haupt*, Park adequately alleges a violation of her due process right to a fair trial based on the suppression of Ayala's testimony, regardless of the fact that she was eventually acquitted. We recognize that

culpability defense: "And if today Miss Ayala is asserting her 5th Amendment rights and not going to testify, then I am going to preclude you from mentioning anything about the third party culpability defense;" "[I]f you don't have a witness that is—can testify to [Gilmore's statements], then it is not going to come in and the jury is not going to hear it, and you are not going to mention it in your opening statement. So the rubber meets the road today;" "[I]f you can't get the connecting evidence in [i.e. Ayala's non-hearsay testimony as to Gilmore's statements while choking her, connecting him to Redding's murder], none of that other stuff [i.e. ongoing fighting between Redding and Gilmore, including past violent outbursts] is coming in".

the Eleventh Circuit has created a conflict with *Haupt* in a subsequent compulsory process case. *See Kjellsen v. Mills*, 517 F.3d 1232, 1239-40 (11th Cir. 2008).[16] We see no reason, however, to abandon *Haupt* in favor of the Eleventh Circuit's approach in *Kjellsen.*[17] That

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[16] We also recognize that in the *Brady* context, the Sixth and Tenth Circuits have held Section 1983 claims are barred when the plaintiff was acquitted. *See Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *see also Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998) (same). The Seventh Circuit has explicitly declined to decide whether an acquittal bars a subsequent Section 1983 action based on *Brady* violations. *See Mosley v. City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010) ("Our circuit has not directly resolved whether a plaintiff can assert a claim for a *Brady* violation when the trial resulted in an acquittal.").

[17] We note that in *Kjellsen*, unlike in the case before us, the alleged constitutional violation had no effect on the basic course of proceedings of the trial nor on the issues that the fact-finder was required to resolve. The plaintiff in that case sued for violation of his compulsory process right based on the failure of the forensic sciences division of the Georgia Bureau of Investigation to reveal an exculpatory retest of his blood alcohol levels before his criminal trial for driving under the influence and other charges. 517 F.3d at 1235-36. (This alleged violation was probably more accurately characterized as a *Brady* violation, but the plaintiff did not pursue relief under that theory. *Id.* at 1239 n.2.) Because the retest results reflected similar numbers to those obtained from a retest performed by the defense, these "additional test results . . . would not have materially improved the information in the defense's possession," and therefore "could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 1240. Therefore, the materiality test was not satisfied. *Id.* In contrast, Thompson's misconduct in the present case not only deprived Park of potentially helpful information, but also altered the entire trajectory of her trial by wholly precluding the third party culpability evidence,

decision is not only inconsistent with our binding precedent in *Haupt*, but also fails to recognize the distinction between a criminal prosecution and a Section 1983 action.

The concept of "materiality" does not carry a static and uniform meaning across these two different contexts. In a criminal case, in which the defendant seeks reversal of his conviction, "materiality" means material to the conviction. In other words, in a criminal case, suppressed evidence or testimony is only material if it could have affected the fact-finder's determination whether the defendant is guilty beyond a reasonable doubt. *See Valenzuela-Bernal*, 458 U.S. at 874 (explaining testimony is material "only if there is a reasonable likelihood that [it] could have affected the judgment of the trier of fact").

Valenzuela-Bernal, for example, dealt solely with the materiality of evidence in a criminal case in which the defendant was convicted. It stands for an elementary proposition of our criminal law: we do not reverse convictions based on the absence of testimony, evidence, or even effective assistance of counsel, unless the convicted defendant can demonstrate that he was somehow "prejudiced" by the deprivation. 458 U.S. at 868. In *Valenzuela-Bernal*, the Supreme Court unsurprisingly refused to reverse a conviction simply because

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which might have secured her acquittal regardless of the deficiencies in the prosecutor's DNA evidence. This evidence, unlike the test results in *Kjellsen*, would have "materially improved" her defense and "put the whole case in . . . a different light." *Id.*

the government deported two potential witnesses, especially given that the defendant "made no attempt to explain" how the deportees' testimony could have assisted his defense. *Id.* at 861, 872-74. In short, the error was not "material" to the relief sought—the reversal of the conviction.

In contrast, in a Section 1983 action, the plaintiff is not seeking reversal of his conviction, but rather compensation for the violation of his constitutional rights during a previous criminal trial. In other words, he is seeking to vindicate his right to a procedurally fair criminal trial. Consequently, the materiality test in a Section 1983 case is directed towards a different question: suppressed evidence or testimony is material only if it affected the question whether the defendant was deprived of a fair trial. The fact that a defendant was acquitted has little to do with whether the trial was fair, *see Haupt*, 17 F.3d at 287, and therefore has little to do with materiality in the context of a Section 1983 claim.

The Eleventh Circuit mechanically imported the materiality requirement, as developed in criminal cases like *Valenzuela-Bernal*, into its Section 1983 analysis without recognizing this key distinction. Relying exclusively on *Valenzuela-Bernal*, the Eleventh Circuit held that an acquitted defendant can never state a claim for a violation of his compulsory process right or his due process right to a fair trial because the violation will never be "material." *Kjellsen*, 517 F.3d at 1239. *Kjellsen*'s premise that a constitutional deprivation is only "material" if it would have resulted in a different verdict would mean that an acquittal nullifies any Section 1983 claim by an acquitted criminal defendant. This premise is wholly inconsistent with *Haupt*, which explicitly holds that an acquittal does not bar a Section 1983 claim for due process violations.

The Eleventh Circuit's failure to recognize that materiality must have a different meaning in Section 1983 cases than in criminal cases was an error that led that circuit to effectively bar all Section 1983 claims by acquitted defendants and thus to create a direct conflict with our precedent in *Haupt*. We decline to follow the Eleventh Circuit's approach, and instead reaffirm our binding rule: Park's acquittal does not render Ayala's allegedly suppressed testimony immaterial, nor does it preclude her from bringing a Section 1983 action to vindicate her right to a fair trial.

Thompson contends that *Haupt* has been effectively nullified because it relied on *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), which was later overruled by the Supreme Court in *Chavez v. Martinez*, 538 U.S. 760 (2003). This argument is without merit. *Cooper* held that a *Miranda* violation was actionable under Section 1983 despite the fact that the defendant was "never formally . . . charged in court and [ ] none of his statements ever were offered in evidence to his potential detriment." *Cooper*, 963 F.2d at 1245. This holding was overturned by *Chavez*, in which a plurality of the Supreme Court said that an officer's failure to read *Miranda* warnings to a defendant before interrogation violates only "judicially crafted prophylactic rules" and, for that reason, was not actionable under Section

1983.[18] *Chavez*, 538 U.S. at 772. Critically, *Chavez* simply does not address cases in which a defendant's "core constitutional right[s]" are violated, *see id.* at 772, let alone hold that such violations may not serve as the basis for a Section 1983 action if the defendant has been acquitted. In short, *Chavez* in no way undermines *Haupt*, and regardless of whether the *Chavez* plurality or Justice Souter's even more limited concurring opinion controls, *Haupt* remains the law of the circuit.[19]

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[18] Justice Souter, joined by Justice Breyer, concurred in the judgment only, on an even more limited basis. The concurrence, without which the result in *Chavez* would not have garnered a majority of the Court, explicitly declined to decide "whether the absence of *Miranda* warnings may be a basis for a § 1983 action *under any circumstance*" because that question was "not before the Court." *Chavez*, 538 U.S. at 779 n.* (Souter, J., concurring in the judgment) (emphasis added).

[19] In a subsequent case in this court, the three judges on the panel each offered non-binding comments on an analogous question: whether a *Brady* violation is actionable under Section 1983 following an acquittal. *See Smith v. Almada*, 640 F.3d 931 (9th Cir. 2011). The majority opinion, authored by Judge James Gwin, of the Northern District of Ohio sitting by designation, address the effect of an acquittal because the author, along with Ninth Circuit Judge Ronald Gould, concluded that the undisclosed evidence was immaterial for reasons separate from the acquittal. *See id.* at 939-40. In a separate special concurrence to his majority opinion, Judge Gwin expressed his own view that had the panel been required to reach the question, he would have held that *Brady*-based Section 1983 claims are disallowed in the absence of a conviction. *Id.* at 945. Judge Gould also filed a separate concurrence, indicating that if a case before him properly presented the issue, he would be "inclined" to hold that an acquittal bars *Brady*-based claims. *Id.* at 940. Judge D.W. Nelson dissented on the ground that the undisclosed evidence was material, and its suppression therefore violated the *Brady* doctrine. *Id.* at 946. Consequently, she

b. Ayala's testimony was material to Park's defense.

The district court also concluded that Park failed to adequately plead materiality because Gilmore's statements alone were not sufficient to lead to a reasonable inference that he was the murderer and therefore Ayala's testimony was "not actually 'exculpatory evidence.'" In his analysis, the district judge required a higher degree of exculpation than is appropriate under our precedents. We reverse and conclude that Park has adequately pleaded that Ayala's potential testimony was material. Materiality does not require incontrovertible evidence of exculpation; to the contrary, evidence that tends to "cast doubt" on the government's case qualifies as material. *See United States v. Leal-Del Carmen*, 697 F.3d 964, 972 (9th Cir. 2012); *see also Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992) (concluding witness's excluded testimony was favorable and material where "it could have served to cast doubt on [victim's] identification").

In the present case, were Ayala to have testified that Gilmore choked her while referring to Redding's death, it would have been sufficient to permit Park to present a third party culpability defense under California law. Ayala's testimony about Gilmore would

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would have reached the question of an acquittal's effect and would have held that an acquittal does not bar a *Brady*-based Section 1983 claim. *Id.* at 948. In the end, *Almada* did not reach the *Haupt* question, and *Haupt* remains controlling precedent on the question before us: an acquittal does not preclude a Section 1983 claim arising out of a fundamental constitutional violation.

have satisfied California's threshold standard for introducing evidence of third party culpability, which merely requires "direct or circumstantial evidence linking the third person to the actual perpetration" of the murder. *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986) (defining standard that an accused must meet under California law for admission of evidence of third-party culpability). Consequently, the trial judge would likely have allowed Park to mount a third-party culpability defense under *Hall* if Ayala had been willing to testify.[20] Even if circumstantial evidence of third party culpability is not itself sufficient to compel acquittal, it would have been sufficient to "cast doubt" on the government's evidence and would therefore have been material. *Leal-Del Carmen*, 697 F.3d at 972.

II. Civil Conspiracy Claim Under Section 1983

Park also alleges that Thompson "orchestrated the charging of Ms. Ayala to ensure that she did not testify for the defense" and that, on information and belief, she brought about that result in collaboration with a number of Doe Defendants.[21] After the District Attorney received notice that Park planned to call Ayala as

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[20] *See supra* n.14.

[21] Although "[a]s a general rule, the use of 'John Doe' to identify a defendant is not favored," in circumstances "where the identity of alleged defendants will not be known prior to the filing of a complaint . . . the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds." *Gillespie v.*

a defense witness, and after Detective Thompson's phone conversation with Ayala, Thompson and/or a Doe defendant allegedly contacted the El Segundo Police and convinced an officer to initiate charges against Ayala. The District Attorney then unexpectedly brought felony criminal charges against Ayala stemming from a physical dispute with Gilmore approximately a year earlier.

Shortly afterwards, at Park's criminal hearings, Ayala declined to testify at Park's trial because of these pending charges and after the Deputy District Attorney threatened to "recuse" her attorney if he did not advise her to invoke her Fifth Amendment privilege. Following Ayala's refusal to testify, the District Attorney dismissed the felony charges, and Ayala received a probationary sentence after pleading no contest to a misdemeanor charge. Based on these facts, as well as information and belief, Park alleged that Thompson colluded with others to arrange for the filing of criminal charges against Ayala in an effort to make her unavailable to testify at trial.

Park's complaint alleged facts that are "suggestive" of an agreement to engage in "illegal conduct." *See Twombly*, 550 U.S. at 564 n.8. When the entire factual context is considered,[22] it is clear that Park has

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Civiletti, 629 F.2d 637, 642-43 (9th Cir. 1980). Here, Park is entitled to discovery on the identity of the Does.

[22] The dissent attempts to characterize this rather unusual course of events as merely "some parallel conduct." Dissenting Op. at 37. As explained above, however, when the entire sequence of

"nudged [her] claim[ ]" that Thompson conspired to orchestrate Ayala's unavailability "across the line from conceivable to plausible." *See Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009) (internal quotation marks omitted). "The *Twombly* plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (citations and quotation marks omitted); *see also Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995) ("[W]e relax pleading requirements where the relevant facts are known only to the defendant."). Because many of the relevant facts here are known only to the defendant, and in light of the additional facts alleged by Park, we conclude that she has pleaded sufficient facts to state a plausible claim for civil conspiracy under Section 1983.[23]

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events in the complaint is considered in context, what might otherwise appear to have been coincidental parallel conduct on its own becomes "suggestive of illegal conduct" and is thus sufficient to survive a motion to dismiss. *Twombly*, 550 U.S. at 564 n.8.

[23] Thompson contends that she is entitled to qualified immunity. The district court declined to address Thompson's qualified immunity argument because it dismissed both of Park's causes of action for other reasons. We do not consider the question here in the absence of its initial consideration by the district judge.

CONCLUSION

For the reasons stated above, the district court's dismissal of Park's complaint is reversed and remanded for proceedings consistent with this opinion. **REVERSED AND REMANDED**.

FERNANDEZ, Circuit Judge, concurring in part and dissenting in part:

I respectfully concur in part and dissent in part.

I agree with the majority that we must review the district court's decision *de novo*. *See Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011). Moreover, I agree that we view the allegations of the complaint in the light most favorable to the plaintiff. But that does not mean that a complaint is sufficient because we can imagine a possibility that the defendant has committed some wrongdoing. Rather, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677-84, 686-87, 129 S. Ct. 1937, 1949-52, 1954, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007).

Moreover, where a plaintiff has relied upon a document, or parts thereof, courts can properly consider the whole of the document to be effectively incorporated by reference into the complaint. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam); *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005).

As the district court determined, Park's complaint does not cross the line and reach plausibility; it is blocked by the principles outlined above.

A. I agree that if a government officer "'intimidates or harasses the witness to discourage the witness from testifying,'" that indicates "'[u]ndue prosecutorial interference.'" *United States v. Bohn*, 622 F.3d 1129, 1138 (9th Cir. 2010); *see also Earp v. Ornoski*, 431 F.3d 1158, 1170-71 (9th Cir. 2005); *Williams v. Woodford*, 384 F.3d 567, 601-02 (9th Cir. 2004). Unnecessarily strong warnings can accomplish that. *See, e.g.*, *Webb v. Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 353-54, 34 L. Ed. 2d 330 (1972) (per curiam); *United States v. Vavages*, 151 F.3d 1185, 1190-91 (9th Cir. 1998); *cf. United States v. Jaeger*, 538 F.3d 1227, 1231-32 (9th Cir. 2008). Had Thompson engaged in that sort of activity, she would have acted improperly. *See Ayala v. Chappell*, 829 F.3d 1081, 1110-11 (9th Cir. 2016). She did not do so.

In fact, Thompson did not threaten Ayala at all, and surely did not suggest that Ayala should not testify. Of course, she did state that Gilmore was "really upset." However, that was not because of what Ayala had said or would say, but because the defense minions had bad-mouthed him and claimed that he had committed other unsavory crimes. Gilmore was concerned that their statements would cause Ayala to "lose faith in him." One could speculate that the "really upset" language was, or was taken as, some sort of threat, but that would be speculation about a mere possibility and a rather strange reading of the whole conversation at that. By the way, even if one were persuaded by the reasoning of *Smith v. Baldwin*, 466 F.3d 805, 824 (9th Cir. 2006), *vacated*, 510 F.3d 1127, 1148-49 (9th Cir. 2007) (en banc), it is not at all "obvious" that there was intimidation or coercion by Thompson in this case.

Furthermore, Thompson told Ayala that if she received a subpoena she was "under an obligation to appear." Moreover, when Ayala said that she did not want to hurt Gilmore, Thompson replied: "No, I understand. But—but you have to tell the truth and you'll have to let us do our job. . . ." None of that bespeaks an attempt to keep Ayala from testifying; quite the contrary.

I recognize that Thompson entered dangerous territory when she decided to talk to Ayala and tell her that she was not required to speak further to Park's investigators. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 508-09 (9th Cir. 1994); *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978). But dangerous is not the same as forbidden.[1] Therefore, Thompson's decision to

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[1] For example, our freeways are undoubtedly dangerous to all drivers; they are not forbidden to them.

speak with Ayala may not have been wise, but it was not disastrous.[2]

Incidentally, the complaint's mere general pleading that there is some sort of nexus between the conversation in question and Ayala's decision not to testify is conclusory and insufficient. *See Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 926-27 (9th Cir. 2013); *see also Iqbal*, 556 U.S. at 686-87, 129 S. Ct. at 1954. That is especially true in the context of this case where, in fact, Ayala did appear at trial in response to a subpoena, and refused to testify on wholly different grounds—she, herself, was facing criminal charges and invoked her Fifth Amendment rights on that account. The district court was not required to accept the fantasy, which was based on nothing more than the complaint's information and belief assertion, that Ayala would have blithely incriminated herself were it not for the conversation she had with Thompson. *See Burrage v. United States*, ___ U.S. ___, ___, 134 S. Ct. 881, 887-89, 187 L. Ed. 2d 715 (2014) (but for causation); *Blantz*, 727 F.3d at 926-27 (conclusory information and

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[2] It should be noted that even viewed through the majority's somewhat distorted lens, the alleged claim of substantial interference with Park's due process rights at trial is very weak. For example, just what evidence was Park denied? Possibly, Ayala would have testified that when she baited Gilmore by accusing him of killing the murder victim, who everyone knew had been strangled, he choked her and said: "You want to see how she felt?" Although there is no justification for his reaction to her statement, it is important to recognize that he did not spontaneously choose that topic. He was reacting to Ayala's taunt. Moreover, in their unusual relationship, Ayala had, it seems, also assaulted Gilmore—hence her own prosecution.

belief allegations); *Vavages*, 151 F.3d at 1191 (but for causation).

Thus, I dissent from part I.1 of the Discussion portion of the majority opinion.

B. Because I do not think that there was a proper allegation of a substantive violation, I also do not believe that a conspiracy was effectively alleged. *See Lacey v. Maricopa County.*, 693 F.3d 896, 935 (9th Cir. 2012) (en banc). Furthermore, there is not even a shard of a fact to show that Thompson participated in any agreement to violate Park's constitutional rights. Even if she had committed a violation when she spoke with Ayala, there is nothing to support the claim that she conspired with others to have Ayala prosecuted on criminal charges.[3]

In addition, while the majority basically contents itself with the reflection that in general a pleading of conspiracy on information and belief is enough if defendants have the information,[4] I do not believe that that kind of conclusory pleading can suffice here. *See Blantz*, 727 F.3d at 926-27; *see also Twombly*, 550 U.S. at 555-58, 127 S. Ct. at 1964-66. Were it otherwise, a party could evade the plausible-pleading standard by merely asserting information and belief and pointing

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[3] Those charges were hardly trumped up or false, and Ayala ultimately pled nolo contendere to a lesser offense. *See Williams*, 384 F.3d at 601-02.

[4] An interesting circular concept: I do not have evidence of an agreement, but since I say that you agreed, you must have the evidence.

to some parallel conduct. As it is, Thompson's phone call was a far cry from the filing of a criminal felony complaint by another agency and prosecutor, even though they both involved Ayala.

Thus, I dissent from part II of the Discussion portion of the majority opinion.

C. As I read the majority opinion (Discussion portion part I.2), it seems to declare that an acquittal may or may not ultimately preclude a constitutional claim; that will depend on the facts and circumstances of the particular case.[5] If I read it aright, I do not disagree in principle with that general proposition. However, as I have already indicated, in this case the complaint does not spell out a constitutional claim in the first place. Thus, I need not and do not opine on what the result should be if Park had adequately pled that her rights had been violated by Thompson's conversation with Ayala.

D. I agree with the majority that the issue of qualified immunity should be remanded to the district court for its consideration in the first instance. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20, 102 S. Ct.

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[5] *See Haupt v. Dillard*, 17 F.3d 285, 287-88 (9th Cir. 1994); *see also Smith v. Almada*, 640 F.3d 931 (9th Cir. 2011) (majority opinion, two concurring opinions, and one dissenting opinion); *Mosley v. City of Chicago*, 614 F.3d 391, 397-98 (7th Cir. 2010); *Kjellsen v. Mills*, 517 F.3d 1232, 1238-40 (11th Cir. 2008); *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988).

2727, 2739, 73 L. Ed. 2d 396 (1982); *Price v. Hawaii*, 939 F.2d 702, 707 (9th Cir. 1991).

Thus, I respectfully concur in part and dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA	**Priority** ___ **Send** ___ **Enter** ___ **Closed** ___
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CASE NO.: **CV 14-00330 SJO (RZx)** **DATE:** **September 16, 2014**

TITLE: Kelly Soo Park v. Karen Thompson

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF(S):	**COUNSEL PRESENT FOR DEFENDANT(S):**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT [Docket No. 30]

This matter comes before the Court on Defendant Karen Thompson's ("Defendant" or "Det. Thompson") Motion to Dismiss Plaintiff Kelly Soo Park's ("Plaintiff" or "Park") First Amended Complaint ("Motion II"), filed on July 7, 2014. Defendant filed a Request for Judicial Notice in Support of Motion II on July 7, 2014. Plaintiff filed an Opposition to Motion II on July 14, 2014, to which Defendant Replied on July 21, 2014.

For the reasons stated herein, the Court **GRANTS** Defendant's Motion II.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2014, the Court granted Defendant's first Motion to Dismiss ("Motion") and denied Plaintiff's Motion to Strike Portions of Defendant's Motion ("Motion to Strike"). (Order Granting Defendant's Mot. ("Order"), ECF No. 25.) Plaintiff filed her First Amended Complaint on June 12, 2014 ("FAC").

The Court thoroughly described the background case in its Order. (Order 2-4.) In her original Complaint, Plaintiff alleged the following. Juliana Redding ("Redding") was strangled to death in her home in Santa Monica, California on March 15, 2008. Park was charged with the murder after Det. Thompson, who led the investigation, matched blood found on Redding's body and at the crime scene to Park's DNA. According to Park, Det. Thompson caused a witness, Melissa Ayala ("Ayala"), to refuse to testify about threatening statements made to her by her former boyfriend, John Gilmore ("Gilmore"). Park believed the statements included Gilmore's admissions that he killed Redding. The jury ultimately acquitted Park of all criminal charges. Park brought this civil action against Det.

Thompson, alleging that her acquittal was far less likely without the testimony of Ayala.

Plaintiff's FAC includes 12 amended factual allegations. (ECF No. 27-1.) Park now alleges the following. Gilmore, who was Redding's boyfriend at the time of her death and had a history of domestic violence, broke into and destroyed property in Redding's home days before the murder. (FAC ¶ 23.) Park alleges that her DNA, which was found on Redding's body and at the crime scene, did not consist of Park's blood. (FAC ¶ 20.)

According to Park, Gilmore's threatening statements to his then-girlfriend Ayala constitute "direct evidence that Gilmore confessed to the murder of Redding."[1] (FAC ¶¶ 17, 44.[2]) Gilmore made these statements on two occasions when Ayala asked about Redding's death and she accused Gilmore of killing Redding. (FAC ¶ 29.)

Park alleges, on information and belief, that Ayala would have provided testimony about Gilmore's statements but for Det. Thompson's "unconstitutional conduct." (FAC ¶ 17.) Prior to a telephone call between Ayala and Det. Thompson on February 6, 2013, Ayala had committed to testifying and had cooperated with

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[1] On two occasions, Gilmore allegedly said to Ayala, "You want to see how she [Juliana] felt?" and "Going to show you how [Juliana] felt" while choking Ayala. (FAC ¶ 29.)

[2] Plaintiff incorrectly numbered the FAC paragraphs beginning with ¶ 43 of the FAC. This Order's citations to the FAC are based on the paragraph numbers Plaintiff used.

Park's investigators working on behalf of Park's criminal defense. (FAC ¶ 39.) During the phone call, Det. Thompson allegedly (a) lied about the evidence incriminating Park; (b) unequivocally emphasized that Gilmore was innocent; and (c) told Ayala that Gilmore was "upset" about Ayala's statements. (FAC ¶ 44.) After the phone call, Ayala refused further contact with Plaintiff's investigators. (FAC ¶ 39.)

Park alleges, on information and belief, that if Det. Thompson had not caused Ayala to believe that her testimony would hurt Gilmore and to fear for her safety, Ayala would have testified about Gilmore's statements. (FAC ¶ 44.) Park also alleges, on information and belief, that Ayala would have testified about Gilmore based on Ayala's need to (a) prevent Park from being wrongfully convicted; (b) provide truthful evidence against Gilmore if he did commit the murder; and (c) protect herself and other women from future violent attacks by Gilmore. (FAC ¶ 45.)

Park alleges, on information and belief, and based on the "exculpatory evidence" that Ayala could provide for Park's criminal defense, that Det. Thompson and/or Defendant Does from the Santa Monica Police Department spoke with a representative of the El Segundo Police Department about the need to prevent Ayala from testifying as a basis for filing charges against

Ayala.[3] (FAC ¶¶ 43, 78.) Det. Thompson and/or Defendant Doe allegedly represented to them that it was important to file the charges as soon as possible because the filing would cause Ayala to invoke the Fifth Amendment and therefore, her testimony about Gilmore's statements would be excluded from Park's trial. (FAC ¶ 78.) The representative from the El Segundo Police Department then agreed to initiate charges and requested that the Los Angeles County District Attorney's Office file charges. (FAC ¶¶ 43, 78.) The District Attorney's Office filed charges against Ayala for felony conspiracy, assault, and criminal threats a few weeks before trial.[4] (FAC ¶ 43.)

On the Friday before Park's criminal trial, in a discussion with Ayala's defense attorney, the Los Angeles County Deputy District Attorney "threatened to 'recuse' the defense attorney if he did not instruct Ms. Ayala to invoke [her] Fifth Amendment right against self-incrimination." (FAC ¶ 43.) After this conversation, Ayala invoked her right against self-incrimination. (FAC ¶ 43.) Park speculates, again on information and belief, that even if Ayala's attorney had instructed her to invoke the Fifth Amendment right against self-incrimination for all of her testimony, Ayala **would not have** invoked the right for the events leading up

[3] On April 1, 2012, Ayala and two other individuals allegedly made criminal threats and assaulted Gilmore and another individual. (Mot. 7-8.)

[4] Ayala waived her right to a preliminary hearing, and the District Attorney dismissed all felony charges. The case has been resolved with Ayala pleading no contest to a misdemeanor charge and receiving a probationary sentence. (FAC ¶ 42.)

to Gilmore's statements and the statements themselves. (FAC ¶¶ 45, 72.)

According to Park, Det. Thompson's success in preventing Ayala from testifying "materially affected" Park's right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution. (FAC ¶ 55.) After Ayala refused to testify, the state court judge ruled to preclude "anything about the third party culpability defense" for Redding's murder.[5] (Mot. 5.) Park was limited to a failure-of-proof defense. (FAC ¶ 55.) Park claims, on information and belief, that had the testimony been presented to the jury at trial, the jury would have acquitted her on the first day of deliberations instead of after one and one half weeks because the jury would then have had a suspect with a motive to murder Redding. (FAC ¶ 55.)

On June 12, 2014, Plaintiff filed her FAC with this Court asserting the same two causes of action pursued in her Complaint: (1) deprivation of civil rights, 42 U.S.C. § 1983 ("Section 1983"), by violation of the Sixth Amendment's Compulsory Process Clause and denial of the Fourteenth Amendment's Right to Fair Trial; and (2) conspiracy to interfere with civil rights, 42 U.S.C. § 1985 ("Section 1985").[6] (*See generally* FAC.)

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[5] Judge Kennedy excluded evidence of Gilmore's alleged third party culpability because there was no "connecting evidence to the crime itself." (Mot. 5.)

[6] Plaintiff voluntarily dismissed the third claim for declaratory relief. (Opp'n 20, ECF No. 16.)

Defendant moves to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that both causes of action fail to state a claim upon which relief can be granted.[7] (Mot. II 1.)

II. DISCUSSION

In reviewing a motion to dismiss under Rule 12(b)(6), a court may only consider the complaint, documents incorporated by reference in the complaint, and matters of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A court accepts the plaintiff's factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept*, 901 F.2d 696, 699 (9th Cir. 1988).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that

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[7] As in her first Motion, Defendant also argues that she is entitled to qualified immunity. (Mot. II 10.) The Court did not reach the issue of qualified immunity in its Order. (Order 7.)

is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Further, for allegations based upon "information and belief" to be facially plausible, either the facts on which the allegations are based must be "peculiarly within the possession and control of the defendant," or the belief must be based on factual information that makes the inference of culpability plausible." *Vavak v. Abbott Labs., Inc.*, No. SACV 10-1995 JVS, 2011 WL 10550065, at *2 (C.D. Cal. June 17, 2011) (quoting *Arista Records, LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)). If the factual allegations based on "information and belief" are made without further facts, the allegations do not survive a motion to dismiss. *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 694 (9th Cir. 2009); *see Simonyan v. Ally Fin., Inc.*, No. CV 12-8495 JFW, 2013 WL 45453, at *2 (C.D. Cal. Jan. 3, 2013) (factual allegations based on "information and belief" containing nothing more than a rote recitation of each claim's elements are insufficient).

A. <u>Section 1983 Claim for Violation of Compulsory Process and Right to Fair Trial</u>

Plaintiff alleges that, but for Defendant's conduct, Ayala would have testified about Gilmore's statements to the benefit of Plaintiff's criminal defense. Plaintiff claims that this conduct violated Plaintiff's right to compulsory process and fair trial. Defendant argues, as she does in her first Motion, that Plaintiff's Section 1983 claim fails under Fed. R. Civ. P 12(b)(6).

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations and quotation marks omitted); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). The Sixth Amendment gives a defendant the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. However, the Sixth Amendment does not give the defendant the right to compel the attendance and testimony of any and all witnesses. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). To establish a violation of the Sixth Amendment right to compulsory process, the defendant must make a "plausible showing of how [a witness'] testimony would have been both material and favorable to his defense." *Id.*

Here, Plaintiff's amended allegations are largely based upon "information and belief" and are insufficient as a matter of law. *See Vivendi SA*, 586 F.3d at 694. First, the facts are not peculiarly within the "possession and control of Defendant," as required to sufficiently plead upon "information and belief."[8] *See Vavak*, 2011 WL 10550065, at *2. Also, the allegations

[8] For instance, Defendant did not possess and control knowledge of Gilmore's statements; Ayala did.

do not plausibly permit a reasonable inference to be drawn. *See Iqbal*, 566 U.S. at 678.

Plaintiff alleges that Defendant's February 6, 2013 telephone conversation with Ayala caused Ayala's refusal to testify and that Ayala would have testified about Gilmore even if her attorney instructed her to invoke her Fifth Amendment right for all of her testimony. (FAC ¶¶ 44-45.) But various actors were involved in the time between the telephone conversation and Ayala's failure to testify. After the telephone conversation, Defendant "and/or Defendant Doe" engaged in discussions with officers from the El Segundo Police Department about Ayala. (FAC ¶ 43.) An officer from the El Segundo Police Department investigated the criminal case against Ayala and recommended prosecution to the Los Angeles County District Attorney's Office, who filed the complaint against Ayala.[9] (Mot. 9.) Days before Park's criminal trial, in a discussion with Ayala's defense attorney, the Los Angeles County Deputy DA threatened to recuse the defense attorney if he did not instruct Ayala to invoke her Fifth Amendment right against self-incrimination.[10] (FAC ¶ 43.) After this conversation, Ayala refused to testify. (FAC ¶ 43.)

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[9] Defendant contends that, according to the testimony of the El Segundo Police Department detective, the detective made no contact with the prosecutor in Park's criminal case, Defendant, or any member of the Santa Monica Police Department during the investigation. (Mot. 10.)

[10] Defendant claims that the Deputy DA had never met or spoken with the prosecutor in Park's criminal case nor had any contact with Defendant or any member of the Santa Monica Police Department about the filing of Ayala's case. (Mot. 9-10.)

Ultimately, it was the state court judge who precluded any evidence of third party culpability. (Mot. 5.) The only facts relating to Defendant's interactions with Ayala relate to their telephone call. Plaintiff has not pleaded sufficient facts leading to a reasonable inference that it was Defendant's alleged persuasion that caused Ayala not to testify.

Even if Plaintiff's FAC linked Defendant to Ayala's refusal to testify, and assuming that Ayala's state court acquittal is not a bar to her Section 1983 claim,[11] Plaintiff still does not show how the testimony would have been "material" to her third party culpability defense.[12] *Valenzuela-Bernal*, 458 U.S. at 867.

First, Plaintiff speculates, on information and belief, that the jury would have acquitted her on the first day of deliberations had the testimony been presented to the jury. But even if she were acquitted sooner, Plaintiff would have obtained the same result—she would have been acquitted. Second, Plaintiff claims that Gilmore's threatening statements constitute "direct evidence" that he admitted to Redding's murder. (FAC ¶ 17.) But the statements, without further factual support such as evidence of Gilmore's blood, DNA, or physical evidence linking him to the perpetration of the

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[11] Whether a Section 1983 claim survives absent a conviction in an underlying criminal action "has not yet been definitely resolved in the Ninth Circuit." *Gutierrez v. Solano*, 862 F.Supp. 2d 1037, 1041-42 (C.D. Cal. 2012).

[12] Plaintiff does, however, clearly argue that the testimony would have been "favorable" to her defense. *Valenzuela-Bernal*, 458 U.S. at 867.

crime, does not lead to a reasonable inference that Gilmore was the murderer. (Reply II 2.) The testimony is therefore not actually "exculpatory evidence" and its exclusion did not materially prejudice Plaintiff's defense.[13]

Accordingly, the Court **DISMISSES** Plaintiff's Section 1983 claim without leave to amend.

B. <u>Section 1985 Claim for Conspiracy to Interfere with Civil Rights</u>

Plaintiff claims that Defendant and Doe Defendants 1-10 conspired to violate Plaintiff's Sixth and Fourteenth Amendment rights by intimidating or discouraging Ayala from testifying. Defendant argues that Plaintiff's Section 1985 claim fails under Rule 12(b)(6).

To state a claim under Section 1985 for a conspiracy to violate civil rights, a plaintiff must plead four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992). A "conspiracy may be

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[13] Alternatively, Plaintiff has not shown that Gilmore's statements would be admissible under a hearsay exception of the Federal Rules of Evidence.

inferred from conduct and need not be proved by evidence of an express agreement . . . ." *Ward v. EEOC*, 719 F. 2d 311, 314 (9th Cir. 1983). However, "[a] mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. L. A. Police Dept*, 839 F. 2d 621, 626 (9th Cir. 1988) (internal citations omitted).

First, Plaintiff's Section 1985 claim is subject to dismissal based on Plaintiff's failure to sufficiently allege a Section 1983 claim. *See Thornton v. City of St. Helens*, 425 F. 3d 1158, 1168 (9th Cir. 2005) ("The absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations.") (internal quotation marks omitted).

Furthermore, Plaintiff's amended allegations of a conspiracy, which suffer the same deficiencies as the allegations of a conspiracy in her Complaint, are insufficient to state a claim under Section 1985. Plaintiff's amended allegations contend that Defendant and/or another Doe Defendant from the Santa Monica Police Department spoke to a representative of the El Segundo Police Department about Ayala. (FAC ¶¶ 43, 78.) As a result of the conversation, the representative agreed to recommend prosecution to the District Attorney's Office, who filed the charges a few weeks before trial. (FAC ¶¶ 43, 78.) However, this chain of interactions still does not establish a "meeting of the minds."[14]

[14] For instance, according to Defendant, the El Segundo Police Department detective did not have contact with Defendant during the investigation of Ayala's case. (Mot. 10.) Similarly, the

Ward, 719 F. 2d at 314; *see Woodrum v. Woodward Cnty, Okl.*, 866 F. 2d 1121, 1126 (9th Cir. 1989) (failure to show a meeting of the minds and the deprivation of rights was fatal to civil rights conspiracy claim); *Aldabe v. Aldabe*, 616 F. 2d 1089, 1092 (9th Cir. 1980) (vague and conclusory allegations of participation in civil rights violations, without more, are insufficient to sustain a claim). For these reasons, the Court **DISMISSES** Plaintiff's Section 1985 claim without leave to amend.[15]

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendant's Motion II. Plaintiff's First Amended Complaint is **DISMISSED**. This case shall close.

IT IS SO ORDERED.

Los Angeles County Deputy DA did not have contact with Defendant about the filing of Ayala's case. (Mot. 9-10).

[15] Because the Court dismisses Plaintiff's two causes of action, it need not address Defendant's qualified immunity arguments.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELLY SOO PARK, Plaintiff-Appellant, v. KAREN THOMPSON, Defendant-Appellee.	No. 14-56655 D.C. No. 2:14-cv-00330-SJO-RZ Central District of California, Los Angeles ORDER (Filed May 24, 2017)

Before: REINHARDT, FERNANDEZ, and OWENS, Circuit Judges.

Judges Reinhardt and Owens voted to deny the petition for rehearing en banc, and Judge Fernandez so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**. No further petitions for panel or en banc rehearing will be entertained.