No. 09-09-130

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET
QUESTIONS PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the state may not in a criminal case suppress favorable or exculpatory evidence that is "material" in that, but for its suppression, there is a reasonable probability that the result at sentencing would have been different. *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009). This case presents the following *Brady* questions:

1. When a federal court has found that the state suppressed exculpatory evidence (here, explicit handwritten evidence of the deceased husband's extra-marital sexual trysts) that could mitigate punishment in a domestic homicide case, may the federal court nevertheless find the suppressed evidence not "material" because the defendant suspected or had some knowledge of the deceased's philandering?

2. Does the Sixth Circuit panel majority's *Brady* rule, *i.e.*, that if a defendant has knowledge (or a suspicion) of any fact, she is not entitled to exculpatory, documentary evidence regarding that fact, directly conflict with this Court's black-letter law on materiality set forth in *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009) (reversing Sixth Circuit) and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gaile Owens respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The divided opinion of the Sixth Circuit Court of Appeals (Pet. App. 1-72) is reported at 549 F.3d 399. The opinion of the Sixth Circuit Court of Appeals denying rehearing *en banc* (Pet. App. 212-213) is unreported. The memorandum order of the district court (Pet. App. 73-197) is unreported. The order denying Ms. Owens's Motion to Alter or Amend (Pet. App. 198-211) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on December 9, 2008. Pet. App. 1-72. The order denying Petitioner's timely petition for rehearing *en banc* was entered on February 25, 2009. Pet. App. 212-213. Justice Stevens granted Ms. Owens's application for an extension of time to file a petition for writ of certiorari until July 25, 2009, a Saturday. The petition is accordingly due on the next business day, July 27, 2009. *See* S. Ct. R. 30. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Section 2254 of Title 28 of the United States Code states in relevant part:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Procedural History

Gaile Owens was convicted of accessory before the fact to first degree murder and was sentenced to death in Memphis, Tennessee, on January 15, 1986. The Tennessee Supreme Court affirmed. *State v. Porterfield and Owens*, 746 S.W.2d 441 (Tenn. 1988). She sought post-conviction relief in state court, the denial of which was affirmed. *Owens v. State,* 13 S.W.3d 742 (Tenn. Crim. App. 1999).

Petitioner sought habeas corpus relief in the United States District Court for the Western District of Tennessee, which was denied. Pet. App. 73-197. The United States Court of Appeals for the Sixth Circuit affirmed in a split decision. Pet. App. 1-72.

B. Facts Relevant to Question Presented

1. It Is Taken as a Given that the Very Same Prosecutor Who Withheld Exculpatory Evidence in *Cone v. Bell*, 129 S.Ct. 1769 (2009), Also Withheld Exculpatory Evidence (of the Victim's Infidelity) in This Case[1]

Gaile Owens hired Sidney Porterfield to kill her husband, Ron Owens. When she was arrested for this

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[1] Shelby County Assistant District Attorney General (ADAG) Don Strother withheld exculpatory evidence in Gary Cone's case and in Petitioner's case. *See Cone*, ___ U.S. ___, 129 S.Ct. 1769; *Bell v. Cone*, 2002 WL433359, United States Supreme Court Briefs, Reply Brief of Petitioner, p. *15.

crime, she told the police that her husband had long been cruel to her and that they had a bad marriage. Pet. App. 23. She also believed that her husband had had multiple affairs during their marriage and, shortly before the crime, she caught him in a compromised position with his associate Gayla Scott, who Gaile Owens thought (correctly, as it turns out) was one of his lovers. After years of "[Ron] Owens's cruel and sadistic behavior toward" her,[2] and shortly after Ron's parking lot tryst with Scott, Ms. Owens committed her crime. No evidence about Ron Owens's behavior was introduced at the guilt/innocence phase or at sentencing. Ms. Owens was convicted and sentenced to death, and that judgment was affirmed on appeal. *Owens*, 746 S.W.2d 441.[3]

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[2] Pet. App. 55 (Merritt, J., dissenting). During a pre-trial competency evaluation, Ms. Owens reported that her marriage had been especially unhappy because her husband was verbally abusive, humiliated her sexually, and carried on extramarital affairs. CA6 J.A. 275. Defense counsel advised the court before trial that in his opinion "This case has a meritorious defense in the battered-wife syndrome." CA6 J.A. 120.

[3] Before trial, ADAG Strother offered Ms. Owens and Mr. Porterfield a plea agreement. The offer, which had been approved by the decedent's father, required both Ms. Owens and Mr. Porterfield (who Ms. Owens barely knew) to plead guilty to first degree murder in exchange for a sentence of life in prison. CA6 J.A. 137. Ms. Owens accepted the offer. CA6 J.A. 134. Mr. Porterfield refused. CA6 J.A. 137. As a result, ADAG Strother withdrew the offer. *Id.*

a. Graphic ("Flufflicker"), Handwritten, Explicit, Exculpatory Letters, Proving the Victim's Affairs, Were Suppressed at Trial and, If the Prosecutor Was Telling the Truth, Never Existed

When police searched the victim's home and office, they found

> sexually explicit letters between Mr. Owens and one of his girlfriends, Gayla Scott. In the love letters, the two called each other "flufflicker" and "lollipop," a clear reference to numerous sexual experiences between [Ron] Owens and Gayla Scott.[4]

This is the same Gayla Scott from the parking lot tryst. These love/sex letters, and a police report about them, were not disclosed to defense counsel at trial, despite a specific defense request.

Given the "longstanding, commonsense belief in our culture that people who kill their spouses because of infidelity are not as culpable as other murderers,"[5] defense counsel at trial asked whether the state had collected any evidence of the victim's infidelity. CA6 J.A. 101-102. Counsel wrote that there was "good reason to believe that the deceased husband of the defendant had numerous girlfriends" which he "flaunted . . . with such regularity and in such ways as to contribute to [Ms. Owens's] state of mind" and

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[4] Pet. App. 56-57 (Merritt, J., dissenting).

[5] Pet. App. 36 (Majority Opinion).

that "proof of such is material to issues of guilt and punishment." Counsel averred 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**. . . . Counsel believes that at the house or office were found numerous items that would verify the above allegations including, but not limited to, names, addresses, **correspondence to and from "lovers"** which would be of great benefit to the defense.

Id. (emphasis added).

The trial court held a hearing on the motion. ADAG Strother avowed to the trial court that "**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**." CA6 J.A. 111 (emphasis added). When defense counsel continued to press on the existence of sexually explicit letters, ADAG Strother reiterated to the trial court that the State had complied with its obligations under *Brady*:

> 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.

CA6 J.A. 115-A (emphasis added). Ms. Owens's counsel replied, "Well I certainly accept that. I've got no reason not to." *Id.* When counsel then asked if ADAG Strother could produce an inventory of the items seized, the trial court asked, "Do you have an inventory of the office, Mr. Strother?" *id.*, and ADAG Strother replied, "Not that I am aware of, Your Honor." *Id.*[6]

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[6] The State's theory was that Ms. Owens killed her husband for insurance money. There was literally no evidence to support that theory. In closing argument, the prosecutor stated:

> If it takes the execution of ten Sidney Porterfields [sic] and Marsha Gaile Owens [sic], who would cooly and deliberately plot and design the death of a Ronald Owens . . . if it takes ten of their deaths in the electric chair to make only one potential Sidney Porterfield or Marsha Gaile Owens say, "No, I will not kill that **innocent man**, because I might get electricuted [sic] for it," it's worth it.

T. Tr. 1941-1942, CA6 J.A. 165 (emphasis added). Because the State suppressed evidence, the sentencers never heard that Mr. Owens was not, in fact, an entirely innocent man, that Ms. Owens was humiliated by, and ashamed of, her husband's infidelity, and that it was her husband's ribald philandering, and not some phantom life insurance policy, that motivated Ms. Owens.

b. The Existence of the Exculpatory Love/ Sex Letters and a Police Report Was Revealed to Defense Counsel During State Post-conviction Proceedings

During post-conviction proceedings, and pursuant to Tennessee Public Records Act requests,[7] a police report detailing the search of Ron Owens's home and office, and the discovery of the sexually explicit love letters, was finally disclosed. The letters were "juvenilistic love notes" in which, again, the two referred to each other by their pet names, "Fluff," "Flufflicker," and "Lollipop." CA6 J.A. 412. The police report revealed that when police confronted Ms. Scott about the notes and letters she admitted the affair, but claimed it had ended years earlier. CA6 J.A. 263.

Detective Wray testified during the state post-conviction proceedings that thereafter, and prior to trial, Ms. Scott asked that the love/sex letters be returned to her. Detective Wray told the post-conviction court that he telephoned one of the lawyers for the State to get permission to give the love/sex letters back to Ms. Scott. While Detective Wray was not sure which prosecuting attorney he talked to, he was clear that it was one of the prosecutors involved in the Gaile

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[7] The letters could not have been discovered at trial through a public records act request. *See Capital Case Resource Center, Inc. v. Woodall*, 1992 WL12217 (Tenn. App. 1992) (establishing access to police and prosecution files in state post-conviction); Tenn.R.Crim.P. 16(n)(2) (police files are not subject to disclosure in pre-trial discovery).

Owens case: "To the best of my memory it was General Strother. It may have been a city prosecutor, George McCrary. Or it could have been Mr. Challen, I believe was involved in the – I'm sorry. I just don't remember who it was." CA6 J.A. 413. Detective Wray was clear that either ADAG Strother, ADAG Challen, or City Attorney McCrary told him that *the love/sex letters were not relevant to the case* and to give them back to Ms. Scott. CA6 J.A. 412. Detective Wray complied.

c. The State Post-conviction Courts Held the Love/Sex Letters Were Not Suppressed and Were Not Exculpatory

In her state post-conviction petition, Ms. Owens alleged that her rights under *Brady* were violated *vis-a-vis* her capital sentence.[8] Ms. Owens argued that the report and sexually explicit letters were mitigating evidence because people who commit murder because of a spouse's infidelity are generally believed to be less culpable than many others who commit murder. The post-conviction court denied relief finding first that the State did not suppress the evidence because it was not in the possession of the State's attorneys and second that Ms. Owens was not

[8] Ms. Owens did not challenge her conviction for accessory before the fact to first degree murder in state post-conviction or in federal habeas proceedings.

prejudiced because she knew of her husband's affair with Gayla Scott. CA6 J.A. 246.

On appeal, the Tennessee Court of Criminal Appeals first wrote that because Ms. Owens knew about or suspected that her husband was having an affair, and because her attorneys filed a motion seeking exculpatory evidence of affairs, the State had no "duty" to provide the sexually explicit letters. *Owens,* 13 S.W.3d at 758 ("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."). The Court also wrote that the explicit letters were not exculpatory because "this evidence may have provided the appellant with a motive to kill her husband." *Owens*, 13 S.W.3d at 758-759.

d. The Circuit Court Judges Agreed that The Sexually Explicit Love Letters Should Have Been Disclosed

Petitioner filed a federal habeas corpus petition that included this *Brady* claim. CA6 J.A. 30-31. The district court dismissed Ms. Owens's *Brady* claim, finding that Ms. Owens was not prejudiced by the State's withholding of the love letters because she could have called Gayla Scott to testify. Pet. App. 135.

The Circuit Court affirmed in a 2-1 decision. The lower court majority described the three components of a *Brady* claim, *i.e.*, the evidence at issue must be

favorable to the accused, it must have been suppressed by the state, and prejudice must have ensued. Pet. App. 34. Prejudice is shown when there is "a reasonable probability that there would have been a different result had the evidence been disclosed." *Id.*

The majority agreed that the love/sex letters were covered by *Brady* and should have been disclosed to the defense:

> When Owens filed her request, the prosecution told the court that it had turned over "everything we have in the way of physical evidence." While this may have been technically true because the prosecutors never handled the letters, it was not true for purposes of *Brady*. *Brady*'s disclosure requirement includes not just information in the prosecutor's files, but "information in the possession of the law enforcement agency investigating the offense." *Jamison v. Collins*, 291 F.3d 380, 395 (6th Cir. 2002). These letters were at one time in police possession, but whether by accident or on purpose, those letters were never shown to Owens.

Pet. App. 35-36.[9] The majority found that the State court's conclusion that the letters "were not favorable evidence . . . is questionable," and then "assum[ed] that the letters contained favorable information and

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[9] The majority "assume[d] that the police still had the letters when Owens filed her [*Brady*] request." Pet. App. 38, n. 7.

reject[ed] her claim on the ground that she suffered no prejudice." Pet. App. 36-37.

2. The Panel Below Split on *Brady* Materiality

a. The Majority Rule on *Brady* Materiality: When a Defendant Could Have Offered Other Evidence in Support of a Fact or Defense at Trial, It Cannot Be Prejudicial for the State to Have Withheld Additional Evidence, Even if the Withheld Evidence Is Stronger Evidence of that Fact or Defense

The lower court majority did not analyze the record in this case and determine what effect, if any, the suppressed evidence might have had if it had been disclosed. Instead, the majority pointed to *other* evidence that Owens could have presented to show her husband was a philanderer.

> Owens knew that Ronald was having an affair with Scott. Her brief attempts to transmute that "knowledge" into a mere "suspicion." (Petr.'s Br. At 66). This is a futile task, because her own habeas petition admits that "she [Owens] received an [anonymous] letter made up of words cut out of a magazine telling her that everyone but Ms. Owens knew that Mr. Owens was having an affair with Ms. Scott." The petition also relates an incident where Owens caught Scott and Ronald together in a parking lot, and Ronald reacted in a hostile manner when

> so confronted. Owens's petition also claims that this very incident of catching them together prompted Owens to hire the hit-man. Owens knew of the affair, and if she wanted to present evidence of the affair, she could have testified, produced the anonymous letter, or subpoenaed Scott.

Pet. App. 37-38. Without comparing the probative value of the suppressed graphic love letters with the probative value of the "proof" that was "available elsewhere" (*i.e.*, Ms. Owens's own testimony about witnessing the parking lot tryst), the majority simply wrote: "she . . . loses." Pet. App. 38.[10]

b. The Dissent: "The majority's proposed rule is nonsense."

Judge Merritt dissented. He agreed that there was suppression of exculpatory evidence and further noted that ADAG Strother's misrepresentations and "falsehoods" were "typical of the conduct of the Memphis district attorney's office during this period. *See Cone v. Bell*, 492 F.3d 743, 759 (6th Cir. 2007) (Merritt, J., dissenting), *cert. granted*, ___ U.S. ___,

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[10] After rejecting the state court's finding on the first two elements of a *Brady* claim (*i.e.*, after finding that the evidence *was* suppressed and *was* exculpatory), and having denied relief on a wholly different basis than the state court had, the panel majority inexplicably wrote that it was bound by "AEDPA deference" under 28 U.S.C. § 2254(d)(1). "Perhaps we would have ruled differently on Owens's *Brady* claim if we were the state court, but we are not the state court." Pet. App. 40.

128 S.Ct 2961, 171 L.Ed2d 883, 76 U.S.L.W. 3484 (2008)." Pet. App. 57.[11]

With respect to materiality and prejudice, Judge Merritt observed that "[m]y colleagues state their proposed rule as follows: 'Owens knew of the affair, and if she wanted to present evidence of the affair, she could have testified . . . She loses because the proof she needed was available elsewhere.'" Pet. App. 58. Judge Merritt dismissed this rule out-of-hand: "The majority's proposed rule is nonsense." *Id.*

Judge Merritt observed that the majority rule was directly contrary to *Brady, i.e.*: "if a defendant has knowledge of any fact, or a reasonable suspicion of a fact, the defendant is not entitled to exculpatory evidence regarding that fact because she could testify regarding that fact herself." Pet. App. 57-58. Judge Merritt explained that taken to its logical conclusion, Mr. Brady himself would have lost – "Brady had knowledge that he did not kill the victim, but had no documentary evidence to support that knowledge or to support his view of the identity of the real culprit." Pet. App. 58. Judge Merritt wrote that "according to the rule announced by my colleagues, Brady should have taken the stand and testified about his

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[11] As this Court is aware, Judge Merritt's dissenting view of the *Brady* claim in *Cone v. Bell* was ultimately validated by this Court's decision. *See Cone*, 129 S.Ct. at 1784 ("In sum, both the quantity and the quality of the suppressed evidence lends support to Cone's position . . . that the State's arguments to the contrary were false and misleading.").

knowledge or put the real culprit on the stand and examined him. This argument is directly contrary to *Brady*." *Id.*

Judge Merritt concluded that the "blatant prosecutorial misconduct" was material and prejudicial:

> The prosecution offered Owens life imprisonment (conditioned on the guilty plea of her confederate) because the killing under these mitigating circumstances – circumstances the jury never heard about at all – made her less culpable. The jury never heard the evidence in the hand of the prosecution that made her less culpable because the prosecution consciously and deliberately covered it up. And now my colleagues say, "fine, no problem, she should have taken the stand."
>
> Rather than tell the jury the truth about the matter, the prosecution told the jury that she killed her husband to get "insurance money."

Pet. App. 58-59.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S "NONSENSE" RULE OF MATERIALITY IS SQUARELY AT ODDS WITH THIS COURT'S NATIONAL RULES UNDER *BRADY V. MARYLAND*, *KYLES V. WHITLEY*, AND *CONE V. BELL*

When the State "withholds from a criminal defendant evidence that is material to [her] guilt or

punishment, it violates [her] right to due process of law in violation of the Fourteenth Amendment." *Cone*, 129 S.Ct. at 1782. A *Brady* violation occurs when (1) favorable evidence (2) is suppressed which (3) is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963). Evidence is material if there is a reasonable probability that the result at guilt/innocence or sentencing would have been different absent its suppression. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (1985).

Mr. Cone would have lost in this Court last Term under the "nonsense"[12] majority decision applied in this case. Petitioner asks that this Court grant the petition and either summarily reverse the lower court majority or set the case for briefing and argument.

A. Contrary to This Court's Rulings, the Lower Court Majority, as a Matter of Law, Eschewed an Examination of the Existing Record and the Impact of Suppression on That Record

This case presents a lower court's majority opinion at odds with this Court's materiality test for *Brady* violations.[13] As this Court reiterated in *Cone* and explained in *Bagley*:

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[12] As Judge Merritt wrote in the dissent below, "The majority's proposed rule is nonsense." Pet. App. 58.

[13] The lower court majority did not dispute that the first two elements of a *Brady* violation – suppression, and favorable

(Continued on following page)

> evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. 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 Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383. To assess materiality, a court must examine the suppressed evidence and meticulously compare it to the trial evidence from the standpoint of relative persuasive impact. *Kyles v. Whitley*, 514 U.S. 419, 441-454, 115 S.Ct. 1555, 1569 (1995).

In Petitioner's case, rather than "review[ing] the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial,"

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evidence – were plainly established by the record. The police report and sexually explicit love letters withheld by the State here were unquestionably favorable because they provided Ms. Owens with a motive that minimized her culpability based upon the "longstanding commonsense belief in our culture that people who kill their spouses because of infidelity are not as morally culpable as other murderers." Pet. App. 36. In the face of a direct and explicit request for love letters, ADAG Strother stood in open court and claimed that he had disclosed absolutely "everything which we have seized" – "every single scintilla." CA6 J.A. 111. Then, this same ADAG capitalized on the suppression of the evidence by arguing to the jury that Ms. Owens's only motive was to collect insurance money because she was "just plain no-good" and had an "innocent man" killed. Tr. 1941, CA6 J.A. 165.

Kyles, 514 U.S. at 455 (Stevens, J., joined by Ginsburg, J., and Breyer, J., concurring), the majority below ignored what happened at trial and instead focused not on what Petitioner purportedly *could* have done at trial, but upon what she supposedly chose *not* to do.[14] The proper focus is on *what happened* at trial, given the suppression, *and what could have happened*, without the suppression. The defense presented no evidence of the victim's infidelity at trial or sentencing. Ms. Owens believed that her husband was unfaithful. Defense counsel asked for any proof the State had of infidelity and were told there was none.[15]

Flufflicker. Lollipop. What would the defense have done with this proof? What would the sentencers have thought if they learned that the defendant had her husband killed and that her husband had been having oral sex with Ms. Scott? Rather than

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[14] For example, the panel majority found that the State's deliberate suppression of favorable evidence was not material because (1) Gaile Owens could have testified that she suspected Ron was cheating on her; (2) Ms. Owens could have produced the "anonymous letter" constructed from pieces of newspaper telling her that Ron Owens was sleeping with Gayla Scott; or (3) Ms. Owens could have subpoenaed Gayla Scott to testify about the affair. Petitioner discusses in sub-section C, *infra*, how out-of-touch with actual trial practice these alternatives are.

[15] State representations have consequences. "In reliance on this misleading representation [about the non-existence of evidence], the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise might have pursued." *Bagley*, 373 U.S. at 682, 105 S.Ct. at 3391.

being a greedy, no-good, insurance proceeds-seeker, who killed an "innocent" man "in the prime of his life," as the prosecutor was able to argue, Ms. Owens could have been accurately viewed as a classic, jealous, long-suffering wife betrayed and humiliated by her husband, the "Flufflicker." CA6 J.A. 165, 412. There is a reasonable probability that just one juror would find in this ribald philandering a basis for a sentence less than death. *See Wiggins v. Smith*, 539 U.S. 510, 537, 123 S.Ct. 2527, 2543 (2003) ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); Tenn. Code Ann. § 39-2-203(h) (Michie 1982) (one juror's vote for life results in a life sentence).

Letters in hand, the penalty phase defense could have been markedly different and the State would have been deprived of its "insurance money" theory. No longer able to contend that Mr. Owens was an "innocent man," the State would have had to concede that Mr. Owens had been a philanderer. Armed with the letters, the defense could have been emboldened to call Ms. Scott as a witness. Had Ms. Owens chosen to testify, she would have been insulated on cross-examination because she would have had powerfully persuasive proof that her husband was cheating on her and rubbing her nose in it.

Not only did the State deprive Ms. Owens of the best evidence of her husband's misbehavior, they affirmatively misled her lawyers about whether or

not the affair even happened. The lawyers filed their discovery request for the letters based on what they had heard had been recovered. When ADAG Strother stridently denied that such evidence had ever been seized, the lawyers were left to conclude that the rumors of the affair were just that – rumors. The letters were the best evidence of the affair and could have been introduced in mitigation on their own. *See* Tenn. Code Ann. § 39-2-203(c) (Michie 1982) (**any** evidence tending to establish a mitigating factor admissible).

B. The Lower Court Majority's Rule that "*Brady* does not apply when the information is available from another source," Is an Unprecedented and Indefensible Curtailment of *Brady*

Kyles and *Cone* reject the lower court's legal analysis. In *Kyles*, this Court found a *Brady* violation even though Kyles's attorneys had knowledge of the withheld information at the time of trial, and **it was available from another source**. This Court explained that, even though the *information* was available from another source, Kyles's due process rights were still violated because the *withheld evidence* at issue would (1) have strengthened the defense theory, and (2) made that theory more believable to a jury. *Kyles*, 514 U.S. at 449, n. 19. This Court found "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. Here, "exposure to [Gayla 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. The fact that in *Kyles* "information . . . [supporting a defense theory was] available from another source" did not preclude the finding of a *Brady* violation. Rather, it was because prosecutors withheld evidence which would have powerfully bolstered the "information . . . available from another source" and supported Kyles's defense theory that this Court found a *Brady* violation.

And, in *Cone*, the defendant presented an insanity defense based in part on evidence that he was a drug user, having become hooked on drugs while serving his country in Vietnam. Cone presented voluminous testimony to support his insanity defense, but the State (ADAG Strother in fact) withheld evidence which would have bolstered the defense. This Court found that the withheld evidence relating to Mr. Cone's drug use "strengthened the inference that Cone was impaired by his use of drugs around the time the crime was committed," *Cone*, 129 S.Ct. at 1783, even though Cone knew he was a drug addict.

Quite a contrary conclusion would have been reached in *Cone* were the *Owens* Sixth Circuit panel majority in charge. According to the panel majority's rationale, Gary Cone would not be entitled to any evidence relating to his drug use because he knew he was a drug user and could have testified himself about his drug use. However, as this Court

recognized, Mr. Cone's own statements about his drug use would not be as persuasive as the reports of independent witnesses who verified that Mr. Cone appeared to be on drugs at the time of the crime. As a result, this Court remanded Mr. Cone's case to the district court for a determination of materiality as to sentence because it found that "both the quantity and the quality of the suppressed evidence lends support to Cone's position at trial that he habitually used excessive amounts of drugs, that his addiction affected his behavior during his crime spree, and that the State's arguments to the contrary were false and misleading." *Cone*, 129 S.Ct. at 1784.

The State's deliberate withholding from Gaile Owens is indistinguishable from that in *Kyles* and *Cone*. Capital and other defendants in the Sixth Circuit are treated differently than defendants throughout the country on this crucial issue. Petitioner asks this Court to again, as it had to do in *Cone*, reverse the Sixth Circuit's purported application of *Brady*.[16]

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[16] The lower court majority found that the state court's ruling on this *Brady* claim was dubious to the degree that the state courts found that the love letters and police report were not exculpatory. Petitioner agrees, and contends that the state court's findings that the letters and report were not favorable to the defense were contrary to and an unreasonable application of *Brady* (*see* 28 U.S.C. § 2254 (d)), as discussed in text above. The state court also held that there was no *Brady* violation because the defense already knew of the victim's affairs and so there was no state obligation to disclose "Flufflicker." *Owens*, 13 S.W.3d at 758. Petitioner contends that this state court finding is also

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C. The Lower Court's Majority Holding Is at Odds With the Reality of Criminal Trials

The panel majority found that the State's deliberate suppression of favorable evidence was not material because (1) Gaile Owens could have testified that she suspected Ron was cheating on her; (2) Ms. Owens could have produced an "anonymous letter" constructed from pieces of newspaper telling her that Ron Owens was sleeping with Gayla Scott; or (3) Ms. Owens could have subpoenaed Gayla Scott to testify about the affair. These suggestions have no grounding in the reality of criminal trials.

First, the Fifth Amendment protects criminal defendants from being forced to testify. A criminal defendant cannot be forced to abandon his or her constitutional rights under the Fifth Amendment and thereby relieve the State from its due process obligations.[17] Moreover, the experienced prosecutor

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contrary to and an unreasonable application of *Brady,* as discussed in text above.

In addition, because the lower court found (or should have found) that the state court decision did not present a limitation on granting federal habeas corpus relief, *de novo* review of Petitioner's claim is required. Under *de novo* review, "[p]erhaps we would have ruled differently on Owens's *Brady* claim if we were the state court, but we are not the state court." Pet. App. 40.

[17] As Judge Merritt explained, under the majority's rationale: "Brady [himself] was not entitled to documentary evidence in the hands of the prosecution that would support any knowledge Brady already had," and instead "Brady should have taken

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during cross-examination could simply say "where's the proof?"

Second, the panel majority ignores the fact that the withheld, explicit, sex-laced love letters and police report would have blunted any State effort to challenge at trial a defense assertion of the deceased's philandering ways and its impact on Petitioner's mental state. Other proof – (1) the anonymous letter, (2) testimony by Ms. Owens that she believed her husband was having an affair, or (3) putting Gayla Scott ("Fluff") on the stand without any way to prove the affair or to impeach her testimony (and without any knowledge that Ms. Scott had admitted the affair to police)[18] (Pet. App. 37-38) – pales by comparison to "*Flufflicker*."

Just as in *Kyles*, "exposure to [Gayla 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. And as this Court has recently reiterated in *Cone*, "[T]he documents suppressed by the State vary in kind, but they share a common feature: Each **strengthens** the inference that [Gaile Owens was motivated to hire someone to

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the stand and testified about his knowledge or put the real culprit on the stand." Pet. App. 58.

[18] It bears remembering that Ms. Scott requested, and received, the return of the love letters, at least intimating her desire to hide her relationship with Ron Owens.

kill her husband not because of a life insurance policy but because of her husband's infidelity]." *Id.*, 129 S.Ct. at 1783.

As Judge Merritt points out, the State knew that this case was mitigated by Ron Owens's flagrant infidelity. Pet. App. 58. That is why they offered Ms. Owens a sentence of life in prison. This Court should grant certiorari to enforce the clear principles of *Brady, Kyles,* and *Cone* which have been eviscerated by the Sixth Circuit panel majority in this case. The lower court majority conflicts with the decisions from this Court, and its decision brings the relevant Supreme Court precedents into confusing collision with one another.

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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