No. 22-7337

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

REPLY TO THE STATE'S BRIEF IN OPPOSITION TO CERTIORARI

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REPLY TO THE STATE'S BRIEF IN OPPOSITION TO CERTIORARI

The State argues for the first time in the history of this case that Petitioner Johnson could have obtained the documents regarding the State's $5,000 payment to Violet Ellison all along. According to the State, the documents were "subject to disclosure to any member of the public under Alabama's Open Records Act," and therefore, the State never concealed anything. State's Br. 14. The problem with this argument is that the State told Johnson explicitly, in response to a discovery order from the circuit court, that its files contained "[n]othing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8. As this Court has made clear, a rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

The suggestion that Johnson could have obtained the reward documents at any time marks the latest in a series of "shifting explanations" from the State in this capital case.[1] The State presented five different theories of the offense in various court proceedings, including several that contradicted Ellison's account.[2] It declared that it did not have any records about Ellison seeking or receiving a reward, C3. Supp-3, R. 8, even though it had an entire file documenting how much

[1] *See Foster v. Chatman*, 578 U.S. 488, 512 (2016) (holding that the prosecution's "shifting explanations" indicated an effort to conceal misconduct).

[2] *See* C3. 493-95 (the State's lead investigator, who had interviewed Ellison five months earlier, testifying under oath to the grand jury that he had "no doubt" that two men other than Johnson had shot Deputy Hardy); Pet. 5 n.4 (providing citations to the State's varying theories).

it paid her and why, C3. 465-80. It claimed that Ellison sought the reward payment on her own, R3. 19, yet it now asserts that a prosecutor initiated the process "unbeknownst to Ellison," State's Br. 1. It even suggests that the reward process was somehow separate from Johnson's case, State's Br. 13, despite the fact that its own documents concerning the payment to Ellison include the caption, "State of Alabama v. Toforest Johnson," with the trial court case number, C3. 470.

The State's shifting explanations should not obscure the essential facts on the *Brady* issue, which are the following: (1) the State paid Ellison $5,000 without informing Johnson and then concealed the payment for years; (2) the reason for the payment was that Ellison provided information pursuant to the State's pretrial reward offer; and (3) Ellison would not have been entitled to the payment if she had not communicated to the State that she was hoping to receive the reward when she came forward. Those facts establish that the State suppressed evidence at Johnson's trial regarding Ellison and the reward.[3]

This is not a business-as-usual case, as the State suggests, nor is it a case that turns on state law. Instead, this is an exceptional case in which the State's own documents show that the prosecution violated Johnson's right to due process by concealing evidence that Ellison was seeking reward money and ultimately obtained it. This Court should grant certiorari and reverse.

[3] *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment . . . ."); *see also Kyles v. Whitley*, 514 U.S. 419, 432-37 (1995) (explaining the *Brady* rule).

I. The State Concealed Its Reward Documents for Years.

The Due Process Clause prohibits the State from concealing evidence and then blaming the defendant for failing to discover it. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) (rejecting the argument that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence"). Nevertheless, the State has done exactly that here. After telling Johnson that its files contained nothing about a reward payment to Ellison, C3. Supp-3, R. 8, the State now says the following in its brief to this Court:

> 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 whatever reason, Johnson chose not to avail himself of this process, instead making arguments that have no factual basis.

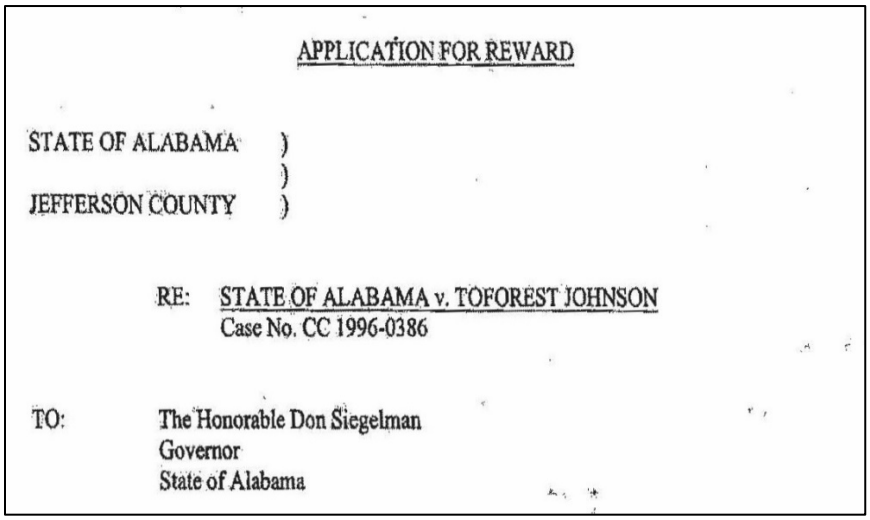
State's Br. 14.

To be clear, the circuit court issued a discovery order in July 2018 requiring the State to produce its entire file to Johnson for the specific purpose of ensuring a fair hearing on the reward issue. C3. 26. In response, the State asserted—in a court proceeding on October 9, 2018—that its files contained "[n]othing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8.[4] It is absurd for the State to suggest that it would have disclosed its reward documents

[4] The Third Supplemental Volume from the 2020 appeal contains two separate transcripts, and each has a Page 8. This citation refers to Page 8 from the hearing on October 9, 2018, which is Page 39 of the PDF file.

under the Open Records Act when it denied their existence in response to a direct court order.[5]

The State also claims that it did not have an affirmative obligation to disclose its reward documents to Johnson because the statute that authorizes rewards in Alabama does not state that the reward process "must be done as a part of the underlying criminal case." State's Br. 13. But paying a witness for her testimony in a capital case is certainly part of the capital case. If there were any doubt about this, the State's own paperwork resolves it. The State's documents regarding the payment to Ellison were captioned "State of Alabama v. Toforest Johnson," with the trial court case number:



APPLICATION FOR REWARD

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

RE: STATE OF ALABAMA v. TOFOREST JOHNSON
Case No. CC 1996-0386

TO: The Honorable Don Siegelman
Governor
State of Alabama

C3. 470. The State's payment to Ellison cannot be separated from Johnson's case.

The only reason the State eventually disclosed its reward documents is that a retired state employee informed Johnson's counsel that the State maintained a

[5] In its brief, the State does not acknowledge that it represented in court that its files contained "[n]othing about anyone applying for a reward or being granted a reward." C3. Supp-3, R. 8.

separate, confidential reward file. The State attempts to dispute this, State's Br. 13, but the timeline speaks for itself. On December 20, 2018, Johnson filed a "Renewed Motion for Discovery in Light of Disclosures to Date." C3. 93-96. In the motion, he explained that the State still had not produced any documents concerning Ellison and the reward. C3. 95. He also informed the court that a retired state employee had told his counsel "that the District Attorney's office maintained a separate reward file" containing documents about payments to witnesses. C3. 95. The following day, the court issued another discovery order, this time specifically instructing the State to produce "any separate file containing any documentation whatsoever, regarding a reward request, offer, or payment in this case." C3. 35. Within one month of that order, the State produced its reward file for the first time. C3. 464-80. This was 18 years after the payment to Ellison, C3. 465, 16 years after Johnson first raised his *Brady* claim regarding the reward, C. 397-98, and three months after the State declared in open court that its files contained "[n]othing" about anyone seeking or receiving a reward, C3. Supp-3, R. 8.

II. The Reward Documents Establish That the State Suppressed Evidence During Johnson's Trial.

The reward documents show not only that the State paid Ellison, but also that the State was aware, prior to Johnson's trial, that Ellison was hoping to receive a reward. Specifically, the documents establish that Ellison provided information "pursuant to the public offer of a reward" and was entitled to a payment of $5,000. C3. 472-73. Under existing state law—the *Gadsden Times* rule—Ellison would not have been entitled to such a payment unless she had "knowledge of [the] reward at

the time [she provided information]." *Gadsden Times v. Doe*, 345 So. 2d 1361, 1363 (Ala. Civ. App. 1977).[6] The court below responded to these facts by holding that the knowledge requirement from *Gadsden Times* has no bearing on Ellison because it applies only to private rewards, not to public rewards—a distinction no Alabama court had ever made before. Pet. App. 10a.

The history of Alabama reward law warrants discussion here, but it does *not* concern a matter of "state law that does not implicate federal law," as the State suggests. State's Br. 15. Instead, it highlights the severity of the due process violation in this case. As this Court has recognized, federal issues often involve "the status of state law as of a given moment in the past." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). When that happens, due process prohibits any state court from changing its interpretation of the relevant state law retroactively. *See id.* (explaining that due process bars state courts from reinterpreting state laws retroactively); *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 456 (1958) (refusing to allow a retroactive change to Alabama law to affect the case because it was impossible "to reconcile the . . . holding of the Alabama Supreme Court in the present case with its past unambiguous holdings"). Here, the state court created a distinction in 2022 and then used that distinction to inform its analysis of events that occurred between 1995 and 2001, which is incompatible with due process.

[6] The State concedes that it did not have any substantive discussions with Ellison about the reward between the 1998 trial and the initiation of the payment process in 2001. State's Br. 1; *see also* R3. 121-23. Therefore, the only way the State could have known that Ellison qualified for the reward was if it had already known, prior to trial, that she was aware of the reward offer.

The State suggests that *Gadsden Times* itself made a distinction between private rewards and public rewards, State's Br. 15-16, but its analysis is wrong. According to the State, the fact that the witness in *Gadsden Times* received a Governor's reward means that the knowledge requirement did not apply to public rewards. State's Br. 16. However, the witness in *Gadsden Times* was entitled to the Governor's reward *because he was aware of that reward when he came forward*, as the record from the case demonstrates.[7] At the same time, he was not entitled to the separate reward offered by the newspaper because he was not aware of that reward when he came forward. *Gadsden Times*, 345 So. 2d at 1364. The court made the distinction clear in its decision. It confirmed that the witness "had knowledge of a reward at the time he supplied the information," and he "received the state reward of $1,000." *Id.* at 1363-64. But, the court explained, the witness could not have had knowledge of the newspaper's reward "since he acted prior to its publication"; therefore, he was not entitled to the newspaper's reward. *Id.*

The entire point of *Gadsden Times* was that a witness in Alabama was entitled to a reward—private or public—only if he had knowledge of the reward offer when he came forward. Like the witness in *Gadsden Times*, Ellison was entitled to the State's reward *only if* she had knowledge of the reward offer when she provided information.

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[7] *See* Record at T.R. 200, *Gadsden Times v. Doe*, 345 So. 2d 1361 (Ala. Civ. App. 1977) (Witness: "When I talked to Chief Cary the thing I remember most, there was a reward of $6,000 . . . ." Counsel: "Did the $6,000 include the Thousand Dollar State reward?" Witness: "Yes, it did."). The record from *Gadsden Times* is available at the Alabama Department of Archives & History, which is located at 624 Washington Avenue, Montgomery, Alabama 36104.

Three different State lawyers determined that the State should pay Ellison $5,000. *See* C3. 469, 479. The only reasonable interpretation of the record is that the State paid Ellison because she provided information pursuant to the State's reward offer (as its documents say) and because she conveyed to the State that she knew about the reward offer when she came forward (as the law required for eligibility). This Court should reverse the lower court's ruling and hold that Johnson established suppression under *Brady*.[8]

III. This Court Should Remand for a Materiality Analysis.

If this Court were to hold that Johnson established suppression, it should remand the case for a materiality inquiry. The State represents that the lower court "ruled that Johnson had not established *any* of the elements to prove a *Brady* violation." State's Br. 1; *see also* State's Br. 12. The lower court, however, addressed only the first element under *Brady*—whether the State suppressed evidence. Pet. App. 6a-17a. It did not address whether the evidence at issue was favorable to the defense or material, which is why a remand is warranted.

To the extent that this Court conducts its own materiality analysis, the State's brief underscores the importance of Ellison's credibility. The State recognizes that Ellison provided the "key evidence" against Johnson, State's Br. 4, and it concedes that her testimony did not match the physical evidence.[9] There is

[8] The State claims that "Johnson does not challenge the merits ruling" of the Alabama Court of Criminal Appeals. State's Br. 1. Johnson's petition reflects otherwise. *See*, *e.g.*, Pet. 22-23 ("The evidence establishes that the State suppressed evidence that Ellison was hoping to receive a reward. This Court should reverse the decision below on this point.").

[9] The State attempts to address the contrast between Ellison's account and the physical evidence by stating that Ellison was simply "repeating what she heard Johnson say." State's Br. 5 n.2. However,

no dispute that the primary issue for the jury was whether to believe Ellison or not. To address this, the prosecutor argued that Ellison was an unimpeachable witness:

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

T.R. 905. The prosecutor added, "[S]he told you her conscience wouldn't let her do it. And that's exactly the kind of response you would expect from a person who got into the case like she did . . . ." T.R. 910. In other words, the prosecutor argued that Ellison had no reason to lie. If Johnson's counsel had known that Ellison was hoping to receive a $5,000 payment in exchange for her testimony, they would have used that information to expose her reason to lie, thereby changing the entire course of the trial.

CONCLUSION

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

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the fact that the purported admission contradicts the physical evidence certainly provides reason to question the veracity of Ellison's testimony.

Respectfully submitted,

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