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

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

NOTICE OF APPEARANCE AND MOTION FOR A STATUS CONFERENCE, FOR APPOINTMENT OF COUNSEL, AND FOR AN ORDER OF DISCLOSURE

COMES NOW the undersigned counsel, Bernard E. Harcourt, Professor of Law and Political Science at Columbia University, to notice his appearance on behalf of Petitioner, Mr. David Phillip Wilson, in the above-styled case, and to move for a status conference, for the appointment of counsel under the Criminal Justice Act, and for an order of disclosure of the co-defendant's hand-written letter taking responsibility for the capital offense, which to date has never been turned over to Mr. Wilson or any of his previous attorneys. A status conference is necessary in this case in order to establish a proper timeframe for this federal capital habeas case to proceed and to initiate the preliminary disclosure that will determine the schedule in this death penalty case.

There are a number of unique elements and peculiarities surrounding this case that need to be addressed at a status conference before formally noticing counsel's appearance, appointing counsel, and setting a schedule for discovery, for the appointment of experts, and for amending the petition. This is a complex capital habeas corpus case with an extensive record. The initially filed petition itself is 320 pages long and raises over 10 significant legal challenges. In addition, Mr. Wilson is not satisfied with the petition as filed and has indicated that he would like other matters investigated, including his actual innocence of intentional homicide. (Doc. 15.)

As a preliminary matter, there is an on-going and inexplicable *Brady* violation in Mr. Wilson's case, the likes of which counsel has never seen in any criminal case before, let alone a capital case. To date, despite its on-going *Brady* obligation, the State of Alabama has still not turned over to Mr. Wilson, or any of his previous counsel, the self-incriminating, hand-written, and USPS-verified letter from the female co-defendant, Ms. Catherine Nicole "Kitty" Corley, in which Corley takes responsibility for killing the victim, Mr. Dewey Walker. That exculpatory and clearly material hand-written letter, to date, has never been turned over to Mr. Wilson. Undersigned counsel would not even be able to begin investigating Mr. Wilson's claim of innocence until the co-defendant's letter taking responsibility for the homicide is disclosed. The state's *Brady* obligation does not

end merely because the capital case has moved into state or federal post-conviction. The duty to disclose exculpatory information undercutting the fairness of the trial and sentencing, information known to the prosecution before the trial, is a continuing due process obligation. That violation does not expire merely because the prosecution has been delinquent. If states were allowed to do what has been done in this case, it would preclude the entire *Brady*-framework.

This issue raises both ethical and professional responsibility issues, as well as malpractice liability issues. An attorney would face malpractice liability for allowing a case to move forward with known, undisclosed *Brady* material. Undersigned counsel cannot enter this case without first receiving the co-defendant's letter. This would represent a direct violation of professional ethics and create malpractice liability; as such, this is something that should be addressed immediately at a status conference.

Moreover, undersigned counsel will need to be appointed as CJA counsel, as in the other death penalty cases that he has been appointed to in Alabama. Given that he is a professor and does not have the financial backing of a large law firm to cover the expenses of this capital habeas case, he would not be able to proceed without a CJA appointment, and the Court should resolve this before formally entering his appearance. In addition, the parties will need to agree on a schedule for discovery, for expert assistance, and for amending the petition. In light of these

unique circumstances, undersigned counsel moves for a status conference in Mr. David Wilson's case before the Court formally enters his notice of appearance. That would save the Court the trouble of unnecessary delay and the possibility of an appearance and withdrawal.

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

In support of this notice of appearance and motions for a status conference, for appointment of counsel, and for preliminary disclosure, undersigned counsel states the following:

I. Notice of Appearance and Motion to Appoint CJA Counsel

Undersigned counsel, Bernard E. Harcourt, submits that he fully meets the eligibility requirements for appointment of counsel in §2254 death penalty habeas cases as set forth in 18 U.S.C. § 3599 and for appointment under the Criminal

Justice Act, 18 U.S.C. § 3006A. In support, undersigned counsel would show the following:

1. Mr. Wilson has filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in which he challenges his capital murder convictions and sentence of death. Mr. Wilson is an inmate at Holman Correctional Facility in Atmore, Alabama. He is indigent and his motion to proceed *in forma pauperis* has been granted by this Court. (Doc. # 10.)

2. Undersigned counsel, Bernard E. Harcourt, has almost 30 years of experience representing death-sentenced state prisoners in federal habeas proceedings.

3. Undersigned counsel graduated from Harvard Law School in June 1989. He was admitted to practice in the State of Alabama on April 29, 1991 and is a member in good standing of the Alabama State Bar. As a result of previous representation of Alabama death row inmates, he is authorized to practice and is in good standing in the United States District Courts for the Middle, Northern, and Southern Districts of Alabama; the United States Court of Appeals for the Eleventh Circuit; and the United States Supreme Court.

4. Undersigned counsel is presently employed by Columbia University as the Isidor and Seville Sulzbacher Professor of Law, Professor of Political Science, Executive Director of the Eric H. Holder Initiative for Civil and Political

Rights, and Executive Director of the Columbia Center for Contemporary Critical Thought. Previously, undersigned counsel was employed by the Alabama Capital Representation Resource Center, the precursor to the Equal Justice Initiative, in Montgomery, Alabama. In that capacity and as appointed counsel since, undersigned counsel has appeared on behalf of Alabama death row inmates in § 2254 proceedings in the Middle, Northern, and Southern Districts of the State of Alabama, and at the Eleventh Circuit.

5. Undersigned counsel moves the Court for appointment under the Criminal Justice Act, 18 U.S.C. § 3006A. Undersigned counsel is a law professor and does not have the resources of a law firm to conduct the investigation and prosecution of this habeas petition.

B. Motion for a Status Conference and for an Order of Disclosure

This habeas case, in its present posture—following Mr. Wilson's letter to the Court (Doc. 15) raising a claim of innocence, and given the State of Alabama's failure to ever produce to Mr. Wilson or his counsel the material, exculpatory co-defendant's hand-written letter taking responsibility for the capital offense—raises unique and peculiar issues that need to be addressed at a preliminary status conference. Under ordinary circumstances, undersigned counsel would need at least eight months to investigate a capital habeas corpus case properly before filing a habeas petition. In this case, undersigned counsel cannot even begin to

investigate until the State has produced the co-defendant's letter, or begin to assess how much time it will take to properly investigate the claim of innocence and other potential claims that may not have been raised by conflicted previous counsel. Accordingly, a status conference is necessary to order preliminary disclosure of this material and to set a schedule for discovery and the appointment of experts, and for amending the petition in this capital habeas case. In support of these motions, undersigned counsel states:

1. Prior to Mr. Wilson's capital trial, the prosecution came into possession of a letter hand-written by a co-defendant, Catherine Nicole "Kitty" Corley. The complete and exact contents of this letter have never been disclosed to Mr. Wilson, but a police officer who read the letter reported that it contained a confession by the co-defendant that directly contradicted the state's theory presented at Mr. Wilson's trial. In fact, the letter as described is wholly consistent with Mr. Wilson's statements as told to the police. Had the jury been presented with a confession by a co-defendant that corroborated his story, there is a reasonable probability that they would have believed Mr. Wilson to be not guilty and/or retained residual doubt and not sentenced him to death. Thus, there is a reasonable probability that Mr. Wilson would not have been found guilty of capital murder and a certainty he would not have been sentenced to death.

2. To date, neither this letter nor its contents have ever been turned over to Mr. Wilson or his previous counsel, despite the state's continuing obligation under *Brady* to do so. Disclosure of this material exculpatory *Brady* evidence must be made before undersigned counsel can begin to investigate and propose a proper schedule for this habeas case. This Court has authority to order disclosure under Rule 6 of the Rules Governing Cases Brought Under 28 U.S.C. § 2254.

A. *Relevant Facts*

3. Mr. Wilson made a statement to police when he was taken into custody. This statement was not fully recorded (Tr. R.[1] 383); however, the recorded portion of the statement was played to the jury at trial and entered into evidence. (Tr. R. 418-21). A transcript of the statement was also admitted into evidence. (Tr. R. 433).

4. 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. (Tr. C. 505-7). Mr. Wilson also stated that Mr. Walker struck his head on the corner of a wall when he fell. (Tr. C. 505-6). These were the only injuries described by Mr. Wilson in his statement. Before leaving, Mr. Wilson stated he checked for and felt Mr. Walker's pulse and that Mr.

[1] The following abbreviations for the state court records will be used: (Tr. R.#) refers to the trial transcript; (Tr. C.#) refers to the clerk's record on direct appeal; (C. #) refers to the clerk's record on appeal from dismissal of Mr. Wilson's state post-conviction petition.

Walker appeared to be breathing. (Tr. C. 507-8). Mr. Wilson maintained that he did not, intentionally or unintentionally, kill Mr. Walker.

5. Mr. Wilson said that, over his objections, codefendant Catherine Nicole "Kitty" Corley wanted to return to Mr. Walker's house. (Tr. C. 510). The pair returned to and entered the house, but Mr. Wilson refused to proceed any further. 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." (Tr. C. 510-11).

6. Before Mr. Wilson's trial, the state came into possession of a hand-written letter by 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." (C. 615). This short description was buried in an otherwise lengthy police report. This evidence directly contradicts the statement Corley gave to police at the time of her arrest, wherein she denied ever entering the portion of the house where Mr. Walker lay. (C. 626-29). The police report by Sgt. Luker 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. Nothing was done about it at trial. Mr. Wilson was not informed.

7. After receiving the letter, Sgt. Luker collected handwriting samples from Corley's jail cell. (C. 615-16). Both the letter and the samples were sent to the

USPS for examination by a handwriting expert. (C. 634-37). The expert stated that the letter and the samples were probably written by the same person, Corley. (C. 636).

8. During Mr. Wilson's trial, the state's pathologist testified that numerous other blows were inflicted on Mr. Walker (Tr. R. 497) and that the cause of death was "multiple traumatic injuries." (Tr. R. 561-2). The pathologist further testified that Mr. Walker received all these injuries while still alive (Tr. R. 499, 503-4, 513), and that he was alive for multiple hours after first being injured (Tr. R. 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. (Tr. R. 606-7, 609-10, 612, 623).

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

10. Mr. Wilson was convicted of capital murder (Tr. C. 355). The jury voted 10-2 for death. (Tr. C. 356). This is the minimum number of votes for a recommendation of death. Ala. Code § 13A-5-46.

B. *Relevant Law*

11. The confession of someone other than the defendant is undeniably critical information favorable to the defense. As the Supreme Court held in *Brady v. Maryland*, where just such a confession went undisclosed, the withholding of such

evidence "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice ...." 373 U.S. 83, 88 (1963). The prosecutor in this case withheld such favorable, material evidence from Mr. Wilson.

12. Under *Brady* and its progeny, the state has an affirmative duty to disclose material evidence that is favorable to a defendant. *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). To show a *Brady* violation, a defendant must meet three criteria: (1) the evidence must be actually favorable, in the sense of being exculpatory or impeaching; (2) the evidence must have been suppressed by the state, either intentionally or mistakenly; and (3) the evidence must be material in the sense that defendant must have experienced prejudice from the suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

13. Evidence favorable to the defendant is that which "tend[s] to exculpate him or reduce the penalty." *Brady*, 373 U.S. 83 at 88. Thus, undisclosed evidence may be equally material at either the guilt or sentencing stages of a trial. *Id.* at 87.

14. Evidence is suppressed, within the meaning of *Brady*, when it is withheld from the defense. *Id.* at 84, 86-87. The duty of a prosecutor to disclose favorable material evidence is independent of the defense and does not require a specific request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). A prosecutor is not absolved of his obligations under *Brady* by defense counsel's failure to act in a certain manner, and the defense is not required to "scavenge for

hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

15. Additionally, for evidence to be suppressed, it must be unobtainable by the defendant on his or her own. The defendant must show he "does not possess the evidence nor could he obtain it himself with any reasonable diligence." *Wright v. Hopper*, 169 F.3d 695, 701 (11th Cir. 1999). The key element of this determination is whether the "evidence was in the State's possession," as opposed to available to the defendant from his own knowledge or from "a neutral source." *Agurs*, 427 U.S. at 111 (1976). *See Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1995) (holding that the existence of a witness was not suppressed since the defendant would have known about that witness even before the state, and thus the evidence was part of his own personal knowledge).

16. "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). The "reasonable probability" hurdle does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434. The materiality question in a *Brady* analysis is not a "sufficiency of the evidence test," and the defendant does not need to show

that the suppressed evidence renders his conviction impossible; the question is only whether or not the defendant received a fair trial and whether the addition of the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 434-35.

17. Moreover, the state has an ongoing obligation to release exculpatory material obtained pre-trial that meets the test described above, and the duty to disclose such material continues throughout the post-conviction process. *Brown v. Sec'y, Dep't of Corr.*, 750 F. App'x 915, 928 (11th Cir. 2018); *High v. Head*, 209 F.3d 1257, 1264 n.8 (11th Cir. 2000). The *Brady* obligation is a trial right and continues to bind the state to disclose this information because "the taint on the trial that took place continues throughout the [post-conviction] 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).

18. The exact contents of the letter written by Corley are unknown, but undersigned counsel has a good faith belief that it contains, at minimum, a confession by a co-defendant to the crime Mr. Wilson was charged with. Sgt. Luker wrote in his police report that Corley admitted she "hit Mr. Walker with a baseball bat until he fell." (C. 615). A confession by a co-defendant is clearly favorable as it is inherently exculpatory: it is the very evidence at the heart of *Brady* itself. 373 U.S. at 84.

19. Further, the letter and the state's investigation into the letter have been suppressed by the state. The existence of a letter was mentioned in a lengthy police report apparently turned over to trial counsel at an unspecified time (C. 615), but the prosecutor, Doug Valeska, never disclosed the contents of the letter or the letter itself. Trial counsel was entitled to assume that Mr. Valeska had performed his constitutional duties to disclose all *Brady* material. However, the state clearly considered the letter credible and inculpatory against Corley; they requested forensic handwriting analysis from the USPS. (C. 634-37).

20. As stated in *Agurs*, the duty to disclose *Brady* information is affirmative and incumbent upon the prosecutor in this case, regardless of any action on the part of trial counsel. While the state released one document that hinted at potential *Brady* material yet undisclosed, the defense is not required to "scavenge for hints" such as these. *Banks*, 540 U.S. at 695. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696.

21. The requirement in *Wright* that the defendant exercise "reasonable diligence" is met here. The state had obtained the letter by September 2004. (C-615). They received the USPS handwriting analysis in January 2007 (C-635). In March 2007, counsel for the defendant requested all *Brady* information. (Tr. C. 118). The state did not provide the letter, its contents, or the forensic report. The

state had a constitutional duty to disclose at this point, or at minimum before the trial was completed. Trial counsel was justified in presuming "that public officials have properly discharged their official duties." *Banks*, 540 U.S. at 696. At this point, none of the relevant materials were obtainable through the defendant's independent efforts, no matter the level of diligence exercised. They were completely within prosecutorial control. The *Brady* claim was then raised at the first available opportunity during state collateral review,[2] after post-conviction counsel reviewed trial counsel's discovery file and gained access to Corley's case files.

22. The Corley letter is clearly material because it would have been crucial to Mr. Wilson's defense against the charge of intentional murder. In his statement, Mr. Wilson admitted to choking Mr. Walker in an attempt to make him pass out and to striking him only once with the intent to disarm him. (Tr. C-505). When he left the house, he believed Mr. Walker to still be alive. (Tr. C. 507-8). He later returned to the house at the behest of Corley, who would enter alone the area of the house where Mr. Walker was. She remained there for some period of time and returned in a state of agitation. (Tr. C. 510-11).

[2] The claim could not have been raised by appellate counsel, who were restricted to the record 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. *See* Pet. for Writ of Cert., *Ex parte Wilson*, No. 1170747 (Ala. filed May 17, 2018), at 22.

23. The state pathologist stated, in apparent contradiction to Mr. Wilson's statement, that Mr. Walker had in fact been struck numerous times, survived multiple hours after the first injury, and died of "multiple traumatic injuries." (Tr. R. 499-504, 513, 561-62). The state argued that the number of injuries made Mr. Wilson's statement impossible (Tr. R. 606-607), and that the only explanation was that Mr. Wilson intentionally tortured Mr. Walker over a period of time. (Tr. R. 606-7, 609-10, 612, 623).

24. The confession letter from Corley would have undercut the prosecution's theory of the case and confirmed Mr. Wilson's statement. In her letter, Corley is purported to have stated that she "hit Mr. Walker with a baseball bat until he fell." (C. 615). This would directly contradict the state's argument during closing that only Mr. Wilson could have inflicted the injuries and thus his statement was a lie. It would also support Mr. Wilson's claim that he never intended to kill Mr. Walker, since the state's main evidence of such intent was the multiple injuries. *Kyles* shows that evidence is material when there is a "reasonable probability" that the result of the proceeding would have been different, had the evidence been handed over to the defense. 514 U.S. at 433. This letter would certainly have changed the course of the trial, and creates such a reasonable probability that Mr. Wilson would not have been convicted of capital murder. See Ala. Code, §§ 13A-5-40(b) and 13A-6-2(a)(1) (requiring a specific intent to cause death).

25. Such a confession would also have been relevant to punishment, even if Mr. Wilson were convicted of capital murder. Lesser culpability is mitigating. Ala. Code § 13A-5-51(4); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The jury voted 10-2 for death. (Tr. C. 356). This is the minimum number of votes for a recommendation of death. Ala. Code § 13A-5-46. There is a "reasonably probability" that had the letter been available to the defense, at least one juror would have changed their vote at sentencing, as the number of injuries was used to show the severity of the crime. The residual doubt from Corley's letter would have resulted in a sentence of life imprisonment without parole.

26. The prosecution's withholding of Corley's letter is an ongoing *Brady* violation that has seriously prejudiced Mr. Wilson to date because it left him with no defense and thereby deprived him of a fair trial both as to guilt and as to punishment. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Without immediate disclosure of the letter, undersigned counsel will not be able to begin to investigate this case and formulate a proper schedule for moving forward.

FOR THE FOREGOING REASONS, undersigned counsel respectfully moves for an order of disclosure and a status conference to set a proper schedule in this case.

Dated this 20th day of November 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, the foregoing has been electronically filed with the Clerk of the Court and a copy is being served upon the following by Federal Express:

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