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.	)	

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITIONER'S RENEWED MOTION FOR DISCLOSURE OF ONGOING *BRADY* MATERIAL

BERNARD E. HARCOURT
Alabama Bar No. ASB-4316A31B
COLUMBIA LAW SCHOOL
Jerome Greene Hall, Suite 603
435 West 116th Street
New York, New York 10027
Telephone (212) 854-1997
E-mail: beh2139@columbia.edu

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TABLE OF CONTENTS

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Pursuant to this Court's order dated November 28, 2022 (Doc. 63), Petitioner respectfully submits this reply to Respondent's Response (Doc. 64) to Mr. Wilson's Renewed Motion for Disclosure of Ongoing *Brady* Material. (Doc. 60) Petitioner's request for disclosure concerns the hand-written letter by his co-defendant, Catherine Nicole "Kitty" Corley, confessing to the crime, as well as the accompanying handwriting-expert report identifying Kitty Corley as the author, both of which have never been turned over to Mr. Wilson. Petitioner raised this *Brady* claim as the first count in his habeas corpus petition filed by previous counsel. *See* Doc. 1, p. 14-21.

Respondent makes six arguments in response to Petitioner's renewed motion. Respondent argues that: (1) there is no ongoing *Brady* duty to disclose in post-conviction (Doc. 64, p. 2-5); (2) the state of Alabama "*never suppressed* the Corley letter" (Doc. 64, p. 6-7); (3) Mr. Wilson's *Brady* claim is "procedurally defaulted" (Doc. 64, p. 7-8); (4) the Kitty Corley letter itself "is not exculpatory" (Doc. 64, p. 8-9); (5) the Kitty Corley letter "was inadmissible hearsay and, thus, not *Brady* material at all" (Doc. 64, p. 10); and (6) the onerous standards under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), including the AEDPA standards regarding discovery, preclude any discovery. (Doc. 64, p. 10-12 and n.4 on p. 12).

Mr. Wilson had preemptively addressed each of these arguments when making his affirmative case for disclosure of the Kitty Corley letter. (Doc. 60) In fact, each of Respondent's arguments, although incorrect, nevertheless highlights an important reason why Mr. Wilson is entitled to production of the Kitty Corley letter. In this reply, Mr. Wilson will address each one of Respondent's arguments in the order in which they were raised.

I. THIS CASE FALLS SQUARELY WITHIN THE *BRADY* FRAMEWORK BECAUSE THE EVIDENCE WAS AVAILABLE PRE-TRIAL. THEREFORE THERE IS AN ONGOING *BRADY* DUTY TO DISCLOSE THAT EXTENDS INTO POST-CONVICTION PROCEEDINGS

There are two different legal frameworks for potentially exculpatory material: there is the *Brady* framework for favorable evidence that existed *before* trial, and the *Osborne* framework for evidence that may arise *after* conviction (such as through later DNA testing). In the first, *Brady* framework, the constitutional right and associated duty to disclose extend into state and federal post-conviction proceedings. In the second, *Osborne* framework, the duty to disclose is far more limited, which is why courts will often say, in a shorthand way, that the *Brady* framework does not apply in post-conviction; when courts say this, however, they do not mean that the first, *Brady* framework no longer applies in post-conviction, rather they mean that the *Brady* framework does not apply to favorable evidence that arises *after* conviction. In other words, the *Brady* framework does not apply in the second, *Osborne* context.

Application of the different frameworks depends on whether the favorable evidence was available *before* or *after* conviction. In Mr. Wilson's case, the Kitty Corley letter existed *before* the trial. Therefore, Mr. Wilson's constitutional claim falls squarely within the first, *Brady* framework and is not governed by the second, *Osborne* framework. In fact, the constitutional claim and procedural posture of Mr. Wilson's case are identical, for all relevant purposes, to that of John Leo Brady, the Petitioner in the famous case of *Brady v. Maryland*, 373 U.S. 83 (1963). Like Mr. Wilson, Mr. Brady was in post-conviction proceedings when the *Brady* right was declared. Like Mr. Wilson, the *Brady* right extended into post-conviction because the favorable evidence Mr. Brady sought—the confession of a co-defendant—was available *before* trial. Same thing here.

Mr. Wilson was entitled to production of the Kitty Corley letter when his trial attorney moved for discovery of "any written statements made by any co-defendant" prior to trial on March

1, 2007. *See* Fed. Rec. Vol. 1, PDF p. 135 (Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial, at p. 4) Still today, following at least ten more requests (*see* Part II *infra*), Mr. Wilson is still entitled to production of the pre-trial exculpatory evidence—namely, the Kitty Corley letter and associated expert report.

Relying on *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009) (a case involving a post-conviction request for DNA testing), Respondent argues that Mr. Wilson is not entitled to see the Kitty Corley letter because there is no ongoing *Brady* duty to disclose in post-conviction. (Doc. 64, p. 2-5) Respondent, however, fails to understand the legal distinction between the *two different frameworks* that apply to potentially exculpatory evidence. Respondent directs this Court to the wrong legal framework and argues the wrong line of cases.

Given that Petitioner had tried to clarify this distinction to Respondent twice already, to no avail—both in his reply on the original motion for disclosure and in his renewed motion for disclosure—Petitioner will explain the different legal frameworks step by step here:

Under the Supreme Court's Due Process jurisprudence, there are two different legal frameworks to address defense requests for potentially favorable evidence. They differ according to whether the favorable evidence was discoverable before or after conviction:

(1) The first legal framework applies to evidence that was available *prior to trial*. Regarding such evidence, the state has an ongoing duty to turn over the favorable evidence to the defense, and that duty extends into state and federal post-conviction. That duty does not sunset at conviction. This is known as the *Brady* framework because it was established in the famous case of *Brady v. Maryland*, 373 U.S. 83 (1963).

(2) The second legal framework applies to evidence that arises *after trial and conviction*. For example, it pertains to post-conviction requests for DNA testing or confessions made by third parties after trial. Regarding that type of evidence, the right to discovery is far more limited, and the *Brady* framework does not apply.

All of the cases that both Mr. Wilson and Respondent cite in their briefs can be divided neatly into those two legal frameworks—whether they arise in the criminal context (on motions to disclose or

in habeas corpus petitions) or in the civil context (in situations involving qualified immunity under § 1983). The cases fall in the first or the second legal framework as follows:

	First Legal Framework: Pre-trial favorable evidence (ongoing duty to disclose)	**Second Legal Framework: Post-trial favorable evidence (no ongoing duty to disclose)**
Criminal context (e.g., motion for disclosure, habeas corpus petition, criminal appellate review)	*Brady v. Maryland*, 373 U.S. 83 (1963) *High v. Head*, 209 F.3d 1257, 1265, n. 8 (11th Cir. 2000) *Collins v. City of New York*, 923 F. Supp. 2d 462, 474 (E.D.N.Y. 2013). *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001)	*Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (later DNA testing) *In re Bolin*, 811 F.3d 403, 408–09 (11th Cir. 2016) (statement made twelve years after conviction) *Cunningham v. Dist. Attorney's Off. for Escambia Cnty.*, 592 F.3d 1237, 1260 (11th Cir. 2010) (later DNA testing)
Civil context (e.g., no qualified immunity for failure to disclose)	*Steidl v. Fermon*, 494 F.3d 623, 630-32 (7th Cir. 2007) *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003)	

The reason that this division is so neat and tidy is that the *Brady* case itself created the first legal framework, the first column. *Brady* dealt with pre-trial favorable evidence that had been withheld until after Mr. Brady "had been tried, convicted, and sentenced, and after his conviction had been affirmed." 373 U.S. at 84. The *Brady* framework does not expire, sunset, or end at conviction. As a matter of basic logic, it would be self-contradictory for the *Brady* right to

terminate at conviction. *Brady* material is practically always discovered during post-conviction proceedings and raised at the collateral stage. To suggest that the *Brady* framework ends at conviction would be to enshrine a constitutional right without any remedy—an unjust outcome. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle… that every right, when withheld, must have a remedy, and every injury its proper redress. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

By contrast, the *Brady* case does not control the second, *Osborne* framework for evidence that arises *after* conviction. In fact, Chief Justice Roberts of the United States Supreme Court specifically stated that, with regard to that second column (favorable evidence that may arise post-trial): "Brady is the wrong framework." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). *Osborne* involved post-trial access to DNA testing that would have been conducted *after* conviction and is therefore explicitly outside the framework of *Brady*.

The federal courts are clear about the distinction between these two legal frameworks. As the Eleventh Circuit declared in *High v. Head*, 209 F.3d 1257, 1265, n. 8 (11th Cir. 2000): "The State's duty to disclose exculpatory material is ongoing." The Eleventh Circuit there explicitly used the term "ongoing" to mean that it extends to federal habeas proceedings. Similarly, the Seventh Circuit explained that "the *Brady* line of cases has clearly established a defendant's right to be informed about exculpatory evidence throughout the proceedings, *including appeals and authorized post-conviction procedures*, when that exculpatory evidence was known to the state *at the time of the original trial*." *Steidl v. Fermon*, 494 F.3d 623, 625 (7th Cir. 2007) (emphasis added).

Judge Block of the United States District Court for the Eastern District of New York spelled out the distinction between the two legal frameworks very clearly in his decision in *Collins v. City of New York*, 923 F. Supp. 2d 462, 474 (E.D.N.Y. 2013):

> *Brady* itself refutes the [§ 1983] defendants' claim that the duty it imposes ends with the trial. *District Attorney's Office v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (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, 129 S.Ct. 2308. Since Collins's *Brady* claim involves nondisclosure of evidence in existence at the time of trial, *Osborne* does not apply. Cf. *Steidl*, 494 F.3d at 629 (''The [pre-*Osborne*] cases on which the [defendants] 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.'').

Similarly, the Seventh Circuit explained in clear terms the difference between the two legal frameworks in its *Steidl* decision:

> 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.

Steidl, 494 F.3d at 629. The Seventh Circuit added on the same page:

> *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.

By the same token, the Eleventh Circuit explained the distinction in an unpublished opinion in which, referring to the *Osborne* decision, it wrote that "*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 App'x 915, 928 (11th Cir. 2018) (emphasis added).

Respondent's argument fails to understand the distinction between these two legal frameworks. Respondent quotes the Eleventh Circuit and argues that "[p]ostconviction relief proceedings do not require the full range of procedural rights that are available at trial, and *Brady v. Maryland* has no application in the postconviction context," citing *Cunningham v. Dist. Attorney's Off. for Escambia Cnty.*, 592 F.3d 1237, 1260 (11th Cir. 2010). But Respondent is confusing the two frameworks and collapsing the distinction into the second column. In *Cunningham* (and other cases in the *Osborne* line), the federal courts are simply acknowledging that the *Brady* framework does not apply to evidence that arises *after* conviction—that it does not control the second column. They are *not* saying that the *Brady* right and duty to disclose exculpatory pre-trial evidence ends at conviction. They are not getting rid of the first column.

In Mr. Wilson's case, the state of Alabama obtained Kitty Corley's confessional letter prior to trial. It then embarked on an elaborate investigatory procedure (again, pre-trial) to confirm her authorship. Mr. Wilson specifically requested all written statements by co-defendants. *See* Part II *infra*. Under the correct legal framework—the *Brady* framework, the first column—Mr. Wilson was and still is entitled to see that favorable pre-trial evidence in order to determine and prove to this Court, among other things, that it was material and exculpatory. *See also* Mr. Wilson's Renewed Motion for Disclosure (Doc. 60, p. 2-11) and Habeas Corpus Petition (Doc. 1, p. 14-21).

II. STILL TODAY, RESPONDENT IS SUPPRESSING THE KITTY CORLEY LETTER

Respondent claims that Mr. Wilson is not entitled to see the Kitty Corley letter because the state of Alabama "*never suppressed* the Corley letter." (Doc. 64, p. 6-7) This, however, is factually incorrect. Even as we speak, the state of Alabama is actively suppressing the Kitty Corley letter and the associated expert report.

Prior to trial, on March 1, 2007, Mr. Wilson's trial attorney filed a *Brady* motion specifically requesting any and all written statements by Kitty Corley. Trial counsel requested:

> *Statements of Co-conspirators, Co-defendants, and Accomplices.* Provide the same information requested in paragraphs one through six above, for any written or recorded statements made by any co-defendant or alleged co-conspirator whether indicted or not. Provide or reduce to writing the same information as requested in paragraph two for any oral statements by any co-defendant or alleged co-conspirator whether or not the statements were written or recorded by the State and its agents or any other responsible person.

Fed. Rec. Vol. 1, PDF p. 135; CRT. 121 (Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial, at 4). On March 5, 2007, the trial court effectively granted that request by referencing its earlier Reciprocal Discovery Order, entered on July 27, 2004, which ordered the prosecutor to "make any exculpatory materials available to the defense." *See* Fed. Rec. Vol. 1, PDF p. 42; CRT. 28 (Reciprocal Discovery Order).

Since that time, Mr. Wilson has continued to request the Kitty Corley letter. In fact, Mr. Wilson has requested production almost a dozen times, all of which specifically mentioned the Kitty Corley letter or any written statement by Kitty Corley:

1. Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial (includes specific request for "Statements of Co-conspirators, Co-defendants, and Accomplices"), dated March 1, 2007 (Fed. Rec. Vol. 1, PDF p. 132-144).
2. Motion for Hearing on Those Motions Denied Without a Hearing (includes Motion for Discovery of Prosecution Files, Records, and Information filed on March 1, 2007), dated October 4, 2007 (Fed. Rec. Vol. 2, PDF p. 160-162).
3. Motions and Suppression Hearing (trial counsel raises the motions, including the Motion for Discovery of Prosecution Files, Records, and Information filed on March 1, 2007), dated October 9, 2007 (Fed. Rec. Vol. 6, PDF p. 118-119).
4. Motion for Discovery of Law Enforcement and Prosecution Files, Records, and Information (specifically requesting Kitty Corley's confession on pages 6, 7, 8, et seq. of the motion), dated September 7, 2016 (Fed. Rec. Vol. 28, PDF p. 4-26).
5. Response to State's Motion to Withhold Ruling on Motion for Discovery (requesting discovery motion be granted), dated October 4, 2016 (Fed. Rec. Vol 28, PDF p. 82-84; R32C. 1481-1483).

6. Hearing on Rule 32 Motions (Rule 32 counsel specifically states: "And we're entitled to the [Kitty Corley] letter. We still don't have the letter"), dated November 8, 2016 (Fed. Rec. Vol. 30, PDF p. 114; Motion Proceedings Transcript, at 17).
7. *Pro se* Letter by Mr. Wilson to this Court asking for the Kitty Corley letter (stating that "[I]f this issue was litigated in the first place like I tried to have done I would have more than likely received an evidentiary hearing and obtained the newly discovered evidence which is in the *Brady* issue that was filed"), dated June 13, 2019 (Doc. 15, at p. 2).
8. Notice of Appearance and Motion for a Status Conference, for Appointment of Counsel, and for an Order of Disclosure (which specifically requests the Kitty Corley letter), dated November 20, 2019 (Doc. 29).
9. Reply to Respondent's Response (which reiterates necessity of disclosure of the Kitty Corley letter to Petitioner), dated December 29, 2019 (Doc. 36).
10. Transcript of Motion Proceedings held on January 23, 2020, before Judge Charles S. Coody (specifically requesting the Kitty Corley letter), dated January 23, 2020 (Doc. 42).
11. Second Motion to Produce Material Exculpatory Handwritten Letter by Co-Defendant "Kitty" Corley Pursuant to Respondent's Ongoing Obligation to Disclose Under *Brady v. Maryland*, dated November 7, 2022 (Doc. 60).

Despite all these requests, the state of Alabama has never produced the Kitty Corley letter.

Respondent suggests that there was a mention of the Kitty Corley letter buried in lengthy police reports that allegedly were turned over to trial counsel, Mr. Hedeen. They insist that this passing reference to Kitty Corley's letter is sufficient to satisfy *Brady*. But that is not the law.

First, it is worth noting that there has never been any evidence presented at an evidentiary hearing before a fact-finding court as to whether Mr. Hedeen actually received the police reports prior to trial. Mr. Wilson's lengthy, elaborate, 242-page Rule 32 petition was dismissed on the pleadings, with prejudice, for failure to plead sufficient facts, without any factual development. *See* Fed Rec. Vol. 28, PDF p. 130 (Circuit Court); Fed. Rec. Vol. 33, PDF p. 22 (ACCA). So, there is no way to know, at this point, whether Mr. Hedeen actually received the police reports.

Incidentally, even if he had received the reports, it is unlikely that he was able to read them and learn of the Kitty Corley letter. Mr. Hedeen was practically blind in the months prior to Mr.

Wilson's capital trial as a result of severe cataract problems and surgery. He also underwent open-heart surgery in the months before the trial. In fact, during the one-year period between his appointment as trial counsel and the start of Mr. Wilson's trial on December 3, 2007, Mr. Hedeen had open-heart surgery, cataract surgery, suffered from diabetes, went through a divorce, and was ordered to move from his home the very week of Mr. Wilson's trial. *See* Doc. 1, p. 55-58. None of these facts have been presented to, heard by, or found by a fact-finding court. So here too, it is pure speculation as to whether Mr. Hedeen knew about the existence of the Kitty Corley letter. Given the fact that Mr. Hedeen did not even give a closing argument at the guilt phase of the capital trial (*see* Doc. 1, p. 148-159), it would be rash to assume that he received or read the police reports. In any event, there has been no fact finding on these matters.

But second, and more importantly, even assuming that Mr. Hedeen received the police reports, disclosure of the reports does not absolve the state of its *Brady* duty to turn over the Kitty Corley letter itself. A prosecutor does not comply with its duty to disclose simply by informing defense counsel that exculpatory evidence exists. Under *Brady*, Mr. Wilson is entitled to the letter itself, not just mentions of it in other reports. See *Goudy v. Cummings*, 922 F.3d 834, 840-41 (7th Cir. 2019) (explaining why second-hand statements about exculpatory evidence does not satisfy *Brady*); *see also Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1090 (9th Cir. 2009) (placing notes regarding witness's statements in police file did not fulfill inspectors' *Brady* duty to disclose exculpatory information). The prosecution is obligated to turn over the source material itself, rather than a mere description of it. The reasons underpinning this rule are obvious: A summary of the evidence produced by the prosecution or police may reflect bias against the defendant by omitting or misconstruing key details.

In this case, according to 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). Still today, Mr. Wilson has no idea what those specific details consist of. Mr. Wilson is entitled to see the Kitty Corley letter and expert report to determine and argue, inter alia, their materiality before this Court.

In its Response, Respondent writes that "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 for Dep't of Corr*., 432 F.3d 1292, 1315 (11th Cir. 2005). Consequently, Respondent denies that Wilson has a valid *Brady* claim." Doc. 64, at p. 6, n.2. This is, however, an incorrect usage of the "defendant's own knowledge" case law.

Maharaj is entirely inapposite: it concerned 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.

Mr. Wilson's situation differs on each relevant point: Mr. Wilson had no independent means to obtain the Kitty Corley letter and certainly did not have "equal access" to it. Rather, Respondent was and still is in control of the letter. *See United States v. Agurs*, 427 U.S. 97, 111

(1976). Under these circumstances, Respondent is obligated to produce the letter. Mr. Wilson satisfied his due diligence obligation by repeatedly requesting disclosure. *See supra*, p. 9-10.

The Supreme Court has made clear that the prosecution may not play hide and seek with favorable evidence that it is required to turn over under *Brady*. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"); *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs*, 427 U.S. 97, 107 (1976). In the end, contrary to Respondent's second argument, the state of Alabama is still today suppressing the favorable evidence.[1]

III. MR. WILSON'S *BRADY* CLAIM IS NOT PROCEDURALLY DEFAULTED BECAUSE, EVEN IF IT WAS NOT RAISE AT TRIAL, THERE WOULD BE CAUSE AND PREJUDICE BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL TO EXCUSE ANY BAR

Respondent next argues that Mr. Wilson is not entitled to see the Kitty Corley letter "because his underlying *Brady* claim is procedurally defaulted." (Doc. 64, p. 7-8) Respondent states that "Wilson's *Brady* claim regarding the Corley letter was procedurally barred pursuant to Alabama Rule of Appellate Procedure 32.2(a)(3) & (5) because it could have been raised at trial or on direct appeal." (Doc. 64, p. 7-8)

Without conceding the point at this early stage, Respondent may be correct that a *Brady* claim was not raised at trial or on direct appeal.[2] That is often the case in *Brady* litigation. But that

[1] As prior counsel noted in Mr. Wilson's original habeas corpus petition, the accompanying report by the handwriting expert was also suppressed. Unlike Kitty Corley's confession, the expert report was not mentioned in the police reports or anywhere else. It was first discovered by state post-conviction counsel in Kitty Corley's casefile at the Houston County Circuit Clerk's office. *See* Doc. 1, p. 20. However, this too needs to be established at a fact-finding hearing.

[2] As prior counsel noted in Mr. Wilson's original federal habeas petition, among other things, "the [*Brady*] claim could not have been raised by appellate counsel, who were restricted to the record

does not vitiate Mr. Wilson's right to production of the Kitty Corley letter for purposes of litigating his *Brady* and ineffective assistance claims, and the ancillary matters of procedural default, exhaustion of state remedies, right to an evidentiary hearing, and other technical matters of federal habeas corpus litigation.

Even assuming that Respondent is correct and that the *Brady* claim was not raised at trial or on direct appeal, there is "cause and prejudice" to excuse any procedural bar in this case based on the ineffective assistance of trial and appellate counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). It is well established that "cause and prejudice" will excuse a procedural default. *See Murray v. Carrier*, 477 U.S. 478 (1986). It is equally well established that counsel's failure to raise a constitutional issue "is one situation in which the [cause] requirement is met." *Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988); *see also Murray*, 477 U.S. 478 (1986). The "cause and prejudice" standard for purposes of federal habeas review is a matter of federal law that could not be resolved by the state courts below. Thus, even if Respondent is correct that trial and appellate counsel knew of the Kitty Corley letter and failed to raise a *Brady* claim, the *Brady* claim would still have to be considered on the merits under an ineffective assistance of counsel "cause and prejudice" analysis.

In the federal habeas corpus petition filed by previous counsel, Mr. Wilson raised a claim of ineffective assistance of trial and appellate counsel for failure to investigate and raise the *Brady* claim regarding the Kitty Corley letter and expert report. *See* Doc. 1, Claim III, p. 91-96. Mr. Wilson had raised a similar claim of ineffective assistance of counsel in his state Rule 32 petition and on appeal from the dismissal of his Rule 32 petition. *See* Fed. Rec. Vol. 31, PDF p. 57-62 (Brief of the Appellant, at 44-49). Much of the ineffectiveness evidence is tied to the fact that Mr.

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on appeal. The police report describing the Corley letter was not part of this record, and there is no evidence to show that appellate counsel had it or knew of its existence." Doc. 1, p. 19, n. 18.

Hedeen was experiencing extreme health problems at the time of trial. As noted earlier, Mr. Hedeen could not see during most of the pre-trial litigation. He explained as much to the state trial court on several occasions. The trial transcript in fact reads like a Greek tragedy. One can almost glimpse the shadow of Sophocles:

> Mr. Hedeen: The soonest [we could try the case] would be in the winter, Your Honor. And I say that not only because of the open-heart surgery that I had and my stamina, but also, I went to the ophthalmologist last Wednesday, and I have cataracts in both eyes, and I am going to have to have surgery on that. And if I was to have to tell the Court that I could not read a normal piece of paper, that would not be an exaggeration. In fact, looking at you right now, Judge, all I see is a blur.

Fed. Rec. Vol. 6, PDF p. 37 (Motion Hearing on June 26, 2007, at 4); *see also* Fed. Rec. Vol. 6, PDF p. 117 (Motion and Suppression Hearing on October 9, 2007, at 67) ("Mr. Hedeen: I didn't have an eyesight to look at the pictures").

None of the factual predicate regarding the ineffective assistance of counsel was developed in state court because Mr. Wilson's 242-page, Rule 32 state post-conviction petition was dismissed with prejudice for failure to plead in sufficient detail. Specifically, regarding the Kitty Corley letter, the last state court dismissed the ineffectiveness claim for failure to plead sufficiently that the letter "would have been admissible." *See* Fed. Rec. Vol. 33, PDF p. 22 ("Wilson failed to plead sufficient facts to … show that the letter would have been admissible"). That finding by the state court is clearly erroneous and belied by the language in Mr. Wilson's Rule 32 petition, where counsel specifically pleaded that:

> The confessional letter, or its contents, would have been admissible at Mr. Wilson's trial under *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Chambers v. Mississippi*, 410 U.S. 284 (1973). In *Chambers*, the Supreme Court found that exclusion of evidence supporting a finding of third-party guilt under a hearsay rule which did not include an exception for statements against penal interest violated the defendant's due process right to a fair trial. 410 U.S. at 298-302. *Holmes* held invalid another state evidentiary rule which excluded evidence

> of third-party guilt if the State's evidence was strong in the view of the trial court. 547 U.S. at 328-31.

Fed. Rec. Vol. 22, PDF p.152; R32C. 351; Amended Petition for Relief from Judgment Pursuant to Rule 32, at 120; *also see* Part V, *infra.*

The ACCA's decision was based on an unreasonable determination of facts in light of this passage in the pleadings, under 28 U.S.C. § 2254(d)(2), and resulted in a decision contrary to and involving an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. As a result, this Court will need to address the ineffective assistance of counsel claim *de novo* after an opportunity for Mr. Wilson to conduct discovery, after an evidentiary hearing on ineffective assistance of counsel, and after full briefing on the matter. It is, however, at this juncture, premature for this Court to address the question of "cause and prejudice" since Mr. Wilson has not yet had an opportunity to present any evidence to a fact finder on the question of ineffective assistance of counsel for purposes of "cause and prejudice." Precisely for this reason, Mr. Wilson is entitled to production of the Kitty Corley letter.

IV. THE KITTY CORLEY LETTER IS THE MOST IMPORTANT EXCULPATING EVIDENCE IN THIS CASE FOR BOTH GUILT AND DEATH PENALTY SENTENCING

Respondent also argues that Mr. Wilson is not entitled to see the Kitty Corley letter because "the Corley letter is not exculpatory." (Doc. 64, p. 8-9) Respondent argues that the jury could have found that the victim, Dewey Walker, died due to the injuries inflicted by Mr. Wilson during their struggle. There are a number of problems with this argument.

First, as a facial matter, it is clear that a confession by a co-defendant is "exculpatory" material. In fact, the evidence in *Brady* was also a confession by a co-defendant—an extrajudicial statement, dated July 9, 1958, in which the 24-year-old Charles Donald Boblit, the co-defendant

to 25-year-old John Leo Brady, admitted to having killed Mr. William Brooks. *Brady v. Maryland*, 373 U.S., at 84. Such statements are, by definition, exculpatory as to the accused.

Second, as applied in Mr. Wilson's case in particular, the confession by Kitty Corley is clearly exculpatory. Petitioner spells this out in detail in his original renewed motion, *see* Doc. 60, pages 15-20, and habeas petition, *see* Doc. 1, pages 14-21. In fact, the Kitty Corley letter is likely the *most* exculpatory evidence in this case.

In his police statement, Mr. Wilson admitted to striking the victim, Mr. 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; but he insisted that when he left, 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. 10-11; Fed. Rec. Vol. 3, PDF p. 124-125; CRT. 507-8). He stated that Mr. Walker "looked like he was breathing." (Fed. Rec. Vol. 3, PDF p. 125; CRT. 508). Mr. Wilson told the police that, over his objections, Kitty Corley wanted to return to Mr. Walker's house, and that when they returned, Mr. Wilson refused to proceed any further, so Kitty Corley, on her own, went to go see where Mr. Walker was. Thus, Kitty was alone with Mr. Walker for some period of time. When she returned, Mr. Wilson described her as acting strangely "excited" or "thrilled." (Fed. Rec. Vol. 3, PDF p. 127-128; CRT. 510-11). Mr. Wilson 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." (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." (Fed. Rec. Vol. 3, PDF p. 128; CRT. 511).

Kitty Corley's letter confessing that she had "hit Mr. Walker with a baseball bat until he fell" is thus lynchpin exculpatory evidence. It 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). It also now explains why the prosecutor never called Kitty Corley to testify against Mr. Wilson and, instead, quickly entered into a negotiated plea with her for a fixed term of 25 years. Everything in this case turned on who delivered the multiple blows to Mr. Walker's head. Mr. Wilson has always denied that he did. The Kitty Corley letter—in which she confesses that she "hit Mr. Walker with a baseball bat until he fell"—is exculpatory evidence in Mr. Wilson's case.

Third, Respondent may be arguing, not so much that the Kitty Corley letter is not exculpatory, but rather that there was no "prejudice" in the state's failure to turn over the Kitty Corley letter to defense counsel—the third prong of a *Brady* analysis. Respondent's lengthy discussion of whether Mr. Walker died of asphyxiation (Doc. 64, p. 8-9) speaks more to the prejudice prong than the exculpatory prong; namely, it speaks more to whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Youngblood v. West Virginia*, 547 US 867, 870 (2006) (quoting *Kyles v. Whitley*, 514 U.S., 419, 435 (1995)).

On that point, though, there is clearly enough doubt raised by Kitty Corley's letter to establish prejudice. During Mr. Wilson's trial, the state pathologist testified that the cause of death was "multiple traumatic injuries," and that Mr. Walker was alive for multiple hours after first being injured (Fed. Rec. Vol. 9, PDF p. 45, 47-48; TR. 499, 501-2). If Kitty Corley indeed "hit Mr. Walker with a baseball bat until he fell," that would cast a whole new light on the case and undermine confidence in the guilty verdict.

Fourth, any analysis of the materiality or prejudice of the Kitty Corley letter must also address its potential impact on sentencing. As the Supreme Court emphasized in *Brady*, the withholding of exculpatory evidence violates due process "where the evidence is material either to guilt *or to punishment*." 373 U.S. at 87 (emphasis added). The Kitty Corley letter surely raises fundamental questions about residual doubt and lesser culpability, both important mitigating factors. *See* Ala. Code 1975, § 13A-5-51(4); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). Mr. Wilson's capital jury voted 10-2 for death, which was the minimum number of votes for a recommendation of death. *See* Fed. Rec. Vol. 2, PDF p. 172; Ala. Code § 13A-5-46. Had the Kitty Corley evidence been presented to the jury, it is unlikely the state would have mustered those 10 votes for death. The last state court did not properly address the admissibility of the Kitty Corley letter for purposes of sentencing. *See* Fed. Rec. Vol. 33, PDF p. 52 (holding merely that "[e]vidence that *an accomplice was involved* is not mitigating evidence"; here, it is factually much more than that). The last state court decision is contrary to and involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

In any event, it is premature to rule on these important questions before Mr. Wilson even receives the Kitty Corley letter and expert report, so that he can argue their materiality and prejudice. The test 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." Neither Mr. Wilson, nor this Court, can properly assess materiality or prejudice 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 that information first. *Ritchie*, 480 U.S. 39, 57, 58 (1987).

V. THE KITTY CORLEY LETTER WOULD HAVE BEEN ADMISSIBLE AT TRIAL, ESPECIALLY FOR PURPOSES OF MITIGATION AT THE DEATH PENALTY SENTENCING PHASE

Respondent argues that Mr. Wilson is not entitled to see the Kitty Corley letter because the Alabama Court of Criminal Appeals found that "the Corley letter was inadmissible hearsay and, thus, not *Brady* material at all." (Doc. 64, p. 10) Respondent's argument relies, in part, on the decision of the Alabama Court of Criminal Appeals dismissing Mr. Wilson's ineffective assistance of counsel claim on *Brady* for failure to plead that the Kitty Corley letter would have been admissible. As noted above, Mr. Wilson did in fact plead the admissibility of the Kitty Corley letter in his Rule 32 petition and stated that it would be admissible "under *Holmes v. South Carolina*, 547 U.S. 319 (2006), and *Chambers v. Mississippi*, 410 U.S. 284 (1973)." Fed. Rec. Vol. 22, PDF p.152.

There are, of course, a number of ways in which the Kitty Corley letter could have been presented to Mr. Wilson's jury. For instance, it could have been admitted as a declaration against interest. It could also have been used as impeachment evidence if defense counsel had called Kitty Corley to testify; or as impeachment evidence during cross-examination of Sgt. Luker, the lead investigator in the case who also investigated the Kitty Corley letter. It could have been admitted as mitigation evidence at the penalty phase sentencing. The Alabama rules concerning hearsay evidence could not have barred its admission because state rules cannot trump federal constitutional law. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Green v. Georgia*, 442 U.S. 95 (1979).

The argument that the Kitty Corley letter would be inadmissible under state hearsay rules is in clear violation of Due Process and contrary to clearly established federal law under AEDPA, as determined by the U.S. Supreme Court in *Green v. Georgia*, 442 U.S. 95 (1979). *See also Boykins v. Wainwright,* 737 F.2d 1539, 1544 (11th Cir. 1984) ("Fundamental fairness is violated when the evidence excluded is 'material in the sense of a crucial, critical, highly significant factor.'") As the Supreme Court declared in *Green*:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, see *Lockett v. Ohio,* 438 U. S. 586, 604-605 (1978) (plurality opinion); id., at 613-616 (opinion of BLACKMUN, J.), and substantial reasons existed to assume its reliability. …. In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' *Chambers v. Mississippi,* 410 U. S. 284, 302 (1973). Because the exclusion of [the co-defendant's] testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

Green v. Georgia, 442 U.S. 95. 97 (1979).

The Supreme Court's decision in *Green* is perfectly applicable to Mr. Wilson's case—on all four corners. Like Mr. Wilson and Kitty Corley, Mr. Green and Carzell Moore were co-defendants. At the penalty phase, Mr. Green tried to introduce as mitigation evidence at his death penalty sentencing hearing the confession that Mr. Moore made to a third party. Mr. Wilson also would have introduced the Kitty Corley letter as mitigation at the death penalty sentencing phase. In *Green,* the state trial court precluded the evidence under Georgia's hearsay rules. The U.S. Supreme Court then ruled that Georgia's evidentiary rule violated Due Process under the principles of "*Chambers v. Mississippi*, 410 U. S. 284, 302 (1973)." *Green v. Georgia*, 442 U.S., at 97.

In sum, the Kitty Corley confession is admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), as Mr. Wilson specifically pleaded in his Rule 32 and federal habeas corpus petition.

VI. MR. WILSON IS ENTITLED TO PRODUCTION UNDER THE AEDPA STANDARD FOR DISCOVERY PURSUANT TO 28 U.S.C. § 2254(E)(2)

Finally, Respondent argues that Mr. Wilson is not entitled to see the Kitty Corley letter because of the onerous standards imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), including 28 U.S.C. § 2254(e)(2)'s standards regarding discovery. (Doc. 64, p. 10-12 and n.4 on p. 12) Petitioner agrees that the AEDPA does indeed place unconscionably onerous burdens on federal habeas corpus petitioners, especially in death penalty cases. However, in this case, it is clear that Mr. Wilson has well satisfied AEDPA's burden.

Respondent acknowledges that Mr. Wilson is entitled to production of the Kitty Corley letter in federal habeas corpus if "he can (1) make a colorable claim showing that the underlying facts, if proven, constitute a constitutional violation; (2) show 'good cause' for the discovery; and (3) that he exercised due diligence in obtaining the requested discovery in state court." *See* Doc. 64, p. 12 n.4. All three of those prongs are satisfied here, as demonstrated in Mr. Wilson's habeas corpus petition (Doc. 1, p. 14-21), renewed motion (Doc. 60) and above, *supra.* First, Mr. Wilson has made a colorable claim that the state's failure to produce the Kitty Corley letter deprived Mr. Wilson of favorable evidence that could reasonably be taken to have put his whole case in such a different light as to undermine confidence in the jury verdict of guilt at the guilt phase and the jury verdict of death at the penalty phase. Second, Mr. Wilson has shown good cause for the disclosure of the Kitty Corley letter because he was not given the opportunity to obtain the letter in state collateral proceedings through no fault of his own. Third, Mr. Wilson exercised due diligence in obtaining the favorable evidence in state court, as evidenced by the numerous times he requested disclosure. *See* Part II, *supra*.

Mr. Wilson has amply demonstrated good cause for discovery pursuant to Rule 6 (a) of the Rules Governing Section 2254 Cases, as interpreted by the Supreme Court. *See, e.g., Bracy v.*

Gramley, 520 U.S. 899 (1997). Moreover, federal courts have discretion 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 cases. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 1089-92 (7th ed. 2015).

The Supreme Court's decision in *Bracy* holds 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. *See Bracy*, 520 U.S., at 908-09; *see also* Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts. *Bracy* still controls this area of the law; the *Bracy* decision was just cited three months ago by the Eleventh Circuit to explain the good cause requirement of Rule 6(a). *See Jones v. Warden, Georgia Diagnostic & Classification Prison*, No. 20-12587, 2022 WL 4078631, at *4 (11th Cir. Sept. 6, 2022). Mr. Wilson has clearly met the *Bracy* standard. Indeed, good cause for discovery is even clearer here than it was in *Bracy*. This Court has discretion to determine the scope of discovery in habeas corpus proceedings. Where, as here, Petitioner has established good cause, discovery is required.

Moreover, this Court has even wider latitude to grant discovery to address ancillary issues it will need to determine eventually, such as cause and prejudice regarding ineffective assistance of trial counsel on the Kitty Corley letter. That is certainly not precluded by *Cullen v. Pinholster*, 563 U.S. 170 (2011). As the District Court in Nevada recently explained, "*Pinholster* does not preclude consideration of such evidence when presented by the petitioner in an effort to overcome a procedural bar in federal court." *Taukitoku v. Filson*, No. 316CV00762HDMCSD, 2022 WL

1078657 (D. Nev. Mar. 30, 2022), reconsideration denied (D. Nev. July 6, 2022) (granting petitioner's motion for discovery, pursuant to Rule 6).

This is not a situation where Mr. Wilson is asking this Court for an "expansion of the state court record." *See Shinn v. Ramirez,* 142 S. Ct. 1718, 1735 (2022). There is no state court record to expand upon. There has been *no* factual development of Mr. Wilson's case in state post-conviction proceedings. Mr. Wilson needs the favorable pre-trial evidence in order to make that factual record before this Court.

VII. IN THE ALTERNATIVE, PETITIONER REQUESTS ORAL ARGUMENT IN THIS CAPITAL HABEAS CORPUS CASE IN ORDER TO ADDRESS ANY REMAINING QUESTIONS THE COURT MAY HAVE

In the event this Court has any lingering questions of a factual or legal nature, Petitioner would respectfully request oral argument on his renewed motion for disclosure of the Kitty Corley letter and expert report so that undersigned counsel can address those questions.

FOR THE FOREGOING REASONS, undersigned counsel respectfully moves the Court for an order of disclosure of the Kitty Corley letter and the accompanying handwriting-expert report, or, in the alternative, for oral argument on the motion. Mr. Wilson continues to maintain that counsel for Respondent has an ethical duty under the Alabama Rules of Professional Conduct (*see* Rule 3.8(1)(d)) and the Middle District of Alabama Local Rules (*see* 83.1. Attorneys: Admission to Practice and Disciplinary Proceedings) to turn over favorable pre-trial evidence to the defense, especially in a death penalty case. *See* Doc. 60, p. 11-13. Counsel's obligation is to ensure justice, not to seek execution at any cost.

Dated this 19th day of December 2022.

Respectfully submitted,

BERNARD E. HARCOURT
Alabama Bar No. ASB-4316A31B

COLUMBIA LAW SCHOOL
Jerome Greene Hall, Suite 603
435 West 116th Street
New York, New York 10027
Telephone (212) 854-1997
E-mail: beh2139@columbia.edu

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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:

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

Bernard E. Harcourt