

No. 16-7835

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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May 10, 2017

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CAPITAL CASE
QUESTION PRESENTED (REPHRASED)

Toforest Onesha Johnson killed an off-duty sheriff, Deputy William G. Hardy, who was working a second job as nighttime security at a hotel in Birmingham, Alabama. Johnson ambushed him in the parking lot and shot him twice in the head. When found, Deputy Hardy's gun was still holstered. R. 423–26. After deliberating for nearly three hours, the jury returned a guilty verdict. R. 1100. The jury then recommended a death sentence by a vote of 10-2. R. 1177. The trial court followed that recommendation.

On post-conviction review, the Alabama Court of Criminal Appeals dismissed Johnson's *Brady* claim based on a state procedural rule that it interpreted to preclude a *Brady* claim based on "impeachment evidence" in certain circumstances. Pet. App. 10a (quoting ALA. R. CRIM. P. 32.1(e)(3)). The Alabama Supreme Court has since reversed that interpretation of the procedural rule in an unrelated case. *See Ex parte Beckworth*, 190 So. 3d 571, 574 (Ala. 2013). Should this Court grant, vacate, and remand this case in light of the change in Alabama law?

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

QUESTION PRESENTED (REPHRASED)..... i
PARTIES ii
TABLE OF AUTHORITIES iv
STATEMENT..... 1
REASONS FOR GRANTING, VACATING, AND REMANDING 3
CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases

<i>Ex parte Beckworth</i> , 190 So. 3d 571 (Ala. 2013)	i, 3
<i>Johnson v. State</i> , No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Sept. 28, 2007).....	4

Rules

ALA. R. CRIM. P. 32.1	i
ALA. R. CRIM. P. 32.2	4

STATEMENT

The evidence adduced at trial tended to show that Johnson shot and killed Deputy Hardy of the Jefferson County Sheriff's Department between 12:30 a.m. and 1:00 a.m. on July 19, 1995. R. 355, 389, 434.¹

Deputy Hardy had been working a second job as a nighttime security guard at a hotel. R. 354. Some time between 12:30 and 1:00, the night manager and hotel guests heard gun shots. 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., Toforest Johnson, Yolanda Chambers and Ardragus Ford arrived at the house of Latanya Henderson. R. 562–63. They were driving a 1972 black Monte Carlo. R. 564. They drove around for a couple 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 model 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, Chambers and Ford hid Johnson's gun under the dashboard of the

1. Citations to the clerk's record are designated “C.” Citations to the reporter's transcript are designated “R.”

car. R. 557. Johnson was arrested because of an outstanding warrant, and the car was not searched. R. 578, 583.

Johnson presented two theories of defense at trial. First, 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.

REASONS FOR GRANTING, VACATING, AND REMANDING

The Court should grant, vacate, and remand in light of *Ex parte Beckworth*, 190 So. 3d 571, 574 (Ala. 2013). Johnson claims that his due process rights were violated under *Brady* and its progeny because alleged impeachment evidence was suppressed. The Alabama Court of Criminal Appeals affirmed the dismissal of Johnson's post-conviction petition, at least in part, because the allegedly suppressed evidence was merely "impeachment evidence," which cannot support a post-conviction petition under Alabama Rule of Criminal Procedure 32.1(e)(3). Johnson contends that this interpretation of Rule 32.1(e)(3) conflicts with *Brady*.

But the problem in this case is not that a state procedural rule arguably conflicts with *Brady*; the problem is the Alabama Court of Criminal Appeals arguably misapplied Alabama law. Long after this issue was decided on appeal, the Alabama Court of Criminal Appeals' understanding of Rule 32.1(e)(3) was rejected by the Alabama Supreme Court in *Ex parte Beckworth*, 190 So. 3d 571, 574 (Ala. 2013). There, the Alabama Supreme Court made clear that alleged constitutional violations, including *Brady* claims, do not need to satisfy the heightened pleading requirements of newly discovered material facts under Rule 32.1(e). Instead, such claims are examined under Rule 32.1(a). The heightened pleading standards of Rule 32.1(e) do not apply, including its bar on granting a post-conviction petition based on "impeachment evidence."

Because of the long procedural history of this case, the Alabama Court of Criminal Appeals has never had an opportunity to apply *Ex parte Beckworth*. After

two remands, the Alabama Court of Criminal Appeals eventually issued three opinions affirming the denial of Johnson's post-conviction petition. *See Johnson v. State*, No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Sept. 28, 2007). The first decision was issued on September 27, 2007. That is the decision that denied the *Brady* claim, and it predated *Beckworth* by several years. The appellate court remanded on other issues and, on return from remand, issued two decisions affirming the denial of other claims in Johnson's post-conviction petition on June 14, 2013 and August 14, 2015. The Alabama Court of Criminal Appeals did not revisit its 2007 decision on the *Brady* claim.

Moreover, there are alternative grounds that support the state courts' decision to deny this *Brady* claim. The trial court, for example, found that the *Brady* claim was precluded because it could have been raised at trial or on direct appeal but was not. *See* ALA. R. CRIM. P. 32.2(a)(3) and (5). The trial court also suggested that, based on the fact-specific record in this case, there was no reasonable probability that the outcome of the proceedings would have been different had the information been known. The state appellate court should have the opportunity to evaluate whether any alternative grounds support the post-conviction court's decision to deny the *Brady* claim.

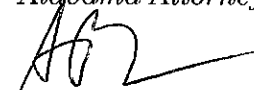
In short, the Alabama Court of Criminal Appeals should be allowed to apply *Ex parte Beckworth* in the first instance and evaluate whether the post-conviction court's decision should be affirmed on other grounds.

CONCLUSION

The Court should GVR this case for further consideration in light of *Ex parte Beckworth*.

Respectfully submitted,

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