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

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

_____

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INDEX TO APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

December 16, 2022

SC-2022-0827

Ex parte ToForest Onesha Johnson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: ToForest Onesha Johnson v. State of Alabama) (Jefferson Circuit Court: CC-96-386.60; Criminal Appeals CR-05-1805).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on December 16, 2022:

Writ Denied. No Opinion. PER CURIAM. -- Bolin, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur. Parker, C.J., and Wise, J., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

APPENDIX B

ALABAMA COURT OF CRIMINAL APPEALS

August 26, 2022

CR-05-1805
ToForest Onesha Johnson v. State of Alabama. (Appeal from Tallapoosa Circuit Court, Jefferson Division: CC96-386.60).

NOTICE

You are hereby notified that on August 26, 2022, the following action was taken in the above-reference cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk

APPENDIX C

2022 WL 1438949
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

ToForest Onesha JOHNSON

v.

STATE of Alabama

CR-05-1805

|

May 6, 2022

Synopsis

Background: Defendant, whose conviction for capital murder and sentence of death had been affirmed on appeal by the Court of Criminal Appeals, 823 So.2d 1, petitioned for postconviction relief on the basis that prosecution did not disclose that a key witness was motivated by hope of a reward. The Circuit Court, Jefferson County, No. CC–96–386.60, denied petition. Defendant appealed. On return to remand, the Court of Criminal Appeals, 2007 WL 2812234, affirmed. Defendant petitioned the United States Supreme Court for a writ of certiorari, which granted the writ, vacated the judgment, and remanded, 137 S.Ct. 2292. On remand, the Court of Criminal Appeals, 2018 WL 1980778, remanded with instructions. On remand the Circuit Court rejected the *Brady* claim. Defendant appealed.

The Court of Criminal Appeals, Minor, J., held that trial court did not abuse its discretion in denying defendant's postconviction *Brady* claim.

Affirmed.

Cole, J., recused himself.

Appeal from Jefferson Circuit Court (CC-96-386.60)

On Return to Remand After Remand from the United States Supreme Court

MINOR, Judge.

***1** This appeal involves a postconviction petition that ToForest Onesha Johnson filed almost two decades ago. After three evidentiary hearings on many of the claims that Johnson alleged, the only issue remaining before this Court is whether the Jefferson Circuit Court abused its discretion in finding that Johnson did not prove his claim alleging that the State of Alabama violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by not disclosing that a key witness testified in the hope of a reward. After giving Johnson the chance to prove his claim, the circuit court found that the State did not pay the witness a reward until years after Johnson's trial and that the State thus could not have disclosed the reward payment before trial. The circuit court also found that the witness did not testify in the hope of a reward and that the State thus could not have suppressed that information.

After supplemental briefing from the parties and with the benefit of oral argument, we hold, for the reasons below, that the circuit court did not abuse its discretion in denying Johnson's Brady claim, and we affirm.

Facts and Procedural History

A jury convicted Johnson in 1998 of capital murder for the 1995 shooting death of Jefferson County Deputy Sheriff William G. Hardy. The jury recommended, by a 10-2 vote, that the circuit court sentence Johnson to death, and the circuit court followed that recommendation. This Court affirmed Johnson's conviction and death sentence. Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001). Both the Alabama Supreme Court and the United States Supreme Court denied certiorari review. See Ex parte Johnson, 823 So. 2d 57 (Ala. 2001); Johnson v. Alabama, 535 U.S. 1085, 122 S.Ct. 1978, 152 L.Ed.2d 1035 (2002).

Johnson filed this Rule 32, Ala. R. Crim. P., petition in 2003, attacking his conviction and death sentence. The circuit court summarily dismissed the petition in 2006. On appeal, this Court remanded the matter for more proceedings in 2007. On return to remand in 2013, this Court again remanded the matter for more proceedings. In 2015, we affirmed the circuit court's denial of Johnson's petition. See Johnson v. State, [Ms. CR-05-1805, Sept. 28, 2007] —— So. 3d ——, 2007 WL 2812234 (Ala. Crim. App. 2007) (June 14, 2013, opinion on return to second remand). The Alabama Supreme Court denied certiorari review in November 2016.

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Upon Johnson's and the State of Alabama's request, the United States Supreme Court granted Johnson's petition for a writ of certiorari, vacated this Court's judgment, and remanded the matter to this Court in July 2017 for consideration of Johnson's claim under Brady, supra, and Ex parte Beckworth, 190 So. 3d 571 (Ala. 2013). See Johnson v. Alabama, —— U.S. ——, 137 S. Ct. 2292, 2293, 198 L.Ed. 2d 720 (2017). In April 2018, this Court remanded the matter to the Jefferson Circuit Court:

> "The evidence against Johnson is set forth in multiple opinions and will not be recounted in detail here other than to note that Victoria Ellison was a key witness for the State. Ellison testified at Johnson's trial and stated that she had listened in on a three-way telephone call her daughter had made for Johnson while he was in jail awaiting trial. Ellison testified that during the call Johnson said, 'I shot the fucker in the head and I saw his head go back and he fell.... He shouldn't have got in my business, messin' up my shit.' (Direct Appeal R. 683-84.)
>
> ***2** "In his third amended Rule 32 petition, Johnson alleged:
>
> " 'The State also withheld crucial evidence regarding Violet Ellison's motivation for coming forward with her story. Although news of the large cash reward offered in the case was widespread, the State never disclosed to Mr. Johnson's lawyers that Ms. Ellison had specifically come forward with her story pursuant to the reward offer, although it knew this to be the case. Had Mr. Johnson's lawyers known that Ms. Ellison was specifically motivated by the reward money, they would have had in their possession powerful impeachment evidence with which to challenge her credibility on cross-examination.'
>
> "The circuit court denied the claim on the basis that the information regarding Violet Ellison's motivation to testify amounted to impeachment evidence. This Court's opinion of September 28, 2007, upheld the denial of that claim, citing authority that the claim was 'procedurally barred because [Johnson] failed to satisfy the requirements of Rule 32.1(e)[, Ala. R. Crim. P.,] and because of the preclusionary grounds of Rule 32.2(a)(3) and (5), Ala. R. Crim. P.' Johnson, —— So. 3d at ——.
>
> "In 2013, the Alabama Supreme Court in Ex parte Beckworth, supra, recognized that a petitioner may allege a claim for relief under Rule 32.1(a) based on an alleged violation of Brady. In such a case, the Court held, the petitioner does not have to plead facts in the initial petition to negate the preclusive bars of Rule 32.2(a)(3) and (5), Ala. R. Crim. P. Ex parte Beckworth, 190 So. 3d at 575.
>
> "Johnson's claim that the State knew Ellison was motivated by hope of a reward and did not disclose that fact to Johnson is a claim for relief under Rule 32.1(a), Ala. R. Crim. P. Johnson thus far has not had the opportunity to establish that the preclusionary grounds do not apply or to prove his claim. In light of Ex parte Beckworth, Johnson is entitled to that opportunity.
>
> "Accordingly, this matter is remanded for additional proceedings. On remand, the circuit court shall conduct an evidentiary hearing on Johnson's Brady claim related to the State's alleged knowledge of and alleged failure to disclose to Johnson that Violet Ellison testified against Johnson in the specific hope of obtaining the reward offered in the case."

Johnson v. State, [Ms. CR-05-1805, April 27, 2018] —— So. 3d ——, ——, 2018 WL 1980778 (Ala. Crim. App. 2018) (opinion on remand from the United States Supreme Court).

In May 2019, Johnson moved the circuit court to vacate his death sentence. The next month, the circuit court ruled that it lacked jurisdiction to vacate Johnson's death sentence because, the court said, this Court in its opinion remanding the matter had limited the circuit court's jurisdiction to addressing the Brady claim involving Ellison. On June 6, 2019, the circuit court held a hearing on Johnson's Brady claim.

At the hearing, Johnson offered 28 documentary exhibits[1] into evidence, including:

— A July 1995 letter from Jefferson County District Attorney David Barber asking then Governor Fob James to make an offer of reward for information leading to the arrest and conviction of the person or persons who killed Deputy Hardy (C. 461);[2]

***3** — Then Governor James's reward proclamation from 1995 offering up to $10,000 for information about the crime (C. 463);

— Newspaper articles from 1995 about the crime and the reward offer (C. 134-37);

— An August 2, 2001, e-mail from Barber to Kathy Faulk, an employee in then Governor Don Siegelman's

office, asking about getting part of the reward money for Ellison's assistance with the case (C. 479);

— Ellison's August 6, 2001, application for the reward (C. 470);

— An August 7, 2001, letter from Barber to then Governor Siegelman requesting payment of $5,000 to Ellison (C. 472);

— An August 13, 2001, letter from then Governor Siegelman's legal advisor to the State Finance Director requesting payment of $5,000 to Ellison (C. 469); and

— A copy of an August 18, 2001, check for $5,000 that the State paid Ellison for her testimony in Johnson's case (C. 467).

The State called Ellison to testify at the hearing. Johnson called one witness in rebuttal, Sandra Turner.

At the circuit court's request, Johnson filed a post-hearing brief and a proposed order in October 2019 and the State did likewise in November 2019.[3] In March 2020, the circuit court denied the petition after considering the Brady claim, finding that Johnson did not show "by a preponderance of the evidence that witness Violet Ellison either came forward or gave testimony out of a 'hope of reward' OR that the State had knowledge of such motivation at or before the time of trial' " (capitalization in original). (Supp. C. 54.) Johnson timely appealed.[4]

Standard of Review

***4** " 'To prove a Brady violation, a defendant must show: (1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to the defense, (3) that the evidence was material [or that the defendant was prejudiced].' " Jones v. State, 322 So. 3d 979, 1024-25 (Ala. Crim. App. 2019) (quoting Jefferson v. State, 645 So. 2d 313, 315 (Ala. Crim. App. 1994)).

The circuit court denied Johnson's Brady claim after Johnson had a chance to prove the claim at an evidentiary hearing. See Rule 32.9(a), Ala. R. Crim. P.

> "When the circuit court conducts an evidentiary hearing, '[t]he burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.' Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' '[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). 'However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition." ' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992))."

Marshall v. State, 182 So. 3d 573, 581 (Ala. Crim. App. 2014).

Discussion

Johnson argues that he is due "a new trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), because the State failed to disclose that Violet Ellison, its key trial witness, was motivated by a cash reward offer." (Johnson's brief, p. 18.) The circuit court denied the claim because, it found, Johnson did not prove that Ellison was ever motivated by a reward. Thus, the State could not have suppressed evidence about Ellison and the reward because no such evidence existed. See, e.g., Gavin v. State, 891 So. 2d 907, 986 (Ala. Crim. App. 2003) ("The State cannot suppress evidence that does not exist.").

Johnson argues that the circuit court erred in its findings denying him relief. Johnson argues first that, in finding that Johnson did not prove that Ellison was motivated by the State's reward offer, "the circuit court erred in evaluating both the State's reward records and ... Ellison's testimony." (Johnson's brief, p. 22.) Johnson focuses on the August 7, 2001, letter from Barber to then Governor Siegelman requesting payment of $5,000 to Ellison. That letter stated:

> "Dear Governor Siegelman:
>
> "On August 2, 1995, Governor Fob James, Jr. issued a proclamation offering a reward for information leading to

the arrest and conviction of the guilty person or persons of the death of Mr. William G. Hardy.

"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. An application has been submitted to the Honorable Alfred Bahakel, Circuit Judge, and he has signed an order authorizing the payment of half of said reward ($5,000) to the applicant.

***5** "Enclosed are the following:

"1. Copy of Proclamation dated August 2, 1995.

"2. Order of Honorable Alfred Bahakel dated April 8, 2001.[5]

"3. Application for Reward executed by Violet Ellison.

"It is respectfully requested that you approve payment of half of this reward ($5,000.00) by the State Comptroller to the applicant as set out in Judge Bahakel's Order. If you will direct the Comptroller to mail the check to me, I will make arrangements to deliver it to the applicant.

"If any further information is required, please advise me.

"Very truly yours,

"David Barber

"District Attorney"
(C. 472-73.)

Johnson argues that Barber's use of the phrase "pursuant to the public offer of a reward" shows that "Ellison acted 'in consequence of,' or in pursuit of, the offer" (emphasis added). Citing the statement in Gadsden Times v. Doe, 345 So. 2d 1361, 1363 (Ala. Civ. App. 1977), that "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," Johnson argues that "for Ms. Ellison to qualify for the reward, Mr. Barber had to believe that she knew about the reward offer when she provided information to the State." (Johnson's brief, p. 24.)

The circuit court, after considering the testimony and all admitted exhibits, rejected these arguments. The court found:

"The only direct evidence offered by [Johnson] at the evidentiary hearing, which is argued to be evidence of both Ms. Ellison's motive for coming forward in 1995 and the State suppressing this evidence before trial in 1998, is a letter from District Attorney David Barber requesting a reward from the Governor for Ms. Ellison dated August 7, 2001. This court does not find this letter to be evidence by a preponderance of the evidence of either claim. On its face, it is evidence that the District Attorney sought a reward be paid to Ms. Ellison in 2001, for her testimony at Johnson's trial, which led to his conviction in 1998. The language used by Mr. Barber is not conclusive as to whether Mr. Barber or any other prosecutor or detective knew of any motivation in 1995 up until the trial in 1998 on Ms. Ellison's part. The letter ... while evidence to be considered by the court, is neither conclusive [n]or convincing evidence to rebut the testimony of Ms. Ellison at the hearing. [Johnson] argues the very specific language 'pursuant to' imparts intent on Ms. Ellison's part three years earlier before the trial, simply does not make logical sense. According to Black's Law Dictionary 1356 (9th ed. 2009), 'pursuant to' means that one acts 'in accordance with,' or 'as authorized by' a particular law or request. This court finds this language to be the legalese used to advise the Governor that Ms. Ellison was entitled to part of the reward that had been previously authorized in connection with Deputy Hardy's murder. It was necessary to accomplish the result Mr. Barber intended.

***6** "Even if this court was convinced that this letter imparted motivation to Ms. Ellison for the reason she came forward with information in 1995, it certainly would not establish knowledge on the part of the District Attorney, his prosecutors, or law enforcement in this case. The Alabama Supreme Court has specifically held that Brady requires that 'the information requested by a criminal defendant be known to the prosecution,' Ex parte Cammon, 578 So. 2d 1089, 1091 (Ala. 1991). Mr. Barber was not called as a witness, or his affidavit introduced by [Johnson]; therefore, it was not established that Mr. Barber ever spoke to, met, or had any knowledge of the motivations of Ms. Ellison when she came forward in 1995 and later gave testimony at the trial in 1998. Nor were any detectives or prosecutors alleged in the case called as witnesses or testimony offered by affidavits on the alleged Brady violation; therefore, no suppression of evidence has been established by a preponderance of the evidence as required in establishing a violation under Brady. Freeman v. State, 722 So. 2d 806, 811 (Ala. Crim. App. 1998). In regard to this prong of the test set forth in Freeman, speculation and conjecture will not support a finding that the State violated Brady. See Bailey v. State, 421 So. 2d 1364, 1369 (Ala.

> Crim. App. 1982). Moreover, even if Mr. Barber's letter convinced this Court that Mr. Barber had knowledge that Ms. Ellison came forward with information in hope of a reward, there is nothing in this letter and no other evidence of when Mr. Barber would have allegedly learned of Ms. Ellison's motivation. See Thrasher v. State, [295 So. 3d 118, 134 (Ala. Crim. App. 2019)] ('The State's possession or knowledge after trial of evidence potentially favorable to the defense is not a basis for a Brady claim.') In this case, the court finds no evidence 'that law enforcement officers or representatives of the prosecution ever discussed the possibility of a reward with [Ms. Ellison].' McMillian v. State, 594 So. 2d 1253, 1258 (Ala. Crim. App. 1991)."

(Supp. C. 49-50.)

The record supports the circuit court's findings. The circuit court did not err in finding that the August 7, 2001, letter—including Barber's use of the phrase "pursuant to"—does not prove that Ellison came forward with information in hope of the reward or that the State ever knew of such a hope before Johnson's trial. And the circuit court did not err in finding that "[t]he letter ... is neither conclusive [n]or convincing evidence to rebut the testimony of Ms. Ellison at the hearing."

First, the circuit court's interpretation of the phrase "pursuant to" is reasonable. Consistent with the definition of "pursuant to" that the circuit court used, Garner's Dictionary of Legal Usage (3d ed. 2011) 737 defines the phrase as "(1) in accordance with; (2) under; (3) as authorized by; or (4) in carrying out." Garner writes, "Because the phrase means so many things, it is rarely—if ever—useful." Id.

And Gadsden Times does not support Johnson's position. The statement that Johnson cites from that decision addresses a reward offered by a private party, as a later statement clarifies:

> "[W]e are bound by the law of this state, which permits one to collect a reward offered by a private party only if he knew of such offer at the time of his action. Morrell [v. Quarles, 35 Ala. 544 (1860)]. The record reveals that Gulledge acted prior to the publication of any article which might reasonably have been construed to constitute an offer of reward by the Times. Thus, as a matter of law, there could have been no contract between the parties."

Gadsden Times, 345 So. 2d at 1364 (emphasis added). In Johnson's case, however, the Governor—not a private party—made the reward offer under § 15-9-1, Ala. Code 1975.[6] (C. 463.) That section conditions the payment of a reward only upon a person "giv[ing] information leading to the arrest and conviction of the guilty person."

The circuit court made these findings about Ellison's testimony:

> *7 "Ms. Ellison testified that she recalled giving testimony in 1998 at Johnson's trial. Ms. Ellison's testimony at trial was to conversations overheard on three-way phone calls that her 16-year-old daughter was making for inmates at the Jefferson County Jail. On one of these calls, she overheard a man identify himself as 'ToForest' admit to murdering Deputy Bill Hardy. Ms. Ellison contacted the Jefferson County Sheriff's Office six days later to give them the information she had and had made notes of. These notes were admitted at the trial and reintroduced at this evidentiary hearing. Ms. Ellison recalled contacting the Jefferson County Sheriff's Office on August 9, 1995, and meeting with investigators that same day.
>
> "Ms. Ellison testified that at the time she made the initial phone call to the office, she had no knowledge from any source that a reward had been offered. She had not read anything about a reward in the newspaper, heard about a reward on TV or discussed a reward with anyone. She also testified, that at the time she testified in this case, and that in all the time leading up to the trial, she was unaware of any reward. She did testify both at the trial on cross-examination and at the hearing, that she came forward and called the Sheriff's Office six days after she overheard the conversation, because 'I was troubled. My spirit was troubled by not—you know, by hearing this and not saying anything and doing anything about it.' She testified she couldn't sleep during this time. Ms. Ellison further testified at the hearing that before coming forward to the Jefferson County Sheriff's Office, she talked to her mother and her mother told her to tell the truth, and to do what she needed to do.
>
> "Ms. Ellison testified that she did not know anything about a reward until about three years after she testified at Johnson's 1998 trial, when she received a call from someone in the Jefferson County District Attorney's Office asking her to 'come in and sign some papers.' She testified she waited 'a couple of days,' then went to the District Attorney's Office. Ms. Ellison identified a copy of the application for the reward that she signed on August 6, 2001. Ms. Ellison also identified a copy of the receipt for $5,000 in reward money that she signed on August 23,

2001. Ms. Ellison testified that the first time she knew about a reward was when she was contacted by the District Attorney's office in August of 2001.

"On cross-examination, Ms. Ellison testified that she read about Deputy Hardy's murder in a newspaper a couple of days after it happened. Ms. Ellison testified that she figured out that she knew Deputy Hardy's wife, because she worked at the bank where Ms. Ellison was a customer. She also testified that she had met Deputy Hardy at the dog track with his wife. Ms. Ellison was asked questions concerning her finances and gave testimony that she and her husband filed for bankruptcy some five years before going to the [Jefferson County Sheriff's Office] in 1990.

"After the State rested, [Johnson] called rebuttal witness Ms. Sandra Turner. Ms. Turner and Ms. Ellison have been next door neighbors for over 30 years. Ms. Turner testified that it was her personal opinion that Ms. Ellison was not truthful and that her reputation in the community was not good for truthfulness. On cross-examination, Ms. Turner admitted that her son and Ms. Ellison's granddaughter have a son together and there is bad blood between her and Ms. Ellison and in the family. She also admitted that her son had been sent to prison for being a 'watchman,' while another man raped Ms. Ellison's daughter.

"....

"Rather than speculate as to the meaning and knowledge imparted in a letter three years after the trial, and six years after Ms. Ellison came forward with information, or on numerous other circumstantial and irrelevant exhibits introduced at the hearing by [Johnson], it is critical that this court evaluate Ms. Ellison's credibility, both as a witness at the trial and the evidentiary hearing, as her testimony at the evidentiary hearing is completely contrary to the Brady violation claim made by [Johnson], and the sole issue to be decided by this court. ... [T]his court was not the trial judge in this case, but a thorough review of the trial record has been made. This court observed ... Ms. Ellison testify at the evidentiary hearing, such as the jurors in the trial did, before reaching a verdict of guilty and recommending a sentence of death. There is no question that Ms. Ellison was a critical witness for the State at both proceedings. The jurors' opinion of her credibility at the trial has been clearly established by the verdicts rendered. Her testimony at the hearing was consistent with her trial testimony and she was not impeached on cross-examination by [Johnson] at the hearing. It is not this court's role at this stage of the Rule 32 process to address the weight of evidence at the trial or the weight of Ms. Ellison's testimony at the trial, but her credibility then is relevant here and now.

***8** "This court was very narrowly directed by the Court of Criminal Appeals to determine after a hearing whether [Johnson's] claim of a Brady violation has been proven by a preponderance of the evidence. This requires this court to assess this witness's credibility. Ms. Ellison appeared before the court well dressed, well spoken and answered the questions both on direct and cross with confidence, deliberate in her testimony. She had a good recollection of dates, names, and meetings. She had a good recollection of the facts that she testified to at trial. She did not [waver] about any subject on cross-examination. Ms. Ellison testified on at least eight occasions while on the witness stand, that she had no knowledge from any source about a reward before she came forward and gave information to the Jefferson County Sheriff's Office on August 9, 1995, or before trial of the case in August of 1998. Johnson contends that 'the evidence from the trial and the 2019 hearing supports the conclusion that Ms. Ellison knew about the reward all along.' This court finds no convincing evidence to rebut Ms. Ellison's testimony at the hearing. Johnson's Exhibits of newspaper and television accounts reporting a reward are circumstantial evidence at best that Ms. Ellison must have known about the reward at the time she came forward or gave testimony at trial. Ms. Ellison admitted she followed the case in the media but was unaware of a reward. [Johnson's] Exhibits concerning pretrial publicity about the reward, are also evidence of possible pretrial knowledge of the reward by trial counsel. It is clear from the trial record that [Johnson's] trial counsel had knowledge of the reward and asked defense witness Yolanda Chambers during Johnson's 1998 trial about her seeking a reward. It is as likely as not that Ms. Ellison was deliberately not asked about the reward on cross as part of a strategy by trial counsel. In fact, Ms. Ellison has been clear and consistent about her motivation in coming forward both at the trial in 1998 and the hearing. At trial on cross-examination, Ms. Ellison said she waited six days to come forward because [she] didn't want to get involved. She said:

> " 'A. And I didn't know—reasons I didn't get in touch with anybody, I didn't even know how to get in touch with Patricia, because I didn't know where Patricia Hardy lived.

> " 'Q. But it was so important to you on the 3rd that you took these notes down verbatim about this conversation, and yet you took no action whatsoever about it for six days.
>
> " 'A. Because I did not want to get involved because I felt like if a person would shoot a police officer with a uniform on, what would they do to me? [A]nd I did not want to get involved. That's why I didn't talk. And my conscience bothered me and I could not sleep, and that's why I came in.' (Trial R. 708.)

"At the evidentiary hearing on direct examination, she testified, 'I was troubled. My spirit was troubled by not —you know, by hearing this and not saying anything and doing anything about it.' On cross-examination Ms. Ellison continued to explain her motivation for coming forward. On cross-examination she testified that

> " 'yes, my spirit was troubled about that. But in this world these days, you don't go out and try to tell people about what has happened. I did not do that. I waited until I felt like I was being—I was safe in going to these people to talk. People will hurt you. Because I talked to my mother. And my mother and my father had always told me to tell the truth.'

"Ms. Ellison went on to testify that '[a]nd then I talked to my mother about it. And she said, "You have to do what you have to do but just be careful." That's what she said.'

"Johnson also contends that Ms. Ellison's financial condition at the time she came forward is circumstantial evidence of her motivation for a reward. She testified at the hearing that she lived on a fixed income, her husband's job had been discontinued and he was unemployed for a few weeks, and they had filed for bankruptcy some five years before she came forward with information. This court finds this argument to be contradicted by the facts actually presented by [Johnson]. There is no record until August 6, 2001, five years after she initially came forward and made a statement and three years following the conviction in this case, that she made an application for the reward. This certainly is contrary to the argument that she was in financial need and came forward motivated by substantial financial reward. In fact, the timing of her actions are completely consistent with her testimony that she knew nothing of a reward until she got a call from someone at the [District Attorney's] office to 'come in and sign some papers.' If her true motive was to seek a reward, this court would expect she would have made application for the reward as soon as possible after the conviction. There is no evidence that the State knew of her interest in a reward before her making the application, that the District Attorney invited her to do. Had the State known of either before the trial in this case, it would seem logical that the State would have started the process as soon as possible after the trial. The relevant focus in this court's Brady analysis is not how Ms. Ellison learned about the reward, although important here, but when she learned about the reward. Based on this Court's observation of Ms. Ellison's demeanor as well as her clear, consistent, and articulate testimony at the evidentiary hearing in this case, this court finds her testimony to be compelling and credible evidence that she did not learn of the reward until years after Johnson's trial. Ms. Ellison's testimony rebuts any evidence introduced by [Johnson]. Therefore, [Johnson's] Brady claim has failed to be proved by a preponderance of the evidence."

***9** (Supp. C. 47-48, 51-53 (some citations omitted).)

For many reasons, Johnson argues that Ellison's testimony was "impossible to believe." (Johnson's brief, p. 27.) Before evaluating those reasons, however, we note that "[w]hen evidence is presented ore tenus, it is the duty of the trial court, which had the opportunity to observe the witnesses and their demeanors, and not the appellate court, to make credibility determinations and to weigh the evidence presented." Ex parte Hayes, 70 So. 3d 1211, 1215 (Ala. 2011). Here, the circuit court made extensive findings about Ellison's testimony. The circuit court found Ellison credible and relied on her testimony to deny Johnson's Brady claim. In Washington v. State, 95 So. 3d 26, 47 (Ala. Crim. App. 2012), this Court stated:

> " 'The resolution of this factual issue required the trial judge to weigh the credibility of the witnesses. [That] determination is entitled to great weight on appeal. State v. Klar, 400 So. 2d 610, 613 (La. 1981). "When there is conflicting testimony as to a factual matter such as this, the question of the credibility of the witnesses is within the sound discretion of the trier of fact. [Those] factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence." Klar, 400 So. 2d at 613.'
>
> "Calhoun v. State, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984). See also Brooks v. State, 929 So. 2d 491, 496 (Ala. Crim. App. 2005); State v. Cortner, 893 So. 2d 1264 (Ala. Crim. App. 2004). 'A trial court's ruling on conflicting

> evidence will not be disturbed unless it is palpably contrary to the weight of the evidence.' State v. Cortner, 893 So. 2d at 1267-68."

Johnson first asserts that

> "Ms. Ellison's 2019 [testimony] as to how she came to receive the reward in 2001 does not make sense. Ms. Ellison claimed that the State contacted her out of the blue in 2001, three years after Mr. Johnson's trial, and asked her to come, 'sign some papers,' and receive a reward."

(Johnson's brief, p. 28.) The circuit court, however, found Ellison credible on this point, and Johnson's disagreement with the circuit court's finding does not show that the finding was " 'palpably contrary to the weight of the evidence.' " Washington, supra. The documents Johnson offered at the hearing likewise do not show that the circuit court's findings about Ellison's testimony were wrong.

And as the State notes, Johnson offered no evidence from anyone employed in the Jefferson County District Attorney's Office to rebut Ellison's testimony. Indeed, during closing arguments, the circuit court told the parties that it would like to hear, either by affidavit or live testimony, "from [District Attorney] David Barber, from [prosecutor] Jeff Wallace, from [prosecutor] Theo Lawson, from deputy—or Sergeant Salter and Sergeant Richardson." (R. 213.) Johnson objected to offering more evidence, however, stating that he thought he had proved his case. (R. 214.) The State also objected to reopening the evidence because, in the State's view, Johnson knew about those witnesses but did not call them to testify—and he should not have another chance to prove his case. (R. 214-15.)

***10** Johnson again cites Gadsden Times, supra, to argue that Ellison was not eligible for the reward unless she knew about it when she gave information to the State. But as stated above, Gadsden Times does not support Johnson's position.

Johnson next asserts that the State "has repeatedly contradicted [Ellison's] account of the confession she claimed to have heard." (Johnson's brief, p. 28.) In support of this assertion, Johnson cites what he says were conflicting theories of prosecution in the proceedings against Johnson's codefendants Ardragus Ford and Omar Berry. The circuit court, however, refused to consider those theories because, the court held, its decision had to be "based on an impartial review of the admissible evidence presented according to the law."[7] (Supp. C. 54.) And, the circuit court said, this Court's remand order did not instruct that court "to consider the weight or sufficiency of the evidence at the trial in this case or to make judgments concerning the conflicting theories of the prosecution of this case." (Supp. C. 54.) In his initial brief on return to remand Johnson does not challenge the circuit court's rulings on these points.[8] Thus, Johnson waived any challenge to them. See, e.g., Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived.").

***11** Johnson also asserts that the State, in its opening statement at the evidentiary hearing, "undermin[ed] Ms. Ellison's credibility" because, Johnson says, "it did not track her testimony concerning how she learned about the reward." (Johnson's brief, p. 29 n.7.) During its opening, the State asserted:

> "The State anticipates that Ms. Ellison when she testifies will inform the court when she contacted law enforcement, the sheriff's department, on August 9th, 1995, she didn't know anything about a reward, had not heard about a reward. When she testified in August of 1998, she didn't know about a reward, had not heard of a reward. A few years later, she had a conversation with someone who mentioned the reward. And I'm not going to get into that conversation. I don't want to get into hearsay before the court. But after that conversation, she made an inquiry to the district attorney's office. And she made an application. And this was in August of 2001, three full years after she testified."

(R. 18-19.) According to Johnson, however, "Ellison then testified to an entirely different story—that the first time she ever heard of the reward was when the Office of the District Attorney contacted her years after the trial and asked her to accept a reward payment that she had not requested." (Johnson's brief, p. 29 n. 7.)

The circuit court, however, rejected Johnson's assertion:

> "Johnson claims that statements made in the opening by the State at the June 6, 2019, evidentiary hearing constitute evidence which this Court should consider in assessing witness Violet Ellison's credibility and as part of this Court's Brady analysis. Because the statements of counsel are not evidence in this case, the fact that the State's summary of what the witness would testify to, does not match up in every respect with the [witness's] testimony under oath, does not support the argument made by [Johnson], that Ms. Ellison's testimony was not credible. See Land v. State, 678 So. 2d 201, 221 (Ala. Crim. App. 1995), aff'd, 678 So. 2d 224 (Ala 1996)."

(Supp. C. 53-54.) Johnson has not shown that the circuit court erred in rejecting his assertions about the State's opening statement.

Johnson next asserts that "the confession that Ms. Ellison claimed to have heard contradicts the physical evidence in the case." (Johnson's brief, p. 29.) Johnson asserts: "Ms. Ellison claimed to hear a man say that his name was 'ToForest' and that he and another man fired shots at Deputy Hardy. ... But the State's own evidence makes clear that one shooter fired two shots in rapid succession." (Johnson's brief, p. 29.)

Johnson's trial counsel argued that the physical evidence in the case contradicted Ellison's testimony, and, as Johnson describes it, trial counsel "speculated that Ms. Ellison had embellished or altered what she had heard on the phone." (Johnson's brief, p. 34 (citing Trial R. 985-86).)

As noted above, Johnson did not challenge the circuit court's refusal "to consider the weight or sufficiency of the evidence at the trial in this case." (Supp. C. 54.) As also noted above, the circuit court found:

> "The jurors' opinion of [Ms. Ellison's] credibility at the trial has been clearly established by the verdicts rendered. Her testimony at the hearing was consistent with her trial testimony and she was not impeached on cross-examination by [Johnson] at the hearing. It is not this court's role at this stage of the Rule 32 process to address the weight of evidence at the trial or the weight of Ms. Ellison's testimony at the trial, but her credibility then is relevant here and now."

***12** Johnson has not shown this Court that, considering the State's evidence at Johnson's trial, the circuit court erred in its conclusion that Ellison was a credible witness.

Next, Johnson asserts that "Ms. Ellison claimed to have taken notes based directly on what she heard, but her notes include facts from other sources." (Johnson's brief, p. 29.) But Johnson gives only one example of a "fact from other sources"—Johnson says that even though Ellison "testified unequivocally that the man on the phone 'didn't say Johnson, he just said ToForest,' " in her notes Ellison "repeatedly wrote 'Johnson' referring to the person she heard on the phone." (Johnson's brief, p. 30.)

Johnson's trial counsel and his Rule 32 counsel cross-examined Ellison thoroughly about her notes. The circuit court found that Johnson did not impeach Ellison at the Rule 32 hearing, and Johnson has not shown that the circuit court erred in that finding.

Finally, Johnson asserts that Ellison's testimony at the Rule 32 hearing "that she followed the case closely in the news in 1995 ... undermines her claim that she had never heard of the public reward offer." (Johnson's brief, p. 30.) He argues: "Given the way Ms. Ellison was following the case—a case in which a person she knew had been killed—it is implausible that she never heard about the reward offer." (Johnson's brief, p. 31.) As the already quoted parts of the circuit court's order show, however, the court ruled against Johnson on this issue:

> "This court finds no convincing evidence to rebut Ms. Ellison's testimony at the hearing. Johnson's Exhibits of newspaper and television accounts reporting a reward are circumstantial evidence at best that Ms. Ellison must have known about the reward at the time she came forward or gave testimony at trial. Ms. Ellison admitted she followed the case in the media but was unaware of a reward. [Johnson's] Exhibits concerning pretrial publicity about the reward, are also evidence of possible pretrial knowledge of the reward by trial counsel. It is clear from the trial record that [Johnson's] trial counsel had knowledge of the reward and asked defense witness Yolanda Chambers during Johnson's 1998 trial about her seeking a reward. It is as likely as not that Ms. Ellison was deliberately not asked about the reward on cross as part of a strategy by trial counsel.[9] In fact, Ms. Ellison has been clear and consistent about her motivation in coming forward both at the trial in 1998 and the hearing.
>
> "....
>
> "... Based on this Court's observation of Ms. Ellison's demeanor as well as her clear, consistent, and articulate testimony at the evidentiary hearing in this case, this court finds her testimony to be compelling and credible evidence that she did not learn of the reward until years after Johnson's trial. Ms. Ellison's testimony rebuts any evidence introduced by [Johnson]. Therefore, [Johnson's] Brady claim has failed to be proved by a preponderance of the evidence."

Under our standard of review, we must give great weight to the circuit court's factual determinations and findings about Ellison's credibility. Washington, supra. Johnson has not shown that those determinations are " ' "clearly contrary to the evidence." ' " Id. Thus, he is due no relief.

***13** In his reply, Johnson asserts:

> "The problems with this capital case are so severe that both the Jefferson County District Attorney and the lead trial prosecutor from the case support a new trial for ToForest Johnson. Yet the State, now represented by the Office of the Attorney General, does not address any of the problems with the case in its brief. Instead, the State argues that this Court should ignore virtually everything —the District Attorney's position, legal authority that supports Mr. Johnson's Brady claim, the amicus brief of the Innocence Project, and even parts of the record that undermine the State's position. This Court should reject the State's approach, confront the realities of this case, and reverse the decision of the circuit court."

(Johnson's reply, p. 1.) We must reject Johnson's request that we consider the wishes of the Jefferson County District Attorney or the former lead prosecutor in Johnson's case or that we consider the opinion of the Innocence Project about Johnson's conviction. The only issue before the circuit court on remand was giving Johnson a chance to prove his Brady claim.

On appeal, the only issue before this Court is whether the circuit court abused its discretion in denying Johnson's Brady claim. Johnson has not shown that the circuit court erred in finding that he did not prove that, at any time before or during Johnson's trial, Ellison knew about or hoped to get a reward. Thus, the State could not have known that Ellison knew about or hoped to get a reward, and Johnson is due no relief on his Brady claim. See, e.g., Gavin, 891 So. 2d at 986 ("The State cannot suppress evidence that does not exist.").

The circuit court's judgment is affirmed.

AFFIRMED.

Windom, P.J., and Kellum and McCool, JJ., concur. Cole, J., recuses himself.

All Citations

--- So.3d ----, 2022 WL 1438949

Footnotes

1 Johnson at first offered 22 exhibits. He offered six more exhibits after Ellison testified at the hearing.

2 "C. __" refers to the clerk's record on return to remand after remand by the United States Supreme Court. "R. __" refers to the reporter's transcript of the June 6, 2019, evidentiary hearing.

"Supp. C. __" refers to the first supplemental record on return to remand after remand by the United States Supreme Court. "2d Supp. C. __" refers to the second supplemental record on return to remand after remand by the United States Supreme Court. "3d Supp. C. __" refers to the third supplemental record on return to remand after remand by the United States Supreme Court.

"Trial R. __" refers to the reporter's transcript in Johnson's direct appeal. See Rule 28(g), Ala. R. App. P.

3 In December 2019, the Innocence Project moved to file an amicus curiae brief in support of Johnson. (Supp. C. 106.) The Innocence Project included a brief with its motion, but the circuit court did not rule on the motion.

4 Three months after the circuit court denied Johnson's petition, the Jefferson County District Attorney filed an amicus curiae brief asking the circuit court to grant Johnson a new trial. After the State replied, the circuit court ruled that it did not have jurisdiction to consider the District Attorney's request.

On appeal, Johnson asserts that this Court may consider the District Attorney's amicus curiae brief because it "is a public document filed by a state actor." (Johnson's reply, p. 2.) He cites Ex parte Davidson, 736 So. 2d 1146, 1148 (Ala. Crim. App. 1999), in which this Court took judicial notice of its own records. This Court's authority to take judicial notice of its own records is well established. But Davidson does not establish that this Court may take judicial notice of the records of other courts. And Johnson cites no authority for his position that we should reverse the circuit court's judgment based on a brief filed with the circuit court after it had lost jurisdiction over the case.

Even if we were to consider the District Attorney's brief, it is based on the premise that the State "paid [Ellison] $5,000 which was never mentioned during trial." (3d Supp. C. 11.) But payment of the reward could not have been mentioned during the trial because it did not happen until three years after the trial. And payment of the reward was not the basis

of Johnson's Brady claim. His claim was that the State knew, but did not disclose, that Ellison testified against Johnson in the specific hope of obtaining the reward.

5 Although Barber's letter states that Judge Bahakel's order is dated April 8, 2001, the order is dated August 8, 2001. (C. 475.) Barber's letter is dated August 7—the day before Judge Bahakel's order.

6 Section 15-9-1, Ala. Code 1975, provides that, for certain crimes,

> "the Governor, upon application of the district attorney in the county in which it shall have been committed, may offer publicly a reward not exceeding $10,000.00 to the person who shall give information leading to the arrest and conviction of the guilty person; provided, however, that in cases involving murder, attempted murder, assassination or attempted assassination of any member of the judiciary, public or state official or any law enforcement officer, the Governor may increase the reward up to a maximum of $10,000.00. Any such reward shall be paid to the informer by the state by order of the court before which such conviction is had."

7 Johnson repeatedly cites what he says was the prosecution's use of inconsistent theories. More than a decade ago, Johnson had a chance to prove his claim alleging that his trial counsel was ineffective for not objecting to the State's use of what Johnson said were inconsistent theories in Johnson's trials and the trials of his codefendant Ardragus Ford. This Court's 2013 opinion on return to remand affirmed the circuit court's judgment denying that ineffectiveness claim because the underlying claim had no merit. We stated:

> "There is no due-process violation when the State argues at one trial that one codefendant shot the victim and at the codefendant's trial argues that that codefendant shot the victim.
>
> > " 'When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecutor's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent. Thus, because there was evidence that supported both theories, and since [the defendant] could have been convicted of aiding and abetting under either theory, we find no error.'
>
> "United States v. Paul, 217 F.3d 989, 998-99 (8th Cir. 2000)." Johnson, —— So. 3d at ——.

We also note that, at his second trial, Johnson presented the testimony of two alibi witness who said they saw Johnson at a nightclub on the night of the murder and a witness, Yolanda Chambers, who testified that she was with Johnson and Ardragus Ford on the night of the murder. Chambers testified that she had lied when she had testified before that Quintez Wilson, Omar Berry, and Johnson had fired the shots that killed Hardy; Chambers testified at Johnson's second trial that she had seen Ford kill Hardy. (Trial. R. 745-46, 762, 785-86.) After an evidentiary hearing, the circuit court denied Johnson's claim that counsel was ineffective for presenting the testimony of Chambers and the alibi witnesses. This Court's 2013 opinion also affirmed the judgment denying that claim.

8 To be sure, Johnson asks this Court to consider the conflicting theories of prosecution. But he does not challenge the circuit court's stated reason for refusing to do so. Thus, we will not review the circuit court's refusal to consider those theories.

In his reply brief, Johnson argues for the first time that "[t]he court's failure to consider the substance of [Ellison's] testimony in the context of the other evidence at trial in assessing Ms. Ellison's credibility was erroneous as a matter of law." (Johnson's reply, p. 13.) This argument is not properly before us. See, e.g., L.J.K. v. State, 942 So. 2d 854, 869 (Ala. Crim. App. 2005) (" '[N]ew issues may not be raised for the first time in a reply brief.' McCall v. State, 565 So. 2d 1163, 1167 (Ala. Crim. App. 1990).").

9 In a footnote, Johnson argues that this statement by the circuit court conflicts with this Court's holding in its 2013 opinion on return to remand that Johnson's trial counsel had no reason to ask Ellison about the reward because there was "no evidence [in the record] indicating that Ellison knew about the reward, that she attempted to get the reward, or that she received any reward for her testimony at Johnson's trial." Johnson, —— So. 3d at ——. We see no conflict.

This Court's statement in 2013 addressed Johnson's claim that his trial counsel was ineffective for not "establishing how widely publicized the reward offer was and whether Violet Ellison was aware of the reward." Johnson, —— So. 3d at

——. As the circuit court found in its 2020 order, no evidence showed that Ellison knew about the reward, tried to get the reward, or received any reward until 2001. Trial counsel knew of no reason to ask Ellison in 1998 whether she knew about or had tried to get a reward, and, if counsel had asked her, she would have answered in the negative. Thus, it was not unreasonable for trial counsel not to ask Ellison questions that would have reinforced her stated motive for giving information to law enforcement.

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APPENDIX D

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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACQUELINE ANDERSON SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

STATE OF ALABAMA	)	
	)	
V.	) Case No.:	CC-1996-000386.60
	)	
JOHNSON TOFOREST ONESHA	)	
Defendant.	)	

ORDER ON THIRD REMAND

This Court was assigned this Rule 32 Petition following the retirement of the trial and sentencing judge, the Honorable Alfred Bahakel and after his successor, the Honorable William Cole, recused himself. Judge Bahakel also handled the Rule 32 initially, denying the Rule 32 without an evidentiary hearing. The Court of Criminal Appeals remanded the Rule 32 twice, once in 2007 for additional proceedings in front of Judge Bakakel, and again in 2013 for proceedings in this Court. In 2015 the Court of Criminal Appeals affirmed this Court's denial of the Rule 32 petition. See Johnson v. State, [Ms. CR-05-1805, August 14, 2015] ---So. 3d--(Ala. Crim. App. 2007). The Alabama Supreme Court denied certiorari review on November 18, 2016.

Johnson filed a petition for a writ of certiorari with the United States Supreme Court. In that petition, the Petitioner raised one issue: whether his claim that the State suppressed information that Violet Ellison testified against the Defendant Johnson out of hope for a reward warranted a remand to the Court of Criminal Appeals for further consideration in light of Ex parte Beckworth, 190 So. 3rd 571 (Ala. 2013). The State conceded that the case should be remanded. On April 27, 2018, following remand from the United States Supreme Court, The Alabama Court of Criminal Appeals remanded the case to this Court to " conduct an evidentiary hearing on Johnson's Brady claim related to the State's alleged knowledge of and alleged failure to disclose to Johnson that Violet Ellison testified against Johnson in the specific hope of

obtaining the reward offered in the case. " Johnson v. State, CR-05-1850, 2018, 2WL 1980778 (Ala. Crim. App. April 27,2018) (Opinion on third remand).

On June 6, 2019, after a thorough and lengthy discovery process, this Court held an evidentiary hearing on the Petitioner's Brady claim. The Petitioner introduced 28 exhibits into evidence, including numbers 16 and 17 relative to the proclamation of a reward from the Governor's office on August 2, 1995 and the application and issuance of one half of the reward to Ms. Ellison, three years after her testimony, in 2001. The Petitioner rested without calling a witness. The State called Ms. Violet Ellison to testify. The Petitioner called a rebuttal witness, Ms. Sandra Turner. Both parties submitted briefs and proposed orders. This Court has thoroughly reviewed the trial record in this case, the allegations made in the Third Amended Rule 32 Petition, all Exhibits, hearing testimony, pleadings and briefs, and makes the following findings of fact and conclusions of law and denies the Rule 32 relief sought on the single allegation of a Brady violation, and pursuant to the very specific instruction given this Court by the Court of Criminal Appeals.

I. LEGAL AUTHORITY RELEVANT TO BRADY CLAIMS

Due process is violated where the prosecution has suppressed "evidence favorable to an accused person... where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v Maryland, 373 U.S. at 87. Under Rule 32.3 of the Alabama Rules of Criminal Procedure, the Petitioner has the burden of proving the facts necessary to warrant relief by a preponderance of the evidence. For a Brady violation to be established here, as alleged in Claim III in the Third Amended Rule 32 Petition, the Petitioner must establish by a preponderance of the evidence " 1.that the prosecution suppressed evidence; 2.that the evidence was favorable to his defense; and 3.that the evidence was material".. Smith v. State, 639 So..2d 543 , 547 (Ala. Crim. App. 1993). " The knowledge of government agents working on the case, including a deputy sheriff, as to the existence of exculpatory evidence will be imputed to the prosecution."Savage v. State, So. 2d 405, 407 (Ala. Crim. App. 1992) . "[T]he rule of Brady applies only in situations which involve " discovery after trial of information which had been known to the prosecution but unknown to the defense." Gardner v. State, 530 So. 2d 250, 256 (Ala. Crim. App. 1987) "Impeachment evidence... as well as exculpatory

evidence , falls within the Brady rule. United States v. Bagley , 473 U. S. 667, 676 (1985)

Before addressing the three prong test that the Petitioner must establish by a preponderance of the evidence as set out in Brady and Smith cited above, the Petitioner must establish that the evidence existed at the time of the trial and that the State knew of its existence. The "evidence" in this Brady claim, which must be established by the Petitioner by a preponderance of the evidence , is that the witness Violet Ellison gave testimony against Johnson in the "specific hope of obtaining the reward offered in the case. " Johnson v. State, CR-05-1805, 2018 WL 1980778 (Ala. Crim. App. April 27,2018) (opinion on third remand). There is no dispute that the State's key witness against Mr. Johnson was a woman named Violet Ellison, who testified that she overheard , while listening in on a three way call initiated by her daughter, a jail inmate, who referred to himself as Toforest admit to shooting Deputy Hardy. (T.R. 683) Specifically, Ms. Ellison testified at the trial that ...

Q. Please refer to your notes and tell us what you heard him say.
A. Okay. ToForest was talking to Daisy about the incident on the lot. And he said that Michael Ansley was to be robbed. Johnson said he and the men had followed Michael, and Michael had changed from a gold -- from a red to a gold Blazer. And Johnson said that, Toforrest, said that they had went back to the motel and that they had waited. And this bitch of Michael's had come back in the car, and that she had a gun. An argument took place and the officer came out because of the disturbance, he heard them and he saw them out there. He came out and I heard ToForest say that , let's see--
Q. Tell us exactly what he said if you can do that.
A. "Toforrest said "I shot the fucker in the head and I saw his head go back and he fell. And he shouldn't have got in my business, messin up my shit". (T. R. 683,684)

At the June 2019 hearing, the State acknowledged that "[n]o one has ever disputed that Ms. Ellison's testimony was material and very important to the case." (H.R.193) There is also no dispute that the jury credited Ms. Ellison's testimony and relied on it to convict Mr. Johnson. (State's Br. at 149) "[T]he jury observed Ms. Ellison's testimony and, and in finding Johnson guilty, obviously found that it was credible") This Court finds that the jury certainly would have had to find her a credible witness at the time of trial. Finally, it is undisputed that the State, some three years later paid Ms. Ellison $5000 for giving testimony in 1998, pursuant to a reward which had been proclaimed before the trial in this case. (See Hearing Exhibits #16 and #17) In the Third Amended Rule 32 Petition, Mr. Johnson alleged that the State failed to disclose to his lawyers that Ms. Ellison had come forward with her story " pursuant to [a] reward offer,

although it knew this to the case."(C. 1171). The Court of Criminal Appeals remanded the case to the Circuit Court for this Court to determine whether Mr. Johnson could prove this allegation true by a preponderance of the evidence.

II. EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

At the June 6, 2019, evidentiary hearing, Johnson introduced 28 exhibits, including documentation from the District Attorney's office of both witness Ellison's application for a reward approximately three years after her testimony at trial resulting in a guilty verdict and the check she received approximately two weeks later. Also offered into evidence as an exhibit was a letter from District Attorney David Barber to the Governor requesting the reward be granted to Ms. Ellison. (Petitioner's Exhibit 17) Johnson did not call any witnesses in the case in chief.

The State called Ms. Violet Ellison. Ms. Ellison testified that she recalled giving testimony in 1998 at Johnson's trial. Ms. Ellison's testimony at trial was to conversations overheard on three way phone calls that her 16 year old daughter was making for inmates at the Jefferson County Jail. On one of these calls, she overheard a man identify himself as "Toforrest" admit to murdering Deputy Bill Hardy. (H.R. 86) Ms. Ellison contacted the Jefferson County Sheriff's office six days later to give them the information she had and had made notes of.(H.R. 55) These notes were admitted at the trial and reintroduced at this evidentiary hearing. (Petitioner's Exhibit 24) Ms. Ellison recalled contacting the Jefferson County Sheriff's Office on August 9, 1995, and meeting with investigators that same day. (H.R. 55)

Ms. Ellison testified that at the time she made the initial phone call to the Jefferson County Sheriff's Office, she had no knowledge from any source that a reward had been offered. (H.R. 55) She had not read anything about a reward in the newspaper, heard about a reward on TV or discussed a reward with anyone. (H.R. 55,56) She also testified, that at the time she testified in this case, and that in all the time leading up to the trial, she was unaware of any reward. (H.R. 56) She did testify both at the trial on cross examination and at the hearing, that she came forward and called the Sheriff's office six days after she overheard the conversation, because "I was troubled. My spirit was troubled by not -- you know, by hearing this and not saying anything and doing anything about it. " (H.R. 56,57) She testified she couldn't sleep during this time. (H.R.57) Ms. Ellison further testified at the hearing that before coming forward

to the Jefferson County Sheriff's Office, she talked to her mother and her mother told her to tell the truth, and to do what she needed to do.(H.R. 106,107)

Ms. Ellison testified that she did not know anything about a reward until about three years after she testified at Johnson's 1998 trial, when she received a call from someone in the Jefferson County District Attorney's office asking her to "come in and sign some papers." (H.R. 57,58) She testified she waited "a couple of days", then went to the District Attorney's Office.(H.R. 58) Ms. Ellison identified a copy of the application for the reward that she signed on August 6, 2001 (H.R. 58,59 ; Petitioner's Exhibit 17, pp.7-8) Ms. Ellison also identified a copy of the receipt for $5000 in reward money that she signed on August 23, 2001. (H.R. 62; Petitioner's Exhibit 17 p.2) Ms. Ellison testified that the first time she knew about a reward was when she was contacted by the District Attorney's office in August of 2001. (H.R. 62)

On cross examination Ms. Ellison testified that she read about Deputy Hardy's murder in a newspaper a couple of days after it happened. (H.R. 67) Ms. Ellison testified that she figured out that she knew Deputy Hardy's wife, because she worked at the bank where Ms. Ellison was a customer. (H.R. 70). She also testified that she had met Deputy Hardy at the dog track with his wife. (H.R. 71) Ms. Ellison was asked questions concerning her finances, and gave testimony that she and her husband filed for bankruptcy some five years before going to the JCSO in 1990.(H.R. 80)

After the State rested, the Petitioner called rebuttal witness Ms. Sandra Turner. Ms. Turner and Ms. Ellison have been next door neighbors for over 30 years. (HR 135) Ms. Turner testified that it was her personal opinion that Ms. Ellison was not truthful and that her reputation in the community was not good for truthfulness.(H.R. 138) On cross examination, Ms. Turner admitted that her son and Ms. Ellison's granddaughter have a son together and there is bad blood between she and Ms. Ellison and in the family.(H.R.145) She also admitted that her son had been sent to prison for being a "watchman", while another man raped Ms. Ellison's daughter.(H.R. 143, 144)

III. MR. JOHNSON HAS NOT PROVEN THAT IT IS MORE LIKELY THAN NOT THAT MS. ELLISON GAVE TESTIMONY AGAINST THE DEFENDANT WITH THE SPECIFIC HOPE OF OBTAINING THE REWARD IN THIS CASE

Johnson's Brady claim is atypical in that the State has always asserted that the evidence

Johnson claimed the State suppressed did not exist. As a result, Johnson's initial burden at the evidentiary hearing was to affirmatively prove by a preponderance of the evidence that the evidence he claimed was suppressed did, in fact, exist, either before or during his trial. See Timmons v.State, 487 So. 2d 975, 982 (Ala. Crim. App. 1986 ("There must be some showing that such exculpatory and influential evidence actually exists before such a constitutional violation can be found") Speculation and conjecture will not support a finding that the State violated Brady. See Bailey v. State, 421 So 2d 1364, 1369 (Ala. Crim. App. 1982)

In his Third Amended Rule 32 petition, Johnson claimed that...

> the State withheld crucial evidence regarding Violet Ellison's motivation for coming forward with her story. Although news of the large cash reward offered in the case was widespread, the State never disclosed to Mr. Johnson's lawyers that Ms. Ellison had specifically come forward with her story pursuant to the reward offer, although it knew this to be the case. (Third Amended Petition at 52)

The State denied that Ms. Ellison came forward out of a hope of reward. Therefore, Johnson had the initial burden at the evidentiary hearing of proving by a preponderance of the evidence that Ms. Ellison did in fact, come forward out of a hope of reward, and if that was proven, that the State, did in fact, know Ms. Ellison's motivation, and failed to disclose it to trial counsel. See Freeman v. State, 722 So. 2d 806, 811 (Ala. Crim. App. 1998) (" Where there is no suppression of evidence, there is no Brady violation.")

A. Letter to Governor From District Attorney Dated August 7, 2001 Seeking Reward Does Not Establish Affirmative Evidence of a Brady Violation Prior to the Trial in 1998.

The only direct evidence offered by the Petitioner at the evidentiary hearing, which is argued to be evidence of both Ms. Ellison's motive for coming forward in 1995 and the State suppressing this evidence before trial in 1998, is a letter from District Attorney David Barber requesting a reward from the Governor for Ms. Ellison dated August 7, 2001. This Court does not find this letter to be evidence by a preponderance of the evidence of either claim. On it's face, it is evidence that the District Attorney sought a reward be paid to Ms. Ellison in 2001, for her testimony at Johnson's trial, which led to his conviction in 1998. The language used by Mr. Barber is not conclusive as to whether Mr. Barber or any other prosecutor or detective knew of any motivation in 1995 up until the trial in 1998 on Ms. Ellison part. The letter reading..." Violet Ellison, pursuant to the public offer of a reward, gave information leading to the conviction of

Toforest Johnson ..." , while evidence to be considered by the Court, is neither conclusive or convincing evidence to rebut the testimony of Ms. Ellison at the hearing. (Petitioner's Exhibit 17) The Petitioner argues the very specific language "pursuant to" imparts intent on Ms. Ellison's part three years earlier before the trial, simply does not make logical sense. According to Black's Law Dictionary 1356 (9th ed. 2009), "pursuant to" means that one acts "in accordance with" , or " as authorized by" a particular law or request. This Court finds this language to be the legalese used to advise the Governor that Ms. Ellison was entitled to part of the reward that had been previously authorized in connection with Deputy Hardy's murder. It was necessary to accomplish the result Mr. Barber intended.

Even if this Court was convinced that this letter imparted motivation to Ms. Ellison for the reason she came forward with information in 1995, it certainly would not establish knowledge on the part of the District Attorney, his prosecutors, or law enforcement in this case. The Alabama Supreme Court has specifically held that Brady requires that "the information requested by a criminal defendant be known to the prosecution." Ex parte Cammon, 578 So. 2d 1089, 1091 (Ala. 1991). Mr. Barber was not called as a witness, or his affidavit introduced by the Petitioner, therefore, it was not established that Mr. Barber ever spoke to, met or had any knowledge of the motivations of Ms. Ellison when she came forward in 1995 and later gave testimony at the trial in 1998. Nor were any detectives or prosecutors alleged in the case called as witnesses or testimony offered by affidavits on the alleged Brady violation, therefore, no suppression of evidence has been established by a preponderance of the evidence as required in establishing a violation under Brady. Freeman v. State, 722 So. 2d 806, 811 (Ala. Crim. App. 1998). In regard to this prong of the test set forth in Freeman, speculation and conjecture will not support a finding that the State violated Brady. See Bailey v. State, 421 So. 2d 1364,1369 (Ala. Crim. App. 1982) Moreover, even if Mr. Barber's letter convinced this Court that Mr. Barber had knowledge that Ms. Ellison came forward with information in hope of a reward, there is nothing in this letter and no other evidence of when Mr. Barber would have allegedly learned of Ms. Ellison's motivation. (See Thrasher v. State, CR-17-0393, 2019 WL 1592564, at *13 (Ala. Crim. App. April 12, 2019) ("The State's possession or knowledge after trial of evidence potentially favorable to the defense is not a basis for a Brady claim.") In this case, the Court finds no evidence "that law enforcement officers or representatives of the prosecution ever discussed the possibility of a reward with [Ms. Ellison]. "McMillian v. State, 594 So. 2d 1253,

1258 (Ala. Crim. App. 1991)

B. Credible Testimony of Witness Ellison at Evidentiary Hearing Rebuts Any Proof of a Brady Violation by a Preponderance of the Evidence

Rather than speculate as to the meaning and knowledge imparted in a letter three years after the trial, and six years after Ms. Ellison came forward with information, or on numerous other circumstantial and irrelevant exhibits introduced at the hearing by the Petitioner, it is critical that this Court evaluate Ms. Ellison's credibility, both as a witness at the trial and the evidentiary hearing, as her testimony at the evidentiary hearing is completely contrary to the Brady violation claim made by the Petitioner, and the sole issue to be decided by this Court. As stated above, this Court was not the trial judge in this case, but a thorough review of the trial record has been made. This court observed the witness, Ms. Ellison testify at the evidentiary hearing, such as the jurors in the trial did, before reaching a verdict of guilt and recommending a sentence of death. There is no question that Ms. Ellison was a critical witness for the State at both proceedings. The jurors' opinion of her credibility at the trial has been clearly established by the verdicts rendered. Her testimony at the hearing was consistent with her trial testimony and she was not impeached on cross examination by the Petitioner at the hearing. It is not this Court's role at this stage of the Rule 32 process to address the weight of evidence at the trial or the weight of Ms. Ellison testimony at the trial, but, her credibility then is relevant here and now.

This Court was very narrowly directed by the Court of Criminal Appeals to determine after a hearing whether the Petitioner's claim of a Brady violation has been proven by a preponderance of the evidence. This requires this Court to assess this witness' credibility. Ms. Ellison appeared before the Court well dressed, well spoken and answered the questions both on direct and cross with confidence, deliberate in her testimony. She had a good recollection of dates, names, and meetings. She had a good recollection of the facts that she testified to at trial. She did not waiver about any subject on cross examination. Ms. Ellison testified on at least eight occasions while on the witness stand, that she had no knowledge from any source about a reward before she came forward and gave information to the Jefferson County Sheriff's Office on August 9, 1995, or before trial of the case in August of 1998. (H.R. 55,56,57,62,63,64) Johnson contends that "the evidence from the trial and the 2019 hearing supports the conclusion

that Ms. Ellison knew about the reward all along." (B.F. 14) This Court finds no convincing evidence to rebut Ms. Ellison's testimony at the hearing. Johnson's Exhibits of newspaper and television accounts reporting a reward are circumstantial evidence at best that Ms. Ellison must have known about the reward at the time she came forward or gave testimony at trial. Ms. Ellison admitted she followed the case in the media, but was unaware of a reward (T.R. 667,706-707,711; H.R. 69; see Pet'r Ex 1at 2; Pet'r Ex. 2,3; BF 14) The Petitioner's Exhibits concerning pretrial publicity about the reward, are also evidence of possible pretrial knowledge of the reward by trial counsel. It is clear from the trial record that the Petitioner's trial counsel had knowledge of the reward, and asked defense witness Yolanda Chambers during Johnson's 1998 trial about her seeking a reward. (R. 731-732) It is as likely as not that Ms. Ellison was deliberately not asked about the reward on cross as part of a strategy by trial counsel. In fact, Ms. Ellison has been clear and consistent about her motivation in coming forward both at the trial in 1998 and the hearing. At trial on cross examination, Ms. Ellison said she waited six days to come forward because didn't want to get involved. She said...

A. And I didn't know how - - reason I didn't get in touch with anybody, I didn't even know how to get in touch with Patricia, I didn't know where Patricia Hardy lived.
Q. But it was so important to you on the 3rd that you took these notes down verbatim about this conversation, and yet you took no action whatsoever about it for six days.
A. Because I did not want to get involved because I felt like if a person would shoot a police officer with a uniform on, what would they do to me? and I did not want to get involved. That's why I didn't talk. And my conscience bothered me and I could not sleep, and that's why I came in. (T.R. 708)

At the evidentiary hearing on direct examination she testified "I was troubled. My spirit was troubled by not -- you know, by hearing this and not saying anything and doing anything about it." (H.R. 56,57). On cross examination Ms. Ellison continued to explain her motivation for coming forward. On cross examination she testified that...

> "yes, my spirit was troubled about that. But in this world these days, you don't go out and try to tell people about what has happened. I did not do that. I waited until I felt like I was being - - I was safe in going to these people to talk. People will hurt you. Because I talked to my mother. And my mother and my father had always told me to tell the truth - -" (H.R. 105,106).

Ms. Ellison went on to testify that "And then I talked to my mother about it. And she said, You have to do what you have to do but just be careful. That's what she said." (H.R. 107,108)

Johnson also contends that Ms. Ellison's financial condition at the time she came forward is circumstantial evidence of her motivation for a reward. She testified at the hearing that she lived on a fixed income, her husband's job had been discontinued and he was unemployed for a few weeks, and they had filed for bankruptcy some five years before she came forward with information. (H.R. 76) This court finds this argument to be contradicted by the facts actually presented by the Petitioner. There is no record until August 6, 2001, five years after she initially came forward and made a statement and three years following the conviction in this case, that she made an application for the reward. This certainly is contrary to the argument that she was in financial need and came forward motivated by substantial financial reward. In fact, the timing of her actions are completely consistent with her testimony that she knew nothing of a reward until she got a call from someone at the DA's office to "come in and sign some papers". (H.R. 58) If her true motive was to seek a reward, this Court would expect she would have made application for the reward as soon as possible after the conviction. There is no evidence that the State knew of her interest in a reward before her making the application, that the District Attorney invited her to do. Had the State known of either before the trial in this case, it would seem logical that the State would have started the process as soon as possible after the trial. The relevant focus in this Court's Brady analysis is not how Ms. Ellison learned about the reward, although important here, but when she learned about the reward. Based on this Court's observation of Ms. Ellison's demeanor as well as her clear, consistent and articulate testimony at the evidentiary hearing in this case, this Court finds her testimony to be compelling and credible evidence that she did not learn of the reward until years after Johnson's trial. Ms. Ellison's testimony rebuts any evidence introduced by the Petitioner. Therefore, the Petitioner's Brady claim has failed to be proven by a preponderance of the evidence.

IV. COURT DOES NOT CONSIDER IRRELEVANT, INADMISSIBLE AND INAPPROPRIATE REFERENCES IN THE PETITIONER'S BRIEF IN THIS COURT'S BRADY ANALYSIS

Johnson claims that statements made in the opening by the State at the June 6, 2019, evidentiary hearing constitute evidence which this Court should consider in assessing witness Violet Ellison's credibility and as part of this Court's Brady analysis. Because the statements of

counsel are not evidence in this case, the fact that the State's summary of what the witness would testify to, do not match up in every respect with the witnesses testimony under oath, does not support the argument made by the Petitioner, that Ms. Ellison's testimony was not credible. See Land v. State, 678 So. 2d 201, 221 (Ala. Crim. App 1995), aff'd 678 So. 2d 224 (Ala 1996)

This Court further finds that out of court statements made in a television broadcast aired after the hearing in this case by a reporter, or a representative of the Attorney General or of the District Attorney's office and in the public, to be illegal hearsay and certainly not in evidence. These statements are totally inadmissible and improper references in a legal brief to this or any other court. This Court can only surmise that said references were meant to improperly influence this Court or if not this Court, to create public clamor. (P.B. 3,12,13) Accordingly, under Canon 3 of the Alabama Canons of Judicial Ethics, this court should and is "unswayed by partisan interests, public clamor, or fear of criticism' in making a determination in this case. (Alabama Canons of Judicial Ethics, p. 4) This Court was ordered by the Alabama Court of Criminal Appeals to conduct an evidentiary hearing on the narrow issue of whether a Brady violation could be proven by a preponderance of the evidence presented to this Court at the June 6, 2019. Johnson v. State CR-05-1805, 2018 WL 1980778, at 2 (Ala. Crim. App. April 27, 2018) Of course the Petitioner is constitutionally guaranteed this due process review. This Court's decision is based on an impartial review of the admissible evidence presented and according to the law. This Court was not instructed to consider the weight or sufficiency of the evidence at the trial in this case or to make judgments concerning the conflicting theories of the prosecution of this case and the co-defendant and at the Grand Jury. Those legal matters are not before this Court at this time and are not within this Court's jurisdiction.

CONCLUSION

For the reasons stated above, this Court finds that the Petitioner has NOT established by a preponderance of the evidence that witness Violet Ellison either came forward or gave testimony out of a "hope of reward", OR that the State had knowledge of such motivation at or before the time of trial. Therefore, this Court finds NO suppression of material evidence by the State, thus NO Brady violation. Having found no evidence suppressed by the State, this Court does not address the materiality prong of Brady analysis or whether the Petitioner's Brady claim

is procedurally barred from post conviction review. Rule 32 relief under Petitioner's Claim III in the Third Amended Rule 32 is denied.

Clerk is to immediately forward this order to the Alabama Court of Criminal Appeals, as it is due this date.

DONE this 16th day of March, 2020.

/s/ TERESA T. PULLIAM
CIRCUIT JUDGE