UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CROSLEY ALEXANDER GREEN,

Petitioner,

v. CASE NO. 6:14-cv-330-Orl-37TBS

SECRETARY, DEPARTMENT OF CORRECTIONS, et. al.,

Respondents.

_____/

MOTION FOR STAY PENDING APPEAL

Respondents move this Court pursuant to Federal Rule of Civil Procedure 62 and Local Rule 3.01, to stay its July 27, 2018 amended order (Doc. 74), pending Respondents' appeal of that order to the Eleventh Circuit Court of Appeals, and in support thereof states:

MEMORANDUM OF LEGAL AUTHORITY

This Court has ordered the State to initiate trial proceedings within ninety days of the date of its order. Respondents' are filing a notice of appeal simultaneously with this motion. The standard for issuance of a stay is based on four factors: (1) whether the stay applicant has made a strong showing that it (the State) is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will injure the other parties interested in the proceeding; and (4) where the public

interest lies. *See Hilton v. Braunskill* 481 U.S. 770, 776 (1987). Respondents submit that all four factors warrant a stay.

This Court granted relief based on an alleged *Brady* violation by the State of Florida. Respondents first contend that there is a strong likelihood that it will succeed on the merits in an appeal. As will be demonstrated, this Court's resolution of this issue is procedurally, factually and legally erroneous. This Court granted habeas relief on grounds that were not exhausted in the State court, due to Green's failure to challenge on appeal the state court's findings that this Court now finds fault with, as well as on facts that were **expressly found** to be procedurally defaulted. Further, this Court completely overlooked other state court factual findings. In addition, the grant of relief is based on handwritten notes that are hearsay, which contains hearsay within hearsay based on hearsay, and most importantly, contain information **that defense counsel indisputably had in his possession** before trial.

Further, even if the claim were cognizable in federal habeas corpus proceedings, Green has never alleged, much less demonstrated, that the state court acted contrary to or unreasonably applied clearly established Supreme Court law in rejecting any claim that was fully and fairly presented to the

state court. Rather, it was this Court, and not the state court, that unreasonably applied *Brady v. Maryland.* Finally, as will be demonstrated, there is no possibility, much less a reasonable probability, that the result of the proceeding would have been any different if the prosecutor had told defense counsel that Officers Clarke and Rixey, who responded to the scene in the middle of the night in complete darkness and never talked to Kim Hallock and had no further role in the investigation of the case, thought Hallock "did it."

First and foremost, Hallock's alleged statement that she tied the hands of victim Chip Flynn was made to Deputy Walker, and only Deputy Walker, the night of Flynn's murder, and the actual statement in Walker's report is, "Mr. Flynn exited the pickup truck and then Ms. Hallock **was told** to tie Mr. Flynn's hands behind his back with a shoe string." This alleged statement **was contained in Walker's report from that evening, which defense counsel had a copy of, and used during his deposition of Wade Walker,** well before trial in this case. (Doc. 64, Appendix 28 at 4475).

This Court states in its order that "conspicuously absent" from the state court findings is the "information contained in the prosecutor's note that '[H?] said she tied his hands behind his back.'" (Order at 16). First, and again, Green never

challenged the State court findings as being insufficient, no doubt because it was apparent that counsel had this information, and had it from the only person who had first hand knowledge of it, which was Deputy Walker. In fact, on appeal from the denial of his postconviction motion, Green acknowledged that counsel had this information by arguing:

> A handwritten police statement dated 8/28/89 with the names Diane Clark and Mark Rixey underlined on the front page was obtained through Ch. 119. It was not disclosed to the defense at trial. It contains the following statement: "Mark & Diane suspect girl did it, she changed her story a couple of times...[?] She [?] said she tied his hands behind his back."
>
> **This is consistent with Dep. Walker's recollection that Hallock said that she was the one who did the actual tying of Flynn's hands,** and inconsistent with Hallock's subsequent statements and eventual trial testimony.

(Supp.App.E at 84-85)(emphasis supplied). Respondent would note that it is not only consistent with Walker's recollection, it **is** Walker's recollection, because he is the **only** one of the three who spoke with Hallock. Green further acknowledged defense counsel had this information, by arguing, "Defense counsel did not confront Hallock at trial with either the drug deal gone bad scenario **or with Deputy Walker's report that she had been the one to tie Flynn's hands**." (*Id.* at 86)(emphasis supplied).

Further, while this Court found the statement contained in the handwritten notes "conspicuously absent" from the State

court's findings on the *Brady* issue, it was conspicuously present before the state trial court in that section of its order addressing Green's claim where he argued that counsel was ineffective for not impeaching Hallock with **this prior statement that counsel already knew about:**

> At the evidentiary hearing, Officer Walker was not called to testify. Consequently, this Court is only left with the allegations made by the Defendant in his post-conviction motion as to what Officer Walker purportedly said in 1999 to FDLE concerning what Kim Hallock told him.
>
> The Defendant also alleges that defense counsel was ineffective for failing to impeach Kim Hallock with Officer Walker's written report that the perpetrator told Kim to tie Chip Flynn's hands behind his back with a shoe string. At trial and in her recorded statements, Kim testified that the Defendant told her to remove the shoe laces, give the shoe laces to him, and then the Defendant tied Chip Flynn's hands with the laces. (See Exhibit II," 5/31/1990 Court Proceeding Transcript Composite; Exhibit "JJ," Kim Hallock's deposition, pgs. 43, 78-82; and Exhibit "B,"pgs. 585-589, 707). The Defendant has failed to meet the Strickland standard for postconviction relief, as counsel cannot be ineffective for failing to present cumulative evidence of inconsistent statements. Maharaj v. State, 778 So.2d 944, 957 (Fla. 2000). Mr. Parker impeached Kim Hallock with numerous other inconsistent statements. (see Exhibit "B," pages 666-677, 682-694, 700-704, 740-744, 1846-1850, 1857-1861). Additionally, Mr. Parker did argue to the jury that Chip's hands were tied for comfort. (See Exhibit "B," p. 1859). Lastly, this claim is without merit because Deputy Walker's written report specifically states Kim Hallock said she "***was told to*** tie Mr. Flynn's hands behind his back with a shoe string." (emphasis supplied). (See Exhibit "HH.") This is far different than reporting that Kim Hallock stated that she tied Chip Flynn's hands.

(Order at 15).

Significantly, the argument and/or basis for this Court's current grant of relief was never presented to or addressed by the State court. It is nothing more than an amalgam of facts and hybrid of claims from Green's first postconviction motion and his successive, procedurally defaulted motion. Likewise, Green has never alleged or demonstrated a specific, cohesive claim that he raised and that was ruled upon in state court, nor has he ever alleged or demonstrated exactly how the state court unreasonably applied any United States Supreme Court law or unreasonably determined any facts related to such claim.

This Court also states that this impeachment information, that Hallock tied Flynn's hands, "was unquestionably material as it seriously undermined the testimony of Hallock that the assailant tied Flynn's hands behind his back and that the gun discharged in the process." (Order at 16). Again, the defense had this information about what Hallock had said, and further, victim Chip Flynn **was not shot at the same time his hands were tied**. *See Green v. State*, 641 So.2d 391, 393 (Fla. 1994)("The man then tied Flynn's hands behind his back with shoelaces. While tying Flynn's hands, the man's gun went off but did not injure Flynn."). In fact, he was not even shot at the same location where his hands had been tied. *Id.*

This leaves only the "opinions" Rixey and Clarke expressed to the prosecutor, and again, this claim was never asserted on the appeal from the denial of Green's first postconviction motion, and was expressly found to be procedurally defaulted in his successive postconviction motion, wherein Green had attached the affidavits of Rixey and Clarke. First, this Court refers to those procedurally defaulted facts, stating, "In their affidavits, **executed more than twenty years** after the crime, Clarke and Rixey, contradict certain statements made at their depositions, which were taken closely after the commission of the crime," specifically, that they had stated at deposition that they had no further involvement in the investigation of the murder, and they never had any contact with Hallock (Order at 10). Not only are any claims based on those twenty year after the fact hearsay affidavits procedurally defaulted, **the facts remain** the Clarke and Rixey had no further involvement in the investigation of the case after the night of the murder, and they never had any contact with Hallock. The defaulted twenty year after the fact hearsay affidavits do nothing to contradict these facts.

In terms of legal analysis, Respondents will demonstrate that it was this Court, and not the state courts, that unreasonably applied *Brady v. Maryland*, 373 U.S. 1194 (1963).

This Court found that it was objectively unreasonable for the state court to end its prejudice inquiry once it made an admissibility determination on the prosecutor's notes concerning the deputies suspicions that Hallock murdered Flynn. Again, this is an argument that was never raised in state court. Further, *Brady* requires the **defendant** to show that the evidence was material, and there must be a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different; it must undermine confidence in the outcome of the trial. *See Rimmer v. Secretary*, 876 F.3d 1039 (11th Cir. 2017). *Brady* does not set a point where the prejudice inquiry ends, and a court reviewing a *Brady* claim must consider the totality of the circumstances in the context of the entire record. *Id*. More importantly, a federal court must defer to a state court's findings on such issues, and should not conduct a de novo review. *Id*. The state court's unchallenged determination that prejudice could not be shown because the opinions of first responders would not have been admissible at trial is entirely reasonable, and this Court erred in conducting its own de novo analysis.

Further, this Court states that "it is unknown and unknowable whether counsel could have elicited the testimony from either [Rixey or Clarke] in a fashion to avoid the 'opinion

of innocence' issue, by framing the question 'isn't it true you believed the investigation should have focused on Hallock,' or something to that effect." Relief cannot be based on such rank speculation, particularly on such a minor issue. Further, even if the defense could have elicited the "essence of the testimony from either one of them to avoid an 'opinion of innocence issue,'" which it could not have because such evidence is totally irrelevant, both witnesses would have been thoroughly impeached on cross examination, or redirect examination, or whatever posture the case would have been in when the defense may have been able to do this, which again, is neither alleged or demonstrated. As stated, **neither Rixey nor Clarke talked to or had contact with Hallock that night, and if they even saw her it was when she was sitting in Deputy Walker's car with Deputy Walker.**

It is unimaginable that the result of the trial would have been different based on inadmissible opinion testimony of two police officers who only responded to the crime scene in the middle of the night, and had no further participation in the investigation. At page 14, this Court states that the prosecutor's notes went to the heart of the defense strategy, yet totally speculates, and even acknowledges, that it is completely unknown if counsel would have been able to use any of

the initial responders opinions, which it would not have been, as the State court found. Again, not only is this rank speculation, it totally ignores that it is the duty of the defendant, not the reviewing court, to assert and demonstrate prejudice.

Finally, in examining prejudice, this Court failed to look at the totality of the circumstances, and referred only to Hallock's identification. Hallock's identification was not the only direct evidence in this case. This murder happened the night of April 3-4, 1989. Green made admissions to several people. He told his sister Sheila the day after the shooting that he did not intentionally kill the victim, and that the man had pulled a gun on him and told the girl to go for help (T 854-58). This is exactly how Kim Hallock described the events (T 615-17). That same day Green told his friend Lonnie Hillery, who said Green seemed shaken and scared, that he "fucked up" when some people came through and tried to get something from him (T 872-74). Alan Murray was hanging out on a street corner with a group of guys, and Green came up and said he had just killed a man, and was going to disappear (T 1231). The police searched for Green from April until June, checking places where he had been before and checking with family members; they found him in Mims (T 1494, 1292-95, 1561-21, 1526-27).

Additional evidence showed that two witnesses, who knew Green, saw him at Holder park the night of the murder, and each contacted the police after reading about the murder and the suspect's description in the paper (T 1267-1297). Also, within hours of the murder, a police dog tracked from the crime scene to the home of Green's sister (T 1396-1492). Green had been seen at his sister's house on April 3, 1989 at three o'clock p.m. (T 1225).

Respondents next submit that there is a substantial likelihood of irreparable injury absent a stay because an appeal cannot be completed in the time given to retry a case. The murder in this case happened almost thirty years ago, and if the State were to lose on retrial, it would lose a first degree murder conviction that may otherwise have been sustained on appeal. *See Bauberger v. Haynes*, 702 F.Supp. 588 (M.D.N.C. 2010). Conversely, even if the State were to obtain a conviction, it would moot an extremely viable appellate issue. In this respect, Respondents would also note that no evidence that was presented in the original trial has been excluded by this Court's order, and that evidence is substantial. In fact, there is now mitochondrial DNA evidence from which Green cannot be excluded. However, the passage of time may have an effect on the presentation of that evidence, so Respondents would ask this

Court to allow the State to maintain the status quo pending appeal of its decision to grant relief, particularly in light of the State's likelihood of success on appeal. *See Pierre v. Vannoy*, 891 F.3d 224 (5th Cir. 2018). In this respect, Respondents would also point out that this appeal involves only the one issue set forth previously, so extensive briefing time will not be required.

Respondents further assert that Respondents have a duty to protect crime victims, and another trial prior to resolution of the appeal would bring substantial hardship to the victims in this case. Kim Hallock has been accused of murder for several decades now, but she is a crime victim who was kidnapped and robbed, and saw a friend shot to death. Her actions that night have been scrutinized and criticized by Green for years, but he has never explained exactly how it was that she was able to tie up Chip Flynn and shoot him. Likewise, Chip Flynn's family will once again have to relive the murder of their family member.

In contrast, in evaluating injury to other interested parties, Respondents would note that, as this Court previously found, Green did not exercise due diligence in pursuing his rights. Green had all of the information which this Court reviewed as to this claim at the time he filed his first motion for postconviction relief. He could have pursued this claim in

federal court years ago, but instead, waited until the time for filing a state postconviction motion had expired, and presented additional procedurally barred and meritless claims to the state court.

Finally, the public interest lies in staying this proceeding until the appeal is resolved, for essentially the foregoing reasons. Most importantly, as demonstrated, there is a strong likelihood of success on appeal, and this factor, along with the consideration a retrial, which due to the passage of time could result in an acquittal and the loss of a first degree murder conviction that would have been sustained on appeal, weigh in favor of a stay. This Court has already rejected Green's claim of actual innocence. Two state court trial judges, after extensive hearings at which Green was in no way limited in presenting evidence, the Florida Supreme Court, and the Fifth District Court of Appeal have evaluated the claims that Green has presented to them and found them to be without merit. Further, despite the numerous and extensive hearings afforded to Green in state court, he has never attempted to or presented the testimony of either Officers Clarke or Rixey, Deputy Walker, or Kim Hallock, in an attempt to prove any of his allegations, and they remain just that, speculative allegations. As the Eleventh Circuit has stated, "Unless we respect the

AEDPA's onerous standard, we risk 'distur[bing] the State's significant interest in repose for concluded litigation, den[ying] society the right to punish some admitted offenders, and intrud[ing] on state sovereignty to degree matched by matched by few exercises of federal judicial authority." *Rimmer*, 876 F.3d at 1055, quoting *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1729 (2017).

COMPLIANCE WITH LOCAL RULE 3.01(g)

The undersigned emailed counsel for petitioner Green, Keith Harrison, who responded that he would oppose a stay.

WHEREFORE, Respondents request this Court stay its amended order granting in part and denying in part Green's petition for writ of habeas corpus pending respondent's appeal of it in the Eleventh Circuuit Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 20, 2018, I electronically filed this Motion for Stay of Proceedings with the Clerk of the Court by using the CM/ECF system, which will serve counsel for petitioner, Jeane Thomas, Keith Harrison and Robert Rhoad, Crowell & Moring LLP, 1001 Pennsylvania Avenue, NW, Washington, DC, at jthomas@crowell.com., kharrison@crowell.com, and rrhoad@crowell.com, and Mark E. Olive, Law Offices of Mark E. Olive, P.A., 320 West Jefferson Street, Tallahassee, FL 32301, at meolive@aol.com,

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