No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

TOFOREST JOHNSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

_____

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

_____

PETITION FOR WRIT OF CERTIORARI

_____

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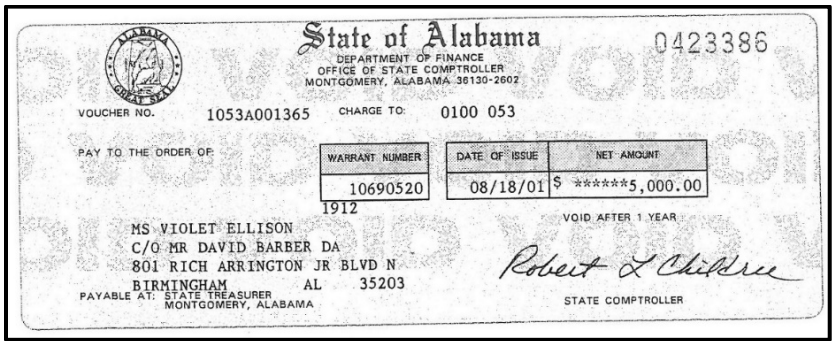
CAPITAL CASE

QUESTION PRESENTED

This is a death penalty case in which both the District Attorney and the original trial prosecutor support a new trial for Petitioner Toforest Johnson, who has spent the past 25 years on Alabama's death row.

Johnson was convicted of capital murder and sentenced to death based on the testimony of one key witness, Violet Ellison, who claimed that she overheard him confessing to the crime on a telephone call. In post-conviction proceedings, Johnson raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), alleging that the State suppressed evidence that Ellison was hoping to receive a reward and was later paid for her testimony. The Alabama courts dismissed the claim on procedural grounds, but this Court granted certiorari, vacated the judgment, and remanded the case after the State conceded that the dismissal was improper. *Johnson v. Alabama*, 137 S. Ct. 2292 (2017).

On remand, the State claimed that its files contained "nothing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8. However, a retired state employee revealed to Johnson's counsel that the State maintained a set of confidential reward files. C3. 94-95. After this information was conveyed to the post-conviction court, the State disclosed, for the first time, a reward file regarding Ellison. The file included a copy of a check for $5,000, which the State had paid to Ellison in secret after Johnson's trial:



State of Alabama 0423386
DEPARTMENT OF FINANCE
OFFICE OF STATE COMPTROLLER
MONTGOMERY, ALABAMA 36130-2602

VOUCHER NO. 1053A001365 CHARGE TO: 0100 053

PAY TO THE ORDER OF

WARRANT NUMBER	DATE OF ISSUE	NET AMOUNT
10690520	08/18/01	$ ******5,000.00

1912

VOID AFTER 1 YEAR

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The file also included documents, written by government officials, stating that Ellison was eligible for the reward payment because she had provided information pursuant to the State's pretrial reward offer. Nevertheless, the Alabama courts again declined to find a *Brady* violation.

The question presented is this:

> Did the State suppress evidence under *Brady* in the extraordinary circumstances of this death penalty case?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State v. Johnson*, No. CC-96-386 (Jefferson Cnty. Cir. Ct.) (judgment entered on October 30, 1998)
- *Johnson v. State*, No. CR-98-0391 (Ala. Crim. App.) (judgment entered on June 29, 2001)
- *Ex parte Johnson*, No. 1002085 (Ala.) (order denying certiorari issued on December 14, 2001)
- *Johnson v. Alabama*, No. 01-9193 (U.S.) (order denying certiorari issued on May 20, 2002)
- *Johnson v. State*, No. 1150524 (Ala.) (order denying certiorari issued on November 18, 2016)
- *Johnson v. Alabama*, No. 16-7835 (U.S.) (order vacating judgment and remanding issued on June 26, 2017)
- *Johnson v. State*, No. CC-96-386.60 (Jefferson Cnty. Cir. Ct.) (following multiple remands, judgment entered on March 16, 2020)
- *Johnson v. Dunn*, No. 2:16-cv-01945-RDP (N.D. Ala) (order staying proceedings issued on April 28, 2020)
- *Johnson v. State*, No. CC-96-386.61 (Jefferson Cnty. Cir. Ct.) (orders staying proceedings issued on February 4, 2021, and December 27, 2022)
- *Johnson v. State*, No. CR-05-1805 (Ala. Crim. App.) (following multiple remands, judgment entered on May 6, 2022)
- *Johnson v. State*, No. SC-2022-0827 (Ala.) (order denying certiorari issued on December 16, 2022)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Toforest Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The order of the Alabama Supreme Court denying Johnson's petition for a writ of certiorari is unpublished and is attached as Appendix A. Pet. App. 2a. The order of the Alabama Court of Criminal Appeals denying rehearing is unpublished and is attached as Appendix B. Pet. App. 4a. The opinion of the Alabama Court of Criminal Appeals affirming the denial of Johnson's petition for post-conviction relief is published on Westlaw, *see Johnson v. State*, No. CR-05-1805, 2022 WL 1438949 (Ala. Crim. App. May 6, 2022), and is attached as Appendix C. Pet. App. 6a-17a. The order of the Circuit Court of Jefferson County, Alabama, denying Johnson's petition for post-conviction relief is unpublished and is attached as Appendix D. Pet. App. 19a-30a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the denial of Johnson's post-conviction petition on May 6, 2022. Pet. App. 6a-17a. The court denied Johnson's timely application for rehearing, Pet. App. 4a, and the Alabama Supreme Court denied certiorari on December 16, 2022, Pet. App. 2a. This Court granted Johnson an extension of time within which to file a petition for writ of certiorari, up to and including April 17, 2023. *See Johnson v. Alabama*, No. 22A762 (Feb. 23, 2023). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 19, 1995, Jefferson County Deputy Sheriff William G. Hardy was shot and killed in the parking lot of a hotel in Birmingham, Alabama. The State prosecuted two men, Toforest Johnson and Ardragus Ford, for the same crime at separate trials. Both men maintained their innocence, and there was no physical evidence connecting either to the crime. The State tried both Johnson and Ford twice because at each of their initial trials, the jury was unable to agree on a guilt-phase verdict. C1. 885.[1] Ultimately, Ford was acquitted; Johnson was convicted and sentenced to death. C1. 885; T.R. 1192.

A. The State's Investigation and Conflicting Theories

The investigation into Deputy Hardy's murder proved difficult from the start. There were no eyewitnesses to the shooting. No fingerprints were found, and no murder weapon was recovered. The sheriff's department set up a hotline to receive tips and offered a reward for information. C3. 134-35. A week later, still no arrest

[1] "T.C." and "T.R." refer to the trial record. "C." and "R." refer to the record from the initial post-conviction proceedings. "C1." and "R1." refer to the first remand record. "C2." and "R2." refer to the second remand record. "C3." and "R3." refer to the third remand record.

had been made. News outlets published numerous details about the shooting. C3. 134-37, 541-46. In one article, the Birmingham Police Chief cautioned that "too much information about the crime had been released." C3. 541. He warned that "[r]eleasing information about the circumstances of a death – like where and how many times someone was shot – makes it more difficult for authorities to determine whether the tips they receive are from people who witnessed an incident or just heard about it from someone else . . . ." C3. 541.

A week after the crime, a 15-year-old girl named Yolanda Chambers went to the police, claiming to have information about the shooting. Initially, she claimed that she had only heard about the crime, but later she claimed that she had witnessed the crime herself. C3. 491. Her accounts were inconsistent and perpetually changing. Investigators interviewed Chambers twenty times, T.R. 727-28, and she offered nine different versions of the crime, implicating seven different men in the shooting, T.R. 748-49; C1. 313-497. She admitted to telling "hundreds of lies"[2] because the police pressured her and threatened her with jail time.[3] Given her total lack of reliability, even the State eventually disavowed her credibility. C3.

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[2] *See* C1. 313-497 (overview of Chambers's accounts); C1. 503 (State recognizing that Chambers told "hundreds of lies"); *see also* C1. 483 (Chambers admitting that she told 102 lies in her initial three statements to the police); C1. 486-97 (Chambers admitting that she told many more lies to the police after her initial statements).

[3] Chambers testified at a pretrial hearing in Ford's case that she was not present at the shooting and had no idea what happened. She explained why she lied to the police: "Because [of] the pressure, they were telling me, you know, don't you know you can go to jail for this, and that's all I was thinking, that's all I had put in [my] mind: jail. I don't want to go to jail. . . . So after they were putting all the pressure on me I went on and said I was there. I said maybe if I go on and say I was there maybe all the threats and everything would end about me going to jail or juvenile." C1. Supp-1 1146.

243. However, Chambers implicated Johnson in several of her early statements, which led to Johnson's arrest. C3. 491-92.

After the arrest, news articles identified Johnson as a suspect, disclosed that he was being held at the Jefferson County Jail, and noted that a reward had been offered for information regarding the case. C3. 134-37, 541-46. Days later, a woman named Violet Ellison contacted the sheriff's office claiming to have information about the murder. T.R. 693-94. Ellison said that she overheard a three-way phone call made from the jail in which a man referred to himself as "Toforest" and said that he and "Fellow"—a nickname for a man named Quintez Wilson—had shot Deputy Hardy. C3. 173.

The State did not believe Ellison's story. Ellison came forward on August 9, 1995; but five months later, the State presented a wholly different theory of the crime to the grand jury. The State told the grand jury that its investigation revealed that there was "no doubt" Ardragus Ford and Omar Berry—not Johnson or Wilson—had shot Deputy Hardy. C3. 495. Sergeant Tony Richardson, the State's lead investigator, testified before the grand jury, and he described the crime as follows: "Ardragus Ford spins in his wheelchair, pulls up a 9mm and fires a shot. After he fires this shot, the deputy starts to stumble down the hill at which time he was shot again by Omar Berry." C3. 493.

In the three years after the grand jury proceeding, the State changed its theory of the case repeatedly. After indicting four men on charges of capital murder, the State ultimately dropped the charges against two of them but

proceeded to trial against Ford and Johnson. The State then advanced conflicting theories of the crime at the separate trials.[4]

B. Trial Proceedings

During pretrial proceedings, Johnson's counsel requested that the prosecution disclose any information favorable to the defense, including promises or agreements with state witnesses. C3. 482-85. The trial court ordered discovery, C3. 486-87, and the State produced various documents to the defense, C1. 1670-71. However, the State never informed the defense that Ellison knew about the reward and was hoping to be paid.

At trial, the State's case against Johnson hinged on Ellison's testimony.[5] The prosecutors wrote in their notes that Ellison was "the key to this case." C3. 256. Defense counsel observed, "[I]f you took Mrs. Ellison out of the mix, would Toforest Johnson even be anywhere around any of this? No." T.R. 1028. As the lead trial prosecutor later testified, "I don't think the State's case was very strong, because it depended on the testimony of Violet Ellison in my opinion." C3. 455.

Ellison testified that, around the time of the crime, her 16-year-old daughter Katrina had a friend who was incarcerated at the Jefferson County Jail. T.R. 668-69. Katrina occasionally made three-way calls for her friend and other people at the jail so they could talk with multiple people without having to pay for additional

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[4] *See* C3. 493 (State's theory in the grand jury proceeding); C1. Supp-1 1625 (State's theory at Ford's first trial); C1. Supp-1 782 (State's theory at Johnson's first trial); T.R. 903-04, 942 (State's theory at Johnson's second trial); C1. 510, 512, 524 (State's theory at Ford's second trial).

[5] Ellison testified against Johnson, but not Ford.

calls. T.R. 620-24, 668-70. According to Ellison, on August 3, 1995, Katrina made a three-way call, put the phone down, and left the room. T.R. 671. Ellison claimed that she then picked up the phone and overheard a man identify himself as "Toforest." T.R. 682. Ellison had never met Toforest Johnson or heard his voice. She claimed that the man on the phone described Deputy Hardy's murder, saying that "Fellow" had shot one time, and then, "I shot the f[***]er in the head and I saw his head go back and he fell." T.R. 683. Ellison waited six days to report this call to the police.[6]

Ellison's story contradicted the physical evidence in the case. For example, Ellison testified that the man on the phone said there were two shooters. T.R. 683. But the State's evidence indicated that there was only one shooter: two shots were fired in rapid succession from the same gun. T.R. 389, 886-87. In addition, Ellison claimed to have taken contemporaneous notes during the call she overheard. T.R. 673-81. But her notes included information she learned from outside sources after the call. For example, Ellison wrote "Johnson" in her notes but testified that the person she overheard on the phone identified himself only as "Toforest." C3. 537-39; C1. Supp-1 447. She also included Deputy Hardy's nickname "Bill" in her notes because she knew Deputy Hardy personally and assumed that the caller was referring to him, even though she testified that the caller never identified the victim by any name. C3. 537; C1. Supp-1 502-03.

[6] Ellison testified that she overheard additional three-way phone calls from the jail between August 3 and August 12, 1995, involving the man who referred to himself as "Toforest" and other people, but she put the phone down and stopped listening to those calls because they did not have to do with the shooting. T.R. 686-93.

On cross-examination, Johnson's counsel sought to undermine Ellison's credibility by pointing out the six-day delay between when she purportedly heard the man confess on the phone and when she approached the police. T.R. 707. Ellison explained her motive for coming forward: "[M]y conscience bothered me and I could not sleep, and that's why I came in." T.R. 708. The lead prosecutor then argued to the jury:

> Violet Ellison is, in a case like this, some of the most important evidence one could find, because Violet Ellison came into this case, not as an investigator, not as someone who's out to get whoever did in [Deputy Hardy] . . . . Violet Ellison was one of those people that just happens to be in the right place for us sometimes, much like an eyewitness is sometimes, except her evidence came by telephone and not by eyesight.

T.R. 905. The prosecutor added, "[S]he told you her conscience wouldn't let her do it. And that's exactly the kind of response you would expect from a person who got into the case like she did . . . ." T.R. 910. The jury accepted the prosecutor's argument and found Johnson guilty. At the penalty phase, the jury voted 10 to 2 for death, T.R. 1177, and the trial court imposed a death sentence, T.R. 1192.[7]

C. Post-Conviction Proceedings

In post-conviction proceedings, Johnson raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), alleging that the State suppressed evidence during trial that Ellison knew about the reward and was hoping to receive it. C. 1171-72. Over the course of the next fifteen years—from 2003 to 2018—the *Brady* claim was

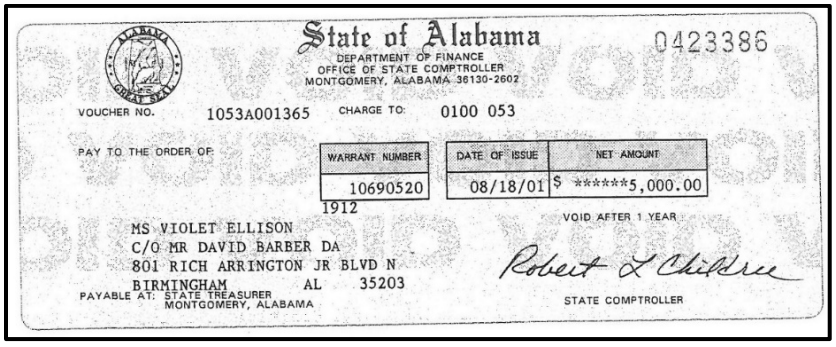
[7] On direct appeal, the Alabama Court of Criminal Appeals affirmed Johnson's conviction and death sentence. *Johnson v. State*, 823 So. 2d 1, 57 (Ala. Crim. App. 2001). The Alabama Supreme Court and this Court denied petitions for certiorari. *See Ex parte Johnson*, 823 So. 2d 57, 57 (Ala. 2001); *Johnson v. Alabama*, 535 U.S. 1085, 1085 (2002).

the subject of extensive litigation in the Alabama courts and this Court. The State initially denied the factual allegations in the claim and sought dismissal on procedural grounds. C. 847. The Alabama courts accepted the State's procedural argument and dismissed the claim. *Johnson v. State*, No. CR-05-1805, 2007 WL 2811234, at *8 (Ala. Crim. App. Sept. 28, 2007). But in 2017, this Court granted certiorari, vacated the ruling below, and remanded the case after the State conceded that the dismissal was improper. *See Johnson v. Alabama*, 137 S. Ct. 2292, 2292 (2017). The Alabama Court of Criminal Appeals then remanded the case to the circuit court for an evidentiary hearing. *Johnson v. State*, CR-05-1805, 2018 WL 1980778, at *2 (Ala. Crim. App. Apr. 27, 2018).

Before the hearing, the circuit court entered an order granting Johnson discovery of the State's file, including all documents concerning reward payments. C3. 35-37. In response, the State disclosed a file with no information about any reward payments to any witnesses. The State told the court and Johnson that its file contained "[n]othing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8.

However, a retired secretary and office manager from the district attorney's office revealed to Johnson's counsel that, at the time of Johnson's trial, the district attorney's office maintained a set of confidential reward files that contained documents about reward payments to witnesses. C3. 94-95. Johnson brought this information to the attention of the court, C3. 93-109, and only then did the State disclose its file regarding Ellison and the reward. The file included a copy of a check

for $5,000, which the State had paid to Ellison after Johnson's trial without informing Johnson or his counsel:



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Robert L Childree

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MONTGOMERY, ALABAMA

STATE COMPTROLLER

C3. 465.

The file also included e-mail correspondence between government officials specifically discussing Ellison's eligibility for the reward and contemplating the wording of the reward paperwork to ensure its accuracy. C3. 479-80. In addition, the file contained a letter written by then-District Attorney David Barber requesting that the Governor grant the reward payment to Ellison. The letter stated: "Violet Ellison, pursuant to the public offer of a reward, gave information leading to the conviction of Toforest Johnson in the Circuit Court of Jefferson County, Alabama, in the death of Mr. Hardy." C3. 472.

Johnson introduced these documents and others at the evidentiary hearing on his *Brady* claim to show that the State was aware that Ellison knew about the reward offer prior to trial and was later paid $5,000 for her testimony. C3. 134-546. In response, the State admitted that it paid Ellison $5,000 but argued that the payment did not implicate *Brady*. In its opening statement, the State claimed that Ellison did not know about the reward until 2001, three years after Johnson's trial, when she heard about the reward and *she contacted the district attorney's office*. R3.

19. The State then called Ellison, who testified that she first learned about the reward when *the district attorney's office contacted her* "to come in and sign some papers" in order to receive $5,000 for her testimony from three years earlier. R3. 57-58. Following the hearing, the circuit court issued an order denying relief. Pet. App. 19a-30a.

The Alabama Court of Criminal Appeals affirmed, holding that Johnson failed to show that Ellison knew about the reward at the time of trial and was hoping to receive it. Pet. App. 6a-17a. The court did not acknowledge that the State concealed its payment to Ellison for nearly two decades, and it declined to consider the State's assertions that contradicted Ellison's testimony. Pet. App. 12a-13a. The court recognized that under longstanding Alabama law, "one must have the knowledge of a reward at the time of performing the services for which the reward is offered to be entitled to the reward." *Gadsden Times v. Doe*, 345 So. 2d 1361, 1363 (Ala. Civ. App. 1977). But for the first time, the court held that this principle applies only to private rewards, and therefore Ellison would have been eligible for the reward even if she had not known about it until after Johnson's trial. Pet. App. 10a. Because the court found that the State did not suppress evidence, it did not address whether any evidence was material. The Alabama Supreme Court denied certiorari. Pet. App. 2a.

D. The District Attorney's Request for a New Trial

Following the circuit court's denial of relief but before the Court of Criminal Appeals ruled, another significant development occurred in the case: Jefferson

County District Attorney Danny Carr filed a brief in the circuit court supporting a new trial for Johnson. C3. Supp-3 10-11. The brief was the product of an extensive, independent review of the case that included a discussion with the victim's family.[8] The District Attorney stated:

> After reviewing the circumstances of Mr. Johnson's conviction and his subsequent *Brady* claim, the District Attorney has determined that its duty to seek justice requires intervention in this case based on a couple of factors.
>
> 1. There were several trials of different individuals relative to his case. Pursuant to these trials the state presented as many as five different theories relative to who shot Deputy Hardy.
>
> 2. The case originally was based on a young lady who admitted repeatedly lying to the police and prosecutors, as well as under oath.
>
> 3. There are a number of alibi witnesses who did not testify at trial [who] claim to have seen Mr. Johnson in another area of town at the time of the murder.
>
> 4. The main witness who testified to hearing the defendant admit killing Deputy Hardy over a telephone conversation was subsequently paid $5,000 which was never mentioned during trial.
>
> 5. The District Attorney prior to the filing of this brief, met with the Original Lead Prosecutor in this case. He expressed concerns about this case and supports this request as well.
>
> It is the District Attorney's position that in the interest of justice, Mr. Johnson who has spent more than two decades on Death Row, be granted a new trial.

C3. Supp-3 10-11.

> After 25 years, Johnson remains on death row.

[8] *See* Beth Shelburne, *District attorney urges new trial for man on Alabama's death row*, WBRC, June 12, 2020, https://www.wbrc.com/2020/06/12/district-attorney-urges-new-trial-man-alabamas-death-row/ (describing the extent of District Attorney Carr's investigation).

REASONS FOR GRANTING THE WRIT

This Court has long held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see Smith v. Cain*, 565 U.S. 73, 75 (2012); *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). It is now undisputed that the State paid $5,000 to its key witness in this capital case without informing Johnson or his counsel and then failed to disclose the payment for nearly two decades. Johnson argued in the Alabama courts that the State violated *Brady* by suppressing evidence during trial that the witness, Violet Ellison, was hoping to receive the reward. The court below denied relief, holding that nothing was suppressed because Ellison did not learn about the reward offer until after Johnson's trial. Pet App. 8a-14a. That ruling cannot be squared with the realities of the case. This Court should grant certiorari, reverse the judgment below, and remand for further proceedings.

I. The State Court's Decision Regarding Suppression Is Wrong Under *Brady* and Warrants Reversal.

The decision below regarding suppression cannot withstand scrutiny for three reasons. *First*, the State went to extraordinary lengths to conceal its $5,000 payment to Ellison. It filed the paperwork regarding the payment *ex parte*; it declined to disclose the payment while simultaneously seeking dismissal of Johnson's *Brady* claim; and it misrepresented the contents of its own files. *Second*, the suggestion that Ellison did not learn about the State's reward offer until three years after Johnson's trial is implausible in light of the record and the law. Under

existing state law, Ellison would not even have been eligible for the reward if she did not know about the offer when she came forward and testified. The only reasonable interpretation of the evidence is that the State knew Ellison was seeking the reward from the start, which is why it paid her in the end. *Third*, this Court should give "great weight" to the fact that both the District Attorney and the trial prosecutor support Johnson's request for relief. *Young v. United States*, 315 U.S. 257, 258 (1942). This type of support is rare in capital cases, and it is particularly striking in a case that centers on a *Brady* issue.

This Court has not hesitated to reverse factual findings in compelling circumstances, particularly in capital cases. *See*, *e.g.*, *Foster v. Chatman*, 578 U.S. 488, 512-13 (2016) (reversing the state court's findings that the prosecution struck Black prospective jurors for race-neutral reasons); *Wiggins v. Smith*, 539 U.S. 510, 528, 538 (2003) (reversing the denial of habeas relief in part because the state court made factual findings that were undermined by the record); *see also Wearry v. Cain*, 577 U.S. 385, 395 (2016) (explaining why review and reversal of the petitioner's "fact-intensive *Brady* claim" was warranted). Here, as in those cases, the ruling below cannot pass muster under any standard of review, no matter how deferential.

A. The State Went to Extraordinary Lengths to Conceal Its $5,000 Payment to Ellison.

If there were nothing problematic about the State's $5,000 payment to Ellison, there would have been no reason for the State to conceal the payment for 18 years. Yet the State did exactly that—it paid Ellison without informing Johnson, and it then prevented Johnson from obtaining information about the payment from

2001 to 2019. Even when Johnson raised his *Brady* claim regarding Ellison and the reward, the State denied the allegations and failed to disclose that the payment happened. C. 847. If not for a retired state employee informing Johnson's counsel in 2018 that the State maintained a confidential reward file, C3. 94-95, Johnson never would have obtained the documents about the payment. The State's conduct with respect to the payment necessarily informs the suppression analysis.

The following timeline shows the State's representations about the payment over the years:

Year	**State's Representations About the Payment to Ellison**
2001	When the State paid Ellison a $5,000 reward, it filed the paperwork *ex parte*, and it did not disclose anything about the payment to Johnson or his counsel. C3. 469-77.
2005	In response to Johnson's claim under *Brady* that Ellison was hoping to receive a reward and was paid $5,000, the State explicitly denied the allegations, C. 847, and it did not disclose anything about the reward payment.
2017	The State agreed that this Court should GVR Johnson's case due to an error below, but it asserted that the *Brady* claim should be summarily dismissed on other grounds, and it did not disclose anything about the reward payment. Br. in Opp. 4, *Johnson v. Alabama*, No. 16-7835 (U.S. May 10, 2007).
2018	On remand, the State asserted in a hearing that its file contained "[n]othing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8.
2019	After a retired state employee disclosed to Johnson's counsel that the State had maintained a confidential reward file, C3. 94-95, the State disclosed—for the first time—its file regarding the $5,000 payment to Ellison, C3. 464-80.

When the State finally produced the relevant documents in 2019, it claimed that the documents had not been disclosed earlier because they were "misfiled." C3. 464. The State offered this explanation without any acknowledgment that Johnson had been trying to obtain the documents for 18 years while sitting on death row based on Ellison's testimony.

This Court has made clear that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004). Here, the State has done everything *but* set the record straight. The State deliberately concealed the payment to Ellison for years and then provided affirmatively misleading information about the contents of its file. There can be no question that the State's approach "has been to disclose as little as possible, and as late as possible." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998).

B. The Suggestion That Ellison Did Not Know About the Reward Until Three Years After Johnson's Trial Is Implausible In Light of the Record and the Law.

After concealing the reward payment for 18 years, the State then began arguing that even though it *did* pay Ellison $5,000, the payment was a trivial matter. According to the State, the payment did not implicate *Brady* because Ellison did not know about the reward offer until 2001, three years after Johnson's trial. R3. 18-19. That position, which the Alabama Court of Criminal Appeals adopted, *see* Pet. App. 8a-14a, is incompatible with the record and the history of

reward law in Alabama. The only realistic interpretation of the evidence is that Ellison knew about the reward offer prior to trial, and the State was aware of her knowledge—which is why she eventually was paid.

If Ellison had no knowledge of the State's reward offer when she came forward and testified, she would not have been legally eligible for the reward. In *Gadsden Times v. Doe*, 345 So. 2d 1361 (Ala. Civ. App. 1977), the Alabama Court of Civil Appeals provided a clear statement of the requirements for reward eligibility in Alabama:

> Jurisdictions are split over whether one must have knowledge of a reward at the time of performing the services for which the reward is offered in order to be entitled to the reward. 53 A.L.R. 542. *Alabama, however, as do the majority of jurisdictions, requires such knowledge.*

Id. at 1363 (emphasis added).[9]

The court's holding in *Gadsden Times* was straightforward. The question was "whether one must have knowledge of a reward at the time of performing the services for which the reward is offered in order to be entitled to the reward." *Id.* The answer was that "Alabama . . . requires such knowledge." *Id.* This was the controlling law regarding reward eligibility in Alabama in 1995, when the reward offer was made in this case; in 1998, when Ellison testified at Johnson's trial; and in 2001, when the State paid Ellison $5,000.

[9] Although *Gadsden Times* is the modern case on this point, the principle at issue dates back to the 19th century. In deciding *Gadsden Times*, the court relied in part on this quote from a case decided in 1860: "[I]f one offer a reward, [a]nd another, *knowing of the offer*, shall do the lawful thing proposed to be rewarded, there is a contract supported by a consideration; and that the assent to the contract is given by the party claiming the reward, when he performs the designated act." *Gadsden Times*, 345 So. 2d at 1364 (quoting *Morrell v. Quarles*, 35 Ala. 544, 550 (Ala. 1860) (emphasis added)).

There should be no question that the state officials tasked with handling the reward payment to Ellison were aware of the law. *See Banks*, 540 U.S. at 696 ("Ordinarily, we presume that public officials have properly discharged their duties."). This is especially true since three different state lawyers were involved in the process of ensuring that Ellison was eligible for the amount she was paid. *See* C3. 469-82. The state lawyers sent multiple e-mails to each other discussing the wording of the request that Ellison receive payment, C. 479-80, after which they prepared and submitted paperwork stating that "Ellison, pursuant to the public offer of a reward, gave information leading to the conviction of Toforest Johnson in the Circuit Court of Jefferson County, Alabama, in the death of Mr. Hardy," C3. 472.

As Johnson noted in the court below, the law of *Gadsden Times*, the State's payment of the reward, and the documents concerning the payment demonstrate that Ellison had knowledge of the reward offer when she came forward and testified. Without such knowledge, Ellison would not have been legally entitled to a reward payment, and she never would have received one.

In response to Johnson's argument, the Alabama Court of Criminal Appeals rewrote 45 years of state law. The court claimed in its 2022 decision that the knowledge requirement from *Gadsden Times* applies only to *private* rewards, not to *public* rewards—and therefore Ellison was eligible for the reward after Johnson's trial regardless of whether she had previous knowledge of it. Pet App. 10a, 13a.

This distinction had never been made in Alabama before 2022, yet the court used it to inform its analysis of events that occurred between 1995 and 2001.[10]

This Court has made clear that while states are free to shape their own laws for future cases, they are not permitted to use a retroactive and unsupported interpretation of state law to deny a person his constitutional rights. *See Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (holding that a state court's new interpretation of state law cannot be applied retroactively when it affects a criminal defendant's right to due process). Yet here, the Alabama Court of Criminal Appeals changed the meaning of state reward law to suggest that Ellison would have been eligible for the reward in this case even if, as the State now claims, she first learned about it years after Johnson's trial.

Significantly, the evidence makes clear that the State was aware *before Johnson's trial* that Ellison knew about the reward. It is undisputed that the State did not have any substantive discussions with Ellison between the 1998 trial and the 2001 payment. R3. 121-23. Yet the state officials who arranged for the payment in 2001 knew that Ellison qualified for the reward. The only way they

[10] The Alabama Court of Criminal Appeals claimed that *Gadsden Times* applies only to private rewards because it refers at one point to "a reward offered by a private party"—an accurate description of the reward at issue in the case. Pet. App. 10a (quoting *Gadsden Times*, 345 So. 2d at 1364). However, the court ignored the part of the decision that stated, in plain terms, that the question was "whether one must have knowledge of a reward at the time of performing the services for which the reward is offered in order to be entitled to the reward." *Gadsden Times*, 345 So. 2d at 1363. The answer, as the decision reflects, was yes. *Id.* The court below also cited the statute that authorizes the Governor to pay rewards in criminal cases, noting that the statute does not contain a specific knowledge requirement. Pet. App. 10a (citing Ala. Code § 15-9-1). But the statute does not in any way exempt public rewards from the body of law regarding reward eligibility.

could have known that she qualified was if they had already known, prior to trial, that she was aware of the reward offer.

The State's contention that Ellison did not learn about the reward until three years after the trial is suspect for another reason as well: even in 2019, Ellison and the State could not keep their stories straight about how the reward came to be paid. In its opening statement at the post-conviction hearing, the State said that *Ellison contacted the district attorney's office* in 2001 to seek the reward. *See* R3. 19 ("[S]he made an inquiry to the district attorney's office. And she made an application.").[11] This explanation was strange on its own; why would a witness who had never heard of a reward offer when she came forward in 1995 and testified in 1998 suddenly seek payment in 2001? Ellison then testified, and her story was different. She said that *the district attorney's office contacted her* and told her to come in, sign some papers, and get $5,000. *See* R3. 57-58 ("I didn't know anything about a reward until approximately three years later . . . when I got a call from the district attorney's office . . . asking me to come in and sign some papers."). This explanation was even more strange. Why would the district attorney's office contact a witness from a trial three years earlier and give her $5,000 based on a reward offer that she knew nothing about? The logical explanation is that the State had discussed the reward with Ellison at the time of the trial, and the payment simply

[11] The Alabama Court of Criminal Appeals refused to consider the State's opening statement at the post-conviction hearing on the ground that opening statements are not evidence. Pet. App. 13a-14a. But this Court often looks to the actions and representations of state actors when evaluating *Brady* claims. *See Banks*, 540 U.S. at 694-96. The fact that Ellison and the State could not keep their stories straight about their interactions *with each other* is unquestionably relevant to the suppression issue in this case.

followed the affirmance of Johnson's conviction on direct appeal in 2001.[12] Nevertheless, the circuit court accepted Ellison's testimony, and the Alabama Court of Criminal Appeals deferred to that finding. Pet. App. 14a.

In other capital cases, this Court has reversed findings that "blink reality," *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005), findings based on explanations by state actors that amount to "[n]onsense," *Foster v. Chatman*, 578 U.S. 488, 509 (2016), and findings that rest on blatant "factual error," *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). Here, the Alabama Court of Criminal Appeals denied Johnson's *Brady* claim by ignoring the State's misrepresentations, revising longstanding reward law in Alabama, and accepting an incredible story about the $5,000 payment to Ellison. This is exactly the type of situation in which this Court's intervention is warranted.

C. This Court Should Give "Great Weight" to the Fact That Both the Office of the District Attorney and the Original Trial Prosecutor Support Johnson's Request for Relief.

This Court's decisions and the rules governing attorney conduct require prosecutors to speak out against unjust convictions. Both the Jefferson County District Attorney and the lead trial prosecutor have done that here, requesting a new trial for Johnson. This Court should give "great weight" to those requests. *Young v. United States*, 315 U.S. 257, 258 (1942).

[12] The Alabama Court of Criminal Appeals affirmed Johnson's conviction and sentence on June 29, 2011, *Johnson v. State*, 823 So. 2d 1, 57 (Ala. Crim. App. 2001), and Ellison was paid within two months of the decision. C3. 465.

The mission of a prosecutor is to "seek justice, not merely to convict." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987). Accordingly, this Court has explained that government authorities should be "quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young*, 315 U.S. at 258; *see also Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (explaining that after a prosecutor secures a conviction, he is "bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). The American Bar Association's Model Rules of Professional Conduct impose a similar requirement, emphasizing the duty of prosecutors to speak out against wrongful convictions. *See* Am. Bar Ass'n Model R. Prof'l Conduct 3.8(g), (h). Although courts have an obligation to examine the cases and issues before them, the concessions of prosecutors are "entitled to great weight." *Young*, 315 U.S. at 258.

The District Attorney and the trial prosecutor have done precisely what this Court's decisions and the rules of professional conduct require. They recognized that Johnson's conviction was problematic, and they informed the circuit court that they believe a new trial for Johnson is appropriate. C3. Supp-3 10-11. Specifically, the District Attorney stated that Johnson should be granted a new trial "in the interest of justice" in part because "[t]he main witness who testified to hearing the defendant admit killing Deputy Hardy over a telephone conversation was subsequently paid $5,000." C3. Supp-3 11. The District Attorney further stated

that the trial prosecutor "expressed concerns about this case" and "supports this request as well." C3. Supp-3 11.

The requests of the District Attorney and the trial prosecutor are particularly striking given the nature of *Brady* claims. Johnson has been seeking a new trial under *Brady* for nearly two decades. One might expect a defensive reaction from the office and the individual accused of violating a capital defendant's constitutional rights.[13] Yet here, both have requested that Johnson's conviction be vacated based on a litany of problems, including the facts of the *Brady* claim before the Court.

The public's trust in the criminal legal system depends on the belief that the government is seeking justice. *See Brady*, 373 U.S. at 87 ("An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'"). The public cannot possibly have confidence in the system if the State of Alabama is permitted to execute Johnson when it paid its key witness $5,000 in secret and both the District Attorney and the trial prosecutor support a new trial.

Each aspect of this case is concerning—the State's 18-year concealment of the payment to Ellison, the many problems with the version of events accepted by the court below, and the requests for relief from unlikely corners.[14] Together, the

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[13] *See*, *e.g.*, *Foster*, 578 U.S. at 513 (the trial prosecutor stating, in a case involving prosecutorial misconduct, "[The defense's argument is] an attempt to discredit the prosecutor. . . . The State and this community demand an apology.").

[14] In addition to the District Attorney and the trial prosecutor, many prominent citizens in Alabama have called for a new trial for Johnson, including former Alabama Attorney General Bill Baxley and former Alabama Chief Justice Drayton Nabers, Jr. *See*, *e.g.*, Bill Baxley, *I support the death penalty, but an innocent man is on our death row*, Wash. Post, Mar. 10, 2021, at A19; Drayton Nabers, Jr.,

evidence establishes that the State suppressed evidence that Ellison was hoping to receive a reward. This Court should reverse the decision below on this point.

II. This Court Should Remand the Case to the Alabama Court of Criminal Appeals for a Determination of Whether the Suppressed Evidence Was Material.

Because the Alabama courts declined to recognize that the State suppressed evidence at Johnson's trial, they did not conduct a materiality analysis under *Brady*. Therefore, if this Court were to hold that the State suppressed evidence regarding Ellison and the reward, it should remand the case to the Alabama Court of Criminal Appeals for a determination of whether the suppressed evidence was material. *See McWilliams v. Dunn*, 582 U.S. 183, 200 (2017) (remanding for the lower court to "decide in the first instance" whether the error identified by this Court had a substantial and injurious effect on the case); *Hinton v. Alabama*, 571 U.S. 263, 276 (2014) (remanding for the state court to conduct a prejudice inquiry "[b]ecause no court has yet evaluated the prejudice question by applying the proper inquiry to the facts of this case").

However, if this Court were to address materiality, it should hold that the suppressed evidence regarding Ellison was material. Under *Brady*, the materiality inquiry turns on whether there is a "reasonable probability" that the result would have been different if the suppressed evidence had been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Where the State's case was already weak, suppressed

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Why Is Toforest Johnson Still on Death Row?, Ala. Daily News, Apr. 20, 2022, https://aldailynews.com/nabers-why-is-toforest-johnson-still-on-alabamas-death-row/.

evidence takes on greater significance, particularly if it casts doubt on the State's most important evidence. *See id.* at 441 (holding that suppressed evidence was material where it undermined the testimony of a man the State rated as "its best witness"); *Banks v. Dretke*, 540 U.S. 668, 701 (2004) (holding that suppressed evidence was material where it undermined a witness who was "the centerpiece of [the State's] case").

The State's case against Johnson was weak, and it rested on Ellison's testimony. As the prosecutors prepared for trial, they referred to Ellison as "the key to this case" and wrote in their notes, "Where would we be without her?" C3. 256-57. In closing arguments, defense counsel asked the jury, "[I]f you took Mrs. Ellison out of the mix, would Toforest Johnson be anywhere around any of this? No." T.R. 1028. The prosecution responded by arguing that Ellison's testimony was "some of the most important evidence one could find" because she "just happen[ed] to be in the right place . . . ." T.R. 905. Years after the trial, the lead prosecutor—who now supports a new trial for Johnson—conceded, "I don't think the State's case was very strong, because it depended on the testimony of Violet Ellison . . . ." C3. 455.

If Johnson's trial counsel knew that Ellison was hoping to receive a reward, they would have used that information to undermine her credibility.[15] The power of

[15] Both of Johnson's trial attorneys confirmed in the proceedings below that they would have used the suppressed reward information to impeach Ellison. Attorney Erskine Mathis testified that he "absolutely" would have used information about Ellison hoping to receive a reward if he had known about it. C3. 273. He explained, "If [Ellison] had a motive to testify other than just to come up here and tell the truth, I feel like a jury needs to know that in making their determination as to guilt or innocence." C3. 273. Attorney Darryl Bender testified, "Let's assume that I knew that the sheriff's department had gone out to her and told her, [t]here is some reward money that you would be subject to if you testified. That would have been a great reason for me to bring it up." C3. 386.

this line of impeachment is well recognized. *See Kyles*, 514 U.S. at 442 n.13 (explaining that suppressed evidence was favorable to the defense in part because it would have helped the defense show that the State's key witness was "interested in reward money"); *United States v. Bagley*, 473 U.S. 667, 683 (1985) (remanding under *Brady* and explaining that "[the] possibility of a reward gave [the two witnesses] a direct, personal stake in [the defendant's] conviction"). With Ellison's testimony undermined and no other evidence linking Johnson to the crime, there is a reasonable probability that at least one juror would not have voted to convict.

CONCLUSION

This Court should grant certiorari, reverse the judgment of the Alabama Court of Criminal Appeals, and remand the case for further proceedings.

Respectfully submitted,

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