No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

CHARLES McCRORY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

The forensic dentist who provided the only physical evidence purportedly connecting Charles McCrory to a 1985 murder fully recanted his testimony in 2019. The dentist's testimony for the State at trial had been that a "bite mark" was inflicted on the decedent by McCrory during the murder. At the state post-conviction hearing, the dentist completely recanted his testimony—he testified that, in fact, the mark (shown below) was not even a bite mark at all, much less one that could be linked to McCrory. Two additional expert forensic dentists corroborated that testimony and further explained that modern scientific developments have debunked the sort of "bite mark identification" on which the State relied to convict McCrory. The State did not impeach any of that testimony or present any contrary evidence.

Yet the Alabama post-conviction court denied relief. The court adopted the State's proposed order, which stated that despite expert consensus that the mark on the decedent was not a bite mark and, therefore, could not be admitted as probative identification evidence at trial, lay jurors somehow could decide for themselves that it was a bite mark and that McCrory had made it. The Court of Criminal Appeals affirmed. But one of the judges who decided the appeal had represented the State in McCrory's direct appeal, when the judge had been an Alabama assistant attorney general. Despite this clear conflict, the judge failed to recuse from the post-conviction appeal. On rehearing, the Court of Criminal Appeals reissued exactly the same opinion, again affirming the denial of post-conviction relief, with just one change: the court added a bare notation that the conflicted judge was "recused."

The questions presented are:

1. Whether, as several circuits have found, there is a due process right not to be convicted based on forensic evidence later shown to be fundamentally unreliable, or, as the Alabama courts held, due process permits a conviction based on expert testimony that was later recanted and unanimously discredited having been debunked by intervening scientific developments.

2. Whether due process prohibits an appellate judge from participating in the appeal of a case the judge had actively litigated previously as counsel for one of the parties.

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PARTIES TO THE PROCEEDING

Petitioner Charles McCrory was the petitioner/appellant in the proceedings below. Respondent the State of Alabama was the respondent/appellee in the proceedings below.

LIST OF RELATED PROCEEDINGS

Trial and Direct Appeal

State of Alabama v. Charles C. McCrory, Cir. Ct. Covington Co. No. CC-1985-164

McCrory v. State, 505 So. 2d 1272 (Ala. Crim. App. 1986)

State Post-conviction and Appeal

State of Alabama v. Charles C. McCrory, Cir. Ct. Covington Co. No. CC-1985-164.60

State of Alabama v. Charles C. McCrory, Cir. Ct. Covington Co. No. CC-1985-164.61

Charles C. McCrory v. State of Alabama, No. CR-21-0487 (Ala. Ct. Crim. App.)

PETITION FOR WRIT OF CERTIORARI

Petitioner Charles McCrory 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 Circuit Court of Covington County, Alabama, denying and dismissing Mr. McCrory's state post-conviction petition is attached as Exhibit A. The decision of the Court of Criminal Appeals of Alabama affirming the post-conviction court's order is attached as Exhibit B. The decision of the Court of Criminal Appeals granting Mr. McCrory's Application for Rehearing and re-affirming the post-conviction court's order is attached as Exhibit C. The Order of

the Supreme Court of Alabama denying Mr. McCrory's petition for writ of certiorari to the Alabama Court of Criminal Appeals is attached as Appendix D.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the post-conviction court's order denying and dismissing Mr. McCrory's state post-conviction petition on December 9, 2022. On February 10, 2023, the Court of Criminal Appeals granted rehearing and reissued its opinion affirming the post-conviction court's order. The Supreme Court of Alabama denied Mr. McCrory's petition for writ of certiorari to the Alabama Court of Criminal Appeals on August 11, 2023. On October 12, 2023, Justice Thomas extended the time within which to file this petition for writ of certiorari to and including December 9, 2023. 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 law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

"I therefore fully recant my testimony that 'these teeth marks [were] made by Charles McCrory.'"

--Dr. Richard Souviron, the State's Expert

In the decades since Charles McCrory's conviction, repeated scientific studies, multiple governmental reports, and an increasing number of wrongful convictions have revealed that bite mark analysis has no scientific foundation. It has been completely debunked—indeed, it has been called the "most egregious" type of discredited evidence.

In this case, Dr. Richard Souviron gave bite mark testimony as the State's key expert witness at Mr. McCrory's trial. He has now fully recanted his trial testimony, and his new opinion was corroborated by two additional experts, who also testified about the scientific community's current understanding of the limits of bite mark evidence. The State offered no rebuttal evidence. And yet, an Alabama circuit court denied Mr. McCrory a new trial, and he remains in prison. His conviction is one of the few remaining bite mark-based convictions in the country that courts have failed to correct.[1] And this is not the first time the problematic

[1] *See, e.g.*, *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1052 (N.D. Ill. 2015) (finding it "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702," because 702(c) requires that "expert testimony be 'the product of reliable principles and methods'"); *Howard v. State*, 300 So. 3d 1011 (Miss. 2020) (reversing capital conviction based in part on discrediting of bite mark evidence); *State v. Denton*, No. 04-R-330, 2020 WL 7232303 (Ware Co. Ga. Super. Ct. Feb. 7, 2020) (granting new trial based on discrediting of bite mark evidence); *Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018) (reversing conviction based in part on scientific developments discrediting bite mark evidence and recantation by trial expert); *State v. Hill*, 125 N.E.3d 158 (Ohio Ct. App. 2018) (acknowledging the discrediting of bite mark evidence); *Commonwealth v. Kunco*, 173 A.3d 817, 824 (Pa. Super. Ct. 2017) (citing testimony by three forensic dentists at a post-conviction evidentiary hearing concerning the change in scientific understanding of the limitations of bite mark evidence).

role that "comparison experts" play in Alabama murder cases has come to this Court. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263 (2014) (reversing and remanding in feature comparison case where Mr. Hinton later was exonerated).

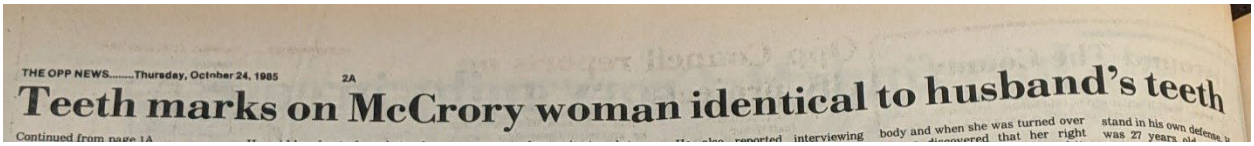
The Alabama courts below failed to apply the necessary due process scrutiny to this new evidence. The post-conviction court adopted the State's proposed order, which also included an astonishing conclusion belied by modern scientific consensus—that "the jury had the ability to compare the physical evidence 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 drew that conclusion even though it was *unrebutted* that no expert could reliably offer those opinions today. The appellate court affirmed in an opinion initially joined by an admittedly conflicted judge.

Although this is a case unique in its procedural violations and facts sometimes difficult to believe, it is a case of broad significance. The lower courts upheld Mr. McCrory's conviction even though the "bite mark" was the only physical evidence offered at trial and despite that "bite mark" evidence being recanted by the State's *own* expert witness. The courts reasoned, instead, that a jury could somehow have decided for itself that the mark—which all experts in the case now agree was *not* a bite mark, and thus not admissible in evidence—nevertheless *was* a bite mark and was inflicted by Charles McCrory. This ruling violates due process and contradicts the view expressed by other courts that due process includes a right not to be convicted based on discredited science.

This Court should intervene and hold, as some courts already have held, that a due process claim exists where the defendant shows that his conviction was based on the admission at trial of subsequently discredited forensic evidence.

STATEMENT OF THE CASE

The headline in the October 24, 1985, edition of *The Opp News* captured it: the jury convicted Charles McCrory in 1985 based on testimony that his teeth marks were left on the decedent at the time of her death.



THE OPP NEWS.....Thursday, October 24, 1985 2A

Teeth marks on McCrory woman identical to husband's teeth

Continued from page 1A ... interviewing body and when she was turned over ... that her right ... stand in his own defense ... was 27 years old

Today, that testimony, the only evidence that purported to directly connect Mr. McCrory to the crime, has been wholly and incontrovertibly refuted. Faced with that reality during post-conviction proceedings, the prosecution offered to resentence Mr. McCrory to time-served—immediate release—in exchange for a guilty plea. Mr. McCrory declined, unwilling to admit to a crime he did not commit.

Following the 2021 state post-conviction hearing, the trial judge adopted almost verbatim an order written by the prosecution and denied relief, reasoning that lay jurors could engage in junk science even when the experts—including many of the leaders in the field—all agreed the discipline was entirely incapable of providing probative evidence in this case. The Court of Criminal Appeals—which included a judge who signed the State's brief against Mr. McCrory during his direct appeal—affirmed.

A. The Crime, The Investigation, The Evidence, and the Trial

At his 1985 trial in Covington County, Alabama, there was *one* piece of evidence directly connecting Charles McCrory to the murder of his wife: an expert forensic odontologist, fresh off testifying live on national television against Ted Bundy to secure a sensational capital conviction, flew into southern Alabama to testify that an injury on the victim's body was a human bite mark, that the bite mark matched the dentition of Charles McCrory, and that the bite mark was inflicted by Mr. McCrory during the murder of the victim. (R-314-15.)[2] With that evidence, the jury had no choice but to convict Mr. McCrory, and they did.

Charles McCrory had no prior arrests, let alone criminal convictions. He had gone to college, worked a job in technology, and was a volunteer emergency medicine technician (EMT) in the county. On the morning of May 31, 1985, Mr. McCrory was at work when he heard over his EMT radio that emergency services were needed at the home of his wife and toddler son. He and others responded and found his wife, deceased, inside her home—she had been brutally beaten to death.

Mr. McCrory and his wife were in the midst of a divorce so, despite the separation being amicable,[3] he became the first suspect. (R-157-62, 182-85, 349-89.) Mr. McCrory immediately consented to a search of his person, his home twice, and his car. (R-186-88, 193.) He turned over his clothes and shoes for forensic testing. (R-187-88.) Despite the brutal nature of the murder that occurred just hours

[2] References to "R-__" refer to the original trial record. References to "R. 32 H'ng __" refer to the record from the 2021 state post-conviction hearing.

[3] The trial record revealed no evidence of motive, and the prosecution can cite to none.

earlier, no evidence—not a speck of blood—was found on his clothes or shoes, in his car or home; not a scratch was found on his body, despite evidence the victim had struggled with her attacker. (R-262.) And the hair found clutched in the decedent's hand did *not* belong to Mr. McCrory. (R-269, 290-91.)

Mr. McCrory interviewed twice with police and, as he has for the last 38 years, maintained his innocence. He later took the stand in his own defense, and testified consistently with both of the statements he voluntarily provided to the police. (R-157-62, 182-85, 349-89.) He had been with his wife the evening prior, he did laundry, the couple was intimate, and then he left for his apartment, after also saying goodnight to his toddler son, Chad. The next morning, he tried calling his wife from work a few times but could not reach her. When he heard the call for EMS, he immediately responded, along with other EMTs and police. He did not kill his wife. (R-157-62, 182-85, 349-89.)

Yet Mr. McCrory remained investigators' only suspect. When he was standing with other EMTs and police near the body of his deceased wife, in plain view of the blood pooled around her due to obvious gashes that had been inflicted to the back of her head during the beating, Mr. McCrory asked a responder if it was those wounds that killed her. Investigators inexplicably found the question odd, despite the plainly visible injuries. (R-84-85.) Later, a teenager staying with his grandfather a couple of houses down would tell police that, at 5:00 a.m. on what he *believed* was the morning in question, he was out checking the garden and saw a vehicle resembling the kind of vehicle Mr. McCrory drove in the driveway of his

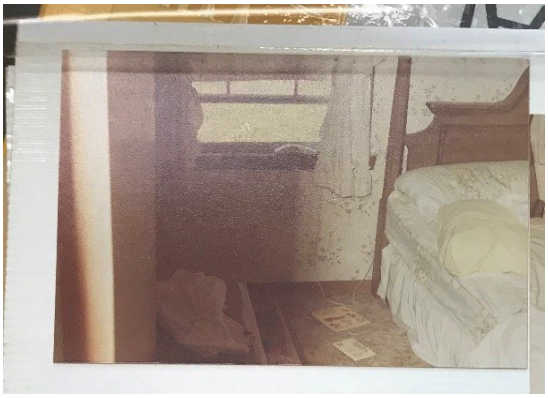
wife's house. (R-203.) Two other neighbors who were out at the same time, who were certain about what morning it was, and who were closer to the decedent's home than the teenage, testified that they did not see any such vehicle on the morning in question. (R-332-41.) The case against Mr. McCrory was thin, and the District Attorney knew it. There was no physical evidence, no motive, no witness, and no confession; the only physical evidence police did have—hairs in the victim's hand and other items recovered from the scene—did not inculpate Mr. McCrory.

Faced with this reality, select members of the victim's family invoked a little-used Alabama law that allowed them to hire private prosecutors to prosecute the case against Mr. McCrory. The family hired and paid for the services of the father-son duo Frank and Harvey Tipler to prosecute Mr. McCrory. *McCrory v. State*, 505 So. 2d 1272, 1279-80 (Ala. Crim. App. 1986). These retained prosecutors quickly realized they would need physical evidence to support the prosecution they were hired to win. It was the son, Harvey Tipler (later disbarred and convicted of solicitation of murder),[4] who flew to Florida to meet with, and retain, forensic dentist Dr. Richard Souviron, who had just found fame for his role in securing Ted Bundy's capital conviction. Harvey Tipler would return to Alabama with Dr.

[4] Years later Harvey Tipler was sentenced to thirty years in prison for attempting to have an Assistant State's Attorney murdered. *See* "Tipler sentenced to 30 years," *The Andalusia Star News* (June 3, 2013), *available at* https://www.andalusiastarnews.com/2013/06/03/tipler-sentenced-to-30-years/. He was sentenced to a concurrent term of eighty months for racketeering and the unlicensed practice of law. *Id.* Before passing away, he told Mr. McCrory's post-conviction counsel that his entire closing argument—a transcript of which has never been located—revolved around the bite mark evidence. Counsel proffered that evidence in a pleading, but the court refused to consider it.

Souviron's testimony in tow: Mr. McCrory bit the victim during the murder, without doubt. The case against Mr. McCrory was made.

Meanwhile, leads suggesting that another man, Alton Ainsworth, had committed the murder, went unpursued. Mr. Ainsworth worked on the construction grounds adjacent to the victim's home and usually arrived to work in the early morning hours when the murder was believed to have occurred. Mr. Ainsworth was known to wear a red bandana; a red bandana was found next to the victim. (R-95, 136-40, 391-92.) A window at the victim's home facing the construction yard was found open:



And just weeks later, Mr. Ainsworth committed a home invasion and rape nearby; he would plead guilty and be sentenced to twenty years for that crime. (Rule 32 Petition, Ex. D.) None of this outdid the bite mark.[5]

Absent any other evidence, the trial turned on the bite mark evidence:

- There were no eyewitnesses to the crime;
- There was no blood, fingerprints, or other forensic evidence implicating Mr. McCrory, nor did the nail clippings taken from the decedent for forensic analysis incriminate Mr. McCrory in any way (R-108-10);

[5] For reasons thus far unexplained, the local police department has claimed that it destroyed all of the physical evidence that otherwise could have been, today, tested for DNA.

- Mr. McCrory consented to searches of his body, car, and home, revealing no incriminating evidence despite the bloody nature of the crime (R-186-88, 193);

- Mr. McCrory's statements to the police (and ensuing trial testimony) were consistent and exculpatory (R-157-62, 182-85, 349-89); and

- The hair found clutched in the decedent's hand did *not* belong to Mr. McCrory (R-269, 290-91).

The private prosecutors knew all this. So they saved Dr. Souviron's unimpeached "scientific" expert trial testimony for the close of their case, to effectively seal Mr. McCrory's conviction:

> Q. Let me ask you this then, doctor. In your expert opinion, based on the evidence which has been presented to you, are these teeth marks?
>
> A. Yes.
>
> Q. Again, based on your expert opinion and on the evidence which has been presented to you, did these teeth marks occur at or near the time of death of [Julie Bonds]?
>
> A. Yes.
>
> Q. Again, in your expert opinion and based on the evidence presented to you, were these teeth marks made by Charles McCrory?
>
> A. Yes.

(R-314-15.) This testimony about the bite mark was *the only evidence* that directly linked Mr. McCrory to the crime. The prosecution's case was a simple syllogism: the perpetrator bit the victim during the murder; Mr. McCrory was the biter; therefore Mr. McCrory was the murderer.

And so Charles McCrory was convicted and faced a mandatory life sentence. Rather than immediately revoke his bond—Mr. McCrory had been free, on a murder charge, pending trial—the judge let him go home, confident that he would return and surrender himself for a life in prison. (R-434.) When Mr. McCrory indeed returned a few weeks later to be sentenced in the fall of 1985, he was sentenced to life in prison.

B. The Downfall of Bite Mark Evidence

Beginning with cases in 1975 and 1976, courts began to permit forensic dentists to identify the source of a given bite mark by comparing a mark of unknown origin to a cast of a known dentition. Saks, Michael J. et al., "Forensic bite mark identification: weak foundations, exaggerated claims," J. Law. Biosci. 538, 543-46 (Nov. 23, 2016) [hereinafter "Weak Foundations"]. Bite mark comparison evidence gained "widespread credulity" beginning in the mid-1970s and throughout the next three decades, including up to and through Mr. McCrory's trial. It was during this time that the Alabama Court of Criminal Appeals, primarily relying on California precedent from the 1970s, Ted Bundy's case, and the Wisconsin case of Robert Lee Stinson,[6] accepted bite mark evidence as an appropriate area for expert witness testimony in the *Handley* case that would decades later be cited to support Mr. McCrory's conviction below. *See Handley v.*

[6] Robert Lee Stinson, whose case was relied on by *Handley* and the court below in support of the use of bite mark evidence, was innocent. He served twenty-three years in prison for a rape and murder he did not commit thanks to faulty bite mark evidence. *See* Innocence Project, "Description of Bite Mark Exonerations," https://innocenceproject.org/wp-content/uploads/2023/10/DESCRIPTION-OF-BITE-MARK-EXONERATIONS-Updated-10.18.23.pdf [hereinafter "Bite Mark Exonerations].

State, 515 So. 2d 121, 130 (Ala. Ct. Crim. App. 1987) (citing *Bundy v. State,* 455 So. 2d 330, 349 (Fla. 1984)); *see also State v. Stinson,* 397 N.W.2d 136, 137 n.2 (Wis. 1986); *People v. Slone,* 76 Cal. App. 3d 611 (Cal. Ct. App. 1978); *People v. Marx,* 54 Cal. App. 3d 100 (Cal. Ct. App. 1975).

Doubt surrounding bite mark evidence began to grow when scientists "realiz[ed] that the field stands on quite limited foundation of scientific fact, that there is 'a lack of valid evidence to support many of the assumptions and assertions made by forensic dentists during bite-mark comparisons,' and that error rates by forensic dentists are perhaps the highest of any forensic identification specialty still being practiced." Weak Foundations at 548 (citations omitted).[7]

Doubt about the reliability of the discipline accelerated in 2009, following a report issued by the National Academy of Sciences,[8] which observed that there was a lack of criteria by which "to determine whether the bite mark can be related to a person's dentition and with what degree of probability." National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 174 (2009) [hereinafter "NAS Report"]. The NAS Report concluded that no scientific studies supported the notion that bite marks can contain sufficient detail to support a source identification, observing that in "numerous instances,

[7] This publication's thirty-eight authors included forensic dentists, forensic science professors, statistics professors, and lawyers.

[8] The National Academy of Sciences is an authoritative body with an independent, objective, diverse, and accomplished membership. "Members are elected to the National Academy of Sciences in recognition of their distinguished and continuing achievements in original research. Membership is a widely accepted mark of excellence in science and is considered one of the highest honors that a scientist can receive." National Academy of Sciences, "Membership Overview," http://www.nasonline.org.

experts diverge widely in their evaluations of the same bite mark evidence." *Id.* at 176.

Adding to the emerging doubt about the accuracy of bite mark testimony was the ever-growing list of exonerations. Dr. Souviron himself has three wrongful convictions and one wrongful murder indictment attributed to him. *See* Bite Mark Exonerations. "The rise and coming fall of bite mark evidence has left a trail of miscarriages of justice in its path. A series of individuals have been exonerated by DNA testing in cases involving bite mark evidence and still more have been exonerated by non-DNA evidence." Weak Foundations at 566. Today, at least thirty-nine people in the United States have been wrongfully indicted or convicted based on bite mark testimony. *See* Bite Mark Exonerations. "It has taken more than three decades to begin to undo the massively unsupported field of bite mark evidence." Weak Foundations at 567.

Then in 2016 the Texas Forensic Science Commission published a report, which was the product of a six month in-depth investigation solely into the reliability of bite mark evidence. *See* Texas Forensic Science Commission, *Forensic Bite Mark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney – Final Report* (Apr. 12, 2016). Citing the Construct Validity Test, a study co-authored by Dr. Adam Freeman (one of the experts who testified on behalf of Mr. McCrory in this case), the Texas Commission found that experts in the field could not even reliably diagnose an injury as a human bite mark and unanimously issued several recommendations for reform. Most significantly, the

Commission placed an indefinite moratorium on the use of bite mark evidence in Texas criminal courts. *Id.* at 11, 15-16. The Commission 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. Moreover, the Commission found that "the overwhelming majority of existing research does not support the contention that bite mark comparison can be performed reliably and accurately from examiner to examiner due to the subjective nature of the analysis." *Id.*

Since the Commission's report, every scientific entity that has examined the scientific foundations of bite mark analysis has come to the same conclusion: the technique is scientifically indefensible. For example, in 2016, the President's Council of Advisors on Science and Technology issued a Report to the President entitled *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*" [hereinafter "PCAST Report"].[9] The PCAST Report was the culmination of an "extensive literature review" with input from the Federal Bureau of Investigation, the National Institute of Standards and Technology, and "forensic scientists and practitioners, judges, prosecutors, defense attorneys, academic researchers, criminal-justice-reform advocates, and representatives of Federal agencies." PCAST Report at x. The Council reviewed the scientific state of seven feature-comparison forensic methods, including bite mark analysis. The

[9] The President's Council of Advisors was established by President Dwight D. Eisenhower and consists of "the Nation's leading scientists and engineers." PCAST Report at iv.

PCAST Report observed that the empirical studies that have investigated whether forensic odontologists can accurately identify the source of an alleged bite mark reveal that "the observed false positive rates were so high that *the method is clearly scientifically unreliable at present*." PCAST Report at 87 (emphasis added). Its conclusion was unequivocal:

> [B]itemark 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 bite mark and cannot identify the source of [a] bite mark with reasonable accuracy.

PCAST Report at 87; *see also* Suzanne Bell, et al., "A call for more science in forensic science," *Proceedings of the National Academy of Sciences of the United States of America* (May 1, 2018), *available at* https://www.pnas.org/content/115/18/4541.full (recognizing that today the "most egregious case" of forensic methods that "have never been validated" and "are clearly invalid" is bite mark identification, "which has been discredited by both scientific studies and false convictions based on the method").

In early 2019, a forensic dentist summarized the state of the forensic odontology discipline as follows:

- A lack of valid evidence to support many of the assumptions and assertions made by forensic dentists during bite-mark comparisons.
- Error rates by forensic dentists are perhaps the highest of any forensic identification specialty still being practiced.
- Bite mark testimony has been introduced in criminal trials without any meaningful scientific validation, determination of error rates, or reliability testing.

C. Michael Bowers, "Review of a forensic pseudoscience: Identification of criminals from bite mark patterns," 61 J. of Forensic & Legal Medicine 34, 35 (Feb. 2019). As to the high incidence of wrongful convictions, the author observed, "the prosecutorial dental experts in these exoneration cases generally had the highest level of forensic dental training, professional accolades and experience . . . [yet it is now known that] these dentists provided shockingly erroneous results to the courts." *Id.* at 36.

Most recently, still another scientific entity undertook a major investigation into the validity and reliability of bite mark evidence: the National Institute of Standards and Technology (NIST).[10] NIST came to the following conclusion: "Forensic bite mark analysis *lacks a sufficient scientific foundation* because the three key premises of the field are not supported by the data. First, human anterior dental patterns have not been shown to be unique at the individual level. Second, those patterns are not accurately transferred to human skin consistently. Third, it has not been shown that defining characteristics of that pattern can be accurately analyzed to exclude or not exclude individuals as the source of a bitemark." NIST Report at 2 (emphasis added). NIST cited, as an authority for its conclusions, the study conducted by Dr. Adam Freeman, discussed below as one of Mr. McCrory's experts. NIST noted that the research "casts doubt on the utility of bitemark

[10] Over several years of study, "Over 400 sources were considered via literature searches and input from previous efforts by the National Institute of Justice Forensic Technology Center of Excellence. Our NIST review also utilized input from an October 2019 BiteMark Thinkshop organized by the Center for Statistics and Applications in Forensic Evidence (CSAFE) where experts and stakeholders associated with bitemark analysis were convened to discuss key issues." NIST Interagency Report, "Bite Mark Analysis: *A NIST Scientific Foundation Review*," at i (Mar. 2023), *available at* https://nvlpubs.nist.gov/nistpubs/ir/2023/NIST.IR.8352.pdf [hereinafter "NIST Report"].

analysis as a viable method of excluding or not excluding individuals." NIST Report at 22.

Informed by this research, changes to Guidelines issued by the American Board of Forensic Odontology (ABFO), the increasing number of bite mark-induced wrongful convictions, and his almost six decades of experience, Dr. Souviron newly reviewed his file and signed an affidavit fully recanting his trial testimony against Mr. McCrory.

C. The Post-Conviction Hearing

On April 28, 2021, prior to the start of the post-conviction evidentiary hearing, the State offered Mr. McCrory a plea to time-served. He declined to plead guilty to a crime he did not commit, despite the promise of being released from prison without any restrictions that very same day, nearly four decades after his wrongful conviction.

At the hearing, Dr. Souviron, via a sworn affidavit entered into evidence, attested that:

> 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."*

Affidavit of Richard R. Souviron, D.D.S. at ¶ 21 (R. 32 H'ng Def. Ex. 3) (emphasis added).

The prosecution did not contest Dr. Souviron's expert opinion. Nor could it. Given the corroborating expert testimony presented at the post-conviction hearing and the modern state of scientific knowledge regarding the unreliability of bite mark evidence, the prosecution could not identify a single expert in the field, including its own trial expert, to defend the evidence used to convict Mr. McCrory. Instead, the post-conviction hearing testimony established that the injury that at trial was testified to have been inflicted by Mr. McCrory's teeth was scientifically unsupportable. Rather, the science says it was not inflicted by teeth at all. This conclusion was further supported by two renowned forensic dentists presented by Mr. McCrory.

Drs. Cynthia Brzozowski and Adam Freeman testified that they traveled to testify in this case out of an "ethical and civic responsibility." (R. 32 H'ng 17, 55.) They did so without being paid for their work, and each suffered a financial loss to be away from their respective practices to testify. (R. 32 H'ng 17, 55.) Both testified that, like Dr. Souviron, at one point in their forensic dentistry careers, they believed bite mark evidence could be probative in court. (R. 32 H'ng 17, 56.) But advances in scientific understanding, recent scientific studies, the lack of proficiency testing among forensic dentists, and the growing number of wrongful convictions attributable to bite mark evidence led them to see the error of their past beliefs.

Dr. Brzozowski candidly admitted that when she became a member of the ABFO in 2006, she believed that bite mark analysis was based on valid science; however, she no longer does, for several reasons. First, there are no scientific

studies that validate the accuracy and reliability of bite mark analysis. To the contrary, there are studies that demonstrate bite mark analysis is grossly unreliable. Second, there have been three independent scientific bodies that have concluded, after extensive research and investigation, that bite mark evidence is unreliable: the Texas Forensic Science Commission,[11] the National Academy of Sciences,[12] and the President's Council of Advisors on Science and Technology.[13] Third, no studies have been conducted to attempt to validate the methods underlying bite mark analysis and comparison. And fourth, there is an astonishing number, ever-increasing, of wrongful convictions attributable to the use of bite mark evidence. (R. 32 H'ng 17-18.)

Dr. Brzozowski testified, unimpeached, that she reviewed photographs of the evidence in this case and, applying today's scientific understanding, determined that the injury in this case was "not a human bite mark." (R. 32 H'ng 34.) Because the injury was not a bite mark, a conviction based on Dr. Souviron's testimony cannot stand.

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[11] After a six-month investigation, the Texas Forensic Science Commission "concluded that the scientific studies that we have today do not support the reliability of bite mark methods . . . and they recommended a moratorium on bite marks in criminal cases in the State of Texas until such studies are done." (R. 32 H'ng 22-23.)

[12] The National Academy of Sciences "stated that there's no scientific basis for identifying an individual to the exclusion of all other potential people based upon a bite mark in skin. We do not have any database for tooth characteristics for bite mark patterns to substantiate the rarity of such a claim." (R. 32 H'ng 20.) That is precisely the testimony Dr. Souviron offered at trial. (R-314-15.)

[13] The President's Council of Advisors on Science and Technology "said that after reviewing the critical literature for bite marks, they concluded there's no foundational validity for bite mark methods . . . [and] they recommended not devoting significant funding or resources because the prospect of developing it into a scientifically valid method is very low." (R. 32 H'ng 21-22.)

Dr. Freeman corroborated Dr. Brzozowski's testimony. Dr. Freeman testified that he became a member of the ABFO in 2009 and eventually served as the president of the organization in 2016. When he first began studying bite marks in 2003, he accepted the field as being based on valid science. However, Dr. Freeman no longer holds that belief. Dr. Freeman testified that his belief changed, in large part, after the results of a study he conducted, along with Dr. Iain Pretty, called the Construct Validity Test, which was presented to the American Academy of Forensic Sciences. (R. 32 H'ng 63.) The Construct Validity Test was designed to answer the threshold question in bite mark analysis: whether board-certified odontologists can reliably determine if an injury is a bite mark or not. He testified that the study revealed that the answer is no: there was widespread disagreement about what even constituted a bite mark in the first place.[14] (R. 32 H'ng 58-69; R. 32 H'ng Pet. Exs. 4, 5). This study, and the evolved consensus of the scientific community, led to the ABFO deciding to reject all "matching" testimony, like the kind Dr. Souviron offered at the trial of this case. Dr. Freeman characterized this ABFO change as a seminal moment. (R. 32 H'ng 57.)

Dr. Freeman also reviewed the evidence in Mr. McCrory's case and testified that—under today's ABFO Guidelines—it was his expert opinion that the injury was not a bite mark in the first place. (R. 32 H'ng 77.) In addition, he confirmed what Dr. Souviron stated in his affidavit: today, no forensic dentist could or would

[14] In the study, one of the only injuries in which there *was* substantial agreement between the dentists that it was a human bite mark turned out *not*, in fact, to be a bite mark; it was an injury created by a boxcutter. (R. 32 H'ng 66-67; R. 32 H'ng Pet. Ex. 4).

testify in court that the injury in this case was a bite mark inflicted by Mr. McCrory's teeth. (R. 32 H'ng 78-79.) Dr. Freeman testified at his own cost because,

> [I]t's the right thing to do . . . and it's important for people to understand what's going on with wrongful convictions, the science behind bite marks, what we know today, what's at stake. Again, what's at stake here is the life and liberty of people, and that life and liberty is based on really what is junk science.

(R. 32 H'ng 79.) This is testimony offered by a past president of the ABFO, and the prosecution has at no time ever in this case contested that what Dr. Freeman called "junk science" was indeed used to convict Mr. McCrory.

In sum, all three experts were unanimous and firm: the injury was *not* made by Mr. McCrory's teeth. To conclude otherwise would be to engage in unsupported "speculation" that contradicts the uncontradicted expert evidence. (R. 32 H'ng 43.)

The State of Alabama did not contest any of the new evidence regarding the unreliability of bite marks at the post-conviction hearing. Rather than opposing any of this new evidence, which has compelled courts and prosecutors across the country to concede wrongful convictions obtained based on unreliable bite mark testimony, the State had an investigator from its office read into the record cherry-picked portions of direct testimony from select witnesses. The only true witness the State called was Huey Dewayne Meeks, the purported eyewitness, a teenager staying with his grandfather, who testified at the original trial. Notably, the prosecution did *not* call him to testify about what he remembered about the case. Instead, it called him to read his prior testimony into the record, which he had such difficulty doing that the post-conviction court reconsidered its overruling of a

defense objection, struck his testimony, and removed him. (R. 32 H'ng 162-63, 170-71.) The State then had its own investigator read Mr. Meeks's trial testimony into the record. (R. 32 H'ng 171-73.)

Mr. Meeks's trial testimony had been that when he awoke on what *might* have been the morning of May 31, 1985, he happened to step outside of his grandfather's home at approximately 5:00 a.m. to check on the garden, despite it still being dark, and saw a car that looked similar to Mr. McCrory's parked in the victim's driveway. (R-203.)

The investigator at the post-conviction hearing who read Mr. Meeks's and other cherry-picked direct testimony did not read James Whitaker's testimony, nor did he read Shannon Wiggins's testimony, both of whom were awake at the same time, were closer to the decedent's home, and testified that they did *not* see a Bronco parked there around the time that Mr. Meeks claimed he did. (R. 32 H'ng 174-75.) James Whitaker was a neighbor who, unlike Mr. Meeks, did live directly across the street from the victim and was sure he was awake at 5:00 that morning and outside getting the newspaper shortly after that. (R-333-34.)

Given the evidence at the post-conviction hearing, the State's story in closing argument changed remarkably, from a theory at trial centered on bite mark evidence to a story at post-conviction that was newly manufactured, unsupported by the evidence, and untethered to reality. As it had to be; the State's only direct evidence of guilt was gone.

D. The Denial of Post-Conviction Relief

After the hearing, the Court requested post-hearing briefing. Almost ten months later, the court added one sentence to the four-page order the State had written, affixed its signature, and denied relief, without addressing any of the arguments put forth in Mr. McCrory's extensive post-hearing briefing or engaging with any of the new facts Mr. McCrory presented during the hearing.[15]

After accepting as true the evidence presented by the forensic dentists at the post-conviction hearing that the injury was not a bite mark and could not be compared to any dentition by any forensic expert, the court ruled that 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." Order at 2-3. In other words:

- The court accepted that board-certified experts, each of whom had decades of experience, agree the injury is *not* a bite mark.
- And the court accepted that, given the lack of scientific validity of the entire field of bite mark analysis, no expert could compare the injury to a dentition.
- *But, nevertheless, the court found that a lay jury could do what the experts admit is scientifically unjustified: compare a dentition to a photograph of an injury of unknown origin or type, conclude*

[15] Judge J. Skelly Wright's admonishment was cited with approval by this Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964): "I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. . . . When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the courts of appeals in determining why the judge decided the case." *See also Jefferson v. Upton*, 560 U.S. 284, 292-94 (2010) (criticizing the verbatim adoption of a party's proposed findings when the circumstances cast doubt on the judge's engagement with the underlying facts).

> *that the injury is a human bite mark, and determine that Mr. McCrory inflicted the bite and did so at the time of the murder.*

The court also failed to *even mention* in its order, let alone address, the single-most important piece of unimpeached evidence adduced at the state post-conviction hearing: the State's *own* forensic dentist from trial fully recanted his trial testimony. *See* Appendix A. Lastly, the court rejected Mr. McCrory's federal due process claim. *Id.* at 4.

E. The Appeal

One of the five appellate judges on the Alabama Court of Criminal Appeals who heard the case, deliberated with the other judges, and affirmed the denial of post-conviction relief had previously, in her role as an assistant attorney general, authored the State's brief against Mr. McCrory on direct appeal. *See* Br. of Appellee, *McCrory v. State*, No. 4 Div. 609 (June 30, 1986). As Mr. McCrory pointed out during his post-conviction proceedings, in that brief the now-judge recognized the critical significance of Dr. Souviron's testimony to the outcome, arguing that "teeth marks in the victim's arm made during her murder were identified as being made by Appellant's teeth." *Id.* at 17. Now as a judge asked by the State to uphold the conviction on a different theory, the former advocate against Mr. McCrory saw things a little differently.

But she did not recuse. So in his application for rehearing, Mr. McCrory argued that the failure to recuse was improper. The court agreed, and it purported to "grant" the application for rehearing and reissue an opinion. The "new" opinion was word-for-word identical, with one exception: it ended with a notation that, this

time, the conflicted judge was "recused." *See* Appendices B & C. In addition to affirming the lower court's opinion on state law grounds, the appellate court also held that Mr. McCrory was not entitled to relief on his federal due process claim. Appendix C at 33. The Alabama Supreme Court denied certiorari. *See* Appendix D.

REASONS FOR GRANTING THE WRIT

To date, there have been thirty-nine documented wrongful convictions and indictments in the United States on the account of unreliable bite mark testimony of precisely the kind used against Charles McCrory in this case.[16] Nearly all of those individuals have been exonerated, and few, if any bite mark-based convictions remain on the books—aside from this one. The parties here *agree* that there would not (and, consistent with modern science, could not) be any bite mark evidence admitted at a retrial of Mr. McCrory today. Yet the post-conviction court denied a new trial, based on a novel, and completely unsupportable, way to uphold Mr. McCrory's conviction: the jurors could, without any expert testimony, decide *for themselves* that the decedent had a bite mark on her person, and that it was inflicted by Mr. McCrory, even though there is now no evidence or science to support this speculation.[17] An Alabama appellate court affirmed in a decision that

[16] The exonerees' names are as follows: Keith Harward, Robert Stinson, Gerard Richardson, Willie Jackson, Roy Brown, Ray Krone, Calvin Washington, Joe Williams, James O'Donnell, Levon Brooks, Kennedy Brewer, Bennie Starks, Michael Cristini, Jeffrey Moldowan, Anthony Keko, Harold Hill, Dan Young, Jr., Greg Wilhoit, Crystal Weimer, Steven Chaney, William Richards, Alfred Swinton, Sherwood Brown, John Kunco, Gary Cifizzari, Sheila Denton, Robert Duboise, Eddie Lee Howard, Gilbert Poole, Leigh Stubbs, Tammy Vance, Albert Schweitzer. *Each was wrongfully convicted due to bite mark evidence and has since been released from wrongful incarceration, notwithstanding so-called "other evidence" that incriminated them*. *See* Bite Mark Exonerations.

[17] This reasoning is both perplexing and concerning, to say the least—particularly because it is being used to uphold a conviction and life sentence. Imagine a post-conviction hearing involving newly-available DNA testing at which three forensic biologists unanimously agreed that "the DNA profile

was further infected by the participation of a judge who had previously litigated the State's appeal against Mr. McCrory in his direct appeal.

Those rulings cannot withstand due process analysis, so this Court should intervene.

I. Lower Courts Are Split on Whether Due Process Prohibits a Conviction Based on Subsequently Discredited Forensic Evidence, and the Alabama Courts, in Finding No Due Process Violation in this Bite Mark Case, Erred.

When a conviction is based on expert testimony that later is completely eliminated from the case—whether because it has been recanted, later deemed false, or shown to be contrary to scientific developments (or, as in this case, all of the above)—due process and fundamental fairness require relief. "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 564 (1967); *see also Estelle v. McGuire*, 502 U.S. 62, 70 (1991) ("[T]he Due Process Clause guarantees fundamental elements of fairness in a criminal trial."). Accordingly, "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment."[18] *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also United States v. Ausby*, 436 F. Supp. 3d 134, 148 (D.D.C. 2019) (government conceding, in the case of false hair

found at the crime scene excluded the defendant because his alleles were not present in the DNA sample." Then imagine the post-conviction judge saying, "Well, the jury could have compared the defendant's profile to the crime scene profile for itself and decided that the alleles *were* present, so the conviction stands." Such a ruling would be repugnant to basic notions of justice. Likewise here.

[18] The State has not disputed—and thus now knows—the expert testimony used to convict Mr. McCrory is false. *Cf. Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting from denial of certiorari).

matching evidence, that "knowledge of the falsity should be imputed to the prosecution"). When evidence turns out to be false or misleading, the use of that evidence constitutes a due process violation, and the conviction cannot stand if "the false testimony . . . in any reasonable likelihood [could] have affected the judgment of the jury." *Napue*, 360 U.S. at 271; *see also Howard v. State,* 945 So.2d 326, 370 (Miss. 2006) ("In adjudicating a claim involving the use of false testimony [in a bite mark case], the 'any reasonable likelihood' standard has been applied to determine materiality.") (citations omitted). The lower court's holding to the contrary conflicts with this Court's precedent and that of several circuits.

An increasing number of courts have recognized that a conviction violates due process if it was based on scientific evidence now known to be faulty and unreliable. For example, in *Ege v. Yukins*, the Sixth Circuit granted habeas relief on due process grounds and, *citing the highly prejudicial nature of bite mark identifications specifically*, concluded that "improper admission of certain evidence injurious to the defendant" violates due process when it "deprive[s] a defendant of her right to a fair trial." 485 F.3d 364, 376-78 (6th Cir. 2007). Then, in 2012, the Third Circuit concluded that due process is violated when a conviction is "predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony." *Han Tak Lee v. Glunt,* 667 F.3d 397, 403 (3d Cir. 2012). A few years later, the Ninth Circuit agreed: "We join the Third Circuit in recognizing that habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence

'undermined the fundamental fairness of the entire trial.'" *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (quoting *Lee v. Houtzdale SCI,* 798 F.3d 159, 162 (3d Cir. 2015).

Other courts, like those in Alabama, think otherwise. The appellate court here found no due process violation notwithstanding that the State's own expert fully recanted his trial bite mark testimony; his recantation was corroborated by two additional experts, who also explained that under modern forensic scientific principles, *no expert* could identify the mark as a bite mark, much less for identification purposes; and the prosecution did not even attempt to argue that the expert evidence admitted at trial would be admissible today. Rather, the Alabama courts relied on reasoning that is belied by modern science and inconsistent with basic evidentiary principles: "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." Appendix A at 2-3. *See also Nicholls v. Long*, No. 20-1159, 2022 WL 211617 (10th Cir. Jan. 25, 2022) (acknowledging that some circuits recognized a due process right sounding in newly developed scientific evidence but declining to follow those decisions); *Pierre v. Vannoy*, 891 F.3d 224, 230 (5th Cir. 2018) (Ho, J., concurring) (arguing that "false trial testimony does not implicate a defendant's due process rights if the State was unaware of the falsity at the time the testimony was given"); *People v. Prante*, No. 127241, 2023 WL 3514382, at *11 (Ill. May 18, 2023) (acknowledging that some federal courts "have recognized

a due process claim where the defendant alleges the improper admission of subsequently discredited forensic evidence," but concluding that no such right exists in Illinois).

Today, as demonstrated at the evidentiary hearing and not contested by the State, there is no basis for the admission of bite mark testimony—the technique has been entirely discredited. Additionally, there are no experts, including the prosecution's trial expert, who would say there is a bite mark in this case. Rather, it is now known, and both widely and generally accepted in the scientific community, that *forensic dentists themselves* cannot do what the lower court reasoned that lay jurors could do to uphold Mr. McCrory's conviction. *See, e.g.*, NIST Report at 24; PCAST Report at 87; NAS Report at 176. But lay jurors are not at liberty to rely on baseless and incorrect forensic speculations in support of conviction, particularly where it is wholly undermined by the unanimous expert testimony presented and available.

At a trial today, *the State could not place any expert testimony before a jury* that could link the mark on the victim's body to Mr. McCrory *at all*. Under the facts of this case, due process requires that Mr. McCrory receive a new trial. Alabama, it seems, does not recognize such a right—even under these egregious circumstances—whereas some federal circuit courts have recognized such a right. Thus, this Court should grant certiorari, hold that there is a due process right not to be convicted based on forensic evidence later discredited, and reverse.

II. The Involvement of a Conflicted Judge in the Decision Below Violates *Williams v. Pennsylvania* and Warrants Summary Reversal.

"Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quotation omitted). The test is "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter," there is an unconstitutional potential for bias to infect the proceedings. *Id.* "[U]nder the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id.* at 8; *cf. Liteky v. United States*, 510 U.S. 540, 543-45 (1994) (holding that "earlier judicial proceedings conducted by the same judge" can require recusal).

Here, Judge Elizabeth Kellum was previously the State's advocate in Mr. McCrory's case—she signed the brief in favor of affirming Mr. McCrory's conviction on direct appeal as Assistant Attorney General. *See* Br. of Appellee, *McCrory v. State*, No. 4 Div. 609 (June 30, 1986). In that brief, Judge Kellum recognized the critical significance of the bite mark evidence to Mr. McCrory's conviction, arguing that "teeth marks in the victim's arm made during her murder were identified as being made by Appellant's teeth." *Id.* at 17.

As such, Judge Kellum had significant, personal involvement as a prosecutor in a critical decision regarding Mr. McCrory's case. This is precisely the kind of "impermissible risk of actual bias" that mandates recusal. *Williams*, 579 U.S. at 8. Because an observer would "reasonably question" Judge Kellum's

impartiality, her participation in this appeal violated Mr. McCrory's constitutional right to due process. *See* U.S. Const. amend. XIV.

Indeed, the lower court acknowledged the impropriety of Judge Kellum's initial participation in this case through her ex-post recusal. The only difference between its original December 9, 2022, opinion and its substitute February 10, 2023, opinion is a notation at the end: "Kellum, J., recuses herself." It is otherwise identical. Reissuing the same opinion without Judge Kellum's signature does not remedy the conflict. Nor does it "cure" the influence Judge Kellum's participation in the deliberations had on the December 2022 opinion and the identical February 2023 opinion.

The lower court's decision to the contrary violates *Williams*. The 2016 *Williams* decision involved the Supreme Court of Pennsylvania's vacatur of a decision granting postconviction relief to a person on death row. 579 U.S. at 4. There, one of the justices "had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case." *Id.* This Court affirmed that "an unconstitutional potential for bias exists when the same [judge] serves as both accuser and adjudicator in a case," reasoning that there is an inevitable risk that the judge will either be unable to "set aside any personal interest" in the case or will "consciously or unconsciously avoid the appearance of having erred or changed position." *Id.* at 8-9 (internal quotation marks and citation omitted).

This Court went on to hold that "the appearance of bias demeans the reputation and integrity not just of one jurist, but of *the larger institution of which*

he or she is a part." *Id.* at 15 (emphasis added). Indeed, a "judge's own personal knowledge and impression of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court." *Id.* at 9-10 (internal quotation marks and citation omitted). Because "[t]he deliberations of an appellate panel . . . are confidential[,] . . . it is neither possible nor productive to inquire whether the jurist in question might have influenced the view of his or her colleagues during the decisionmaking process." *Id.* at 14-15. Thus, "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Id.* "The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position," which "does not lessen the unfairness to the affected party." *Id.* at 15.

Judge Kellum's original involvement in the lower court's deliberations indelibly tainted its original opinion, and by extension its *identical* substitute opinion. This Court in *Williams* recognized that there may be ways for the balance of a court to constitutionally rehear a petitioner's case post-recusal of a conflicted judge. *Id.* at 16. But here, the lower court adopted no such remedy and instead simply reissued its original opinion. This conflicts with *Williams*—the unconstitutional appearance of impropriety remains and Mr. McCrory's due process rights have been violated. This Court should grant certiorari and summarily reverse because Mr. McCrory "must be granted an opportunity to present his claims to a court unburdened by any possible temptation not to hold the balance nice, clear

and true between the State and the accused." *Id.* at 16 (alteration adopted) (internal quotation marks and citation omitted).

CONCLUSION

This Court should grant certiorari and reverse the judgment of the Alabama Court of Criminal Appeals.

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Appendix A

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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

Appendix B

Rel: December 9, 2022

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

WINDOM, Presiding Judge.

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.
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> "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.
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> "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.
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> "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.
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> "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.
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> "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.
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> "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:
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> > "'Q. Again, in your expert opinion and based on the evidence presented to you, were these teeth marks made by Charles McCrory?
> >
> > "'A. Yes.
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> "([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.
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> "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).
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> "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.

AFFIRMED.

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

Appendix C

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.

Appendix D

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

CERTIFICATE OF SERVICE

I certify that, in accordance with Supreme Court Rule 29, on December 8, 2023, I served a copy of the foregoing via first class mail, postage prepaid, and via email, upon counsel for the Respondent.

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