No. _____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

ELISABETH SEMEL
TY ALPER
KATHRYN MILLER
DEATH PENALTY CLINIC
U.C. BERKELEY SCHOOL OF LAW
Berkeley, CA 94720-7200

PATRICK MULVANEY
Counsel of Record
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar St. NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org

February 2, 2017

CAPITAL CASE

QUESTION PRESENTED

Petitioner Toforest Johnson was convicted of capital murder and sentenced to death based on the testimony of Violet Ellison, who claimed that she overheard him confessing to the crime on a telephone call. No physical evidence implicated Johnson. As the lead prosecutor later observed, the State's case "depended on the testimony of Violet Ellison."

Years after the trial, Johnson discovered that Ellison came forward pursuant to a cash reward offer and was paid $5,000 for her testimony. Because the State failed to disclose Ellison's connection to the reward, Johnson raised a claim in post-conviction proceedings under *Brady v. Maryland*, 373 U.S. 83 (1963), which prohibits the suppression of material evidence.

The Alabama Court of Criminal Appeals dismissed the claim by enforcing a state procedural rule that "allows relief on *Brady* claims only where '[t]he facts do not merely amount to impeachment evidence.'" Pet. App. 10a (quoting Ala. R. Crim. P. 32.1(e)(3)).

The question presented is this:

> Can a state court enforce a rule that *Brady* does not apply to impeachment evidence when this Court has held that *Brady* does apply to impeachment evidence?[1]

[1] *See United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.").

TABLE OF CONTENTS

QUESTION PRESENTED……i

TABLE OF CONTENTS……ii

TABLE OF AUTHORITIES……iii

PETITION FOR WRIT OF CERTIORARI ……1

OPINIONS BELOW ……1

JURISDICTION……1

RELEVANT CONSTITUTIONAL PROVISIONS……2

STATEMENT OF THE CASE……2

REASONS FOR GRANTING THE WRIT ……5

I. The Ruling of the Alabama Court of Criminal Appeals That *Brady* Does Not Apply to Impeachment Evidence Conflicts Directly With This Court's Precedent……6

II. This Case Is Well Suited for Certiorari Review Because Petitioner Johnson Squarely Presented and Preserved the *Brady* Issue in the Alabama Courts……10

CONCLUSION……13

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Cases

Bagley v. Lumpkin, 798 F.2d 1297 (9th Cir. 1986) 7

Banks v. Dretke, 540 U.S. 668 (2004) 8, 13

Brady v. Maryland, 373 U.S. 83 (1963) ..... passim

Broad River Power Co. v. State of South Carolina ex rel. Daniel, 281 U.S. 537 (1930) 11

Bush v. State, 92 So. 3d 121 (Ala. Crim. App. 2009) 9

Ex parte Beckworth, 190 So. 3d 571 (Ala. 2013) 9

Ex parte Johnson, 823 So. 2d 57 (2001) 4

Ex parte Pierce, 851 So. 2d 606 (Ala. 2000) 11

Foster v. Chatman, 136 S. Ct. 1737 (2016) 11

Guzman v. Sec'y, Dept. of Corr., 698 F. Supp. 2d 1317 (M.D. Fla. 2010), *aff'd*, 663 F.3d 1336 (11th Cir. 2011) 7

Hathorn v. Lovorn, 457 U.S. 255 (1982) 12

Haywood v. Drown, 556 U.S. 729 (2009) 6

Jackson v. State, 133 So. 3d 420 (Ala. Crim. App. 2009) 9

Johnson v. Alabama, 535 U.S. 1085 (2002) 4

Johnson v. State, 823 So. 2d 1 (Ala. Crim. App. 2001) 2, 4

Johnson v. State, No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Feb. 12, 2016) 1

Johnson v. State, No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Aug. 14, 2015) 1

Johnson v. State, No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Sept. 28, 2007) ..... passim

Kyles v. Whitley, 514 U.S. 419 (1995) 6, 7, 8

Montgomery v. Louisiana, 136 S. Ct. 718 (2016) 6

Musgrove v. State, 144 So. 3d 410 (Ala. Crim. App. 2012) 9

Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Flowers, 377 U.S. 288 (1964) 12

Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958) 11

Payne v. State, 791 So. 2d 383 (Ala. Crim. App. 1999) 5, 8

Perkins v. State, 144 So. 3d 457 (Ala. Crim. App. 2012) 9

Reynolds v. State, No. CR-13-1907, 2015 WL 5511503 (Ala. Crim. App. Sept. 18, 2015) 12

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702 (2010) 11

United States v. Bagley, 473 U.S. 667 (1985) ..... passim

Ward v. Board of County Commissioners, 253 U.S. 17 (1920) 11

Yates v. Aiken, 484 U.S. 211 (1988) 6

Constitutional Provisions and Statutes

28 U.S.C. § 1257(a) 1

U.S. Const. amend. XIV 2

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The order of the Alabama Supreme Court denying Johnson's petition for a writ of certiorari is attached as Appendix A. Pet. App. 1a-3a. The decisions of the Alabama Court of Criminal Appeals affirming the denial of Johnson's petition for post-conviction relief and denying rehearing are published on Westlaw, *see Johnson v. State*, No. CR-05-1805, 2007 WL 2812234 (Ala. Crim. App. Feb. 12, 2016), and are attached as Appendix B, Pet. App. 4a-51a. The order of the Circuit Court of Jefferson County, Alabama, summarily dismissing Johnson's petition for post-conviction relief, is unpublished and is attached as Appendix C. Pet. App. 52a-130a. The claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in Johnson's amended post-conviction petition is attached as Appendix D. Pet. App. 131a-146a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the denial of Johnson's post-conviction petition in three separate decisions dated September 27, 2007; June 14, 2013; and August 14, 2015. *See Johnson v. State*, No. CR-05-1805, 2007 WL 2812234, at *1 (Ala. Crim. App. Aug. 14, 2015). The court denied Johnson's timely application for rehearing on all claims on February 12, 2016, and the Alabama Supreme Court denied certiorari as to all claims on November 18, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

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

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

STATEMENT OF THE CASE

This is a capital case involving the murder of Deputy Sheriff William Hardy in the parking lot of a hotel in Birmingham, Alabama, on July 19, 1995. The State prosecuted two defendants, Petitioner Johnson and Ardragus Ford, at separate trials involving much of the same evidence. Both men maintained their innocence, and there was no physical evidence connecting either to the crime. Ford was acquitted; Johnson was convicted and sentenced to death.[2]

The case against Johnson hinged on the account of Violet Ellison, who testified against Johnson but not Ford. In the words of the lead prosecutor, "I don't think the State's case was very strong, because it depended on the testimony of Violet Ellison in my opinion." R-2 25; *see also* T.R. 929 (the lead prosecutor arguing at trial, "This case was proven by the words heard by Mrs. Ellison and the evidence corroborating that."); T.R. 1028 (defense counsel arguing at trial, "[I]f you took Ms.

[2] *See Johnson v. State*, 823 So. 2d 1, 9 (Ala. Crim. App. 2001); Clerk's Record on First Return to Remand at 885 (explaining Ford's acquittal). The State tried both Ford and Johnson twice because at each of the initial trials, the jury was unable to agree on a guilt-phase verdict. *See Johnson*, 823 So. 2d at 27 n.5 (explaining Johnson's first trial); Clerk's Record on First Return to Remand at 885 (explaining Ford's first trial).

Ellison out of the mix, would Toforest Johnson even be anywhere around any of this? No.").[3]

In the summer of 1995, Ellison's 16-year-old daughter Katrina had a friend who was incarcerated at the Jefferson County Jail. T.R. 668-69. Katrina occasionally made three-way calls for her friend and other inmates so they could talk with multiple people without paying for additional calls. T.R. 620-24, 668-70. Violet Ellison claimed that on August 3, 1995, Katrina made a three-way call for an inmate, put the phone down, and left the room. T.R. 670-71. According to Violet Ellison, she then picked up the phone and heard a man identify himself as "Toforest." T.R. 682. Ellison had never met Toforest Johnson nor spoken with him. The man on the phone allegedly described Deputy Hardy's murder, saying "Fellow" had shot one time, and then, "I shot the fucker in the head and I saw his head go back and he fell." T.R. 683.[4]

On cross-examination, Johnson's counsel sought to undermine Ellison's credibility, noting that she waited six days to approach the police after purportedly hearing the confession. Ellison replied, "[M]y conscience bothered me and I could not sleep, and that's why I came in." T.R. 708.

---

[3] "T.R." refers to the reporter's transcript from Johnson's trial. "T.C." refers to the clerk's record from Johnson's trial. "C." refers to the clerk's record from Johnson's post-conviction case as certified for the initial appeal on July 24, 2006. "R-2" refers to the transcript of the Rule 32 hearing held on June 24, 2014, regarding several of Johnson's ineffective assistance of counsel claims. All additional citations are explained where they appear.

[4] According to Ellison, the man who called himself "Toforest" said that he and others intended to rob someone at the hotel, and the officer came out to the parking lot immediately before the shooting because an argument had begun. T.R. 683.

The lead prosecutor then argued to the jury:

> Violet Ellison is, in a case like this, some of the most important evidence one could find, because Violet Ellison came into this case, not as an investigator, not as someone who's out to get whoever did in 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 State argued that there was simply no reason for Ellison to lie. The jury agreed and voted to convict.[5]

During post-conviction proceedings, Johnson discovered that (1) Ellison had approached the police in direct response to a cash reward offer for information leading to a conviction, and (2) she was paid $5,000 for her testimony. *See* C. 1171-72. Because Ellison's connection to the reward had been withheld from the defense at trial, Johnson raised a claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), which prohibits the suppression of evidence that is favorable to the defense and material. C. 1166-72, 1178.

In the claim, Johnson alleged that the prosecutors knew Ellison had come forward in an effort to obtain the reward money and failed to inform the defense. Pet. App. 138a-139a. Johnson further asserted that if defense counsel knew that Ellison approached the police and testified to obtain the reward money, they would

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

have used that fact to impeach her. Pet. App. 138a. Finally, Johnson explained that the reward issue was material because Ellison's testimony was critical and the case against Johnson was weak. Pet. App. 139a, 145a.

The state post-conviction court summarily dismissed Johnson's *Brady* claim without a hearing. Pet. App. 56a-57a.[6] On appeal, the Alabama Court of Criminal Appeals affirmed, stating as follows:

> Johnson admits, in his brief to this Court, that the information regarding Ms. Ellison's motivation to testify amounted to impeachment evidence. It is well-settled that newly discovered evidence under Rule 32.1(e)(3), Ala. R. Crim. P., allows relief on *Brady* claims only where "[t]he facts do not merely amount to impeachment evidence." *See also Payne v. State*, 791 So. 2d 383 (Ala. Crim. App. 1999). As evidenced by the trial court's order, Johnson's *Brady* claims are procedurally barred because he failed to satisfy the requirements of Rule 32.1(e) and because of the preclusionary grounds of Rule 32.2(a)(3) and (5), Ala. R. Crim. P.

Pet. App. 10a-11a.[7] The Alabama Supreme Court denied certiorari. Pet. App. 2a-3a. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the ruling of the Alabama Court of Criminal Appeals conflicts directly with this Court's law under *Brady v. Maryland*, 373 U.S. 83 (1963), and warrants reversal. The case is well

[6] The circuit court ruled without any explanation that all of Johnson's *Brady* claims—which involved the reward, prior statements by witnesses, and other evidence—were precluded because they could have been raised at trial or on direct appeal. Pet. App. 57a.

[7] Although the Alabama Court of Criminal Appeals issued its decision on Johnson's *Brady* claim on September 28, 2007, Pet. App. 10a-11a, it rejected Johnson's timely application for rehearing as to the claim on February 12, 2016, Pet. App. 48a-49a. The delay was caused by remands and further proceedings on other claims. The Alabama Supreme Court denied certiorari on all claims, including the *Brady* claim, on November 18, 2016. Pet. App. 2a-3a.

suited for certiorari review, as Johnson squarely presented and preserved the constitutional issue in the state courts.

I. The Ruling of the Alabama Court of Criminal Appeals That *Brady* Does Not Apply to Impeachment Evidence Conflicts Directly With This Court's Precedent.

"[I]f a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) (quoting *Yates v. Aiken*, 484 U.S. 211, 213 (1988)); *see also Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").

Federal law requires relief under *Brady v. Maryland*, 373 U.S. 83 (1963), where the prosecution suppresses evidence that is favorable to the defense and material. *Id.* at 87. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court held unequivocally that "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *Bagley*, 473 U.S. at 676; *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (explaining that in *Bagley* the Court "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes").

There is no dispute that Johnson's *Brady* claim involves impeachment evidence. If defense counsel had known that Violet Ellison came forward and testified with the expectation that she would receive a substantial cash reward if Johnson were convicted, they would have used that information to undermine Ellison's credibility and cast doubt on her motivations. Specifically, counsel would

have questioned Ellison about the reward and argued to the jury that she was fabricating her account of Johnson's confession to obtain the reward money.

The power of this line of impeachment is well recognized. In *Bagley*, the prosecution suppressed evidence that its two key witnesses expected to receive compensation if their information led to a conviction. *See Bagley*, 473 U.S. at 683. When remanding the case for consideration under the proper legal standard, this Court noted that "[the] possibility of a reward gave [the two witnesses] a direct, personal stake in [the defendant's] conviction," particularly since it was "expressly contingent on the Government's satisfaction with the end result." *Id.* On remand, the lower court found the suppressed evidence material, stating: "Counsel could have used the [reward evidence] to discredit all of [the witnesses'] testimony. Evidence of potential payment would challenge the veracity both of their direct testimony and of their substantive cross-examination testimony." *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986). Other *Brady* cases involve variations of this theme.[8]

The reward issue in Johnson's case carries even greater significance given the lead prosecutor's concession that the State's case was "not very strong because it depended on the testimony of Violet Ellison," the recipient of the reward. R-2 25. The materiality inquiry under *Brady* turns on whether there is a "reasonable

[8] *See Kyles*, 514 U.S. at 442 n.13 (explaining that suppressed evidence concerning a reward and other issues was material in part because it would have helped the defense show that the State's key witness came forward because he was "interested in reward money"); *Guzman v. Sec'y, Dept. of Corr.*, 698 F. Supp. 2d 1317, 1332-35 (M.D. Fla. 2010), *aff'd*, 663 F.3d 1336 (11th Cir. 2011) (granting habeas relief because the prosecution suppressed evidence that its "most important witness" testified in exchange for a $500 reward).

probability" that the result would have been different if the suppressed evidence had been disclosed. *See Kyles*, 514 U.S. at 434-35; *Bagley*, 473 U.S. at 682. Where the State's case was already weak, suppressed evidence takes on greater significance—particularly if it casts doubt on the State's most important evidence. *See Kyles*, 514 U.S. at 441 (holding that suppressed evidence was material where it undermined the testimony of a man "[t]he State rated as its best witness"); *see also Banks v. Dretke*, 540 U.S. 668, 701 (2004) (holding that suppressed evidence was material where it would have undermined a witness who was "the centerpiece of [the State's] case").

Nevertheless, the Alabama Court of Criminal Appeals rejected Johnson's *Brady* claim explicitly because it was based on impeachment evidence. Pet. App. 10a. The court explained that Alabama law "allows relief on *Brady* claims only where '[t]he facts do not merely amount to impeachment evidence.'" *Id.* (quoting Ala. R. Crim. P. 32.1(e)(3)). That ruling contradicts this Court's law. *See Bagley*, 473 U.S. at 676 ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule.").

This is not the first case in which the Alabama courts have committed this error. In *Payne v. State*, 791 So. 2d 383 (Ala. Crim. App. 1999), the Alabama Court of Criminal Appeals held that Rule 32.1(e) of the state Rules of Criminal Procedure, which lists five requirements for claims based on newly discovered facts, applies to all *Brady* claims. *Id.* at 397-98. One of the requirements of Rule 32.1(e) is that the

new facts "do not merely amount to impeachment evidence." Ala. R. Crim. P. 32.1(e)(3).

Alabama courts have rejected many *Brady* claims on this basis. For example, in *Bush v. State*, 92 So. 3d 121 (Ala. Crim. App. 2009), the petitioner alleged that the prosecution violated *Brady* by suppressing a statement by its key witness that contradicted her trial testimony. *Id.* at 147-48. The Alabama Court of Criminal Appeals rejected the claim, stating, "Bush freely admits that the alleged suppressed evidence was merely impeachment evidence. Clearly, Bush failed to meet his burden of showing that he was entitled to relief." *Bush*, 92 So. 3d at 148 (citing Rule 32.1(e)); *see also Jackson v. State*, 133 So. 3d 420, 463 (Ala. Crim. App. 2009) (rejecting *Brady* claim because the suppressed evidence would "amount to mere impeachment evidence").

In isolated cases, the Alabama courts have suggested that *Brady* claims need not satisfy the requirements of Rule 32.1(e), but they have not applied that view consistently. For example, on a single day in 2012, the Alabama Court of Criminal Appeals stated in one case that *Brady* claims need not meet the requirements of Rule 32.1(e), *Musgrove v. State*, 144 So. 3d 410, 435-36 (Ala. Crim. App. 2012), and in another case that they must, *Perkins v. State*, 144 So. 3d 457, 468 (Ala. Crim. App. 2012). The next year, the Alabama Supreme Court signaled that *Brady* claims should not have to satisfy Rule 32.1(e). *See Ex parte Beckworth*, 190 So. 3d 571, 574 (Ala. 2013). But as Petitioner Johnson's case shows, the problem continues.

Because it is unconstitutional for a state court to rule that *Brady* does not apply to impeachment evidence when this Court has held that *Brady* does apply to impeachment evidence, this Court should grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand the case for further proceedings.

II. This Case Is Well Suited for Certiorari Review Because Petitioner Johnson Squarely Presented and Preserved the *Brady* Issue in the Alabama Courts.

This case is particularly appropriate for certiorari review because the Alabama Court of Criminal Appeals undermined this Court's *Brady* law in explicit and unequivocal terms. Johnson objected to the court's constitutional error through an application for rehearing, *see* Application for Rehearing, *Johnson v. State*, CC-96-396.60, at 1, 20-21 (Nov. 10, 2015), and then sought discretionary review on the issue in the Alabama Supreme Court, *see* Petition for Writ of Certiorari, *Johnson v. State*, No. 1150524, at 18-32 (Feb. 26, 2016). Both courts denied his requests. *See* Pet. App. 2a-3a (order of the Alabama Supreme Court order denying certiorari); Pet. App. 48a-49a (decision of the Alabama Court of Criminal Appeals denying rehearing). As a result, the constitutional error is both clear and properly preserved.

Because the Alabama courts rejected Johnson's *Brady* claim through the use of state procedural rules, their decisions necessarily involve state law components. However, the state law rulings are intertwined with and directly undermine Johnson's federal rights under *Brady*.

As explained above, the Alabama Court of Criminal Appeals relied on Rule 32.1(e) of the state Rules of Criminal Procedure to hold that *Brady* does not apply to impeachment evidence. *See* Pet. App. 10a. That ruling conflicts with *Bagley* and is therefore inseparable from the federal issue. *See Foster v. Chatman*, 136 S. Ct. 1737, 1747 n.4 (2016) (recognizing that where a state law ground is intertwined with federal law, this Court has jurisdiction to review it).

The Alabama Court of Criminal Appeals also stated without explanation that Johnson's *Brady* claim was precluded by Rules 32.2(a)(3) and (5) of the state Rules of Criminal Procedure because it could have been raised at trial or on direct appeal. *See* Pet. App. 10a-11a. However, that ruling has no "fair support" under Alabama law. *See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 455 (1958) (stating that this Court has jurisdiction to review a ruling involving a state law ground where the state law ground lacks "any fair or substantial support") (quoting *Ward v. Board of County Commissioners*, 253 U.S. 17, 22 (1920)); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 725 (2010) ("To ensure that there is no 'evasion' of our authority to review federal questions, the nonfederal ground must have 'fair support.'") (quoting *Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930)).

The Alabama courts have made clear that a claim cannot be barred by Rules 32.2(a)(3) and (5) unless the petitioner has had an opportunity to prove that the claim could not have been raised in the earlier proceedings. *See Ex parte Pierce*, 851

So. 2d 606, 617 (Ala. 2000) (remanding "to the trial court for an evidentiary hearing on the question whether Pierce's claim could have been raised at trial or on appeal and is thus barred pursuant to Rule 32.2(a)(3) or (a)(5)"); *see also Reynolds v. State*, No. CR-13-1907, 2015 WL 5511503, at *13 (Ala. Crim. App. Sept. 18, 2015) (explaining that because the State pled that the petitioner's claim was barred under Rules 32.2(a)(3) and (a)(5), the petitioner "must present evidence . . . disproving those grounds of preclusion").

Johnson alleged in his petition that he could not have raised his *Brady* claim at trial or on direct appeal because the State was concealing the evidence at issue. *See* Pet. App. 134a-135a ("[T]he exculpatory evidence was discovered by Mr. Johnson's post-conviction counsel. . . . [T]he suppression of exculpatory evidence by the State has continued long past any such time as the claim could have been raised at Mr. Johnson's trial, and long past any such time as the claim could have been raised on direct appeal."). The circuit court never gave Johnson an opportunity to prove that allegation despite his specific request. *See* Pet. App. 53a-130a (the circuit court's dismissal order); C. 983 ("At the very least, Mr. Johnson requests an evidentiary hearing at which this Court can determine whether trial or appellate counsel knew or should have known of the facts and law supporting this claim."). The Alabama courts cannot evade federal review by invoking procedural grounds that are not even consistent with their own law. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); *Nat'l*

Ass'n for Advancement of Colored People v. Ala. ex rel. Flowers, 377 U.S. 288, 296 (1964) (holding that a state rule was not adequate to preclude Supreme Court review where it was "crystal clear that the rule invoked by [the state court] cannot reasonably be deemed applicable to this case").

Finally, it is absurd for a court to rule that Johnson should have raised a *Brady* claim at trial, when there is no evidence that he could have done so. The point of a *Brady* claim is that the State suppressed evidence at trial. This Court has rejected the notion that the prosecution can conceal evidence and then blame the defendant for failing to discover it. *See Banks v. Dretke*, 540 U.S. 668 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

CONCLUSION

For the foregoing reasons, Petitioner Johnson respectfully requests that this Court grant certiorari, vacate the decision of the Alabama Court of Criminal Appeals, and remand this case to the Alabama Court of Criminal Appeals for further proceedings consistent with this Court's *Brady* law.

Respectfully submitted,

PATRICK MULVANEY
Counsel of Record
KATHERINE CHAMBLEE
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar St. NW
Atlanta, GA 30303
(404) 688-1202
pmulvaney@schr.org

ELISABETH SEMEL
TY ALPER
KATHRYN MILLER
DEATH PENALTY CLINIC
U.C. BERKELEY SCHOOL OF LAW
Berkeley, CA 94720-7200

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on February 2, 2017, I served a copy of the foregoing via first class mail, postage prepaid, and via email, upon counsel for the Respondent:

William Dill
Assistant Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Tel. 334-242-7366
wdill@ago.state.al.us

Patrick Mulvaney