No. _____

In The Supreme Court of the United States

MARCELLA WINN,

Petitioner,

vs.

SUSAN MELLEN, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Do claims against a police officer under 42 U.S.C. § 1983 for failure to disclose material evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) require a plaintiff to show bad faith by the officer as required by the Eighth Circuit, or are such claims governed by a deliberate indifference standard as required by the Seventh and Ninth Circuit?

2. Do the actions of a police officer shock the conscience, and constitute bad faith or deliberate indifference so as to support liability under 42 U.S.C. § 1983 for failure to disclose material evidence under *Brady v. Maryland*, 373 U.S. 83 (1963) when the evidence consisted of a sibling's general opinion of her sister's lack of veracity, while acknowledging that she had no personal knowledge of the facts of the particular case?

3. Did the Ninth Circuit depart from the decisions of this Court directing lower courts not to evaluate clearly established law at too high a level of generality for purposes of qualified immunity, by concluding that, at the time of the events in question, it was clear that "police officers had a duty to disclose material impeachment evidence to prosecutors," without reference to any case law that "'squarely governs' the specific facts at issue," as required by this Court's decision in *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

- Marcella Winn, an individual, defendant and appellee below, petitioner here.

- Susan Mellen, Julie Carroll, Jessica Curcio, and Donald Besch, individuals, plaintiffs and appellants below, respondents here.

There are no publicly held corporations involved in this proceeding.

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The Ninth Circuit's opinion, the subject of this petition, is reported at 900 F.3d 1085 (9th Cir. 2018) and reproduced in the Appendix hereto ("Pet. App." at pages 1-43.) The district court's decision granting petitioner's motion for summary judgment based on qualified immunity is not reported and is reproduced in the Appendix at pages 44-130.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit entered its judgment and its opinion on August 17, 2018. This Court has jurisdiction to review the Ninth Circuit's August 17, 2018 decision on writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondents brought the underlying action under 42 U.S.C. § 1983, which states:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondents allege petitioner violated their rights under the United States Constitution's Fourteenth Amendment, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Susan Mellen Is Arrested And Convicted For The Murder Of Richard Daly.

1. The investigation.

On July 21, 1997, petitioner Marcella Winn, a detective with the Los Angeles Police Department ("LAPD"), was assigned to investigate the murder of

Richard "Rick" Daly. (6ER 1369-70.)[1] Between July and August 1997, Winn focused the investigation on three gang members—Santo Alvarez aka Payaso, Lester Monllor aka Wicked, and Chad Landrum aka Ghost. (5ER 1130-34; 6ER 1369 ¶ 3–1380 ¶ 43.)

On August 13, 1997, a civilian witness, Ginger Wilborn, told Winn that Susan Mellen had control over all three gang members, that they did what she told them to do, and that Mellen had recently complained to Wilborn that Daly was stealing from her and was a snitch. (5ER 1134; 6ER 1379-80 ¶¶ 42-43; SER 1-3.) Shortly thereafter, Monllor told Winn that he saw Mellen wiping fingerprints off door knobs at the Mellen Patch, the Mellen family home and site of the murder, but did not know if Mellen was present at the time of the murder. (SER 13-14.)

On August 14, 1997, civilian witness Cynthia Sanchez told Winn that Monllor's mother, Terry, had told her that Mellen had lured Daly into the Mellen Patch and had been having oral sex with him on the day of the murder. Sanchez also stated that Daly had been stealing from Mellen and that she had seen Mellen and Mellen's boyfriend, Tom Schenkelberg, wiping their fingerprints off the doors at the Mellen Patch on the night of the house fire a few days after the murder. (5ER 1135; SER 4-12.)

On August 22, 1997, Winn received an unsolicited memo from Detective Patrick Such of the Torrance

[1] "ER" denotes the Excerpt of Record filed in the Ninth Circuit and "SER" denotes the Supplemental Excerpt of Record.

Police Department stating that a source had implicated Mellen and Schenkelberg in the Daly murder. The source stated that Mellen had set up the murder and had lured Daly to the scene by giving him oral sex. (5ER 1136; SER 59-64, 79-81.) The memo from Such was placed in the Murder Book. (6ER 1386 ¶ 63.)

On August 15, 1997, Winn met with civilian June Patti, who claimed to have information regarding Daly's murder. At the time, Winn had no reason to think that Patti was not being truthful or intended to deceive or manipulate the investigation in any way. (6ER 1391-92 ¶¶ 81, 84-85.)

Patti told Winn that she called Mellen to buy drugs and Mellen agreed to meet Patti because she "wanted to talk about something." (6ER 1195.) Mellen asked Patti if she could be implicated in the Daly murder when her involvement was limited to "watching" it take place. (6ER 1203.) Patti provided a recorded statement to Winn summarizing Mellen's confession to her.

Patti told Winn that Mellen had told her that she and Tom, with help from Chad Landrum, killed Daly because he kept going to Mellen's mother's house and stealing all their things, including drugs. (Pet. App. 9.) Patti said that Mellen told her that Tom and Landrum kicked Daly and taped his mouth shut, that Landrum pulled out a knife and threatened to stab Daly, and that Tom and Landrum set fire to Daly and Mellen's mother's house. (*Id*.) Mellen told Patti that she had pulled back Daly's head with his bandanna, kicked him, and got high while Tom and Landrum beat Daly.

(*Id*.) She also said that a fourth unnamed person came over from next door to tell her, Tom and Landrum to be quiet and that this person was already in custody. (*Id*.) According to Patti, Mellen told her that she and Landrum had put Daly in the back of Mellen's car and dropped him off in San Pedro because "Tom didn't want to go." (*Id*.)

Winn also prepared a written statement for Patti's signature, which indicated that a fourth unnamed person had acted as a lookout for Mellen, Tom, and Landrum, and that Landrum set Daly on fire again in San Pedro, and that Patti and Tom had left Daly's body near a trash can in an alley with a chain link fence. (Pet. App. 9-10.) It also stated that Mellen and Landrum had dumped the body in San Pedro around 8:30 or 9:30 p.m., although Patti had earlier told Winn that Landrum and Tom had started beating Daly during the daytime. (Pet. App. 10.)

Winn's notes from the meeting, along with a signed statement from Patti relating Mellen's admissions, were placed in the Murder Book and the audio tape of Patti's interview was given to Scientific Investigation Division ("SID") and documented in the Murder Book. (5ER 928-29; 6ER 1370 ¶ 6, 1382 ¶ 50, 1383-84 ¶ 56.) Winn also placed a copy of Patti's criminal history (rap sheet) in the Murder Book, which referenced charges for three different counts of forgery, criminal threats, and false impersonation. (6ER 1403 ¶ 18; SER 82-84.)

On August 18, 1997, Winn presented the case to the District Attorney's Office, which subsequently filed homicide charges against Mellen, resulting in her arrest on August 25, 1997. (5ER 1135; 6ER 1384 ¶ 57, 1390 ¶ 75.) Following Mellen's arrest Winn again met with Wilborn, who told him that the rumor on the street was that Mellen had lured Daly into the Mellen Patch by offering him oral sex and that Mellen had offered to pay if Monllor would get rid of Daly. (SER 15-17.)

Prior to Mellen's Preliminary Hearing, a copy of the Murder Book was provided to the District Attorney's Office, and to Mellen's defense counsel. (6ER 1390 ¶ 77.) Deputy District Attorney Valerie Cole was assigned to prosecute the cases arising out of the Daly murder, reviewed the Murder Book, which included varying accounts of what happened and who was involved, and determined that the murder charges filed against Mellen were appropriate. (6ER 1400 ¶ 5.)

2. Patti makes statements at the preliminary hearing calling her credibility into question.

At the preliminary hearing in Mellen's case, Patti testified to various facts implicating her credibility including:

- Patti had stabbed Mellen's boyfriend five years earlier;
- Patti hated all officers and police departments (even though her sister, Laura

Patti ("Laura"), was a Torrance police officer);

- Patti's sister Laura had arrested Patti's husband;
- Patti's sister Laura had arrested Patti; and
- Patti had previously helped Detective Jim Wallace and the Torrance Police Department.

(SER 18-30.)

Patti also changed the substance of her account of Mellen's confession. She reiterated her prior statement that Mellen had confessed to her that Mellen and Tom recruited Landrum from next door to beat up Daly for stealing Mellen's things, but on questioning from defense counsel about the involvement of a fourth person, Patti insisted that the fourth person had only banged on the window and asked them to keep it quiet, but otherwise had nothing to do with the murder. When pressed, Patti said that Detective Winn had made up details of the story that was in her written statement concerning the involvement of a fourth person. (Pet. App. 11-12.) Patti stated that Winn had pressed her to sign the statement, and seemed irritated when she initially refused to do so, but that she eventually relented and signed it because she wanted to get to the airport. (Pet. App. 12.)

Patti also changed her account of her meeting with Mellen, i.e., where and when she telephoned Mellen to arrange the meeting, and that she—Patti—was on

speed the night that she spoke to Mellen at the hotel. (Pet. App. 12.) Patti did not mention whether anyone else had been present with her at the hotel, whether Daly's attacker had used a hammer or a knife, or any other detail about how they had allegedly kept Daly quiet or transported his body to San Pedro. (Pet. App. 12-13.)

Deputy District Attorney Cole knew that Patti denied telling Winn some of the specific details that were in her signed and initialed declaration during the hearing. (6ER 1401 ¶ 9.) Mellen's defense attorney also recognized the inconsistencies in Patti's testimony and, as noted, pointed out each instance during cross-examination. (SER 31, 33-38.)

3. Patti changes her testimony at trial, her credibility is again challenged, but Mellen is Convicted.

By the time of trial, Mellen's criminal defense attorney was well aware of Patti's lengthy criminal history and dubious past. (2ER 169.) However, when asked by the court if he intended to cross-examine Patti about the prior stabbing of Mellen's boyfriend, Mellen's defense attorney responded:

> A: I don't even know where I got the information. No. If I [sic] comes up in the course of testimony, fine. I don't expect to.

> Q: You don't intend to ask the witness that question?
>
> A: No. No.

(2ER 168.)

In addition to the information that was specified on Patti's criminal rap sheet (including forgery and falsely impersonating another), the defense also had evidence that Mellen's brother killed Patti's dog in retaliation for Patti stealing a Mellen family vehicle. (2ER 168-69.) When asked if he intended to produce such evidence, Mellen's defense attorney passively responded, "[y]our Honor, I don't have him under subpoena, so it is not going to happen." (2ER 169.)

Mellen's defense attorney even believed that Patti may have been a paid informant, since she had several prior arrests and few, if any, felony convictions. (2ER 169.) While noting that prior arrests and misdemeanors were not admissible, the trial court advised that the defense was free to prove up underlying conduct that was relevant. Although Mellen was free to prove up Patti's character for truthfulness as it related to conduct underlying Patti's forgery charges and false impersonation of another, Mellen's defense attorney merely advised the court that he "had no quarrel" with that particular 402 motion. (2ER 167.)

At trial, Patti again changed her testimony, offering an entirely new motive for Daly's murder and details she had never offered to anyone before. She testified that Mellen had confessed to her that she had

been giving oral sex to Daly when Tom had "'kind of caught her with her pants down.'" She stated that Daly and Mellen had a child together and that Mellen loved Daly, even though he had been stealing from her, and that Mellen had started a relationship with Tom. Patti stated that Mellen informed her that Tom became angry when he figured out what had happened and started beating Daly on the head with a hammer that Tom had taken from Daly's bicycle. (Pet. App. 16-17.) Patti also testified that "'somebody from next door'" (Landrum) came over to help Tom beat up Daly, convincing him to do so in exchange for a quarter ounce of dope. (Pet. App. 17.) According to Patty, Mellen told her that Tom left and Landrum continued to beat up Daly, and when Tom returned, Mellen gagged Daly with his own bandanna by stuffing it down his throat and supergluing and taping his mouth shut. (*Id*.) Patti stated that after hearing Mellen's confession, she had vowed to tell her sister, who was a Torrance Police Officer. (*Id*.)

Patti's inconsistencies and trustworthiness were hammered home by defense counsel during cross-examination:

> Q: "You have gone out of your way to embellish your testimony, haven't you?"
>
> A: "[During the Preliminary Hearing], I told the truth. I just didn't tell the complete truth."
>
> A: " . . . I hid the facts from the police . . . "
>
> A: "Yes, I did not tell [the police] . . . "

Q: "Are we getting the whole truth today?"

A: "Probably not . . . "

(SER 31-38.)

Other evidence at trial implicated Mellen. The crime scene, the Mellen Patch, was Mellen's mother's property. Mellen and her children had recently lived there and still had belongings in the house at the time of the murder. (6ER 1292-93.) Mellen had admitted in her interrogation that Daly was an ex-boyfriend and that he had been stealing from the Mellen Patch house. (6ER 1291.)

Mellen also placed herself at the crime scene with Daly on the day of the murder, in both her interrogation and her trial testimony. (6ER 1292-93.) Mellen never offered any alibi during her interrogation. She did not claim that she was physically moving on the day of the murder, instead raising it for the first time at trial. (6ER 1389-90, 1405; SER 39-40.)

Mellen was also inconsistent in her interrogation concerning her relationship with June Patti, initially stating she had heard of Patti, then admitting to knowing her, but claiming to have last spoken with her years ago, and finally admitting she had seen Patti recently when Patti called her from a motel to buy drugs. (6ER 1306, 1314-15.)

The jury returned a guilty verdict and Mellen was sentenced to life in prison without the possibility of parole on June 5, 1998. (Pet. App. 21-22.)

4. The habeas proceedings.

Almost 20 years after she had been convicted, Mellen's case came to the attention of Innocence Matters, a nonprofit legal organization dedicated to secure habeas relief for people with valid innocence claims. As part of its investigation, Innocence Matters spoke with numerous individuals close to the investigation, including Chad Landrum and Santo Alvarez, who confessed to the murder and said that Mellen had nothing to do with it. (Pet. App. 22-23.) Innocence Matters also contacted Patti's sister Laura, who stated that she had spoken with Winn in advance of Mellen's trial and told her that Patti was "'the biggest liar that [she] had ever met in her life,'" "'[she] didn't believe anything [Patti] said,'" and that Patti would do anything to get her or her boyfriend Dean out of trouble because Patti only gives information that would benefit herself. (Pet. App. 79.) Laura acknowledged, however, that she had no personal information about whether her sister lied as part of the Daly murder investigation, and offered her own belief that Detective Winn reasonably relied on Patti's statements because she recalled that Winn told her that her sister offered details about the murder that were not publicly available. (Pet. App. 22, 79-80.)

Innocence Matters also obtained information from the City of Torrance Police Department regarding the use of Patti as a paid or non-paid informant, and received a Torrance Police Department informant information report dated December 23, 1993, which documented Patti as an "'unreliable informant.'" (Pet. App. 81.)

Based on this evidence, on September 18, 2014, Mellen filed a petition for writ of habeas corpus, which the District Attorney's Office did not oppose, finding that based upon the evidence submitted, the testimony of Patti incriminating Mellen was doubtful. (Pet. App. 22.) On October 10, 2014, the habeas petition was granted, and on October 15, 2014, Mellen filed a motion for finding of innocence by a preponderance of the evidence, pursuant to California Penal Code section 1485.55, subdivision (b), which was unopposed and granted on November 21, 2014. (Pet. App. 82.)

5. Plaintiffs file suit and the district court grants summary judgment.

Mellen, along with her three children—Julie Carroll, Jessica Curcio, and Donald Besch—filed suit against Winn, among other defendants, asserting a deprivation of civil rights under the Fourteenth Amendment for failure to provide information required by *Brady v. Maryland*, 373 U.S. 83 (1963), among other claims.[2]

Winn moved for summary judgment, arguing that she was entitled to qualified immunity with respect to any alleged failure to disclose her conversation with Patti's sister Laura to the prosecution, because any failure was not deliberately indifferent, and in any

[2] The other defendants, Winn's supervisor and the City of Los Angeles, were eventually dismissed. (Pet. App. 45-46.)

event, there was no clearly established law that would have suggested that her conduct was improper.

The district court granted the motion. It found that Winn's failure to disclose the conversation with Patti's sister, Laura, was not a *Brady* violation. (Pet. App. 96.) Plaintiffs contended that had Mellen's defense counsel been aware of Winn's conversation with Patti's sister, he would have contacted the Torrance Police Department and then learned of their determination that Patti was an unreliable informant. (*Id*.) Yet, as the district court noted, there was no evidence that Laura told Winn anything about her sister being an informant, and indeed Patti's connection to the Torrance Police Department was made clear to Mellen's defense counsel at her preliminary hearing. (Pet. App. 97-98.)

The district court also noted that Laura's statement regarding Patti being a liar, based upon her personal experience, was only marginal impeachment evidence. (Pet. App. 100.) Significantly, Laura did not provide Winn with a reason why she thought her sister was a liar. (*Id*.) Moreover, Laura did not claim to have any personal knowledge concerning Patti's testimony with respect to the Mellen investigation, and, in fact, she could not say that Patti had lied to Detective Winn in relation to the murder investigation. (Pet. App. 80.)

The court also noted that there was insufficient evidence to show that Winn had acted with deliberate indifference. (Pet. App. 101.) The district court acknowledged that in deposition testimony, Winn had stated that if she had found out that June Patti was a

pathological liar in 1997, that would have been the kind of information that she would have to turn over under *Brady*, but observed that Laura had never used the word pathological liar. (*Id*.) The court noted that the evidence actually undisclosed by Winn was very limited, and there was no indication that Winn did appreciate, or should have fully appreciated, the significance of Laura's opinion that Patti was the biggest liar she had ever met in her life. (Pet. App. 102.) At most, the statement was of only "modest impeachment value" (*id*.), and at worst, Winn's conduct was only "perhaps negligent." (Pet. App. 103.)

The district court also concluded that plaintiffs could not show that the nondisclosed evidence was material or that its nondisclosure prejudiced Mellen's defense in her murder trial. (Pet. App. 105.) The court again observed that Laura's statement was not "significant impeachment evidence," particularly since for many years prior to the Daly murder, Laura had no significant contacts with Patti. Even given her opinion that her sister was a liar, she had no reason to doubt that Mellen had, in fact, confessed to Patti and could not say that Patti lied to Detective Winn in relation to the murder investigation. (Pet. App. 105-06.) Nor did Laura think it unreasonable for Winn to rely on Patti's statements. (Pet. App. 106.)

In addition, the court noted that at most, Laura's opinion evidence that Patti was a liar was cumulative of impeachment and that significant other evidence was presented to the jury, calling into question Patti's credibility. (Pet. App. 107-08.)

Finally, the district court concluded that in any event, Winn would be entitled to qualified immunity because there was no clearly established law that would have put her on notice that her conduct was unlawful under the circumstances. (Pet. App. 109-12.)

6. The Ninth Circuit reverses.

Respondents appealed, and on August 17, 2018, the Ninth Circuit issued its opinion reversing the judgment. (Pet. App. 1-43.) The Ninth Circuit concluded that Laura's statement was material *Brady* evidence as a matter of law. (Pet. App. 24.) Because Patti's testimony was critical to Mellen's conviction, issues concerning her credibility were necessarily important. (Pet. App. 25-26.) The court found that Laura's statement would not be cumulative of other impeachment evidence at trial because she was especially trustworthy as a police officer and a member of Patti's immediate family. (Pet. App. 27.) The court concluded that Laura was a "gateway to a whole host of other information about Patti's unreliability as a paid informant and her many, untruthful contacts with law enforcement," and that had her conversation with Winn been disclosed, defense counsel would have learned that Patti had been an unreliable informant for the Torrance Police Department. (Pet. App. 31.)

The court also found that there was an issue of fact as to whether Winn acted with deliberate indifference. (Pet. App. 34-35.) The court noted that Winn was aware that Patti's credibility was a critical issue at trial.

Moreover, the fact that the withheld statements came from what the court characterized as a "particularly credible source" made Detective Winn's failure to disclose to the prosecutor all the more culpable. (Pet. App. 35-36.) Even though Laura had no knowledge of the murder investigation, and in fact, as noted, thought Winn had a basis for believing Patti's statement, the Ninth Circuit stated that:

> [A] juror could reasonably find that Detective Winn was reckless in withholding a *fellow law-enforcement officer's* opinion, even if that same juror would conclude that withholding a *layperson's* opinion was no more than negligent.

(Pet. App. 36 (emphasis in original).)

The court noted that Winn's failure to ask Laura about the basis for her opinion could be viewed as turning a blind eye to potentially unfavorable evidence. (Pet. App. 37.) It further noted that plaintiffs' police practices expert—whose testimony had been excluded by the district court—opined that any reasonably trained officer would have vetted the credibility of a key witness, and hence, a jury could conclude that Winn must have knowingly suppressed that statement. (Pet. App. 37-38.)

The Ninth Circuit also found Winn was not entitled to qualified immunity, stating the issue was "whether it was clearly established, in 1997, that police officers had a duty to disclose material impeachment evidence to prosecutors." (Pet. App. 40.) The court

concluded that Winn's duty to disclose Laura's testimony was clearly established by three cases: *Kyles v. Whitley*, 514 U.S. 419 (1995); *Carrillo v. County of Los Angeles*, 798 F.3d 1210 (9th Cir. 2015); and *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (per curiam)—none of which involved alleged suppression of a witness's opinion as to a witness's reputation for credibility. (Pet. App. 40-41.)

REASONS WHY CERTIORARI IS WARRANTED

Over 55 years ago in *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the due process clause of the Fourteenth Amendment required prosecutors to disclose evidence favorable to the accused in order to preserve the accused's right to a fair trial. Since then, the Court has clarified the application of *Brady*, holding that it applies to impeachment evidence, *United States v. Bagley*, 473 U.S. 667 (1985), and extending the disclosure obligation to all members of the prosecution team, including police officers, *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Although the Court has assumed the existence of a civil claim for a *Brady* violation under 42 U.S.C. § 1983 in the context of addressing issues concerning immunity or municipal liability,[3] it has never

[3] *See*, *e.g.*, *Connick v. Thompson*, 563 U.S. 51 (2011) (municipal liability); *McMillian v. Monroe Cty., Alabama*, 520 U.S. 781 (1997) (municipal liability); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (absolute prosecutorial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute prosecutorial immunity).

addressed the precise nature of such a claim. The Ninth Circuit's decision in this case, which exposes petitioner Winn to potentially catastrophic liability for failure to disclose what amounts to, as the district court noted, marginal impeachment evidence, underscores why it is essential that this Court grant review to set down clear guidelines for future cases.

- It is necessary for this Court to clarify the standard for imposing liability on a police officer for failure to disclose information gleaned during the course of a criminal investigation. Respondent Mellen was convicted of murdering Richard Daly, based upon the testimony of various witnesses noting she had been wiping fingerprints at the location of the murder, and the testimony of June Patti, to the effect that Mellen had confessed her involvement in the murder. Mellen served 17 years in prison before securing habeas relief based upon the fact that (1) another individual had confessed to the murder; (2) post-trial investigations had determined that Patti had served as an informant for the Torrance Police Department, which had deemed her "unreliable," and (3) a statement from Patti's sister, Laura, a police officer, that she had spoken to petitioner Winn and had told her that her sister was the "biggest liar I've ever met in my life and I don't believe anything she says." In reversing the district court's grant of summary judgment to Winn in Mellen's subsequent § 1983 action based upon violation of a due process right under *Brady*, the Ninth Circuit held that Laura's opinion concerning her sister's trustworthiness constituted *Brady* material as a matter of law, and

that a jury could conclude that Winn was deliberately indifferent, or acted with reckless disregard in failing to disclose that statement to the prosecutor assigned to the case. (Pet. App. 24, 34-35.)[4] It did so, despite, as the district court noted, the fact that Laura acknowledged she had no personal information about whether her sister lied as part of the murder investigation, and indeed understood why Winn would find her sister's testimony credible, given that she had related facts to Winn concerning the manner in which the murder was committed. (Pet. App. 80, 102.) In addition, as the district court further noted, following the preliminary hearing, Mellen's defense counsel was aware that Patti's sister Laura was a Torrance Police Officer, and that Patti herself stated that she had previously provided assistance to the Torrance Police Department. (Pet. App. 98.) Moreover, Patti changed her story in several significant ways between the time of her initial meeting with Winn, her testimony at the preliminary hearing and at trial, where her credibility was vigorously attacked. As the district court noted, in light of that, her sister Laura's opinion about her veracity, especially given the bad blood between them, was at best "marginal" impeachment evidence and not significant enough to impose liability for violation of *Brady*.

- As the district court observed (Pet. App. 88), there is currently a circuit split as to whether a police

[4] Winn denies any conversation with Laura Patti ever took place, but the truth of Laura's testimony was accepted for purposes of Winn's qualified immunity argument on summary judgment.

officer's failure to disclose exculpatory evidence establishes a § 1983 claim in the absence of bad faith. The Eighth Circuit has held that a showing of bad faith is required, consistent with this Court's decision in *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), and *California v. Trombetta*, 467 U.S. 479, 488 (1984). *Helmig v. Fowler*, 828 F.3d 755, 760 (8th Cir. 2016); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). In contrast, the Seventh and Ninth Circuits have held that bad faith need not be shown, only deliberate indifference. *Steidl v. Fermon*, 494 F.3d 623, 631-32 (7th Cir. 2007); *Tennison v. City and Cty. of San Francisco*, 570 F.3d 1078, 1087 (9th Cir. 2009). While petitioner submits that a bad faith standard more closely adheres to his Court's prior jurisprudence in *Trombetta* and *Youngblood* and hence should be the applicable standard, even under a lesser deliberate indifference standard, there is no basis for liability against petitioner Winn. This Court has expressly noted that the *Brady* rule has "gray areas and some *Brady* decisions are difficult." *Connick*, 563 U.S. at 71. The Court has also sharply distinguished between prosecutors and law enforcement officers in regards to *Brady* determinations, noting, "attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles. *Id*. at 70. Moreover, the Court has emphasized that such determinations are particularly difficult with respect to impeachment evidence, "given the random way in which such information may, or may not, help a particular defendant." *United States v. Ruiz*, 536 U.S. 622, 623 (2002). Given the marginal impeachment value of Laura's statement concerning her

opinion about her sister's veracity, it was untenable to contend that Winn was somehow acting in reckless disregard and with deliberate indifference in failing to disclose it to the prosecution. Indeed, the Ninth Circuit, in finding that Winn acted with deliberate indifference, relied on expert testimony to the effect that any reasonable police officer would know that Laura's statement was *Brady* material—effectively importing the very sort of negligence standard that this Court has rejected as a basis for a due process claim. *Daniels v. Williams*, 474 U.S. 327, 332-34 (1986). The Ninth Circuit's muddy standard for imposing liability against police officers under *Brady* necessarily creates uncertainty as to the extent of an officer's obligations, that will extend to criminal as well as civil cases.

- It is also necessary for the Court to grant review to once again require the Ninth Circuit to adhere to the requirement that in determining qualified immunity, courts must not define the right at issue at too high a level of generality. Just last term, in *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018), the Court observed:

> This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.

(Internal quotation marks omitted.)

Yet, that is exactly what the Ninth Circuit did here, stating that the issue was "whether it was clearly established, in 1997, that police officers had a duty to

disclose material impeachment evidence to prosecutors." (Pet. App. 40.) Yet, that is nothing more than stating the general constitutional standard at issue, which this Court has repeatedly held to be improper in assessing qualified immunity. Despite this Court's admonition that a plaintiff is required to identify "existing precedent [that] 'squarely governs' the specific facts at issue," *Kisela*, 138 S. Ct. at 1153, neither plaintiffs nor the Ninth Circuit identified any such case law here. The Ninth Circuit cited only three cases, none of which involved the specific factual situation confronted by petitioner Winn. None involved failure to disclose opinion evidence concerning a witness's reputation for veracity, let alone circumstances analogous to those present here. This Court has repeatedly recognized the importance of qualified immunity and the need for this Court to intervene to compel compliance with its precedence. *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases). Once again, the Ninth Circuit's departure from controlling case law of this Court requires the Court to intervene.

Given the increasing use of DNA evidence, and conviction integrity units, more criminal convictions are being reversed. While such efforts are important and laudable, as illustrated by this case, such exonerations will necessarily spawn follow-on civil suits to supplement state compensation systems for the wrongfully convicted with potentially massive awards. In addition, *Brady* claims are ubiquitous in criminal cases. It is therefore essential for this Court to set

down clear guidelines for future cases as to what constitutes material evidence for *Brady* claims, as well as the standards for imposing civil liability and assessing qualified immunity for such claims.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT HAS DEPARTED FROM THE DECISIONS OF THIS COURT BY EXPOSING LAW ENFORCEMENT OFFICERS TO POTENTIAL LIABILITY FOR FAILING TO DISCLOSE EVIDENCE THAT DOES NOT FALL WITHIN *BRADY V. MARYLAND*, AND IT IS NECESSARY FOR THE COURT TO CLARIFY THE ELEMENTS OF A CIVIL CLAIM FOR ALLEGED *BRADY* VIOLATIONS.

A. The Court has never addressed the standard for imposing civil liability for a *Brady* claim.

As noted, this Court has never addressed the merits of a civil claim for damages for violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Indeed, even in the context of criminal cases the Court has not clearly indicated whether *Brady* rights stem from the substantive or procedural protections of the Due Process Clause of the 14th Amendment, although the latter seems likely. *See Albright v. Oliver*, 510 U.S. 266, 273 n.6 (1994).

There are three elements to a *Brady* violation: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is

impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Suppressed evidence is considered material, and hence prejudice ensues, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," either with respect to guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Although a criminal defendant may obtain relief from conviction even for an inadvertent *Brady* violation, application of the *Brady* standard becomes more problematic in civil cases, where imposition of liability typically requires some proof of fault or culpability. Since *Brady* rights stem from the Due Process Clause, mere inadvertence, or even negligence cannot be enough. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (negligently caused slip and fall insufficient to support due process claim). The Court has made it clear that in the context of civil claims arising from a violation of substantive due process rights, the defendant's conduct must "shock the conscience," a standard that varies depending on the period of reflection a defendant may have before taking the action in question. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472-73 (2015).

B. The Court should resolve the circuit split on whether civil claims against a police officer require a showing of bad faith, or deliberate indifference.

The Circuits are currently divided on the standard of liability for *Brady* claims. The Eighth Circuit requires a showing of bad faith by a police officer. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004); *Helmig v. Fowler*, 828 F.3d 755, 760 (8th Cir. 2016). The Ninth and Seventh Circuit only require proof of deliberate indifference or reckless disregard. *Tennison v. City and Cty. of San Francisco*, 570 F.3d 1078, 1087 (9th Cir. 2009); *Steidl v. Fermon*, 494 F.3d 623, 631-32 (7th Cir. 2007). Petitioner submits that the bad faith standard applied by the Eighth Circuit is consistent with the Court's decisions in *California v. Trombetta*, 467 U.S. 479, 488 (1984) and *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) with respect to requiring bad faith on the part of non-lawyers for mishandling evidence. But in any event, as we discuss, petitioner Winn's conduct does not even rise to the level of deliberate indifference, much less bad faith, and the Ninth Circuit's suggestion that it can give rise to liability underscores why it is necessary for this Court to clarify the standards for imposing liability for *Brady* violations.

C. Petitioner's alleged conduct does not constitute bad faith or deliberate indifference, and the Ninth Circuit's holding that it is sufficient to support liability, underscores the need for the Court to provide clear guidelines concerning civil liability for alleged *Brady* violations.

In assessing what constitutes deliberate indifference or reckless disregard for purposes of a civil *Brady* claim against a police officer, several observations of the Court are critical. First, the Court has noted that many *Brady* issues are complex, and that the doctrine has many "gray areas." *Connick v. Thompson*, 563 U.S. 51, 71 (2011). Second, the Court has noted that it is often particularly difficult to assess the nature and extent of impeachment evidence. *United States v. Ruiz*, 536 U.S. 622, 630 (2002). Third, police officers, in stark contrast to prosecutors, do not have extensive legal training to necessarily discern potential *Brady* evidence. *Connick*, 563 U.S. at 70.

Against this background, it is clear that the Ninth Circuit erred and departed from this Court's decisions in concluding that respondents could proceed to trial on their claims against Winn.

At the outset, in an effort to give Laura's statement to Winn undue prominence, the Ninth Circuit notes it was one of the grounds for Mellen's successful habeas petition, and largely downplays the two most

obvious grounds for vacating her conviction—the fact that someone else (one of the original suspects) confessed to the murder and exonerated Mellen, and discovery of the Torrance Police Department memo describing Patti as an "unreliable" informant. (Pet. App. 23.) The Ninth Circuit speculates that had Winn disclosed her conversation with Laura it would have led Mellen's defense counsel to discover the Torrance Police Department connection and discover the memo earlier. (Pet. App. 31.) However, as the district court noted, Mellen's defense counsel was well aware that Patti provided assistance to the Torrance Police Department and that her sister was an officer there, as she disclosed that at the preliminary hearing. (Pet. App. 72.) This evidence was not suppressed, just ignored by defense counsel, who failed to follow up on it. The Ninth Circuit's suggestion that nothing in Patti's preliminary hearing testimony should have prompted her defense counsel to contact Laura (Pet. App. 32) does not pass the "'straight-face test,'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018).

The Ninth Circuit attempts to inflate the significance of Laura's statement, by asserting that Winn was deliberately indifferent because she should have known that a jury would necessarily give it extra weight because Laura was a police officer speaking to another law enforcement officer about her sister. (Pet. App. 27, 34, 36.) Yet, the Ninth Circuit ignores the fact that, as the district court noted, at bottom, Laura's

testimony was nothing more than evidence of reputation that was subject to limited admissibility under California law, with a threshold challenge of weighing probative value versus prejudice under California Evidence Code section 352 before it could be considered by a jury. (Pet. App. 99-100.) As the district court observed, although "favorable impeachment evidence," it was only "marginally so." (Pet. App. 100.)

Moreover, as the district court found, there was nothing deliberately indifferent or reckless about Winn not disclosing what was at most evidence "of modest impeachment value," especially given that Winn was not an attorney, and "the evaluation of the degree of help that impeachment evidence will provide can depend on factors which are not readily apparent to the investigating police officer. . . ." (Pet. App. 102 (citing *Connick*, 563 U.S. at 70; *Ruiz*, 536 U.S. at 630).) In addition, Laura testified that Winn seemed to believe that Patti was providing good information given Patti's knowledge about the case, a belief confirmed by other evidence corroborating Patti's testimony. (Pet. App. 104.) Indeed, Laura did not think it unreasonable of Winn to believe Patti's statements. (Pet. App. 106.) As the district court noted, in light of these facts, nothing about Winn's conduct could be said to "'shock the conscience.'" (Pet. App. 104.)

The Ninth Circuit's exaggerated characterization of the importance of Laura's statement in contrast to

other impeachment evidence, so as to suggest that Winn recklessly ignored its materiality, similarly does not withstand scrutiny. As the district court noted, the jury had plenty of direct impeachment evidence concerning Patti's conduct *in the very case at issue* that was far more compelling than reputational evidence from an estranged sibling. Patti repeatedly changed her story in material ways—in her oral statement, written statement, at preliminary hearing and at trial. (Pet. App. 108.) Laura's marginal reputation evidence was at best cumulative evidence and hence it was hardly indifferent of Winn to discount its significance.

Further, Laura's statement is even less compelling evidence than the evidence this Court found insufficient to show materiality for a *Brady* violation in *Turner v. United States*, 137 S. Ct. 1885 (2017). There, defendants argued that suppressed evidence that the victim was killed by one or two individuals was material to their defense against the charge that they had murdered the victim as part of a group assault. *Id*. at 1893-94. The Court rejected the contention, noting that the evidence at trial overwhelmingly established a group assault, and hence the indirect evidence of something other than that was not material for purposes of *Brady*. *Id.* at 1894-95. Here Laura's statement was much less than that—it was not tied to any knowledge of the case because she had none; it was only general reputation evidence from an estranged family member.

The Ninth Circuit also concluded a jury could find that Winn deliberately or recklessly sought to suppress exculpatory evidence based upon her failure to investigate the basis of Laura's statement. First, the court cited two criminal cases concerning defendants' "willful blindness" to the fact that they were in vehicles carrying drugs. (Pet. App. 37 (citing *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) (en banc); *United States v. Jewell*, 532 F.2d 697, 699-700 (9th Cir. 1976) (en banc)).) Neither case concerns any obligation for a police officer to conduct an investigation to specifically seek out exculpatory information. And in fact, as the district court noted, the Ninth Circuit has held there is no free-standing due process right to an adequate investigation. (Pet. App. 92-93, 125-26 (citing *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985); O*gunrinu v. City of Riverside*, 79 F. App'x 961, 962-63 (9th Cir. 2003)).)

Second, the Ninth Circuit cited testimony from plaintiffs' expert (which it found the district court had improperly excluded), as establishing that any reasonable officer would know of the need to investigate Laura's statement, and hence, if "any reasonable officer" must have known this, a jury could conclude that Winn must have deliberately or recklessly decided to depart from this standard. (Pet. App. 37-38.) Yet, this is doing exactly what this Court proscribed in *Daniels*—attempting to premise a due process claim on what amounts to a negligence standard, i.e., failure to act as a "reasonable police officer." *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

Finally, the Ninth Circuit concluded that a jury could find that Winn was deliberately out to get Mellen, based on other investigatory conduct concerning execution of a warrant, examination of other witnesses and failure to pursue other suspects. (Pet. App. 39.) Yet, the same conduct was urged as a basis for additional claims below, and was rejected by the district court for lack of evidence and legal support. (Pet. App. 112-23.) Indeed, the district court characterized at least one claim as "nonsensical." (Pet. App. 122.) Plaintiffs did not appeal from the dismissal of those claims, instead pursuing only the *Brady* claim. That the Ninth Circuit found it necessary to invoke contentions rejected by the district court, without challenging the basis for the district court's ruling, underscores the court's strained effort to find a basis for liability.

The Ninth Circuit's opinion underscores why it is essential that this Court grant review and set clear guidelines for future cases. The opinion creates confusion regarding the standards for imposing civil liability on police officers for *Brady* violations by applying an ill-defined deliberate indifference standard that is effectively nothing more than a dressed-up negligence standard. Moreover, its casual disregard of this Court's decisions on materiality in the *Brady* context will infect criminal as well as civil cases. The petition should be granted.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT DEPARTED FROM THE CONTROLLING DECISIONS OF THIS COURT REQUIRING THAT QUALIFIED IMMUNITY BE GRANTED IN ALL BUT THE MOST OBVIOUS CASES IN THE ABSENCE OF A ROBUST CONSENSUS OF CASES IMPOSING LIABILITY IN FACTUAL CIRCUMSTANCES CLOSELY ANALOGOUS TO THOSE CONFRONTING AN OFFICER.

A. An officer is generally entitled to qualified immunity in the absence of clearly established law as set out in a robust consensus of cases imposing liability in circumstances closely analogous to those confronted by the officer.

As this Court has repeatedly recognized, officers are entitled to qualified immunity under section 1983 unless they violated a federal statutory or constitutional right, and the unlawfulness of their conduct was clearly established at the time of the events in question. *Reichle v. Howards*, 566 U.S. 658, 664 (2012); *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). To be "clearly established" the law must be "'sufficiently clear' that every 'reasonable official would have understood that what he is doing'" is unlawful. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In short, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al-Kidd*, 563 U.S. at 741. As this Court observed in *Wesby*:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority.'" It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know.

138 S. Ct. at 589-90 (citations omitted).

The Court has also repeatedly emphasized that the law must be clearly established with respect to the particular factual situation confronted by the officer. "The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" 138 S. Ct. at 590 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) ("[T]he crucial question [is] whether the official acted reasonably in the particular circumstances that he or she faced.").

Although "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances," nonetheless a body of relevant case law is usually necessary to render the law clearly established. *Wesby*, 138 S. Ct. at 590;

White v. Pauly, 137 S. Ct. 548, 551 (2017) ("While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" (internal quotation marks omitted)). As the Court held last term in *Kisela*, "police officers are entitled to qualified immunity unless existing precedent '*squarely governs' the specific facts at issue.*" 138 S. Ct. at 1153 (emphasis added).

Because of the importance of qualified immunity to "society as a whole," *Sheehan*, 135 S. Ct. at 1774 n.3, this Court has repeatedly reversed the denial of qualified immunity, frequently via per curiam opinion, based on the circuit courts' failure to identify either controlling authority or a robust consensus of cases imposing liability in factual situations closely analogous to those confronted by the officer, and avoid defining the purported right at too high a level of generality. *See id.* (collecting cases). Indeed, this Court has repeatedly reversed the Ninth Circuit based on the court's failure to identify factually analogous case law that would have put the defendants on notice that their conduct could subject them to liability.[5]

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[5] *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts—and the Ninth Circuit in particular . . . —not to define clearly established law at a high level of generality."); *see also*, *e.g.*, *Ryburn v. Huff*, 565 U.S. 469, 474 (2012) (per curiam); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009); *Wood v. Moss*, 572 U.S. 744, 756-63 (2014); *Sheehan*, 135 S. Ct. at 1774-78.

B. Existing Ninth Circuit authority did not establish the unlawfulness of petitioner's conduct "beyond debate" and hence she is entitled to qualified immunity.

The Ninth Circuit has once again failed to heed this Court's repeated admonition that other than in the most obvious of cases—which this most certainly is not—an officer is entitled to qualified immunity unless either controlling authority or a robust consensus of cases put the officer on notice that his or her conduct would subject them to liability in light of the particular factual circumstances confronting the officer. The Court has emphasized that this is particularly important where the underlying constitutional violation is highly fact specific. *Kisela*, 138 S. Ct. at 1153 ("Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case'"); *Wesby*, 138 S. Ct. at 590 (probable cause "'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules'"). And, as the Court noted in *Turner*, *Brady* claims are "fact-intensive" and "factually complex." 137 S. Ct. at 1888, 1893.

Moreover, as noted, the Court has observed that there are many "gray areas" in *Brady*, and that evaluation of impeachment evidence is particularly difficult, with the inquiry all the more problematic with respect to police officers who lack the formal legal training of prosecutors that might allow them to

discern the nature and impact of potential evidence. *Connick*, 563 U.S. at 70-71; *Ruiz*, 536 U.S. at 630.

Despite this Court's observations concerning the complex nature of *Brady* claims, and the clear command that highly factually dependent constitutional claims not be assessed at too high a level of generality, here the Ninth Circuit merely parroted the general outlines of *Brady*: "We . . . must decide whether it was clearly established, in 1997, that police officers had a duty to disclose material impeachment evidence to prosecutors." (Pet. App. 40.) The Ninth Circuit made no attempt to identify any case involving facts remotely analogous to those confronting Winn.

The Ninth Circuit cited this Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995) as clearly establishing Winn's obligation to disclose Laura's statement here, but *Kyles* did not involve alleged suppression of opinion evidence as to a witness's reputation for truthfulness. In *Kyles*, the officer allegedly suppressed prior inconsistent statements that defense counsel could have used to impeach key witnesses in a homicide trial. *Id*. at 441-48.

The Ninth Circuit also cited *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (per curiam) as putting Winn on notice of her obligation to disclose Laura's statement. (Pet. App. 40.) Yet, in *Butler*, the suppressed impeachment evidence consisted of an officer's assurances to a witness "that pending charges against him would be dismissed if he testified favorably to the prosecution." 567 F.2d at 886. Such evidence of a quid pro

quo arrangement for testimony is nothing like Laura's generalized statement about Patti's lack of credibility, which was not tied to any understanding Laura had of the underlying criminal investigation.

Finally, the Ninth Circuit cited *Carrillo v. Cty. of Los Angeles*, 798 F.3d 1210, 1219 (9th Cir. 2015), for the proposition that "[t]he law in 1984 clearly established that police officers were bound to disclose material, exculpatory evidence." As a threshold matter, *Carrillo*, a 2015 opinion, is irrelevant to determining the applicable clearly established law in 1997. *Brosseau*, 543 U.S. at 198 ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct"). Moreover, in *Carrillo*, the police officers were not contending that the allegedly suppressed evidence did not fall within *Brady*, but rather, that at the time the alleged suppression occurred, only prosecutors had a *Brady* disclosure obligation, not police officers. *Carrillo*, 798 F.3d at 1218-19. Finally, the allegedly suppressed evidence consisted of notes indicating that a photo identification by a witness was equivocal and that no definitive identification had been made. *Id.* at 1215-16. That is a far cry from Laura's opinion, as a general matter, that Patti was not credible.

As the district court correctly observed:

> It was by no means clearly established in 1997 that a sibling's general opinion of her sister's lack of veracity, absent any substantiating

> information tying that opinion to the case, qualified as *Brady* material; indeed, it is not clearly established today.

(Pet. App. 110-11.)

The Ninth Circuit has again blatantly disregarded the controlling decisions of this Court by assessing clearly established law at a high level of generality and eschewing any effort to identify case law involving facts directly analogous to those confronted by Detective Winn. Under the governing decisions of this Court, petitioner Winn is entitled to qualified immunity, and it is essential that this Court intervene to compel the Ninth Circuit to adhere to controlling precedent, and clarify application of qualified immunity in cases concerning *Brady* claims.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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