

IN THE SUPREME COURT OF THE UNITED STATES

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TOFOREST ONESHA JOHNSON,

*Petitioner,*

v.

STATE OF ALABAMA,

*Respondent.*

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

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**REPLY TO THE STATE'S RESPONSE TO  
PETITION FOR WRIT OF CERTIORARI**

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

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

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## ARGUMENT

The State has conceded that the decision below is in error and should be vacated, and that a remand to the Alabama Court of Criminal Appeals is necessary to further the interests of justice. In light of the State's concession, Petitioner Johnson respectfully submits that this Court should grant, vacate, and remand (GVR) as the State suggests or, in the alternative, summarily reverse the decision below.

### **I. This Court Should GVR the Case.**

In its brief filed on May 10, 2017, the State concedes that the decision of the Alabama Court of Criminal Appeals regarding Johnson's *Brady* claim conflicts with the Alabama Supreme Court's subsequent decision in *Ex parte Beckworth*, 190 So. 3d 571 (Ala. 2013), and thus warrants a remand for further proceedings. This is the first time the State has addressed Johnson's *Brady* claim since *Ex parte Beckworth* and the first time it has conceded error.

The Court of Criminal Appeals rejected Johnson's *Brady* claim in 2007 based on Rule 32.1(e) of the Alabama Rules of Criminal Procedure, which bars relief where newly discovered facts "merely amount to impeachment evidence." *Johnson v. State*, No. CR-05-1805, 2007 WL 2812234, at \*8 (Ala. Crim. App. Sept. 28, 2007) (quoting Ala. R. Crim. P. 32.1(e)(3)). However, in 2013, the Alabama Supreme

Court held in *Ex parte Beckworth* that Rule 32.1(e) should not apply to *Brady* claims. Johnson had argued that same position in the Court of Criminal Appeals.<sup>1</sup>

This Court has stated:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

*Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

This Court has employed GVR orders in light of “a wide range of developments,” including intervening state court decisions and changes in the position of a State respondent. *See Lawrence*, 516 U.S. at 166-67 (“We have GVR’d in light of a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions taken by the Solicitor General and state attorneys general.”) (citations omitted); *see also Lindsey v. Indiana*, 137 U.S. 32, 32 (2016) (“Judgment vacated, and case remanded to the Court of Appeals of Indiana, Fourth District for further consideration in light of the position asserted by Indiana in its

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<sup>1</sup> *See, e.g.*, Reply Brief of the Petitioner at 16-21, *Johnson v. State*, No. CR-05-1805 (Ala. Crim. App. May 7, 2007). From 2007 through 2015, the Alabama courts conducted proceedings with respect to several other claims in the case. Although Johnson presented his *Brady* claim and cited *Ex parte Beckworth* in his application for rehearing in the Alabama Court of Criminal Appeals in 2015 and in a petition for certiorari in the Alabama Supreme Court in 2016, the State did not respond in either court, and both courts declined to address the issue.

brief for the respondent filed on May 23, 2016.”); *Arizona v. Gant*, 540 U.S. 963, 963 (2003) (“Judgment vacated, and case remanded to the Court of Appeals of Arizona, Division Two, for reconsideration in light of *State v. Dean*, 206 Ariz. 158, 76 P.3d 429 (Ariz. 2003).”); *Cuffle v. Avenenti*, 498 U.S. 996, 996 (1990) (“The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of the position asserted by the Attorney General of Arizona in his brief for the respondents filed November 7, 1990.”).

Both of those circumstances are present here: the decision below conflicts with the Alabama Supreme Court’s intervening decision in *Ex parte Beckworth*, and the State has now conceded error. Therefore, Johnson respectfully requests that this Court grant certiorari, vacate the judgment of the Alabama Court of Criminal Appeals, and remand the case for further proceedings in light of *Ex parte Beckworth* and the position asserted by the State in its brief filed on May 10, 2017.

## **II. In the Alternative, This Court Should Summarily Reverse the Decision Below.**

Alternatively, this Court should summarily reverse. The Due Process Clause prohibits state courts from barring *Brady* claims because they are based on impeachment evidence.

This Court has decided several state post-conviction cases through summary disposition on the merits in recent terms. In *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), the Court held that the Alabama Court of Criminal Appeals misapplied its performance analysis under *Strickland v. Washington*, 466 U.S. 668 (1984), and

remanded the case for further proceedings regarding prejudice. *See also, e.g.,* *Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) (reversing the denial of post-conviction relief on a *Brady* claim based on impeachment evidence). This case is appropriate for summary reversal on the following grounds:

- “[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)).
- Under *Brady v. Maryland*, 373 U.S. 83 (1963), federal law requires relief for a criminal defendant if the prosecution suppressed evidence at trial that was favorable to the defense and material, including impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995).
- The ruling of the Alabama Court of Criminal Appeals that a petitioner cannot prevail on a *Brady* claim if the claim is based on impeachment evidence conflicts with *Bagley* and *Kyles*. *See Johnson*, 2007 WL 2812234, at \*8.

### CONCLUSION

Petitioner Johnson respectfully requests that this Court issue a GVR order, summarily reverse the decision below, or grant plenary review.

Respectfully submitted,



PATRICK MULVANEY  
*Counsel of Record*

CRYSTAL REDD  
SOUTHERN CENTER FOR  
HUMAN RIGHTS  
83 Poplar St. NW  
Atlanta, GA 30303  
Phone: (404) 688-1202  
Fax: (404) 688-9440  
pmulvaney@schr.org

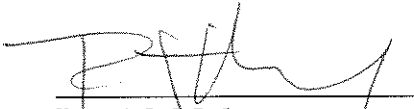
ELISABETH SEMEL  
TY ALPER  
KATHRYN MILLER  
DEATH PENALTY CLINIC  
U.C. BERKELEY SCHOOL OF LAW  
Berkeley, CA 94720-7200



**CERTIFICATE OF SERVICE**

I hereby certify that, in accordance with Supreme Court Rule 29, on May 19, 2017, I served a copy of the foregoing via first class mail, postage prepaid, and via email, upon counsel for the Respondent:

Andrew Brasher  
Solicitor General  
Office of the Attorney General  
501 Washington Avenue  
Montgomery, Alabama 36130  
abrasher@ago.state.al.us

  
Patrick Mulvaney