IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MELISSA CALUSINSKI, REG. NO. R88005 PETITIONER, V. BEATRICE CALHOUN, WARDEN, LOGAN CORRECTIONAL CENTER, RESPONDENT.	Case No. 1:19-cv-02122 The Honorable Martha M. Pacold, Judge Presiding

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Now comes Petitioner, Melissa Calusinski, by and through her attorneys, Kathleen T. Zellner & Associates, P.C., pursuant to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and, for her response to Respondent's[1] answer to her petition for writ of habeas corpus, states as follows:

I. MELISSA'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE SUPPRESSED MATERIAL X-RAYS THAT WERE FAVORABLE TO HER. RESPONDENT'S ARGUMENTS TO THE CONTRARY ARE MISGUIDED.

A. The readable x-rays were material.

Respondent argues that "[t]he appellate court's express holding that the TIFF versions were not material was correct, and at the very least, reasonable. And its adjudication of the claim was all the more reasonable because the x-rays were not

[1] Petitioner agrees with Respondent that Beatrice Calhoun, the acting warden of Logan Correctional Center, is automatically substituted as respondent pursuant to Fed. R. Civ. P. 25(d).

'suppressed' for purposes of *Brady*." (Dkt. 16, p. 17). Respondent further argues, "[t]here was no reasonable probability that petitioner would have been acquitted had the TIFF x-ray had [*sic*] been produced because the additional evidence that [B.K.] suffered a skull fracture was strong." (Dkt. 16, p. 17).

Respondent's argument fundamentally misapprehends the *Brady* materiality requirement. "Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Yet, Melissa need not show that she "more likely than not" would have been acquitted if the readable x-rays were tendered before trial; she must only show that the readable x-rays are sufficient to undermine confidence in the guilty verdict. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

Respondent makes much of its argument that the readable x-ray images are immaterial under *Brady* because "the jury heard testimony that the fracture did not appear on the x-ray and that the visible line in the [autopsy] photographs may have been something other than a fracture. In support of this position, Respondent first notes that Dr. Choi testified that he had viewed an x-ray of B.K.'s head and did not see the fracture on the x-ray. (Dkt. 16, p. 18). Respondent deliberately omitted that Dr. Choi testified that he may not have been able to read the x-ray film <u>because of its poor quality</u>. (Dkt. 17-5, pp. 334–35). The exchange between Dr. Choi and Mr. DeLuca went as follows:

> [Mr. DeLuca]: [D]id the x-ray come out?

> [Dr. Choi]: I look again after the autopsy and in asking the people, no, it was a poor quality. It didn't show.
>
> [Mr. DeLuca]: It was a poor quality x-ray; correct? Well, let me ask you this, Doctor. Could you see anything on the x-ray film?
>
> [Dr. Choi]: No, I didn't see the fracture line on the x-ray.
>
> [Mr. DeLuca]: All right. Is that because it may have been a poor quality?
>
> [Dr. Choi]: It could be.

(Dkt. 17-5, pp. 334–35).

That Dr. Choi could not tell whether (1) there was, as a matter of fact, no skull fracture or (2) the x-ray image was of such poor quality that he could not read it squarely supports Melissa's habeas claims. This determination—whether there was no fracture or whether the poor quality of the x-ray images rendered them illegible—is precisely what makes the TIFF x-ray images material. Indeed, Dr. Choi, when confronted with the legible x-ray evidence, admitted his error and attested that B.K. suffered a re-aggravation of an existing injury. (Dkt. 2-8, pp. 128–29).

Respondent's argument—that Dr. Choi's brief discussion of the x-ray images' poor quality renders the readable x-ray evidence cumulative—is specious. Indeed, the absurdity of this argument is borne out by the section of Dr. Choi's testimony at Melissa's trial recreated above. The readable x-ray evidence, as described by Dr. Zimmerman in Melissa's postconviction proceedings, cuts through Dr. Choi's ambiguity. While Dr. Choi testified that the poor quality of the x-rays could have been the reason why he did not observe a fracture in the x-ray, Dr. Zimmerman—

after studying the readable x-ray images—testified that there was no fracture present in B.K.'s skull. (Dkt. 17-8, pp. 129–30). Therefore, Dr. Zimmerman clarified that not only was the quality of the illegible x-rays degraded to point of being useless, but also that there was never a fracture in B.K.'s skull. Neither the State nor DeLuca presented evidence that the x-rays of B.K.'s skull definitively showed there was no fracture; therefore, Dr. Zimmerman's testimony is far from cumulative. Instead, where the contested issue is whether the legible x-rays show a fracture in B.K.'s skull, Dr. Zimmerman's opinions are dispositive. Respondent should not be permitted to escape the import of Dr. Zimmerman's testimony by leveling the hollow contention that his opinions are cumulative of evidence presented at trial because there was absolutely no evidence presented at trial to establish that the x-rays, when viewed in a legible format, unilaterally and conclusively demonstrated that there was no fracture in B.K.'s skull.

Moreover, Respondent holds out Dr. Teas's "testimony that the visible line on B.K.'s skull was possibly a defect and not a fracture" in further hopes of convincing this Court that the readable x-ray evidence was merely cumulative. (Dkt. 16, p. 18). This argument is as unavailing as Respondent's argument concerning Dr. Choi. While Dr. Teas opined that the line on B.K.'s skull was possibly a defect—and not a fracture—her opinion is qualitatively distinct from that rendered by Dr. Zimmerman. While Dr. Teas's review was confined to the illegible x-rays and the autopsy photographs, Dr. Zimmerman's review benefitted from the legible, uncompressed, and highest quality x-ray images.

Indeed, Dr. Zimmerman's postconviction testimony does not even state the same opinion as Dr. Teas's opinion at trial. While Dr. Teas equivocally testified, based only on the illegible x-rays and the autopsy photographs, that the visible line on B.K.'s skull was possibly a defect and not a fracture (Dkt. 2-3, p. 28), Dr. Zimmerman testified conclusively that there was no skull fracture because the legible x-ray images did not show one. Therefore, Dr. Zimmerman's testimony is far from cumulative of evidence adduced at Melissa's trial; Dr. Zimmerman's opinions represent a careful review of evidence that Dr. Teas did not review and which changed Dr. Choi's opinion as to the cause of B.K.'s death. Far from merely cumulative of evidence presented at Melissa's trial, these opinions are distinct and, for the first time in the history of this case, offer definitive and unequivocal evidence that there was no fracture in B.K.'s skull.

Additionally, Respondent argues that DeLuca knew that he could challenge the existence of B.K.'s skull fracture because Dr. Teas sent him a report stating that she had advised DeLuca that he should obtain the x-rays. (Dkt. 16 at 19). Respondent ignores a critical component of the case: former ASA Bishop informed DeLuca, on the record, that the x-rays were saved to the CD she tendered DeLuca, that the x-ray images were unreadable, and that the State's Attorney's Office was working to improve their quality. (Dkt. 17-3, pp. 110–12). Bishop explained to the trial court that "[the x-rays] are very illegible on the digital." (Dkt. 17-3, p. 111). The Lake County State's Attorney's Office never provided DeLuca with readable x-rays

before trial and never gave DeLuca notice that they were actively pursuing improved x-rays.

This sequence of events fatally undermines Respondent's argument that the readable x-rays were not withheld for *Brady* purposes (discussed fully in part I(B), *infra*). Indeed, well-settled Supreme Court precedent has condemned the very argument Respondent makes in its answer—*i.e.*, that Melissa should be punished because DeLuca took Bishop at her word. In *Banks v. Dretke*, 540 U.S. 668, 695 (2004), the Supreme Court held that a defendant is not responsible for uncovering evidence that has been withheld by the prosecution. The Court reasoned, "Our decision lends no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. *Id.* Respondent, nevertheless, urges this Court to disregard the Supreme Court's clear instructions.

Bishop's representations—and production of unreadable x-ray images—to DeLuca are precisely the sort of partial disclosures the Supreme Court has repeatedly held are *Brady* material. Here, Bishop's disclosure of the unreadable x-ray images induced DeLuca to believe that no better x-ray images existed. Just as in *United States v. Bagley*, 473 U.S. 667, 681 (1985), Bishop made a partial disclosure (of the illegible x-ray images), which misled DeLuca into believing no further x-ray evidence existed. Just as in *Bagley*, the prosecution violated *Brady*. Respondent's arguments that DeLuca would not have pursued further investigation in light of legible x-ray images are unavailing. While DeLuca did elicit testimony from Dr. Choi that the

poor-quality x-ray image did not show a skull fracture, he was unable to elicit conclusive testimony about the absence of a skull fracture without legible x-rays. Indeed, DeLuca could not perform further examinations of the x-rays or otherwise obtain evidence about them because Bishop induced DeLuca into believing no better x-rays existed. Therefore, any "knowledge [of the readable x-rays] and inaction" on DeLuca's part is directly attributable to Bishop's representation to him wherein she told him the x-rays were not readable and that there were no other x-rays in the State's Attorney's possession. (Dkt. 16, p. 19).

Contrary to Respondent's contention that there is no reasonable probability that the outcome of Melissa's trial would have been different if DeLuca had known about the readable x-ray images, petitioner has made a substantial showing that: (1) DeLuca would have altered his trial strategy; (2) DeLuca would have elicited evidence, akin to Dr. Zimmerman's testimony, that the legible x-rays showed there was no fracture in B.K.'s skull; and (3) that there exists a reasonable probability that the outcome of Melissa's trial would have been different had Bishop and the State not withheld the uncompressed, highest quality x-ray images.

B. The State suppressed the readable x-ray images.

Respondent also contends that the state court's judgment was reasonable because the State did not suppress the readable x-ray images. (Dkt. 16, p. 22). Respondent, for its part, argues that evidence is suppressed under *Brady* "when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the

exercise of reasonable diligence." *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) (Dkt. 16, p. 22). First, Respondent argues that the state court did not unreasonably interpret the facts when it found that the deleteriously compressed illegible x-rays are of "substantially similar" quality to the uncompressed legible x-rays discovered on the Lake County Coroner's computer after Melissa's trial where a program that could be used to manipulate the x-ray images was disclosed with the illegible x-rays. (Dkt. 16, p. 23). In reply, Petitioner renews her contention that the circuit court's holding on this matter constituted an unreasonable interpretation of the facts.

In support thereof, Petitioner contends that Dr. Zimmerman's evidentiary hearing testimony—which, unique among the multifarious experts in this case, is informed by the highest-quality x-ray images—is dispositive of this issue. Dr. Zimmerman's testimony, which went unrebutted at Melissa's evidentiary hearing, established that the illegible x-rays would not allow him to diagnose a skull fracture. (Dkt. 17-8, p. 127). Lightening up the image—*e.g.*, in the ways described by TigerView representative Stauffacher—would not aid Dr. Zimmerman in interpreting the deleteriously compressed x-ray images. (Dkt. 17-8, p. 129). It was only when Dr. Zimmerman reviewed the uncompressed, highest quality x-ray images that he could render the definitive, unqualified opinion that there was no skull fracture present in B.K.'s skull. (Dkt. 17-8, pp. 129–30). Dr. Zimmerman testified that any fracture present in B.K.'s skull should be visible in the x-ray (Dkt. 17-8, p. 137). Dr. Zimmerman went on to testify that it would have been impossible for

someone to have examined B.K.'s skull and touched a fracture because no fracture was present on the uncompressed x-ray image he reviewed. (Dkt. 17-8, p. 137).

Thus, the state court erred when it held that the deleteriously compressed x-ray images were, when further processed using TigerView software, "substantially similar" to the uncompressed, highest quality x-ray images. This holding is wholly unsupported by the record and is completely untethered from the unrebutted medical opinion testimony elicited from Dr. Zimmerman at Melissa's evidentiary hearing. For these reasons, the State court's holding that the images were substantially similar constitutes an unreasonable determination of the facts because, *inter alia*, the circuit court considered its lay opinion to be of greater evidentiary weight than Dr. Zimmerman's rigorous opinions, which were offered within a reasonable degree of scientific certainty. (Dkt. 17-8, p. 130).

Additionally, Respondent argues that the legible x-ray images were not suppressed by the State because they were "readily available to defense counsel had he simply exercised reasonable diligence." (Dkt. 16, p. 23). Respondent alleges that Dr. Teas's report to DeLuca "should have alerted counsel to the existence of the better-quality TIFF images." (Dkt. 16, p. 23). This statement is conclusory and unsupported by the record. Indeed, Respondent continues by disparaging DeLuca's efforts in preparing for Melissa's trial. In so doing, Respondent is attacking a straw man instead of the heart of Petitioner's argument. Petitioner's argument in the instant habeas petition is not whether DeLuca acted with reasonable diligence with regard to the uncompressed x-ray images; instead, Petitioner's argument—which

Respondent neglects to address in its Answer—concerns the State's withholding the legible x-ray image evidence when it made a partial disclosure of the deleteriously compressed x-ray images in September 2011.

When Bishop tendered to DeLuca the deleteriously compressed x-ray images in September 2011, she informed him that the x-rays she was giving him were unreadable and that the State's Attorney's Office was working to improve their quality. (Dkt. 17-3, pp. 110–12). Consistent with well-established Supreme Court precedents, DeLuca was entitled to take Bishop at her word. *Banks*, 540 U.S. at 695 (holding an accused is not responsible for uncovering evidence that has been withheld by the prosecution). Thus, the relevant issue in the instant petition is whether Bishop's representations that the x-rays were illegible and that her office would notify DeLuca when and if better-quality images became available misled DeLuca into believing no other x-ray images existed. *Bagley*, 473, U.S. at 681 (holding that *Brady* is violated when the prosecution makes a partial disclosure that misleads defense counsel into believing that no further exculpatory evidence as to a certain issue exists).

This conclusion is borne out by DeLuca's testimony at Melissa's evidentiary hearing. On September 7, 2011, the same day Bishop gave him the x-ray images and told him they were illegible, DeLuca tried to view the files that were saved to the disc. After he put the CD in his computer, he opened its directory. There, he observed three image files and their icons. Because all three images appeared very dark and

unclear, DeLuca asked his secretary for assistance. They attempted to open the other files on the disk, but nothing happened. (Dkt. 17-8, pp. 42–45).

Then, two days later on September 9, 2011, when the State memorialized the production of the "[CD] with 3 digital x-ray images purporting to be of [B.K.]" and "the program required to view the [x-ray] images," DeLuca and his secretary attempted to open the program required to view the x-ray images from the CD Bishop had given him. (Dkt. 17-8, p. 45). Neither DeLuca nor his secretary could open the TigerView program. Because Bishop had represented to him that the images "were not legible or readable," DeLuca undertook no further efforts to use TigerView to open or alter the x-ray images before Melissa's trial. (Dkt. 17-8, p. 45). Thus, DeLuca abandoned x-ray evidence inquiry because Bishop represented to him that no better x-ray images existed. Even considering Dr. Teas's suggestion that DeLuca may wish to pursue better x-ray evidence, Bishop's representation that that the available images were illegible clearly violates *Brady* because it misled DeLuca into abandoning an avenue of investigation that otherwise would have unearthed favorable evidence.

That Respondent makes the same argument at issue in *Banks v. Dretke* is deeply troubling. In *Banks*, the Supreme Court condemned the State's argument that the defendant was responsible for uncovering evidence withheld by the prosecution. 540 U.S. at 695. As the Court reasoned, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the

prosecution represents that all such material has been disclosed." *Id.* (emphasis added). The *Banks* Court has strong—and controlling—words for Respondent:

> The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," . . . so long as the "potential existence" of a prosecutorial misconduct claim might have been detected . . . . A rule this declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to account defendants due process.

Id. at 696.

That Respondent has adopted the State's argument in Banks—yet declines to address the Supreme Court's holding—is disconcerting. Instead, Respondent repeatedly attacks DeLuca, laying at his feet the responsibility for missing the legible x-rays while punishing Melissa for the same. Yet, as the Supreme Court held in *Banks*, responsibility for the non-disclosure of the uncompressed, full-data x-rays belongs solely to the State. The State withheld the legible x-rays from DeLuca before trial. The State induced DeLuca into believing no legible x-rays existed. Now, the State insists that Melissa is rightfully the scapegoat for its violation of her due process rights. Melissa's unconstitutional conviction cannot stand.

III. RULE 6 DISCOVERY

Petitioner also submits her request for discovery pursuant to Rule 6 of the Rules Governing Section 2254 and Section 2255 Proceedings. Specifically, Melissa prays that this court grant leave for the parties to conduct discovery under the Federal Rules of Civil Procedure and authorize the parties to forensically examine the computer at the Lake County Coroner's office where the x-ray images were saved

in January 2009. In support thereof, Petitioner states that undersigned counsel met with Assistant Illinois Attorney General Richard Cenar on September 18, 2019, to discuss the possibility of conducting an independent examination of the Lake County Coroner's computer. The purpose of such an examination would be to demonstrate conclusively that the x-ray images saved to the Coroner's computer were uncompressed, data-full images. Such a finding would directly support Petitioner's contention that the B.K. x-ray images were intentionally degraded by exporting them from TigerView as compressed .jpg files and further reducing their quality and file size with outside image editing software.

Whether the deleteriously compressed x-ray images were intentionally degraded is an issue of ongoing contention between the parties. See, *e.g.*, Dkt. 16, p. 23 (Respondent's contention that the severe compression was "inadvertent[]"); Dkt. 2, pp. 22–25 (Petitioner's postconviction imaging expert, Mueller, testified that the deleteriously compressed images must have been created by exporting the image files as low-quality .jpg files, then further degrading them using external image editing software.). Thus, a further examination of the Lake County Coroner's computer is warranted to (1) confirm that the Coroner's computer never, in standard practice, exported image files as .jpg files and (2) to confirm that the uncompressed x-ray images were present on the Coroner's computer when Bishop tendered the deleteriously compressed x-ray images to DeLuca in September 2011. Undersigned counsel has offered to bear the expense of any examination of the Lake County Coroner's computer to which the B.K. x-ray images were saved in January 2009.

IV. CONCLUSION

WHEREFORE, for the reasons stated herein and in her petition, Petitioner, Melissa Calusinski, prays that this Court grant the writ, discharge her from her unconstitutional confinement, and grant any and all other relief deemed just and appropriate.

Dated: September 23, 2019

Respectfully submitted,

/s/ Kathleen T. Zellner
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 23, 2019, she caused to be filed Petitioner's Reply to State's Answer to Petitioner's Habeas Corpus Petition with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, using the CM/ECF system, which will send notification of such filing to the following:

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