No.

In the Supreme Court of the United States

MARY WILKERSON - PETITIONER

v.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI OF MARY WILKERSON,
In Forma Pauperis

Thomas G. Ledford
Counsel for Mary Wilkerson, In Forma Pauperis
The Ledford Law Firm, LLC
P.O. Box 287
Albany, Georgia 31702
State Bar No.: 443087
Phone: (229) 431-2310
Fax: (229) 431-2305
E-mail: tom@theledfordlaw.com

I.

QUESTIONS PRESENTED

1. Whether, under Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley 514 U.S. 419 (1995) the Courts may consider information that arises after Trial in determining the materiality of suppression.
2. Whether, under Brady v. Maryland, 373 U.S. 83 (1963) the prosecution's deliberate suppression of information and exculpatory evidence denied the Petitioner due process rights under *Brady* and *Kyles* and effectiveness of Counsel in providing a Defense and constituted Prosecutorial Misconduct.
3. Whether the Federal Rule of Evidence 606(b) permits the Petitioner moving for a new Trial based on juror dishonesty during Voir Dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

II.

PARTIES TO THE PROCEEDING

Petitioner, Mary Wilkerson. Ms. Wilkerson is petitioning this Court separately from her Co-Defendants for a Writ of Certiorari to review the Judgment of the Eleventh Circuit Court of Appeals in this case, In Forma Pauperis.

The United State of America is the Respondent.

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Mary Wilkerson respectfully petitions for a Writ of Certiorari to review the Judgment of the Eleventh Circuit Court of Appeals in this case. Mary Wilkerson was represented in the Middle District Court of Georgia - U. S. District Court and in the Eleventh Circuit Court of Appeals by a CJA Appointed attorney, Thomas G. Ledford, pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is unreported (App. A, 1a). The Order of the Eleventh Circuit Court of Appeals denying en banc and division rehearing is unreported (App. B, 24a).

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals was entered on January 23, 2018. (App. A, 1a) A Petition for Panel and Rehearing En Banc was denied on June 11, 2018. (App. B, 24a) The Judgment Order of the U. S. District Court was entered on September 30, 2015 (App. C, 25a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257. This Petition is being filed within 90 days of the judgment below, specifically on June 11, 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

"…No person shall be … deprived of life, liberty, or property, without due process of law,…"

The Sixth Amendment to the United States Constitution provides in relevant part that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

"...nor shall any State deprive any person of life, liberty, or property, without the due process of law….".

Federal Rule of Criminal Procedure 16 provides in relevant part that:
Government's Disclosure:

1. *Information Subject to Disclosure*

(A) *Defendant's Oral Statement*. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement*. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(E) *Documents and Objects*. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;
(ii) the government intends to use the item in its case-in-chief at trial; or
(iii) the item was obtained from or belongs to the defendant.

Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and
(2) the other party previously requested, or the court ordered, its production.

STATEMENT

This case involves the withholding of evidence by the use of a relatively novel concept of an electronic data dump of non-relevant discovery which was imbedded with the exculpatory evidence and relevant evidence in inaccessible discovery since the Government did not provide the required databases for the production to be searched in a forensic search software program. The Government's discovery had its databases created for quick and easy searching in the search software versus the Petitioner's required scrolling page by page due to a lack of databases. This prevented Wilkerson from finding the exculpatory and relevant evidence timely for use at Trial and impeachment of Government witnesses. The Petitioner had a CJA Panel attorney with a small staff of one paralegal with limited access to a court approved computer technician, none of whom had specialized training or experience in forensic search software. They could not determine why the discovery was not searchable until well into Trial and the indigent defendant could not afford the experts to disseminate the estimated eight to 15 million or more pages of Discovery nor locate the approximate 900 pages of documents tendered by the Government for

Trial. The Government provided the raw and unprocessed discovery to the Petitioner leading the Petitioner on a wild goose chase with no hope of ever finding any exculpatory or relevant evidence within the millions of pages of documents in time for use at Trial. In essence, the Government did not provide the Discovery in the format which could be searched by any effective means but instead provided unaccessible and unformatted documents which had no databases, and, therefore, the Discovery required a manual page by page scrolling to read millions of pages, page by page, which prohibited the Petitioner from successfully searching and accessing the suppressed relevant evidence and exculpatory evidence for use at Trial. Brady v. Maryland, 373 U.S. 83 (1963). Kyles v. Whitley, 514 U.S. 419 (1995), Strickler v. Greene, 527 U.S. 263 (1999). Fed. R. Crim. Proc. 16.

A. Background and Trial Proceedings

The Petitioner was originally indicted on February 25, 2013 for two counts of Obstruction of Justice in a 76 Count Indictment. (App. D – 30a). Mary Wilkerson was charged with two counts of Obstruction of Justice, 18 U.S.C. § 1505, Count No. 73 and Count No. 76 in the Indictment, each of which Count carried a fine and/or a sentence of up to five years imprisonment. The Appellant Wilkerson pled Not Guilty to both Counts and filed a Motion to Sever (App. E – 82a) since she was not a part of any alleged conspiracy and maintained her innocence on both Counts. The Appellant jointly filed a Pre-Trial Motion to Dismiss Due to Post-*Stevens* Discovery

Abuses with Co-Appellants (App. F – 91a) showing the case had been "…inalterably compromised by systematic discovery abuses….", and a Memorandum in Support of Joint Motion was filed, (App. G – 139a). although the Court denied the Motion. (App. H – 142a). The Trial of the three Defendants, including Mary Wilkerson, was designated a complex case by the Court and began on July 28, 2014 and ended 35 days later on September 19, 2014. (App. I- 145a) After the conclusion of Closing Arguments and giving of the jury charges, the jury retired to deliberate the case on September 12, 2014 and returned a verdict of Guilty on the Obstruction charge in Count 73 and Not Guilty on the Obstruction charge in Count 76 for Appellant, Mary Wilkerson, on September 19, 2014. Appellant filed an Oral Motion for Judgment of Acquittal and a written Motion for Judgment of Acquittal. (App. J – 147a) Wilkerson also timely filed a Notice of Appeal on September 19, 2014. (App. K – 151a) A Final Judgment was issued on September 30, 2015 as to Mary Wilkerson for Count 73 for 60 months imprisonment followed by 2 years Supervised Release and she was acquitted on Count 76. (App. C – 30a)

The Petitioner appealed her case to the Eleventh Circuit Court of Appeals from conviction and sentencing by the District Court for the Middle District of Georgia, Albany Division, having been indicted on February 25, 2013 on two counts of Obstruction of Justice, 18 U.S.C. § 1505. She was convicted of one count of

Obstruction of Justice (Count 73) on September 19, 2014. The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The District Court entered a Final Judgment in this matter on September 30, 2015 as to Mary Wilkerson. (App. C – 25a). A Notice of Appeal was timely filed by Mary Wilkerson, in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on September 19, 2014. (App. K – 151a) Although a Restitution Hearing was held on January 26, 2016, it had been determined by the District Court that Mary Wilkerson was not to be held accountable for any restitution in this matter and had no victim impact. (App. L – 171a)

Mary Wilkerson, was given the title of Quality Assurance Manager but apparently not the authority for the job for the Peanut Corporation Plant in Blakely, Georgia on June 16, 2008 having been employed the plant as a secretary and other office positions, even though she was clearly untrained and unskilled to be put into this position. She was not given any authority to perform any management duties that should have been associated with the title. Two weeks after assuming this job title, a new plant Operations Manager, Samuel Lightsey, came to work and immediately began making plans to move Mary Wilkerson back to the front office again out of Quality Assurance. There was a Lab Technician, Catina Hardrick, who had been performing the duties of lab technician and the Quality Assurance Manager for over a year prior to Mary Wilkerson, processing the

Certificate of Analysis reports, receiving the lab test reports and releasing product to be shipped with falsified documentation for years along with several Plant Operation Managers. Mary Wilkerson was never a part of this conspiracy and was never indicted or charged as such.

B. Disclosure of Brady Information

The Petitioner, Mary Wilkerson, has consistently maintained her innocence in the conviction of Obstruction of Justice for making a false statement to investigators concerning her knowledge of "positive" salmonella testing.

The Government tendered into evidence less than 900 documents for potential evidence after approximately five and a half years (January 2009-July 28, 2014) which was less than 1% (.00006%) of the approximate 15 million pages of retrieved materials. Out of this discovery production the Government only tendered three documents pertaining solely to Wilkerson which were so buried in the eight to 15 million pages that the Petitioner had no hope of locating or determining what relevant evidence Government was relying upon for its case in chief in order to prepare a defense for Trial. The Petitioner did not find the relevant evidence in her production timely for Trial nor has she ever found the key exculpatory documents timely for use at Trial. While these three documents were not exculpatory they were relevant evidence and the Petitioner was denied Due Process in preparing her defense on these issues in violation of the Fifth Amendment (Due Process) and the Sixth Amendment (Effectiveness of Counsel). Significantly, the only folder in the

entire discovery with Mary Wilkerson's name on it was completely empty. Brady v. Maryland, 373 U.S. 83 (1963). Strickler v. Greene, 527 U.S. 263 (1999).

The material suppressed exculpatory evidence is setout below:

(1) Two years after Trial while attempting to open documents during the Appeal process, (post-Trial) a material document was found during a random scrolling in the 100K package which was mailed on June 30, 2014 to Petitioner's Attorney and received less that two weeks before the scheduled Trial date of July 14, 2014. This e-mail clearly showed that FDA Agent Gray conspired with her superior to rewrite multiple times the Petitioner's answer to a question allegedly posed to her which formed the basis of Count 73 until the Government's witnesses were satisfied with the context of the answer. (App. M – 180a) This was a significant piece of evidence since it was the first written documentation of a question and an answer that these two agents were attempting to create weeks after the investigation was closed. The materiality analysis in this case comes into question due to the finding of this exculpatory e-mail as to whether "there is any reasonable likelihood it could have affected the judgment of the jury." Weary v. Cain, 136 S. Ct. 1002, 1006 (2016) (per curiam), Cone v. Bell, 556 U.S. 449, 469-470. The other significant point concerning this exculpatory e-mail was that all of the changes made by her superior and the Agent to the answer of Mary Wilkerson were deleted before the material was provided in the unprocessed and unsearchable late 100K production two weeks before Trial scheduled for July 14, 2014. As a result of

a subsequent Hearing held on July 11, 2014 Trial was continued until July 28, 2014. This exculpatory material evidence was not found until post-trial two years later during the Appeal process. The withheld evidence in this case satisfied the standard of whether there is a reasonable likelihood it could have affected the judgment of the jury if it had been presented by the Petitioner and puts the confidence of the case in a different light so that the confidence in the verdict was compromised. Kyles v. Whitney, 514 U.S., at 435. In evaluating the materiality of suppressed evidence, courts should consider the effect of all suppressed evidence along with other evidence uncovered following the Trial. The suppression of this exculpatory prohibited her Counsel from effectively preparing a Defense in violation of the Fifth and Sixth Amendments of the United States Constitution. The denial of the right to present a defense denies an accused a basic right and requirement for a fair trial which is a denial of a constitutional right. This should never be treated as a harmless error as it leads to both prosecutorial misconduct and wrongful incarceration of the innocent. Therefore, this Petition for a Writ of Certiorari should be granted.

(2) The late batch of 100,000 plus pages of discovery received by Petitioner two weeks before Trial date of July 14, 2014 but continued to July 28, 2014 contained exculpatory evidence buried within the documents although the batch was deceptively labeled as *Jencks* materials. The documents were not searchable in search software due to the fact there were no databases and required a manual

page by page reading. The Petitioner notes another significant exculpatory document hidden on this late 100K hard drive, which Defense Counsel for Co-Defendant Stewart Parnell found in his limited reading of the late production a few days before Trial but the Petitioner did not have knowledge that this e-mail even existed nor ever located it in her own production due to the suppression so as to be able to prepare a defense before Trial or for impeachment of Government witnesses. This e-mail clearly showed FDA Janet Gray sent her "official" inspection report to several departments in the FDA in Atlanta, Georgia and to Washington, D.C. to edit and modify and that numerous persons in the home office edited her "official" EIR report at least ten times which challenges the credibility of her report and testimony. (App. N – 181a) This e-mail would have been material evidence as exculpatory evidence for use at Trial against FDA Agents Bob Neligan, Richard Hartline and Janet Gray if the e-mail had not been buried in the late 100,000 documents produced a few days before original Trial date of July 14, 2014 which could not possibly be viewed in entirety by any person reading page by page before Trial since the databases were not provided to Wilkerson. In this e-mail FDA Agent Gray states she "…will add whatever CFSAN (*Department of FDA – Washington, D.C.)* wants, just as long as they help back us up on what we put in there when the bullets start flying." (App. N – 181a). This significant exculpatory e-mail was found by Defense Counselor Bondurant for Stewart Parnell imbedded in the late 100K produced two weeks before Trial falsely which was falsely labeled

"Jencks" materials in his limited reading of about 200 pages out of 100K. Petitioner was not made aware of this e-mail until Post-Trial so she did not have time to analyze and evaluate it in time to use in her defense at Trial since it was sufficiently suppressed. The Petitioner has never found this e-mail in the millions of pages of her discovery which she was provided and was prevented from reading completely before the Trial due to the distinct impossibility of reading up to 15 million pages page by page.

(3) The Petitioner, Mary Wilkerson, had searched for a copy of her interview transcript (MOI) by the Department of Justice investigators but could not find it in her production and she requested a copy from the Government on May 9, 2014 before Trial in an e-mail to prosecution. The Government's prosecutor, Alan Dasher, refused to specifically produce the Appellant's interview by the FDA/FBI when requested in an e-mail May 9, 2014 several times. (App. O – 182a-216a) Alan Dasher stated there was "No" transcript of an interview, although the prosecutor most certainly knew of its existence since he was a documented witness to this official interview by the FBI and he never produced it to her even after several requests were made and denied its existence which surmounts to blatant misconduct and an egregious *Brady* violation and a violation of Federal Criminal Rule 16. (App. O –182a-216a and App. P – 217a). This document was not produced in her discovery either, and, therefore, was effectively suppressed for 18 months since the Petitioner had first requested it in *Brady* Motions after Arraignment in

February 2013. The significance of this document is that it is the only written documentation of the only interview by the Government of Mary Wilkerson and she was denied access to it for a considerable period of time in violation of Federal Criminal Rule 16.

(4) A photocopy of the Diary/Notebook of scratch notes of FDA Janet Gray. (App. Q – 221a) was provided by Stewart Parnell's Defense Counsel to the Petitioner late after Trial started on August 11, 2014. Wilkerson has determined that the diary notebook was so suppressed in her production or was deliberately not produced to her that she did not know of its existence in order to prepare a Defense until she was given a copy late in Trial by Co-Defendant's counsel who had found it in his production. The Petitioner was denied the timely use to prepare a defense, the time to have the "original" book examined for authenticity since there were suspicious gaps and alterations in the wording concerning the Petitioner, therefore, she could not validate the book for impeachment of Agent Gray. (App. Q – 221a) Due to this suppression of material evidence, Wilkerson was denied Due Process and was prevented from effectively confronting the Government's witnesses for use at Trial. Strickler v. Greene, 527 U.S. 263 (1999).

(5) Mary Wilkerson was also denied the production by suppression or omission of a key piece of evidence utilized against her which was an e-mail from her to management and other staff shortly after she became the Q. A. Manager. In fact,

she had vehemently sent out the e-mail to the staff of the PCA Plant to "HOLD" a shipment that had tested positive for salmonella, although her cries to prevent the product from shipping were quickly shutdown by all parties involved. (App. R – 224a) It was not long after that Wilkerson was moved out of the loop of "need to know" as the plans to move her back to the secretary position were already being arranged by the Operations Manager, Sammy Lightsey. This very e-mail was one of the three documents utilized against her to prove she allegedly had knowledge of positives.

Mary Wilkerson was denied Due Process of this material evidence so that she could prepare a defense in time for Trial. Mary Wilkerson has always maintained her innocence in saying she "never" knew of positives, when clearly she was the sole screaming whistleblower in the plant and has paid dearly for that fact but did not timely have access of this e-mail which was material to her defense.

REASONS FOR GRANTING THE PETITION

There is reasonable probability that the suppressed evidence (exculpatory) would have changed the outcome and is a mixed question of law and fact. The impact of incrementally producing the novel and unprecedented mega electronic data dump of up to 15 million pages of documents, without databases, and the late production of exculpatory evidence two weeks before Trial which was buried in 100,000 or more raw documents without databases created and deceptively

mislabeled as "Jencks" by Prosecutor Hearn effectively hid and suppressed significant exculpatory and impeachable evidence, therefore, was an egregious act manipulated by prosecution. Prosecution mislabeled this production as "Jencks" to justify hiding late production of relevant and exculpatory evidence. All Defendants in this case found this deception tactic of the hidden exculpatory to be true and reported it to the Court at a Hearing on July 11, 2014 to no avail. (App. S -225a) This case is an opportunity to correct egregious and deliberate *Brady* violations which undermined the confidence in the Petitioner's conviction. Pursuant to *Brady* this challenges the conviction due to the withholding of favorable evidence which was material and conflicts with other circuits and this Court on this issue. Brady v. Maryland, 373 U.S. 83 (1963). Strickler v. Greene, 527 U.S. 263 (1999). Weary v. Cain, 136 S. Ct. 1002, 1006 (2016) (per curiam). The delayed provision of *Brady* materials can be grounds for reversal when the Defendant can show prejudice as in Wilkerson so that it could not be effectively used. This case also involves the second half of this standard concerning Brady, which is the materiality analysis. Smith v. Cain, 132 S. Ct. 627, 630-631 (2012); Kyles v. Whitley, 514 U.S. 419, 434-441 (1995); U. S. v. Bagley, 473 U.S. 66, 674-684 (1985). The concept of materiality and suppression of evidence is not new, but the method in which the evidence in this case was suppressed was novel and high-tech by using the e-discovery data dump on an indigent defendant, who, along with her counsel and computer technician were not skilled nor trained to perform the acts of creating

databases to access this data in search software. One can surmise that the Government had teams of data analysts at its disposal in this case for years before the Indictment. It would have taken a trained search software expert several years to create the number of databases necessary for this amount of discovery (eight to 15 million pages or more) even if you had the required knowledge and time to dedicate solely to it. There was no such forensic software expert assistance available to the Petitioner who could dedicate the time to assist her CJA appointed attorney to create these databases.

These egregious acts of Discovery abuse could rightfully be compared to the withholding of exculpatory evidence in *Brady*, and there is reasonable likelihood that the information could have affected the judgment of the jury. Brady v. Maryland, 373 U.S. 83 (1963). Kyles v. Whitley, 514 U.S. 419, 434-441 (1995). The suppression of the exculpatory evidence denied the Petitioner Due Process in being able to prepare a Defense and the effectiveness of Counsel in violation of the Sixth Amendment of the United States Constitution.

Wilkerson was not able to review all of the 15 million pages of documents before Trial and never will be able to read them all and, significantly, she was not able to review the 100K production shipped on June 30, 2014 with Trial set for July 14, 2014. The Trial was continued to July 28, 2014 by a Motion filed by the Petitioner and her Co-Defendants after a Hearing was held on July 11, 2014 to discuss the issue of exculpatory hidden in the 100K production and the lack of

searchability of the 100K documents in the search software. (App. S -225a) The task of creating databases requires an expert in search software and/or a computer software or engineering expert, but her own consultant, who was merely a computer technician, was not qualified nor trained as a forensic search software expert nor a software engineer. Her technician had immense difficulty in trying to open and review the discovery due to a lack of databases and the various raw formats in which it was produced which prohibited even reading the document. He spent most of his time working on the issues of the defective laptop borrowed from the National Defender's Office in California, as well as, attempting to open and load the numerous hard drives (some of which were encrypted and never could be viewed) and numerous CD's produced by the Government which were shipped incrementally over an 18 month period without the use of search software. The production was produced to Wilkerson was in three formats: raw, native and image, which multiplied the quantity received times three. Each "document" contained multiple pages and Wilkerson's technician calculated the actual number of pages produced was between eight to 15 million pages but there was no way to determine an exact count of pages. Without the expertise in forensic search software one would not have any idea that databases must be created and required to load the discovery into the search software program. (App. T – 347a) It would have taken at least two

weeks to create databases on just the late 100,000 pages of documents alone, so it can be reasonably surmised that it would have taken at least 160 weeks to 300 weeks to create databases for the entire eight to 15 million pages of documents received. Wilkerson did not have the time, experts nor resources afforded to her defense and, therefore, was not able to create the databases even for the late 100K production before Trial which contained crucial exculpatory evidence.

The Government successfully found a way to get around *Brady* which requires production by the Government of exculpatory and impeachable evidence and violated both the Fifth Amendment, which prohibits any person from being deprived of life, liberty and due process of law, and the Sixth Amendment, which requires that the accused be informed of the nature and cause of the accusation. This use of this novel electronic e-discovery mega data-dump in the raw format without databases was unlike the easily and quickly accessible version of production the Government must have had in its possession even before the Indictment. Anything found by Wilkerson could only be by accident or divine providence.

Therefore, the conviction of the Petitioner should be set aside and reversed for the many rampant *Brady* violations committed against Mary Wilkerson denying her a fair and impartial Trial and the opportunity to prepare any defense due to the hiding of exculpatory evidence in the mega data-dump of millions of pages produced by the Government which clearly was blatant misconduct on its part.

The Government's production of the e-discovery data dump was well calculated and deliberate since it had to retrieve the raw data from the FBI, rather than send the processed production it possessed and was utilizing and it further delayed production by piece-milling producing it over an 18 month period right up to Trial which made it even more of an egregious *Brady* violation. It should have been blatantly obvious that the Petitioner could not scroll through millions of pages in a matter of months since her production was lacking databases and AUSA Patrick Hearn admittedly stated during the Hearing on July 11, 2014 concerning the late 100K production, that he could pull up documents quickly from his "databases" which significantly shows he had production with databases created and knew it was required to search in the software program. An e-mail from the Government's Information Technology Specialist of FDA to all FDA Investigators for this case, instructed the staff how to use the "relevant search word" searches which is the method utilized if you have the use of search software with the databases already loaded with the discovery in working order. (App. U– 353a) Mary Wilkerson did not have this same format of "load-ready" production that the Government obviously possessed although it denied such. (App. S – 225a)

The Petitioner still maintains her innocence after nearly serving three years in Federal prison for something she did not say and challenges the conviction due to the fact that exculpatory evidence was suppressed which was material and

favorable to her defense and adversely affects the confidence in the verdict. The Court's decision conflicts with other District Courts, other Court of Appeals and this Court, as well as, the Fifth, Sixth and 14th Amendment of the U. S. Constitution. Brady v. Maryland, 373 U.S. 83 (1963). Kyles v. Whitley, 514 U.S. 419, 434-441 (1995). Weary v. Cain, 136 S. Ct. 1002, 1006 (2016) (per curiam), Cone v. Bell, 556 U.S. 449, 469-470.

JUROR DISHONESTY IN VOIR DIRE

The second issue on appeal is the question of whether the Federal Rule of Evidence 606(b) permits the Petitioner moving for a new Trial based on juror dishonesty during Voir Dire to introduce juror testimony about statements made during Voir Dire and Deliberations that tend to show the alleged dishonesty of the jury panel. The Defendants' trial began on July 28, 2014, surrounded by extensive national and local media coverage in every form of media nationwide for many months. Even on the morning the veniremen reported for jury selection, the local Channel 10 NBC television news broadcasted a detailed report about the trial and asserted that the Defendants had killed nine people. These same stories of deaths and hundreds of illnesses and financial losses had been covered as a high-profile case throughout the United States by all networks, the internet, food safety news websites, the websites of CDC, DOJ, FBI and FDA for months as if factual (although no boots on the ground investigation concerning deaths and illnesses had

ever occurred) prior to completion of jury selection on July 31, 2014 and throughout the Trial. Two Hearings were held by the Court post-Trial on October 23, 2014 and November 12, 2014 with the jurors concerning the issue of the alleged dishonesty of jurors and exposure to extrinsic evidence by one or more jurors during deliberations which could have affected the outcome of the jury's verdict. All jurors were interviewed by the Court on two separate Hearing dates and the following information was confirmed by more than one juror concerning at least the Voir Dire dishonesty of at least one juror (J35) and whether this dishonesty resulted in Juror Misconduct and exposure of the Jury to extrinsic evidence which led to an unfair trial and wrongful conviction of the Appellant. This conflicts with panel decisions in this Circuit, the other Circuits and the United States Supreme Court and involves a question of exceptional importance. As detailed herein several jurors discussed these deaths and sicknesses as a result their own research during Voir Dire and deliberations. J42 and J93 both admitted that the deaths had influenced their decision and that one juror had told the jury that Juror 35 had done outside research. J34 witnessed J35 tell the jurors that "all defendants had killed nine people". J34 also heard several jurors state during the trial and before deliberations that they had done their own research about the salmonella deaths, concluding that "they're all pretty much guilty." (App. V – 356a, p.45–49.) This occurred in Voir Dire "when we wasn't supposed to be even discussing the case." (App. V – 356a, p. 50). J34 replied to J35 that "she couldn't say that" about them

being guilty because "we hadn't even been selected yet." (App. V – 356a, p. 37, 41) Asked why she did not mention J35's statement when she was questioned by the court during voir dire, J34 said that she "didn't realize [she] could" and didn't understand that she could "tell on people," and was "kind of scared." (App. V – 356a, p. 43) The Court next interviewed J35 and asked whether during jury selection she had made any statement about having an opinion about guilt or innocence in the case. (App. W – 384a, p. 9) J35 said "no", and that no other person made such a statement during jury selection. (App. W – 384a, p. 9) J35 also said that she had not heard any juror or anyone else discuss deaths and had not herself made a statement about deaths. (App. W – 384a, p. 9) J35 clearly was not truthful about Voir Dire nor about deliberations according to several jurors who testified at the Hearings and she brought her predisposition of guilt and to punish all of these Defendants to the table. J10 and J34 stated that J93 and J35 had prejudged the guilt of all Defendants before Trial and, therefore, were dishonest during Voir Dire and decided guilt before all evidence was presented, and J93 and J35 each had repeatedly stated "they were all guilty" throughout deliberations, as well. J35 clearly had an agenda to get on the jury by any means and influence and intimidate the other jurors until all voted guilty. The court next questioned J37 and asked if during jury selection she heard statements that the defendants were guilty and caused deaths, J37 replied that although she could not recall names she did recall "some of them was saying it." (App. W - 384a, p. 31) "A lot of statements were

made before we got in the jury." (App. W – 384a, p. 41) J37 explained that "we did a lot of shucking and jiving in there," and other panelists would "holler out and say he (Judge) told us don't talk about the case, resulting in laughter." (App. W - 384a, p. 31) J37 said that when she arrived at the courthouse, "I never knew anything about the case," but "a lot of people out there," including "most of the people that was around me" on the jury panel knew about it and had already decided guilt before jury selection. (App. W- 384a, p. 32, 35-36.) "And I told them that this was my first time hearing it, so that's why some people was saying guilty, they guilty." J37 also confirmed that several jurors talked about "them being guilty", "they killed people" and "them being greedy", "some was saying fry them, they need to fry them" and also confirmed J35 said "…they know them people did that, they guilty" and "they know them people guilty" to the jurors and "they know they did, they this, they that" and "seven or nine people died, and then stuff like that" although no evidence was presented for deaths or discussed during Trial. J37 also stated that a big argument took place between J37 and J35 as J35 was "being bossy and took over" the jury during deliberations and felt like the jury was being rushed by J35 to give a guilty verdict. J4 also confirmed that another juror was bringing up the "deaths" during deliberations. No evidence of deaths was presented at Trial which was decision of prosecution and it had told the Court this before Trial started. J12 confirmed that J35 talked about deaths during deliberations and that J35 said "700 and something people had died from this", which was not the truth. Before Trial

the Judge had explained that deaths were not to be mentioned during the Trial as the evidence of deaths and sicknesses had not been tried before a Jury as fact. It is clear that J35 was also not truthful and credible in her answers provided at the Juror Misconduct Hearing under oath when several jurors so clearly specifically remembered and testified under oath at the Hearings that J35 discussed the illness and deaths during Voir Dire, had already predisposed all Defendants as "guilty" and continued to insist in their guilt for the deaths during deliberations since she had already researched the case and that she strongly pressured all jurors to punish all of the Defendants, (App. V – 356a, p. 23,26,28-29,33-37,40-41,45-50,55,70-71,74,77-79 and App. W- 384a, p. 9,23) although she denied any discussions of deaths and sicknesses and influence to intimidate the other jurors to give a guilty verdict. J35 clearly was not truthful during Voir Dire and had an agenda to insure that she was selected to be a juror, as well as, was untruthful under oath later during the Juror Misconduct Hearings, yet no sanctions were taken against her and others nor any relief found for the Defendants. It was evident after the conclusion of the Hearings that the predisposition and exposure to extrinsic evidence had occurred prior to and during Voir Dire which influenced deliberations. The Petitioner was not provided a fair and impartial Trial which resulted in a guilty verdict.

CONCLUSION

The Petitioner's conviction should be reversed in light of the Government's withholding extensive information favorable to the Petitioner's defense, as well as, relevant evidence. The numerous *Brady* violations prevented the Petitioner from locating exculpatory evidence buried in the unprecedented and novel unsearchable e-discovery mega-data dump in time for use at Trial and the confidence in the conviction is duly challenged by the Petitioner as the withheld exculpatory evidence was favorable and material for the Petitioner, and "there is a reasonable likelihood that it could have affected the judgment of the jury". Reversal is justified due to the orchestrated *Brady* violations with interlinked Prosecutorial Misconduct.

If the exculpatory e-mails, statement and log book had not been immersed in an unsearchable mega data-dump of electronic discovery and had been timely disclosed pre-trial the Petitioner could have utilized them in developing her defense for Trial which demonstrates the materiality of this evidence. The prosecution's deliberate suppression in the raw unprocessed data format undermines the confidence in the outcome of the Trial. Kyles v. Whitley, 514 U.S. 419 (1995). The prosecution has in fact violated its own policy pursuant to the U. S. Department of Justice Criminal Division Policy Regarding Discovery Practices, October 2010 which states in relevant part in Section B, Timing: "Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant promptly after discovery. Impeachment information,

which depends on the CRM Attorney's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before Trial to allow the Trial to proceed efficiently…." In Section C, Form of Disclosure it states in part "Large Volumes of Documents…Also, when dealing with massive amounts of data and the defense lacking resources, consider whether to provide the defense with "hot docs" or search terms…." and the Petitioner's Attorney was a CJA Appointed Attorney through the Criminal Justice Act in the Middle District of Georgia, U. S. District Court with a small firm and limited resources. The use of the search terms refers to the use of "search software" and the data must be processed with databases created to utilize the software. The prosecution shipped batches of millions of pages of discovery over 18 months period without the databases on numerous hard drives and CD's up until two weeks before Trial. In Section D of Form of Disclosure it states that "…1) Materials that must be disclosed: a) Brady, *Jencks* and *Giglio* materials, b) All materials required by Fed. R. Crim. P. 16 and 26.2, including statements of the defendant under Rule 16(a)(1)(A) and (B), c) Exculpatory and impeachment materials required by USAM 9-5.001, and d) Additional materials or information required by any discovery order entered by the Court." The prosecution failed miserably in complying with its own policy which ultimately prohibited the Petitioner from preparing a defense and denied her Due Process in violation of the Fifth and Sixth Amendments of the

Constitution. The prosecution was also untruthful to the Petitioner in denying the existence of her statement and untruthful to the Court in the method it provided the Discovery when Patrick Hearn, Assistant U. S. Attorney, continuously told the Court the production was "load-ready", which is the definition of data that already has its databases created although it certainly did not have databases. (App. X– 398a)

Mary Wilkerson duly filed a Sealed Motion for Authorization for Technological Software, Support and Services after realizing that the extensive discovery received and formats it was produced were more technological than her computer technician could ever deem to process. (App. Y - 419a) This service would reflect the amount of storage, resources, funds and expertise that the Government utilized to process the production into an easily loadable and searchable product. Wilkerson clearly lacked the funds, resources, time and expertise to process the millions of pages of production and search it effectively with a CJA Appointed attorney, CJA authorized technician and one paralegal, none of whom were qualified for the expert services necessary. Her technician acquired quotes from search software experts to host the software, create the databases and prepare it for loading into the search software and time and labor for such a monumental task for these quotes ranged from $250,000.00 to $471,595.00 accordingly. (App. Y – 419a) The Petitioner followed this Motion for Authorization with a Motion to Compel Meaningful Discovery since she was prohibited from

effectively searching through millions of pages of documents. (App. Z - 462a) As each "document" or file received could contain an unlimited number of pages, it was determined that the initial 2-1/2 million documents actually contained approximately 7-1/2 to 8 million pages and subsequently each additional production package added millions of pages as they were produced over 18 months, none of which could be loaded into the search software in the format produced. It was also discovered by these experts in reviewing the initial production package for quote purposes that the reason Wilkerson could not open 14 of the 16 hard drives produced is that they were in the original forensic image of the computer or coding. The Petitioner did not have the expertise or special forensic software required to decipher these images or code. The Court denied Wilkerson's request for such technological expert services and her Motion for Meaningful Discovery (Brady) in a Sealed Order on August 9, 2013 after an Ex-Parte Hearing was held on June 25, 2013 regarding the Motion requesting authorization for expert technological services, software and support. (App. AA - 467a and App. BB – 470a) The District Court Docket for this case confirms that an Ex Parte Hearing was held on the Sealed Motion for Authorization for Technical Services. (App. BB – 470a) The Petitioner filed another Motion for Discovery (Brady) on August 9, 2013 due to the continuous influx of additional unsearchable discovery. (App. CC – 471a) with the Trial originally scheduled to commence a few months away on February 10, 2014 but she had only been able to manually read five to six thousand pages by this time.

The Petitioner filed another Revised Sealed Motion for Authorization for Past, Present and Future Technological Expert Services on May 9, 2014 as she proposed an alternative to the expensive hosting proposal with a lease of the search software from LexisNexis at a rate of $3,536.00 per year plus $707.00 in maintenance and support since she had been futilely trying to read and search through the production to no avail and the Trial date which had been continued to July 14, 2014 was fast approaching. (App. DD – 478a) The Docket Sheet shows that this Motion was sealed since it referenced funding. (App. EE – 486a) This proposal was also denied by the Court. All the way up until Trial, the Petitioner continued to receive unsearchable production and continued filing Brady Motions and requests for expert services to assist in preparing the production to be searchable to no avail and she was prohibited from reviewing, evaluating and successfully find exculpatory and relevant evidence in the massive data dump of millions of pages in time for Trial. Having to read eight to 15 million pages of discovery, page by page, would not be considered being provided a "searchable" production. The Petitioner consistently fought a hopeless battle that she could not win and she was not given any relief for provision of exculpatory and relevant evidence. Therefore, she was not provided Due Process with a fair and impartial Trial and for her requests for *Brady*. Brady v. Maryland, 373 U.S. 83 (1963). Strickler v. Greene, 527 U.S. 263 (1999). Weary v. Cain, 136 S. Ct. 1002, 1006 (2016) (per curiam) Kyles v. Whitley, 514 U.S. 419, 434-441 (1995). Giglio v. U.S., 405 U.S. 105 92 S. Ct. 763 (1972).

After Trial, the Petitioner had to justify the use of her technician by a letter to the Court and the number of hours he utilized over the months he was consulting with the Petitioner in a fruitless effort to work with the production, read pages, trying to load and open encrypted and coded disks and hard drives containing the millions of pages of discovery dumped upon the Petitioner in order to seek exculpatory and relevant evidence before Trial. (App. FF- 487a)

In recent years this Court has pointed out that the lower courts are misapplying *Brady* as they discounted the materiality of suppressed evidence in error and, therefore, questionable convictions were affirmed. The lower courts have been directed by this Court to resist basing materiality determinations on what a "jury would have done" and "what it could have disbelieved". Smith v. Cain, 332 S. Ct. 627, 630-631 (2012). This case warrants this Court's review and correction of the *Brady* materiality.

The Petitioner, Mary Wilkerson, only demonstrates that if the suppressed exculpatory had been disclosed pre-trial and during Trial, there would have been a probability of an acquittal, not that an acquittal was certain.

Concerning the Jury Misconduct issue, the Petitioner, Mary Wilkerson, demonstrates that several if not most jurors had already pre-disposed guilt even before Voir Dire began so that "they needed to pay", "they needed to fry" and "they were all guilty" and already decided to convict all defendants as a group and make them pay for the illnesses and death as so stated by several jurors during

Voir Dire to other jurors according to testimony given at the Juror Misconduct Hearings. The Petitioner, Mary Wilkerson, was deprived of the basic right to a fair and impartial Trial in violation of Federal Rule 606(b).

The discovery abuses as setout in the Petitioner's Writ of Certiorari clearly violate the requirements of *Brady*: "(1) The information must be favorable to the accused; (2) the information must have been suppressed by the Government willfully or inadvertently; (3) the prejudice must have ensued or the suppression of exculpatory evidence must undermine confidence in the outcome with a reasonable probability that if the evidence was disclosed to the defense the result would have been different; and (4) a significant and crucial fourth element is that the Defendant did not possess the evidence nor could *she* obtain it her self with reasonable diligence and said abuses conflict with the opinions of this Circuit, the authoritative decisions of the other Circuits and the United States Supreme Court…." pursuant to Brady v. Maryland, 373 U.S. 82 S.Ct. 1194 (1963), Strickler v. Greene, 527 U.S. 263 (1999), Kyles v. Whitley, 514 U.S. 419, 434, and Giglio v. U.S., 405 150, 153-154 (1972).

For the foregoing compelling reasons setout herein this Petition, accordingly the Petitioner's conviction should be reversed.

Respectfully submitted.

THOMAS G. LEDFORD
THE LEDFORD LAW FIRM, LLC
U. S. Supreme Court Bar #296825
P. O. Box 287
Albany, Georgia 31702
(229) 431-2310
tom@theledfordlaw.com
Counsel for Mary Wilkerson, Petitioner
In Forma Pauperis

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