

In The Matter Of:

*David Wilson v.
Jefferson S. Dunn*

*Hearing
January 23, 2020*

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

CASE NO. 1:19-cv-00284-WKW-CSC

DAVID WILSON,
Plaintiff,

vs.

JEFFERSON S. DUNN,
Defendant.

DEATH PENALTY - HABEAS CORPUS

* * * * *

MOTION FOR STATUS CONFERENCE, MOTION FOR
APPOINTMENT OF COUNSEL, MOTION FOR ORDER OF
DISCLOSURE BY DAVID WILSON

* * * * *

BEFORE THE HONORABLE CHARLES S.
COODY, UNITED STATES DISTRICT JUDGE, at the Frank
M. Johnson, Jr., U.S. Courthouse Complex, One
Church Street, Courtroom 2C, Montgomery, Alabama,
on January 23, 2020, at 2:07 p.m.

Taken by: Victoria M. Castillo, ACCR No. 17

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APPEARANCES

FOR THE PLAINTIFF, DAVID WILSON:

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*Plaintiff present

1 (Proceedings began at 2:07 p.m.)

2 THE COURT: Good afternoon.

3 MR. ANDERSON: Good afternoon,
4 Your Honor.

5 MR. HARCOURT: Good afternoon,
6 Your Honor.

7 THE COURT: The matter before
8 the Court this afternoon is in Wilson versus
9 Dunn, 2019, Civil 284, a death penalty case. And
10 this is on the petitioner's request to be
11 appointed -- Professor Harcourt is requesting
12 that he be appointed counsel. He also requests
13 disclosure of a letter written by one of
14 Mr. Wilson's co-defendants, and further a status
15 conference. I think I have covered everything,
16 Professor.

17 So I want to get right to this issue
18 about the letter. You indicate that you can't go
19 forward in this case until you have the letter
20 and know how you're going to move forward. I
21 don't understand that. And I say that simply
22 because there's no secret about the letter. I
23 mean, quotes from the letter have appeared in the
24 police report, in the opinions of the Alabama
25 courts. So why do you need the letter itself,

1 the physical letter itself?

2 MR. HARCOURT: Thank you, Your
3 Honor. Let me maybe backtrack just one moment
4 and then respond directly to that question.

5 THE COURT: All right.

6 MR. HARCOURT: I was contacted
7 by Mr. Palombi and asked whether I would consider
8 representing Mr. Wilson in these federal habeas
9 corpus proceedings. And Mr. Wilson, as you know,
10 had written a letter to the Court and had raised
11 a conflict of interest with his counsel, Anne
12 Borelli from the Federal Defenders office for the
13 Middle District. And Mr. Wilson wrote that
14 Ms. Borelli had not adequately represented him in
15 the post-conviction proceedings and that she had
16 not raised certain claims, specifically these
17 questions of innocence, actual innocence, of
18 capital murder. And he asked that those be added
19 and -- to the federal petition. And of course so
20 this is a bit of an unusual situation, both for
21 the Court, for Mr. Wilson, and also for any
22 attorney who would jump into a case like this at
23 this point --

24 THE COURT: Well, it's still
25 pretty early in this case. It's not like this

1 case has been going on for a while.

2 MR. HARCOURT: Correct, Your
3 Honor. Correct. But it is a little bit unusual
4 to have a situation like this where a petitioner
5 is raising questions of conflict of interest and
6 about claims of actual innocence. And I begin --

7 THE COURT: Let me interrupt
8 you, if I may.

9 MR. HARCOURT: Excuse me?

10 THE COURT: Let me interrupt
11 you, if I may.

12 MR. HARCOURT: Yes, sir, Your
13 Honor.

14 THE COURT: You have described
15 this as a conflict of interest. But what you
16 said in support of that simply indicates that
17 there's a disagreement between Mr. Wilson and
18 Ms. Borelli. That's not a conflict. It may be a
19 reason for Mr. Wilson to ask for a new counsel.
20 So --

21 MR. HARCOURT: Correct.

22 THE COURT: -- is there a
23 conflict of interest as we would typically think
24 about that, or is it just a disagreement?

25 MR. HARCOURT: Well, now that

1 Mr. Wilson has raised the disagreement, I believe
2 that it would present a conflict of interest for
3 the attorney, Anne Borelli, or for the office of
4 the Middle District to continue to represent
5 Mr. Wilson.

6 THE COURT: Why?

7 MR. HARCOURT: Well, because
8 there are issues of whether the attorneys in the
9 state post conviction properly, adequately
10 represented Mr. Wilson on these questions of the
11 actual innocence, the disclosure of the letter --

12 THE COURT: Did the Federal
13 Defenders office represent Mr. Wilson in the
14 state court post-conviction proceedings?

15 MR. HARCOURT: According to
16 the -- according to the pleadings that were filed
17 and I believe according to your order dated from
18 August, Ms. Borelli was involved in the state
19 post-conviction proceedings.

20 THE COURT: We don't have a
21 state court record yet.

22 So, Mr. Palombi, can you shed light
23 on that?

24 MR. PALOMBI: Your Honor, what I
25 -- I was not involved in Mr. Wilson's case

1 substantively. I should put on the record that I
2 did represent Mr. Wilson for purposes of
3 challenging method of execution, but that was
4 unrelated to this case. Ms. Borelli did not
5 enter an appearance in state court. She assisted
6 the volunteer lawyer who did represent Mr. Wilson
7 in state court, but there is no appearance from a
8 federal defender attorney anywhere during the
9 state court proceedings. However, she did
10 assist. So that's the extent of it. And
11 Ms. Borelli brought that up in her motion after
12 Mr. Wilson wrote his letter. When she did the
13 motion to stay pending appointment of new
14 counsel, she brought that up in that motion as
15 well that there may be a conflict because she
16 assisted the post-conviction counsel that
17 Mr. Wilson is alleging were also ineffective and
18 thus potentially implicating Martinez (phonetic).

19 THE COURT: That's not much of a
20 conflict. Not in the traditional sense that I
21 think of a conflict. It simply sounds like it's
22 a disagreement between Mr. Wilson and
23 Ms. Borelli. Which, again, doesn't necessarily,
24 it seems to me, mean that the Federal Defenders
25 office couldn't represent Mr. Wilson.

1 MR. HARCOURT: Well, I was
2 providing this as background to respond to your
3 original question.

4 THE COURT: I understand.

5 MR. HARCOURT: But if you would
6 like, we could take that other question on board
7 as well. I was provided that as background --

8 THE COURT: Well, you have asked
9 to be appointed as counsel in this case. And I
10 would assume because we don't have the state
11 court record -- and I, frankly, did not look at
12 Ms. Borelli's papers that she filed. I just
13 assumed that there was a conflict. That's shame
14 on me.

15 MR. HARCOURT: Well, I think --

16 THE COURT: But you're asking to
17 be appointed under the Criminal Justice Act, and
18 we're always loathed, frankly, to do that when
19 the federal defender can represent a petitioner
20 without the expenditure of additional federal
21 funds.

22 MR. HARCOURT: So to come back
23 for a moment to the original question, which has
24 to do with the disclosure of the Kitty Corley
25 (phonetic) letter. So as I was asked to -- or to

1 consider intervening in the case and taking on
2 the case, I started to review the pleadings, the
3 federal habeas corpus petition and the state
4 court opinions, and I immediately realized that
5 there's a threshold issue in this case that would
6 prevent or make hesitant a careful attorney from
7 entering an appearance in this case. And when I
8 say careful, I mean an attorney that does not
9 wish to be in any way ineffective or to engage in
10 malpractice. And that threshold question is
11 somewhat minuscureal. It's almost just a
12 question of supplementing the record when
13 reviewing this case. And that threshold matter
14 is precisely the question of the fact that the
15 Kitty Corley letter, the co-defendant's
16 confession, has never been turned over to
17 Mr. Wilson. And so it makes it -- it makes it
18 somewhat difficult to get a sense of this case
19 when one of the -- probably the most important
20 pieces of exculpatory evidence was not turned
21 over.

22 THE COURT: That's where -- and
23 I know you probably don't like to be interrupted,
24 but I get to do that. That's where I fail to
25 understand. There's no secret about the letter.

1 There's no secret about the confession, if you
2 will. There's no secret that she says she hit
3 him with a baseball bat. So why do you need the
4 letter? You know what it says.

5 MR. HARCOURT: Well, Your Honor,
6 we have one short five sentence indication of
7 what it says. According to the Court of Criminal
8 Appeals, there's information in that letter that
9 only a person who would have committed the murder
10 would be aware of. And it's pretty patently
11 clear that it's a violation of Brady not to have
12 that disclosed to Mr. Wilson at this point, which
13 is now seven or eight or 10 years after the -- or
14 13 years after the crime. There's an ongoing
15 obligation on the part of the State -- ongoing
16 goes through federal habeas corpus -- to turn
17 over exculpatory material. And it seems as kind
18 of a preliminary threshold a flagrant issue here
19 not to actually have the letter. I think it --
20 as I pointed out in the -- in the reply, which I
21 of course incorporate by reference here, the
22 issue is so clear as a legal matter that you
23 wouldn't -- that the state defender wouldn't be
24 entitled to qualified immunity on this. This
25 letter has been requested. This was a motion for

1 it in the state court. There is right now. This
2 is -- this is a motion -- one doesn't even need
3 to make a motion for this material to have to be
4 turned over.

5 THE COURT: Well, let's back up.

6 MR. HARCOURT: Yes. Yes, your
7 Honor.

8 THE COURT: We have an opinion
9 by state court that rejects the Brady claim. If
10 I understand it, it rejects the Brady claim on
11 the basis of the police report mentioned the
12 letter, and therefore counsel for Mr. Wilson had
13 within his knowledge the ability to know about
14 and then therefore obtain the letter. The cases
15 that you cite in support of the ongoing
16 obligation -- and, by the way, I think you're
17 right in the sense this obviously was exculpatory
18 material which should have been turned over. But
19 the cases that you cite, it's not up to counsel
20 for Mr. Wilson to hunt and seek, in all of those
21 cases that I have read -- and I haven't read
22 every case in existence -- seem to indicate that
23 that posture of the case was ones in which the
24 prosecution had said, You've got everything,
25 we've got an open file, there's no other

1 material. And I don't know what the situation
2 here is about that. Did the prosecution say,
3 We've given you-all of the information? I don't
4 think we know.

5 MR. HARCOURT: Right. So my
6 understanding is that there is an open file
7 discovery in capital cases in the state of
8 Alabama.

9 THE COURT: That's a fact I'm
10 not sure that we can necessarily assume.

11 MR. HARCOURT: Okay. There was
12 a motion by trial counsel for all exculpatory
13 material under Brady. What is clear is that --
14 and it's unclear what trial counsel had. There's
15 never been an evidentiary determination of these
16 questions in the sense that there was a request
17 for discovery and in state court and in Rule 32
18 and that there was a specific request for this
19 letter. And there was oral argument -- if I
20 understand correctly, there was oral argument in
21 front of the state circuit court judge regarding
22 these questions. And I believe David Schoen, who
23 was representing Mr. Wilson at the time, stated
24 on the record that there needs to be factual
25 development as to what was turned over to the --

1 I mean, we are certain that the letter has never
2 been turned over, but there needs to be factual
3 development as to what was turned over, what
4 wasn't turned over. That wasn't accomplished in
5 Rule 32.

6 What is clear is that this letter
7 has never been turned over. It's been requested
8 on multiple occasions, I believe. Certainly is
9 on the table right now. There's a request for it
10 right now. And I don't think that under very
11 well-established federal institutional law that
12 that letter cannot be immediately turned over to
13 Mr. Wilson. In other words, there's a Brady
14 violation that's going on this minute, and one
15 minute ago, and -- and that --

16 THE COURT: But this Court is
17 staring in the face of a state court appellate
18 conclusion that there was no Brady violation.
19 Now, you've got to get past that (unintelligible)
20 problem.

21 MR. HARCOURT: Yes, Your Honor.

22 THE COURT: And how does having
23 the letter help you do that?

24 MR. HARCOURT: So you're correct
25 that the ruling of the Court of Criminal Appeals

1 in final state court opinion on page nine of
2 their written opinion dismissing the Rule 32
3 petition says that it's procedurally barred
4 because it could have or should have been raised
5 by trial or appellate counsel --

6 THE COURT: And it could have
7 conclusion that --

8 MR. HARCOURT: Well, so there
9 are a couple of responses there. First of all,
10 it's -- I would argue that -- I mean, I don't
11 think this is the -- necessarily the time to
12 address the merits of these claims. But I would
13 argue first that that is an unreasonable
14 conclusion because there's no indication that the
15 State was willing to turn over the favorable
16 evidence at any point before. And certainly we
17 have an indication that the State is not willing
18 to turn it over even now. So the idea that it
19 could have been turned over or could have been
20 raised is wrong as a matter of law and fact, I
21 would argue.

22 But even if we assume that the Court
23 of Criminal Appeals is correct on that question,
24 the state procedural default -- of course that
25 raises a federal question of whether there's

1 cause of prejudice or alternatively -- I would
2 argue in this case -- well, the cause of
3 prejudice would be ineffective assistance of
4 counsel. In other words, if indeed trial
5 counsel -- if it turns out on an evidentiary
6 matter that the trial counsel had information
7 that there was -- that the co-defendant had
8 confessed to killing -- to committing the murder
9 in this case, I think it would be ineffective for
10 that attorney not to get ahold of that letter and
11 present that. Particularly at the penalty phase
12 of a capital murder case --

13 THE COURT: Most likely, but --

14 MR. HARCOURT: And just it would
15 also be questions of fundamental mischaracter of
16 justice which is actually the point that
17 Mr. Wilson was raising in his letter --

18 THE COURT: But I'm still
19 perplexed --

20 MR. HARCOURT: Yes, sir.

21 THE COURT: -- why you feel the
22 need for the physical possession of the letter at
23 this juncture? I will put it that way. You are
24 assuming that the letter contains some other
25 information that would be important.

1 MR. HARCOURT: Well, Your
2 Honor --

3 THE COURT: I mean, what could
4 be more important than the co-defendant's
5 confession?

6 MR. HARCOURT: Well, I --

7 THE COURT: What could be more
8 important than the statement that she disclosed
9 things that only someone who had been there and
10 was involved in the murder could have known? I
11 mean, don't you have enough to move forward?

12 MR. HARCOURT: I would agree
13 with Your Honor that we would probably be
14 entitled to summary judgment on the Brady on --

15 THE COURT: But you don't want
16 me to decide the Brady.

17 MR. HARCOURT: At this moment on
18 the pleadings basically, I would say that is
19 undoubtedly true. But, nevertheless, we don't
20 know what -- we don't know what more there is in
21 this letter. And --

22 THE COURT: But you're assuming
23 that something is in the letter that is also
24 important?

25 MR. HARCOURT: Well, if there's

1 nothing in the letter, why are we here 13 years
2 later requesting the letter under Brady -- on a
3 clear Brady claim in order to get a sense of -- I
4 mean, to -- I was asked to review the case. I
5 start looking into the case, and I -- and
6 essentially it's -- it's also very hard to
7 imagine what kind of work would need to be done
8 to reconstitute what was in the letter. For
9 instance --

10 THE COURT: Well, let me ask you
11 this at this point --

12 MR. HARCOURT: Yes, Your Honor.

13 THE COURT: -- if the Court were
14 to conclude that disclosure of the letter at this
15 juncture were not appropriate, do you still want
16 to go forward with representation of Mr. Wilson?
17 Because I will tell you the next steps will be we
18 will order the State to file the complete record
19 of the state court proceedings. I would appoint
20 you. And you would hold a budgeting conference
21 with the death penalty law clerk. And we would
22 move on from there. And you would be -- after
23 the state court record is filed, you would be
24 given the opportunity to amend the petition. I
25 would hope you would cut it down, all 300 and

1 something pages of it. And it would move forward
2 logically from there in that kind of process.

3 MR. HARCOURT: So --

4 THE COURT: In other words, it's
5 not going to happen quickly, and you will have
6 plenty of time to consider view of the case and
7 certainly present the Brady claim. Which is in
8 the petition by the way. I mean, the Brady claim
9 --

10 MR. HARCOURT: Correct. Right.
11 Correct.

12 THE COURT: -- is in the
13 petition.

14 MR. HARCOURT: And continue to
15 litigate the disclosure of this --

16 THE COURT: Yes.

17 MR. HARCOURT: -- of this
18 letter?

19 THE COURT: Yes. And on that
20 note, let me turn to the respondents.

21 MR. HARCOURT: Yes, sir.

22 THE COURT: Cat is out of the
23 bag. Why the devil don't you-all just disclose
24 the letter?

25 MR. ANDERSON: Your Honor, one

1 of the things -- first things I want to, as
2 initial matter, note is that in the police report
3 regarding Kitty Corley she has not confessed to
4 committing to murder. She confesses she hit the
5 man with a bat until he fell.

6 THE COURT: I know what it said.
7 It's a fine point, but I know what it said.

8 MR. ANDERSON: The petitioner is
9 no longer in the position he was in at trial --

10 THE COURT: Look, we can argue
11 those fine points of the law. We can argue he's
12 been convicted and it's all -- discovery in a
13 habeas case is different than it is in a regular
14 civil case. But my question still pertains. We
15 know essentially what the letter says, so why are
16 you-all being so stubborn about disclosure of it?

17 MR. ANDERSON: Because he
18 doesn't have any right to it at this point, Your
19 Honor.

20 THE COURT: When would he have a
21 right to it?

22 MR. ANDERSON: Essentially what
23 we're dealing with here at this point is a
24 discovery request. There is no Brady violation.
25 My opposing counsel seems very confident --

1 THE COURT: Well, if there's no
2 Brady violation, then why don't you want to
3 disclose the letter? I mean, look, I tend to
4 take a very practical viewpoint about these
5 things. We can get real nice about all the
6 fineries of the law and he's not entitled to this
7 because he's already been -- we know what the
8 letter says essentially.

9 MR. ANDERSON: Yes, Your Honor.

10 THE COURT: So why are you
11 hiding it?

12 MR. ANDERSON: I am not hiding
13 it.

14 THE COURT: Yes, you are. Yes
15 are. You're taking a stance that is very common
16 in these cases where something wasn't disclosed
17 and nobody knows what it is. Well, heck, we know
18 what it is. So what's wrong with disclosing it?

19 MR. ANDERSON: The State has I
20 believe the right to disclose what a person has a
21 right to and retain what he does not have a right
22 to. And I take a very conservative view of the
23 State's obligations. If there's something we're
24 obliged to disclose, I will disclose it --

25 THE COURT: But would you agree

1 that it's exculpatory?

2 MR. ANDERSON: No, Your Honor,
3 we're not. Having seen the letter myself.

4 THE COURT: She hit him with a
5 baseball bat. She says that.

6 MR. ANDERSON: I will concede,
7 Your Honor, that the police report is the best
8 version of the evidence that Mr. Wilson could
9 have. And the police report, which was disclosed
10 to trial counsel at the time of trial --

11 THE COURT: Yes.

12 MR. ANDERSON: -- also a hearsay
13 document -- that is every bit as valuable as the
14 letter is. The letter itself at this point is a
15 red herring, Your Honor. The letter, as the
16 Alabama court's ruled, was inadmissible. Trial
17 counsel could not have put it into evidence under
18 Alabama law.

19 THE COURT: That's not the point
20 of a Brady violation though. It doesn't have to
21 be admissible to be exculpatory to be a Brady
22 violation.

23 MR. ANDERSON: Well, Your Honor,
24 talking about the purpose of what Brady is. The
25 11th Circuit has said -- I'm sorry -- the 10th

1 Circuit before the 11th Circuit said the purpose
2 of Brady is to ensure that the accused will not
3 be denied access to exculpatory evidence known to
4 the government but unknown to him. In this case
5 the State at the time of trial produced this
6 police report which includes a description of the
7 letter. It includes identification of at least
8 two people unassociated with the government who
9 knew the contents of the letter that a diligent
10 petitioner could have interviewed in post
11 conviction, that a diligent defendant could have
12 interviewed prior to trial. The letter itself,
13 in the State's position, is a red herring. And
14 it not only -- not only is there no allegation
15 that it would have led to any admissible
16 evidence, I would note also that Kitty Corley is
17 still alive. Kitty Corley was alive during post
18 conviction. Kitty Corley could have been
19 interviewed or sought for an affidavit. All
20 these things that a diligent petitioner could
21 have done were not done.

22 And to impose on the State at this
23 point, at this -- an extraordinary obligation to
24 produce a document that -- if it turns out that
25 the petitioner has a meritorious Brady claim, he

1 might be entitled to in discovery, but he's
2 simply not entitled to just because he wants it
3 in making a decision on whether or not to take a
4 case.

5 THE COURT: Well, I agree with
6 you about the latter part. He's not entitled to
7 it to decide whether or not he's going to take
8 the case or not.

9 MR. ANDERSON: I mean, Your
10 Honor, I would be happy to provide it to the
11 Court for an in camera review. And if you
12 believe it to be exculpatory, then we can proceed
13 from there. But the State --

14 THE COURT: Well, what if I find
15 it to be exculpatory? Would you then disclose
16 it, or do I have an obligation at that point to
17 order you to disclose it?

18 MR. ANDERSON: Well, I think at
19 that point, Your Honor, you could disclose it to
20 the other side.

21 THE COURT: Professor, back to
22 my question. Do you intend to represent
23 Mr. Wilson?

24 MR. HARCOURT: Your Honor, let
25 me -- may I first respond to just a few arguments

1 that were made?

2 THE COURT: You can do that
3 after you answer my question.

4 MR. HARCOURT: I -- I would be
5 willing to take on this case and represent
6 Mr. Wilson, but I would like the record to
7 reflect that there is an ongoing Brady violation
8 right now, this moment, in this second. And that
9 I am making the Court aware of that.

10 THE COURT: And I understand
11 your position, and I do understand. And we have
12 a -- and this --

13 MR. HARCOURT: And I will do
14 everything in my power to ensure that that Brady
15 violation is taken care of as soon as possible.
16 And I would be happy to have in camera review,
17 Your Honor.

18 THE COURT: And I will consider
19 that. Now respond.

20 MR. HARCOURT: Yes. In terms of
21 what the diligent person could have done in state
22 post conviction, diligence -- there was due
23 diligence. There was perfect due diligence.
24 There's a petition that was filed. There was a
25 motion for this evidence that was filed. There

1 was a perfect argument that there is a Brady
2 violation in this case based on what we know,
3 which I would argue is correct. Now, that
4 petition was then dismissed predominantly for
5 failure to meet the pleading requirements of the
6 Alabama courts. So it's predominantly dismissed
7 on the Rule 27D, I believe it is, which is the
8 rule requiring specificity in the pleading
9 requirements. So it was -- I believe it was a
10 230-page or something like that. Hold on.
11 241-page Rule 32 petition that was not specific
12 or that didn't plead sufficiently enough.

13 But in terms of due diligence,
14 absolutely everything was done in state post
15 conviction. So there's nothing -- there's
16 nothing new going on here. There's not a request
17 for new evidence. It's not opening up a new can
18 of worms. I understand (unintelligible) very
19 well, and you can't do that really. This was all
20 in the process, perfect diligence, requests, and
21 it was denied basically and it was kicked out.
22 Effectively, as if there was no state post-
23 conviction petition filed because it was
24 dismissed for (unintelligible) and without leave
25 to amend ultimately. And so it's as if there was

1 nothing filed in state court. But I did want to
2 address that question.

3 I also would want to address the
4 admissibility question. I think that was another
5 issue that was raised. There's absolutely no
6 question in Green versus Georgia that this letter
7 would be admissible in a court of law under
8 Brady. I mean, Green versus Georgia is exactly
9 this case. And it was a situation that in Green
10 versus Georgia that Mr. Green and his
11 co-defendant, Carzell Moore -- were
12 co-defendants, as in this case David Wilson and
13 Ms. Corley, Kitty Corley. Defendant Green tried
14 to introduce a third party and the co-defendant
15 had confessed that Mr. Carzell Moore confessed to
16 doing the killing. Tried to present that
17 litigation. Exactly what would happen here.
18 There was a state rule that precluded evidence
19 under Georgia's hearsay rules. And the Supreme
20 Court was very clear that that is -- that you
21 can't use state admissibility rules when you've
22 got basically a due process violation like that.

23 THE COURT: You know what's
24 interesting about our argument at this juncture?
25 I think everybody is agreed that this is not the

1 appropriate time to resolve the Brady claim and
2 yet we continue to argue the Brady claim as if it
3 were properly before the Court. I don't think
4 resolution of the claim at this juncture is
5 appropriate. Yes? Go ahead.

6 MR. HARCOURT: The reason -- the
7 reason that there is this odd posture -- and
8 you're -- I agree, Your Honor.

9 THE COURT: It would make a
10 great law school question, wouldn't it?

11 MR. HARCOURT: Yes. No. And
12 depending on how it can resolve, I think it will
13 make for a great Supreme Court decision. In
14 other words, there's an -- there's a ticking
15 Brady violation going on right now --

16 THE COURT: I understand. I
17 understand what you're saying.

18 MR. HARCOURT: So that's why I
19 am kind of coming back to the Brady claim,
20 because every moment going forward is part of
21 an -- is a part of a Brady violation for which
22 state agents would be in some sense liable for a
23 violation of civil rights. So that's why for
24 some odd reason I keep on coming back to that.

25 THE COURT: I understand. I

1 understand your position. But here's my
2 position. No court worth its salt likes to rule
3 in a vacuum. We don't know what the letter says.
4 I also don't know what happened in the state
5 courts other than reading the state court
6 opinions. We don't have the record. I don't
7 have the trial transcript. I don't have any of
8 the materials from the state court. And until
9 that vacuum is resolved, I'm not comfortable
10 doing anything with regard to your position about
11 the letter. After the transcript and the other
12 documents, the state court proceedings, are filed
13 and we all have a chance to review them, then the
14 Court will be in a better position to determine,
15 even on a preliminary basis, the question about
16 the letter. Context matters. You look at the
17 Supreme Court cases, they talk about that. The
18 context matters. I don't have a context here
19 that I feel is reliable. So if that sort of
20 tells you where I'm going to go, you're right.
21 I'm still aggravated with the State's position,
22 to be blunt.

23 MR. HARCOURT: Just as a matter
24 of legal procedure, to be clear on the record,
25 that I do -- I would object to any ongoing

1 seconds of nondisclosure of this particular --

2 THE COURT: I understand. And
3 you have made that very clear you want it
4 immediately disclosed. That's not going to
5 happen right now. That's not to say that the
6 Court won't order its disclosure at some point.
7 And I would hope the State would reconsider its
8 technical legal position, which still strikes me
9 as bonkers. And just as it makes Professor
10 Harcourt suspicious, it makes me suspicious, as
11 any good lawyer would be.

12 So, Professor, I think I have
13 telescoped what I am going to rule. And I will
14 do this in a written decision. But we will
15 appoint you as counsel. I will give you 30 days
16 to speak with our death penalty law clerk and
17 have a budgeting conference. And I will order
18 the State to produce the record of the state
19 court proceedings. I don't think that will take
20 very long.

21 You have already got it, don't you?

22 MR. ANDERSON: Shouldn't take
23 long, Your Honor.

24 THE COURT: And we will proceed
25 from there.

1 MR. HARCOURT: Thank you, Your
2 Honor. I would just like one other thing
3 mentioned perhaps for the record. There were
4 some statements made by counsel for respondent as
5 to the content of that letter, and I don't think
6 that that's evidence as to what the letter says.

7 THE COURT: I don't think we
8 have any -- this is not an evidentiary procedure,
9 Professor, so we don't have any evidence before
10 the Court.

11 MR. HARCOURT: Thank you.

12 THE COURT: Anything else?

13 MR. PALOMBI: Your Honor, would
14 you -- given that you stated you are going to
15 appoint Professor Harcourt, would you like a
16 written order for the Federal Defenders to
17 withdraw?

18 THE COURT: You mean a written
19 motion?

20 MR. PALOMBI: A written motion.
21 Or I can give an oral motion right now.

22 THE COURT: File the written
23 motion.

24 MR. PALOMBI: File the written
25 motion, Your Honor?

1 THE COURT: This being a death
2 penalty case, I think we need to have that on the
3 record.

4 MR. PALOMBI: Be happy to do
5 that, Your Honor.

6 THE COURT: Anything else?

7 MR. HARCOURT: No, Your Honor.

8 MR. ANDERSON: No, sir.

9 THE COURT: Professor, welcome
10 to Alabama.

11 MR. HARCOURT: Thank you, Your
12 Honor.

13 THE COURT: If you have time, I
14 hope you take advantage of your being here and
15 take in some of the civil rights --

16 MR. HARCOURT: I will, Your
17 Honor.

18 THE COURT: -- exhibits.

19 MR. HARCOURT: I lived in
20 Montgomery for many years and am glad to be back.

21 THE COURT: Thank you. We are
22 in recess.

23 MR. ANDERSON: Thank you, Your
24 Honor.

25 (Recess at 2:44 p.m.)

1 STATE OF ALABAMA)

2 COUNTY OF ELMORE)

3

4 I hereby certify that the above
5 proceedings were taken down by me and transcribed
6 by me using computer-aided transcription and that
7 the above is a true and accurate transcript of
8 said proceedings taken down by me and transcribed
9 by me.

10 I further certify that I am neither
11 of kin nor of counsel to any of the parties nor
12 in anywise financially interested in the outcome
13 of this case.

14 I further certify that I am duly
15 licensed by the Alabama Board of Court Reporting
16 as a Certified Court Reporter as evidenced by the
17 ACCR number following my name found below.

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VICTORIA CASTILLO, ACCR #17, 9/30/20

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FREELANCE COURT REPORTER

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