No. 09-130

In The Supreme Court of the United States

GAILE K. OWENS,

Petitioner,

v.

JEWEL STEELE, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Whether the court of appeals' conclusion – that the suppression of documentary evidence corroborating the victim's extramarital affair was not "material" for the purposes of petitioner's sentencing hearing within the meaning of *Brady v. Maryland*[1] because the petitioner knew or should have known the essential facts permitting her to take advantage of any exculpatory information, and the evidence she wanted was clearly available from another source – conflicts with decisions of this Court.

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[1] 373 U.S. 83 (1963)

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on December 9, 2008. An order denying the petition for rehearing en banc was filed on February 25, 2009. On April 30, 2009, Justice Stevens extended the time for filing the petition for writ of certiorari until July 25, 2009 (Saturday), and the petition was filed on July 27, 2009 (Monday). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. State Trial and Sentencing Proceeding

On February 17, 1985, Ronald Owens was murdered in his Memphis home. Sidney Porterfield and Ronald Owens' wife, Gaile K. Owens ("petitioner" or "Owens"), subsequently were indicted for the murder. At a joint trial in January 1986, a Shelby County Criminal Court jury convicted Porterfield of

first-degree murder and Owens of accessory before the fact to first-degree murder.[2]

The evidence at the trial showed that, over the course of several months, Owens solicited several men to kill her husband. One of the men was Porterfield, with whom she met on at least three occasions. At the last meeting at 2:30 P.M. on Sunday, February 17, 1985, she told Porterfield that her husband either would be home alone that night or at their church playing basketball. *State v. Porterfield*, 746 S.W.2d 441, 444 (Tenn. 1988).

That evening, Owens, her husband, and their two sons attended an evening church service. Afterwards, Owens refused to allow the boys to remain at the church to watch their father play basketball, which they usually did, and took them to dinner instead and then to her sister's home, where they stayed until 10:30 P.M. When they returned home at 11:00 P.M., Ronald Owens' car was in the driveway. The car doors were open, the interior light was on, and his coat and tie were on the seat. The back door to the house was partially open, and his keys were in the lock. There

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[2] Under Tenn. Code Ann. § 39-1-301 (1982), in effect at the time of the commission of the offense, "[a]ny person who shall feloniously move, incite, counsel, hire, command or procure any other person to commit a felony, is an accessory before the fact." Under Tenn. Code Ann. § 39-2-206 (1982), "[a]ny person tried and convicted as an accessory before the fact of murder in the first degree shall be punished by life imprisonment or by death. . . ."

were signs of a struggle in the kitchen, with blood spattered on the wall and the floor. Ronald Owens was found unconscious in the den, his head covered with blood. He died six hours later. *Id.*

The autopsy revealed that his death resulted from multiple blows to the head. He had been struck at least 21 times with a blunt instrument, which the pathologist described as a long, striated cylinder, such as a tire iron. The blows had been delivered with such force that his skull was crushed, driving bone fragments into his brain and his face into the floor. The pathologist also found extensive injuries to the victim's hands and strands of hair between his fingers, indicating that he had been covering his head with his hands during the attack. *Id.*

After the killing, George James, one of the men solicited by Owens to kill her husband, contacted the police and told them of her offer. He agreed to meet Owens while wearing a hidden microphone monitored by the police. At the meeting, Owens paid James $60 to keep quiet, telling him that this was all the money she had. She told James that she had her husband killed because of "bad marital problems." *Id.*

Owens was promptly arrested. At first, she insisted that she only had hired people to follow her husband and "rough him up." However, she later confessed to paying out $4,000 to $5,000 to various men for "expenses" and to offering three men $5,000 to $10,000 to kill her husband. She admitted meeting a man she knew as "Little Johnny" at 2:30 P.M. on

the day of the murder, discussing killing her husband with him, and promising to pay him three or four days after the murder. Owens explained to the police that she had contracted to have her husband killed because "we've just had a bad marriage over the years, and I just felt like he had been cruel to me," although she admitted that "[t]here was very little physical violence." *Id.*

Porterfield confessed to the murder. He admitted meeting Owens on three occasions to discuss the plans, the last time at 2:30 P.M. on the day of the murder. He stated that Owens offered him $17,000 to kill her husband. He stated that he went to the house that evening at about 9:00 P.M. and took a tire iron with him. He further stated that he was in the backyard when the victim arrived home, that the victim thought he was a burglar, that they struggled, ending up in the kitchen, and that when he was unable to break away, he struck the victim with the tire iron. Porterfield admitted continuing to strike the victim's hands and head. On leaving, he threw the tire iron and the gloves he was wearing into a dumpster. *Id.* at 445.

The prosecution also produced the testimony of witnesses identifying Porterfield as the man who met Owens on Sunday afternoon. A witness also placed Porterfield in the vicinity of the Owenses' house a week before the murder. In addition, there was evidence that, shortly after her husband's funeral, Owens asked her father-in-law for $17,000 "to pay some bills." *Id.* at 445.

Neither Porterfield nor Owens testified at trial, and Porterfield offered no evidence. Owens produced a neighbor, who testified that Owens was almost hysterical after her husband was found. A funeral home employee also testified that a large balance was owing on the victim's funeral bill. *Id.* at 445.

At the sentencing phase, the pathologist again testified concerning the circumstances of the victim's death, and two photographs of the victim's head wounds were introduced. The State also presented proof of Porterfield's prior convictions for armed robbery and simple robbery. *Id.* at 448.

In mitigation, Owens presented evidence that she had been treated by a psychiatrist on one occasion in 1978 for severe behavioral problems. She also produced two jail employees, who testified that she was a good prisoner who caused no problems, volunteered to work, and attended Bible study. *Id.* at 448.

The jury imposed the death sentence for Owens and Porterfield. With respect to Owens, the jury found two aggravating circumstances: "[t]he defendant . . . employed another to commit the murder for remuneration or the promise of remuneration," Tenn. Code Ann. § 39-2-203(i)(4) (1982), and [t]he murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind," Tenn. Code Ann. § 39-2-203(i)(5). *Id.* at 448. The Tennessee Supreme Court affirmed the judgment in 1988. Owens did not seek a writ of certiorari from

this Court. Porterfield did, but the petition was denied. *Porterfield v. Tennessee*, 486 U.S. 1017 (1988).

II. State Post-Conviction Proceeding

Owens filed a petition for state post-conviction relief in 1991, raising, *inter alia*, a boilerplate claim that "[t]he state failed to disclose evidence to which petitioner was entitled at both guilt and sentencing." (C.A.J.App. 189) Owens narrowed the claim at the post-conviction evidentiary hearing to allege the suppression of sentencing-phase mitigating evidence substantiating the victim's marital infidelity: cards and notes revealing a romantic relationship between the victim and Gala Scott; and a police report relating the discovery of the cards and notes during a search of the victim's office and stating that, when interviewed, Scott had admitted the affair. (No. 2:00-02765, Docket Entry No. 17, Addendum No. 12 at 165-69 (Post-Trial Brief of Petitioner))

The post-conviction court summarized the evidence on this claim:

> Mr. Emmons, one of petitioner's attorneys, filed a written motion pre-trial due to information he believed came from an interview with petitioner alleging that
>
> > there was a search of the entire house of the deceased after the defendant was in custody; his personal possessions at his office were inventoried and seized and

> numerous friends and business acquaintances were interviewed by officers. Counsel believes that at the house and office were found numerous items that would verify the above allegations including but not limited to names, addresses, and correspondence to and from "lovers" which would be of great benefit to the defense.
>
> Defendant moves the Court to order the state to seek out these items through its agents and to make available to the defense the entire contents of the house seized and the contents of the office of the deceased.

During a hearing on this pretrial motion three months before the trial, petitioner's attorneys requested this material be turned over to them, and if not in the possession of the state, to order turned over to them names of witnesses who could discover such evidence. The state responded:

> MR. STROTHER: Your honor, I think that we are required, and as we have done, show them – you know, we talk about items coming from the house. To the best of my knowledge, we have shown them every single scintilla of evidence which we have seized and which we have that came from the house.

Anything that is in the possession of any law enforcement agency we have and we have shown to counsel for the defense.

As to any other information that could be developed, then I think we might be, if we have such information, required to furnish them the names and addresses of any individuals who can shed any light on it. And I will be happy to do that if – and I think it has in fact been done.

THE COURT: Mr. Emmons, who made – who allegedly made the search at [sic] the personal property at the office?

MR. EMMONS: Your Honor, I'm not sure. I'm not sure if it was police officers or if it was simply hospital personnel cleaning out his – or if it were in fact relatives of the family.

I believe probably – and this is just a guess based on what information I have – that it was maybe hospital personnel and relatives of the family, and thus, would not involve police officers, but I don't know that for a fact.

Now, the point I want to stress to the court is that assuming the

> state exercised a search warrant and seized only certain items, we have no doubt but that they would furnish us with everything they seized. But there was a housefull of stuff there. There was an office full of stuff that are not in our possession that are in somebody's possession.
>
> THE COURT: You claim they're in the state's possession?
>
> MR. EMMONS: I claim that they could be. I claim that the state has the power and the authority to get those items that we don't have the power to and the authority to get. . . .
>
> THE COURT: Well, unless they're in the possession of the State, the court has no jurisdiction to order somebody to turn them over.

The trial judge denied the motion to make the state go out and look for these items, and told Mr. Emmons to use his subpoena power. He then asked the state if it had such evidence in its possession.

> THE COURT: Do you have an inventory of items in his office?
>
> MR. STROTHER: Not that I am aware of, Your Honor. Everything we have in the way of any

> kind of piece of physical evidence, any piece of paper, any notebook, any – anything along those lines, letters and etcetera that we have, we have made available to them. The names of any people who we know who would know anything about this and the addresses of those individuals, I think likewise we have provided them with. That's the only thing I know to say.

Entered as Exhibit "C" to the hearing on this petition is a General Assignment Report of Investigation written by K. D. Wray, Chief of Police in Bartlett, Tennessee, [the city where the victim's body was found] stating that he went with another officer to Baptist Hospital [the victim's workplace] and met with the chief of security who allowed them to look at the property in the victim's office. They found several cards and notes from a Gala Scott and a Diane Wood. He interviewed Gala Scott that day and she verified she had an affair with the victim during 1981 and 1982. But they had since stopped seeing each other romantically [the victim was killed in 1985].

Chief Wray testified at the hearing that the notes from Diane Wood were merely friendly. The ones from Gala were more sexual. He held them for a while, and then Gala Scott called him, asking for them back, he checked with an attorney, was told they had no bearing on the case, and returned

> them to her. He could not remember who the attorney was – either the two prosecutors, Mr. Strother and Challen, or the Bartlett, Tennessee city attorney. None of petitioner's trial attorneys, Mr. Emmons, Mr. Stein or Mr. Marty recall having seen that report prior to the hearing on this petition.

(C.A.J.App. 243-45) (internal citations omitted) Owens did not testify. Mr. Strother, Mr. Challen, and Gala Scott were not called as witnesses; nor were the cards and notes introduced.

The post-conviction court concluded:

> This Court cannot find from the record before it that the State wrongfully withheld evidence in its possession from petitioner. Although it is unclear exactly when the Bartlett Police Department returned these notes and cards to Ms. Scott, it is clear that they were never turned over to the two state's attorneys. The only remaining questions are whether or not the report of the affair between the victim and Ms. Scott should have been turned over to petitioner's attorneys, and whether or not this prejudiced petitioner.
>
> Assuming *arguendo* that the state was aware of the report, and willfully failed to turn the information over to petitioner's attorneys (which is not shown by the proof), that would clearly be a violation of their agreement at the above-mentioned hearing on the motion. However, since petitioner

already knew of the affair with Ms. Scott, she did not need the state to give her notice of it. She told her psychological intern that her husband has [sic] been having affairs when they attempted to evaluate her in October prior to her January trial. Detective Townsend asked her when taking her confession whether her husband had been "going out on her," and she told him she didn't care if he did or not. Mr. Gentry, her "traumatologist," testified at the hearing that petitioner told him that in December, 1984, she had gone to her husband's job to find out if he and his car were there, or if he was with his mistress, and confronted him when he and Gala Scott returned to the parking lot together early the next morning. She told Gentry her husband told her "Don't you ever follow me again, bitch . . . " and she then realized that his allegiance was attached to Gala Scott. She told Mr. Gentry that she went around for the next three days with photographs and diagrams trying to find someone to kill him. Since Ms. Owens did not testify at the hearing on this petition, it is unclear whether or not she withheld this information from her attorneys, but it seems extremely unlikely that she would have if that incident precipitated the killing. If she did withhold knowledge of the affair from her trial attorneys, she can not now blame the state for withholding information she already knew. If she did not withhold the information, but told her attorneys about the affair and they decided not to use it, there is

no prejudice to petitioner that the state did not also tell them. Mr. Emmons testified that he filed the motion for the "love notes" because he felt he had discussed their existence with Ms. Owens and co-counsel. Although Mr. Marty could not remember whether or not he had received the report, he testified as follows as to its possible use:

> Q. Mr. Marty, going back to an earlier question concerning, for instance, the report by K. D. Wray concerning the verification of an affair, sexual affair with Ron Owens, do you think that would have been important knowledge for you to have in this case?
>
> A. It may or may not have been. It may have given her a motive to kill him.
>
> Q. Do you think it might have been useful in sentencing, perhaps, to give the jury a reason not to kill her?
>
> A. It may have given them a stronger reason to kill her.
>
> Q. Well, we're talking about sentencing now. Do you –
>
> A. I understand that.
>
> Q. Have you ever used the defense that utilized affairs that the deceased might have had?

A. In the right case, yes, we have.

Q. You did not consider –

A. Not in a capital murder case.

This court can find no intentional wrongdoing on the part of the state from the proof in the record, and even if there were, there has been no prejudice shown to petitioner. Since the duty of the State to disclose under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), does not extend to information that the defense already possesses or is able to obtain, or to information not in the possession or control of the prosecution, *State v. Wooden*, 898 S.W.2d 752, 755 (Tenn. Crim. App. 1994), this issue is without merit.

(C.A.J.App. 245-46) (some internal citations omitted)

On appeal, the Court of Criminal Appeals affirmed the judgment of the post-conviction court, concluding:

The proof establishes that the appellant discovered the victim's affair with Gala Scott several months prior to the murder. This discovery led the appellant to consider suicide and subsequently solicit her husband's murder. Moreover, the appellant's attorneys were aware of extramarital affairs of the victim through their conversations with the appellant as evidenced by their request for information in their exculpatory motion. The duty upon the State under *Brady* does not

> extend to information already in the possession of the defense or that they are able to obtain or to information not in possession or control of the prosecution.
>
> More importantly, however, is the requirement that the information suppressed must have been exculpatory, i.e., favorable to the appellant. We conclude that this evidence was not favorable and accordingly, no *Brady* violation is found. In this regard, we would not disagree with trial counsel's testimony that introduction of this evidence may have provided the appellant with a motive to kill her husband. This issue is without merit.

Owens v. State, 13 S.W.3d 742, 758-59 (Tenn. Crim. App. 1999). The Tennessee Supreme Court denied review, and this Court denied Owens' petition for a writ of certiorari. *Owens v. Tennessee*, 531 U.S. 846 (2000).

III. Federal Habeas Corpus Proceeding

On August 23, 2000, Owens initiated the instant action by filing a petition for a writ of habeas corpus in the district court. Owens raised the *Brady* claim, asserting:

> Had the State provided defense counsel with (1) the cards and notes from Ms. Scott to Ms. Owens; (2) the police report in which Chief Wray recounts the discovery of those cards and notes and that Ms. Scott admitted that Mr. Owens and she had an affair; or (3) any

> information indicating that the cards and notes existed or that Ms. Scott admitted that Mr. Owens and she had an affair, and had the jury been presented that information, a reasonable probability existed that the jury would have sentenced Ms. Owens to life imprisonment instead of death.

(C.A.J.App. 32-33) However, Owens' petition acknowledges that "throughout the marriage of Mr. and Ms. Owens, Mr. Owens had affairs with other women, including Carolyn Nobles and Gala Scott" and that

> she learned of Mr. Owens' affair with Ms. Scott when she received a letter made up of words cut out of a magazine stating that everyone but Ms. Owens knew that Mr. Owens was having an affair with Ms. Scott[.] [ ] During the final months of 1984, Ms. Owens caught Mr. Owens and Ms. Scott riding together in a parking lot. Mr. Owens responded by pushing Ms. Owens against a car and yelling, "Don't you ever follow me again bitch," or words to that effect[.] [ ] Ms. Owens drove off of the parking lot intending to commit suicide[.] [ ] [A]s Ms. Owens drove her car, she saw some African-American men standing on a street corner drinking wine. Ms. Owens decided that instead of killing herself, she would have her husband killed. Ms. Owens asked the men she saw if they would be interested in killing her husband[.]

(C.A.J.App. 24)

Based upon a review of the state-court record, the district court rejected the claim, concluding:

> *Brady* requires the disclosure of evidence that is material either to guilt or to punishment. The record indicates that Petitioner knew of Mr. Owens' affair with Scott months before his murder. In fact, Owens asserted that she solicited her husband's murder after finding him in a parking lot with Scott. Moreover, as established by defense counsel's request for evidence of Mr. Owens' extramarital affairs, Petitioner had informed her attorney of Mr. Owens' liaisons. Despite knowing this, the defense presented no mitigation evidence at the sentencing phase of the decedent's illicit conduct.
>
> Petitioner maintains that she did not present such evidence because she had nothing to corroborate her allegations. The Court finds this argument unavailing because she could have corroborated her allegations with Scott's testimony. Had Petitioner wished to introduce evidence of the decedent's extramarital affairs, she could have subpoenaed Scott to testify. Petitioner has not shown that there was a reasonable probability that her conviction or sentence would have been different had these materials been disclosed. She therefore cannot show materiality or prejudice under *Brady*. The Court finds therefore that the state court's conclusion that petitioner's *Brady* claim is without merit is neither contrary to, nor an unreasonable application of, clearly established

> federal law, as determined by the Supreme Court of the United States; nor is it an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(Pet.App. 134-35) The district court granted the respondent's motion for summary judgment. (*Id.* 197)

In response to Owens' motion to alter or amend the judgment, the district court revisited the *Brady* claim. Owens' reiteration of her argument that she was prejudiced at sentencing by the suppression of the items, pointing to cases in which a defendant did not receive the death penalty for killing an unfaithful spouse, was rejected. The district court observed that the cases, dealing with "killings resulting from sudden and excited passions on the part of the defendant-spouse, usually owing to confrontations with the victim-spouse while engaged in acts of adultery, confrontations with the paramour of the adulterous spouse, or after heated argument with the spouse," were inapposite. (*Id.* 200-01) Owens' case, the court observed, was different:

> It is uncontested that Petitioner acted with malice and premeditation in procuring her husband's murder. Indeed, none of the cases cited by Petitioner as examples lending support to her claim that her husband's infidelity should mitigate her punishment are reflective of the protracted deliberation and repeated effort exhibited by the Petitioner in soliciting her husband's murder. The extent of Petitioner's premeditation and

> her concerted efforts over a period of months to solicit the eventual killer, as well as helping to plan the actual murder, remove her from the class of cases where the death penalty has been held inappropriate due to the killer's visceral emotional reaction to a spouse's infidelity. Petitioner's case is therefore more closely analogized to cases where a spouse has received the death penalty for his or her role in the murder-for-hire scheme resulting in the death of their spouse.

(*Id.* 202) In rejecting Owens' argument that the cards' and notes' sexual explicitness would have "sickened the jury" and "conclusively proved the reason for Gaile Owens' actions," the district court stated:

> It defies reason to suggest that Petitioner would have her husband killed due to his infidelity, and then abandon presenting any evidence of the adultery in mitigation of her punishment, even without the victim's love letters from his mistress. Nonetheless, with the proof presented against Owens at trial, Petitioner has not shown that, had the notes been disclosed to her prior to trial, there was a reasonable probability that her sentence would have been different, or that the suppression of the cards and notes "undermine[d] confidence in the outcome of the trial." *U.S. v. Bagley*, 473 U.S. 667, 678 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

(*Id.* 203-04)

On December 9, 2008, the court of appeals affirmed the judgment in a 2-1 decision. The majority agreed with the district court that Owens failed to prove prejudice and concluded that the state courts did not unreasonably apply clearly established federal law in rejecting the *Brady* claim. The court reasoned that Owens knew that her husband was having an affair with Gala Scott, that proof of the affair was available elsewhere, at a minimum, through Scott, and that there was no evidence in the record that Scott, who had admitted the affair to police, would have refused to testify or would have committed perjury. (Pet.App. 37-41)

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner contends that the Sixth Circuit's decision is at odds with this Court's "materiality" test for *Brady* violations as expressed in *Cone v. Bell*, 129 S.Ct. 1769 (2009), *United States v. Bagley*, 473 U.S. 667 (1985), and *Kyles v. Whitley*, 514 U.S. 419 (1995), in that it failed to examine the existing record and the impact of suppression on that record. She also argues that the lower court's application of the principle that "*Brady* does not apply when the information is available from another source" constitutes an unprecedented and indefensible curtailment of *Brady* and its progeny. Neither assertion is correct.

The opinion below reflects that the court applied this Court's materiality test in a way that is consistent with *Cone*, *Bagley*, and *Kyles*. Furthermore, the principle that *Brady* does not apply to information that is not wholly within the control of the prosecution and is not violated where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available from another source is neither novel nor inconsistent with *Brady*. Indeed, this principle is a logical corollary to the rule of *Brady* and its progeny and is entirely consistent with the Court's test for *Brady* "materiality."

A. The Sixth Circuit's opinion demonstrates that the court performed this Court's "materiality" test in analyzing petitioner's *Brady* claim.

In *Brady*, the Court held that "the suppression 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. To prevail on a *Brady* claim, a petitioner must show that the evidence (1) was favorable either because it was exculpatory or because it was impeaching; (2) was suppressed by the prosecution; and (3) was material because prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Evidence is material when "there is a reasonable probability that,

had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682) (internal quotation marks and citations omitted). "In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Cone*, 129 S.Ct. at 1783 (quoting *Kyles*, 514 U.S. at 435).

Contrary to petitioner's contention, the Sixth Circuit performed this calculus in evaluating petitioner's *Brady* claim. The court reviewed the state trial evidence, including the sentencing hearing. (Pet.App. 3-5) The court also reviewed the evidence offered in support of the *Brady* claim at the state post-conviction proceeding. (*Id.* 35-39) The court correctly stated the applicable test:

> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), obligates the government to turn over evidence that is both favorable to the accused and material to guilt or punishment. "There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Prejudice in the *Brady*

> sense means the same as in the *Strickland* sense: a reasonable probability that there would have been a different result had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

(*Id.* 33-34) After thoroughly analyzing the evidence, the court applied the test, concluding that "the district court correctly denied habeas based on a finding of no prejudice" (*id.* 33), and stated that "we . . . reject [Owens'] [*Brady*] claim on the ground that she suffered no prejudice." (*Id.* 37) Owens' contention that the court of appeals eschewed an examination of the existing record and the impact of suppression on that record is simply mistaken.

B. The Sixth Circuit's resolution of the *Brady* claim is not inconsistent with *Brady* and its progeny.

The Sixth Circuit observed that critical to the *Brady* analysis is the rule that

> *Brady* obviously does not apply to information that is not wholly within the control of the prosecution. There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose.

(Pet.App. 34 (quoting *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (internal citations and quotations omitted)). Petitioner contends that this rule is an unprecedented and indefensible curtailment of *Brady*. But that is not so.

First, the rule is a logical corollary of *Brady*'s holding that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Following *Brady*, this Court made it clear that the prosecution is "under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses." *United States v. Agurs*, 427 U.S. 97, 109 (1976) (quoting *In re Imbler*, 60 Cal.2d 554, 569 (1963)); *see also Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."). Indeed, the Court remarked that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional issue." *Agurs*, 427 U.S. at 109-10. Suggesting that "materiality" must take into account what is known by the defense, the Court quoted with approval Justice Fortas's opinion concurring in the judgment in *Giles v. Maryland*, 386 U.S. 66 (1967), in which he stated that convictions should not be reversed under *Brady*

> on the ground that information merely repetitious, cumulative, or embellishing of *facts otherwise known to the defense* or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel.

Agurs, 427 U.S. at 109 n.16 (quoting *Giles*, 386 U.S. at 98 (Fortas, J., concurring)) (emphasis added). As Justice White, also concurring in the judgment in *Giles*, observed: "In the end, any allegation of suppression boils down to an assessment of what the State knows at trial *in comparison to the knowledge held by the defense*." *Giles*, 386 U.S. at 96 (White, J., concurring) (emphasis added). Thus, a rule that *Brady* does not apply to information that is not wholly within the control of the prosecution is logically consistent with *Brady*.

Moreover, the rule is not novel. Both federal and state courts have routinely applied this *Brady* corollary. *See, e.g., United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009) ("[D]efendant is not denied due process by the government's nondisclosure of evidence if the defendant knew of the evidence anyway."); *Tate v. Wood*, 963 F.2d 20, 25 (2d Cir. 1992) (*Brady* does not require disclosure if "'the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence.'") (quoting *United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987)); *United States v. Clark*, 928 F.2d 733, 735 (6th Cir.),

cert. denied, 502 U.S. 846 (1991) (same) (quoting *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989)); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990) ("'[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.'") (quoting *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852 (1986)); *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) ("'The government is not obligated to furnish a defendant with information he already has or can obtain with reasonable diligence.'") (quoting *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977)); *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982) (no *Brady* violation where the information at issue was "available to the defense attorney through diligent discovery"); *Cornwell v. State*, 430 N.W.2d 384, 385 (Iowa 1988) ("Exculpatory evidence is not 'suppressed' if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence.") (citing *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982)); *State v. Hobley*, 752 So.2d 771, 785-86 (La. 1999), *cert. denied*, 531 U.S. 839 (2000) (no *Brady* violation for suppression of mental health clinic records "[b]ecause defendant would have had knowledge of the treatment he received at the mental health clinic"); *State v. Bisner*, 37 P.3d 1073, 1083 (Utah 2001) (failure to disclose potentially exculpatory information not *Brady* violation where defendant knew or should have known the essential facts permitting him to take advantage of exculpatory information).

Finally, the rule is consistent with the Court's test for "materiality" in the *Brady* analysis – a reasonable probability that there would have been a different result had the evidence been disclosed. As the Sixth Circuit observed:

> This rule makes sense because if the defendant could have presented similar evidence to prove the same point that the allegedly-suppressed information would have been introduced to prove, but did not, it is not reasonably probable that government disclosure would have led to a different result.

(Pet.App. 34)

II. THE DECISION BELOW IS CORRECT.

Petitioner contends that the undisclosed evidence was "material" under *Brady* for purposes of sentencing because the defense could have used the evidence to show that, rather than being motivated by the insurance proceeds to have her husband killed, she was "a classic, jealous, long-suffering wife betrayed and humiliated by her husband." (Pet.18-19) But this argument is fatally flawed. Petitioner never saw the cards and notes. Therefore, as the district court concluded, "aspects of her husband's affair that she did not know about cannot be said to have affected her state of mind and are therefore not probative of her contention that her husband's affair drove her to precipitate his murder." (C.A.J.App. 981 n.5) The only relevance of the cards and notes would

have been to corroborate the existence of her husband's affair with Gala Scott. But petitioner knew that her husband was having an affair with Scott:

- Petitioner acknowledges that "throughout the marriage . . . , Mr. Owens had affairs with other women, including Carolyn Nobles and Gala Scott." (C.A.J.App. 24)
- Petitioner learned of the affair with Gala Scott "when she received a letter made up of words cut out of a magazine stating that everyone but Ms. Owens knew that Mr. Owens was having an affair with Ms. Scott[.]" (C.A.J.App. 24)
- In December 1984, two months before the murder, petitioner discovered her husband together with Gala Scott in a parking lot and confronted them. (C.A.J.App. 561-62) It was this incident that precipitated her determination to kill her husband (*Id.* 563)
- Prior to trial, petitioner informed her attorneys of the affair, as demonstrated by her attorneys' request of the prosecution for evidence that Mr. Owens "had numerous girl friends, extra marital sexual affairs possibly involving unusual sexual proclivities and/or perversions and that these proclivities, perversions, and affairs were flaunted and visited upon the defendant with such regularity and in such ways as to contribute to her

> state of mind and mental condition. . . ." (C.A.J.App. 101-02)

Thus, petitioner and her attorneys had knowledge of the essential facts surrounding the victim's infidelity, and if Owens wanted to present evidence of the affair, she could have testified, produced the anonymous letter, or subpoenaed Gala Scott.[3] Owens had as much access to the relevant witnesses as the police did and, therefore, the information was not under the sole control of the government. *Cf. Brady*, 373 U.S. at 84 (accomplice's confession unknown to defense and in sole possession of police); *Kyles*, 514 U.S. at 428-29 (items in government's sole possession); *Strickler*, 527 U.S. at 285 (existence of record of prosecution witness's interviews with police and notes from witness to police unknown to defense counsel and notes undiscoverable from witness because she refused to speak to defense counsel before trial). Moreover, the documentary evidence, corroborative of what was already known, would have been merely cumulative. Owens knew or should have known the essential facts permitting her to take advantage of any exculpatory information, and the evidence she wanted was clearly available from another source.

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[3] There is no evidence in the record from which to conclude that Scott would have refused to testify or would have committed perjury. Scott acknowledged the affair to the police. As the Sixth Circuit observed, this "suggests that she was not taking a position of outright denial." (Pet.App. 39) There is no evidence in the record that petitioner ever tried to contact Scott before or during the litigation.

Petitioner contends that any assertion that she could have testified, that she could have produced the anonymous letter, or that she could have subpoenaed Scott has "no grounding in the reality of criminal trials" because the Fifth Amendment protects criminal defendants from being forced to testify, and her own testimony, evidence of the letter, or Scott's testimony would pale in comparison to the sexually explicit cards and notes.[4] (Pet.23-24) These arguments are insubstantial. True enough, the Fifth Amendment protects defendants from compelled self-incrimination. But any decision by Owens to testify at the sentencing phase would not be a product of government compulsion, but instead a strategic choice to present mitigating evidence – a choice criminal defendants are often called upon to make. And petitioner's argument about the relative impact of the cards and notes on her mental state ignores a basic fact: because petitioner had not seen the cards and notes, they could not have been relevant to her mental state. They were only relevant to corroborate the existence of the affair, about which she already knew. The district court and the Sixth Circuit were clearly correct in concluding that the state court's

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[4] The best evidence of the contents of these cards and notes would be the items themselves, but they were not introduced at the state post-conviction proceeding. Other than Chief Wray's recollection that they were romantic and "explicitly sexual" in nature and contained references to "pet names" for the victim and Scott (C.A.J.App. 412-13), their exact contents are unknown.

determination that the documentary evidence was not "material" was not an unreasonable application of *Brady*.

Furthermore, although not a basis for the court of appeals' rejection of petitioner's *Brady* claim, the decision below is correct for the additional reason that the documentary evidence was not "favorable," i.e., exculpatory or impeaching. If admitted as mitigating proof at petitioner's sentencing hearing, the evidence likely would have been as equally damaging as beneficial to petitioner. This murder was not a heat-of-passion crime, where evidence of marital infidelity might suggest to some jurors a less blameworthy defendant, but instead a calculated, cold-blooded murder for hire, premeditated over the course of several months. Trial counsel, who would have faced the decision whether to use the cards and notes at trial, acknowledged that the admission of the evidence would have demonstrated a strong motive for the murder and might have had the effect of hardening the jury's feeling toward the petitioner at the sentencing hearing:

> Q. Mr. Marty, going back to an earlier question concerning, for instance, the report by K. D. Wray concerning the verification of an affair, sexual affair with Ron Owens, do you think that would have been important knowledge for you to have in this case?
>
> A. It may or may not have been. It may have given her a motive to kill him.

> Q. Do you think it might have been useful in sentencing, perhaps, to give the jury a reason not to kill her?
>
> A. It may have given them a stronger reason to kill her.

(C.A.J.App. 391) Nor was the evidence particularly relevant because, as the district court observed, "aspects of her husband's affair that she did not know about cannot be said to have affected her state of mind and are therefore not probative of her contention that her husband's affair drove her to precipitate the murder." (C.A.J.App. 981 n.5) With the exact contents of the cards and notes unknown and their utility substantially offset by the likely negative consequences of their admission, petitioner did not sustain her burden under *Brady* of demonstrating that the evidence was "favorable." *See, e.g., Edwards v. Ayers*, 542 F.3d 759, 771-72 (9th Cir. 2008) (finding no *Brady* error where suppressed evidence was more damaging than helpful and "would not have been favorable to the defense"); *Luton v. Grandison*, 44 F.3d 626, 629 (8th Cir. 1994) (finding suppression of statement was not *Brady* error where, "[t]aken as a whole, the . . . statement is clearly not favorable to the appellant, and was, in fact, quite damaging to her"). Therefore, regardless of the correctness of the Sixth Circuit's materiality analysis, the decision below is correct because the state courts' conclusion that the documentary evidence was not

"favorable" was not an unreasonable application of *Brady*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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