No. 18-7527

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

DAVID WILSON,
*Petitioner*,
v.

STATE OF ALABAMA,
*Respondent*.

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On Petition for Writ of Certiorari
to the Alabama Supreme Court

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# REPLY TO BRIEF IN OPPOSITION

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**CAPITAL CASE**
**NO EXECUTION DATE SET**

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## CAPITAL CASE

## QUESTIONS PRESENTED

I. Whether the prosecution's failure to provide *Brady v. Maryland* evidence is excused by trial counsel's lack of diligence in pursuing that evidence, and whether Mr. Wilson's counsel were ineffective in failing to obtain the evidence?

II. Where a defendant is arrested in circumstances indistinguishable from those described in *Kaupp v. Texas*, can probable cause to excuse the illegality of the arrest be supplied by the uncorroborated, unsworn statement of a co-defendant, where the co-defendant's veracity is unknown to the police and the co-defendant, while admitting some culpability, shifts the blame for the most egregious conduct to the defendant? And is defense counsel ineffective for failing to argue the applicability of *Kaupp* where the circumstances of the arrest and probable cause are virtually identical?

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## PRELIMINARY MATTERS

The State of Alabama encourages this Court to deny certiorari review by arguing that David Wilson's issues seek "fact-bound error correction," State's Br. at 6, 9, and 13, and involve no "genuine split" of authority, *id.* at 6. Neither of these assertions is true.

The only "fact-bound error[s]" arise from the State's omission of critical facts from its recitations. The omitted facts are not in dispute, but are merely inimical to the State's arguments. The State never identifies any facts that are presently in dispute, but only legal issues, as, for example, whether the facts support a finding that the police had probable cause to arrest Mr. Wilson or whether he was arrested in his home. So, to the extent there is any dispute about facts, it is only a result of the State's error in ignoring the facts as presently pled.[1]

As to a genuine split, Mr. Wilson described the contrary decisions of courts addressing claims under *Brady v. Maryland*, 373 U.S. 83 (1963), respecting whether a prosecutor's failure in his duty to disclose or produce exculpatory information is absolved by defense counsel's lack of diligence. *See* Pet. at 12-14. The State asserts that the Alabama Court of Criminal Appeals ("CCA") relied on no fourth diligence prong, directly after quoting from cases explicitly demanding such a showing to demonstrate the correctness of the CCA's opinion. *See* State's Br. at 10-11. Mr. Wilson also explained at length how the CCA's decision respecting the existence of probable

[1] Mr. Wilson was denied an evidentiary hearing, and, so, the appellate court was required to accept his pled facts as true, *Ex parte Boatwright*, 471 So. 2d 1257, 1259 (Ala. 1985).

cause conflicts with this Court's precedent, because it omits the element of reliability in the information available to police before making an arrest. *See* Pet. at 18-22. That is all that is demanded by Supreme Court Rule 10 to invoke this Court's jurisdiction.

The issues raised in Mr. Wilson's petition are important ones. The CCA's decision in this case allows prosecutors to withhold critical evidence from the defense if a defendant also has ineffective counsel and allows police to arrest citizens in their homes without a warrant on the mere say-so of admitted criminals foisting the responsibility for the most serious elements of their offense off on another, whether the police know anything about the informant's reliability or not. These issues matter to David Wilson, who did not kill the victim in this case, but they also matter to anyone anywhere suspected of a crime.

The State invites this Court to delay action because a federal habeas court may grant relief at a later time. State's Br. at 6. But as this Court has recognized, "[t]he alternative to granting review, after all, is forcing [Mr. Wilson] to endure yet more time on [Alabama]'s death row in service of a conviction that is constitutionally flawed." *Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016). Nothing will be gained by denying review of two such flagrant violations of this Court's precedents, and Mr. Wilson, who was only 20 at the time of the crime, might spend many more years on death row pursuant to a conviction and sentence unlawfully obtained.

## I. The prosecution violated *Brady v. Maryland* by withholding a co-defendant's confession, and the expert report validating that confession.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that the prosecution must provide favorable evidence to the defense. But at the time of Mr.

Wilson's capital murder trial, the prosecution withheld two key items of evidence: (1) as in *Brady*, his co-defendant's confession, in which Catherine Corley admitted to beating the victim with a bat until he fell down; and (2) a handwriting expert's report, commissioned by the prosecution, which authenticated her confession. Neither Ms. Corley's letter nor the expert report have ever been provided to Mr. Wilson.

In his own statement to police, Mr. Wilson admitted to striking the victim only once. (Tr. C. 505-07.) Despite possessing evidence that someone else beat the victim repeatedly, the prosecution insisted at trial that Mr. Wilson was solely responsible for his numerous injuries. (Tr. R. 606-07, 609-10, 612, 623.) On this basis, Mr. Wilson was convicted of capital murder and sentenced to death.

Although the facts here easily establish a *Brady* violation, the State nonetheless opposes certiorari. First, the State argues that this Court's review is precluded by the CCA's ruling that Mr. Wilson should have raised his *Brady* challenge at an earlier time. State's Br. at 9. However, "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). The question whether Mr. Wilson could have brought his challenge earlier is intertwined with the CCA's non-*Brady* absolution of the prosecution where defense counsel can be charged with a lack of diligence.[2]

[2] The State's suggestion that the *Brady* issue could have been raised on direct appeal is inaccurate. *See* State's Br. at i, 7-9. The police report upon which the *Brady* claim is premised is not included in the record on appeal during those proceedings. Therefore, there is no evidence that appellate counsel were aware of the Corley letter.

But this Court has held that the *Brady* rule applies even absent a request from the defendant. *United States v. Agurs*, 427 U.S. 97, 107 (1976). "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Whether *Brady* imposes some measure of diligence on the defense is itself a federal constitutional question, which numerous courts have grappled with. *See, e.g., State v. Ilk*, 422 P.3d 1219, 1226 (Mont. 2018) (explaining that "the diligence factor was inconsistent with federal law and unsound public policy"); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 290 (3d Cir. 2016) (concluding that "the duty to disclose under *Brady* is absolute — it does not depend on defense counsel's actions"); *People v. Chenault*, 845 N.W.2d 731, 737 (Mich. 2014) (reasoning that a diligence requirement was not "consistent with or implied by United States Supreme Court precedent[,]" and was not "consistent with the *Brady* doctrine generally"). As the CCA's diligence ruling is not independent of federal law, this Court's review of Mr. Wilson's *Brady* claim is not precluded.

The State also argues that the failure to comply with *Brady* should be excused because Ms. Corley's confessional letter — which, again, has never been produced — is inadmissible. State's Br. at 13-16. This Court has clearly held that a state cannot erect mechanistic rules to exclude evidence that another person committed the crime. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *see also Holmes v. South Carolina*,

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Present counsel found the police report in trial counsel's discovery file, obtained directly from trial counsel. And the handwriting expert's reports were discovered by present counsel in Corley's court file.

547 U.S. 319 (2006). Nevertheless, the CCA determined that the co-defendant's confession was inadmissible because it did not "exclude [Mr. Wilson] as a perpetrator of the offense[.]" Pet., App. B at 21.

Exclusion is not the standard for disclosure under *Brady*; favorability is. Indeed, in *Brady*, as in this case, both defendants were participants in the crime. *See* 373 U.S. at 84. But this Court held that evidence that the co-defendant was more culpable should have been provided to Brady, as it was favorable to his defense. *Id.* at 87.

The impact that Ms. Corley's confession would have had on the full picture at Mr. Wilson's trial is undeniable. To convict Mr. Wilson of capital murder, the prosecution needed to prove that he had the specific intent to kill. *See* Ala. Code 1975 §§ 13A-5-40(b), 13A-6-2(a)(1) (requiring specific intent to cause death). Although Mr. Wilson confessed to striking the victim only once, the prosecutor repeatedly emphasized the number of injuries as proof of his intent to kill. (Tr. R. 606-7, 609-10, 612, 623.) Mr. Wilson was portrayed as the sole perpetrator, despite the prosecution's possession of authenticated evidence that another person had beaten the victim with a bat until he was down.

In this case, Ms. Corley went alone to the kitchen where Mr. Walker lay after Mr. Wilson's confrontation with him. (C. 626-29.) As she stated she knocked the victim down, he was clearly not dead when Mr. Wilson left him. Evidence that another person inflicted multiple injuries in Mr. Wilson's absence would have supported his defense that he lacked the specific intent to kill. Since no evidence was introduced at Mr. Wilson's trial to even hint that another person might have struck

the killing blows, providing this evidence to the jury — both the letter and the handwriting expert's report — would have had a reasonable probability of affecting the verdict.

Such a confession would also have been relevant to punishment, even if Mr. Wilson were convicted of capital murder. Lesser culpability is mitigating. Ala. Code 1975, § 13A-5-51(4); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). There is a reasonable probability that the vote for death, already at the minimum of ten (Tr. C. 356, 510), would have been fewer, given the likelihood that Mr. Wilson was not the "actual kill[er]," *Brady*, 373 U.S. at 84.

The State also argues that the handwriting expert's report is insignificant because the authenticity of the confession is "not in dispute." State's Br. at 12. But this assertion is contradicted by the State's repeated reference to the confession as "purportedly" written by Ms. Corley throughout its brief. *Id.* at 7 ("a letter purportedly written by one of Wilson's accomplices, Catherine Corley"); 8 ("a letter purportedly from Corley"); 11 ("Corley and her purported letter"). The State also denies that the letter "bore any particular indicia of reliability." *Id.* at 15. However, the expert's report confirms that the letter was actually written by Ms. Corley and thereby bolsters the credibility and significance of the confession. Yet, at the time of Mr. Wilson's capital murder trial, the defense was never given notice of the handwriting report's existence.

In this case, the prosecution clearly violated *Brady* by failing to provide evidence — to Mr. Wilson and the jury — that another suspect, acting alone, repeatedly struck the victim with a bat until he fell, that is, that the killing blows

were not struck by Mr. Wilson, nor was he present, assisting in the fatal assault. This evidence renders Mr. Wilson even less culpable than John Brady, who was present when his co-defendant strangled the victim. 373 U.S. at 84 and 88. Under Alabama law, this circumstance creates reasonable doubt about Mr. Wilson's intent to kill and makes conviction of a lesser offense highly likely. A trial which omitted this evidence cannot be described as fundamentally fair. This Court should grant the writ, find that the prosecution suppressed Corley's letter and the handwriting expert's report, and order a new trial for Mr. Wilson.

**II. The police had neither a warrant nor probable cause when they arrested Mr. Wilson in his home, in violation of his Fourth Amendment rights. His counsel failed to argue that the police had no probable cause and made no citation to this Court's recent precedent in *Kaupp v. Texas*[3] on that score.[4] The State's argument that the police had probable cause omits a critical element, reliability, and is circular because it assumes what needs to be proved. Its subsidiary argument that Mr. Wilson was not arrested in his home is flatly contrary to *Kaupp*.**

**A. The police did not have probable cause to arrest David Wilson.**

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[3] 538 U.S. 626 (2003).

[4] To clarify: trial counsel filed a suppression motion which cited *Kaupp* for the principle that a consensual encounter with police can become coercive (C. 691), a point not at issue in Mr. Wilson's case, since the encounter was coercive from its inception. The motion was cut-and-pasted from a trial manual. *See* (C. 273-74), (C. 696-704) and (C. 691-94). Counsel's only changes to the sample motion were to remove the hypothetical facts without adding any facts from Mr. Wilson's case. At the suppression hearing, counsel made no argument whatsoever about anything. (R.-Suppression 67.) Appellate counsel challenged the absence of a warrant, but did not discuss probable cause and made no citation to *Kaupp* at all. (C. 532-34) (CCA Appellant's Br.) and (C. 878-82) (CCA Appellant's Reply Br.). Thus, the State is incorrect in suggesting that the present Fourth Amendment issue undergirding Mr. Wilson's ineffective assistance of counsel claim was decided on direct appeal.

The State does not contest that, prior to his arrest, the only information available to the police linking David Wilson to the murder of Dewey Walker was uncorroborated statements of self-proclaimed co-defendants. The State attempts to bolster these statements by pointing to "clear" evidence that a crime had been committed and "clear" evidence of a motive. *See* State's Br. at 18, 19, 20-21. Certainly, Dewey Walker was dead and his expensively equipped van was missing when police found him. But to establish probable cause, police must have "reasonably *trustworthy* information ... sufficient to warrant a prudent man in believing that *the petitioner* had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (emphases added). This is the element missing from police knowledge when they arrested Mr. Wilson.

Mr. Wilson does not contest that the police had "clear" evidence of a crime. He does contest that their information reliably implicated *him*. The State argues respecting reliability that police had reliable information because the information they had was reliable. The State never establishes any *source* for reliability, much less any source which this Court has countenanced, i.e., prior contact with informants who had proved reliable or police investigation corroborating any detail of the co-defendants' stories that independently implicated Mr. Wilson. On the contrary, the State would have this Court find that self-described co-defendants' statements are self-authenticating and bypass the test of reliability applicable to any other informant.

What the police knew here was that Matthew Marsh confessed to profiting from a robbery of the deceased victim, Mr. Walker. Marsh led police to Mr. Walker's

missing van. (C. 707.) Marsh denied involvement in the killing and pointed the finger at Mr. Wilson for that part of the offense. (C. 707.) The fact that the police had corroborative evidence, i.e., the van, to support Marsh's participation in at least some part of the crime created probable cause to arrest Marsh, but it did not provide reliable information about Mr. Wilson. The same is true of Michael Jackson. Jackson also received some of the stolen property. (C. 621) (listing items taken from Jackson). He was also in possession of what was identified as the murder weapon, an aluminum baseball bat. (R.-Suppression 61.) Again, this evidence supplied probable cause to arrest Jackson, but not Mr. Wilson, because it did not establish "that the petitioner [Mr. Wilson] had committed or was committing an offense." *Beck*, 379 U.S. at 91.

Ultimately, the State seeks a standard that allows arrest *without a warrant* whenever an individual admits some criminal responsibility, but also implicates another person. As this Court has recognized repeatedly, information from such a source is far from self-authenticating. *See*, *e.g.*, *Lee v. Illinois*, 476 U.S. 530, 539 (1986) ("[T]he confession of an accomplice [is] presumptively *unreliable*.") (emphasis added); *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) ("[In] our *Bruton* line of cases, we have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'") (citing *Lee*, 476 U.S. at 541, and *Bruton v. United States*, 391 U.S. 123, 136 (1968)). This Court has directly held that such information *does not* establish probable cause. In *Wong Sun v. United States*, the Court found that statements of two co-defendants implicating Wong in drug trafficking were not sufficient to support his arrest, because the police had no idea whether the co-defendants were truthful or not and had not investigated on their

own to corroborate what the co-defendants said about Wong's participation. 371 U.S. 471, 475 and 491 (1963). The State sidesteps this holding by pointing to the information police had, or did not have, to believe one of the co-defendants, Blackie Toy, had committed a crime. State's Br. at 18. The State distinguishes Toy, but does not discuss the lack of probable cause to arrest Wong himself.

The CCA denied Mr. Wilson's claim of ineffective assistance of counsel for failing to argue the applicability of *Kaupp* to the circumstances of his case by finding that the co-defendants' uncorroborated statements, standing alone, created probable cause to arrest Mr. Wilson. Pet'r's App. B at 13-14. The State provides no other evidence to support that conclusion. This Court should grant the writ, clarify that co-defendants' statements inculpating another are subject to the same requirements of reliability to establish probable cause as statements made by any informant and find that police did not have probable cause to arrest David Wilson. Because this is so, trial counsel were ineffective for failing to argue the identity of facts with *Kaupp*, which would have necessitated suppression of Mr. Wilson's statement and all other proceeds of the illegal arrest.

### B. David Wilson was arrested in his home. Contrary to the State's argument, the Fourth Amendment does not protect only 17-year-olds in a state of undress.

The State argues that the facts of *Kaupp* are distinguishable from those here, State's Br. at 20-21, but the facts to which it cites are not critical to a determination of arrest. The State emphasizes that Kaupp was only 17, while Wilson was 20, and that Kaupp was taken from his home in his underwear, while Mr. Wilson was allowed to dress. *Id.* at 20. It does not follow that Mr. Wilson was not arrested, when so many

other facts are identical. What the State mentions nowhere in its brief are the following:

> Police had no warrant to arrest either Kaupp or Wilson, 538 U.S. at 628; no arrest warrant ever produced which predates Mr. Wilson's statement to police.[5]
>
> Police went to the homes of Kaupp and Wilson in the early morning hours, 538 U.S. at 628; (R.-Suppression 9).
>
> The police entered both homes in force, 538 U.S. at 628; (R.-Suppression 9-11).
>
> Both Kaupp and Wilson were asleep in bed when the police entered their homes, 538 U.S. at 628; (R.-Suppression 10-11).
>
> Both Kaupp and Wilson were told that they "need[ed] to go and talk" with police, 538 U.S. at 628; (R.-Suppression 12).
>
> Both Kaupp and Wilson were handcuffed and transported to police headquarters in a police vehicle, 538 U.S. at 628; (R.-Suppression 12, 14, 31).

All of these are facts which this Court found material to its determination that Kaupp was arrested in his home. 538 U.S. at 630-31.

The State here hinges its argument that Mr. Wilson was not arrested on precisely the same grounds as the State of Texas did in *Kaupp*. Kaupp said "Okay" when told "we need to go and talk," 538 U.S. at 630-31, and did not resist the police, *id.* at 632. Texas argued that this "Okay" meant Kaupp went voluntarily, but this Court disagreed. *Id.* at 631. The State of Alabama here argues that because Mr. Wilson went with police when told "we needed to talk with him, that he needed to

[5] The CCA has avoided stating that the police had no warrant, both on direct appeal, *see Wilson v. State*, 142 So. 3d 732, 765-68, and here, Pet'r's App. B at 11-13.

come" (R.-Suppression 12), he went "voluntarily." The State asserts that "Wilson was asked to go and agreed." State's Br. at 20. The testimony of the lead arresting officer, Sgt. Luker, does not support the "asked to go" factor. As in *Kaupp*, there is nothing in the record to indicate that Mr. Wilson was given the option not to go.

The State further urges that the conduct of the Dothan police differs from the Texas authorities because the latter had been denied a "pocket warrant" and proceeded to pick Kaupp up anyway. State's Br. at 20-21. This factor might just as easily be read to indicate greater disregard for the law in Mr. Wilson's case, since the Dothan police made no effort at all to obtain judicial authorization for their actions.[6]

Mr. Wilson was arrested in his home without a warrant. He was awakened in the early morning hours while five police officers stood in his living room, told he "needed to come," and hauled out to a police vehicle in handcuffs. The police did not have probable cause to arrest, because the only information they had implicating Mr. Wilson were self-serving, uncorroborated statements from admitted thieves of the victims' property. So the police here failed doubly to follow the law: they failed to obtain a warrant and they failed to conduct any investigation to confirm the co-defendants' accusations. Such conduct does not warrant approval, but reprimand, a reprimand which the state courts have declined to administer.

[6] The State also injects its argument for probable cause here, State's Br. at 20-21, but whether the police had probable cause or not has no bearing on whether Mr. Wilson was arrested or not.

## CONCLUSION

Mr. Wilson turns to this Court for relief, because his convictions for capital murder and sentence of death were unlawfully obtained, both by the State's withholding a co-defendant's confession to striking the killing blows and by his illegal arrest and the taking of his statement under circumstances which enhanced, rather than dissipated, the taint. In a twist from its usual mantra that "justice delayed is justice denied," the State urges this Court to turn a deaf ear to Mr. Wilson's complaints because relief may come from elsewhere on some other day. This Court should not accept that invitation, but should grant certiorari, reverse his unconstitutional convictions and sentence, and remand for a new trial compliant with the Constitution's demands of fairness.

Respectfully submitted,

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