REL: December 15, 2017

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-15-0664

State of Alabama

v.

George Martin

Appeal from Mobile Circuit Court
(CC-99-2696.80)

JOINER, Judge.

The State of Alabama appeals the circuit court's dismissal with prejudice of the capital-murder indictment returned against George Martin by a Mobile County grand jury.

Facts and Procedural History

In June 1999, Martin was indicted for one count of murder made capital pursuant to §§ 13A-6-2 and 13A-5-40(a)(7) (defining as capital "[m]urder done for a pecuniary or other valuable consideration"). The State's evidence at trial tended to show the following: At approximately 11:30 p.m. on October 8, 1995, police and firefighters responded to the area of Willis Road and Highway 90 in Mobile County to find a burning 1991 Ford Escort automobile that had collided with a tree. Inside the vehicle were what appeared to be charred human remains; the victim was determined to be Hammoleketh Martin, Martin's wife. Hammoleketh was alive when the fire started and died as a result of smoke inhalation and body burns. Martin, who was an Alabama State Trooper at the time of Hammoleketh's death, was ultimately arrested and charged with capital murder. While incarcerated, Martin allegedly told Clifford Davis, a fellow inmate, that he had killed Hammoleketh.

A brief summary of the circumstantial evidence the State presented at Martin's trial is as follows:

> "'The investigations revealed that the fire was intentionally set. According to the evidence, the

fire started in the right rear passenger compartment and spread forward. The minimal damage to the front of the vehicle precluded any conclusion that the impact of the car with a tree in the area could have started the fire; rather, the evidence was uncontroverted that the scene was consistent with a staged wreck.

"'A traffic homicide investigator from the Alabama Department of Public Safety testified that he examined the vehicle and the scene in question. He conducted speed calculations of a vehicle and analyzed the kind of force that would have been necessary to cause such a fire. He concluded that the fire was not an accident and the collision of the vehicle with a tree did not produce sufficient force to start the fire.

"'[Martin], when initially notified by officers of the Mobile Police Department that his car had been found with a body in it, stated that he had last seen his wife at approximately 8:00 or 8:30 p.m. that evening. He stated she left the house without telling him where she was going and that he fell asleep watching a football game on television. He initially stated that he had awakened at approximately 1:00 or 1:30 in the morning and, after noticing that his wife was not home, decided to go look for her.

"'[The State] introduced evidence of several inconsistencies in [Martin's] various statements. Among the inconsistencies were the time that he awoke to discover his wife missing, that the victim carried a gasoline can in her automobile with her because the gas gauge did not work, and that a BIC lighter found at the scene was used by his wife, the victim, as a flashlight because the dome light in her car did not work. The evidence also established that the defendant was less than honest when questioned about the existence of life insurance policies insuring the life of his wife, Hammoleketh

> Martin. Though [Martin] acknowledged the existence of a policy insuring his wife's life for $200,000, he lied when he stated there were no other policies. In particular, another policy insuring the life of Hammoleketh Martin for $150,000 was introduced into evidence and, according to the State's evidence, this amount was collectible only if Hammoleketh Martin died in a passenger vehicle.
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> "'The State also introduced evidence of a Traffic Accident Investigation Report prepared by [Martin] approximately one year prior to the death of his wife. The report involved a traffic accident in which an automobile left the road, hit a tree, and burst into flames. The State contended that the report of [t]his incident, which was [Martin's] version of what occurred, was strikingly similar to the occurrences of one year prior.
>
> "'The State linked the evidence of the insurance proceeds with the purported financial difficulties of the defendant. According to the prosecution's testimony, [Martin's] financial condition had deteriorated to the point where he was approaching bankruptcy.'"

Martin v. State, 931 So. 2d 736, 740-41 (Ala. Crim. App. 2003), rev'd in part, 931 So. 2d 759 (Ala. 2004)(footnote omitted).

State's witness James Taylor also testified that he saw an African-American male driving a state-trooper car in the vicinity of the crime scene on the night of the murder. Moreover, during closing statements, the State argued: (1) that Martin, who is African-American, fled the crime scene on

a bicycle he had planted there earlier; (2) that, other than Martin's relatives, no one had ever seen a gasoline can in Hammoleketh's vehicle; and (3) that the jury could infer from Taylor's testimony that Martin was the state trooper Taylor had seen.

Martin's defense theory was that he did not kill Hammoleketh and that he did not know who, if anyone, did. Martin speculated during opening arguments that Hammoleketh's death could have been the result of an accident, that an unknown person carjacked and killed Hammoleketh, or that Hammoleketh committed suicide.

Martin was convicted, and the jury recommended by a vote of 8-4 that he be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Martin to death. After his conviction and sentence were ultimately affirmed on direct appeal, Martin filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief alleging that the State had failed to disclose exculpatory evidence to him, thus violating Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). After an evidentiary hearing, the circuit court

granted Martin's Rule 32 petition and held that he was entitled to a new trial.

> "The circuit court held, among other things, that the prosecution had suppressed several pieces of material evidence that were favorable to the defense. Specifically, the circuit court held that the State improperly suppressed: (1) certain statements made by witness James Taylor during his discussions with police officers on April 22, 1997, and May 8, 1997, (2) an identification made by Taylor from a photographic lineup on May 8, 1997, (3) statements made by the victim's sister[, Terri Jean Jackson,] concerning the presence of a gas can in the victim's vehicle, (4) statements made to police officers by witness Norma Broach, and (5) evidence concerning two anonymous telephone calls received by law enforcement officers."

State v. Martin (No. CR-12-2099, December 12, 2014), 195 So. 3d 1077 (Ala. Crim. App. 2014)(table).[1]

Specifically, Taylor had made a statement to the case agent, Major Thomas Calhoun, describing the person he saw in the state-trooper car as "a big man who filled up the car"; Martin, however, was not a large man. Taylor had also identified Trooper Grayling Williams from a photographic lineup of African-American male troopers as being the size of the man he saw in the trooper car; Martin's photograph was

[1]The Court of Criminal Appeals may take judicial notice of its own records. See Hull v. State, 607 So. 2d 369, 371 (Ala. Crim. App. 1992).

included in the lineup, and Taylor did not identify Martin in any way. Hammoleketh's sister, Jackson, had also stated to Major Calhoun that she had seen a gas can in Hammoleketh's car approximately one month before the murder, which was contrary to the State's argument at Martin's trial that only Martin's relatives had seen a gas can in Hammoleketh's vehicle. Norma Broach, who was at a Texaco gasoline station located near the crime scene on the night of the murder, made statements to police that pointed to a different possible suspect; Broach had seen a white male fill up two large gas cans at the Texaco and watched him move a heavy object from a small black car into the passenger seat of the cab of a camper truck. Finally, the State suppressed evidence of anonymous telephone calls to police indicating that Trooper Williams was involved in Hammoleketh's murder.

On appeal from that ruling, this Court, in an unpublished memorandum, held that the "circuit court's finding that the State violated Brady through its suppression of Taylor's photographic identification and his comments from his May 8, 1997, police interview is sufficient to support the trial court's holding that Martin is entitled to a new trial."

State v. Martin (No. CR-12-2099, December 12, 2014), 195 So. 3d 1077 (Ala. Crim. App. 2014)(table).[2]

While preparing for a new trial, Martin moved the circuit court, pursuant to Rule 16.5, Ala. R. Crim. P., to dismiss the capital-murder indictment with prejudice both as a sanction for misconduct by the State and because the resulting prejudice precluded Martin from receiving a fair retrial. In response, the State argued that its misconduct was not willful and that a new trial would cure any prejudice that had resulted from the discovery violations. The State, citing State v. Moore, 969 So. 2d 169 (Ala. Crim. App. 2006), and State v. Hall, 991 So. 2d 775 (Ala. Crim. App. 2007), asserted that this Court, when given the opportunity, has never affirmed a circuit court's dismissal of an indictment as a sanction for a discovery violation. Martin argued in response that Moore and Hall are factually distinguishable from his case.

[2]We declined to address the circuit court's remaining findings concerning the other Brady violations. The Alabama Supreme Court denied the State's petition for a writ of certiorari, and this Court issued a certificate of judgment on April 17, 2015.

The circuit court held a hearing on Martin's motion, and Martin and the State offered evidence and arguments. The circuit court ultimately dismissed the indictment on the grounds that the State's misconduct was willful and that the resulting prejudice to Martin could not be corrected by a new trial. In its order dismissing the indictment, the circuit court incorporated by reference certain findings it had made in its order granting Martin's Rule 32 petition. The circuit court also incorporated by reference, and adopted as its findings, certain statements of fact in various filings by Martin. For clarity's sake, before recounting the evidence introduced at the hearing on Martin's motion to dismiss, we set out the various findings the circuit court made by incorporation from other filings.

With respect to Norma Broach, the circuit court found:[3]

> "On the night of October 8, 1995, Broach and her husband stopped to get gas at the Texaco station at the corner of Willis Road and Highway 90. As their van approached the service station, with her husband

[3]These findings are from the circuit court's order granting Martin's Rule 32 petition. As noted above, this Court affirmed the circuit court's judgment granting Martin's Rule 32 petition in an unpublished memorandum, State v. Martin (No. CR-12-2099, December 12, 2014), 195 So. 3d 1077 (Ala. Crim. App. 2014)(table). The circuit court's order is included in the record of that case.

driving, Broach saw a small black car and a white camper truck parked alongside Highway 90 pointing South. As previously noted, Hammoleketh Martin drove, and her body was found in, a black 1991 Ford Escort hatchback--a small black car.

"Broach testified at the Rule 32 evidentiary hearing that she saw a man exit the camper truck and lean his upper body into the black car. She then witnessed him return to the camper truck, retrieve a large gas can, and drive the camper truck into the Texaco station. Broach testified that the man parked the camper truck reasonably close to the location of the Broaches' van and then retrieved a second gas can from the camper truck. Broach described the gas cans as maybe two feet long and perhaps one foot wide and said they were similar to what you might see attached to a military jeep.

"Broach testified that her van and the camper truck were parked in the service station such that she had to turn to see the camper truck and observe what the man was doing. Broach testified that she witnessed the man walk into the Texaco's mini-mart and walk out. She testified that the man she saw was white.

"Broach testified that, after exiting the Texaco's mini-mart, the man opened the back door of the camper, which swung wide, allowing her to see the interior. She testified that she saw a mattress, a bag of clothes, and a bag of groceries, and witnessed the man straighten some sheets in the back of the camper. Broach testified that the man then moved the camper truck close to the pumps and filled both of the gas cans he had taken out of the camper, from one of the pumps, while looking at her.

"Broach testified that the man walked around the Broaches' van looking in all of the windows and at the van's tags, then put the filled gas cans in the camper, and drove back to the black car on Highway

> 90. Broach testified that she saw the man park the camper truck beside the black car so that the black car continued to be facing South while the camper truck was facing North. Broach testified that the back of the camper truck was close to the front of the black car, and that the camper truck was parked in such a way that she could look through the window of the camper's truck cab and see a portion of the black car.
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> "Broach testified that she was watching the man continuously. She saw him get out of the cab, open the back of the camper truck, open the passenger door of the cab, look over his shoulder, and go between two vehicles. At no time did he put gas from either of the two cans into the gas tanks of either the camper truck or the black car. Broach testified that she next saw him, between the two vehicles, backing up and dragging a heavy object, stooped over, with arms extended. She then watched him push the heavy object into the passenger side of the cab of the camper truck. Broach testified that she then witnessed the man get into the driver's side of the camper truck, make a U-turn, and speed down Willis Road."

(Record in CR-12-2099, C. 2052-54; internal citations omitted.)

Regarding the gas can Hammoleketh's sister Jackson told Major Calhoun she had seen in Hammoleketh's car, the circuit court stated:[4]

> "Hammoleketh Martin drove a black 1991 Ford Escort hatchback. The State spent a significant amount of time during Martin's trial attempting to

[4]These findings are from the circuit court's order granting Martin's Rule 32 petition.

discredit Martin's statements to police, and his testimony to the effect that Mrs. Martin would carry a gas can in the backseat floorboard of her car because the gas gauge did not work. For example, in her closing argument, Assistant Attorney General Grant argued to the jury:

> "'George [Martin] told the police, well, she had a problem with that gas gauge. She had to carry around a gas can. Oh, boy, we've heard about this mysterious gas can. There was no gas can in that car. There was no gas can. The arson investigators told you they couldn't find any remnants. There would have been remnants [sic] of a gas can in that car had it been there ... you would have had melted plastic that would have been recognizable as being from a red gas can .... Where was the gas--this mysterious gas can kept? ... The one place we know it wasn't was inside Hammoleketh Martin's car.'

"The prosecution also attempted to demonstrate that the witnesses who corroborated Martin's statements and testimony regarding the gas can were related to, and thus presumably biased in favor of, Martin. For example, in his rebuttal closing argument, Assistant Attorney General Valeska argued to the jury:

> "'Why in the world do all of Defendant's relatives come in here and talk about a gas can when none of her friends saw it?'

"It is apparent to this court that the State's Attorneys had not seen petitioner's Exhibit 51[5] at

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[5]As explained below, petitioner's Exhibit 51 was Major Calhoun's handwritten notes taken on May 10, 1997, during an

the trial. If they had, it would be hard to square their closing arguments with their obligations as attorneys as set out above. Indeed, if the State's Attorneys had this document in their possession when making their closing ... argument, and that was shown by a preponderance of the evidence, the court would be in a position to find prosecutorial misconduct. However, no such evidence was shown to the court.

"Evidence that Mrs. Martin did, in fact, have a gas can with her in her car would have supported the defense's theory that the fire was the result of an accident. The record reflects a belief on the part of the State that convincing the jury that there was no gas can in Mrs. Martin's car at the time it caught fire was an important element of their case against Martin.

"Martin pled in his third amended petition that the State violated the constitutional mandate announced in Brady and its progeny by failing to produce evidence in its possession that ... Mrs. Martin's own sister could have corroborated trial testimony that Mrs. Martin carried a gas can in her car. ...

"On May 10, 1997, Major Calhoun interviewed Terri Jean Jackson, Hammoleketh Martin's sister. Major Calhoun took handwritten notes of that interview, which were admitted at the Rule 32 evidentiary hearing as petitioner's Exhibit 51. Major Calhoun's notes reflect that, in her statements to the [Mobile Police Department], Terri Jean Jackson stated that she had seen a small red plastic gas can in Hammoleketh Martin's car.

"Following the Alabama Supreme Court's March 11, 2011, order requiring the State to produce the

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interview with Jackson.

contents of its investigation file relating to Hammoleketh Martin's death to Martin's Rule 32 counsel, the State claimed work-product privilege as to a number of documents contained in that file, including petitioner's Exhibit 51. After conducting an in camera review of those documents that the State asserted were protected by the work-product privilege, this court ordered the State to produce certain of these documents, including petitioner's Exhibit 51, to Mr. Martin's Rule 32 counsel.

"The State does not dispute, and the court finds, that the State withheld petitioner's Exhibit 51, Major Calhoun's handwritten notes from the State's May 10, 1997, interview with Terri Jean Jackson, from Martin's trial counsel.

"The State asserts that a type-written version of petitioner's Exhibit 51, introduced at the Rule 32 evidentiary hearing as State's Exhibit 7, was provided to Martin's trial counsel. The sole evidence submitted by the State in support of that contention was the testimony of Major Calhoun.

"For the reasons previously discussed, including the inconsistent and unreliable testimony offered by Major Calhoun at the Rule 32 evidentiary hearing, the court does not find Major Calhoun's testimony to be reliable or credible evidence showing that State's Exhibit 7 was produced to Martin's trial counsel.

"Martin's trial counsel, [Dennis] Knizley, testified at the Rule 32 evidentiary hearing that he did not recall ever seeing State's Exhibit 7. He testified that Terri Jean Jackson's statement would have been 'memorable,' stating, '[i]t's a pretty biting piece right there.' Knizley testified that the statement would have been an important piece of evidence to Martin's defense because it rebutted the State's argument that only relatives of Martin claimed to have seen the gas can. Knizley's co-

> counsel, [Kenneth] Nixon, likewise testified that he did not recall ever seeing State's Exhibit 7 and believes it would have been important. The court finds this testimony of Martin's trial counsel credible.
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> "The court finds by a preponderance of the evidence that the State withheld State's Exhibit 7 from Martin's trial counsel. The court further finds that both petitioner's Exhibit 51 and State's Exhibit 7 were favorable to the defense. Terri Jean Jackson was Hammoleketh Martin's sister. Her statement to [Mobile Police Department] that she saw a red gas can in Mrs. Martin's car would have corroborated Martin's testimony and his prior statements to police and would have precluded the State from arguing to the jury that only Martin and relatives of Martin had claimed to see a gas can in Hammoleketh Martin's car. ..."

(Record on postconviction appeal, C. 2039-42; internal citations omitted.)

With respect to the gas can allegedly kept in Hammoleketh's car, the circuit court found:[6]

> "The State [suppressed] the interview report of Terri Jean Jackson, Mrs. Martin's sister, and then used the fact of suppression to buttress its false argument to the jury. Ms. Jackson reported seeing a gas can in Mrs. Martin's car less than a month before her death. The prosecutor necessarily knew this and had to prepare the very argument offered to the jury without rebuttal--that the only witnesses

[6]These findings of the circuit court were made by incorporating certain statements Martin made in his response to the State's proposed order on Martin's motion to dismiss the indictment.

> who claimed to see a gas can in Mrs. Martin's car were 'only Martin and relatives of Martin.' The prosecutors knew this was not true, but they knew the defense could not prove it. The prosecution knew that the presence of a gas can in the burned out car would strongly support a theory that the fire was accidentally caused. For this reason, ... the State withheld the statement of Ms. Jackson."

(C. 642-43; internal citations omitted.)

Regarding the anonymous telephone calls, the circuit court found:[7]

> "The State treated the exculpatory anonymous calls that it received in precisely the same way that it treated Mrs. Broach's observations--as obstacles to its prosecution of Mr. Martin. Law enforcement made no effort to track down the caller or callers, and minimal effort was made following up with the potential suspects. Investigators superficially asked Trooper Grayling Williams about the anonymous call and his whereabouts on the night of October 8, 1995, without any meaningful investigation. Trooper Williams endured none of the repeated interrogations and extensive investigation to which Mr. Martin was subjected.
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> "Incredibly, more evidence pointed to Trooper Williams as a suspect than to anyone else. The State knew, as this Court and the defense now know as well, that Williams was on duty in the area the night Mrs. Martin died, that he purported to clock out early from his shift, that he was implicated by an anonymous witness and that he was in all likelihood the trooper seen on Larue Steiner Road by James Taylor at a time long after he purportedly clocked out from his shift. Moreover, Williams's

[7]See supra note 6.

> own conduct indicated culpability. Williams changed his story three separate times, and falsely denied knowing, and ever being in, the area. Mr. Martin's original trial counsel was adamant that, if he personally had the anonymous call information, he would have tracked the caller by checking phone logs for the number and checking cameras downtown to the extent it was from a public phone. This method of simple follow-up investigation was ignored by the State. The only possible explanation for the State ignoring such a significant lead is that the State already was fixed on their previously selected 'defendant'--Mr. Martin. It is now far too late for all of those important efforts in an investigation to be attempted."

(C. 637-38; internal citations omitted.)

With respect to the bicycle tracks, the circuit court found:[8]

> "[T]he State argued to the jury that Mr. Martin must have used a bike to travel from the scene of the car fire to his home. The State acknowledges, and the evidence demonstrates, that officers investigated the scene of the fire days later to search for, among other things, bike tracks. No bike tracks were discovered. The State relied on the unsupported contention that Mr. Martin allegedly rode a bike home from the scene of the fire but withheld evidence that would establish that no bike was ridden from the scene. ...
>
> "But the investigator's effort to locate bike tracks and its unsuccessful results were not disclosed to the defense. The State did not create any reports or memoranda. Instead, as investigators did with all other facts inconsistent with their

[8]See supra note 6.

> theory of the case against Mr. Martin, the investigators ignored and buried this information."

(C. 638; internal citations omitted.)

Regarding Martin's supposed confession to Clifford Davis while Martin was incarcerated, the circuit court found:[9]

> "Mr. Martin offered his full cooperation and submitted himself to numerous lengthy interviews. Throughout it all Mr. Martin vigorously maintained his innocence. Having failed to secure a confession from him, however, the State had to create one, and it ultimately did so by planting a jailhouse snitch who incredulously obtained four purported confessions from inmates charged with serious crimes, including Mr. Martin.
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> "The State contends that in jail, guilty people have to talk about what they did. While common sense suggests otherwise, at least in Mr. Martin's case, this contention is disproved by the evidence. Mr. Martin had every phone call out of jail recorded, and no evidence has been presented that Mr. Martin ever suggested that he might have [had] anything to do with his wife's death in these recordings. If the State's contention was true (it is not), Mr. Martin would have confessed in these communications he engaged in with his family members and friends, but he never did. Mr. Martin was well-known for almost never talking to anyone, including his own family about anything, and particularly anything personal. It is inconceivable that he would divulge detailed personal information to a small time crook like Davis whom Mr. Martin never knew before Davis was planted in his wedge at the jail.

[9]See supra note 6.

"Major Calhoun claimed he believed that Davis was credible because Davis knew so much information about Martin. Yet, while Major Calhoun claimed Davis learned this information from Mr. Martin, at least most if not all of this exact same information was in Mr. Martin's file and available to anyone who had access to that file, including Major Calhoun. There is a distinct pattern in this case of the State's witnesses relating things differently after meeting with Major Calhoun than how they knew things before.

"Moreover, the State's claim that Davis is credible is without basis. This is the same Davis who, contrary to the State's contention that Davis has no record, was arrested for second-degree burglary and first-degree robbery. More significantly, a mere month before the original trial, after they had responded to a call that Davis was harassing his wife, Davis told investigating officers that he would 'fix' them because he claimed he was close personal friends with the [Attorney General] and Major Calhoun. When confronted with Davis's prior conduct, even Major Calhoun admitted that Davis was the type of person to lie to 'influence' others.

"The State also contends that Clifford Davis was offered no favors. This dubious contention appears to be undermined by the fact that an alleged first-degree-robbery charge on Davis's record was dropped because of a purported 'misidentification.' Major Calhoun had no information about what transpired with the second-degree-burglary charge against Davis.

"Moreover, the unusual manner in which Davis came by his confessions--he was switched into the wedge housing inmates with serious crimes for his purported protection--makes no sense and is highly suspect. Moreover, as this court observed, that 'may well have been' the procedure, but 'what's

> unusual is that we come out with suddenly people confessing crimes to a public drunk [Davis] where they [Mr. Martin] don't much talk to anybody else. That's sort of unusual.' But for the State, it did not have to make sense, as a confession was what it needed, and it got a concocted one with Clifford Davis. Despite legitimate and unanswered concerns over, among numerous other issues, the manner in which Davis was placed in the wedge; purportedly obtained four confessions shortly thereafter; had an undocumented interview by Major Calhoun; participated in a videotaped interview by [Assistant Attorney General] Valeska that had multiple, unexplained stops; changed what the alleged chokehold looked like between the videotaped interview and the original trial; and changed his testimony that [the] alleged chokehold 'killed' Mrs. Martin to 'subdued' Mrs. Martin only after the medical examiner opined that Mrs. Martin was alive during the fire--now that Davis may be medically unavailable, the State wants to sneak the testimonial 'confession' past the jury as legitimate and credible."

(C. 638-40; internal citations omitted.)

Finally, with respect to James Taylor, the circuit court found:[10]

> "At trial, Taylor testified that, shortly after 9 p.m. on the night of the murder, as he was driving to his place of employment, he saw a black state trooper in an Alabama State Trooper's patrol car sitting at a stop sign near the area where the victim's body and vehicle were later found. The

[10]These findings of the circuit court were made by incorporating certain statements from this Court's unpublished memorandum affirming the circuit court's judgment granting Martin's Rule 32 petition.

patrol car's headlights were off, but its right turn signal was on. After Taylor passed by the patrol car, it turned right. At trial, no evidence was presented concerning the size of the state trooper that Taylor saw near the scene of the crime, and Taylor was not asked to specifically identify Martin as the trooper he had seen near the scene of the crime. During its guilt-phase closing argument, the State argued:

> "'Now, also around nine o'clock p.m. James Taylor, you remember him, he said that he was--he's a--he worked for--I think it was Penske Truck Lines. And he said that he was going to the--to the Penske offices and he said that he observed a vehicle being operated by a black male coming off LaRue Steiner Road sitting at that intersection with the headlights off. It was a trooper car with a black male in the trooper car. And that when he was turning in to go to the Penske offices, that car made a--the trooper made a--seeing it in his rear view mirror, it made a right turn going toward the direction of Campanella Drive. That's--Campanella Drive is in that direction. Y'all have been out there, you've seen it for yourselves.
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> "Now, LaRue Steiner Road, if you recall, is a road that comes--when you come around Willis Road to get back out to 90, that's the road you would take to get back out to Highway 90. Now, I'm sure y'all are wondering, what the significance of this, of this sighting of the trooper car on LaRue Steiner Road? I submit to you that you could infer from the evidence that that was George Martin in that trooper car. That he was out here in his trooper car scoping out Willis Road to make sure there wasn't anybody back there to see what he

> was getting ready to do. That he was back there in his trooper car, because if anybody saw a trooper car they wouldn't think anything of it. Just law enforcement checking around. But he went out there with that bicycle in the trunk of that trooper car that he planted for his get-away. That he went out there, scoped it out, went back to the house before he took Hammoleketh and her car out there to be torched. You can infer that from the evidence, ladies and gentlemen.
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> "'Now, nine o'clock, the trooper car is out there. At approximately 10:30, if you recall the--the fire investigator said that in their opinion that fire probably burned about an hour. So, 10:30 was the approximate time that you can infer from the evidence that her--that George Martin torched his wife and torched her car.'

"(Trial R. 2354-56.)

"Therefore, the State argued that Martin was the state trooper that was seen by Taylor. Further, the State relied on Taylor's testimony to place Martin near the location where the victim's body and vehicle were found and to place Martin in that area immediately before the victim's body and vehicle were burned.

"Through discovery during the Rule 32 proceedings, Martin received, among other things, an identification made by Taylor from a photographic lineup. The photographic lineup contained photographs of 13 black Alabama State Troopers, including Martin. However, when presented with that lineup on May 8, 1997, Taylor drew an arrow to Trooper Grayling Williams and signed and dated the identification. (C. 2477.) Through Rule 32 discovery, Martin also received a handwritten note

dated May 8, 1997, which concerned the May 8 police interaction with Taylor and stated: 'Was built like G. Williams, a "big man that filled up the car."' (C. 2473.) Martin further received a typed 'investigator's narrative' that was signed by Major Thomas Calhoun and Captain Rowland dated May 9, 1997. That narrative stated:

> "'May 8, 1997
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> > "'This date, Captain Rowland and Major Calhoun traveled to Mr. James E. Taylor's place of employment for the purpose of showing him a picture spread of Alabama State Troopers. Mr. Taylor was shown a picture spread of 13 black male troopers at 11:35 a.m. at which time he identified the picture of Trooper Grayling Williams ONLY as being about the size of the trooper on LaRue Steiner Road on October 8, 1995, at 9:00 p.m. Taylor further stated that although he could not identify any of the pictures as being the specific trooper, he did say that the trooper was "a big man that filled up the car."'

"(C. 2486.)

"Testimony from the Rule 32 hearing indicated that Martin is 5'6". A former Alabama State Trooper troop commander testified that he could not remember any other state trooper who was stationed in Mobile at the time of Hammoleketh Martin's death that was as short as George Martin. (R. 546-47.) Based on its own observation, the circuit court specifically found that Martin is not a 'large' man. (C. 2023.) Grayling Williams testified that he is 5'11" and that he weighed 198 pounds in 1995. (R. 83.)"

The evidence at the hearing on Martin's motion to dismiss was as follows: Major Thomas Calhoun of the Mobile Police Department[11] testified that he was the case agent in the investigation of Hammoleketh Martin's death, which occurred in October 1995, but that he did not become involved in the case until March or April 1997. Martin's case was the first time Major Calhoun had handled discovery in a criminal case; he was not familiar with the Rules of Evidence, the Rules of Criminal Procedure, or the relevant caselaw regarding discovery; and the assistant attorneys general prosecuting the case did not provide him with formal instructions about how to handle discovery. Major Calhoun was aware that the circuit court had entered an open-file discovery order, and he produced everything to which he believed the defense was entitled. Major Calhoun did not believe that he was required to produce investigators' handwritten notes, so he withheld that information.

With respect to James Taylor, Major Calhoun testified that he interviewed James Taylor on May 8, 1997, and made a handwritten note stating: "Mr. Taylor was shown a picture

[11]Major Calhoun testified that, at the time of the hearing, he was retired from the Mobile Police Department.

spread of 13 black male troopers at 11:35 a.m., at which time he identified the picture of Trooper Grayling Williams ONLY ... as being about the size of the trooper on LaRue Steiner Road on October the 8th, 1995, at 9 p.m." (R. 141-42.) Taylor informed Major Calhoun that he could not identify the person he saw that evening but that he was "a big man that filled up the car." Major Calhoun testified that Martin's picture was included in the lineup and stated that Martin and Williams "don't look anything alike" in their facial features or physical build. Taylor's identification did not concern Major Calhoun because, he said, photographic lineups are notoriously unreliable. Major Calhoun acknowledged that the State did not ask Taylor to identify Martin during trial and admitted hearing Assistant Attorney General Grant state during closing arguments that the jury could infer from Taylor's statements that Martin was the trooper Taylor saw on the night of the murder. Major Calhoun did not attempt to correct the prosecutor, though, because he believed Martin was the trooper Taylor saw that night. Major Calhoun testified that he gave the photographic lineup to Martin's defense counsel two months before trial.

With respect to Clifford Davis, Major Calhoun testified that he and Lieutenant Mark Neno interviewed Davis in 1999 because Davis claimed to have information regarding Martin. Davis, who was incarcerated at the Mobile Metro jail for failure to pay traffic tickets, had been placed in the same "wedge" with Martin--who had been charged with capital murder--for safety reasons. Although Davis claimed that Martin had confessed to murdering Hammoleketh, Major Calhoun did not take a written statement from Davis at that time. Immediately following Davis's jail interview, Major Calhoun and Lt. Neno transported Davis to the Attorney General's office in Montgomery at the direction of Assistant Attorney General Valeska. While in Montgomery, Assistant Attorney General Valeska interviewed Davis, and that interview was video-recorded and transcribed by a court reporter.

Major Calhoun believed Davis to be a credible witness because, he testified, Davis knew several details about Martin's life that Davis could only have learned from Martin. This fact bolstered Davis's credibility in Major Calhoun's opinion because, he stated:

> "George Martin doesn't talk to anybody. I mean, he didn't even have any really close friends on the

> troopers. I mean, he was a loner. Nothing wrong with that. But he didn't talk to anybody. I've listened to every jailhouse call he ever made, you know, and I heard him tell his sister, you know, 'I don't talk to nobody.' And he didn't. He knew better than to talk to somebody."

(R. 101.) Moreover, Major Calhoun testified, Davis was different from other informants because Davis did not ask for or receive anything in return for the information he provided. Major Calhoun did not determine whether Davis was "psychologically stable." Major Calhoun admitted that several details Davis provided were also available in records kept by the Alabama State Troopers and that, aside from Martin, only law-enforcement personnel could have passed that information along to Davis. Major Calhoun denied ever giving Davis information about Martin or instructing anyone else to do so. Major Calhoun admitted that Davis also obtained confessions from at least two of the other three inmates who were housed in the "wedge" with him and Martin. Major Calhoun acknowledged that Martin had always maintained his innocence and had been cooperative with law enforcement throughout multiple interrogations. Major Calhoun agreed that it did not make sense that Martin would confess to Davis but not to anyone else.

Martin introduced as an exhibit an incident report from the Mobile Police Department dated April 16, 2000, detailing an incident of harassment and domestic violence by Davis against his wife. During the incident, Davis stated to police that he would "fix" them because he was close friends with Major Calhoun and the "State Attorney General." Major Calhoun denied being close friends with Davis and testified that he would not have assisted Davis in any way regarding criminal charges. Martin also introduced evidence that Davis had been arrested previously and charged with first-degree robbery and second-degree burglary. Major Calhoun testified that the robbery charge was later dismissed due to misidentification and that he did not know the disposition of the burglary charge.

With respect to Norma Broach, Major Calhoun testified as follows: In October 1995, Broach reported to Crimestoppers tip line what she had witnessed on the night of the murder. According to Major Calhoun, Corporals Don Pears and Matthew Thompson,[12] who were involved with the case at that time, did not consider Broach's information to be worth investigating.

[12]Major Calhoun testified that Corporal Thompson was deceased at the time of the hearing.

On October 27, 1995, Investigator Thompson made a note stating: "Crimestoppers, lady was at Texaco one hour before guy inside store bought gas, Norma Broach 660-8212." (R. 66.) Major Calhoun testified that he was first made aware of Broach during Martin's trial:

> "My recollection is that Mrs. Broach's name came up during jury deliberations. Mr. Valeska asked me about her. I did not recall her name. And then, afterwards, there was a letter or something that went to Valeska about her. It seems like maybe from Al Pennington[, Martin's counsel on direct appeal], but I'm not positive. Anyway, [Valeska] referred that to me and said, 'Find out something about this woman.' Something along those lines."

(R. 61.) Following the trial, Major Calhoun gathered information about Broach and her husband, including credit reports and criminal records. Neither Broach nor her husband had criminal records or a negative credit history. When questioned about his motives for obtaining such information, Major Calhoun stated: "That was standard for what Valeska was asking me to do, find out who this woman is and what she's about and what's going on." (R. 98.)

With respect to the gas can, Major Calhoun testified as follows: "I knew Terri Jackson, [Hammoleketh's] sister, had identified a gas can being in the car. I typed up that

statement saying that very thing. Mr. Knizley[, Martin's trial counsel,] signed for it. He got it. It was in my notes, and it was also in a written statement we turned over to the defense, Your Honor."[13] Jackson had seen a gas can in the car on Labor Day of 1995 when she and Hammoleketh were shopping; Hammoleketh moved the gas can to make room for toys they had purchased. Major Calhoun testified that he did not attempt to correct Assistant Attorney General Valeska during closing arguments when the prosecutor stated that no one except members of Martin's family had claimed to see a gas can in Hammoleketh's car. Major Calhoun stated, "I knew [Jackson] had said that, but I can't say I knew sitting there that I felt like I should stop the prosecutor, no, sir, I did not."

[13]As noted above, in its order granting Martin's Rule 32 petition, the circuit court stated that it did not find Major Calhoun's testimony at the evidentiary hearing on Martin's Rule 32 petition to be reliable or credible evidence that Jackson's statement to Major Calhoun regarding the gas can was produced to Martin's trial counsel before Martin's trial commenced. On the other hand, the court found to be credible Nixon's and Knizley's testimony that neither attorney had seen Jackson's statement and that they would have remembered seeing the statement because it would have been important to Martin's defense.

Major Calhoun further testified that police searched for possible bicycle tracks at the crime scene three or four days after the night of the murder. No bicycle tracks or other evidence indicating that Martin had used a bicycle to flee the scene was found. Major Calhoun stated that there was nothing in the case file relating to the search for bicycle tracks and that he would have known if investigators found any evidence because it would have been important to the case. Major Calhoun did not inform Martin of the lack of evidence.

Major Calhoun confirmed that the prosecutors had access to everything in the case file, including his notes, James Taylor's statements about Williams and the photographic-lineup identification, and Jackson's statements about the gas can.

Alabama State Trooper Grayling Williams testified that he worked on October 8, 1995, but that he could not remember what time his shift ended. During Trooper Williams's testimony, Martin introduced an investigator's narrative written by Corporal Matthew Thompson of the Mobile Police Department Homicide Unit, which stated:

> "On November 28, 1996, Cadet W. Jackson of the Mobile Police Department received a phone call while working at his assigned duty station in the Police Records Unit. Jackson stated that the caller

> sounded like a black male with deep crackling voice. The caller stated that he was calling in reference to the murder of Hammoleketh Martin. The caller refused to be transferred to an investigator or supervisor. The caller stated, 'I am only going to say this once. If you want the help, good. If not, I don't care.'
>
> "The caller stated that he was contacted by someone wanting help who was involved in the case. That more people were involved in the case than the police knew about. That a subject known as Greyline [sic] Williams knows all about the case and that investigators should talk to him. That Greyline [sic] was either a State Trooper or a Deputy Sheriff. Cadet Jackson asked the caller to spell the Williams subject's first name. The caller started spelling 'G-R-E,' then stated, 'I don't know how to spell it.' Cadet Jackson stated that he pressed the subject for more information but the subject hung up."

(C. 887.)

Trooper Williams testified that he could not remember speaking with anyone about an anonymous telephone call that indicated that he was involved in Hammoleketh's death but that he did remember speaking briefly with someone about a "so-called letter or something with a name on it, and I said, 'Is that supposed to be me?'" Trooper Williams stated:

> "Well, when I first got to Mobile PD, I said, 'They serious about this ticket fixing.' And he said, 'It's not about that.' He said, 'It's about Martin's wife,' or something to that effect. And he asked me did I know where the death occurred. I said, 'No.' And he showed me a picture of where it

> happened at. And I said, 'Well, I've never been on that road before.' I didn't even know it went back there like that. That, I do remember. That's about all."

(R. 180-81.) Trooper Williams testified that he had never met Hammoleketh and that whoever had made the telephone call was lying. Trooper Williams was never questioned further about his possible involvement in the case, was never subject to searches of his home or vehicle, and was never told he "had been identified as possibly being the man that was in that trooper car."

Kenneth Nixon, one of Martin's two defense attorneys at trial and a former police officer, testified with respect to the anonymous telephone call:

> "If I was a detective working on the case, I would have traced the phone call coming into the cadet to determine who made the call and from what location and try to find out the caller. And then I would focus attention on Trooper Williams.
>
> "....
>
> "... [W]ith Mobile Police Department in 1995, all calls that came in were recorded and traced with a caller ID system. So, as a defense lawyer, I would issue a subpoena."

(R. 201.) Nixon stated that he would consider a detective who did not follow up on this information "extremely lax in his

duties." Martin introduced a letter Nixon wrote to Al Pennington, Martin's counsel on direct appeal, which stated:

> "As per Mr. Martin's request in his most recent letter, I met with Trooper Grayland [sic] Williams today and asked him about his whereabouts on the night that Hammolekeith [sic] Martin was killed. He stated that he was not working that night and that it was not him who was seen in the area. He stated that he did not hear about the death until the next day. He also said that no one had threatened him. He said that he was not familiar with the area where the car was found and that he did not know where it was until the police took him and showed him sometime later. Please communicate this to George [Martin] and let him know that I followed up on his request."

(C. 891.)

With respect to the information provided by Norma Broach, Nixon testified:

> "I would certainly jump right on that and try to determine who made that phone call, get a better description, try to find the truck that she described.
>
> "I believe the truck did not have a tag, had a camper on the back of it or attached to it. I would have checked the--the State Trooper office at that time was not very far from the station on Highway 90. The Mobile Police Department is on Highway 90. As such, there are trooper cars and police cars on Highway 90 all the time. ... So I would have checked to see if anyone had stopped a truck fitting that description for not having a tag and either issued them a citation or called it in, got their identification, ran ... a check on them to see who possibly was driving that car. You could check the

> ATMs in that area, because they had ATMs in that area at the time, to see if there was any ATM video of that truck pulling up, anyone getting out.
>
> "In the past, I've even ran an ad in the newspaper asking if anyone has any information of an owner a vehicle meeting this or fitting this description to call in. And I think she identified--she gave some characteristic information regarding the man being white and bald and I think boyish looking.
>
> "I would have probably went to the service stations around there, because the city had gas can--I think, if I'm correct, I think one of the gas cans was actually affixed to the truck. So he may have been in the lawn business or something that uses gas on a regular basis. And I think I would have stopped at the service stations and asked the people there, 'Do you recognize anybody that drives a truck that fits this description that buys gas from you?'"

(R. 202-04.) Nixon testified that he would have called Broach as a witness and that now, 20 years after the crime occurred, it was too late to investigate that information.

Following the hearing, the circuit court instructed the parties to submit proposed orders and continued the hearing to January 4, 2016. In March 2016, the circuit court granted Martin's motion to dismiss the indictment with prejudice,[14]

[14]The circuit court issued the original written order on March 11, 2016; on March 14, 2016, the court issued a corrected order in which it provided citations that were missing from the original order.

stating:

> "This trial court finds that, under the facts presented, Defendant Martin has shown intentional or willful conduct and prejudice on the part of the State. Furthermore, this court finds that, even though certain materials were ultimately furnished to the defendant over almost ten years, after extensive discovery motions, appeals, mandamus, and other remedies sought by the State, that time has become the enemy of memory and life. The Court hereby finds that the prejudice suffered by Martin cannot be corrected by a new trial. Further, the violations of Brady by the prosecutors were willful, and the appropriate sanction to be applied is a dismissal with prejudice.
>
> "This trial court is not unmindful of the injustice that has been brought about against Martin, and is also aware of and sympathetic to the injustice brought about against Hammoleketh Martin's family. Had this case been tried fairly, all would have had resolution of this matter long ago.
>
> "Prejudice
>
> "Even if all of the witnesses who testified at trial had lived and retained perfect memories, there is no question that we are now sixteen years beyond the original trial of this case and twenty years beyond the event of the death of Hammoleketh Martin. This is not a cold case, but a case that is riddled with impropriety and missteps brought about during the prosecution of the case, resulting in a death sentence and fifteen years on death row.
>
> "Evidence of the lack of 'full access' is shown in that the State has moved to allow the reading of certain testimony at the original trial in the year 2000, because several witnesses are now deceased. The State has also asked the reading of the testimony of the 'snitch' Clifford Davis, who now

tells the State that he has no memory, after several strokes, of the events that led to the so-called admissions and confession by George Martin to him while he was a misdemeanor prisoner assigned to the wedge which housed Martin and other capital-murder defendants.

"Also, the testimony at the Rule 32 hearing of the witness James Taylor, which placed a black State Trooper near the scene of the event, who no longer recalls he made a direct statement to Major Calhoun, who wrote in his non-delivered notes that Taylor specifically told him about the size of the defendant in that he 'filled up the car,' will be difficult to replicate.

"....

"Because the death of at least two significant witnesses, the alleged loss of memory of the 'snitch,' Clifford Davis, and the loss of memory of James Taylor, this court believes that a substantial prejudice has been demonstrated and is such that the simple use of prior transcribed testimony would not accommodate the confrontation required by the Constitution of the United States of America.

"Willfulness

"This court took judicial notice and incorporated all of the testimonial hearings, including the original trial, as part of the record for its review. Defense puts forward the following areas as evidence of the willfulness practiced by the prosecution, and they are as follows:

"1. Norma Broach: failure to disclose (See this court's Rule 32 order dated August 30, 2013.)

"2. The anonymous calls: failure to disclose (See defendant Martin's response

to State's proposed order on defendant's motion to dismiss filed February 12, 2016.)

"3. The bike tracks: (State's contention in closing argument that Martin allegedly rode a bike home from the scene of the fire, but withheld evidence that would establish that no bike tracks were ever found at the scene, even though they were searched for.)(See defendant Martin's response to the State's proposed order of defendant's motion to dismiss filed February 12, 2016.)

"4. Clifford Davis: snitch. (See defendant Martin's response to the State's proposed order of defendant's motion to dismiss filed February 12, 2016.)

"5. James Taylor: (See memorandum opinion on Brady issued by the Court of Criminal Appeals affirming the granting of the new trial in the Rule 32 proceeding dated December 16, 2014.)

"6. The gas can: (See trial court's Rule 32 order dated August 30, 2013, concerning the failure to disclose statement of Terry Jean Jackson that she had witnessed a gas can in Mrs. Martin's car less than a month before her death.) (See also opening statement of Gerri Grant (Volume 3, pages R. 308-09). Grant stated in opening statement as to the carrying of gasoline in the car, a lighter in the car, that she hit something that 'but you will see that the evidence in this case will not support that, not one iota.') (See also defendant George Martin's response to the State's proposed order on defendant's motion to dismiss the indictment with prejudice.)

"Of importance to this court was the testimony of Major Calhoun, City of Mobile policeman, who was the case officer and primary investigator putting together the file that was used to prosecute Martin. Calhoun was present throughout the trial of Martin in 2000. He heard the opening statements of Assistant Attorney General Grant, who stated that there would not be an iota of evidence concerning a gas can. Calhoun had taken the statement from Hammoleketh's sister, Terry Jean Jackson, that she had observed the gas can in the hatchback car that was ultimately burned, and this observation was made just a few weeks before that event. He also heard Assistant Attorney General Valeska make strong argument in closing that there was no gas can and that it was simply a creation of certain Martin family members. Calhoun certainly knew, based on his own investigation, that this was not true. Also, Calhoun heard Assistant Attorney General Grant argue that an inference could be drawn from the testimony of James Taylor that Martin was a black State Trooper close to the scene before the event in question. Calhoun knew that a photo spread had been presented to Taylor and that Taylor identified a physically different State Trooper as being like the one he saw. Martin's picture was in the photo spread and not identified by Taylor. The description 'he filled up the car,' and the fact that Taylor identified Trooper Gray[ling] Williams as that trooper, destroyed any such inference. Yet Calhoun testified at the motion-to-dismiss hearing [that] he felt no obligation to intervene, correct, or suggest to the attorneys that their arguments were not only incorrect, but untrue. ...

"....

"Experienced trial lawyers, including these prosecutors, know that they must be prepared to address weaknesses of their case. The greatest weakness in the prosecution's case in the Martin

trial was the identification by James Taylor of a different trooper as being the one who looked like who he saw on the night of the event. Another weakness was the admission by the sister of the deceased that Hammoleketh carried a gas can in her car. This court has held that those matters were not produced to the defense and that has been affirmed by the Court of Criminal Appeals. The affirmative use by the prosecutors of partial truths and untruths with knowledge satisfy the element of the prosecution's willful misconduct in this case. Thus, prejudice and willful misconduct co-exist in the prosecution of George Martin.

"There is no question that the Court of Criminal Appeals in its memorandum opinion affirming the Rule 32 granting of a new trial noted that:

> "' ... Taylor's photographic identification coupled with his comments to police concerning the size of the state trooper he saw at the scene of the crime were inconsistent with the State's use of Taylor's testimony, which was to show that Martin was the trooper who was seen near the scene of the crime shortly before the victim's body and vehicle were burned.
>
> "'....
>
> "'Taylor never identified Martin, and, based on his comments to police, it appears that he could not have done so.' (emphasis supplied)(Id. memorandum opinion CR-12-2099, Dec. 14, 2014.)'

"The requirements of the Moore[15] case have been met. In May of 2000, the State undertook the prosecution of George Martin through Assistant Attorney Generals [Donald] Valeska, [William] Dill,

[15]State v. Moore, 969 So. 2d 169 (Ala. Crim. App. 2006).

> and [Gerri] Grant. In November 2000, Daniel Wade Moore was indicted and later re-indicted in May of 2002 on five counts of capital murder. It was the Moore situation which brought forth the standard for determining whether or not a dismissal with prejudice should be entered because of prosecutorial misconduct. The Moore case was prosecuted by Assistant Attorney Generals Valeska and Dill. This court has carefully weighed the competing factors. This is not a windfall to defendant Martin, who has served fifteen years in solitary confinement on death row, and is certainly not a procedural device to allow Martin to escape justice. This court has looked at both the need to undo prejudice resulting from multiple violations and the appropriate deterrent value of the sanction in this case. While this is a rare sanction, it is the proper sanction in this case. ..."

(C. 780-84.) Thereafter, the State filed a timely notice of appeal.

On appeal, the State contends that the circuit court erred when it dismissed the indictment against Martin with prejudice. Specifically, the State claims (1) that, because Martin received a new trial as a result of the State's discovery violations, the circuit court erred when it dismissed the indictment as a sanction based upon the State's same discovery violations and (2) that Martin failed to establish that the State's misconduct was willful or intentional or that the prejudice he suffered could not be cured by a new trial.

Discussion

I.

The State contends that "because Martin received a new trial as a sanction for discovery violations that occurred before his first trial, the trial court erred when it imposed the additional sanction of dismissal for the same discovery violations." (State's brief, p. 15.) Specifically, the State argues (1) that the "trial court's imposition of the second sanction of dismissal for the same Brady claims violated principles of collateral estoppel and effectively destroyed the concept of a new trial" (State's brief, p. 16) and (2) that "bifurcation of Martin's original Brady claims and motion to dismiss created a trial-by-ambush situation and deprived the State of due process." (State's brief, p. 20.)

Initially, we address the State's mischaracterization of this claim. The circuit court's granting of Martin's Rule 32 petition and its ordering a new trial was not a "sanction" imposed on the State. Instead, the court's judgment merely provided Martin the relief to which he was entitled. The United States Supreme Court explained in Brady v. Maryland, 373 U.S. 83, 86-88 (1963), that granting an accused relief

because of a due-process violation is not intended to punish the prosecution.

> "[In] Mooney v. Holohan, 294 U.S. 103, 112 [(1935)], ... the Court ruled on what nondisclosure by a prosecutor violates due process:
>
> > "'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.'
>
> "In Pyle v. Kansas, 317 U.S. 213, 215-216 [(1942)], we phrased the rule in broader terms:
>
> > "'Petitioner's papers ... set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103 [(1935)].'
>
> "The Third Circuit in [United State ex rel. Almeida v.] Baldi[, 195 F.2d 815, 33 A.L.R.2d 1407,]

> construed that statement in Pyle v. Kansas to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269 [(1959)], we extended the test formulation in Mooney v. Holohan when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' And see Alcorta v. Texas, 355 U.S. 28 [(1957)]; Wilde v. Wyoming, 362 U.S. 607 [(1960)]. Cf. Durley v. Mayo, 351 U.S. 277, 285 [(1956)] (dissenting opinion).
>
> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription of the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceedings that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169."

373 U.S. at 86-88 (emphasis added; footnotes omitted.)

Accordingly, the State's claim that the circuit court's dismissal of the indictment after Martin had been granted a new trial amounted to a double sanction for the same conduct is a mischaracterization of the circuit court's holding.[16]

Moreover, this Court has stated:

> "Rule 32.9(c), Ala. R. Crim. P., authorizes the circuit court, if it 'finds in favor of the petitioner, ... [to] enter an appropriate order with respect to the conviction, sentence, or detention.' That same subsection also authorizes the circuit court to order 'any further proceedings, including a new trial,' and to address 'any other matters that may be necessary and proper.' (Emphasis added.) Thus, Rule 32, which provides a procedural vehicle for a defendant to collaterally attack the proceedings that led to his conviction or sentence, authorizes the circuit to, in essence, reopen the proceedings that led to the petitioner's conviction and sentence if the petitioner demonstrates he is entitled to relief. Our caselaw illustrates that when a Rule 32 petitioner obtains relief, the proceedings are reopened at the point necessary for the circuit court to address the particular problem in that case.
>
> "For example, if a Rule 32 petitioner demonstrates that his sentence is illegal, the circuit court may then reopen the proceedings and

[16]The State's argument is akin to an argument by an accused that the State has violated double-jeopardy principles. That is, the State appears to be arguing that it may be "punished" only once for its conduct that resulted in its Brady violations against Martin. Double-jeopardy protections, however, exist to protect the accused--not the State.

> resentence the petitioner. See, e.g., McMillian v. State, 934 So. 2d 434 (Ala. Crim. App. 2005)(granting Rule 32 relief where the petitioner's sentence was improperly enhanced under the Habitual Felony Offender Act and instructing the circuit court to resentence the petitioner without the application of the Habitual Felony Offender Act). Additionally, if a Rule 32 petitioner shows that his conviction must be overturned then the conviction--and the corresponding sentence for that conviction--will be set aside and the proceedings will continue from that point--additional proceedings could include, for example, a new trial, a guilty plea, or the dismissal of the charges. See, e.g., Riley v. State, 892 So. 2d 471 (Ala. Crim. App. 2004)(granting Rule 32 relief where the petitioner's guilty plea was involuntary and instructing the circuit court to set aside the petitioner's conviction and sentence)."

Waters v. State, 155 So. 3d 311, 316-17 (emphasis added)(Ala. Crim. App. 2013).

The problems with Martin's case concerned discovery about which he was unaware before his original trial commenced; therefore, the court reopened Martin's case at the pretrial phase. From that point on, Martin was free to make whichever pretrial motions he deemed necessary for his defense, including a motion to dismiss the indictment against him. See Rule 15, Ala. R. Crim. P. With these principles in mind, we address the State's specific arguments with respect to this issue.

A.

The State contends that the circuit court's dismissal of the indictment against Martin violated principles of collateral estoppel and "effectively destroyed the concept of a new trial." (State's brief, p. 16.)

> "'"[The r]equirements for collateral estoppel to operate are (1) issue identical to one involved in previous suit; (2) issue actually litigated in prior action; and (3) resolution of the issue was necessary to the prior judgment."' McNeely v. Spry Funeral Home of Athens, Inc., 724 So. 2d 534, 538 (Ala. Civ. App. 1998)(quoting Adams v. Carpenter, 566 So. 2d 236, 242 (Ala. 1990))."

Russell v. State, 739 So. 2d 58, 62 (Ala. Crim. App. 1999)(emphasis added).

The issue in question during Martin's Rule 32 proceedings was whether the State suppressed exculpatory evidence in violation of Brady. The issue posed by Martin's motion to dismiss was whether the State's misconduct--discovery violations during Martin's original trial that the court found to exist following an evidentiary hearing on Martin's Rule 32 petition--was willful and whether the resulting prejudice to Martin could be remedied by a new trial; in other words, whether the State's misconduct and the prejudice it caused were of such a degree as to merit the sanction of dismissal.

Therefore, the issue that was involved in Martin's Rule 32 proceedings is not identical to the issue that was involved in the proceedings that occurred after Martin moved to dismiss the indictment. Accordingly, the circuit court did not violate principles of collateral estoppel when it dismissed the indictment against Martin, and this claim is without merit.

B.

The State contends that it was denied due process because, it says, the bifurcation of the proceedings regarding Martin's Brady claims and his motion to dismiss "created a trial-by-ambush situation." (State's brief, p. 20.) Specifically, the State claims that, because the circuit court "relied on the Brady evidence presented during the Rule 32 proceeding" as proof of the prosecutorial misconduct that was the basis for dismissing the indictment, the State had unknowingly "present[ed] evidence during the Rule 32 proceeding to a claim with a different burden of proof--a claim the State never had a fair chance to rebut." (State's brief, p. 21.)

> "'Procedural due process, as guaranteed by the Fourteenth Amendment to

> the United States Constitution and Article I, § 6, of the Alabama Constitution of 1901, broadly speaking, contemplates the rudimentary requirements of fair play, which include a fair and open hearing before a legally constituted court or other authority, with notice and the opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party, with reasonable opportunity to controvert them. See Pike v. Southern Bell Telephone and Telegraph Co., 263 Ala. 59, 81 So. 2d 254 (1955); Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944). It is generally understood that an opportunity for a hearing before a competent and impartial tribunal upon proper notice is one of the essential elements of due process.'

"Ex parte Weeks, 611 So. 2d 259, 261 (Ala. 1992)." State v. Harwell, 85 So. 3d 481, 483 (Ala. Crim. App. 2011)(quoting State v. Smith, 23 So. 3d 1172, 1173-74 (Ala. Crim. App. 2009)).

There is nothing in the record to indicate that the State raised this claim below; therefore, it is not preserved for appellate review. See Pate v. State, 601 So. 2d 210, 213 ("An issue raised for the first time on appeal is not subject to appellate review because it has not been properly preserved and presented.").

Regardless, the State's argument is without merit. The

record shows that, on July 20, 2015, Martin filed his motion to dismiss the indictment "pursuant to Rule 16.5[, Ala. R. Crim. P.,] as a sanction for the State's willful and prejudicial Brady violations and attempts to hide its misconduct during the Rule 32 proceeding." (C. 104.) The State filed a response to Martin's motion on August 27, 2015, and Martin filed a reply on September 10, 2015. Following a telephone conference between the parties on September 29, 2015, the circuit court issued a written order setting a hearing on the motion for November 9 and 10, 2015. On November 9-10, 2015, Martin and the State appeared at the hearing and argued their positions. Martin presented witnesses and evidence, and the State thoroughly cross-examined Martin's witnesses. The State, on the other hand, presented a single witness.[17] Following the hearing, the court issued an order continuing the motion to dismiss and instructing Martin and the State to submit proposed orders regarding the motion on or before December 18, 2015. On

[17]The State's witness's testimony is sealed, and, because that testimony is not essential or relevant to the outcome of this case, we have not included the facts related to that testimony in this opinion.

January 4, 2016, the court issued an order stating that Martin's motion to dismiss was "taken under submission." (C. 49.) On March 11, 2016, the circuit court issued an order dismissing the indictment against Martin.

Accordingly, the State had more than enough notice of the time and place of the hearing on Martin's motion and was given ample opportunity to rebut Martin's claim, which was clearly set forth in his motion. Therefore, we cannot say that the State was denied due process in this regard. The State's argument is without merit, and it is not entitled to relief on this issue.

II.

The State contends that the trial court erred when it dismissed the indictment because, it says, "Martin did not establish that the suppression [of evidence exculpatory to him] was due to intentional or willful misconduct by the State or that any prejudice suffered could not be remedied by a new trial." (State's brief, p. 22.)

"Whether a trial court's denial of a motion to dismiss an indictment was error is reviewed under an abuse-of-discretion standard of review. See Raper v. State, 584 So. 2d 544 (Ala.

Crim. App. 1991)." Hunter v. State, 867 So. 2d 361, 362 (Ala. Crim. App. 2003). "'A trial court abuses its discretion only when its decision is based on an erroneous conclusion of law or where the record contains no evidence on which it rationally could have based its decision.'" McCain v. State, 33 So. 3d 642, 647 (Ala. Crim. App. 2009)(quoting Holden v. State, 820 So. 2d 158, 160 (Ala. Crim. App. 2001)). "'"Where evidence is presented to the trial court ore tenus in a nonjury case, a presumption of correctness exists as to the court's conclusions on issues of fact; its determination will not be disturbed unless clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence."'" Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004) (quoting State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996), quoting in turn, Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995)). See also Shealy v. Golden, 897 So. 2d 268, 271 (Ala. 2004) ("Under the ore tenus rule, the trial court's findings of fact are presumed correct and will not be disturbed on appeal unless these findings are 'plainly or palpably wrong or against the preponderance of the evidence.'" [(quoting Ex parte Carter, 772 So. 2d 1117, 1119 (Ala.

2000)])).

"At the outset, we note that '"[t]he rules of criminal discovery are not 'mere etiquette,' nor is compliance a matter of discretion."' State v. Moore, 969 So. 2d 169, 176 (Ala. Crim. App. 2006), quoting State v. Scott, 943 S.W.2d 730, 735 (Mo. Ct. App. 1997). Rule 16, Ala. R. Crim. P., which provides for discovery in criminal cases, authorizes a trial court to impose sanctions against a party that fails to comply with a discovery order. Rule 16.5 states:

> "'If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection; may grant a continuance if requested by the aggrieved party; may prohibit the party from introducing evidence not disclosed, or may enter such other order as the court deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.'

"It appears from the wording of Rule 16.5, Ala. R. Crim. P., that a circuit court, based upon its supervisory powers over proceedings before it, has the authority to dismiss an indictment because of the government's wrongful conduct. State v. Moore, 969 So. 2d 169, 182 (Ala. Crim. App. 2006). In addition, Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requires the government to disclose exculpatory evidence or risk sanctions.

"There are limitations upon the circuit court's ability to dismiss an indictment on the grounds of

the prosecution's wrongful conduct, however. To establish a Brady violation, three elements must be proven: 1) the prosecution's suppression of evidence; 2) the favorable character of the suppressed evidence for the defense; and 3) the materiality of the suppressed evidence. Brady, 373 U.S. at 87, 83 S. Ct. 1194.

"In Moore, this Court discussed at length the limitations upon the trial court's ability to dismiss an indictment based upon improper conduct of the prosecution.

> "'In Government of the Virgin Islands v. Fahie, 419 F.3d 249 (3d Cir. 2005), the federal district court reversed a lower court's dismissal of the charges against Fahie based on a Brady violation. The court stated: "Our research discloses no case where a federal appellate court upheld dismissal with prejudice as a remedy for a Brady violation." 419 F.3d at 254 n.6. The court then discussed the various federal courts and their individual responses to prosecutorial misconduct that necessitates a retrial. The court stated:
>
> > "'"Given the 'societal interest in prosecuting criminal defendants to conclusion,' it is especially important in the criminal context that a court applying sanctions for violation of Rule 16 carefully assess whether dismissal with prejudice is necessary to exact compliance with discovery obligations. [United States v.] Coleman, 862 F.2d 455[(3d Cir. 1988)]. In particular, as discussed above, a court must look to both the need to undo prejudice resulting from

a violation and the appropriate deterrent value of the sanction in each case.

"'"Other courts have considered the question of when a court may dismiss an indictment under its supervisory powers. The Ninth Circuit has held that '[d]ismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice.' United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993). It has suggested that prosecutorial misconduct might satisfy those requirements even where it would fail to justify dismissal under Brady directly. See [United State v.] Ross, 372 F.3d [1097] at 1110 [(9th Cir. 2004)]; United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991). The Seventh Circuit has adopted a more restrictive approach, holding that a sanction under supervisory powers is only appropriate where the conviction could not have been obtained but for the failure to disclose exculpatory evidence. See United States v. Johnson, 26 F.3d 669, 683 (7th Cir. 1994). At least two other circuits instruct courts to balance a number of factors in their choice of a sanction, including 'the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any,

> the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury has been sworn and the trial has begun, a recess.' United State v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985); see also United States v. Wicker, 848 F.2d 1059, 1061 (10th Cir. 1988). While we appreciate the importance of all these factors, we believe that, to merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a Brady violation. Accordingly, we do not expect that trial courts will dismiss cases under their supervisory powers that they could not dismiss under Brady itself.
>
> "'"...."
>
> "'419 F.3d at 258.

"'In United States v. Euceda-Hernandez, 768 F.2d 1307 (11th Cir. 1985), the court stated:

> "'"In exercising its discretion, the district court must weigh several factors, and, if it decides a sanction is in order, should fashion 'the least severe sanction that will accomplish the desired result--

prompt and full compliance with the court's discovery orders.' United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. Unit B 1982). See also [United States v.] Burkhalter, 735 F.2d [1327] at 1329 [(11th Cir. 1984)]; United States v. Gee, 695 F.2d 1165, 1169 (9th Cir. 1983)(citing Sarcinelli, supra). Among the factors the court must weigh are the reasons for the Government's delay in affording the required discovery, the extent of prejudice, if any, the defendant has suffered because of the delay, and the feasibility of curing such prejudice by granting a continuance or, if the jury has been sworn and the trial has begun, a recess. Burkhalter, 735 F.2d at 1329; United States v. Hartley, 678 F.2d 961, 977 (11th Cir. 1982), cert. denied, 459 U.S. 1170, 103 S. Ct. 815, 74 L. Ed. 2d 1014 and 459 U.S. 1183, 103 S. Ct. 834, 74 L. Ed. 2d 1027 (9183); Sarcinelli, 667 F.2d at 6-7.

"'"....

"'"The presence of a clear violation of a discovery order does not excuse a trial judge from weighing the factors cited above and imposing the least severe, but effective, sanction. The purpose of requiring the Government to disclose evidence is to promote 'the fair and efficient administration of

> criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence.' Fed R. Crim. P. 16 advisory committee note.'

"'768 F.2d at 1312 (footnote omitted).

"'Our neighboring State of Florida in State v. Carpenter, 899 So. 2d 1176 (Fla. Dist. Ct. App. 2005), cautioned against dismissing the charges as a sanction for a Brady violation and aptly stated:

> "'"Dismissal of an information is, however, an extreme sanction that should be used with caution, and only when a lesser sanction would not achieve the desired result. State v. Thomas, 622 So. 2d 174, 175 (Fla. 5th DCA 1993). See also [State v.] Del Gaudio, 445 So. 2d [605] at 608 [(Fla. Dist. Ct. App. 1993)]('Dismissal of an information or indictment is "an action of such magnitude that resort to such a sanction should only be had when no viable alternative exists"')(quoting State v. Lowe, 398 So. 2d 962, 963 (Fla. 4th DCA 1981)). Before a court can dismiss an information for a prosecutor's violation of a discovery rule or order, the trial court must find

that the prosecutor's violation resulted in prejudice to the defendant. Thomas, 622 So. 2d at 175; Richardson v. State, 246 So. 2d 771 (Fla. 1971).

> "'"'The obvious rationale for limiting the sanction of dismissal of criminal charges to only those cases where no other sanction can remedy the prejudice to the defendant is to insure that the public's interest in having persons accused of crimes brought to trial is not sacrificed in the name of punishing a prosecutor's misconduct. And, of course, where the prosecutor's failure to make discovery has not irreparably prejudiced the defendant, the sanction of dismissal punishes the public, not the prosecutor, and results in a windfall to the defendant .... [T]he rule authorizing the imposition of sanctions for discovery violation was "never intended to furnish a defendant with a procedural device to escape justice[.]"'

> "'"Del Gaudio, 445 So. 2d at 608 (quoting Richardson, 246 So. 2d at 774).
>
> "'"...."
>
> "'899 So. 2d at 1182-83. We agree with the rationale of the Florida appellate court. See also Fahie, 419 F.3d at 259 ("[T]o merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct, the same standard applicable to dismissal for a Brady violation.").'

"Moore, 969 So. 2d at 182-84."

State v. Hall, 991 So. 2d 775, 778-80 (Ala. Crim. App. 2007). See also State v. Ellis, 165 So. 3d 576, 590 (Ala. 2014)("Rule 16, Ala. R. Crim. P., which provides for discovery in criminal cases, expressly authorizes a trial court to impose sanctions against a party that fails to comply with a discovery order.").

A defendant may establish the State's willfulness by showing either that the State intentionally withheld exculpatory evidence or that the prosecutor has exhibited a pattern of discovery violations. See Government of Virgin Islands v. Fahie, 419 F.3d 249, 256 (3d Cir. 2005). "'Intent, ... being a state or condition of the mind, is rarely, if

ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.'" Seaton v. State, 645 So. 2d 341, 343 (Ala. Crim. App. 1994)(quoting McCord v. State, 501 So. 2d 520, 528-29 (Ala. Crim. App. 1986)).

> "A pattern of constitutional violations may indeed by used to show recklessness on the part of a prosecutor. See Sample v. Diecks, 885 F.2d 1099, 1117 (3d Cir. 1989)('[T]he existence of a pattern of constitutional violations may provide a basis for implying deliberate indifference.'); Farmer v. Brennan, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)('[A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.'); see also [United States v.] Morrison, 449 U.S. [361,] 365 n.2, 101 S. Ct. 665[, 66 L. Ed. 264 (1981)] (noting that higher penalties may be warranted where there is a pattern of misconduct.) Moreover, a constitutional violation that results from a reckless disregard for a defendant's constitutional rights constitutes willful misconduct. See Wehr v. Burroughs Corp., 619 F.2d 276, 282 (3d Cir. 1980)('only three degrees of culpability are associated with the term "willful": intentional, knowing, or reckless'); cf. United States v. Johnstone, 107 F.3d 200, 208-09 (3d Cir. 1997)(holding that 'willful[]' in federal criminal civil rights statute, 18 U.S.C. § 242 'means either particular purpose or reckless disregard'); United States v. Frost, 999 F.2d 797, 743 (3d Cir. 1993)(holding that 'in order to secure suppression of the fruits of [a search based on a misleading search warrant affidavit], a defendant must show ...

> that bad faith or reckless disregard existed on the part of the affiant'); Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994)(holding, in the insurance context, that 'recklessness ... can support a finding of bad faith'). Thus, reckless misconduct, if prejudicial, may sometimes warrant dismissal. Otherwise, a prosecutor who sustains an erroneous view of her Brady obligations over time will be inadequately motivated to conform her understanding to the law."

Fahie, 419 F.3d at 256.

> "The fact that it was law-enforcement officials and not the prosecutors themselves who allowed such misrepresentations to go forward is irrelevant. 'The knowledge of government agents working on the case, including a deputy sheriff, as to the existence of exculpatory evidence will be imputed to the prosecutor. Sexton v. State, 529 So. 2d 1041, 1045 (Ala. Crim. App. 1988).' Savage v. State, 600 So. 2d 405, 407 (Ala. Crim. App. 1992); see also, Moore, 969 So. 2d at 176."

Hall, 991 So. 2d at 781. "Moreover, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" Moore, 969 So 2d at 176 (quoting Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

The circuit court found that the State's misconduct in this case was willful because: (1) the State suppressed evidence that Jackson saw a gas can in Hammoleketh's vehicle

and then argued to the jury that there was no evidence of a gas can being in the vehicle; (2) the State suppressed evidence that Taylor had identified Trooper Williams from a photographic lineup--which also included Martin's photograph--as being the size of the trooper he saw in the patrol car on the night of murder and in the vicinity of the crime scene and argued to the jury that it could infer from Taylor's statements that Martin was the trooper Taylor saw, although it was clear that Martin and Trooper Williams were not of similar build; (3) the State used Davis to testify that Martin confessed to the murder, although Davis's credibility and the circumstances under which he obtained the confession were suspect; (4) the State suppressed an anonymous telephone call that indicated Trooper Williams's possible involvement in the murder; (5) the State suppressed Broach's statements that pointed to a different man as a possible suspect in the murder; and (6) the State suppressed the lack of evidence that a bicycle was used to flee the scene yet argued to the jury that Martin used a bicycle to flee the scene. We also note the significance of the circuit court's conclusion that Major Calhoun's testimony that he had provided Jackson's statement

to Martin's trial counsel was not reliable or credible. See Yeager v. Lucy, 998 So. 2d 460, 463 (Ala. 2008)("'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact."'" (quoting Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000))).

Regardless of whether this evidence was known only to Major Calhoun, his knowledge was imputed to the prosecutors; therefore, there was evidence indicating that the State knowingly suppressed exculpatory evidence. Moreover, the circuit court noted that Assistant Attorneys General Valeska and Dill, who were prosecutors in Martin's case, also prosecuted the capital case against Moore and were found to have committed Brady violations in that case.

More important to Martin's due-process rights, the circuit court further concluded that the substantial prejudice Martin now faced--due in large part to the passage of more than 16 years after the original trial and more than 20 years after the murder--could not be cured by a new trial. In Moore, supra, and in Hall, supra, this Court emphasized that the dismissal of an indictment because of prosecutorial

misconduct and violations of Brady is "'"an extreme sanction that should be used with caution, and only when a lesser sanction would not achieve the desired result."'" Hall, 991 So. 2d at 780 (quoting Moore, 969 So. 2d at 184, quoting in turn State v. Carpenter, 899 So. 2d 1176, 1182 (Fla. Dist. Ct. App. 2005)). In support of its finding that a new trial would not be a sufficient remedy in Martin's case, the circuit court emphasized that the State's willful, wrongful conduct, combined with the passage of time, had resulted in the death or lack of memory of several key witnesses who had testified at Martin's original trial as well as Martin's inability to thoroughly investigate the exculpatory evidence that was disclosed after his trial had occurred. Significantly, the court pointed out that Taylor and Davis--perhaps the State's most important witnesses against Martin--no longer remembered the statements they had made to law enforcement and that reading their testimony from the original trial during a new trial would not satisfy the requirements of the Confrontation Clause of the United States Constitution because Martin would not have an opportunity to cross-examine those witnesses regarding the evidence about which he became aware only after

his trial ended. See Styron v. State, 34 So. 3d 724, 730 (Ala. Crim. App. 2009)("An out-of-court statement by a witness that is testimonial is barred under the Sixth Amendment's Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness."); see also State v. Fields, 168 P.3d 955, 999 (Haw. 2007)(emphasis added)("To the extent that an out-of-court statement is testimonial in nature, such hearsay is admissible '... only where the defendant has had a prior opportunity to cross-examine' the declarant about the statement."). In addition, the circuit court noted that Martin's trial counsel, Nixon, testified that, had he been aware of the anonymous telephone calls indicating Trooper Williams's involvement in the murder, he would have tracked those calls and checked surveillance cameras with views of public pay phones as part of his investigation of Martin's defense. The State has not demonstrated that these findings were in error.

The circuit court did not base its decision on an erroneous conclusion of law, and the record contains evidence upon which the circuit court rationally based its decision. Therefore, under the unique circumstances of this case, we

cannot say that the circuit court abused its discretion when it imposed the "extreme sanction" of dismissing with prejudice the indictment against Martin. See Hall, supra.

Accordingly, the circuit court's decision is affirmed.

AFFIRMED.

Welch and Burke, JJ., concur. Windom, P.J., and Kellum, J., dissent.