No. 18-5933

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 RECONSIDERATION AND REHEARING OF MARY WILKERSON, In Forma Pauperis

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I.

QUESTION PRESENTED

Whether, under Brady v. Maryland, 373 U.S. 83 (1963), Kyles v. Whitley 514 U.S. 419 (1995), U. S. v. Skilling, 554 F.3d, 1492 (11th Cir. 1996) and Giglio v. United States, 405 U.S. 105 92 S. Ct. 763 (1972) , the Government's *Brady* violations rose to an intentional level of Prosecutorial Misconduct in light of the extensive training and policies provided to the Government prosecution concerning the Discovery and the searchable format requirements and the Government's deliberate producing of millions of pages of unsearchable documents which denied the Petitioner Due Process afforded to her under the Constitution due to the astronomical cost that would have been incurred upon the Petitioner to convert the production into a searchable format like the Government already had in its possession but deliberately failed to provide to her.

II.

PARTIES TO THE PROCEEDING

Petitioner, Mary Wilkerson. Ms. Wilkerson is petitioning this Court separately from her Co-Defendants for a Reconsideration and Rehearing of her Writ of Certiorari, In Forma Pauperis.

The United States of America is the Respondent.

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Mary Wilkerson respectfully petitions for Reconsideration and Rehearing to review the Judgment of the Supreme Court 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 and In Forma Pauperis as a pro bono case by her CJA Appointed Attorney for the Supreme Court.

OPINION BELOW

The opinion of the Supreme Court denied the Petitioner's appeal of her case to the Supreme Court on October 9, 2018 and is currently unreported and

unpublished but she files this Petition for Rehearing within the twenty-five day limit of this Court's ruling.

STATEMENT

This case involves the withholding of evidence by the use of a relatively novel concept of an onerous electronic document dump of non-relevant discovery with the exculpatory evidence and relevant evidence imbedded and suppressed deep within unsearchable discovery since the Government intentionally provided the documents in the unsearchable PDF Image format without databases.

The Rules of the District Court, Rules of the Eleventh Circuit Court of Appeals and Supreme Court state that documents "must be provided in the PDF /image format that is searchable and computer-generated not produced by scanning" as scanned documents are not searchable by any means and have to be read page by page unless converted to the PDF computer-generated format which is extremely costly. The prosecutors are highly trained and instructed on the "how-to" of this requirement for receipt of documents produced to the Government and the submission of documents by the Government to any person or entity as shown by the attached Appendices for the Government's Discovery policies and the rules of the Supreme Court. (App. A, B and C). *The Discovery Policy of the Middle District of Georgia* (App. A) states in Exculpatory and Impeachment Material, Section 3, Paragraph 1: "…That is, the AUSA's ignorance of such evidence *sic*. (*Giglio, Brady and Kyles*) will not prevent a Court from penalizing the Government by suppressing

evidence, vacating a sentence, reversing a conviction or recommending that the AUSA be professionally sanctioned." In Section 4, Paragraph 1, The AUSA's Responsibilities Under Brady, states that "…Brady requires the prosecution to disclose to the defendant all 'evidence favorable to (*him*)…where the evidence is material ….to guilt,' that is, all evidence that could be used by the defendant to make his conviction less likely." In Section 5, The AUSA's Responsibilities Under Giglio, Paragraph 1 states that "The Government's constitutional duty to disclose evidence favorable to the defendant includes 'evidence affecting (the) credibility of key government witnesses. Giglio v. U.S., 405 U.S. 150, 154 (1972)." It also refers to Training on *Brady* Discovery that was held in April 2010 for all prosecutors. This Manual further states in Section 11, Preparing Discovery Materials For and Making the Disclosure, Paragraph 2, Formatting, "PRACTICE TIP: The recent trend, particularly in large, document-intensive cases, is to provide documents with OCR. The defense will in all likelihood ask the Court for documents to be disclosed in a searchable format." The Petitioner filed Motion after Motion to the Government for all *Brady, Giglio* and *Kyles* materials in searchable formats without relief and there was no compliance from the Government to this request. Instead Wilkerson was provided millions of pages of documents in numerous increments over an 18 month period on many hard drives, cd's and disks some of which were permanently encrypted with disorganized data, no Bates Numbers and completely unsearchable due to the fact it was all scanned documents with no Optical Character Reading

(OCR) capability and no databases. The Petitioner did not have the $250,000 to $471,000 pursuant to the quotes for processing she had obtained to process the production nor the years of time it would have taken before Trial to reproduce it into a searchable format so that it could be "loaded" into search software resulting in great disparity in the resources of the Petitioner and the Government.

Furthermore, the Department of Justice has issued subsequent Memorandums detailing this requirement to its prosecutorial staff as shown by one such memorandum written by Sally Yates, Deputy Attorney General on January 5, 2017 as an Addendum to the Memorandum issued by Deputy Attorney General David Ogden in January 2010, entitled *Guidance for Prosecutors Regarding Criminal Discovery* ("Ogden Memo"). (App. D) These Memorandums from Ms. Yates and Mr. Ogden are "…general guidance to prosecutors on gathering, reviewing, and disclosing information to defendants." She further states that "The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C.§ 3500), Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. U.S., 405 U.S. 150 (1972). In addition, § 9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material."

The Government intentionally provided the unprocessed e-discovery (ESI) in 'scanned' image formats to the Petitioner in violation of its own Discovery Rules and *Brady* and buried the exculpatory within which gave her no hope of ever finding any exculpatory or relevant evidence in the millions of pages of documents in time for use at Trial, denying her due process. In essence, the Government did not provide the Discovery in the format which could be searched by any effective means but instead provided inaccessible and unsearchable documents which had no databases which could never be searched in the format provided in violation of Brady v. Maryland, 373 U.S. 83 (1963). Kyles v. Whitley, 514 U.S. 419 (1995), Fed. R. Crim. Proc. 16. No amount of due diligence would have achieved the search successfully in time for Trial since every single page had to be read due to the manner in which it was produced.

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 and acquitted on the other Count. Apparently, the Courts relied upon the concept that she received production which met the compliance with *Brady* when in fact receiving millions of onerous and meaningless pages which are not searchable is tantamount to receiving no

production at all as it was literally impossible for any person to read 8 to 15 million pages in a matter of a few months before Trial.

DISCLOSURE OF BRADY INFORAMATION – DUTY TO DISCLOSE

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 suppression of the exculpatory documents such as the e-mails, as set out in her Petition for Writ of Certiorari and her Appeal Brief, prohibited her Counsel from effectively preparing a Defense in violation of the Fifth and Sixth Amendments of the United States Constitution and prevented her from impeaching the Government witness who had no documentation of a conversation whatsoever. These significant exculpatory documents were so well hidden that some were never found by the Petitioner herself before Trial or were found two years after Trial in the Appeal process through random scrolling of pages. 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.

The significance of the hidden "statement" is that it shows that written documentation of the only interview taken by the Government of Mary Wilkerson did in fact exist although she was denied access to it by the Government after several requests were made by Wilkerson and was told by prosecutors that it did not exist but well after Trial started it was discovered by others.

REASONS FOR GRANTING THE PETITION FOR REHEARING

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 document data dump of up to 15 million pages of documents without databases in an unsearchable scanned PDF format including the late production of exculpatory evidence two weeks before Trial also in unsearchable PDF format effectively hid and suppressed significant exculpatory and impeachable evidence, therefore, was an egregious act manipulated by prosecution. Brady v. Maryland, 373 U.S. 83 (1963). The Department of Justice Policy, § 9-5.001, Section B – Policy Regarding Disclosure of Exculpatory and Impeachment Information, states "…Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. Brady v. Maryland, 373 U.S. 83,87 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972). (App. E) The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment….because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes the request for exculpatory or impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 432-33 (1995)." Wilkerson repeatedly requested exculpatory and relevant evidence since the date of Indictment until Trial 18 months later and got no relief. This policy goes into great detail how imperative the disclosure is to a Defendant and the

timing of disclosure being essential to permit the Defendant to make effective use at Trial. In no uncertain terms does burying exculpatory and relevant evidence in millions of unsearchable documents meet the standard nor the basic constitutional right that should have been afforded to Wilkerson but instead shows that these prosecutors blatantly violated their own DOJ policy, *Brady* and the Constitution without conscience to insure she was convicted on nothing more than an unsupported accusation and the prosecution should be held accountable for these egregious acts. The burden falls upon this Court to insure Due Process of disclosure is constitutionally met by the Government to ensure a fair trial for all without regard to race, sex or indigency and that the e-discovery (ESI) is provided into a searchable format of PDF with databases to keep up with the advances in technology.

Due to the sophistication of technology advancements the prosecution has found a way to circumvent *Brady* denying Due Process to Wilkerson to insure a conviction and mislead the Court with the misconception that production "was provided" although it had insured the impossibility of her finding the needle in the haystack for any *Brady* and *Giglio* materials.

This document dump also insured that Wilkerson would be convicted on an unfounded and unsupported accusation of a Government's key witness since she was unable to locate the essential exculpatory documents hidden within the document dump so that she could impeach and confront the witness.

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).

Wilkerson was not able to read all 15 million pages of documents before Trial without the effective use of search software nor did she have the resources, money or staffing to do so. The Petitioner discovered that in order to process the production into a searchable format of PDF and produce databases to create load files and host the unprecedented amount of production on these vendor servers it would cost between $250,000.00 and $471,000.00 as per the quotes she had obtained prior to Trial. The Petitioner was denied the funding of such expertise by the Court due to the magnitude of the expense. The National Association of Criminal Defense Lawyers published an article in its publication, The Champion, titled "White Collar Crime" written by Drew Findling of the Findling Law Firm, Atlanta, Georgia, in its September/October 2018 issue which subject matter involves the proverbial "document dump" by the Government as a threat to Due Process. In this article it details the exorbitant costs even for retained counsel and the trend for "document dumps" are no longer "…relegated to white collar and/or corporate cases….", as they are now being "…turned over in a wide variety of matters involving individual defendants.", whereby substantial production is becoming more and more common. The article states in addressing *Skilling* the Court

provides "…For instance, evidence that the government padded an open file with pointless and superfluous information to frustrate a defendant's review of the file might raise serious Brady issues. Creating a voluminous file that is unduly onerous to access might raise similar concerns. And it should go without saying that the Government may not hide Brady material of which it is aware in a huge open file in the hope that the Defendant will never find it. These scenarios would indicate that the Government was acting in bad faith in performing its obligations under Brady." Mr. Findling states that the costs for "hosting" or "storing" a 300,000 document production would subject the accused to bear costs of about $2,000.00 to $2,500.00 per month and it could take months to years for a case to be concluded. The cost for hosting the production and access to the search software would run from $3,500.00 to $6,000.00 per month according to Mr. Findling. That does not reflect the cost that the Petitioner would have incurred to "reformat" and convert the scanned images in an OCR searchable PDF format which would run into the hundreds of thousands of dollars for 8 to 15 million pages of documents. (App. F)

Another publication that concerns e-discovery (ESI) is titled Criminal Discovery, A Pocket Guide for Judges, published by the Federal Judicial Center in 2015. In Section D, Paragraph 1, The Workflow in Processing ESI, it describes ESI discovery as two forms: preprocessed (raw) or postprocessed and notes that some

raw ESI is not ready to be reviewed electronically as it must be processed into a digital file that can be loaded into 'document-review software' also called search software. "When ESI is in a proprietary format….it cannot be reviewed with industry-standard tools; instead, review requires specialized hardware, software and expertise to convert the data into a form that can be reviewed with standard tools. Even if the discovery is produced in an optimal way, defense counsel may still need expert assistance, such as litigation support personnel, paralegals or database vendors to convert e-discovery into a format they can use and to decide what processing, software and expertise is needed to assess the ESI. Next, the ESI should be organized to facilitate finding information. In voluminous e-discovery case, parties must be able to rely on document-review software, which can be costly. Nonetheless, it saves money because it speeds up the review process and improves counsel's ability to find information…." (App. G)

The Government only had to copy the processed production it already possessed to give to the Petitioner and she would have been able to search through the documents using relevant search terms just as the Government was doing. Instead she was provided "padded" files with "superfluous" and pointless information well in excess of the minimal amount of documents pertaining to her Case. Suppressing relevant evidence or exculpatory rises to the level of prosecutorial misconduct in the highest degree with criminal intent on the part of

the prosecution when it deliberately violated *Brady* and the Constitutional rights of the Petitioner to convict and incarcerate her.

CONCLUSION

The Petitioner's unlawful and wrongful conviction should be reversed in light of the Government's withholding extensive information favorable to the Petitioner's defense deliberately buried in unsearchable documents, as well as, the relevant evidence. The numerous *Brady* violations prevented the Petitioner from locating exculpatory evidence buried in the unprecedented and novel unsearchable e-discovery mega million document 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". The Government's deliberate *Brady* violations have and will set even more precedents in every Circuit in this country which can result in many more innocent persons being convicted and incarcerated on mere uncorroborated accusations without genuine credible evidence if the Defendant or accused has no means to extract exculpatory evidence nor defend oneself in a Court of law before the accusers.

Reversal is justified due to the orchestrated *Brady* violations with calculated Prosecutorial Misconduct which rises to the level of criminal intent with no regard for the Constitution of the United States.

Respectfully submitted.

/s/ Thomas G. Ledford

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November 5, 2018

CERTIFICATION OF COUNSEL

I certify that the Petition for Reconsideration and Rehearing filed on behalf of Mary Wilkerson, IFP, is in good faith and not reason of delay pursuant to Rule 44.

This 5th day of November, 2018.

/s/ Thomas G. Ledford

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