No. 22-7337

In the Supreme Court of the United States

TOFOREST ONESHA JOHNSON
***Petitioner*,**

v.

STATE OF ALABAMA,
***Respondent*.**

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should decline to review the fact-bound decision of the state-court holding that Johnson failed to prove any element of his Brady claim.

2. Should this Court remand this case for the Alabama Court of Criminal Appeals to address materiality when it is undisputed that Johnson failed to prove any element of his Brady claim.

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INTRODUCTION

The law governing this fact-bound case has been settled since this Court's decision in Brady v. Maryland, 373 U.S. 83 (1963). To establish a Brady violation, the convicted criminal must prove: (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; and (3) the materiality of the suppressed evidence. Brady, 373 U.S. at 87. The application of this established doctrine to the particular facts presented here does not warrant review. First, the petition does not allege any split of authority on the question presented. Second, the Alabama Court of Criminal Appeals' decision was correct. Indeed, that court correctly ruled that Johnson had not established any of the elements to prove a Brady violation. Pet. App. 9a—12a, 15a. Johnson does not challenge the merits ruling, instead arguing that "extraordinary circumstances" justify this Court exercising its certiorari jurisdiction. Third, the petition does not raise an issue of extraordinary public importance or any compelling circumstances.

The facts of Johnson's Brady claim are simple and straightforward. Johnson was tried for the capital murder of Deputy William Hardy in 1998. Violet Ellison testified that she overheard Johnson confess to the crime while listening to a three-way telephone conversation between the petitioner and another person. Per Ellison, Johnson said, "I shot the fucker in the head, and I saw his head go back and he fell," and "[h]e shouldn't have got in my business, messin' up my shit." Johnson v. State, 823 So. 2d 1, 29 (Ala. Crim. App. 2001) (transcript citations omitted). In 2001, three years after Johnson's capital murder trial, the prosecutor, unbeknownst to Ellison,

applied for payment of a reward that was offered to a person having information leading to the arrest and conviction of the person responsible for the death of Deputy William Hardy. Pet. App. 8a—9a. This reward was offered by the Alabama Governor in 1995, soon after the murder occurred and three years before Johnson's capital murder trial, pursuant to a state statute. Id. Johnson alleged that the State violated Brady because it failed to disclose that Ellison was motivated to testify by the hope of a cash reward offer.

After conducting an evidentiary hearing, the state court ruled that Johnson failed to prove that at any time before or during his trial, Ellison knew about or hoped to get a reward. Thus, Johnson failed to prove suppression because the prosecution could not have known that Ellison had any anticipation of being rewarded for her assistance. Of course, payment of the reward could not have been mentioned at Johnson's trial in 1998 because the prosecutor did not apply for the reward until three years after the trial. But payment of the reward itself is not the basis of Johnson's Brady claim; rather, his claim is that the State knew, but did not disclose, that Ellison was testifying in the specific hope of receiving the reward offered by the Governor.

In conclusion, Johnson's petition should be denied because it does not allege a split of authority (nor does one exist), because the lower court correctly stated and applied the law, and because Johnson asserts no compelling justification to grant the petition.

STATEMENT OF THE CASE

A. Facts of the Offense

The evidence adduced at trial tended to show that Johnson shot and killed Deputy William Hardy of the Jefferson County Sheriff's Department between 12:30 a.m. and 1:00 a.m. on July 19, 1997. R. 355, 389, 434.[1] Deputy Hardy had been working a second job as a nighttime security guard at a hotel. R. 354. Sometime between 12:30 and 1:00, the night manager and hotel guests heard gunshots. R. 355, 389, 594.

Police responded and found Deputy Hardy mortally wounded, lying on the ground of the hotel parking lot, his gun still holstered. R. 423-26. Deputy Hardy had been shot once in the right side of his forehead at close range and once through his jaw. R. 481, 486, 501, 513. The officers on the scene issued a "be on the lookout" (BOLO) call. R. 435-36, 438.

At approximately 2:00 a.m., several hours after Deputy Hardy was murdered, Toforest Johnson, Yolanda Chambers, and Ardragus Ford arrived at the house of Latanya Henderson, a sixteen-year-old girl, to pick her up. R. 562-63. They were driving a black 1972 Monte Carlo. R. 564. While in the car, Henderson saw Johnson with a gun. R. 556-57. They drove around for a couple of hours before noticing that they were being followed by a sheriff's car. R. 556, 566. Officer James Evans had received a BOLO for an early 1970s black Monte Carlo. R. 574. They pulled into the parking lot of a Super 8 Motel at approximately 4:00 a.m. R. 552. Johnson,

[1] "R." refers to the trial transcript of Johnson's capital murder trial. "C." refers to the clerk's record of Johnson's trial.

Chambers, and Ford hid Johnson's gun under the dashboard. R. 557. Johnson was arrested because of an outstanding warrant, and the car was not searched. R. 578, 583.

The key evidence at trial came from Violet Ellison, who testified that she had listened to several telephone calls Johnson had made in August 1995 while he was housed in the Jefferson County Jail. R. 668-70. Ellison testified that during these calls, she heard Johnson speak about the murder of Deputy Hardy and stated that he admitted to shooting Deputy Hardy in the head. R. 683-84.

There was extensive testimony presented regarding how Johnson was able to make these calls from the county jail. Katrina Ellison, Violet Ellison's sixteen-year-old daughter, placed numerous three-way telephone calls for several inmates at the jail. R. 630. Testimony showed that the inmates had unlimited access to a pay telephone. To avoid paying for each individual call, the inmates would telephone a person outside the jail who had a three-way calling service, and that person would then place one or more calls to other numbers. R. 622. Jeremy Roper, Violet's friend who was housed at the jail, requested that she make three-way calls for an inmate named Fred Carter. Id.

Katrina testified that on August 3, 1995, Carter asked her to make a three-way call for a friend of his who was also in the jail, a friend Carter identified as "his homeboy named Toforest [Johnson]." R. 622, 651. When the other person got on the line, he identified himself as "Toforest." R. 651. Katrina recognized his voice from

the first telephone call and made calls for Toforest Johnson on four or five different occasions over the course of several days. R. 624.

After Katrina would make a three-way call for Johnson, she would lay the telephone down and leave the room. Violet Ellison would then pick up the phone and listen to the conversation. R. 668-70, 715. In relevant part, the Alabama Court of Criminal Appeals summarized the key portion of Violet Ellison's testimony as follows:

In the first call, the man on the telephone, who identified himself as "Toforest" explained an incident in a hotel parking lot to a woman named Daisy. Ellison testified that Toforest said that a man named Michael Ansley was supposed to have been robbed, and that Toforest had followed Ansley to a motel and saw Ansley switch from a red Blazer SUV to a gold Blazer. According to Toforest, after Ansley had switched cars, they stayed in the parking lot of the hotel and waited. Ansley's "bitch" then came and pulled out a gun. R. 683. An argument ensued, and an officer came out of the hotel because of the "disturbance;" the officer had heard and seen them in the parking lot. R. 683. When the officer came out, "Fellow" shot the officer one time. R. 683. Toforest then shot the officer as well. Ellison testified that Toforest 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." R. 683-84.[2] Ellison also testified that Toforest said that "Dray" [nickname for Ardragus Ford] was in the car when the shooting occurred and that nobody saw him because he had

[2] The amicus brief from "death row exoneree Anthony Graves" at pp. 12-13 criticizes Ellison's testimony because it doesn't completely match the State's evidence. But Ellison was repeating what she heard Johnson say, so this criticism misses the mark.

gone into the front of the hotel.[3] Ellison testified about four more three-way calls where she overheard Toforest talking to other people. In these calls, Ellison did not hear Toforest make any other confessions, but he did reference some of the people who were with him at the time of the crime. Johnson v. State, 823 So. 2d 1, 28-30 (Ala. Crim. App. 2001). Mrs. Ellison then went to the police and reported the information that she had heard while listening to the telephone calls. Id.

Johnson presented two theories of defense at trial. First, Yolanda Chambers, fifteen years old at the time of the murder, testified that she saw Deputy Hardy get shot. R. 730, 803. She claimed that Ford fired the fatal shots, but she also admitted to lying under oath in the same matter at least five times prior to Johnson's trial. R. 733-34. Second, Johnson asserted an alibi defense because he claimed that two people saw him at a nightclub at the time of the murder. However, the two witnesses equivocated and disagreed about the actual date that they saw him there. R. 855-56, 868, 878.

B. Trial and Direct Appeal

Johnson was convicted of the murder of Deputy Hardy while he was on duty or "because of some official or job-related act or performance," an offense made capital by section 13A-5-40(a)(5) of the Code of Alabama. The jury recommended

[3] Aside from the admission of guilt, this testimony is significant because it corroborates other testimony that Michael Ansley, a professional basketball player, parked his cars at this hotel so that they were available to his mother, a long-term guest there, and that he was seen at the hotel near the time Deputy Hardy was murdered. R. 354, 361, 594. It also corroborates the testimony of Monika Daniels, Michael Ansley's girlfriend, that she was with Ansley when he swapped cars at the hotel near the time Deputy Hardy was murdered. R. 819. In addition, Ellison did not know any of these individuals and could only learn their identity from someone who did, like Toforest Johnson.

that Johnson be sentenced to death by a vote of ten to two. The trial court accepted the jury's recommendation and sentenced Johnson to death.

Johnson appealed to the Alabama Court of Criminal Appeals, which affirmed his conviction and death sentence. Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001). The Alabama Supreme Court denied certiorari, Ex parte Johnson, 823 So. 2d 57 (Ala. 2001), as did this Court, Johnson v. Alabama, 535 U.S. 1085 (2002).

C. State Postconviction Proceedings

Johnson's post-conviction proceedings began in 2003 and have a protracted and arduous procedural history. On April 30, 2003, Johnson filed his initial petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. C32 108-317.[4] Included in Johnson's initial petition were claims that the State suppressed evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). C32 151-60. In a subsequent amended petition, Johnson added a Brady claim that alleged the State failed to disclose that Violet Ellison testified out of a hope of a reward. C32 397-98. Over the course of the next fourteen years, Johnson was unsuccessful in gaining relief as to his conviction and sentence.

In 2017, Johnson filed a petition for writ of certiorari in this Court after his Rule 32 petition was denied in the state courts. The only issue Johnson pursued in his certiorari petition was the Brady claim relating to Violet Ellison. Johnson v. Alabama, Pet. at 2-5, No 16-7835. Johnson contended that his case should be remanded to state court based upon a recent Alabama Supreme Court decision that

[4] "C32" refers to the clerk's record of Johnson's post-conviction proceedings. "3d C32" refers to the postconviction record on third remand. "CR32" refers to the evidentiary hearing transcript on third remand.

held a Brady claim did not have to meet heightened pleading requirements as required for claims alleging newly discovered evidence. See Ex parte Beckworth, 190 So. 3d 571 (Ala. 2013). After the State conceded that the case should be remanded, this Court granted Johnson's petition, vacated the Alabama Court of Criminal Appeals's decision, and remanded the case to this Court for further consideration of the Brady claim relating to Violet Ellison's testimony. Johnson v. Alabama, 137 S. Ct. 2292 (2017).

D. Evidence Presented at the State Postconviction Evidentiary Hearing.

Curiously, Johnson offered no testimony at the evidentiary hearing, instead offering numerous documentary exhibits primarily relating to the reward offer. In one of those exhibits, the Jefferson County District Attorney, in July 1995, requested the Governor offer a reward "for information leading to the arrest and conviction" of the individuals responsible for murdering Deputy Hardy. 3d C32 461. The request for a reward was made pursuant to section 15-9-1 of the Code of Alabama, which allows for a payment of a reward for a serious crime for someone giving "information leading to the arrest and conviction of the guilty person[.]" The reward payment will be paid to the "informer" only by order of the court in "which such conviction is had." Id. The Governor, in a proclamation issued on August 2, 1995, issued a reward offer of $10,000. 3d C32 463.

The remainder of the exhibits Johnson presented indicate that in August 2001, the Jefferson County District Attorney informally contacted the Governor's Office requesting whether it would be appropriate to give reward money to Violet

Ellison. 3d C32 479. Soon thereafter, the trial court, at the request of the Jefferson County District Attorney, issued an order that Ellison should be paid $5,000 as reward money. 3d C32 474-75. A check for that amount was issued to Ellison on August 18, 2001. 3d C32 467.

As previously stated, Johnson called no witnesses in his case-in-chief, instead relying on documentary exhibits. 3d CR32 7. The State presented Violet Ellison who testified that at the time she made the initial call to the Jefferson County Sheriff's Office in 1995 to report that she had overheard Johnson confessing to the murders, she had no knowledge from any source that a reward had been offered. CR32 55. She had not read anything about a reward in the newspaper, heard about a reward on television, or discussed a reward with anyone. CR32 55-56. When she testified at Johnson's trial in 1998, and at all times leading up to the trial, she was unaware of any reward. CR32 56. She came forward to the Sheriff's Office because, as she explained, "I was troubled. My spirit was troubled by not—you know, by hearing this and not saying anything and doing anything about it." CR32 56-57.

Ellison further testified that she did not know anything about a reward until 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." CR32 57-58. Soon thereafter, she received a check for $5,000. CR32 62. Put simply, Ellison gave undisputed testimony that the first time she knew about a reward was when she was contacted by the District Attorney's Office in August 2001, three years after the trial. CR32 62.

Johnson presented rebuttal witness Sandra Turner, who had lived next door to Ellison for thirty years. CR32 135. Turner testified that it was her opinion that Ellison was not truthful and that her reputation in the community was not good for truthfulness. CR32 138. Turner admitted, however, there is "bad blood" between the families and that her son had been sent to prison for being a "lookout" while another man raped Ellison's daughter. CR32 143, 144.

E. The State Postconviction Circuit Court Denied Johnson's Rule Petition, and the Court of Criminal Appeals affirmed.

Jefferson County Circuit Judge Teresa Pulliam denied Johnson's Rule 32 petition and made findings of fact after conducting the evidentiary hearing. The circuit court ruled that the 2001 letter from the District Attorney to the Governor requesting that Ellison be paid $5,000 in reward money does not violate Brady because it does not establish that Ellison knew about the reward when she testified, and she credibly testified that she did not know about the reward until three years after the trial. Pet. App. 24a-25a. Likewise, the court ruled that the 2001 letter does not establish suppression on the part of law enforcement and Johnson presented no evidence establishing suppression. Pet. App. 25a. The court made extensive findings regarding Ellison's testimony, ultimately concluding that she was "credible," and relied on her testimony to deny Johnson's Brady claim. Pet. App. 26a-28a.

On appeal, the Alabama Court of Criminal Appeals considered all of Johnson's arguments but ruled that the circuit court had not abused its discretion in denying the Brady claim. Johnson v. State, CR-05-1805, 2022 WL 1438949, at **4-13 (Ala. Crim. App. May 6, 2022); Pet. App. 8a-15a. The court concluded:

> 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.

Pet. App. 15a.

REASONS THE PETITION SHOULD BE DENIED

I. This Court should decline to review the fact-bound decision of the state-court holding that Johnson failed to prove any element of his Brady claim.

Johnson contends that the State violated its obligations under Brady v. Maryland, 373 U.S. 83 (1963), by suppressing information that Violet Ellison testified out of hope for a reward. The Alabama Court of Criminal Appeals correctly rejected that argument, and its non-precedential, fact-bound decision does not conflict with any decision of this Court, a federal court of appeals, or a state court of last resort.

Supreme Court Rule 10 explains that certiorari will be granted "only for compelling reasons." The considerations enumerated therein are said to be "neither controlling nor fully measuring the Court's discretion," but rather merely "indicate the character of the reasons" that will be considered. Johnson's petition does not state any of the reasons listed in Rule 10, or indeed, any compelling reason. Instead, he acknowledges that his argument is based on his belief that the state court's decision is "wrong under Brady and warrants reversal." Pet. at 12. Further review of his fact-bound claim is unwarranted.

A. Johnson failed to prove any element of his Brady claim.

This Court should deny certiorari because the state postconviction circuit court correctly held that Johnson failed to prove any element of his Brady claim. That ruling was based on the evidence presented at the evidentiary hearing. The Alabama Court of Criminal Appeals agreed with the circuit court that the State did not pay Ellison a reward until three years after Johnson's trial and that the State thus could not have disclosed the reward payment before trial. Pet. App. 6a. Concomitantly, Ellison did not testify in the hope of a reward, and the State thus could not have suppressed that information. Id. And what does Johnson argue in rebuttal? Only that the state court's holding is "wrong." Pet. at 12. Any asserted error based on a petitioner's belief that the state courts got it wrong does not merit certiorari review. Sup. Ct. R. 10.

A prosecutor's constitutional duty of disclosure stems primarily from this Court's decisions in Brady and Giglio v. United States, 405 U.S. 150 (1972). In those cases, the Court held that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment, Brady, 373 U.S. at 87, and that favorable evidence includes not only evidence that tends to exculpate the accused but also evidence that is useful to impeach the credibility of a government witness, Giglio, 405 U.S. at 154. Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Turner v. United States, 582 U.S. 313, 324 (2017) (citation omitted). But "the 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) (quoting United States v. Agurs, 427 U.S. 97, 104 (1976)) (emphasis in original); see also Timmons v. State, 487 So. 2d 975, 982 (Ala. Crim. App. 1986) ("The prosecution cannot be guilty of failing to produce something which does not exist.").

The allegations underlying Johnson's Brady claim are unusual because he emphasizes post-trial occurrences that he contends support his argument that the State suppressed favorable evidence before trial. For example, Johnson argues that he would have never discovered that Ellison had been paid a reward three years after trial were it not for a "retired state employee" who informed him that the Jefferson County District Attorney's Office maintained a confidential reward file. Pet. at 13 (citing 3d C32 94-95). However, Johnson's citation is to his own motion for discovery, see 3d C32 94-95, and there was no testimony or evidence to support his factual assertion. Johnson next falsely contends, without citation to any authority, that the reward payment ordered by the court was done ex parte. Pet. at 12. But the statute that allows the Governor to offer a reward only requires that the "court before which such conviction is had" issue an order stating that the "informer" can be paid the reward. Ala. Code § 15-9-1 (1975). This statute does not state that the order must be done as a part of the underlying criminal case or that it is an adversarial proceeding requiring notice to the convicted murderer.

Johnson's petition goes to great lengths to describe the reward process here as a conspiracy that is done in secret and states that the relevant documents are tucked away in a confidential file unavailable to the public. Pet. at 12-15. Johnson's argument ignores the fact that every document he references is subject to disclosure to any member of the public under Alabama's Open Records Act and case law that has interpreted this Act. For instance, section 36-12-40 of the Code of Alabama provides, in pertinent part, that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute." Although "public writing" is not defined in the statute, the Alabama Supreme Court has stated it is "a record that is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by [the] citizens." Tennessee Valley Printing Co., Inc. v. Health Care Authority of Lauderdale Cnty., 61 So. 3d 1027, 1030 (Ala. 2010). For whatever reason, Johnson chose not to avail himself of this process, instead making arguments that have no factual basis.

Based on the evidence presented during the evidentiary hearing, the circuit court found that Ellison did not know about or hope to receive a reward at any time before or during Johnson's trial, and therefore, the State could not have known that Ellison knew about or hoped to get a reward pretrial. Pet. App. 15a. In addition, the circuit court found that Ellison's testimony was credible, and it relied on her testimony to deny Johnson's Brady claim. Pet. App. 12a. The state court's ruling is based on credibility findings and documents unique to this case that establish

Johnson's Brady claim lacks any merit. It does not warrant this Court granting certiorari.

B. Johnson misrepresents a state appellate court's holding regarding contract law and rewards offered by a private party to support his meritless argument.

Unable to prove the elements of his Brady claim, Johnson turns to civil law, misrepresenting an Alabama Court of Civil Appeals decision regarding contract law and rewards offered by private parties to argue that Ellison knew of the reward "at the time of performing the services for which the reward is offered in order to be entitled to the reward." Pet. at 16 (citing Gadsden Times v. Doe, 345 So. 2d 1361 (Ala. Civ. App. 1977)). As an initial matter, this Court does not grant certiorari to resolve an issue of state law that does not implicate federal law. See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law."); see also Sup. Ct. R. 10. This Court should decline review because Johnson's claim is based on the state court's rejection of his argument that was based on an interpretation of state law.

A brief review of Gadsden Times is warranted here to show its inapplicability to Johnson's case. In that matter, a minister was murdered in his home. Days later, a group of citizens, along with the city council and mayor, offered a reward for information leading to the conviction of the person responsible. 345 So. 2d at 1362. These private reward offers were published in the local newspaper, the Gadsden Times. Id. The Alabama Governor separately offered a reward under section 15-9-1 of the Code of Alabama, just as in Johnson's case. But before the private reward

offers were published, an informant gave information to the police leading to a conviction. After the informant collected the reward offered by the Governor—a fact conveniently omitted in Johnson's petition—he filed suit against the newspaper to collect on the offer of the private rewards. Id. at 1363. Applying contract law, the Alabama Supreme Court ruled that because the informant gave his information to the police before the newspaper published news of the private rewards, he was not entitled to the rewards. Id. at 1363-64. While the private parties had made an offer, the informant had not accepted, and so there was no valid agreement. Id. at 1363.

Ignoring the fact that Ellison, like the Gadsden Times informant, collected the reward offered by the Governor pursuant to section 15-9-1, Johnson contends that the Court of Criminal Appeals' holding is implausible when considering "the history of reward law in Alabama." Pet. at 15-16. He misrepresents the holding of Gadsden Times to argue that it has application to his case and that as a matter of state law, "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." Pet. at 16 (quoting Gadsden Times, 345 So. 2d at 1363). Here, however, the state courts held that Gadsden Times' discussion of contract law is immaterial to the present matter. Ellison did not attempt to collect on a private offer of reward made after she had already testified, but rather accepted a reward that the Governor was statutorily entitled to give her—just as the informant initially did in Gadsden Times. See 345 So. 2d at 1363.

The Court of Criminal Appeals' distinguishing Gadsden Times does not implicate any federal law, nor any ground stated in Rule 10 and so certiorari is unwarranted.

C. Johnson's citation of irrelevant facts should not be considered.

Johnson argues that this Court should give "great weight" to the fact that the present Jefferson County District Attorney and the "Original Trial Prosecutor" have requested that a new trial be granted. Pet. at 20-23. It would be the height of understatement to say this argument does not warrant certiorari review. This request does not show a conflict with a state court of last resort or a federal court of appeals, or that the question is sufficiently important for this Court to review. Sup. Ct. R 10.

On June 12, 2020, Jefferson County District Attorney Danny Carr filed a two-page document in the state post-conviction circuit court entitled "Jefferson County District Attorney's Amicus Curiae Brief in Support of Petitioner," wherein he requested Johnson receive a new trial. 3d C32 10-11. Carr stated that he "takes no position regarding Johnson's guilt or innocence." He claimed that he reviewed the "circumstances of Johnson's conviction and his subsequent Brady claim," but he did not specifically state what that alleged review entailed.[5] Essentially, he parroted the unfounded and unproven allegations made by Johnson's present counsel. 3d C32 10-

[5] The amicus brief from the Innocence Project at p. 20 contends that Carr's case review took nine months and consisted of extensive file review and reinterviewing witnesses. The Innocence Project even quotes paragraph five from Carr's "amicus brief" filing to support this factual statement. Id. But this paragraph from Carr's "amicus brief" states in full: "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. 3d C32 10-11, paragraph 5.

11. Carr claims that he met with the "Original Lead Prosecutor" who "supports this request." Id. Carr has not testified or produced any information regarding why he is taking this position. Jeff Wallace, one of the prosecutors in this case, testified only that he did not think the State's case was "very strong." 3d C32 455.

The present Jefferson County District Attorney's "amicus brief" does not raise any issues of national importance or point to the existence of a conflict. It does not warrant certiorari.

II. This Court should not remand this case for the Alabama Court of Criminal Appeals to address materiality.

Even though Johnson has failed to prove any element of Brady or that evidence of a reward payment to Ellison existed at the time of trial, he boldly requests that this Court either address the "materiality" element of Brady or remand so that the state court can address it. Although undisclosed evidence that creates a reasonable doubt that did not otherwise exist may deprive the defendant of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment, United States v. Agurs, 427 U.S. 97 (1976), there must be some showing that such exculpatory and influential evidence actually exists before such a constitutional violation can be found. Here, there is no evidence that Ellison had any hope or expectation before or leading up to trial that she would ultimately receive some of the reward money offered by the Governor's Office. As previously stated, she first heard about the reward money three years after the trial occurred.

Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This constitutional standard of materiality presupposes the actual existence of some evidence. There is no need for this Court to address materiality for non-existent evidence nor to remand to the state court.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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