No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2023

CHARLES MCCRORY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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Counsel of Record for Petitioner

October 5, 2023

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TO THE HONORABLE CLARENCE THOMAS, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Eleventh Circuit:

Petitioner Charles McCrory, by and through undersigned counsel and pursuant to Supreme Court Rule 13, respectfully requests an extension of time of thirty (30) days to file his Petition for Writ of Certiorari in this Court. In his Petition, Mr. McCrory will seek review of the decision of the Alabama Court of Criminal Appeals affirming the denial of his petition for post-conviction relief. *See* Attachment A. On August 11, 2023, the Supreme Court of Alabama denied Mr. McCrory's petition for writ of certiorari to the Alabama Court of Criminal Appeals. *See* Attachment B.

Mr. McCrory invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). His time to file a Petition for Writ of Certiorari in this Court elapses on November 9, 2023. He therefore makes this request more than ten (10) days before the date his petition would be due without an extension of time. In support of this request, Mr. McCrory shows the following as good cause:

Mr. McCrory was convicted of murder and sentenced to life in prison in Covington County, Alabama, in 1985. Mr. McCrory has always maintained his innocence and, in April of 2021, rejected a plea offer of time-served. On March 23, 2020, Mr. McCrory filed a petition for post-conviction relief citing new evidence of innocence: the forensic odontologist who testified at trial that the decedent had a bitemark that matched Mr. McCrory's dentition—the only physical evidence introduced at trial—has recanted his opinion and testimony. The trial court denied the petition. *See* Attachment C. On appeal, the Alabama Court of Criminal Appeals initially affirmed; upon application for rehearing, however, the court granted Mr. McCrory's application, re-issued exactly the same opinion, this time with one judge now purportedly "recused," and affirmed again. *See* Attachment A. On August 11, 2023, the Supreme Court of Alabama denied Mr. McCrory's writ of certiorari to the Court of Criminal Appeals. *See* Attachment B.

Undersigned counsel requests this extension of time because of professional obligations in this and other cases pending trial, direct appeal, and collateral review. For example, among other deadlines, counsel has a petition for certiorari due in this Court on October 19, 2023, in the death penalty case of *Jeremy Moody v.*

State of Georgia, No. S23P0046. Counsel also has ongoing deadlines in the pretrial death penalty case of *State of Georgia v. Royhem Deeds*, No. 20R-1162 (Super. Ct. Dodge. Co.), and the post-conviction death penalty case of *Heather Leavell-Keaton v. State of Alabama*, No. CC-2012-3096.60 (Cir. Ct. Mobile Co.).

Finally, a Petition for Writ of Certiorari is essential in this case because the issues regarding the reliability of the evidence used to convict Mr. McCrory and the propriety of a judge presiding over his appeal who previously served as an appellate prosecutor against him each implicate important issues of federal constitutional law. With an extension of thirty (30) days, undersigned counsel will be able to present the relevant issues to this Court.

WHEREFORE, Mr. McCrory respectfully requests that this Court grant him a thirty (30) day extension of time within which to file his Petition for Writ of Certiorari, up to and including December 11, 2023.

Respectfully submitted, this 5th day of October, 2023.

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Attachment A

Rel: February 10, 2023

ALABAMA COURT OF CRIMINAL APPEALS

CR-21-0487

Charles C. McCrory v. State of Alabama.

Appeal from Covington Circuit Court
(CC-85-164.61)

MEMORANDUM DECISION

On Application for Rehearing

WINDOM, Presiding Judge.

This Court's unpublished memorandum opinion issued on December 9, 2022, is withdrawn, and the following unpublished memorandum opinion is substituted therefor.

Charles C. McCrory appeals the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he challenged his 1985 conviction for the murder of his wife, a violation of § 13A-6-2, Ala. Code 1975, and his resulting sentence to life in prison. This Court affirmed McCrory's conviction and sentence in an opinion issued on December 9, 1986. See McCrory v. State, 505 So. 2d 1272 (Ala. Crim. App. 1986). The certificate of judgment was issued on April 24, 1987.

In our opinion affirming McCrory's conviction and sentence, this Court set out the facts of the crime as follows:

> "C.H. McCrory, the appellant's father, testified that he went to the residence of his son and the victim at 8:25 on the morning of May 31, 1985. When McCrory entered the front door, he found the victim's body lying just inside the door. McCrory found his grandson [Chad], the child of the appellant and the victim, alive and well in his bedroom. The appellant arrived at the house five or ten minutes later.
>
> "Gloria Wiggins testified that she and the appellant began having an affair during the summer of 1984. The affair lasted until March or April of 1985. A letter written by Wiggins to the appellant and several letters written by the appellant to Wiggins were admitted into evidence.
>
> "After the affair ended, Wiggins and the appellant continued talking several times a day until the victim's death on May 31, 1985. Wiggins stated that the day before the

victim's body was found, she talked to the appellant three times on the telephone. Their last conversation took place around 10:30 or 11:00 that night.

"The next morning, the appellant called Wiggins at 7:00. She talked to the appellant at 10:30 that night and he did not seem upset.

"Jeff Holland, a member of the rescue squad of the Andalusia Fire Department, received a call at 8:15 a.m. on May 31, 1985, concerning a problem at or near the appellant's house. While he was en route to the scene, the appellant contacted Holland on the radio and asked about the call. When the appellant was informed about the call, he told Holland he would help.

"The appellant was at the scene when Holland arrived. He informed Holland that the victim was dead. Holland then called the police and checked for any signs of forced entry into the house. He could find none.

"Billy Frank Treadway, an investigator with the Andalusia Police Department, arrived at the scene at 8:30 a.m. The appellant was already there. After securing the scene, Treadway contacted Charlie Brooks with the Department of Forensic Sciences.

"Treadway talked with the appellant that morning. The appellant said that he and the victim had been having marital problems. The two were separated and the appellant was living in an apartment while the victim remained in the house.

"The appellant stated that he had been with the victim at their house the previous night and that they had engaged in sexual intercourse. He last saw the victim at 10:15 that night when he left.

"The appellant told Treadway that he did not think his wife had a boyfriend and did not know who would kill her. He stated that the victim would not have let anyone in the house. The only persons with a key to the house were his parents and himself.

"Treadway testified that the appellant's parents told him they did not have a key to the house. He found no signs of forced entry. No weapon was ever found.

"On the day the victim's body was found, the appellant asked Treadway, 'did the lick on the back of her head kill her?' ([Trial] R. 84.) Treadway stated that he could not tell from looking at the victim's body that she had an injury to the back of her head.

"Wade Garrett, an investigator with the Andalusia Police Department, dusted the scene for fingerprints. All of the prints lifted were either the victim's or the appellant's prints.

"Garrett obtained a written statement from the appellant. His statement is as follows:

> "'…Thursday morning, I got up about 6:45 A.M. and showered and got dressed. Left for work at AEC at about 7:25. After getting to work I went into the office and began talking to Mike … one of my employees. Julie called at about 8:00 to bring me a notebook of external degree info and a copy of a new book 'A Passion for Excellence.' I had asked her to stop by and drop them off on her way to work. We talked briefly and I said that I didn't have time to stop by Hardee's and get some breakfast. She said she would go back to Hardee's and get it for me. She left and returned a few minutes later with some

breakfast and then she went on to work at Triple H. Specialty Co. I went about my usual routine, paperwork. Met with two representatives from Data ... About nine or 9:30 my left contact lens began giving me some trouble, irritation, etc. I called and got an appointment at 11:45 with Dr. Davidson to look at it. I left about 11:40 and went to his office, he looked at my eye and gave me a new lens. I went and got some lunch and returned to work. Julie and I had an appointment with a counselor at the Mental Health Center at 5:00. I left the office just before five and went there. I met with Ms. Ellen Williams for approximately an hour. When I came out Julie was waiting in the lobby to see her also. I spoke briefly with Julie and she went back to see Ms. Williams. I spoke to Judy Kelly who was also in the office a couple of minutes and left. I went back to Julie's, 300 Lori Lane, and sat down, turned on the TV. Julie arrived about ten or fifteen minutes later. She came and we talked about what Ms. Williams had said, the day's happenings at work, etc. Ms. Williams had given us both a copy of a personal profile to do. We discussed it and I told her I would fill it out and she could take them back Friday sometime.

"'The old contact lens had irritated my eye and I had a headache. ... I asked Julie to go and get Chad from mother's and I would go to the apartment and get a nap. We both left together somewhere around 7:00 or 7:15. After getting to the apartment I had to wash some clothes. I went back to the Jr. Food Store and got some quarters and returned to the apartment. I decided to call Julie at mother's and ask her if she would help me with them. She said she would just stop and pick them up and wash them while I got a nap. Chad

and Julie stopped by about five minutes later, picked up the clothes, talked with Chad and they left. I got a nap, woke up and went back to Julie's about 9:00. I came in and we sat in the den and watched the first half of Hill Street Blues. We left Chad playing in the den and went to the bedroom about 9:30. We made love for approximately twenty-five to thirty minutes, talked, etc. Just after 10:00 we went back to the den with Chad, watched a minute or two of the news and went into the laundry to fold my clothes she had washed. About 10:20 or so we finished with the clothes. I took them out to the truck and came back in. I stood close to the door and kissed and hugged Julie and Chad goodnight. I backed into the street and honked the horn at them. Chad and Julie were at the front door, both waved goodbye. I left and went back to the apartment. I took my clothes, put them up, read the Opp News about 11:00. I called Gloria Wiggins in Opp. We talked for about thirty to forty-five minutes. I … hung up and went to sleep.

"'I woke up Friday at 6:45, showered, got dressed and went to work. I got to work right at 7:30 and didn't have time to get any breakfast. I called Julie at home to ask her if she would stop and bring me some on her way to work. There was no answer so I redialed to be sure I didn't call the wrong number.

"'There was still no answer. I worked on the MMPI test a few minutes and called mother's to see if she had dropped off Chad yet. Mother said she hadn't got here yet. I called Triple H and she wasn't at work either. I called the house again and still no answer. Mother called me and said that Daddy was going to check on her. I told her I would

> be on my way over there. I left the office and went to the house. On the way I heard on my radio the rescue squad say that they were 10-84 to my house. I called and told them I was also. I pulled in the front yard and started in the house. Daddy came out of the Whitaker's house across the street and said something has happened to Julie. I asked about Chad and he said he was at the Whitakers. I walked in the front door and saw her laying on the floor. I walked over and looked at her and went back outside. The rescue squad arrived and I walked back in, looked at her and walked to the bedroom looking around the house. I returned to the front and walked back outside. … [S]omeone on the squad said they would call the police. Daddy was in the front yard and I talked to him trying to calm him down some. About that time the police arrived.' (R. 159-62)

"Wayne Meeks testified that he was staying with his grandparents during the week of May 31, 1985. Their residence is located in front of the victim's house. At 5:00 a.m. on the morning of May 31, Meeks went out to the garden at his grandparents' house. He saw the appellant's Bronco parked at the victim's house. The Bronco was still there when Meeks left for work at 5:15 a.m. Before he left, Meeks made a comment to his grandfather about the appellant's Bronco being at the house because there were rumors that the appellant and the victim were separated.

"Hubert Walker, Meeks's grandfather, testified that he saw the appellant's Bronco at the victim's house on the morning of May 31, 1985. He heard the Bronco leave at 5:30 a.m.

"Walker also stated that he had seen the appellant's Bronco at the victim's house the night before. It left around 10:30 p.m.

"Ellen Williams testified that she is a marriage counselor and that she interviewed the appellant on May 30, 1985. She stated that the appellant told her that he married the victim out of habit. The appellant said that, although their sex life was good, he and the victim did not communicate. Williams and the appellant also discussed Gloria Wiggins.

"Joshua Sapala, a forensic pathologist, performed the autopsy on the victim. His examination revealed four chop wounds to the back of the head, one chop wound to the side of the head, blunt trauma to the left part of the skull, eleven puncture wounds to the left breast, fractures of both mandibles, bruises to the right shoulder, face and ribs, and two bite marks in the right deltoid muscle area. Sapala concluded the victim died as a result of the chop wounds to the head, a depressed skull fracture and the puncture wounds to the left lung and pulmonary artery. He stated that the injuries to the victim's head occurred prior to the puncture wounds to the chest.

"Dr. William King, a dentist, testified that he took teeth impressions of the appellant. Dr. Allen Stilwell, a medical examiner for the State of Alabama, obtained the appellant's dental impressions and sent them along with photographs of the bite marks on the victim's right deltoid muscle area to Dr. Richard Souviron, a dentist who specializes in forensic odontology.

"Dr. Souviron testified that he received upper and lower dental models of the appellant's teeth and black and white photos which depicted bite marks to the deltoid area of the victim's right arm. Upon his examination of the dental impressions and the photos, he felt that the bite marks on the

victim matched the appellant's upper teeth. Dr. Souviron sent a report of his findings to the district attorney's office.

"Later, Dr. Souviron requested the original negatives of the bite marks. Based on the examination of this evidence, Dr. Souviron concluded that the bite marks on the victim were consistent with the teeth impressions of this appellant. He stated that the teeth marks were made at or about the time of death.

"Charles Brooks, an employee of the Department of Forensic Sciences, testified that he went to the scene on the morning of May 31, 1985. He found the body of the victim lying just inside the house. A stocking was tied to the victim's right wrist and hair was found in her left hand. The hair was later determined to be consistent with the victim's own hair.

"Brooks testified that, while he was there, the appellant asked him if the victim was killed by the blow to the back of her head. Brooks stated that you would not notice a blow to the back of the victim's head unless the victim's hair was pulled up.

"When Brooks first examined the victim's body, he stated rigor mortis had not yet formed. This usually occurs from three to six hours after death. Brooks estimated the victim's death occurred after midnight and towards the early morning hours.

"The defense presented several witnesses. James Whitaker testified that he lives across the street from the victim's house. Whitaker got up at 5:00 a.m. on the morning in question and went outside at 5:30 a.m. to get the paper. The appellant's Bronco was not parked at the victim's house.

"Shannon Wiggins testified that he was employed by Bullard Excavating on the morning of May 31, 1985. Bullard

> Excavating is located adjacent to the victim's house. Wiggins stated he arrived at Bullard Excavating at 3:30 a.m. and stayed there until 4:00 a.m. He did not notice the victim's house but he thought the lights were on. Wiggins said he did not see the appellant's Bronco at the house but admitted it 'could have been' there.
>
> "The victim's two brothers testified about a gun that belonged to the appellant which was never found in the house. The appellant's testimony was similar to the statement he gave the police. He denied killing the victim."

505 So. 2d at 1272-1276.

On March 23, 2020, McCrory, through counsel, filed this, his second, Rule 32 petition. In his petition, McCrory alleged that newly discovered material facts entitled him to a new trial. Specifically, McCrory alleged that the scientific community's advancements in understanding the limitations of bitemark evidence and the resultant changes to the American Board of Forensic Odontology (ABFO) guidelines constitute newly discovered evidence that undermines Dr. Souviron's trial testimony that the victim sustained bitemarks and that McCrory was the individual responsible for those bitemarks. McCrory also argued that the United States Constitution and the Alabama Constitution entitled him to a new trial because, he said, he was convicted as a result of Dr. Souviron's false testimony.

McCrory submitted affidavits from Dr. Souviron and two other forensic odontologists, Dr. Adam J. Freeman and Dr. Cynthia Brzozowski. The doctors focused on changes in the understanding of bitemarks and the changes in the ABFO's guidelines since McCrory's trial. In his affidavit, Dr. Souviron stated:

> "In 1985, I received a request from the State of Alabama's medical examiner to review a set of dental casts and wax bite records for Charles McCrory, the autopsy report in this case, and twenty-eight black and white photographs of the victim and various wounds on the victim's body, and to provide an opinion. I received black and white photographs only; I never received negatives or color photographs. Of these twenty-eight photos, I found only one photograph to be of value in making a comparison between Mr. McCrory's casts and the injury to the victim. Following my analysis and comparison of the evidence, I wrote a report and later testified at the 1985 trial of this case.
>
> "I recently have reviewed my prior trial testimony and the report I issued in this matter. I have also reviewed my case file, which included the casts and the black and white photographs that were originally sent to me.
>
> "At Mr. McCrory's trial in 1985, I identified Mr. McCrory, unequivocally, as the person who was responsible for the teeth marks in this case. In particular I gave the following testimony:
>
> > "'Q. Again, in your expert opinion and based on the evidence presented to you, were these teeth marks made by Charles McCrory?

"'A. Yes.

"([Trial]R. 315.) I also identified certain characteristics of Mr. McCrory's dentition as being uniquely capable of producing the teeth marks found on the victim.

"While this testimony was understood by myself and others within my field as scientifically acceptable at the time of trial, I would not – and indeed under the ABFO's current guidelines I could not – give the above comparison testimony today.

"In light of my experience that I have accrued since I testified at Mr. McCrory's trial and advances in the scientific understanding of the limitations of bitemark evidence, as a forensic odontologist I no longer believe the individualized teeth marks comparison testimony I offered in his case was reliable or proper. I no longer believe, as I did at the time of trial, that there is a valid scientific basis for concluding that the injury found on the skin of the victim in the case, assuming that the injury is in fact teeth marks, could be 'matched' or otherwise connected to a specific individual, such as Mr. McCrory. I therefore renounce that testimony.

"Today, in reviewing this case, it is my opinion that, assuming the injuries to the victim were teeth marks, I could not exclude Mr. McCrory as being the person responsible for leaving those marks. In addition, I did not have and have never had a chance to physically examine the victim's arm, or the tissue from the arm, and I never received color photographs to examine. Had I been able to examine the actual tissue in this case, I might have offered a different opinion altogether. As a forensic odontologist operating under today's scientific understanding of bitemark analysis and comparison, I would insist on examining the actual tissue and/or color photographs before providing an opinion.

"Moreover, while I cannot exclude Mr. McCrory today based on these limited materials, I also cannot exclude any other people from the population with similar teeth who could have left similar looking marks on the victim's body. In other words, if the injuries to the victim were teeth marks, the strongest testimony I could offer is that they could have been left by Mr. McCrory. I do not know how many other people could also have left these injuries.

"In sum, at trial I identified Mr. McCrory as the person responsible for the teeth marks on the victim, and I did not in any way qualify that statement. I would not and could not offer such testimony today. I therefore recant the testimony that Mr. McCrory's teeth were the teeth, to a reasonable degree of certainty, that inflicted the victims' injuries.

"....

"A mandatory Standard of the ABFO for bitemark analysis and comparison that informs my opinion today, and that did not exist at the time of Mr. McCrory's trial or appeal, is that '[a]n ABFO Diplomate shall not express conclusions unconditionally linking a bitemark to a dentition.' ABFO Standards & Guidelines ¶(1)(f).

"Under the current ABFO Guidelines, ABFO Diplomates such as myself may only offer the following opinions when comparing a human dentition to a bitemark: (a) excluded as having made the bitemark; (b) not excluded as having made the bitemark; and (c) inconclusive. ABFO Standards & Guidelines at 3-4.

"Consistent with the strong consensus that recently has emerged in the scientific community (as reflected in the recent changes to the ABFO Guidelines), my experience has taught me that human dentition is not totally unique. I also believe that only in certain, very limited circumstances – not present

> in Mr. McCrory's case – can the features of human dentition accurately be recorded in human skin. These recent scientific developments compel me to renounce the testimony I offered at Mr. McCrory's trial in 1985. Put simply, my previous testimony no longer accords with either my current scientific understanding, which has grown considerable in the nearly thirty-five years since I testified in this case, or the widely accepted standards in the area of forensic odontology today.
>
> "Today I cannot conclude, as I did at Mr. McCrory's trial, that his teeth were the teeth that infected the injuries on the victim in this case to the exclusion of all others. There is no degree of scientific reliability or certainty with which I could testify that Mr. McCrory left the teeth marks in this case. Under today's scientific consensus and the changes in the ABFO Guidelines, it would be unreliable and scientifically unsupported for me or any forensic odontologist to offer individualization testimony that Mr. McCrory was the source of the teeth marks, as I testified in 1985. I therefore fully recant my testimony that 'these teeth marks [were] made by Charles McCrory.'"

(C. 33-38.)

In Dr. Freeman's affidavit, he opined that due to the advancement in the scientific community's understanding of the limitations of bitemark analysis, Dr. Souviron's testimony "is now understood to be scientifically indefensible, both as to his conclusions about the abilities and limitations of bitemark comparison evidence generally, and as to his conclusions regarding the alleged bitemarks at issue in this case." (C. 59.)

Dr. Freeman set forth that since McCrory's trial, the scientific community's understanding of bitemark evidence had shifted significantly as a result of a number of independent scientific bodies rejecting the scientific basis used in bitemark analysis. Dr. Freeman also noted that there had been a large number of wrongful convictions based on bitemark evidence. Dr. Freeman cited to a 2009 report by the National Academy of Science (NAS), a private, nonprofit scientific society, as a major catalyst for the shift. This report addressed the scientific validity of several forensic disciplines, including bitemark analysis. See Nat'l Research Council of the Nat'l Academies, Strengthening Forensic Science in the United States: A Path Forward (2009). In its report, the NAS stated that "the committee received no evidence of an existing scientific basis for identifying an individual to the exclusion of all others." Id. at 176. The NAS also stated that even if an association could be made between a bitemark and a suspect, the lack of any empirical population data about how rare or how common bitemark patterns are would preclude forensic dentists from providing accurate testimony about the probative value of any purported match. Because there is no way of

knowing how many other potential matches might exist, the probative value of any match could not be determined.

Dr. Freeman also cited to a report based on a study that he and another forensic odontologist had conducted to determine whether there would be a consensus in opinion among ABFO certified forensic odontologists who viewed the same data. See Construct validity of bitemark assessments using the ABFO decision tree (Construct Validity Study). In the study, photographs of 100 patterned injuries taken from real forensic cases were shown to the ABFO board-certified Diplomates. The Diplomates were called upon to answer three questions: 1) whether the injury was of sufficient evidentiary quality to proceed with analysis; 2) whether the questioned mark was indeed a human bitemark; and 3) whether the bitemark had distinct, identifiable arches and individual tooth marks. Of the initial 100 cases, there remained just 8 cases in which at least 90 percent of the analyst were still in agreement. None of the cases resulted in unanimous agreement. According to Dr. Freeman, "the unreliability of bitemark analysis exposed in [the study] is significant and exposes fundamental problems with this forensic

technique that go substantially beyond those already revealed in by the conclusions of the NAS Report." (C. 56.)

Dr. Freeman referenced a 2016 report by the Texas Forensic Science Commission (TFSC), a statutorily-created body tasked with managing accredited forensic disciplines and ensuring the integrity and reliability of forensic evidence in Texas criminal courts. See Texas Forensic Sci. Comm'n, Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney 1-17 (April 12, 2016) (the TFSC Report). The TFSC concluded that "there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition" and "that there is no scientific basis for assigning probability or statistical weight to an association." Id. at 11-12. Relying on the Construct Validity Study, the TFSC recommended that bitemark analysis no longer be admissible unless certain criteria are established.

Finally, Dr. Freeman cited to a September 2016 report by the President's Council of Advisors on Science and Technology (PCAST). See President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-

Comparison Methods (Sept. 20, 2016) (the PCAST Report). The PCAST Report concluded that "bitemark analysis does not meet the scientific standards for foundational validity and is far from meeting such standards. To the contrary, available scientific evidence strongly suggests that examiners cannot consistently agree on whether an injury is a human bitemark and cannot identify the source of a bitemark with reasonable accuracy." Id. at 87.

Dr. Freeman stated that "Dr. Souviron's conclusion about the source of the alleged teeth marks in this case are now understood to lack any basis in science, and indeed is wrong, both as a matter of generally accepted science and pursuant to the ABFO Standards and Guidelines." (C. 59.) Dr. Freeman stated that, using today's scientific understanding and ABFO Standards and Guidelines, the mark on the back of the victim's right arm is not a bitemark and no further comparison should be undertaken. He concluded that even if the mark could be considered a bitemark, there would be insufficient evidentiary value for a comparison.

In her affidavit, Dr. Brzozowski also cited the NAS Report, the PCAST report, and the ABFO Bitemark Guidelines for their conclusions that there is no science that supports a finding that a specific perpetrator

inflicted a particular bitemark. She stated that she had reviewed materials from McCrory's trial, including the report and testimony of Dr. Souviron, the photographs of the alleged bitemark, and the photographs of McCrory's dental exemplars. Given the scientific advancements and changes in bitemark identification, Dr. Brzozowski stated that "Dr. Souviron's conclusion about the source of the alleged teeth marks in this case are now understood to be unreliable, and indeed wrong." (C. 67.) "Today, Dr. Souviron would not be able to testify that the scientific community generally accepted the proposition that a perpetrator could be identified from a bitemark; nor could he testify that the ABFO Guidelines permitted him to say that a specific perpetrator actually inflicted a given bitemark." Id. After analyzing the injury marks on the back of the victim's arm, Dr. Brzozowski concluded that the marks contain insufficient detail to declare that it is a human bitemark based on the current guidelines and criteria for a human bitemark. Thus, pursuant to the guidelines, no comparison would or should be made to a particular dentition.

The State filed a response and a motion to dismiss the petition in which it asserted that the petition was precluded pursuant to Rule

32.2(b), Ala. R. Crim. P. The State also contended that McCrory had failed to meet the requirements regarding the existence of newly discovered evidence as set forth in Rule 32.1(e), Ala. R. Crim. P.

On April 28, 2021, the circuit court conducted an evidentiary hearing to allow McCrory an opportunity to prove his claim. At the hearing, Dr. Brzozowski and Dr. Freeman testified in accordance with their respective affidavits. The doctors testified that they had once believed that bitemark comparison was based on valid science but that several subsequent studies had exposed its vulnerabilities, leading them to change their opinion. In response to those studies, the ABFO revised its guidelines for the initial determination whether an injury was, in fact, a bitemark and the permissible conclusions that a reviewer may make after conducting a comparison analysis. The doctors acknowledged that Dr. Souviron's conclusions were sanctioned by the ABFO in 1975 but explained that Dr. Souviron could not reach the same conclusions or render the same testimony using current standards. Both doctors testified that, based on the current guidelines in place for bitemarks, they could not conclude that the injury to the victim's arm was a bitemark.

In addition to the doctors' testimonies, portions of the trial transcript were read at the hearing. The State admitted into evidence the entire trial transcript, and Dewayne Meeks, an original trial witness, testified at the hearing. Meeks testified that he stood by the testimony he gave at trial in 1985 that he saw McCrory's Bronco parked outside the victim's residence around 5:15 a.m. the morning of her death.

Following the testimony at the hearing, the circuit court requested that the parties file post-hearing briefs. After reviewing the briefs, the circuit court issued an order on February 14, 2022, denying McCrory's petition. In its order, the circuit court stated:

> "The defendant has alleged that he is entitled to relief on grounds of 'newly discovered material facts' pursuant to Rule 32.1(e), Ala. R. Crim. P. To succeed on a claim of newly discovered evidence, a defendant must satisfy all five (5) requirements set out in Rule 32.1(e). The parties agree that the defendant has met the first two requirements, and the Court agrees as well. The defendant cannot reasonably be expected to have anticipated that the American Board of Forensic Odontology (herein referred to as 'ABFO') would change its standards for the comparison of bite mark evidence, nor can the changed standards be reasonably considered as cumulative of other evidence presented at trial. The Court finds that he has met the requirements set forth in Rule 32.1(e)(1) and (2).
>
> "The Court finds the defendant has not, however, satisfied the remaining three (3) requirements of Rule 32.1(e)

by a preponderance of the evidence. Dr. Richard Souviron testified at the defendant's 1985 trial as an expert witness in the field of forensic odontology. He testified on direct examination that, in his opinion, the pattern injury to the victim's arm was 'teeth marks' and that by comparing photographs of the injury with a mold of the defendant's teeth, he opined that the defendant's teeth caused the injury to the victim's arm. Subsequently, on cross examination Dr. Souviron admitted that, 'it's not positive for Charles McCrory,' and went on to agree with defense counsel that in a letter that he generated in this case, he stated, 'First of all it is impossible in my opinion, unless very unusual circumstances exit, to make a positive identification from two teeth of a bite mark. Regardless of how unusual the two teeth happen to be.' He explained to the jury the difference between 'teeth marks' and 'bite marks.' Dr. Cynthia Brzozowski and Dr. Adam Freeman testified at the evidentiary hearing as expert witnesses in the field of forensic odontology. Drs. Brzozowski and Freeman testified that, in their opinions, the injury was not a 'bite mark,' according to the standards published by the ABFO in 2018. Dr. Brzozowski testified that the 2018 standards do not include criteria for evaluating and comparing 'teeth marks.' Both Drs. Brzozowski and Freeman testified that Dr. Souviron complied with the ABFO standards that were in place at the time of the crime, investigation, and trial in 1985. The Court finds that their opinions could be construed as impeachment evidence of Dr. Souviron's opinion regarding the nature and cause of the injury. The Court further agrees that, according to Handley v. State, 515 So. 2d 121 (Ala. Crim. App. 1987), the jury had the ability to compare the physical evidence of the photographs of the injury to the victim's arm and the mold of the defendant's teeth for themselves and conclude that the defendant's teeth matched the marks of the injury.

"The Court further finds that the defendant has not shown by a preponderance of the evidence that the result of

his trial probably would have been different had Dr. Souviron not testified, as is required by Rule 32.1(e)(4).

"The appellate courts have made clear that, in determining whether a defendant has satisfied the requirement of Rule 32.1(e)(4), the Court's 'calculation must be made based on the probative value of the newly discovered evidence and its relationship to the other evidence presented to the jury.' Ex parte Ward, 89 So. 3d 720, 728 (Ala. 2011). The Court has reviewed the sufficiency of the evidence which remains after taking out, as it were, the testimony of Dr. Souviron, and the Court is unconvinced that the outcome of the trial probably would have been different had the jury not heard Dr. Souviron's testimony.

"The Court has reviewed the transcript of the trial in its entirety. The Court finds that the evidence against the defendant was sufficient for the rational finder of fact to reasonably exclude every hypothesis except that of guilt, even absent the testimony of Dr. Souviron. The jury could have made the physical comparison between the injury to the victim's arm and the mold of the defendant's teeth on their own. Further, they heard evidence that the defendant, the victim, and the defendant's parents were the only persons with a key to the victim's home. They heard testimony from the Andalusia Police Investigators that there were no signs of forced entry into the victim's home. The jury heard the evidence of Hubert Walker and Wayne Meeks that they saw the defendant's vehicle, with which they were familiar, parked outside the victim's home between 5:00 and 5:30 on the morning of her murder. They heard the defendant's statements, in which he denied leaving his apartment after 10:30 the night before until after 7:00 the next morning. The jury also heard that the defendant asked Andalusia Investigator Billy Frank Treadway and Department of Forensic Sciences Investigator Charlie Brooks whether it was the 'licks' or 'blows' to the back of the victim's head which

caused her death. Both Investigator Treadway and Mr. Brooks testified that they were unable to see whether the victim had any 'licks' or 'blows' to the back of her head. Mr. Brooks, who conducted a preliminary examination of the body, testified that he determined that the time of death was after midnight, 'towards the early morning hours.' Dr. Joseph Sapala, who performed the autopsy, determined that the cause of the victim's death was 'multiple trauma,' including 'chop wounds of the head, a depressed skull fracture.' He testified that 'chop wounds are sliced, deep wounds' and that during his examination of the victim's body, he 'saw four of those to the back of the head and one to the left side of the head.' The Court finds that from the evidence presented to them, absent the testimony of Dr. Souviron, the jury could have reasonably found that the defendant returned to the home of the victim during the early morning hours of May 31, 1985, entered the home using his key, and murdered her.

"Lastly, the Court finds that the defendant has not satisfied the requirement that the newly discovered facts establish that he is innocent of the crime for which he was convicted, as set out in Rule 32.1(e)(5). The Court finds that the absence of Dr. Souviron's testimony would not demonstrate that the defendant is innocent of the murder of the victim.

"The defendant also argues that he is entitled to post-conviction relief under Rule 32.1(a) in that 'the constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief.' The Court finds that he has not proved by a preponderance of the evidence that he is entitled to the relief he seeks on this ground.

"Accordingly, it is hereby ORDERED that the defendant's Petition for Post-Conviction Relief Filed Pursuant

> to Rule 32 is hereby DENIED and DISMISSED with prejudice."

(C. 292-96.)

On appeal, McCrory reasserts the claims raised in his petition.

"[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). Even when those disputed facts arise from a combination of oral testimony and documentary evidence, we review the circuit court's findings for an abuse of discretion and afford those findings a presumption of correctness. See, e.g., Born v. Clark, 662 So. 2d 669, 672 (Ala. 1995) ("When a trial court, sitting without a jury, hears ore tenus evidence and determines disputed questions of fact, whether those

questions come into dispute orally or by the written word, we must apply the ore tenus rule of review.").

> "'The burden of proof in a Rule 32 proceeding rests solely with the petitioner, not the State.' Davis v. State, 9 So. 3d 514, 519 (Ala. Crim. App. 2006), rev'd on other grounds, 9 So. 3d 537 (Ala. 2007). '[I]n a Rule 32, Ala. R. Crim. P., proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.' Wilson v. State, 644 So. 2d 1326, 1328 (Ala. Crim. App. 1994). Rule 32.3, Ala. R. Crim. P., specifically provides that '[t]he petitioner shall have the burden of ... proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.'"

Wilkerson v. State, 70 So. 3d 442, 451 (Ala. Crim. App. 2011). The credibility of evidence in a Rule 32 proceeding is for the circuit court to determine. "The credibility of witnesses is for the trier of fact, whose finding is conclusive on appeal. This Court cannot pass judgment on the truthfulness or falsity of testimony or on the credibility of witnesses." Hope v. State, 521 So. 2d 1383, 1387 (Ala. Crim. App. 1988). Indeed, it is well settled that, in order to be entitled to relief, a postconviction "petitioner must convince the trial judge of the truth of his allegation and the judge must 'believe' the testimony." Summers v. State, 366 So. 2d 336, 343 (Ala. Crim. App. 1978). See also Seibert v. State, 343 So. 2d 788, 790 (Ala. 1977).

In order to warrant relief on a claim of newly discovered evidence, the petitioner must meet the criteria set forth in Rule 32.1, Ala. R. Crim. P., which provides:

> "Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that:
>
> "....
>
> "(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:
>
> > "(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
> >
> > "(2) The facts are not merely cumulative to other facts that were known;
> >
> > "(3) The facts do not merely amount to impeachment evidence;
> >
> > "(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
> >
> > "(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was

> convicted or should not have received the sentence that the petitioner received."

All five requirements in Rule 32.1(e) must be satisfied in order to constitute newly discovered evidence. See, e.g., McCartha v. State, 78 So. 3d 1014, 1017 (Ala. Crim. App. 2011). To satisfy the requirement in Rule 32.1(e)(1), the facts alleged to have been newly discovered must have been in existence at the time of trial. See Ex parte Ward, 89 So. 3d 720, 725 (Ala. 2011) ("Rule 32.1(e)(1) requires that the facts relied upon not have been known by the petitioner or petitioner's counsel at the time of trial (though they must have been in existence at that time) or at the time of an earlier collateral proceeding, and that the facts could not have been discovered earlier through the exercise of reasonable diligence."). Cf. Ex parte Heaton, 542 So. 2d 931, 934 (Ala. 1989) (" The law further requires that the newly discovered evidence 'have been in existence, though not known, at the time of the original trial.' Smitherman v. State, 521 So. 2d 1050, 1055 (Ala. Crim. App. 1987). ...").

Further,

> "The requirements in Rules 32.1(e)(1), (e)(2), and (e)(3) are self-explanatory. Rule 32.1(e)(5) requires not that the newly discovered facts actually establish a petitioner's innocence but that the newly discovered facts 'go to the issue

> of the defendant's actual innocence,' i.e., are relevant to the issue of guilt or innocence, 'as opposed to a procedural violation not directly bearing on guilt or innocence.' Ex parte Ward, 89 So. 3d 720, 727 (Ala. 2011). As for the requirement in Rule 32.1(e)(4) 'that the result probably would have been different had the newly discovered evidence been presented to the jury, this calculation must be made based on the probative value of the newly discovered evidence and its relationship to the other evidence presented to the jury.' Id. at 728."

Lloyd v. State, 144 So. 3d 510, 516-17 (Ala. Crim. App. 2013).

Certainly, the reliability of bitemark evidence and, by extension, the reliability of Dr. Souviron's trial testimony was at the very heart of McCrory's Rule 32 petition filed below. Yet, the issue before this Court is not the reliability – or unreliability, as it were – of bitemark evidence. Rather, the issue is whether McCrory proved by a preponderance of the evidence that he was entitled to relief under Rule 32, Ala. R. Crim. P. This Court agrees with the circuit court that he did not.

We turn first to McCrory's claim that newly discovered evidence entitled him to a new trial. The State and the circuit court concluded that McCrory had established the first two requirements. However, because Rule 32.1(e)(1) requires that the facts alleged to have been newly discovered were in existence at the time of trial, this Court questions whether the advancements in scientific knowledge and understanding of

bitemark evidence and the resultant change in ABFO guidelines, which, according to McCrory, occurred after his trial, meet the first requirement. Nevertheless, even if McCrory met the first two requirements, he has failed to establish the third or fourth requirements of Rule 32.1(e). At trial, Dr. Souviron differentiated the marks on the victim's arm as teeth marks instead of bitemarks. He testified that the marks may have been caused by the victim's arm making contact with the upper teeth of an individual. Dr. Souviron testified that, in his opinion, McCrory's teeth matched the teeth marks on the victim's arm; however, Dr. Souviron also testified that he could not exclude the possibility that another individual's teeth could have inflicted the marks. Based on the testimonies presented at the hearing, current ABFO guidelines – McCrory's newly discovered evidence – do not pertain to teeth-mark analysis.

Even if the ABFO guidelines did apply, under the new guidelines, ABFO Diplomates may identify a mark as a human bitemark and can testify as to the rarity of a certain combination of bitemarks. Additionally, based on his affidavit, Dr. Souviron could still testify that, assuming the injuries to the victim were teeth marks, he could not

exclude McCrory as being the person responsible for leaving those marks the marks on the victim. As a result, although the jury would be presented at a new trial with less definitive testimony by Dr. Souviron linking the marks to McCrory, and while other experts may disagree with Dr. Souviron, the jury could still hear evidence that McCrory could not be excluded as having caused the marks. Any evolving criticism by the scientific community as to the reliability of this evidence would simply be impeaching the bitemark evidence offered at trial. Further, the circuit court analyzed "the probative value of the newly discovered evidence and its relationship to the other evidence presented to the jury," see Ex parte Ward, 89 So. 3d at 728, and found that McCrory failed to establish that the result of the trial probably would have been different had the new guidelines been used. This Court agrees with the circuit court's conclusion.

The circuit court's findings with respect to the third and fourth requirements of newly discovered evidence are supported by the record. Thus, the circuit court did not err when it determined that McCrory's evidence would not entitle him to a new trial under Rule 32.1(e), Ala. R. Crim. P.

Turning next to McCrory's claim raised under Rule 32.1(a), this Court concludes that McCrory is not entitled to relief on his claim that his conviction was unconstitutional. In his petition, McCrory, briefly, asserted that his conviction was based on unreliable evidence and thus could not "withstand the scrutiny of due process, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, or the Constitution of the State of Alabama." (C. 14.) At the evidentiary hearing, McCrory focused on his claim raised under Rule 32.1(e), mentioning his claim under 32.1(a) only once, during his closing argument. Additionally, the State pleaded that this claim was barred by Rule 32.2(b), Ala. R. Crim. P., because McCrory had raised a similar newly discovered evidence claim in his first Rule 32 petition. McCrory did not address this procedural bar at the evidentiary hearing. See Rule 32.3, Ala. R. Crim. P. ("The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."); see also State v. Hurst, 223 So. 3d 941, 951 (Ala. Crim. App. 2015) ("[S]imply pleading facts in a Rule 32 petition that may disprove or overcome a ground of preclusion is not enough;

rather, a petitioner must both plead facts and subsequently prove by a preponderance of the evidence those facts necessary to disprove or overcome a ground of preclusion." (emphasis in original)). The circuit court found that McCrory failed to prove by a preponderance of the evidence that he was entitled to relief on this claim. The circuit court's determination is supported by the record. Therefore, the circuit court did not err in denying this claim.

Accordingly, the judgment of the circuit court is affirmed.

APPLICATION GRANTED; MEMORANDUM OF DECEMBER 9, 2022, WITHDRAWN; MEMORANDUM SUBSTITUTED; AFFIRMED.

McCool and Minor, JJ., concur. Cole, J., concurs in the result. Kellum, J., recuses herself.

Attachment B

IN THE SUPREME COURT OF ALABAMA

August 11, 2023

SC-2023-0324

Ex parte Charles C. McCrory PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Charles C. McCrory v. State of Alabama)(Covington Circuit Court: CC-85-164.61; Criminal Appeals: CR-21-0487)

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 11, 2023:

Writ Denied. No Opinion. Stewart, J. -- Parker, C.J., and Wise, Sellers, and Cook, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck

Clerk, Supreme Court of Alabama

Attachment C

ELECTRONICALLY FILED
2/14/2022 8:36 AM
23-CC-1985-000164.61
CIRCUIT COURT OF
COVINGTON COUNTY, ALABAMA
AMY JONES, CLERK

IN THE CIRCUIT COURT OF COVINGTON COUNTY, ALABAMA

STATE OF ALABAMA,	*	
PLAINTIFF,	*	
VS.	*	Case No. CC-1985-164.61
CHARLES C. MCCRORY,	*	
DEFENDANT.	*	

ORDER

This case is before the Court upon the petition of the defendant for post-conviction relief from judgment or sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The defendant attached a brief to his petition, and the State filed a response to the petition. The Court held an evidentiary hearing on April 28, 2021, and at the conclusion of the hearing, Ordered the parties to submit post-hearing briefs within thirty (30) days. The Court having reviewed the filings of the parties and heard and considered the evidence adduced at the evidentiary hearing and the arguments of the parties, the Court hereby makes the following findings:

The defendant has alleged that he is entitled to relief on grounds of "newly discovered material facts" pursuant to Rule 32.1(e), Ala.R.Crim.P. To succeed on a claim of newly discovered evidence, a defendant must satisfy all five (5) requirements set out in Rule 32.1(e). The parties agree that the defendant has met the first two requirements, and the Court agrees as well. The defendant cannot reasonably be expected to have anticipated that the American Board of Forensic Odontology (herein referred to as "ABFO") would change its standards for the comparison of bite mark evidence, nor can the changed standards be reasonably considered as cumulative of other evidence presented at trial. The Court finds that he has met the requirements

set forth in Rule 32.1(e)(1) and (2).

The Court finds the defendant has not, however, satisfied the remaining three (3) requirements of Rule 32.1(e) by a preponderance of the evidence. Dr. Richard Souviron testified at the defendant's 1985 trial as an expert witness in the field of forensic odontology. He testified on direct examination that, in his opinion, the pattern injury to the victim's arm was "teeth marks" and that by comparing photographs of the injury with a mold of the defendant's teeth, he opined that the defendant's teeth caused the injury to the victim's arm. Subsequently, on cross examination Dr. Souviron admitted that, "it's not positive for Charles McCrory," and went on to agree with defense counsel that in a letter that he generated in this case he stated , "First of all it is impossible in my opinion, unless very unusual circumstances exist, to make a positive identification from two teeth of a bite mark. Regardless of how unusual the two teeth happen to be." He explained to the jury the difference between "teeth marks" and "bite marks." Dr. Cynthia Brzozowski and Dr. Adam Freeman testified at the evidentiary hearing as expert witnesses in the field of forensic odontology. Drs. Brzozowski and Freeman testified that, in their opinions, the injury was not a "bite mark," according to the standards published by the ABFO in 2018. Dr. Brzozowski testified that the 2018 standards do not include criteria for evaluating and comparing "teeth marks." Both Drs. Brzozowski and Freeman testified that Dr. Souviron complied with the ABFO standards that were in place at the time of the crime, investigation, and trial in 1985. The Court finds that their opinions could be construed as impeachment of Dr. Souviron's opinion regarding the nature and cause of the injury. The Court further agrees that, according to Handley v. State, 515 So. 2d 121 (Ala. Crim. App. 1987), the jury had the ability to compare the physical evidence of the photographs of the injury to the

victim's arm and the mold of the defendant's teeth for themselves and thus conclude that the defendant's teeth matched the marks of the injury.

The Court further finds that the defendant has not shown by a preponderance of the evidence that the result of his trial probably would have been different had Dr. Souviron not testified, as is required by Rule 32.1(e)(4).

The appellate courts have made clear that, in determining whether a defendant has satisfied the requirement of Rule 32.1(e)(4), the Court's "calculation must be made based on the probative value of the newly discovered evidence and its relationship to the other evidence presented to the jury." Ex parte Ward, 89 So. 3d 720, 728 (Ala. 2011). The Court has reviewed the sufficiency of the evidence which remains after taking out, as it were, the testimony of Dr. Souviron, and the Court is unconvinced that the outcome of the trial probably would have been different had the jury not heard Dr. Souviron's testimony.

The Court has reviewed the transcript of the trial in its entirety. The Court finds that the evidence against the defendant was sufficient for a rational finder of fact to reasonably exclude every hypothesis except that of guilt, even absent the testimony of Dr. Souviron. The jury could have made the physical comparison between the injury to the victim's arm and the mold of the defendant's teeth on their own. Further, they heard evidence that the defendant, the victim, and the defendant's parents were the only persons with a key to the victim's home. They heard testimony from Andalusia Police Investigators that there were no signs of forced entry into the victim's home. The jury heard the evidence of Hubert Walker and Wayne Meeks that they saw the defendant's vehicle, with which they were familiar, parked outside the victim's home between 5:00 and 5:30 on the morning of her murder. They heard the defendant's statements, in

which he denied leaving his apartment after 10:30 the night before until after 7:00 the next morning. The jury also heard that the defendant asked Andalusia Investigator Billy Frank Treadaway and Department of Forensic Sciences Investigator Charlie Brooks whether it was the "licks" or "blows" to the back of the victim's head which caused her death. Both Investigator Treadaway and Mr. Brooks testified that they were unable to see whether the victim had any "licks" or "blows" to the back of her head. Mr. Brooks, who conducted a preliminary examination of the body, testified that he determined that the time of death was after midnight, "towards the early morning hours." Dr. Joseph Sapala, who performed the autopsy, determined that the cause of the victim's death was "multiple trauma," including "chop wounds of the head, a depressed skull fracture." He testified that "chop wounds are sliced, deep wounds" and that during his examination of the victim's body, he "saw four of those to the back of the head and one to the left side of the head." The Court finds that from the evidence presented to them, absent the testimony of Dr. Souviron, the jury could have reasonably found that the defendant returned to the home of the victim during the early morning hours of May 31, 1985, entered the home using his key, and murdered her.

Lastly, the Court finds that the defendant has not satisfied the requirement that the newly discovered facts establish that he is innocent of the crime for which he was convicted, as set out in Rule 32.1(e)(5). The Court finds that the absence of Dr. Souviron's testimony would not demonstrate that the defendant is innocent of the murder of the victim.

The defendant also argues that he is entitled to post-conviction relief under Rule 32.1(a), in that "the constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief." The Court finds that he has not proved by a

preponderance of the evidence that he is entitled to the relief he seeks on this ground.

Accordingly, it is hereby ORDERED that the defendant's Petition for Post-Conviction Relief Filed Pursuant to Rule 32 is hereby DENIED and DISMISSED with prejudice.

The Clerk shall furnish a copy hereof to the Defendant and the District Attorney.

DONE and ORDERED this 11th day of February, 2022.

CHARLES A. SHORT
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on October 5, 2023, I served a copy of the foregoing via first-class mail, postage prepaid, upon counsel for the Respondent:

Kristi O. Wilkerson
Assistant Attorney General
Office of the Attorney General
Criminal Appeals Division
500 Dexter Avenue
Montgomery, Alabama 36130

/s/ *Mark Loudon-Brown*
Mark Loudon-Brown