IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

DAVID WILSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 1:19-CV-284-WKW-CSC
	)	
JEFFERSON DUNN, Commissioner,	)	DEATH PENALTY CASE
	)	
Respondent.	)	

REPLY TO RESPONDENT'S RESPONSE

Re. Counsel's Notice of Appearance and Petitioner's Motion for a Status Conference, for Appointment of Counsel, and for an Order of Disclosure

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REPLY TO RESPONDENT'S RESPONSE

Petitioner David Wilson is not seeking, on these motions, summary judgment on his *Brady* claim regarding the letter written by Petitioner's co-defendant, Catherine Nicole "Kitty" Corley, that incriminates her in this capital offense and is exculpatory as to Petitioner. Mr. Wilson is by no means seeking a ruling on the merits of that *Brady* claim—as Respondent's Response filed December 5, 2019, might suggest. *See* Doc. 33, at 3 ("as discussed below, Respondent submits that no violation of *Brady v. Maryland*, 373 U.S. 83 (1963), has occurred at any point in this matter"). The reason, very simply, is that Mr. Wilson has never seen the Kitty Corley letter and, therefore, has not yet had the opportunity to properly argue its materiality or the prejudice of its non-disclosure to this Court or any other state or federal court.

Rather, Petitioner David Wilson moves this Court, first, for a preliminary order of disclosure of the Kitty Corley letter, pursuant to the State of Alabama's ongoing legal and ethical duty to turn over favorable evidence in its sole possession to persons in its custody accused or convicted of a crime. This is a prerequisite for undersigned counsel to assess the amount of time and investigation that will be required based on Kitty Corley's letter. And second, Petitioner moves this Court for a status conference in order for the Court and the parties to agree to a reasonable timeframe for the substitution of Petitioner's conflicted counsel and for the appointment of undersigned counsel under the Criminal Justice Act, and to a reasonable schedule for discovery and for undersigned counsel, if appointed, to amend the habeas corpus petition and file all necessary motions for experts and for an evidentiary hearing (regarding, among other things, the introduction into the record of Kitty Corley's letter).

What has become clear, in the short time undersigned counsel has had to review the federal pleadings in Mr. Wilson's case, is that this capital habeas corpus case cannot properly move forward until the State of Alabama turns over the Kitty Corley letter to Petitioner. As Mr. Wilson himself wrote, *pro se*, in his letter to this Court dated June 13, 2019, raising a conflict of interest with his present counsel, "if this issue was litigated in the first place like I tryed [*sic*] to have done I would [have] more than likely received a[n] evidentiary hearing and obtained [the] newly discovered evidence which is in the Brady issue that was filed." *David Wilson v. Jefferson Dunn*, Case No. 1:19-cv-284, Doc. 15, page 2 (Letter from David Wilson to the Court dated June 13, 2019). In order for this capital habeas case to move forward in an orderly manner, Petitioner moves this Court to preliminarily order the disclosure of the Kitty Corley letter to Mr. Wilson, so that undersigned counsel can properly assess the investigatory needs in this case, and to schedule a status conference on the issues of the substitution of conflicted counsel, the appointment of new counsel, and the setting of a reasonable timetable for this capital habeas corpus proceeding.

ARGUMENT

I. RESPONDENT IS UNDER AN ONGOING LEGAL OBLIGATION TO TURN OVER EXCULPATORY EVIDENCE TO PERSONS IN ITS CUSTODY ACCUSED OR CONVICTED OF A CRIME, PURSUANT TO *BRADY V. MARYLAND*.

Respondent has referred the Court to the wrong case law regarding a state's continuing obligation to disclose favorable trial evidence. Doc. 33, at 6. Respondent has cited the case law regarding evidence discovered *after* the trial and conviction (the *Osborne* line of cases); Mr. Wilson's case, however, involves evidence discovered *before* the trial. Respondent is simply misleading this Court when it states that "Brady is the wrong framework." Doc. 33, at 6.

Under clearly established federal law under *Brady v. Maryland*, 373 U.S. 83 (1963), Respondent still now, *today*, has an ongoing legal duty to disclose exculpatory evidence to Mr.

Wilson that was available *at the time of his trial*, and this ongoing legal obligation does not terminate with conviction or sentencing, but extends through appeal, state post-conviction, and *federal habeas corpus* proceedings; in fact, this ongoing legal duty is so clearly established as a matter of federal law, that any state agent who violates it is *not* entitled to qualified immunity in §1983 litigation. *See*, *e.g.*, *Steidl v. Fermon*, 494 F.3d 623, 630-32 (7th Cir. 2007) (holding that the duty to disclose exculpatory trial evidence in post-conviction "was clearly established as of 1979 and 1980"); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1094 (9th Cir. 2009) (duty to disclose exculpatory trial evidence in post-conviction clearly established and defeats qualified immunity). The reason, very simply, is that the *Brady* decision itself dealt with trial evidence that was withheld until after Mr. Brady "had been tried, convicted, and sentenced, and after his conviction had been affirmed." *Brady*, 373 U.S. at 84. As Judge Frederic Block of the United States District Court for the Eastern District of New York has written, "*Brady* itself refutes the [Respondent's] claim that the duty it imposes ends with the trial." *Collins v. City of New York*, 923 F. Supp. 2d 462, 474 (E.D.N.Y. 2013).

The United States Court of Appeals for the Eleventh Circuit has clearly stated that the *Brady* duty to disclose exculpatory trial evidence is "ongoing" and that it extends into federal habeas corpus proceedings. *High v. Head*, 209 F.3d 1257, 1265, n. 8 (11th Cir. 2001). The Eleventh Circuit declared in unambiguous terms in *High*:

> The State's duty to disclose exculpatory material is ongoing. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987); *see also Thompson v. Calderon*, 151 F.3d 918, 935 n. 12 (9th Cir.) (Reinhardt, J., concurring and dissenting), *cert. denied*, 524 U.S. 965, 119 S.Ct. 3, 141 L.Ed.2d 765 (1998) ("The *Brady* duty is an ongoing one, and continued to bind the prosecution throughout Thompson's habeas proceedings.")

High v. Head, 209 F.3d 1257, 1275 (11th Cir. 2000).

The case of *High v. Head* involved a *Brady* claim of non-disclosure of exculpatory *trial* evidence *during federal habeas corpus*. The Eleventh Circuit explicitly held that the *Brady* duty is ongoing and extends to federal habeas corpus. The Eleventh Circuit cited another Circuit Courts of Appeals to the effect that the *Brady* duty continues in federal habeas corpus proceedings. *Id*. As the Eleventh Circuit explained there: "While the State may have made an initial determination that the audiotape of the interview was not exculpatory, nothing prevented High's first habeas counsel from specifically requesting that item and arguing that he had reason to believe that it might in fact be exculpatory. *Cf. Ritchie*, 480 U.S. at 60, 107 S.Ct. at 1003 (noting that if a defendant is aware of specific information in the State's files, he is free to request it directly from the court, and argue in favor of its materiality)." *High v. Head*, 209 F.3d at 1275.

All of the United States Circuit Courts of Appeals that have addressed this question agree: the *Brady* duty regarding exculpatory *trial evidence* is ongoing and extends to post-conviction. *See Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003) ("A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process under [*Brady*]"); *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) ("*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward"); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir.1997) ("We also agree, and the State concedes, that the duty to disclose is ongoing and extends to all stages of the judicial process"); *Thompson v. Calderon*, 151 F.3d 918, 935 n. 12 (9th Cir. 1998) ("The *Brady* duty is an ongoing one, and continued to bind the prosecution throughout [defendant's] habeas proceedings"); *Thomas v. Goldsmith*, 979 F.2d 746, 749-750 (9th Cir. 1992) (state has "duty to turn over exculpatory evidence at trial, but . . . [also a] present duty to turn over exculpatory

evidence relevant to the instant habeas corpus proceeding"); *Workman v. Bell*, 2007 BL 15844, 2 (unpublished opinion) (6th Cir. May 01, 2007) ("During the habeas proceedings, the Respondent, through counsel, the State Attorney General, denied that Willis lied and denied that Davis lied, and failed to comply with their ongoing duty to disclose exculpatory evidence"). *See also Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) ("We emphasize that the duty to disclose such information continues throughout the judicial process. *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997)"); *Collins v. City of New York*, 923 F. Supp. 2d 462, 474 (E.D.N.Y. 2013) (holding that the duty to disclose preexisting exculpatory evidence under *Brady* extends into post-conviction); *Fontenot v. Allbaugh*, No. CIV 16-069-JHP-KEW, 2019 BL 312543, 41 (E.D. Okla. Aug. 21, 2019) (the *Brady* duty "extends to 'all stages of the judicial process'"); *United States v. Cuong Gia Le*, 306 F. Supp. 2d 589, 593 n.4 (E.D. Va. 2004) (*Brady* obligation is ongoing and extends to all stages of the judicial process); *Duckett v. State*, 918 So. 2d 224, 239 (Fla. 2005) ("the State is under a continuing duty throughout all proceedings to comply with *Brady* […] this is a correct statement of the law"); *United States v. Coppola*, 526 F.2d 764, 775 (10th Cir. 1975) (the *Brady* duty to disclose "is a continuing one").

The reason for this simple rule is straightforward: it is inherent to the logic of the *Brady* case itself that the disclosure of withheld exculpatory evidence *available at the time of trial* will inevitably occur after conviction on direct appeal, in state post-conviction, or on federal habeas corpus. As a result, the United States Supreme Court has itself stated that "the duty to disclose [exculpatory trial material] is ongoing." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (ordering disclosure under *Brady* of potentially exculpatory material, despite youth protective confidentiality, after conviction and sentencing); *see also Strickler v. Greene*, 527 U.S. 263, 296 (1999) (finding two of the three components of a *Brady* violation regarding exculpatory material

turned over in federal habeas corpus proceedings under *Brady* request); *Banks v. Dretke*, 540 U.S. 668, 675 (2004) (*Brady* materials revealed during federal habeas corpus: "Ultimately, through discovery and an evidentiary hearing authorized in a federal habeas corpus proceeding, the longsuppressed evidence came to light"). The Supreme Court has emphasized that the *Brady* analysis must be constantly updated, reviewed, and reconsidered post-conviction. *See Pennsylvania v. Ritchie*, 480 U.S. at 60 ("the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.")

In fact, this ongoing *Brady* duty *is so clearly established* that a state actor is not entitled to qualified immunity if they violate it. As the Seventh Circuit declared, in a case denying qualified immunity for the failure to disclose *Brady* trial material in post-conviction proceedings, "For evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings. Put differently, the taint on the trial that took place continues throughout the proceedings, and thus the duty to disclose and allow correction of that taint continues." *Steidl v. Fermon*, 494 F.3d 623, 630 (7th Cir. 2007).

In *Steidl*, the Seventh Circuit was faced with the identical argument from the state actors as in Mr. Wilson's case. The Court unequivocally rejected the argument, writing:

> We cannot accept the implicit premise of the state's position here, which is that *Brady* leaves state officials free to conceal evidence from reviewing courts or post-conviction courts with impunity, even if that concealment results in the wrongful conviction of an innocent person. It is worth recalling, in this connection, that the *Brady* rule was derived from the Due Process Clause of the Fourteenth Amendment. "Society wins," the Court wrote, "not only when the guilty are convicted but when criminal trials are fair; our system of the

> administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87, 83 S.Ct. 1194.

Steidl v. Fermon, 494 F.3d at 630; *see also Tennison v. City & Cnty. of S.F.*, 570 F.3d 1078, 1094 (9th Cir. 2009).

The federal law is beyond clear: with regard to favorable evidence withheld at trial and not turned over to the defense, the *Brady* obligation is ongoing and extends into federal habeas corpus. Incidentally, as a result, law enforcement officers would not be entitled to qualified immunity for failure to turn over exculpatory trial evidence in Mr. Wilson's federal habeas corpus proceedings. *See Steidl*, 494 F.3d at 630-32, and all of the cases cited *supra*.

A. *Respondent Cites the Different Rule For Exculpatory Evidence Discovered After Trial and Conviction*

On page 6 of its Response, Respondent writes that "Wilson's motion is founded, and wholly dependent, on the proposition that *Brady* provides for a continuing duty to disclose that applies in a post-conviction context. However, in arguing for such a standard, Wilson completely ignores the Supreme Court's instruction that 'Brady is the wrong framework' for addressing attempts to obtain evidence post-trial. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009)." Doc. 33, at 6.

The *Osborne* case, however, is completely inapposite because it addresses the federal law surrounding exculpatory evidence that is discovered *after the trial and conviction*. Respondent is misdirecting the Court.

Osborne is about evidence *originating in post-conviction*. It stands for the proposition that a prosecutor does not have the same due process obligations regarding evidence *first discovered by the state after conviction*. *See In re Bolin*, 811 F.3d 403, 408–09 (11th Cir. 2016) (citing *Osborne* to show why *Brady* was not a cognizable claim regarding a statement first made

12 years after conviction); *Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 259 (11th Cir. 2013) (citing *Osborne* to show no suppression when exculpatory statements were first made only after the guilt phase).

In *Osborne* itself, the defendant was bringing a § 1983 suit and demanding access to DNA evidence for new testing, thus arguing that he had a Due Process right to evidence that did not even exist yet. The Ninth Circuit had analogized his "liberty interest" in proving his post-conviction-raised innocence claim to the pre-trial *Brady* duty of disclosure. The Supreme Court rejected that analogy and pointed out that *Brady* is the wrong framework in that context, since the defendant was not asserting any pre-trial suppression. Thus, he was not claiming he was denied a fair trial, but was requesting *post-trial* access to DNA evidence to build a case for innocence.

Many federal courts have addressed Respondent's confusion and tried to set the legal framework straight. The Seventh Circuit dealt with this exact false argument in *Steidl v. Fermon,* discussed above, and declared that: "The district court cases on which the [Respondent] rely also primarily address the question whether the state has the duty to disclose exculpatory evidence that is discovered *after* the trial is concluded. For that reason, we see no need to discuss them. Steidl's case is different. Here, just as in *Brady* itself, and in the later decision in *Kyles v. Whitley*, the evidence at issue was known to the police before Steidl was brought to trial." *Steidl v. Fermon*, 494 F.3d at 629. In case this was not clear enough, the Seventh Circuit added:

> *Brady* dealt with evidence that "did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed." 373 U.S. at 84, 83 S.Ct. 1194. We thus have no need here to decide whether disclosure of exculpatory evidence *discovered post-trial* is required under *Brady;* this case presents only the same question as the Court addressed in *Brady*, namely, whether exculpatory evidence discovered before or during trial must be disclosed during post-conviction proceedings.

Steidl, 494 F.3d at 629.

Faced with the same argument, the United States District Court for the Eastern District of New York responded in the same way in *Collins v. City of New York*:

> *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), is not to the contrary. In *Osborne*, the Supreme Court held that *Brady* does not require disclosure of exculpatory evidence — such as DNA testing — that was or could be created after trial. *See* id. at 68-69. Since Collins's *Brady* claim involves nondisclosure of evidence in existence at the time of trial, *Osborne* does not apply.

Collins v. City of New York, 923 F. Supp. 2d 462, 474 (E.D.N.Y. 2013); *see also Ciria v. Rubino*, 394 Fed.Appx. 400, 402 (9th Cir. 2010) ("Osborne does not apply to the situation here, where the claimed exculpatory evidence was available at the time of trial.")

There is further error in Respondent's brief. At page 7 of its Response, Respondent writes: "Instead of addressing *Osborne*, Wilson relies on an unpublished decision from the Eleventh Circuit, *Brown v. Sec'y, Dep't of Corr.*, 750 App'x 915 (11th Circ. 2018)… *Brown* is inapposite because it revolves around questions of timeliness and equitable tolling, and does not hold that *Brady* requires the state to produce documents in a habeas proceeding where the petitioner has not even filed his final petition." Doc. 33, at 7. This too is incorrect: *Brown* was included because it, in fact, is the most recent example of the Eleventh Circuit citing *Osborne* for the *distinction* between evidence discovered pretrial versus evidence first obtained post-conviction. Petitioner's Motion for Disclosure included a pincite to page 928 of the *Brown* opinion, where the following passage may be found: "Florida's possession of the Keenum records or other similar records *before trial* is a critical element of a Brady claim. *See Dist. Att'y's Off. v. Osborne*, 557 U.S. 52, 68–69, 129 S.Ct. 2308, 2319 –20, 174 L.Ed.2d 38 (2009) (suggesting Brady's disclosure requirement does not extend to material exculpatory evidence

obtained by the government after trial)." *Brown v. Sec'y, Dep't of Corr.,* 750 Fed. Appx. 915, 928, 2018 BL 375079, 12 (11th Cir. 2018) (emphasis added).

In Mr. Wilson's case, the favorable evidence was available at trial. *Brady* is plainly the framework applicable to a violation of that specific trial right, and its protections extend into federal habeas corpus.[1]

II. RESPONDENT IS UNDER AN ONGOING ETHICAL AND PROFESSIONAL RESPONSIBILITY OBLIGATION TO TURN OVER EXCULPATORY EVIDENCE TO PERSONS IN ITS CUSTODY ACCUSED OR CONVICTED OF A CRIME, PURSUANT TO *BRADY V. MARYLAND*.

Respondent's ongoing duty to disclose the Kitty Corley letter is even greater, if possible, under its ethical and professional responsibilities. As United States Magistrate Judge Katherine Nelson of the U.S. District Court for the Southern District of Alabama has emphasized:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. *See Kyles*, 514 U.S., at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). See also ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal").

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[1] While the United States Supreme Court generally addresses the state's obligation to disclose favorable trial evidence under the Due Process Clause of the Fourteenth Amendment and its *Brady* jurisprudence, the Compulsory Process Clause and Confrontation Clause of the Sixth Amendment also require the state to produce evidence that might influence the determination of guilt. *See United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807); *United States v. Nixon*, 418 U.S. 683, 709, 711 (1974); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). The contours of disclosure under the Compulsory Process and Confrontation Clauses remain open because the Supreme Court has been able to avoid reaching the federal question; however, Mr. Wilson would be entitled to relief under the Compulsory Process and Confrontation Clauses if his claim is denied for any reason under the Due Process analysis.

Frison v. Reynolds, 2014 BL 364747, 16 (S.D. Ala. Nov. 21, 2014).

Judge Nelson added there that "As [the Supreme Court] ha[s] often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Frison*, 2014 BL 364747, 16 (citing *inter alia Kyles*, 514 U.S., at 439; *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009)).

In its *Brady* jurisprudence, the United States Supreme Court cites approvingly the standard professional responsibility provisions regarding the prosecution's ethical responsibility to turn over favorable evidence—namely, "ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ('A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused'); ABA Model Rules of Professional Conduct 3.8(d) (1984) ('The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense')." *Kyles*, 514 U.S., at 437. The Alabama Courts as well cite these provisions approvingly, *see, e.g., Shields v. State*, 680 So. 2d 969, 973 (Ala. Crim. App. 1996).

Similar provisions have been adopted by the Alabama Supreme Court in the Alabama Rules of Professional Conduct, Rule 3.8, regarding advocates. Under Rule 3.8(1)(d), counsel for the State of Alabama are directed to:

> Not willfully fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 3.8(1)(d) of the Alabama Rules of Professional Conduct.

These rules of professional conduct apply with full force in this Court. *See* Middle District of Alabama Local Rules, 83.1. Attorneys: Admission to Practice and Disciplinary Proceedings ("Attorneys admitted to practice before this Court shall adhere to this Court's Local Rules, the Alabama Rules of Professional Conduct, the Alabama Standards for Imposing Lawyer Discipline, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct.")

The United States Supreme Court has made clear that the responsibility of prosecutors is to do justice, not just to obtain convictions. As the Supreme Court stated in *Berger v. United States*, the prosecution is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). These words apply with even greater force in a death penalty case. Under these rules of professional responsibility, counsel for Respondent are under a duty to turn over the favorable evidence to Mr. Wilson.

III. THIS COURT HAS THE AUTHORITY TO ENTER A PRELIMINARY ORDER OF DISCLOSURE OF THE *BRADY* EVIDENCE

Federal courts have the legal authority to and regularly order disclosure and development of the factual record as a preliminary matter, in order to address threshold questions in capital post-conviction litigation. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 1089-92 (7th ed. 2015). In many cases, the federal habeas court is required to develop the factual record *before* determining preliminary questions. *See, e.g., Wyzykowski v. Department of Corrections,* 226 F.3d 1213 (11th Cir. 2000); *Whalem/Hunt v.*

Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc); *Walker v. McDaniel*, 495 F. App'x 796 (9th Cir. 2012).

Federal courts have repeatedly recognized the need for preliminary factual development pursuant to Rule 6(a) of the Rules Governing Section 2254 cases, under the AEDPA, as interpreted by the Supreme Court in *Bracy v. Gramley*, 520 U.S. 899 (1997). This principle is consistent with the rules governing federal civil litigation generally, which makes sense, as the "Federal Rules of Civil Procedure apply in habeas corpus proceedings to the extent that they are not inconsistent with the Habeas Rules." *McBride v. Sharpe*, 25 F.3d 962, 967 (11th Cir. 1994). In federal civil litigation, a district court has the power to order discovery to determine whether a claim is properly before the Court. Indeed, the Eleventh Circuit explained that it is "clear that federal courts have the power to order, at their discretion, the discovery of facts necessary to ascertain their competency to entertain the merits." *Eaton v. Dorchester Dev., Inc*., 692 F.2d 727, 729 (11th Cir. 1982).

The United States Supreme Court held in *Bracy v. Gramley* that where "'specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry,'" by allowing discovery under Rule 6. *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). *See also High v. Head*, 209 F.3d 1257, 1275 (11th Cir. 2000) ("More importantly, High's habeas counsel had at his disposal in his federal habeas proceeding discovery tools pursuant to federal law. *See* Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts. We recognize that a petitioner's entitlement to discovery in federal habeas is within the district judge's discretion and only allowed for good cause shown;

nevertheless, we think that readily obtainable facts would have supported a request for discovery under Rule 6.")

IV. PETITIONER DAVID WILSON IS CLEARLY ENTITLED TO PRELIMINARY DISCLOSURE OF THE KITTY CORLEY LETTER

Petitioner David Wilson has clearly shown cause why he is entitled to preliminary disclosure of the Kitty Corley letter. Despite the fact that Petitioner has never seen the Kitty Corley letter, the little that he now knows about the letter demonstrates that it is favorable to him. In fact, it could well be the single most important piece of evidence in his favor regarding guilt and especially sentencing. At this juncture, Petitioner knows four things about the Kitty Corley letter:

1. As reported by the Alabama Court of Criminal Appeals, the Kitty Corley letter "contained details of the murder of Dewey Walker which only the perpetrators would have known." *David Phillip Wilson v. State of Alabama*, Memorandum, CR-16-0675 (Ala.Ct.Crim.App, March 9, 2018), at page 8. At present, Mr. Wilson has no idea what those specific details consist of, except that they are deeply incriminating as to Kitty Corley.

2. As reported by the Alabama Court of Criminal Appeals, Kitty Corley confessed in her letter that she "hit Mr. Walker with a baseball bat until he fell." *Id.*

3. As reported by the Alabama Court of Criminal Appeals, the State of Alabama "initiated an investigation into the letter. The State sought an order for Corley to provide palm prints to be compared to those found on the letter, and Investigator Luker executed a search warrant on Corley's jail cell during which he collected writing samples. The State employed the use of a handwriting expert who determined based on the known samples, that the letter had 'probably' been written by Corley." *Id.*

4. As reported by the Alabama Court of Criminal Appeals, the letter contradicts Kitty Corley's only police statement, dated April 14, 2004, in which "she admitted to entering Walker's residence *after he had been killed* and to rummaging through his property." *Id.* (emphasis added).

Not surprisingly—things are starting to make sense—the State of Alabama never called Kitty Corley to testify against Mr. Wilson and quickly entered into a negotiated plea with her for a fixed term of 25 years. Kitty Corley was never called to the stand.

Clearly, the Kitty Corley letter is at the center of this capital case and may well be the most important piece of exculpatory and mitigating evidence for Petitioner. Mr. Wilson admitted to the police, in his only police statement, also dated April 14, 2004, that he accidentally hit Mr. Walker in the head once as he tried to knock a knife out of Mr. Walker's hand and subdued him with an extension cord, but left Mr. Walker alive and with a pulse when he exited the home; and that Kitty Corley went to see Mr. Walker alone *after* he had left Mr. Walker alive. *See* Doc. 29, at 8-10.

In his police statement, Mr. Wilson said that when he left Mr. Walker's home, he checked for a pulse and felt a pulse, and that Mr. Walker "looked like he was breathing." (Police statement of David Wilson, April 14, 2004, p. 11; Tr. C-508[2]). After that, Mr. Wilson refused to go back to the location in the house where Mr. Walker was; but, he told the police, Kitty Corley went in the house alone to see Mr. Walker. Mr. Wilson maintained that he did not; and also said to the police that, "She, she was, she was kind of I don't know what was her, what her, she seem like she said she got a little thrilled with it or some… something like that. She said she guess she

[2] The following abbreviations for the state court records will be used: (Tr. R.#) refers to the trial transcript; (Tr. C.#) refers to the clerk's record on direct appeal.

was excited I don't [know] what was up with her." (Police statement of David Wilson, April 14, 2004, p. 13; Tr. C-510). Mr. Wilson then said "I asked her if she was OK. She said yeah sure. Cause she use, cause she use to do stuff like that or something like that. I don't know exactly what was up with her, what her story is. Cause she's got in some weird cult thing." (Police statement of David Wilson, April 14, 2004, p. 14; Tr. C-511).

In effect, Mr. Wilson admitted to hitting Mr. Walker once and subduing him with a cord, but to leaving him alive, with a pulse and breathing. The evidence at trial established that Mr. Walker was not killed by asphyxiation, but rather by multiple blows to his head and body.

The undisclosed Kitty Corley letter now provides the missing link: it demonstrates that Kitty Corley was the one who killed Mr. Walker with a baseball bat.

Regarding the cause of death, Respondent writes on pages 8-9 of its response that "The forensic examiner testified that the injuries from strangulation were *capable of causing* Mr. Walker's death […] Moreover, the victim's other blunt force injuries came before the fatal strangulation, a finding that would tend to discredit any theory that relied on Ms. Corley arriving on the scene later and striking additional blows." Doc. 33, at 8-9 (emphasis added).

But Respondent is playing fast and loose with the transcript and conflating testimony by the pathologist as to what *could have happened* with what the pathologist actually stated *did happen*. In fact, the pathologist stated precisely the *opposite* of what Respondent claims: the other injuries came *after* the neck injuries, and Mr. Walker was alive for all the subsequent injuries.

At trial, District Attorney Doug Valeska had the pathologist specifically disclaim any such "fatal strangulation," because Mr. Valeska's theory at trial was that the murder involved

long drawn-out torture. Here is the testimony from trial, on Tr. R-515, from *immediately after* the passage quoted by Respondent:

> Q: And so, in other words, if I'm wrong—and correct me, or I apologize—*those marks alone* [the ligature marks from strangulation]—because you found other injuries and contusions and bruises to his body—*didn't just cause his death*, because there were so many others in your opinion?
>
> A. They could very well have by themselves. Did they? They certainly contributed in my opinion.
>
> Q. And I apologize. The question I should have asked you is, then, all the other injuries—*if he received the ligature marks and they caused the death, all the other injuries would have been after he was dead, postmortem. That didn't happen.* He was still alive on all of them. Correct?
>
> A. *Yes, he was*.
>
> Q. Okay. And I apologize if I asked—but that's what I wanted get you to ascertain to the jury. (C-515, emphasis added)

And then during closing argument, Mr. Valeska reemphasized that the cause of death was the multiple blows to Mr. Walker's head, and not asphyxiation, stating:

> He took that cord and *put it on a 64-year-old man's neck loosely*—and I submit you draw inferences—drug him around his own house, telling him, you better tell me where the money is. When you won't tell me, he took that bat and bashed him a couple of times…
>
> …That blow to the back of the head... That was the last wound he got."

Tr. R-609-10 (emphasis added)

It is thus explicitly untrue, as Respondent states in its Response, that "the jury would nevertheless have had uncontradicted evidence of Wilson's fatal strangulation" (Doc. 33, at 10), since that was not even the theory the prosecution was presenting.

Everything, or much of this case for both the conviction and the sentence of death, turns on who committed the multiple blows to Mr. Walker's head. Petitioner has always and consistently denied that he did. There was, previously, no existing evidence to corroborate Mr.

Wilson. There now is, from the hand of the co-defendant. The Kitty Corley letter confessing that she "hit Mr. Walker with a baseball bat until he fell" is the missing evidence in this case.

The test of materiality articulated by the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)—namely, whether in the absence of the exculpatory evidence the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence"—is well established and clear. However, neither Mr. Wilson, nor this Court, can properly assess materiality without seeing the evidence. As the Supreme Court indicated in *Pennsylvania v. Ritchie*, where defense counsel has not seen the exculpatory evidence, "it is impossible to say whether" the evidence "contains information that probably would have changed the outcome of his trial," and it is therefore necessary for the state to disclose the information. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 58 (1987).

V. THIS IS NOT THE PROPER TIME TO LITIGATE THE MERITS OF MR. WILSON'S *BRADY* CLAIM

Respondent nevertheless argues that, despite the fact that the Kitty Corley letter itself was never turned over or seen by Petitioner's counsel, the *Brady* claim concerning the Corley letter is procedurally barred and without merit. *See* Doc. 33, at 7 and 3. But this is not the time or place to litigate the substance of the *Brady* claim—neither the merits, nor the procedural default, nor the fundamental miscarriage of justice.

Petitioner is not seeking summary judgment on the *Brady* claim. At this juncture, Petitioner simply cannot. Petitioner does not have the Kitty Corley letter in order to demonstrate materiality or prejudice or miscarriage. The only question before the Court is Petitioner's preliminary right to see the Kitty Corley letter, and on that, there is no legal doubt whatsoever under *Brady*.

Now, to be sure, the last state court to rule on these matters ruled that the *Brady* claim was procedurally barred because it was not raised on trial or on direct appeal, *see David Phillip Wilson v. State of Alabama*, Memorandum, CR-16-0675 (Ala.Ct.Crim.App, March 9, 2018), at page 9 ("As such, this claim is procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), and the circuit court did not err in dismissing this claim"). However, that final state court decision did not address the federal questions of whether there is cause and prejudice to excuse the default or a fundamental miscarriage of justice under *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Those federal questions will clearly require that Mr. Wilson have access to the Kitty Corley letter in order to properly argue his cause. Without preliminary disclosure of the letter, Petitioner will not be able to address either the merits or procedural default or miscarriage of justice or other exceptions. *Cone v. Bell*, 556 U.S. 449 (2009).

The legal issue at this point is *not* whether there is a *Brady* violation; it is that the State must preliminarily disclose to Petitioner evidence that is favorable *so that* Petitioner can investigate a *Brady* violation—and so that this Court, eventually, conduct a hearing and rule on a *Brady* argument. *Arvelo v. Sec'y, Fla. Dep't of Corr.*, 788 F.3d 1345, 1350 (11th Cir. 2015) (remand to hold an evidentiary hearing). The little we know about the Kitty Corley letter requires that it be disclosed. As a basic matter, *Brady* aligns on all four corners with Mr. Wilson's case: *Brady* involved a robbery-murder; it involved a defendant and his co-defendant; it involved a defendant who admitted his participation in the crime, but claimed that he did not do the killing; and it involved a co-defendant who made an extra-judicial statement taking responsibility for the crime, which was not turned over to the defendant. All of this is true in Mr. Wilson's case as well. The state's *Brady* obligation does not end merely because the capital case has moved into state or federal post-conviction. That would simply defeat the *Brady* right to due process. It is

patently clear that Respondent is under a duty to preliminarily turn over this evidence to Petitioner.

A. *Purported Disclosure of the Existence of Kitty Corley's Letter*

Respondent contends that Mr. Wilson is not entitled to disclosure because "Wilson has known about [the Corley letter] for over fifteen years" and "the State *never suppressed* the letter" because he knew about its existence. *See* Doc. 33, 1, 4-5. But this is not correct factually or legally.

First, it is a clear misstatement of the facts, which have yet to be developed.[3] Upon information and belief to undersigned counsel, Petitioner David Wilson personally did not know of the existence of the Kitty Corley letter until late in the state post-conviction (Rule 32) proceedings. Petitioner David Wilson has never received a copy of the Kitty Corley letter. No counsel for Petitioner has ever received a copy of the Kitty Corley letter. The State of Alabama maintains an open file discovery system in all capital cases, pursuant to *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989). Accordingly, the Kitty Corley letter apparently was affirmatively withheld from Mr. Wilson and his attorneys.

Second, as a legal matter, Respondent misuses the "defendant's own knowledge" case law. In footnote 2 on page 4 of its Response, Respondent writes that "While the state has not yet had the opportunity to answer Wilson's *Brady* claim regarding the Corley letter, it is well-established that there is no suppression 'where the defendant had within [his] knowledge the information by which [he] could have ascertained the alleged Brady material.' *Maharaj v. Sec'y*

[3] There has been no evidentiary hearing in Mr. Wilson's case in state or federal post-conviction proceedings, so the facts concerning the supposed disclosure of the existence of the Kitty Corley letter are not of record; they will need to be established at an evidentiary hearing.

for Dep't of Corr., 432 F.3d 1292, 1315 (11th Cir. 2005). Consequently, the State denies that Wilson has a valid *Brady* claim." Doc. 33, at 4 n.2.

This is, however, an incorrect usage of the "defendant's own knowledge" case law. It is absurd to suggest that Mr. Wilson could have "ascertained" the contents of the letter anyway, since the letter was solely in the state's possession and Petitioner has never seen it. As Mr. Wilson stated in his Motion for Disclosure, the key element regarding obtainability is whether the "evidence was in the State's possession," as opposed to available to the defendant from his own knowledge or from "a neutral source." *United States v. Agurs*, 427 U.S. 97, 111 (1976).

The case Respondent cites, *Maharaj*, is entirely inapposite and demonstrates precisely the relevant distinction: it concerns a briefcase that was *returned to the victim's family*, and thus *not within the control of the state*. The court specifically stated there that there was no *Brady* violation because:

> Petitioner knew of their existence and had the power to compel their return from the Moo Young family by *subpoena*… Petitioner knew of the briefcase and knew how he could obtain it. The police could not give it to him because they no longer had it… In this case, the prosecution did not physically possess the documents Petitioner sought… Indeed, the police unambiguously directed the investigator to where he might obtain the evidence. When the defendant has "equal access" to the evidence disclosure is not required.

Maharaj, 432 F.3d at 1315 (emphasis added).

Mr. Wilson's situation differs on each relevant point: Mr. Wilson was not in actual fact aware of the letter, had no independent means to obtain it, and certainly did not have "equal access" to it. Rather, the state was in complete control of the letter. In effect, the *Maharaj* case is inapposite for Respondent.

B. *Admissibility of the Corley Letter*

Finally, Respondent argues that the Corley letter would be inadmissible hearsay under Alabama law (Doc. 33, at 1, 4, and 10). This argument is premature and unconvincing. Again, the parties and the Court are not in a position to argue the merits of the *Brady* claim at this stage—especially without access to the Corley letter. But in any event, any ruling from the state courts holding that the Corley letter would be inadmissible under state hearsay rules would be in clear violation of Due Process and contrary to clearly established federal law under the AEDPA as determined by the Supreme Court of the United States since at least 1979 in *Green v. Georgia*, 442 U.S. 95 (1979) (regardless of whether proffered testimony comes within Georgia's hearsay rule, exclusion constituted violation of the Due Process Clause under *Brady*). *See, e.g., Boykins v. Wainwright,* 737 F.2d 1539, 1544 (11th Cir. 1984).

VI. THIS CAPITAL HABEAS CASE CANNOT MOVE FORWARD UNTIL THE STATE OF ALABAMA TURNS OVER THE KITTY CORLEY LETTER TO MR. WILSON

As a practical matter, Mr. Wilson's federal habeas case cannot move forward until the Kitty Corley letter is disclosed to Petitioner. The American Bar Association has issued guidelines that govern questions of competence and malpractice as to the duties of lawyers representing death row inmates in capital post-conviction proceedings. *See* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February 2003; *Hofstra Law Review*, Vol. 31:913-1090 (2003). Those guidelines require counsel in capital post-conviction proceedings to do, among other things, the following:

- "Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law." (932-933)

- "Counsel must also inspect the evidence." (933)
- Counsel "must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment." (933)
- "Counsel must also assess all of the non-testimonial evidence." (935)
- "Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities." (1020)

These guidelines require post-conviction counsel to obtain and review any potentially exculpatory material evidence. *See also* Eric M. Freedman, "The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-conviction Proceedings," 5 *Journal of Appellate Practice & Procedure* 325 (2003), at page 342.

The Eleventh Circuit as well has recognized that an attorney representing a death row inmate in federal habeas corpus has an obligation to seek disclosure of exculpatory evidence. In *High v. Head*, discussed above, federal habeas corpus counsel did not seek disclosure of *Brady* evidence, and the Court held it against the petitioner there. The Eleventh Circuit wrote:

> Thus, we find High's argument that his first habeas counsel had no reason to investigate much less plead a *Brady* or *Giglio* violation unpersuasive and insufficient to excuse his counsel's failure to seek to obtain the audiotape at the time of his first federal habeas petition. Had counsel sought and obtained the audiotape, he would have had all the facts needed to support High's current claims based on what he did and did not say during the filmed interview.

High v. Head, 209 F.3d at 1264-65.

It would be a violation of an attorney's professional responsibilities, it would be ineffective assistance of counsel, and it would be malpractice for an attorney to enter a case in

which it is clear that these basic obligations cannot be fulfilled, especially in a case involving the death penalty. *Rompilla v. Beard*, 545 U.S. 374 (2005) (setting forth minimum competence for litigating sentencing issues in death penalty cases); Code of Alabama 1975, Ala. Code § 6-5-580, Acts 1988, No. 88-262, p. 406, §11, Standards of care (if attorney is specialist in an area of law, "the standard of care applicable to such legal service provider in a claim for damages resulting from the practice of such a specialty shall be such reasonable care, skill, and diligence as other legal service providers practicing as specialist in the same area of the law ordinarily have and exercise in a like case"); *Wilborn v. Trant*, 2018 BL 330993, 8 (N.D. Ala. Sept. 13, 2018).

VII. A STATUS CONFERENCE IS NECESSARY IN THIS CAPITAL HABEAS CORPUS CASE IN ORDER TO ADDRESS THE SUBSTITUTION OF EXISTING CONFLICTED COUNSEL, THE APPOINTMENT OF UNDERSIGNED COUNSEL UNDER THE C.J.A., AND TO SET A PROPER SCHEDULE FOR THESE PROCEEDINGS

Petitioner maintains that a status conference in this case is essential in order to address preliminary questions concerning the substitution of conflicted counsel, the appointment of undersigned counsel under the C.J.A., and the proper sequence of events for purposes of setting a reasonable schedule for this capital habeas corpus case and to ensure that undersigned counsel can properly assume representation in this death penalty case.

FOR THE FOREGOING REASONS, undersigned counsel respectfully moves the Court for a preliminary order of disclosure of the Kitty Corley letter and for a status conference to agree to a reasonable timeframe for the substitution of Petitioner's conflicted counsel and for the appointment of undersigned counsel under the Criminal Justice Act, and to a reasonable schedule for discovery and for undersigned counsel, if appointed, to amend the habeas corpus petition and file all necessary motions.

In response to the Court's order dated October 28, 2019 (Doc. 28, ¶ 3), undersigned counsel would be available to attend a status conference on any Monday or any Friday during the Spring semester 2020, from January 27, 2020, through March 13, 2020, and from March 30, 2020, through May 22, 2020. More specifically, counsel would propose any of the following dates: January 27 and 31, 2020; February 3, 7, 10, 14, 17, 21, 24, and 28, 2020; March 2, 6, 9, and 13, 2020; April 3, 6, 10, 13, 17, 20, 24, and 27, 2020; and May 1, 4, 8, 11, 15, 18, and 22, 2020.

Dated this 27th day of December 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2019, the foregoing has been electronically filed with the Clerk of the Court and a copy is being served upon the following by Federal Express:

Office of the Attorney General
Attn: Capital Litigation Division
501 Washington Avenue
Montgomery, AL 36130

Bernard E. Harcourt