No. 23-6232

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

REPLY BRIEF FOR PETITIONER

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March 27, 2024

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The State's opposition omitted a critical fact that undermines the credibility of the story it tried to tell. In 2021, the Covington County District Attorney made Charles McCrory a plea offer in an attempt to avoid the post-conviction hearing where Dr. Richard Souviron would recant his trial testimony. The offer was time-served; Mr. McCrory could go home after 37 years of wrongful imprisonment to become an unsupervised member of the community. Mr. McCrory rejected that offer because he is an innocent man.

So the hearing proceeded, and Dr. Souviron—the State's decisive witness at trial and the lynchpin of Mr. McCrory's conviction—recanted his trial testimony and acknowledged that "forensic bite mark analysis" not only should not have been used in this case but is *completely inappropriate* for use in criminal cases. Other expert witnesses agreed. The State offered *nothing* in response—no rebuttal, no impeachment, no new evidence, no expert testimony—nothing to contest the new evidence of innocence. Instead, the State simply re-read selected portions of the trial transcripts into the record.

Nonetheless, the Alabama circuit court denied relief. Rather than engaging with what the evidence actually would have been without Dr. Souviron's decisive testimony, the court hypothesized that *the jury itself* could conduct concededly false junk forensic bite mark analysis *on its own*, *without* any supporting expert testimony (Dr. Souviron's fully recanted testimony no longer before the jury), to convict Mr. McCrory. The appellate court adopted the same reasoning and affirmed. That ruling violated Mr. McCrory's due process right not to be convicted

based on forensic evidence later demonstrated to be unreliable—and in this case, later demonstrated to be *false*.

The State's Brief in Opposition ignores those critical facts and instead relies on misstatements of fact and law in its attempt to insulate a significant due process question from review by this Court. None of the State's arguments against certiorari are compelling. Indeed, the State *does not dispute* that this case presents a circuit split on the first question presented. That split—and the glaring inequitable facts presented by this case—underscore the need for this Court's intervention.

I. THE STATE CONCEDES THAT THE CIRCUITS ARE SPLIT, AND THE SPLIT HAS SINCE BEEN WIDENED BY A STATE HIGH COURT DECISION ISSUED EARLIER THIS MONTH.

The State attempts to obfuscate it, to qualify it, to minimize it—but in the end the State concedes, as it must, that a circuit split exists on the first question presented by this case.

The State acknowledges that both the Third and Ninth Circuits have recognized that post-conviction relief is available if a petitioner can show that forensic evidence later shown to be false "'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." State's Brief in Opposition ("BIO") at 22 (quoting *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012)). Meanwhile, other courts, like the Alabama appellate court below, have declined to grant relief in those same circumstances. This Court should grant certiorari to resolve that split.

This issue is unquestionably ripe. And now the split is wider: on the very same day the State filed its Brief in Opposition here, the Minnesota Supreme Court applied Seventh Circuit precedent and *affirmed post-conviction relief* where the trial testimony of two expert witnesses was false, and the petitioner did not and could not have known of the falsity until after trial. *Kaiser v. State*, No. A22-0749, 2024 WL 1080968 (Minn. Mar. 13, 2024).

The State suggested in its opposition here that because the false bite mark testimony in this case was not known at the time of trial, that "should be the end of it." BIO at 20; *see also id.* at 22 (attempting to distinguish *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007), because there, "[u]nlike here, the alleged error did not take 35 years to materialize"). But in *Kaiser*, just like in this case, the expert testimony offered at trial was *not* known to be false at the time it was offered, but today it *is* known to be false. *See Kaiser* at *5. And the Minnesota high court granted relief. The *Kaiser* decision reinforces the holding of *Han Tak Lee*—relief is warranted where new scientific evidence undermines forensic evidence that masqueraded as valid science at an earlier trial and was not known to be false at the time of that trial. *Han Tak Lee*, 667 F.3d at 407-08.

The split in authority acknowledged by the State has grown since the Petition in this case was filed. Review is warranted.

II. HAVING CONCEDED A CIRCUIT SPLIT, THE STATE ATTEMPTS TO SHIELD THE QUESTION FROM REVIEW BY INCORRECTLY CLAIMING THAT THE DECISION BELOW RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The State argues that no federal due process claim is properly before this Court because Mr. McCrory mentioned that claim only "briefly" in the petition and "only once" at the post-conviction hearing. BIO at 18. Of course, the State cites no authority—because there is none—that to properly preserve a federal claim, a petitioner must preserve it more than once, let alone more than twice, as the State concedes Mr. McCrory did in his petition and at the post-conviction hearing. The State's argument is a red herring.

The State then claims that it alleged in the habeas court that Mr. McCrory's petition was precluded under state law because it was a successive petition, and that Mr. McCrory did not address the alleged procedural bar at the evidentiary hearing. BIO at 18. That is demonstrably false. In Alabama, a successive petition is precluded unless the petitioner shows that new grounds exist for relief that were not available via reasonable diligence prior to the original post-conviction petition. *See* Ala. R. Crim. P. 32.2(b). In other words, Mr. McCrory had to overcome preclusion by diligently presenting new evidence—and that is precisely what he did. After the evidentiary hearing, the State conceded (and the circuit court agreed) that Mr. McCrory diligently presented new evidence that was not known at the time of the first post-conviction petition. *See* Appendix A at 1-2; Ala. R. Crim. P. 32.1(e)(1). Thus, the circuit court found that Mr. McCrory *did* present evidence to overcome

the state procedural bar, and the Alabama appellate court did not hold otherwise. *See* Appendix C at 29. What the State tries to conceal is that the preclusion ground in Ala. R. Crim. P. 32.2(b), which the State now claims to be an adequate and independent state ground for relief, *is the same* as what Mr. McCrory was required to—and did—show under Ala. R. Crim. P. 32.1(e)(1): new evidence, diligently presented. Mr. McCrory met that requirement, and neither Alabama court held differently.[1]

Accordingly, there is no adequate and independent state ground upon which to deny relief. This was the State's *first* argument against certiorari. That it has no basis in law or fact reflects the weakness of the State's opposition.

III. THE STATE'S OUTLANDISH CLAIM—THAT THE ONLY EXPERT TESTIMONY PRESENTED AT TRIAL WAS NOT MATERIAL TO THE CONVICTION—CANNOT BE DEFENDED.

The State now adopts the post-conviction court's finding that Dr. Souviron's total recantation of his trial testimony was mere impeachment, even though the Covington County District Attorney had conceded that the recantation went beyond mere impeachment. *See* BIO at 20. This argument is not credible. The prosecution rested its case-in-chief at trial with Dr. Souviron giving the following testimony:

> 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.

[1] The State also admits that before the hearing prosecutors "argued that the petition was precluded because McCrory could not show that he met the requirements of Rule 32.1(e). The trial court overruled the State's motion and set the matter for an evidentiary hearing." BIO at 12. The appellate court did not disturb that ruling either.

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.) Thirty-four years later, Dr. Souviron fully recanted that testimony:

> *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).

A full recantation by *the one and only* expert presented by the prosecution to secure a criminal conviction is not merely impeachment, by any definition. The State's extraordinary claim to the contrary undermines its credibility in opposition.

The State argues that Dr. Souviron's trial testimony—today known and acknowledged to be false—did not undermine the trial's fundamental fairness and that the same verdict would have been returned regardless. BIO at 22-23. That argument reflects a profound misunderstanding of the reality of criminal trials and the weight placed by lay jurors on purportedly "scientific" evidence. As this Court and others have observed, jurors view expert testimony as particularly persuasive,

if not infallible. *See, e.g.*, *Buck v. Davis*, 580 U.S. 100, 121 (2017) ("Dr. Quijano took the stand as a medical expert bearing the court's imprimatur. . . . Reasonable jurors might well have valued his opinion concerning the central question before them."); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (observing that scientific or forensic testimony may "assume a posture of mystic infallibility in the eyes of a jury of laymen"); *United States v. Lester*, 254 F. Supp. 2d 602, 608 (E.D. Va. 2003) ("Expert testimony has the potential to be substantially prejudicial because of the 'aura effect' associated with such testimony."). Thus, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993) (citations and internal quotation marks omitted). Even false scientific testimony "may be assigned talismanic significance in the eyes of lay jurors." *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).[2] "One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *Hinton v. Alabama*, 571 U.S. 263, 276 (2014) (citations and quotation marks omitted).

Here, the expert evidence was not just misleading, it was false. Dr. Souviron himself admitted that the bite mark "science" he offered is unreliable today and

[2] The "potential prejudicial impact [of expert testimony] is unusually high, because jurors are likely to overestimate the probative value of a 'match' between samples." President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, at 45 (Sept. 2016). *See also* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L. J. 1159, 1188 (2008) (recognizing that "most jurors begin with an exaggerated view of the nature and capabilities of forensic identification").

that his testimony was false.[3] Thus, despite what the State would like this Court to conclude, Dr. Souviron's testimony *was* "so extremely unfair that its admission violate[d] 'fundamental conceptions of justice.'" *Cf.* BIO at 21 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). "'[W]hen evidence is so extremely unfair that its admission violates fundamental conceptions of justice,' due process, like the sleeping giant, awakens . . . and courts must step in to prevent injustice." *United States v. Sanders*, 708 F.3d 976, 983 (7th Cir. 2013). The State's argument that this Court should not grant review to resolve the circuit split because Mr. McCrory would not prevail under his preferred rule fails—he unquestionably would.

Notably, the State does not defend the circuit court's materiality analysis, which held that even without any bite mark evidence—expert or otherwise—at a trial, the jury nonetheless "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. No, it had the ability to do no such thing. In light of Dr. Souviron's recantation, there would be no mold of Mr. McCrory's teeth in evidence, there would be no testimony that his teeth inflicted the injury to the decedent; there would be no reason for any juror to engage in its own junk science by comparing the (non-existent) teeth mold with pictures of the injury. For there

[3] Dr. Souviron's modern opinion on the validity of bite mark evidence is consistent with the overwhelming consensus of the scientific community, including the National Institute of Standards and Technology. *See* NIST Interagency Report, "Bite Mark Analysis: *A NIST Scientific Foundation Review*" (Mar. 2023), *available at* https://nvlpubs.nist.gov/nistpubs/ir/2023/NIST.IR.8352.pdf ("Forensic bite mark analysis lacks a sufficient scientific foundation.").

would be no bite mark evidence at the trial. See, e.g., *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1052 (N.D. Ill. 2015) (doubting that bite mark analysis would satisfy Rule 702(c)); *State v. Denton*, No. 04-R-330, 2020 WL 7232303, at *13 (Super. Ct. Ware Co. Ga. Feb. 7, 2020) (granting new trial because "[p]roven unreliable scientific evidence should never serve as the basis of a conviction," and finding that "it is uncontroverted that bite mark analysis and testimony as existed at the time of Denton's conviction has been proven to be unreliable" for purposes of a new trial). The circuit court's imaginative materiality analysis, adopted by the appellate court, necessarily fails because it starts from a premise divorced from the reality of what a trial *without bite mark evidence* would look like. The fairness and integrity of Mr. McCrory's conviction, upheld on such obviously fallacious grounds, are necessarily undermined.

Rather than attempt to defend the lower court's novel, faulty materiality analysis, the State makes a number of misstatements of fact and then, *ipse dixit*, concludes the result of the trial "probably would not have been different." Ala. R. Crim. P. 32.1(e)(4). Knowing it no longer has at its disposal the expert testimony that secured the conviction in this case—and that *no expert* is able to provide similar testimony today in light of the state of the science—the State spends the majority of its opposition suggesting that there was other incriminating evidence. *See* BIO at 3-16. But there wasn't.

The State's brief in opposition has five misstatements of fact in the *first paragraph*:

1) Eyewitnesses did *not* place Mr. McCrory at the scene of the crime. Rather, two witnesses, whose credibility was unrebuttably undermined at the post-conviction hearing, claimed that a car that looked like Mr. McCrory's was parked at the scene. (R-203; R. 32 H'ng 162-63, 170-73.)

2) Investigators *did* find signs of forced entry—the bedroom window was open, as the State acknowledges, *and* the front door was ajar when law enforcement arrived at the scene. Pet. at 9.

3) Mr. McCrory was *not* "trailing investigators" to the crime scene—he was an EMT and was responding to a distress call. Pet. at 6-7.

4) Mr. McCrory did *not* know more than other investigators about the death. Rather, his statements were consistent with what everyone else saw. Moreover, despite the brutal nature of the crime that had just occurred, no blood or other physical evidence was found during immediate consensual searches of Mr. McCrory's person, car, and home. Pet. at 7, 9-10.

5) Dr. Souviron did *not* testify at trial that "he couldn't be sure" about the bite mark evidence—he was *certain*. The end of his trial testimony was unqualified: the teeth marks on the decedent were made by Charles McCrory. (R-314-15.)

See BIO at 1. The State later claims that its so-called "eyewitness" testified at the post-conviction hearing below that he "stood by his statements at trial." BIO at 13. That is patently false; the habeas court *struck* that witness's testimony from the post-conviction record because he was so incredible. (R. 32 H'ng 162-63, 170-71.)

Thus, while the State presented this Court with a fictional "fever-dream narrative built wholly on speculation,"[4] it is *not* the "very different story" heard by the jury, BIO at 3. The jury heard from a renowned expert that Mr. McCrory bit the decedent while killing her, testimony that precluded any verdict other than guilty. Now that expert has said he was wrong—and unrebutted modern science

[4] Liliana Segura and Jordan Smith, "Duty to Correct: A Bogus Bite Mark Sent Him to Prison for Murder. Alabama Wants to Keep Him There." *The Intercept* (Mar. 12, 2022), *available at* https://theintercept.com/2022/03/12/bite-mark-evidence-charles-mccrory/.

confirms that he was wrong. Mr. McCrory's conviction violates fundamental conceptions of justice, and he would prevail under the due process ruling he requests.

IV. NO COURT HAS EVER CONSIDERED THE MERITS OF MR. MCCRORY'S NEW EVIDENCE.

Incredibly, the State claims that serious consideration was given to Mr. McCrory's new evidence, writing, "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." BIO at 23. Not so. As noted above, the Rule 32 court did *not* consider the effect of removing Dr. Souviron's testimony at trial. Rather, the court assumed that jurors would still have had bite mark evidence before them from which to conduct their own junk bite mark comparison—a technique that has resulted in well over thirty wrongful convictions in this country, even when performed by so-called experts.[5] In addition, the circuit court signed a perfunctory order that was almost word-for-word drafted by the prosecution and was riddled with uncorrected errors. As reflected in Mr. McCrory's motion for reconsideration, "research has yet to uncover *any* reasoned decision issued by [the post-conviction judge] addressing the merits of a Rule 32 Petition" in *any* post-conviction proceeding, *ever*. (Doc. 92 at 22.) The same is true here. The post-conviction judge did not truly consider Mr. McCrory's new evidence—he signed what was essentially the prosecution's brief in opposition.

[5] *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 (last visited March 25, 2024).

The State then attempts to justify the affirmance of this nondecision by a conflicted appellate court, arguing that the Court of Criminal Appeals "issued a new opinion" after Judge Kellum recused. BIO at 16, 24. Not so. The court issued *the same opinion*—it was word-for-word identical, differing only in a notation that Judge Kellum now was "recused." *See* Appendix C at 33. The court plainly did not rehear the case and did not even claim to engage in new deliberations without the conflicted judge's participation. This violated *Williams v. Pennsylvania*, 579 U.S. 1, 15 (2016) ("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"). Thus, the State's substantive response to this claim, which it relegated to a footnote, BIO at 24 n.5, rests on a false premise. The *Williams* error was not cured by rehearing because the record strongly suggests that the case was not actually reheard.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on March 27, 2024, 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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