No. 23-6232

In the Supreme Court of the United States

CHARLES C. MCCRORY,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 1985, a jury found Charles McCrory guilty of murdering his estranged wife. At trial, in addition to presenting eyewitness testimony placing McCrory at the scene of the murder, the State presented an expert on bitemark comparison evidence who testified that a wound on the victim's arm was caused by a tooth mark that could be matched to McCrory.

Since McCrory's trial, bitemark comparison evidence has come under scrutiny for its purported unreliability. In 2020, represented by his current counsel, McCrory filed his second petition for postconviction relief pursuant to Alabama Rule of Criminal Procedure 32.1. He raised two grounds for relief. First, he argued that the shift in understanding concerning bitemark evidence constituted "[n]ewly discovered material facts" that "establish[ed]" his innocence under Rule 32.1(e). Second, he claimed that Rule 32.1(a), which affords relief under "[t]he constitution of the United States," mandated a new trial, reasoning that "[a] conviction based on evidence now known to be unreliable and invalid cannot withstand the scrutiny of due process."

The Court of Criminal Appeals affirmed the Rule 32 trial court's finding, following an evidentiary hearing, that McCrory failed to prove by a preponderance of the evidence that the "newly discovered" evidence would have changed the outcome of his trial, thus precluding relief under Rule 32.1(e). And the appellate court affirmed the trial court's denial of McCrory's attempt to bring a federal constitutional challenge under Rule 32.1(a) because (1) McCrory had largely abandoned the claim at the evidentiary hearing, mentioning it "only once, during his closing argument," (2) McCrory "did not address" the State's argument that his petition was procedurally barred, and

(3) the record supported the trial court's finding that McCrory failed to prove by a preponderance of the evidence that he was entitled to relief. McCrory applied for rehearing, arguing for the first time that one of the judges on the appellate court should have recused because she had been involved in McCrory's direct appeal nearly forty years earlier. The court granted the petition, the judge recused, and the court again affirmed.

The questions presented are:

1. Whether the holding by the Alabama Court of Criminal Appeals that McCrory's petition was precluded pursuant to Alabama Rule of Criminal Procedure 32.1 is an adequate and independent state-law ground for the judgment.

2. If the judgment was not based on adequate and independent state-law grounds, whether the Fourteenth Amendment's Due Process Clause requires that an inmate challenging his conviction in state-court postconviction proceedings be granted a new trial whenever scientific evidence is presented at trial and subsequent scientific advancements cast doubt on the accuracy of the evidence.

3. Whether the Due Process Clause affords McCrory additional relief when the conflicted appellate judge recused upon being informed of the conflict and the Court of Criminal Appeals granted rehearing and issued a new opinion without the judge's participation.

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INTRODUCTION

Thirty-nine years ago, Petitioner Charles McCrory was convicted of murdering his wife. Eyewitnesses placed him at the scene of the crime—the home the couple had shared before McCrory left due to his ongoing affair with another woman. Investigators found no signs of forced entry; McCrory was one of the few people with a key. McCrory acted strangely on the day of the murder, carefully ensuring that his actions that morning were recorded and later trailing investigators as they examined the murder scene. He asked investigators questions that revealed he knew more than they did about his wife's death. And at trial, a forensic odontologist testified that—though he couldn't be sure—in his opinion a tooth mark on the victim's body could be matched to McCrory.

In 2002, McCrory sought relief in state-court postconviction proceedings on the basis that scientific developments after his trial cast doubt on the veracity of the bitemark comparison evidence the State had presented. The state court denied the petition and McCrory chose not to appeal. Eighteen years later, he tried again. He filed a second state-court postconviction petition alleging that he was due relief under state law because "newly discovered evidence"—further developments regarding the veracity of bitemark comparison evidence—showed that the jury would not have convicted him had it not been misled by the scientific standards of the day. He also briefly alleged that his due process rights were violated for the same reason.

The state court held an evidentiary hearing and denied McCrory's petition. "[E]ven absent" the expert testimony McCrory challenged, the court found, "the evidence against [McCrory] was sufficient for a rational finder of fact to reasonably

exclude every hypothesis except that of guilt." Pet. App. A at 3. The state appellate court affirmed. In addition to agreeing that McCrory had failed to carry his evidentiary burden, the court explained that McCrory's constitutional claim was precluded because McCrory had not met the requirements for postconviction relief under state law: He had mentioned his due process claim "only once, during his closing argument," at the evidentiary hearing, and he did not even address the procedural bar asserted by the State, despite it being his burden to disprove it. Pet. App. C at 32.

McCrory now seeks review from this Court. The Court should not grant it. The Court lacks jurisdiction to consider McCrory's claims because they were decided on independent and adequate state grounds. Even if the Court could review the decision below, McCrory's argument depends on a radical extension of current precedent that very few courts have been willing to grant—and even then, McCrory's claim would *still* fail under the reasoning he urges this Court to adopt. Last, McCrory's request for summary reversal based on the initial involvement of an appellate judge who later recused is hard to take seriously given that the court of appeals already granted McCrory relief and issued a new opinion without the recused judge's participation. The Court should deny the petition.

STATEMENT OF THE CASE

A. McCrory Murders His Wife.

In June 1985, Charles McCrory was indicted for the brutal murder of his estranged wife, Julie Bonds McCrory. C.913;[1] *see* Ala. Code § 13A-6-2. Though McCrory claims that there was just "one piece of evidence" connecting him to the murder, Pet. 6, the jury heard a very different story.

Julie was found murdered in her home on the morning of May 31, 1985. The day before, Julie and McCrory met with a counselor—separately—to talk about their failing marriage. According to the counselor, McCrory felt that he had married Julie "out of habit," "found Julie to be very mediocre," and much preferred the woman with whom he was having an affair: Gloria Wiggins. C.672-73.

McCrory had started seeing Wiggins a year earlier. C.456-58, 831. They frequently exchanged love letters, introduced at trial, that spelled out McCrory's feelings for her, his growing distance from Julie, and his plans for a future with Wiggins. C.461-87. McCrory told Wiggins: "I know what has to be done for us to enjoy life together as we want to and those things *will be done*. I also realize that it will not be easy to do." C.474-75.

Julie learned of her husband's affair about two months before she was murdered. They separated, and McCrory and Wiggins broke off their physical relationship but continued to speak multiple times a day—a fact McCrory hid from Julie.

[1] Citations to the record are to the certified appellate record in McCrory's postconviction proceeding. "C." refers to the clerk's portion of the record, which includes the original trial transcript (which was admitted as an exhibit); "R." refers to the transcript of the postconviction evidentiary hearing.

C.487, 495-96, 674, 830, 840-41. McCrory had also hidden the truth of his marriage from Wiggins. C.477-81. About a month after their affair was exposed (and the same month Julie was murdered), McCrory wrote to Wiggins:

> I love you so much it honestly hurts. And the last thing that I want is someone else. I'm perfectly happy for the first time with my lover, best friend, companion, partner, crying towel, etc. You have made me realize what life really is and what having someone you care so very much about is living.... No way will I ever look for or allow someone else in my life. I'm honestly happy and completely satisfied with you.

C.468-71.[2] On May 21, just ten days before Julie's murder, Wiggins responded that McCrory seemed to want to just "pick up where we left off." C.464-65. "That may be possible for you," she wrote, "but I'm afraid it's not that easy for me." *Id.* "I do not think we can truly have a future until all the past is dead," she told McCrory. *Id.*

Nine days later, in an after-work counseling session, McCrory told the counselor of his dissatisfaction with Julie and his continued relationship with Wiggins. C.610-11, 672, 834, 1024-25. After the session, Julie picked up the couple's two-year-old son from McCrory's parents' house and stopped by McCrory's apartment to get his dirty laundry. C.611-12, 1025. She left around 8:00 p.m. As soon as she did, McCrory called Wiggins on the telephone. C.487-88, 489-90.

McCrory testified that he went to Julie's house an hour later, around 9:00 p.m. C.612, 835, 1025-26. According to McCrory, he and Julie watched television and had sex in Julie's bedroom. *Id.* McCrory testified that Julie tied his wrists to the bedpost using a "little multi-colored" "belt off of a dress" and that "[t]here was a red bandana"

[2] This letter was written on McCrory's first day working at the Alabama Electric Cooperative, C.468, which was sometime in May of 1985, C.985-86.

they used as well.[3] C.838-39. According to McCrory, he left Julie's house around 10:30 p.m. and called Wiggins when he got to his apartment. C.611-12, 490-91, 803-04, 835, 1026. Then, McCrory says, he went to bed. C.612, 804, 1026.

At some point later that night, Julie was murdered in the house she once shared with McCrory. A neighbor, Wayne Meeks, testified that he was staying at his grandparents' house across the street and was up early that morning to get to his job working construction. C.647-48, 656-57. When he went outside around 5:00 a.m., he saw McCrory's maroon and tan Bronco parked in front of Julie's house. C.648, 655. Meeks said he found the presence of the Bronco noteworthy because he had heard rumors that McCrory and Julie had separated; he thus told his grandfather, who was drinking coffee in the kitchen. C.658-59. As the grandfather recounted, Meeks came into the house and told him: "Mr. Charles I reckon has come home, I see the Bronco out there." C.688. The grandfather testified that he then looked out the sliding glass door and also saw McCrory's Bronco parked next to Julie's car. C.678-79, 688. Shortly afterward, at about 5:30 a.m., he heard the Bronco drive away. C.679.

As for McCrory, after calling Wiggins from his apartment around 7:00 a.m., he arrived at work around 7:30 and immediately called Julie's house. C.491-92, 806-07. This was not normal. McCrory rarely called Julie at that time and had not done so for months. C.815-19. But, the jury learned, McCrory knew that his work logged outgoing calls, so making a call would provide a record of where he was. C.807. When

[3] McCrory's trial testimony concerning the bandana is notable given his present suggestion that the red bandana found at the crime scene should have led police to Alton Ainsworth because "Ainsworth was known to wear a red bandana." Pet. 9.

Julie did not answer, McCrory redialed, and then called his mother. As McCrory explained it, his mother watched his and Julie's son during the day while Julie was at work, so he was ostensibly calling to see if Julie had dropped off their son. She hadn't. C.808. "[R]ight at eight o'clock," McCrory called Julie's work, where she usually arrived "about eight or shortly thereafter." *Id.* She wasn't there, either. At about 8:15 a.m., McCrory's mother called to say that his dad was going to Julie's house to check on her. C.808-09. McCrory left work to meet him there.

On the way to Julie's house in his Bronco, McCrory—who was a volunteer EMT—heard on the emergency radio that a woman was reported "down" either at or near Julie's house. C.518-19, 810. When he arrived, McCrory saw his father, C.H., walking out of a neighbor's house visibly upset. C.811. C.H. had found Julie's front door "cracked open" and discovered Julie's body about eight feet inside. C.514-16. C.H. retrieved the McCrorys' toddler, asleep in his room, and took him to a neighbor's house. C.514-17, 793-94, 812. After speaking briefly with his father, McCrory walked into the house and saw Julie lying on the floor, "obviously dead." He stepped out to calm his dad and then went back in, walking through the crime scene and turning on several lights. C.813.

Emergency personnel then arrived. C.521-22. Investigators found Julie's body lying face down on the living room floor. C.615, 719, 1007-13. Her right wrist had a stocking or pantyhose tied around it. C.719, 723. There were no visible wounds on the back of Julie's body. C.721. While examining the top of Julie's head, the CSI investigator picked through Julie's hair; only then did he see "lacerations underneath the

hair." C.721-22. He noted that Julie had hair fibers clutched in her left hand, and there were two "clumps of hair" on the floor beside her left shoulder. C.616-19, 720-21. Later analysis showed that the hairs were consistent with Julie's hair. C.730-31, 739-40. When the investigator turned Julie's body over, he "found blood coming from the nose and the mouth," which was "consistent with the pattern of blood that was around the body." C.722. He observed "a series of puncture wounds" above Julie's left breast and slight bruising on her left hand. R.722-23. The investigator estimated that Julie was murdered "some time after midnight," "[p]robably[] more towards the early morning hours." C.729.

Investigators did not find any evidence of forced entry. C.541-42. Of course, McCrory still had a key. C.541-42. As McCrory points out (Pet. 9), investigators did find a window in the master bedroom partially opened—not unusual for early summer nights in Alabama. Though McCrory now theorizes that Julie's assailant could have come in that way, the jury knew better: Evidence showed that the window screen remained intact, the spider webs on both the interior and exterior of the screen were undisturbed, the dust in the windowsill appeared untouched, and a telephone rested on the sill. C.583-84, 594-97. Investigators found no signs that a struggle occurred in the house, and the only blood they found was under Julie's body. C.543, 593, 829. They dusted several areas of the house for fingerprints, but the only usable prints (eight total) were on glasses in the kitchen sink; they belonged either to Julie or McCrory. C.580-81, 592-93.

McCrory remained at the crime scene shadowing law enforcement as they conducted their investigation. Some of the questions he asked investigators seemed suspicious. Two investigators testified that McCrory asked them whether the "lick" or "blow" on the back of Julie's head had killed her. C.535, 726. The question was odd because, as both investigators testified, it was impossible to tell just from looking at the body whether there was a "lick" on the back of Julie's head:

> Q. All right, looking at the body and looking at that dead girl's head, could you tell if she had had a lick to the back of her head?
>
> A. No, sir. I could not.

C. 536; *see* C.540-41

> Q. What did he ask you?
>
> A. He asked me at that time was it the blow to the back of the head that killed her?
>
> Q. What did you say to him?
>
> A. I said I did not know there was a blow to the back of the head. I said we'll have to wait until we get to the autopsy.

C.726.

None of the emergency personnel at the scene reported that McCrory expressed any type of strong emotion. The same was true later that evening when McCrory spoke with Wiggins about his wife's murder; according to Wiggins, McCrory "appeared to be calm and collected about it all." C.493.

Julie's autopsy revealed that she had endured severe pain and trauma when she was killed, having suffered a depressed skull fracture, multiple "chop wounds" to the back of her head, and stabs wounds above her left breast. C.44-47. The medical examiner also found what appeared to be teeth marks on Julie's left arm at her

deltoid muscle. C.702. Based on teeth molds McCrory provided and photos from the autopsy, Dr. Richard Souviron, a forensic odontologist, testified that the teeth marks matched McCrory's dental impressions. C.745-62. On cross-examination, Dr. Souviron explained that his conclusions were not "positive" because he could not "exclude everyone in the world." C.766, 780.

McCrory testified at trial. He denied murdering Julie or having anything to do with her death. C.799-841. And he presented the testimony of a neighbor, who testified that at "about 5:30 [a.m.], give or take a few minutes," on the day of Julie's murder he walked outside to get his morning paper and did not see McCrory's Bronco parked at Julie's house. C.785. But the neighbor acknowledged that his timing could have been off and that he might not have gone outside until after 5:30—*after* Meeks's grandfather had heard McCrory's Bronco leave. C.786. McCrory's other witness was an employee of a construction company near Julie's house. He testified that he arrived at work around 3:30 a.m. and waited in his car for someone to unlock the gate. C.788-89. While waiting, he took a nap. C.789. When asked whether he "observe[d] anything about the McCrorys' house," he answered: "I didn't pay any attention to it at the time." C.789. Unsurprisingly, he also didn't recall seeing McCrory's Bronco. C.789.

The jury found McCrory guilty and he was sentenced to life in prison. C.885, 978-79. His conviction became final on November 1, 1987, when the Alabama Supreme Court denied his petition for writ of certiorari. *See McCrory v. State*, 505 So. 2d 1272 (Ala. Crim. App. 1986).

B. In 2002, McCrory Files His First Rule 32 Petition for Postconviction Relief Based on Bitemark Comparison Evidence.

In February 2002, McCrory, represented by counsel, filed a petition pursuant to Alabama Rule of Criminal Procedure 32 seeking postconviction relief on two grounds: (1) his trial counsel's alleged ineffective assistance and (2) "newly discovered" material facts concerning the reliability of bitemark identification evidence. *See State v. McCrory*, CC-85-164.60 (Cir. Ct. Covington Cnty. Ala. Feb. 11, 2002). As relevant here, McCrory argued that newly discovered material facts demonstrating the "unreliability of bitemark identification" undermined Dr. Souviron's trial testimony and denied him a fair trial. *Id.* McCrory attached to his petition a *Newsweek* article from August 20, 2001, entitled "A Dentist Takes the Stand." *Id.* In the article, Dr. Souviron states that bitemarks are "not the same as fingerprints or DNA.… You cannot make a positive ID from a bitemark." *Id.* McCrory also attached an article discussing efforts by the American Board of Forensic Odontology (ABFO) to assess the reliability of bitemark comparison evidence. *Id.* The trial court dismissed McCrory's petition on September 18, 2003. McCrory did not appeal.

C. In 2020, McCrory Files His Second Rule 32 Petition for Postconviction Relief Based on Bitemark Comparison Evidence.

On March 23, 2020, McCrory, again represented by counsel, filed a second Rule 32 petition for postconviction relief. C.6-120. He asserted two grounds for relief. First, he argued that his claim fit within Rule 32.1(e), which allows an inmate to seek relief "on the ground that":

> 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.

Ala. R. Crim. P. 32.1(e).

Second, McCrory argued that he was also due relief under Rule 32.1(a), which allows a defendant to "secure appropriate relief on the ground that" "[t]he constitution of the United States or of the State of Alabama requires a new trial, a new sentence proceeding, or other relief." Ala. R. Crim. P. 32.1(a). Claims under Rule 32.1(a) are ordinarily time-barred unless they are brought within one year following final judgment. *See* Ala. R. Crim. P. 32.2(c). McCrory said very little in his petition about this claim or why it was not precluded. He simply alleged:

> Mr. McCrory is also entitled to relief pursuant to Rule 32.1(a) because the state and federal constitutions require a new trial. A conviction based on evidence now known to be unreliable and invalid cannot 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. "Proven unreliable scientific evidence should never serve as a basis of a conviction and should be dealt with by the Courts if and when it is found."

> Finally, neither Rule 32.2(b) nor (c) preclude the requested relief. The evidence Mr. McCrory has presented is newly discovered since the time of his trial and first Rule 32 petition, and the new evidence would result in an acquittal today, so failure to grant relief would result in manifest injustice.

C.9 (quoting Order Granting Extraordinary Mot. for New Trial, *Georgia v. Denton*, No. 04R-330 (Superior Ct. of Ware Cnty., Ga. Feb. 7, 2020)).

McCrory attached to his petition affidavits from Dr. Souviron and two other forensic odontologists, Dr. Adam J. Freeman and Dr. Cynthia Brzozowski. C.33-39, 52-60, 62-70. Dr. Souviron acknowledged in his affidavit that his trial testimony was "scientifically acceptable at the time of trial" but stated that "advances in the scientific understanding of the limitations of bitemark evidence" and resultant changes to the ABFO's guidelines would alter his testimony if given today. C.35-36. Dr. Souviron reviewed his casefile from trial in light of the ABFO's current guidelines and determined that, "assuming the injuries to the victim were teeth marks, [he] could not exclude Mr. McCrory as being the person responsible for leaving those marks," but he also "[could not] exclude any other people from the population with similar teeth who could have left similar looking marks on the victim's body." *Id.*

The State sought summary dismissal of McCrory's petition because it was successive to his 2002 petition, which "raised this same issue." C.185. The State also argued that the petition was precluded because McCrory could not show that he met the requirements of Rule 32.1(e). C.185-86. The trial court overruled the State's motion and set the matter for an evidentiary hearing.

1. The Rule 32 Court Holds an Evidentiary Hearing.

At the hearing, Dr. Brzozowski and Dr. Freeman testified that Dr. Souviron's conclusions and testimony at McCrory's trial were considered reliable at the time. R.32-33, 88. Since then, the doctors explained, the scientific community's understanding of the reliability of bitemark comparison evidence had evolved and the ABFO had issued new guidelines. R.17-33, 53-72. Under the new guidelines, they said, a forensic odontologist would not be able to testify that the mark on Julie's arm was a bitemark that could be matched to McCrory. R.32-33, 44-45, 76-77, 81, 88.

For its part, the State read into the record portions of the trial testimony and introduced the entire trial transcript into evidence. R.99, 101-45, 171-73; C.421-1124. Wayne Meeks—the witness who testified at trial that he had seen McCrory's Bronco at Julie's house the morning her body was discovered—was the only original trial witness available to testify at the hearing. He testified that he stood by his statements from trial. R.163.

2. The Rule 32 Court Denies McCrory's Petition.

On February 14, 2022, the trial court denied McCrory's petition, finding that McCrory failed to prove by a preponderance of the evidence that he met the requirements of Rule 32.1(e) for newly discovered evidence. Pet. App. A. The court made three specific factual findings based on the evidence it heard.

First, the court found that the testimony offered by Dr. Brzozowski and Dr. Freeman was simply "impeachment of Dr. Souviron's opinion regarding the nature and cause of the injury" on Julie's arm. Pet. App. A at 2. The court thus determined

that McCrory failed to show that the "newly discovered" facts he relied on "do not merely amount to impeachment evidence," as required by Rule 32.1(e)(3).

Second, after "review[ing] the transcript of the trial in its entirety" and "review[ing] the sufficiency of the evidence which remains after taking out, as it were, the testimony of Dr. Souviron," the court found that McCrory had "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 required by Rule 32.1(e)(4)." Pet. App. A at 3.

And third, the court found that McCrory had "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)," because "the absence of Dr. Souviron's testimony would not demonstrate that the defendant is innocent of the murder of the victim." Pet. App. A at 4.

The court also disposed of McCrory's constitutional claim, finding that McCrory did "not prove[] by a preponderance of the evidence that he is entitled to the relief he seeks on this ground." Pet. App. A at 4-5. McCrory appealed. C.375-77.

3. The Court of Criminal Appeals Affirms.

The Alabama Court of Criminal Appeals affirmed. *See* Pet. App. C (as modified on grant of rehearing). Starting with McCrory's claim under Rule 32.1(e) concerning newly discovered material facts, the Court of Criminal Appeals agreed with the trial court that "[a]ny evolving criticism by the scientific community as to the reliability of" bitemark comparison evidence "would simply be impeaching the bitemark evidence offered at trial." Pet. App. C at 31. The court also "agree[d]" that McCrory

"failed to establish that the result of the trial probably would have been different had the new guidelines" for bitemark evidence "been used." *Id.*

Turning to McCrory's constitutional claim brought under Rule 32.1(a), the Court of Criminal Appeals gave three reasons for affirming. First, the court noted, "[a]t 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." Pet. App. C at 32. Second, the court recognized that "the State pleaded that this claim was barred by Rule 32.2(b)," yet "McCrory did not address this procedural bar at the evidentiary hearing." *Id.* Under Alabama law, the court explained, "simply 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." Pet. App. C at 32-33 (alteration omitted) (quoting *State v. Hurst*, 223 So. 3d 941, 951 (Ala. Crim. App. 2016)). Third, the court ruled, "[t]he circuit court's determination" that "McCrory failed to prove by a preponderance of the evidence that he was entitled to relief on this claim" was "supported by the record." Pet. App. C at 33. The court thus affirmed the trial court's ruling.

4. The Court of Criminal Appeals Grants Rehearing and Judge Kellum Recuses.

McCrory sought rehearing. In addition to challenging the court's substantive conclusions, he argued that one of the judges on the Court of Criminal Appeals, Judge Elizabeth Kellum, should have recused because in 1986 she had "authored the State's brief on direct appeal." McCrory's App. for Reh'g at 12-15. This was no surprise to

McCrory (*see id.* at 13), but he nonetheless waited until *after* the court's decision to raise the issue—even though he also knew that Judge Kellum was one of only five judges on the court and was thus bound to hear his case unless she recused.

Despite McCrory's delay, the Court of Criminal Appeals granted his application, withdrew its prior opinion, and issued a new opinion that noted Judge Kellum's recusal. Pet. App. C at 1, 33. McCrory unsuccessfully sought certiorari review from the Alabama Supreme Court. Pet. App. D. This petition followed.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction To Review McCrory's Due Process Claim Because It Was Resolved On Independent And Adequate State Grounds.

"This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). This bar is jurisdictional. *See* 28 U.S.C. § 1257(a); *Foster v. Chatman*, 578 U.S. 488, 497-98 (2016). And it is well established. It is not the province of federal courts to sit in judgment of state-court decisions interpreting state law. *E.g.*, *Murdock v. Memphis*, 87 U.S. 590, 636 (1874). Absent extraordinary exceptions not applicable here,[4] the rule applies on direct review "whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

[4] *E.g.*, *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (explaining that "in 'exceptional cases,' a 'generally sound [state] rule' may be applied in a way that 'renders the state ground inadequate to stop consideration of a federal question'" (quoting *Lee v. Kenna*, 534 U.S. 362, 376 (2002))).

The rule applies in this case because the Court of Criminal Appeals resolved both of McCrory's claims on adequate and independent state-law grounds. As a result, this Court lacks jurisdiction to review McCrory's claims.

1. The appellate court's resolution of McCrory's primary claim under Rule 32.1(e) was obviously based on state law because both the claim and the relief McCrory sought were based in state—not federal—law. And it is black letter law in Alabama that "[a]ll five requirements in Rule 32.1(e) must be satisfied in order to constitute newly discovered material facts, and, if all the requirements in Rule 32.1(e) are not satisfied, a claim of newly discovered material facts is subject to the preclusions in Rule 32.2." *Lloyd v. State*, 144 So. 3d 510, 516 (Ala. Crim. App. 2013); *see also McCartha v. State*, 78 So. 3d 1014, 1017 (Ala. Crim. App. 2011) (explaining that before a claim "can be considered to be based on newly discovered evidence, [the petitioner] must meet all five requirements of Rule 32.1(e)").

The Court of Criminal Appeals correctly ruled that McCrory did not meet these requirements under Alabama law. The court determined that the Rule 32 record supported the trial court's finding that McCrory's "newly discovered" evidence amounted merely to impeachment evidence (failing Rule 32.1(e)(3)); that McCrory failed to establish that "the result" of his trial "probably would have been different" if the "new" evidence "had been known at the time of trial" (failing Rule 32.1(e)(4)); and that the facts did not "establish that [McCrory] is innocent of the crime for which [he] was convicted" (failing Rule 32.1(e)(5)). Pet. App. C. at 29-31. Accordingly, the denial of McCrory's petition under Rule 32.1(e) did not "depend[] on a federal constitutional

ruling" and was wholly "independent of federal law." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

2. The same is true of McCrory's claim under Rule 32.1(a). Although that provision can turn on the application of federal law—it provides relief, after all, under "[t]he Constitution of the United States"—McCrory's petition was denied because he failed to meet the requirements of state law. Under Alabama law, the Rule 32 petitioner has "the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Ala. R. Crim. P. 32.3. But as the Court of Criminal Appeals pointed out, after only "briefly" alleging in his petition that his conviction "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,'" "[a]t 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." Pet. App. C at 32 (quoting C.14).

"Additionally," the court explained, "the State pleaded that this claim was barred by Rule 32.2(b)" because McCrory had raised a similar claim in his first Rule 32 petition. *Id.* Yet "McCrory did not address this procedural bar at the evidentiary hearing," either. *Id.* As a result, McCrory's petition was precluded on state-law grounds because McCrory did not meet his "burden of disproving" by a preponderance of the evidence the existence of a ground of preclusion asserted by the State. *Id.* (quoting Ala. R. Crim. P. 32.3); *see State v. Cross*, -- So. 3d --, No. CR-2023-0079, 2023 WL 4144633, at *3-4 (Ala. Crim. App. June 23, 2023) (holding that "[o]nce properly

asserted by the State, application of" a ground for preclusion is "mandatory" unless disproved by the petitioner).

Because McCrory's due process claim was denied on independent and adequate state-law grounds, this Court lacks jurisdiction to review it. It should deny the petition on that basis.

II. Even If The Court Could Hear McCrory's Due Process Claim, It Should Not Do So.

Even if McCrory could bring his due process claim to this Court, the Court should not hear it. The judgment below does not conflict with decisions of this Court. The lopsided split in authority McCrory relies on is shallower than McCrory suggests. And the Rule 32 court's factual finding that McCrory failed to show that the result of his trial would have been any different absent the evidence he now complains of would preclude McCrory from receiving relief even under the minority rule he suggests this Court adopt. Certiorari should be denied.

1. The major premise for McCrory's due process argument is a simple holding by this Court: "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Pet. 26 (alteration added) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). The minor premise is more creative: The tooth mark evidence presented at his trial was "false evidence" under *Napue* because, though it comported with scientific standards at the time and the State had no reason to believe it wasn't reliable, advances in science have since cast doubt on the reliability of the evidence. The suggested

conclusion? McCrory's conviction also "must fall under the Fourteenth Amendment." Pet. 27.

The syllogism fails. The Court in *Napue* was concerned with evidence that the State knew was false *when it was introduced at trial*. *See* 360 U.S. at 268-69. The Court has "never held"—and is "unlikely ever to do so"—that the use of "false testimony violate[s] the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity." *Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting from denial of certiorari); *see Pierre v. Vannoy*, 891 F.3d 224, 230 (5th Cir. 2018) (Ho, J., concurring) (discussing the "long line of precedent" "holding 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"). Here, even assuming that Dr. Souviron's testimony was "false," it is undisputed that the State did not know that. That should be the end of it.

To make his minor premise work, McCrory seeks to radically extend *Napue* to situations where *no one*—not even its offeror—knew the testimony was "false" until years later. But this doesn't help McCrory, either. As the Rule 32 court explained, the "new" evidence McCrory relied on was simply "impeachment of Dr. Souviron's opinion regarding the nature and cause of the injury." *See* Pet. App. A at 2. That does not make Dr. Souviron's testimony "false" in the sense that word was used in *Napue*. While McCrory showed that the scientific community's understanding of the reliability of bitemark comparison evidence has evolved since his trial, even McCrory's experts acknowledged that Dr. Souviron's testimony comported with accepted

standards and protocols at the time. Pet. App. C at 20; R.32-33, 44-45, 76-77, 81, 88. And in any event, Dr. Souviron acknowledged at trial that he could not say with absolute certainty that McCrory caused the mark found on Julie's arm. C.766, 769-71, 780. Under these circumstances, Dr. Souviron's testimony was not "so extremely unfair that its admission violate[d] 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352 (1990).

2. Recognizing that his claim depends on untethering *Napue* to recognize a springing due process claim, McCrory offers a small handful of courts that he says have already taken the plunge. Pet. 27. But the split is even more fledgling and lopsided than McCrory suggests.

Take the first case McCrory cites for the proposition that "courts have recognized that a conviction violates due process if it was based on scientific evidence now known to be faulty and unreliable." Pet. 27. That is an odd way to describe the holding of *Ege v. Yukins*, where the Sixth Circuit granted a federal habeas petitioner relief based on an evidentiary error that was obviously error *at the time of trial*. *See* 485 F.3d 364, 374-80 (6th Cir. 2007). In *Ege*, the State presented an expert in bitemark evidence as a witness in a murder prosecution. *Id.* at 374-75. That was not the problem. Rather, the problem came when the witness, without providing "any foundation whatsoever," offered a statistical probability—1 in 3.5 million—that the defendant caused the bitemark on the victim. *Id.* (finding it "highly problematic not that the prosecution had used" the witness "to introduce bite mark evidence in the first place, but that [the witness] had tied his observations to a statement about probabilities

that was wholly without foundation”). Unlike here, the alleged error did not take 35 years to materialize. It was evident in the courtroom as soon as it occurred. *Ege* does not support McCrory’s claim of an entrenched circuit split.

3. McCrory’s two other cases—*Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), and *Gimenez v. Ochoa*, 821 F.3d 1136 (9th Cir. 2016)—get him closer to showing a split of some kind. *See* Pet. 27. Both decisions recognize that a petitioner seeking federal habeas relief can state a due process claim by alleging facts showing that his conviction was “predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony.” *Lee*, 667 F.3d at 403; *see Gimenez*, 821 F.3d at 1143-44 (recognizing due process claim where conviction was based on “expert testimony” reliant on “discredited forensic principles or other junk science”).

Unfortunately for McCrory, both decisions also show why McCrory would not be afforded relief even under the minority approach he advocates. Both courts recognized that relief would be available only if the petitioner could show that the admission of the evidence “undermined the fundamental fairness of the entire trial” and that the jury would not have found the defendant guilty had the evidence not been introduced. *Lee*, 667 F.3d at 403, *see Gimenez*, 821 F.3d at 1145. The *Gimenez* court denied the petitioner relief just on this basis: “Even assuming the prosecution’s experts couldn’t testify” regarding the outdated forensic evidence, the court held, “the evidence [the petitioner] presents isn’t enough to show by clear and convincing evidence that ‘no reasonable factfinder’ would have found him guilty.” 821 F.3d at 1145 (applying standard under 28 U.S.C. § 2244(b)(2)(B)(ii)).

If McCrory argues that the Due Process Clause mandates that States adopt a similar standard, then he has no cause to complain. After hearing the evidence McCrory produced at the evidentiary hearing, the Rule 32 trial court considered the effect of "taking out" "the testimony of Dr. Souviron" at trial. Pet. App. A at 3. When it did so, the court found that the remaining "evidence against [McCrory] was sufficient for a rational finder of fact to reasonably exclude every hypothesis except that of guilt, even absent the testimony of Dr. Souviron." *Id.*; *see* Pet. App. C at 31 ("agree[ing] with the circuit court's conclusion"). Just as in *Gimenez*, then, McCrory's claim would fail even under his preferred standard. That makes McCrory's petition a particularly poor vehicle for resolving the shallow split in authority he has identified.

III. Any Judicial Conflict Has Been Resolved.

In addition to seeking certiorari review of his due process claim, McCrory also seeks summary reversal based on Judge Kellum's initial participation in hearing his Rule 32 appeal. Pet. 30-31. The Court should deny the request for at least two reasons.

First, McCrory waived his challenge to Judge Kellum's participation. "More than one court has recognized the sensible principle that a defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge." *United States v. Barrett*, 111 F.3d 947, 951 (D.C. Cir. 1997); *see also United States v. Parker*, 837 Fed. App'x 341, 345 n.1 (6th Cir. 2020) (same) (collecting cases); *accord Ex parte Parr*, 20 So. 3d 1266, 1270 (Ala. 2009) ("The issue of recusal may be waived if it is not timely asserted."). The same principle applies here. By the time he filed his opening brief at the Court

of Criminal Appeals, McCrory knew both that (1) Judge Kellum had been counsel for the State in his direct appeal years earlier and (2) Judge Kellum, as a member of a five-judge court, was sure to hear his case unless she recused. Despite this, McCrory waited until *after* the Court of Criminal Appeals ruled against him to alert the court of the potential conflict. *See* McCrory's App. for Reh'g at 12-18. Given these circumstances, he can hardly complain that Judge Kellum did not recuse *sua sponte*.

Second, when McCrory finally brought the potential conflict to the court's attention, Judge Kellum promptly recused. The Court of Criminal Appeals granted McCrory's application for rehearing, withdrew its prior opinion, and issued a new opinion noting Judge Kellum's recusal. *See* Pet. App. C at 33. It's unclear what more McCrory could want. "Allowing an appellate panel to reconsider a case without the participation of the interested member" was precisely the remedy ordered in *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016). And it is precisely the remedy McCrory received. The Constitution does not require anything more.[5]

CONCLUSION

For these reasons, the Court should deny certiorari.

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[5] McCrory suggests that additional relief is warranted because Judge Kellum's initial participation tainted not only the court's original opinion but also the opinion the court issued without her. Pet. 32. The Court rejected this precise argument in *Williams*. *See* 579 U.S. at 16 (rejecting argument that "ordering a rehearing … may not provide complete relief to [a defendant] because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case"). As the Court explained, allowing the appellate court to reconsider the case without the conflicted judge's participation "permit[s] judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Id.* After that new deliberation, the court is free to rule any way it chooses—including, as here, by sticking to its previous holding.

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