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
	)	
JOHN Q. HAMM, Commissioner,	)	DEATH PENALTY CASE
	)	
Respondent.	)	

RENEWED MOTION FOR DISCLOSURE OF ONGOING *BRADY* MATERIAL

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RENEWED MOTION FOR DISCLOSURE OF ONGOING *BRADY* MATERIAL

Petitioner David Wilson renews his motion for disclosure of the letter written by his co-defendant, Catherine Nicole "Kitty" Corley, that incriminates her in the capital offense for which he was convicted and is materially exculpatory as to him, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The state of Alabama has an *ongoing* legal and ethical duty to disclose to Mr. Wilson clearly exculpatory material in their possession, and that duty extends into these federal habeas corpus proceedings. That duty applies now, today. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *High v. Head*, 209 F.3d 1257, 1265, n. 8 (11th Cir. 2000). Mr. Wilson has never seen the Kitty Corley letter. He has the right to, under the state's continuing obligation to turn over material exculpatory evidence.

The state of Alabama has an *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. *See infra*, Part I. Mr. Wilson himself has asked this Court for the Kitty Corley letter in his *pro se* letter to this Court dated June 13, 2019. *See David Wilson v. Jefferson Dunn*, Case No. 1:19-cv-284, Doc. 15, at 2 (Letter from David Wilson to the Court dated June 13, 2019) ("[I]f 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.") Undersigned counsel immediately asked this Court for disclosure of the *Brady* material before even entering an appearance. In order for Mr. Wilson's capital habeas corpus case to proceed 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 amend Mr. Wilson's petition.

At the previous hearing on January 23, 2020, this Court reserved ruling on Mr. Wilson's *Brady* motion for disclosure of the Kitty Corley letter until Respondent filed the federal habeas corpus record in this case. Respondent has now filed a preliminary record. *See David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 59, Respondent's Notice of Manual Filing of Federal Record, dated October 7, 2022. Mr. Wilson is requesting some corrections, modifications, and additions to the record, *see David Wilson v. John Q. Hamm*, Case No. 1:19-cv-284, Doc. 61, Petitioner's Motion for Respondent to Correct, Supplement, and Refile the Federal Habeas Corpus Record and Checklist, filed November 7, 2022; but those requested changes do not alter the facts in the record in this case. Despite any necessary revisions to the record, Mr. Wilson points the Court in this motion to the places in the current federal record where all the relevant documentary evidence is located. The Court now has an adequate record to rule on Mr. Wilson's ongoing *Brady* motion.

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*.

Under clearly established federal law, Respondent has an *ongoing* legal duty to disclose exculpatory evidence to Mr. Wilson that was available at the time of his original trial. This legal obligation—first acknowledged in *Brady v. Maryland*, 373 U.S. 83 (1963)—does not terminate with conviction or sentencing, but rather extends throughout all stages of the judicial process, including direct appeal, state post-conviction, and federal habeas corpus proceedings. *See Ritchie*, 480 U.S. at 60; *Head*, 209 F.3d at 1265, n. 8. In fact, this *ongoing* duty is so clearly established that any state agent who fails to disclose exculpatory evidence following a defendant's conviction is not entitled to qualified immunity in suits under 42 U.S.C. § 1983. *See, e.g.*, *Steidl v. Fermon*,

494 F.3d 623, 630-32 (7th Cir. 2007) (holding that appellant police officials were not entitled to qualified immunity, and 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) (the duty to disclose exculpatory trial evidence in post-conviction is 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 Supreme Court has declared that the duty to disclose exculpatory material is "ongoing." *Ritchie*, 480 U.S. at 60. The Eleventh Circuit Court of Appeals has interpreted this decision as extending the obligation to "all stages of the judicial process"—including federal habeas corpus proceedings. *See High v. Head*, 209 F.3d 1257, 1265, n. 8 (11th Cir. 2000) ("We also agree, and the State concedes, that the duty to disclose is ongoing and extends to all stages of the judicial process."). 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).

Moreover, both the United States Supreme Court and Eleventh Circuit have affirmed that petitioners may request exculpatory evidence directly from the court and argue in favor of its

materiality. *Ritchie,* 480 U.S. at 60 ("If a defendant is aware of specific information contained in the file… he is free to request it directly from the court, and argue in favor of its materiality. Moreover, 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."); *Head,* 209 F.3d at 1265, n. 8 ("While the State may have made an initial determination that the [evidence at issue] 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") (citing *Ritchie*); *see also United States v. Jordan*, 316 F.3d 1215, 1253 (11th Cir. 2003).

All the United States Circuit Courts of Appeals that have addressed the issue agree: The *Brady* duty to provide defendants with exculpatory trial evidence is *ongoing* and extends to all stages of the judicial process. *See, e.g., 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"); *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"); *United States v. Coppola*, 526 F.2d 764, 775 (10th Cir. 1975) (the *Brady* duty to disclose "is a continuing one"). *See also 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").

This ongoing legal obligation to disclose exculpatory evidence inheres to the logic of *Brady v. Maryland*, 373 U.S 83 (1963). There, the Supreme Court found that withholding exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment." 373 U.S. at 87. In that case, 25-year-old John Leo Brady and 24-year-old Charles Donald Boblit were charged with murdering Mr. William Brooks. Both Brady and Boblit were convicted of first-degree murder (committed during the course of a robbery) and sentenced to death. At trial, Brady took the stand and admitted to his participation in the robbery, but claimed that Boblit had done the actual killing. Prior to trial, Brady's attorney had requested that the prosecution allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him, but one dated July 9, 1958—in which Boblit admitted to having killed Brooks himself—was withheld by the prosecution. That statement did not come to Brady's notice until after he had been tried,

convicted, and sentenced to death, and after his conviction had been affirmed on appeal. Brady motioned for a new trial on the basis of this newly discovered evidence, and the Maryland Court of Appeals remanded Brady's case for retrial on the question of punishment.

On appeal, the United States Supreme Court found that the suppression of Boblit's confession violated the Due Process Clause of the Fourteenth Amendment. Citing *Mooney v. Holohan*, 294 U.S. 103 (1935), the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court explained that this holding was grounded in fundamental notions of procedural fairness:

> Society wins 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.… A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.' 373 U.S. at 87-88 (internal citations omitted)

The Court went onto say that while Boblit's confession would not have exculpated Brady under Maryland law, it was nevertheless material to his degree of culpability. As such, it was prejudicial error for the prosecution to withhold that statement, and Brady was entitled to relief.

Fundamental principles of procedural fairness likewise demand that Mr. Wilson have access to Kitty Corley's letter. As in *Brady*, Mr. Wilson's case involves an unplanned murder committed during the course of a robbery. Moreover, like Brady, Mr. Wilson has consistently asserted throughout that he did not kill Mr. Walker—and evidence existed at the time of trial that his co-defendant killed Mr. Walker. The possibility that exculpatory evidence was withheld by the prosecution during Mr. Wilson's trial casts doubt on the propriety of his conviction and sentence,

and on the integrity of our criminal justice system. This Court must allow Mr. Wilson to review the Kitty Corley letter to determine whether his conviction and sentence were the product of a proceeding "that [did] not comport with standards of justice." *Brady*, 373 U.S. at 88. As the Brady Court explained, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." The Kitty Corley letter casts clear doubt on the validity and fairness of Mr. Wilson's conviction and sentence.

The *Brady* obligation extends after conviction. Due process is violated when exculpatory evidence available at the time of trial is withheld after conviction—in direct appeal, state post-conviction, or federal habeas corpus proceedings. As noted, the United States Supreme Court has 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 long suppressed evidence came to light"). The Supreme Court also emphasized in *Ritchie* that the *Brady* analysis must be constantly updated, reviewed, and reconsidered after the defendant's conviction. 480 U.S. at 60 ("[I]nformation 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).

The state of Alabama has refused to hand over the Kitty Corley letter, arguing that the *Brady* rule does not apply at this stage. In *Steidl*, the Seventh Circuit was confronted with the same argument from the state. There, the Court unequivocally rejected the state's contention, 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 due process rationale underpinning *Brady* applies equally to the withholding of exculpatory evidence available at the time of trial *after* the defendant's conviction.

The law is clear: The *Brady* obligation extends into federal habeas corpus proceedings.

A. *The* Osborne *Framework Is Inapposite*

Previously, Respondent objected to disclosure of the Kitty Corley letter on the grounds that "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, Response to Notice of Appearance, Motion for a Status Conference, for Appointment of Counsel, and for an Order of Disclosure, at 6. The *Osborne*

case, however, is completely inapposite because it addresses the federal law surrounding exculpatory evidence that is *discovered after* (not before or during) trial and conviction.

Osborne concerned evidence originating in post-conviction. It stands for the proposition that a prosecutor does not have the same due process obligations regarding evidence arising after conviction as it does vis-à-vis evidence discovered prior to or during trial. *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 twelve years after conviction); *Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 259 (11th Cir. 2013) (citing *Osborne* to show an absence of suppression when exculpatory statements were first made only after the guilt phase).

In *Osborne* itself, the defendant had brought a § 1983 suit and demanded access to DNA evidence for new testing. The defendant argued that he had a Due Process right to exculpatory evidence that did not yet exist. The Ninth Circuit had analogized his "liberty interest" in proving his innocence claim to the pre-trial *Brady* duty of disclosure. The Supreme Court rejected this analogy and pointed out that *Brady* was the wrong framework to apply in such a context, because the defendant was not asserting any pre-trial suppression. Unlike Mr. Wilson then, the defendant in *Osborne* did not claim that he was denied a fair trial, but instead requested post-trial access to DNA evidence to build a case for innocence.

Many federal courts have addressed Respondent's inapposite contentions by supplying the appropriate legal framework. The Seventh Circuit dealt with Respondent's exact argument in *Steidl v. Fermon* (discussed above) and declared that:

> The district court cases on which the [Respondents] 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. 494 F.3d at 629.

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 explained in *Collins v. City of New York* that:

> *Osborne*… 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.

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.")

Brown v. Sec'y, Dep't of Corr., 750 App'x 915 (11th Cir. 2018) is the most recent example of the Eleventh Circuit citing *Osborne* for the distinction between evidence discovered pretrial versus evidence arising post-conviction. There, the Eleventh Circuit wrote that "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)." 750 Fed. Appx. 915, 928, 2018 BL 375079, 12 (11th Cir. 2018).

Unlike in *Osborne*, the favorable evidence in Mr. Wilson's case was available at the time of trial. The *Brady* framework is therefore applicable to a violation of that due process right, and its protections extend into federal habeas corpus proceedings.[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 also has an *ongoing* duty to disclose the Kitty Corley letter 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* [*v. Whitley*], 514 U.S., at 437 ("[T]he rule in [*United States v.*] *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").

[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 that "[a]s [the Supreme Court] ha[s] often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Id.* (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* line of cases, the Supreme Court has often cited provisions pertaining to the prosecution's ethical and professional responsibilities to turn over favorable evidence to the defense—namely, the 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"); *see also* 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"). *See, generally, Kyles*, 514 U.S. at 437. The Alabama courts have likewise cited these provisions approvingly. *See, e.g.*, *Shields v. State*, 680 So. 2d 969, 973 (Ala. Crim. App. 1996).

Similar ethical provisions have been adopted by the Alabama Supreme Court in the Alabama Rules of Professional Conduct. Under Rule 3.8(1)(d), attorneys 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 U.S. Supreme Court has made clear that prosecutors must seek to do justice, not just to obtain convictions. As the 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." 295 U.S. 78, 88 (1935). These words apply with even greater force in the context of the death penalty.

Under the aforementioned rules of ethical and professional responsibility, counsel for Respondent is under an obligation to turn over the Kitty Corley letter 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 order the disclosure and development of the factual record as a preliminary matter so as to address the 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, 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, 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 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

Despite the fact that Petitioner has never seen the Kitty Corley letter, what little he now knows about the item demonstrates that it is material and favorable to his case. Indeed, it could well be the single most important piece of evidence pertaining to Mr. Wilson's guilt and sentencing. The relevant facts are as follows:

A. *Relevant Facts*

1. Mr. Wilson made a statement to the police when he was taken into custody. This statement was not fully recorded (Fed. Rec. Vol. 8, PDF p. 127; TR.[2] 383); however, the recorded portion of the statement was played to the jury at trial and entered into evidence. (Fed. Rec. Vol. 8, PDF p. 162-165; TR. 418-21). A transcript of the statement was also admitted into evidence. (Fed. Rec. Vol. 8, PDF p. 177; TR. 433).

2. In his statement, Mr. Wilson admitted to striking Dewey Walker once while attempting to disarm him of a knife, and to choking him with an extension cord until he "passed out" in order to subdue him. (Police statement of David Wilson, April 14, 2004, p. 8-10; Fed. Rec. Vol. 3, PDF p. 122-124; CRT. 505-7). Mr. Wilson also stated that Mr. Walker struck his head on the corner of a wall when he fell. (Police statement of David Wilson, April 14, 2004, p. 8-9; Fed. Rec. Vol. 3, PDF p. 122-123; CRT. 505-6). These were the only injuries described by Mr. Wilson in his statement. Before leaving, Mr. Wilson stated that he checked for and felt Mr. Walker's pulse and that Mr. Walker appeared to be breathing. (Police statement of David Wilson, April 14, 2004, p.

[2] The following abbreviations for the state court records will be used: (TR. #) refers to the trial transcript; (CRT. #) refers to the clerk's record from the trial on direct appeal; (R32C. #) refers to the clerk's record on appeal from dismissal of Mr. Wilson's Rule 32 state post-conviction petition; (Fed. Rec. Vol. #, PDF p. #) refers to the thirty-five volume record filed by Respondent in this Court on March 16, 2020, and given that no BATES numbers were provided for this record, page numbers indicate the page of the PDF of each volume.

10-11; Fed. Rec. Vol. 3, PDF p. 124-125; CRT. 507-8). Mr. Wilson maintained that he did not, intentionally or unintentionally, kill Mr. Walker.

3. Mr. Wilson said that, over his objections, codefendant Catherine Nicole "Kitty" Corley wanted to return to Mr. Walker's house. (Police statement of David Wilson, April 14, 2004, p. 13; Fed. Rec. Vol. 3, PDF p. 127; CRT. 510). The pair returned to and entered the house, but Mr. Wilson refused to proceed any further. Kitty Corley, on her own, went to go see where Mr. Walker was; thus, she was alone with Mr. Walker for some period of time. When she returned, Mr. Wilson described her as acting strangely "excited" or "thrilled." (Police statement of David Wilson, April 14, 2004, p. 13-14; Fed. Rec. Vol. 3, PDF p. 127-128; CRT. 510-11).

4. Before Mr. Wilson's trial, the state came into possession of a hand-written letter by Kitty Corley. Sgt. Luker, the lead investigator in the case, described the contents of the letter, in a police report, as Corley confessing that she had "hit Mr. Walker with a baseball bat until he fell." (Fed. Rec. Vol. 24, PDF p. 16; R32C. 615). This short description was buried in an otherwise lengthy report. The evidence directly contradicts the statement Kitty Corley gave to police at the time of her arrest, wherein she denied ever entering the portion of the house where Mr. Walker lay. (Fed. Rec. Vol. 24, PDF p. 27-30; R32C. 626-29). Sgt. Luker's police report was apparently turned over to trial counsel for Mr. Wilson, but Corley's hand-written letter was not. Trial counsel did not seem to know of the letter's existence, and Mr. Wilson was not informed.

5. After receiving the letter, Sgt. Luker collected handwriting samples from Kitty Corley's jail cell. (Fed. Rec. Vol. 24, PDF p. 16-17; R32C. 615-16). Both the letter and the samples were sent to the USPS for examination by a handwriting expert. (Fed. Rec. Vol. 24, PDF p. 35-38; R32C. 634-37). The expert stated that the letter and the samples were probably written by the same person—Kitty Corley. (Fed. Rec. Vol. 24, PDF p. 37; R32C. 636).

6. During Mr. Wilson's trial, the state's pathologist testified that numerous other blows were inflicted on Mr. Walker (Fed. Rec. Vol. 9, PDF p. 43; TR. 497), and that the cause of death was "multiple traumatic injuries." (Fed. Rec. Vol. 9, PDF p. 108-109; TR. 561-2). The pathologist further testified that Mr. Walker received all these injuries while still alive (Fed. Rec. Vol. 9, PDF p. 45, 49-50, 59; TR. 499, 503-4, 513), and that he was alive for multiple hours after first being injured (Fed. Rec. Vol. 9, PDF p. 45, 47-48; TR. 499, 501-2). The prosecution argued that Mr. Wilson alone inflicted all of the injuries and that the large number of injuries proved his intent to kill Mr. Walker. (Fed. Rec. Vol. 9, PDF p. 153-154, 156-157, 159, 170; TR. 606-7, 609-10, 612, 623).

7. The Kitty Corley letter and the contents of that letter were never presented at trial. Corley was not called by the prosecution to testify.

8. Mr. Wilson was convicted of capital murder (Fed. Rec. Vol. 2, PDF p. 171; CRT. 355). The jury voted 10-2 for death. (Fed. Rec. Vol. 2, PDF p. 172; CRT. 356). This is the minimum number of votes for a recommendation of death. Ala. Code § 13A-5-46.

B. *What We Know about the Kitty Corley Letter*

At this juncture, Petitioner knows four things about the Kitty Corley letter:

First, 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 8 (Fed. Rec. Vol. 33, PDF p. 9). At present, Mr. Wilson has no idea what those specific details consist of, except that they are deeply incriminating as to Kitty Corley.

Second, 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.*

Third, 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.*

Fourth, 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, 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.

C. *The Most Important Piece of Exculpatory Evidence*

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, 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 thereafter subdued him with an extension cord. However, he left Mr. Walker alive when he exited the home. Kitty Corley then went to see Mr. Walker alone.

In his police statement, Mr. Wilson said that when he left Mr. Walker's home, he checked Mr. Walker for a pulse and felt one. Moreover, he stated that Mr. Walker "looked like he was breathing." (Police statement of David Wilson, April 14, 2004, p. 11; Fed. Rec. Vol. 3, PDF p. 125; CRT. 508). Mr. Wilson said that he later refused to return to the location in the house where

Mr. Walker was, but that Kitty Corley went into the house alone to check on Mr. Walker. Mr. Wilson also told 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 was excited I don't [know] what was up with her." (Police statement of David Wilson, April 14, 2004, p. 13; Fed. Rec. Vol. 3, PDF p. 127; CRT. 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; Fed. Rec. Vol. 3, PDF p. 128; CRT. 511).

In sum, Mr. Wilson admitted to hitting Mr. Walker once and to subduing him with a cord; but he maintained that he left Mr. Walker 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.

Everything in this case turned on who delivered the multiple blows to Mr. Walker's head. Petitioner has always denied that he did so; however, there was no available evidence to clearly corroborate Mr. Wilson's claim. But in fact there is—straight from the written hand of his co-defendant. The Kitty Corley letter—in which she confesses that she "hit Mr. Walker with a baseball bat until he fell"—is the linchpin evidence in Mr. Wilson's case.

The test of materiality articulated by the Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) is 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." However, neither Mr.

Wilson, nor this Court, can properly assess materiality without first reviewing the evidence. As the Supreme Court indicated in *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. 480 U.S. 39, 57, 58 (1987).

V. THIS IS A REQUEST FOR DISCLOSURE, NOT FOR A RULING ON THE MERITS OF MR. WILSON'S *BRADY* CLAIM

Petitioner is not seeking a ruling on the merits of his *Brady* claim, but rather the right to review the Kitty Corley letter.

The last state court to rule on these matters held that Mr. Wilson's *Brady* claim was procedurally barred because it was not raised at trial or on direct appeal. *See David Phillip Wilson v. State of Alabama*, Memorandum, CR-16-0675 (Ala. Crim. App, March 9, 2018), at 9 (Fed. Rec. Vol. 33, PDF p. 10) ("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 whether there was a fundamental miscarriage of justice under *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Those federal questions 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 issue on the merits. *Cone v. Bell*, 556 U.S. 449 (2009).

The legal issue in this motion is *not* whether a *Brady* violation occurred, but rather whether the State must preliminarily disclose evidence that is favorable to the Petitioner, so that he can investigate a potential *Brady* violation—and so that this Court may eventually conduct a hearing on that claim. *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.

The state's *Brady* obligation does not end merely because the capital case has moved into state or federal post-conviction proceedings. That would defeat the *Brady* right to due process. It is a fundamental maxim of the law that there can be no right without a remedy. See *Marbury v. Madison*, 5 U.S. 137 (1803). It is patently clear that Respondent is under an ongoing duty to turn over this evidence to Mr. Wilson.

FOR THE FOREGOING REASONS, undersigned counsel respectfully moves the Court for an order of disclosure of the Kitty Corley letter.

Dated this 7th day of November 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, the foregoing has been electronically filed with the Clerk of the Court and therefore a copy has been electronically served upon counsel for Respondent:

Office of the Attorney General
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Bernard E. Harcourt