No. 09-130

In The Supreme Court of the United States

GAILE OWENS,

Petitioner,

vs.

JEWELL STEELE,

Respondent.

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

REPLY BRIEF

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INTRODUCTION

Ms. Owens found her husband, Ron Owens, in what appeared to be a tryst with his associate, Gala Scott, in a parking lot. Pet. App. 117, 134. When he saw Ms. Owens, Mr. Owens slammed her into his car, called her a "bitch" and told her never to follow him again. Pet. App. 117. After years of "[Ron] Owens' cruel and sadistic behavior toward her," Pet. App. 55 (Merritt, J., dissenting), and, given her belief that Mr. Owens had been carrying on multiple affairs, this parking lot scene was Ms. Owens's tipping point. Pet. App. 134; *Owens v. State*, 13 S.W.3d 742, 758 (1999) ("this discovery led [Ms. Owens] to consider suicide and subsequently solicit her husband's murder").

When Ms. Owens was arrested she told police that she believed her husband had been having an affair with Gala Scott. Pre-trial, defense counsel requested discovery of any love letters that the State had found in Ron Owens's property after his death and alleged that they had reason to believe that Ron "had numerous girlfriends" which he "flaunted . . . with such regularity and in such ways as to contribute to [Ms. Owens's] state of mind." CA6 J.A. 101-102. The majority below agreed that such letters would be relevant to capital sentencing because of the "longstanding commonsense belief in our culture that people who kill their spouses because of infidelity are not as culpable as other murderers." Pet. App. 36. The District Attorney said there were no letters, not one "scintilla." CA6 J.A. 111.

There were letters. In light of them, and in light of the manner in which the State obtained and suppressed them, Ms. Owens should have been provided a new capital sentencing hearing at which jurors would add "Flufflicker" to, and subtract "innocent man" (CA6 J.A. 165) from, the sentencing equation. The reason Ms. Owens was not provided such a resentencing proceeding is that the lower court majority applied a "nonsense"[1] rule of "materiality" squarely at odds with *Brady v. Maryland,* 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); and *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009).

ARGUMENT

I. Respondent Concedes That The Graphic Handwritten, Explicit, Exculpatory Letters, Were The "Best Evidence" Of The Deceased's Affairs

Respondent defends the majority's rule that *Brady* was not violated because Ms. Owens had knowledge of (or at least suspected) her husband's affairs. Respondent, like the Sixth Circuit majority, wrongly equates Ms. Owens's purported *knowledge* of her husband's affair with *evidence* of it, i.e. the graphic sex/love letters, the police report documenting their discovery, and the police interrogation of Gala Scott. As Respondent admits, "the only

[1] Pet. App. 58 (Merritt, J., dissenting).

relevance of the cards and notes would have been to corroborate the existence of her husband's affair with Gala Scott." Respondent's Brief In Opposition (BIO) at 28. Ms. Owens agrees, and also agrees that these letters were the "*best* evidence" of that affair. BIO at 30 (emphasis added).

Respondent does not dispute that though Ms. Owens believed her husband was having an affair with Gala Scott, she did not know: 1) that the police had found sexually explicit letters; 2) that those letters were in the sole control of the police until the District Attorney claimed they were not relevant and instructed that they be returned to Gala Scott; 3) that a police report documented the discovery of the letters and the police interrogation of Gala Scott; and 4) that the District Attorney claimed no letters had been found and everything that was found had been shown to Ms. Owens's counsel. Moreover, Respondent does not dispute that the District Attorney's statements that there were no letters chilled the defense investigation of Mr. Owens's infidelity and their preparation.[2]

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[2] Showing quite a bit of nerve, Respondent writes that Ms. Owens did not introduce the letters at the State court evidentiary hearing and suggests that she should have. BIO at 30, n.4. At the District Attorney's instructions, the police gave the letters back to Ron Owens's lover. Counsel for Ms. Owens would have introduced the letters in state post-conviction proceedings if they then existed. Instead, a police detective testified to what the letters contained in post-conviction proceedings. It was apparently difficult to forget "Flufflicker"

(Continued on following page)

II. Under Respondent's (And The Majority's) "Nonsense" Rule, *Brady*, *Kyles*, And *Cone* Were Wrongly Decided – Each Petitioner Had "Knowledge" And They Were Seeking "Evidence" To Corroborate Their Knowledge

John Brady knew he was innocent. Curtis Kyles knew he was innocent. And Gary Cone knew he was a heavy drug user. Each of these men sought **evidence** in the possession of the State to corroborate the **knowledge** they already had. Each of these men were denied that evidence, and each obtained relief from this Court. Yet in direct contravention of these cases, Respondent and the Sixth Circuit majority still maintain that *because* Gaile Owens knew (or believed) that her husband was having an affair, evidence which admittedly "corroborate[s] the existence of her husband's affair" is not material. BIO at 28. Just as it was nonsense to think that Brady, Kyles, and Cone were not entitled to material exculpatory evidence, it is nonsense to deprive Ms. Owens of sentencer consideration of the corroborative evidence suppressed by the State.

Respondent's attempts to cabin the majority's rule under *Brady* and its progeny fail. First, the State's quotation from Justice Fortas's concurring opinion in *Giles v. Maryland*, 386 U.S. 66 (1967),

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and "Lollipop." The State has never denied what the letters contained.

regarding "repetitious, cumulative or embellishing of facts otherwise known to the defense" (BIO at 24-25) does not fully convey Justice Fortas's actual points and ignores the remainder of his paragraph:

> It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information. But this is not that case. Petitioners were on trial for their lives. The information was specific, factual, and concrete, although its implications may be highly debatable. The charge was rape, and, although the circumstances of this case seem to negate the possibility of consent, the information which the State withheld was directly related to that defense. Petitioners' fate turned on whether the jury believed their story that the prosecutrix had consented, rather than her claim that she had been raped. In this context, it was a violation of due process of law for the prosecution to withhold evidence that a month after the crime of which petitioners were accused the prosecutrix had intercourse with two men in circumstances suggesting consent on her part, and that she told a policeman – but later retracted the charge – that they had raped her. The defense should have been advised of her suicide attempt and commitment for psychiatric observation, for even if these should be construed as merely products of the savage mistreatment of the girl by petitioners, rather than as indicating a

> question as to the girl's credibility, the defense was entitled to know.

Giles, 386 U.S. at 98-99 (Fortas, J., concurring). In *Giles,* Justice Fortas was clear – the withholding of information that is "specific, factual, and concrete, although its implications may be highly debatable" where "Petitioners' fate turned on whether the jury believed their story," is a violation of due process. *Giles*, 386 U.S. at 99. The lower court decision was contrary to *Giles*.[3]

Second, the cases in Respondent's lengthy string cite in support of its "*Brady* corollary" are not on point. BIO at 25-26. For example, in *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009), the defendant actually had the exhibit that she alleged was withheld and had tried to use it at trial. In *Tate v. Wood*, 963 F.2d 20, 25 (2nd Cir. 1992), the defendant was awarded an evidentiary hearing: "the hearing must demonstrate that helpful evidence differing from that available to Tate was in the hands of the prosecution." In *United States v. Gaggi*, 811 F.2d 47, 59 (2nd Cir.), *cert. denied*, 482 U.S. 929

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[3] Just as the defense in *Giles* was entitled to evidence of the prosecutrix's prior sexual mishaps which were "directly related" to prove what Giles himself already knew (which was that the prosecutrix had consented to having sex with Giles), so was Ms. Owens entitled to evidence of her husband's extra-marital affairs because it was the "best evidence" and directly relevant to "corroborate the existence of her husband's affair." BIO at 28-29.

(1987), the appellant, who received before trial copies of all of the relevant witness statements, should have been able to draw his own conclusions regarding whether his testimony was perjured. In *United States v. Clark*, 928 F.2d 733, 735 (6th Cir.), *cert. denied*, 502 U.S. 846 (1991), the evidence in question was disclosed at a prior detention hearing, and as a result, defendant had knowledge of that evidence. In *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) and *Lugo v. Munoz*, 682 F.2d 7, 9-10 (1st Cir. 1982), the evidence allegedly withheld was a matter of public record. In *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977), the Fifth Circuit found that the allegedly withheld evidence had been mailed to the defendant. In *State v. Hobley*, 752 So.2d 771, 785-786 (La. 1999), *cert. denied*, 531 U.S. 839 (2000), the allegedly withheld treatment records from the mental health clinic were not suppressed by the State because the defendant could have requested them from the clinic himself. Finally, in *State v. Bisner*, 37 P.3d 1073, 1083 (Utah 2001), the court found that "the defense knew days before trial about the State's alleged agreement to reduce the jail sentence and fine imposed in Lyman's unrelated misdemeanor in exchange for his testimony in Bisner's trial. *Id.* These are not cases in which a defendant believes something is true and the State has evidence of its truth but does not disclose it.

III. Respondent Misconstrues The Obligation Of A Reviewing Court To Consider The Suppressed Evidence In Light Of The Record As A Whole And How Its Suppression Affected Defense Preparation

Respondent states that the Sixth Circuit performed a proper *Brady* analysis, including a "review[ ] [of] the state trial evidence, including the sentencing hearing" and also "a review[ ] [of] the evidence offered in support of the *Brady* claim at the state post-conviction proceeding." BIO at 22. Respondent, and the panel majority, imply that a simple review of the evidence that was presented at trial, along with a review of the evidence presented to support the *Brady* claim in post-conviction, without any consideration of how the *Brady* evidence would have changed the way the case was investigated or presented to the jury, satisfies the prejudice inquiry under *Brady*.

In fact, a reviewing court must determine whether that evidence would have (1) strengthened the defense theory, or (2) made that theory more believable to a jury (*Kyles*, 514 U.S. at 449, n.19), or (3) changed the actual defense "investigation, defense, or trial strategies." *United States v. Bagley*, 539 U.S. 510, 682, 105 S.Ct. 3375, 3391 (1985). Thus in *Kyles*, this Court granted relief finding that "because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.*, 514 U.S. at 429.

Had the sentencers heard or read the victim's actual words, had Ms. Owens been allowed to prepare after being provided the truth, and had the District Attorney not been able to get away with referring to the victim as "innocent" and Ms. Owens as "a desperate woman" whose decisions were not propelled by "anyone else's actions," there is a reasonable probability the result in this case would have been different. As *amicus curiae* notes, this non-disclosure was "pernicious" and "tainted the entire pre-trial and trial proceedings." Brief of Amicus Curiae, National Clearinghouse for the Defense of Battered Women, at 4. Even "without adverting to the multitude of issues arising from battering and its effects, it is at once obvious that Ms. Owens' trial would have been remarkably different had the prosecution disclosed the evidence." *Id.*

As things stood at trial, though, all that Ms. Owens *knew* was that she believed that her husband had been cheating on her with Gala Scott. CA6 J.A. 101, 275. Ms. Owens had no evidence of Ron Owens's affairs and could not testify about the nature of Ron Owens's relationship with Gala Scott or any other woman for that matter – which is why counsel made the *Brady* request. CA6 J.A. 100 ("counsel . . . has good reason to believe that the deceased husband of the defendant had numerous girlfriends, extra martial sexual affairs . . . "). Had Ms. Owens testified, as Respondent suggests she should have, she would have been viciously cross-examined by the experienced Assistant District Attorney General

(ADAG) Strother.[4] ADAG Strother would have pressed Ms. Owens for her "proof" that her husband had an affair and painted her as a self-serving liar. Moreover, calling Gala Scott to testify without any way to prove the affair or to impeach her testimony and without knowledge that Ms. Scott had admitted the affair to police, would also have been completely discredited. Just as in *Kyles*, "exposure to [Gala Scott's] own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack." *Id.*, 514 U.S. at 449, n.19.

IV. Respondent's Alternative Position That The Sexually Explicit And Lurid Letters Were Not Favorable Is Unsupportable

Respondents argue in the alternative that the explicit sex letters were not favorable to Ms. Owens because they would have given Ms. Owens a motive for the murder. True, they provide a motive; but not for insurance money, which was the State's theory.

The fact that the letters provide a motive is exactly why they are favorable. Even the panel

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[4] It was well-known that ADAG Strother was very skilled on cross-examination and in argument. In fact, in *Bell v. Cone*, 535 U.S. 685, 721 (2002), also a Shelby County case that ADAG Strother prosecuted, this Court recognized that "defense counsel waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal." *Id.*

majority recognized that there is a "common sense" belief in our society that a spouse who causes the death of her adulterous spouse is less culpable than other murderers. Pet. App. 36. Respondent's argument would be more plausible if this were a *Brady* claim directed at guilt/innocence. But it is not. Ms. Owens's claim is that there is a reasonable probability that at least one juror would have voted for a life sentence if Ms. Owens had been allowed to prepare for sentencing with knowledge of the letters and had the jurors heard the truth.

CONCLUSION

This Court should grant the petition for writ of certiorari and either (1) vacate the judgment and remand for further proceedings; or (2) reverse the judgment below.

Respectfully submitted,

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