No. 18-7796, 18A-813

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

DOMINEQUE RAY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION TO CERTIORARI AND TO THE MOTION FOR STAY OF EXECUTION

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EXECUTION SCHEDULED FOR FEBRUARY 7, 2019

CAPITAL CASE
QUESTIONS PRESENTED
(Restated)

I. Should this Court deny Ray's motion because his underlying state appeal remains pending on appeal after dismissal for failure to comply with independent and adequate state procedural rules, including failure to show diligence and raising his claim in a successive petition when it could have been raised earlier?

II. Should this Court deny Ray's motion because his underlying state appeal remains pending on appeal after dismissal for his failure to bring his claim within Alabama's applicable limitations period?

III. Should this Court deny Ray's motion because he has presented no genuine circuit split?

IV. Should this Court deny Ray's request for a stay of execution because the balance of the equities tilts against him, as indicated by Ray's (1) filing a motion for stay of execution a day before his scheduled execution and (2) filing a motion for stay of execution in the Alabama Supreme Court on February 1, 2019, even though the execution date has been set since November 6, 2018?

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INTRODUCTION

Domineque Ray is set to be executed on February 7, 2019, for the rape and murder of a fifteen-year-old girl, Tiffany Harville.[1] In an attempt to delay his scheduled execution, Ray has been pursuing an untimely and meritless successive state postconviction action, presenting a claim that the district attorney violated *Brady v. Maryland*[2] by failing to produce Alabama Department of Corrections ("ADOC") records regarding Ray's accomplice, Marcus Owden. Ray was denied relief at the trial court level, and on February 1, 2019, he filed a last-minute request to stay his execution in the Alabama Supreme Court while his appeal was pending in the Alabama Court of Criminal Appeals. This motion, which was little more than a last-ditch effort to stave off his execution, was denied on February 5. On February 6, the day before his scheduled execution, Ray filed a meritless petition for writ of certiorari and asks this Court to stay his execution.

Ray's execution has been set since November 6, 2018, and his petition relies on an underlying claim that, in addition to being meritless, was woefully untimely and barred by independent and adequate state procedural rules. Moreover, none of the grounds for granting certiorari review set out in Rule 10 are present in this case. The fact that Ray waited until a day before his scheduled execution to file the

1. Ray was previously convicted and sentenced to life imprisonment for the murders of a thirteen-year-old boy, Reinhard Mabins, and his eighteen-year-old brother, Earnest Mabins.
2. 373 U.S. 83 (1963).

instant petition and request for a stay of execution is, by itself, a sufficient reason to deny his petition. Finally, Ray's failure to pursue his underlying action until after the State moved to set his execution date argues against granting a stay in this matter.

JURISDICTION

Ray contends that this Court has jurisdiction pursuant to 28 U.S.C. §1257(a) because the Alabama Supreme Court's denial of a stay was a "final and appealable decision." Ray is incorrect. The denial of Ray's stay request was not a final judgment or decree regarding the merits of his claims. Indeed, Ray's appeal remains pending in the Alabama Court of Criminal Appeals. Consequently, Ray's invocation of this Court's jurisdiction is in error.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's statement of the constitutional and statutory provisions raised on page two of his certiorari petition is correct.

STATEMENT OF THE CASE

A. THE MURDER OF TIFFANY HARVILLE

On a midsummer evening in 1995, fifteen-year-old Tiffany Harville was taken to a cotton field outside of Selma, Alabama, by Domineque Ray and Marcus Owden.[3] Regrettably, Tiffany did not know what sort of person Ray was. If she had known that Ray and Owden had previously murdered thirteen-year-old Reinhard Mabins and his eighteen-year-old brother, Earnest, then perhaps the horrific events that occurred in that cotton field could have been avoided. But she did not know, and that night, Ray and Owden raped Tiffany and stabbed her repeatedly as she cried out her final prayer: "God, help me."[4] They left her abused body in that cotton field, where her bones would be found almost a month later.

Affirming the denial of relief in Ray's original postconviction proceeding, the Eleventh Circuit addressed these "profound and compelling" facts.[5] That court deemed Ray's crime "heinous," as were his prior murders of the Mabins brothers.[6] As the court wrote, "Tiffany Harville was killed by blunt force trauma to her head, with repeated stab-like punctures of her brain, while being raped and robbed. . . .

3. C. 599–602.
4. C. 560, 603–04.
5. *See Ray v. Ala. Dep't of Corrs.*, 809 F.3d 1202, 1210–11 (11th Cir. 2016); *cert. denied*, 137 S. Ct. 417 (2016) (mem.).
6. *Id.*

[A]fter killing Tiffany, Ray audaciously went to Tiffany's house, spoke with her mother on multiple occasions, and pretended to assist in locating Tiffany."[7]

B. PROCEEDINGS BELOW

On July 28, 1999, Ray was convicted of two counts of capital murder for Harville's death: murder committed during a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975), and murder committed during a rape, in violation of section 13A-5-40(a)(3).[8] Contrary to Ray's claims, Owden's testimony was not the only evidence that "placed Ray or Owden in Selma or Dallas County at the time of Harville's death.[9] During the trial, the State presented Ray's confession, in which he admitted to participating in the attack and stabbing Harville, but attempted to shift most of the blame to Owden.[10] The jury recommended by a vote of 11–1 that Ray receive the death penalty.[11] The trial court accepted the jury's recommendation and sentenced Ray to death.[12] On direct appeal, the Alabama

7. *Id.*
8. R. 721. References to the clerk's record at trial and the trial transcript are designated C. # and R. #. References to the first R32 proceedings are designated 1st R32 C. # and 1st R32 R. #. References to the current Rule 32 record and evidentiary hearing transcript are designated R32 C. # and R32 R. #.
9. Pet. 5.
10. R. 560.
11. R. 780.
12. R. 805.

Court of Criminal Appeals and the Alabama Supreme Court affirmed Ray's conviction and death sentence, and this Court denied certiorari.[13]

Ray filed his first petition for Rule 32 petition for postconviction relief in February 2003.[14] After an evidentiary hearing, the circuit court denied the petition.[15] The Court of Criminal Appeals affirmed,[16] and the Alabama Supreme Court denied certiorari on September 16, 2011.

Ray filed a petition for writ of habeas corpus in the Southern District of Alabama on May 16, 2006. On September 27, 2013, the district court denied the petition, a decision that the Eleventh Circuit Court of Appeals affirmed on January 6, 2016.[17]

As Ray's avenues for appeal were exhausted, the State of Alabama filed a motion to set an execution date in the Alabama Supreme Court on August 6, 2018. Ray requested and was granted until September 28 to reply.

On September 27, the day before his response was due, Ray filed a successive Rule 32 petition, styled as his "Second Petition for Relief from Judgment under Rule 32 of the Alabama Rules of Criminal Procedure (hereinafter "Successive Petition"). The Successive Petition presented a single claim for relief,

13. *Ray v. State*, 809 So. 2d 875 (Ala. Crim. App. 2001), *aff'd*, 809 So. 2d 891 (Ala. 2001), *cert. denied*, 534 U.S. 1142 (2002) (mem.).
14. R32 C. 9.
15. R32 C. 1094.
16. *Ray v. State*, 80 So. 3d 965 (Ala. Crim. App. 2011).
17. *Ray*, 809 F.3d at 1206 (11th Cir. 2016).

alleging that the State violated *Brady v. Maryland* by failing to produce ADOC records of his accomplice, Marcus Owden, that allegedly showed that Owden was suffering from schizophrenia at the time of trial.[18] Ray contended that the alleged failure to disclose this material resulted in a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments.

The State filed a motion to dismiss the Successive Petition on October 12, 2018, and an amended answer and motion to dismiss on November 30. On December 13, the circuit court granted the State's motion to dismiss and reissued a previously withdrawn final order denying relief. Ray's notice of appeal to the Court of Criminal Appeals was not filed until January 17, 2019, thirty-five days after the circuit court dismissed his petition and only three weeks before his scheduled execution. Briefing has concluded, and Ray's appeal is currently pending in the Court of Criminal Appeals.

18. R32 C. 47.

REASONS FOR DENYING THE PETITION

Ray's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari.[19] The petition is splitless, heavily fact-bound, and a poor vehicle for addressing Ray's substantive claims, and Ray has not shown that any of the grounds for granting certiorari review set out in Rule 10 exist. Ray's petition does not arise from a final judgement by a state court of last resort resolving any federal law question on the merits, but rather from a denial of a motion for a stay while his state appeal is pending. Moreover, Ray does not show any conflict between the denial of a stay in this matter and a decision of any state court of last resort, any decision of a United States court of appeals, or any decision of this Court.[20] Further, Ray's substantive claims were dismissed on independent and adequate state law grounds. For the reasons set forth below, Ray's petition is without merit and should be denied.

19. SUP. CT. R. 10.
20. *Id.*

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO RESOLVE A CLAIM RAY FAILED TO DILIGENTLY PURSUE, THAT REMAINS PENDING ON APPEAL, AND THAT WAS DISMISSED ON INDEPENDENT AND ADEQUATE STATE-LAW GROUNDS.

A. RAY DID NOT DILIGENTLY PURSUE HIS CLAIMS.

Ray's *Brady* claims arise out of his contention that the district attorney should have obtained and produced the ADOC records of his accomplice, Marcus Owden. Ray has not alleged, much less shown, that the district attorney had actual possession or knowledge of those records. Indeed, he did not. Nor did he have reason to suspect they existed, as Owden was evaluated at Taylor Hardin Secure Medical Facility (hereinafter "Taylor Hardin"), and the resulting report (hereinafter "the Owden evaluation") concluded that Owden did not have any major mental illness.

Ray's petition presents a poor vehicle for addressing the purported circuit split regarding the extent of a prosecutor's duty pursuant to *Brady* because Ray's *Brady* claim was dismissed on independent and adequate state law grounds. First, Ray's claim was dismissed because it could have been, but was not, raised at trial.[21] Pursuant to Alabama law, postconviction claims that could have been raised as the time of trial are procedurally defaulted.[22] Rule 32.2(a) of the Alabama Rules

21. R32 C. 429.
22. ALA. R. CRIM. P. 32.2(a)(3), 32.7(d); *see also Lynch v. State*, 229 So. 3d 260, 264 (Ala. Crim. App. 2016) (*Brady* claims subject to procedural default).

of Criminal Procedure is "an independent and adequate ground."[23] Ray's appeal of this state-law issue is currently pending in the Alabama Court of Criminal Appeals. This Court should not grant a stay because the correctness of the circuit court's order presents a fact-bound matter of state law for the state courts to resolve. This Court is not in the business of reviewing state courts' application of state law, and it should not start now. Further, it was not state action, but rather Ray's failure to diligently pursue this claim, that has brought the matter to this Court at the eleventh hour.

Second, Ray's *Brady* claim was also dismissed because he failed to comply with Alabama's rules for successive postconviction petitions. Because the *Brady* claim was brought in a successive petition as a new ground for relief, Ray was required to show that "good cause exists why the new ground . . . [was] not known or could not have been ascertained through reasonable diligence."[24] The application of these independent and adequate state law grounds rests upon the state circuit court's factual findings based upon the record before it.

This case concern's Ray's allegations that the State prevented him from learning that Owden was mentally ill at the time of trial, evidence that he contends could have been used in impeachment. But the circuit court correctly concluded that Ray knew or could have discovered Owden's mental state before trial. Ray

23. *Mason v. Allen*, 605 F.3d 1114, 1121 (11th Cir. 2010).
24. ALA. R. CRIM. P. 32.2(b); C. 436–39.

was friends with Owden.[25] The two had been associated with each other since at least 2014, when Ray and Owden murdered two teenage boys, Earnest and Reinhard Mabins.[26] As such, Ray had ample opportunity to become familiar with Owden and with any mental health issues he may have had. Indeed, the record shows that Ray had formed an opinion about Owden's mental health prior to trial. The record contains Ray's statement on August 22, 1997, that "[Owden] is crazy. You know he has a psychiatrist."[27] Likewise, the trial record contains Ray's August 19, 1997, statement where he told Det. Roy Freine, "[Owden is] my friend, but, you know, he's kind of crazy. You know he's got a psychiatrist he talks to or whatever."[28] The circuit court correctly found that Ray believed that Owden had mental health problems and had obtained mental health treatment before Ray's trial. This belief was confirmed by the Owden evaluation, which Ray received in 2006 during postconviction discovery. As his evaluator, Dr. Kathy Ronan, noted, "[Owden] reported that he had talked with a psychiatrist in Selma in the past . . . after he was placed in special education."[29]

Based on this record, the circuit court made a factual finding that Ray was in possession of sufficient information to pursue claims regarding Owden's mental

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25. R. 564.
26. C. 286.
27. 1st R32 C. 3026. The State notes that this statement was offered as an exhibit **by the petitioner himself** during Rule 32 proceedings. *Id.*
28. R. 564.
29. R32 C. 309.

state.[30] Indeed, by the time that Ray was tried, Owden had already been convicted and remanded to ADOC custody for the murders of Harville and the Mabins brothers. Owden had also undergone a court-ordered mental health evaluation at Taylor Hardin, a fact that Ray could easily have confirmed by simply looking at Owden's case file in the Circuit Clerk's office.[31] Ray knew that Owden would be a witness against him. With his knowledge of Owden's mental health, he could have either directly asked the District Attorney for any results of the court-ordered evaluation and any related mental health records or he could have raised a *Brady* claim regarding the failure to proactively disclose the results.[32] Ray could have likewise directed a discovery request or a *Brady* motion to the ADOC, given his stated belief that Owden had mental health problems and that he knew, or should have known, that Owden entered ADOC custody prior to his trial. Ray did not do so.[33] As the circuit court concluded, Ray could have investigated Owden's mental

30. R32 C. 431.
31. R32 C. 148–59.
32. Taylor Hardin issued the Owden evaluation on January 16, 1998. (R32 C. 148–59.) At the time of Ray's trial, that document was the only document regarding Owden's mental health that was in the possession of the prosecution team. As discussed below, the Owden evaluation itself was not "material" because it was neither exculpatory nor impeaching.
33. Ray filed four discovery motions prior to trial. (C. 21–23, 25–28, 56–61, 62–64.) None was directed to the ADOC or requested any ADOC records regarding Owden. The closest request Ray made was his request to "the District attorney or his assistants, the Dallas County Sheriff's Department, the Selma Police Department, the Alabama Bureau of Investigation, the Alabama State Troopers, or any of their agents" for potentially impeaching evidence

state at the time of the trial and the offense. Likewise, he could have raised his present *Brady* claim at that time. Because he did not, the circuit court correctly found that this claim was procedurally barred and dismissed it.[34]

Ray relies heavily on the notion that even in postconviction, the State was under a continuing duty to search out and produce any evidence that could possibly be useful to him. He is mistaken. In *District Attorney's Office for Third Judicial District v. Osborne*,[35] this Court rejected the notion that the duties recognized in *Brady* extend into the postconviction context. As this Court held:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1993). "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (internal quotation marks and alterations omitted).
>
> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania v. Finley,* 481 U.S. 551, 559 (1987). Osborne's right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found

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regarding the State's witnesses. As discussed below, the Owden evaluation itself was not "material" because it was neither exculpatory nor impeaching.

34. R32 C. 429; *see* ALA. R. CRIM. P. 32.2(a)(3), 32.7(d); *see also Lynch*, 229 So. 3d at 264 (*Brady* claims subject to procedural default).

35. 557 U.S. 52, 68–69 (2009).

> guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.[36]

As in *Osborne*, the State of Alabama provides adequate procedures "to vindicate its state right to postconviction relief."[37] Among these are the State's Rule 32 postconviction relief procedures, including the right to discovery.[38] It was up to Ray to avail himself of them, and his failure to do so in a timely or diligent manner should not prevent the State from giving effect to its judgments.[39]

At bottom, Ray had everything he need to pursue his present *Brady* claim no later than during the pendency of his original state postconviction proceeding. As

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36. *Id.* (citations edited).
37. *Id.* at 69.
38. To the extent that Ray argues that Alabama's statute of limitations on Rule 32 proceedings "violates fundamental fairness," he is mistaken. (Pet. 34–38.) First, he misstates Alabama law. There is no "novel issue" here. Instead, it has long been settled that Rule 32.2(c)'s limitations period applies to all petitions. *Lloyd v. State*, 144 So. 3d 510, 518 (Ala. Crim. App. 2013); *Tarver v. State*, 761 So. 2d 266, 268 (Ala. Crim. App. 2000).
39. In attempting to shoehorn this case into a novel situation involving *Osborne* that this Court should address, Ray alleges that the State "flouted" postconviction discovery orders. But Ray fails to inform the Court that his discovery motion sought records "in the District Attorney's Possession" and further defined "the State" as "the District Attorney for the Fourth Judicial District of Alabama, the Selma Police Department, the Dallas County Sheriff's Department, and the Alabama Bureau of Investigations." (R32 C. 239, 242.) **At no point in the motion** did Ray direct any request to the ADOC. (R32 C. 238–51.) Nor did the District Attorney have any of Owden's ADOC records in his possession. Instead, the State produced the one thing the District Attorney did have, the Owden evaluation. While Ray did request his own records from ADOC and Taylor Hardin, **he did not request anyone else's**. Because the State produced all responsive documents, Ray cannot rely on his entirely unfounded and inappropriate allegations of impropriety to excuse his own lack of diligence.

he was before trial, he was armed with the knowledge that Owden was "crazy" and had seen a "psychiatrist" during his first postconviction proceeding.[40] This knowledge was confirmed by Owden's statement to Dr. Ronan that he had seen a psychiatrist no later than high school.[41] That statement was contained in Owden's mental evaluation that Ray received in 2006.[42] Yet Ray made no effort to investigate Owden's mental health, interview Owden, attempt to obtain Owden's mental health records, or attempt to obtain any of the collateral documents referenced in Owden's evaluation. Instead, Ray waited over a decade to visit Owden and begin investigating the possibility that he had mental health problems. Ray's lack of diligence and failure to pursue this claim when it first became available properly caused the state circuit court to dismiss Ray's petition under independent and adequate state law grounds. This Court should not grant certiorari to disturb that decision.

B. RAY'S CLAIMS WERE UNTIMELY PURSUANT TO ALABAMA'S STATUTE OF LIMITATION ON POSTCONVICTION CLAIMS.

Ray also challenges Alabama's provisions regarding the limitations periods for bringing postconviction challenges, including *Brady* claims.[43] This Court has recognized that states have a right to impose limitations periods and that they are

40. C. 560, 564; R32 C. 431.
41. R32 C. 309.
42. *Id.*
43. Pet. 34–38.

binding on the federal courts.[44] The clear provisions of Alabama law required Ray to bring his claim within six months of discovery of the new evidence that is the basis for his claim. The circuit court concluded that the applicable six-month limitation period accrued on May 15, 2017, when Ray learned of Owden's current mental health condition.[45] As the circuit court held, "[i]n those six months, Ray had reasonable time and opportunity to file his petition, but he simply did not."[46]

1. RULE 32.1(A)

Ray attempts to escape the constraints of Alabama's independent and adequate limitations period, established by Rule 32.2(c) of the Alabama Rules of Criminal Procedure, by presenting this Court with a red herring—arguing that the State could suppress evidence until after the limitations period had run.[47] However, Alabama law presents no such danger. Alabama law has long recognized that:

> A *Brady* claim may be raised in a postconviction petition as either a claim of newly discovered evidence under Rule 32.1(e), Ala. R. Crim. P., or a constitutional claim under Rule 32.1(a), Ala. R. Crim. P. *See Washington v. State*, 95 So. 3d 26 (Ala. Crim. App. 2012).[48]

44. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).
45. C. 429–31, 434.
46. *Id.*
47. Pet. 31–34.
48. *Stallworth v. State*, 171 So. 3d 53, 75 (Ala. Crim. App. 2013).

Similarly, in *Giles v. State*,[49] the Court of Criminal Appeals held that a *Brady* claim that was untimely could still be raised "as a newly discovered evidence claim under Rule 32.1(e), Ala. R. Crim. P."[50] The Alabama courts have already considered petitioners who find themselves in Ray's shoes and recognized that *Brady* claims that are outside the limitation period for Rule 32.1(a) can still be raised as Rule 32.1(e) claims. Notably, Ray relied on both Rules 32.1(a) and 32.1(e) in his Successive Petition.[51] Thus, the applicable limitation period for a claim like that in the Successive Petition has long been clear: six months from the date of discovery.[52]

2. RULE 32.1(E)

The circuit court also properly considered and applied Alabama's applicable tolling period for claims, like Ray's, brought pursuant to Rule 32.1(e)'s provision for claims based on "newly discovered evidence."[53] Under that standard, Ray's petition was due to be filed "within six (6) months after the discovery of the newly

49. 906 So. 2d 963 (Ala. Crim. App. 2004).
50. *Id.* at 973, *overruled on other grounds by Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005).
51. R32 C. 64.
52. To the extent Ray relies on what he refers to as "the Newly Released Records" (Pet. 15–17), the State notes that these records were all specifically referenced in the Owden evaluation, which Ray has had since 2006. There is not, nor has there ever been, any suppression with regard to these records.
53. R32 C. 430–31; see R32 C. 64.

discovered material facts" that gave rise to the claim.[54] In his petition, Ray alleged that he discovered evidence that Owden suffered from schizophrenia at the time of trial, when postconviction counsel visited Owden and received permission to access his ADOC mental health records.[55] During proceedings below, Ray conceded that he visited Owden and learned of his current mental health condition on May 15, 2017. Any claim based on that newly discovered evidence should have been brought by November 15, 2017, six months later. Ray could have, but did not, file a Rule 32.1(e) petition asserting his Brady claim by that date. Instead, he chose to wait until after the State filed its motion to set his execution date on August 6, 2018. Ray's petition was not filed until September 27, 2018, nearly two months later. As the circuit court correctly found, his eleventh-hour petition was untimely and unavailing.[56]

Ray also concedes that he obtained Owden's ADOC records on September 6, 2017. Even if, arguendo, Ray's *Brady* claim could not have been raised until he

54. ALA. R. CRIM. P. 32.2(c). Ray argues that there is a "novel issue" regarding Alabama's limitation period for successive petitions. He ignores the plain language of Rule 32.2(c), which applies to "any petition." ALA. R. CRIM. P. 32.2(c). Moreover, Ray also ignores the fact that the Alabama courts have regularly and properly applied Rule 32.2(c)'s limitation periods to successive petitions. *See, e.g.*, *Wallace v. State*, 959 So. 2d 1161, 1164 (Ala. Crim. App. 2006) (holding that a successive petition raising "a non-jurisdictional claim [] is barred by the limitations period in Rule 32.2(c), Ala. R. Crim. P."); *see also Lloyd*, 144 So. 3d at 518 (successive petition was "clearly time-barred by Rule 32.2(c)").
55. R32 C. 59.
56. R32 C. 429–32.

received the ADOC records, that still means that pursuant to Rule 32.2(c), his Successive Petition would have been due no later than March 6, 2018. Again, Ray failed to file prior to that date. He eventually filed his Successive Petition on September 27, 2018, over sixteen months after he learned of Owden's alleged mental illness. Consequently, his petition was time-barred pursuant to Rule 32.2(c).[57]

Moreover, the circuit court correctly found that Ray himself believed that Owden was "crazy" and had a psychiatrist as far back as 1997.[58] This belief was confirmed by Owden's statement to Dr. Ronan that he had seen a psychiatrist no later than high school.[59] Thus, Ray had within his knowledge sufficient information to pursue these claims nearly two decades before May 15, 2017. In light of this fact, it is unquestionable that Ray's September 27, 2018, petition was untimely. Consequently, in accordance with Rule 32.2(c)'s provision that a court "shall not entertain a petition" not filed within the limitations period, the Rule 32 court correctly dismissed Ray's untimely Successive Petition. This Court should not grant certiorari review to second-guess the Alabama courts' application and construction of Alabama law.

57. R32 C. 431.
58. C. 560, 564; R32 C. 431.
59. R32 C. 309.

II. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE RAY'S SUBSTANTIVE *BRADY* CLAIM IS MERITLESS.

In addition to his continued delay, Ray's petition also fails to present this Court with a meritorious issue that would warrant a stay or certiorari review. Certiorari review for fact-bound error correction is disfavored.[60] As shown above, Ray's Successive Petition was woefully untimely under Alabama law. The circuit court also correctly found that his *Brady* claim was meritless.[61] As the circuit court explained, Ray failed to identify any material documents of which the prosecutor had knowledge (whether actual or imputed) that were not disclosed prior to trial. Nor did Ray show any discovery violation or other "deception" by the State. Ray's allegations of postconviction "suppression" do not present a legitimate *Brady* violation.[62] Rather, they are nothing more than excuses for Ray's own failure to either investigate Owden's mental health or bring any claims arising out of it in a timely manner.

In an alternative ruling, the circuit court correctly found that Ray's *Brady* claim was meritless. A petitioner seeking relief pursuant to *Brady* must satisfy a four-pronged test:

> (1) that the [G]overnment possessed evidence favorable to the defense, (2) that the defendant did not possess the evidence and could not obtain it with any reasonable diligence, (3) that the prosecution

60. SUP. CT. R. 10.
61. R32 C. 439–46.
62. *Osborne*, 557 U.S. 52, 69 (2009).

> suppressed the evidence, and (4) that a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense.[63]

Ray's Successive Petition was meritless on its face because the facts he alleged, even if proven true, would not satisfy *Brady*'s requirements.

A. THE PROSECUTION DID NOT POSSESS IMPEACHING INFORMATION REGARDING OWDEN.

For the purposes of evaluating Ray's *Brady* claim, the only relevant documents were those that existed prior to his conviction.[64] Ray was convicted on July 28, 1999, and documents created after that date, including the vast majority of the ADOC records cited in Ray's state-court petition, could not support Ray's allegation that the prosecution violated *Brady*.

Ray has never contended that more than a few pages of the ADOC records predated his conviction. *Brady*'s first prong requires a showing that the prosecution actually possessed, or had imputable possession of, those few pages. To be imputable to the prosecution, the prosecutor must have "knowledge of and access to the documents responsive to the defendant's requests."[65] In the present case, Ray asks this Court to impute knowledge of records maintained by the ADOC, a State agency, to a local prosecutor. Ray's position is not supported by this Court's

63. *Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002).
64. *Id.*
65. *United States v. Libby*, 429 F. Supp. 2d 1, 11 (D.D.C. 2006).

caselaw and would vastly expand the prosecutor's responsibility for consulting with agencies that have played no active role in the investigation or prosecution. As shown below, the circuit court did not err in finding that knowledge of material in Owden's ADOC file could not properly be imputed to the District Attorney.

In *Brady* itself, there was no dispute that the prosecution possessed and failed to disclose an exculpatory statement by Brady's accomplice.[66] Subsequently, this Court extended the prosecutor's duty to disclose information known to subordinate agencies in *Kyles v. Whitley*, holding that "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."[67] However, *Kyles* did not require prosecutors to search out information from other government agencies that are neither part of the prosecution team nor subordinate to the prosecutor. Nor does *Strickler v. Greene*,[68] upon which Ray also relies. In *Strickler*, imputed knowledge was not in controversy because there was "no dispute" that the *Brady* material was known to the prosecutor and not disclosed to the defense.[69] Consequently, *Strickler* focused on whether the petitioner had shown prejudice.[70] Thus, none of this

66. 373 U.S. at 84.
67. 514 U.S. 419, 437 (1995).
68. 527 U.S. 263 (1999).
69. *Id.* at 282.
70. *Id.*

Court's cases upon which Ray relies hold that information held by an agency outside of the prosecutor's authority should be imputed to the prosecution.

In the present case, the alleged *Brady* material was not in the possession of the District Attorney or of any subordinate agency. Relying on this Court's precedent, Alabama courts have long recognized that in such instances, "a prosecutor in a criminal case is not required to disclose evidence the prosecutor does not possess, except that evidence that is imputed—such as knowledge of law enforcement agents."[71] Likewise, the Court of Criminal Appeals has held that "[t]he prosecutor should not be charged with the suppression where the undisclosed evidence was in the possession of an officer or agency in another jurisdiction."[72] Alabama courts have also affirmed the denial of a *Brady* claim where there "is no evidence that the prosecution had obtained [the defendant's] complete criminal record or that the prosecutor had knowledge of all of [his] prior criminal convictions."[73] Ray has shown no conflict between these decisions and the decisions of this Court.

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71. *Pace v. State*, 714 So. 2d 320, 331 (Ala. Crim. App. 1996), *rev'd in part*, 714 So. 2d 332 (Ala. 1997).
72. *McMillian v. State*, 616 So. 2d 933, 948 (Ala. Crim. App. 1993).
73. *Parker v. State*, 587 So. 2d 1072, 1087 (Ala. Crim. App. 1991); *see also Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) (denying habeas relief where there was "no showing that the prosecutor had knowledge of" alleged *Brady* material).

The circuit court correctly found that Ray failed to allege facts that, if true, would establish that the prosecution either possessed or had imputable possession of evidence that Owden suffered from psychosis or schizophrenia. Ray's *Brady* claim was based on the alleged suppression of ADOC records, only two of which appear to have existed before trial.[74] First, Ray describes a "psychological progress note" (hereinafter "the note") that purportedly shows that a "Dr. Murbach" diagnosed Owden with schizophrenia in 1997 or 1998.[75] Ray failed to allege when the note was created or that it existed at the time of trial. Presumably, that is because, as the State has learned, the note was not created until January 31, 2007.[76] Moreover, the note does not describe information or documents in the ADOC's possession. Rather, it describes Owden's subjective reporting that he was diagnosed in "1997/1998."[77] Because this document did not exist at the time of trial, the prosecution team did not suppress it.[78]

Second, Ray described a single-page "Problem List" bearing the notation "Mental-psychosis" and the date "October 22, 1998."[79] Again, Ray did not plead

74. R32 C. 59–60.
75. *Id.*; Appellant's Br. 72 n.34, Ray v. State, CR-18-0395 (Ala. Crim. App. Jan. 23, 2019).
76. R32 C. 411–12.
77. *Id.*
78. *United States v. Mills*, 334 F. App'x 946, 948 (11th Cir. 2009) (no *Brady* violation where "document was unavailable—it did not exist—at the time of Mills's trial").
79. R32 C. 60; Appellant's Br. 72 n.34.

facts that would show that the document existed at the time of trial, much less that the prosecution team had knowledge of it. The ADOC is a separate agency not under the authority or control of the Dallas County District Attorney. Ray did not allege how the prosecution team would have obtained or known about the Problem List, even if it had existed at the time of trial. Nor did the District Attorney's file contain any mental health records regarding Owden other than the Owden evaluation.[80]

The record also suggests that the prosecution team would have had no cause to attempt to suspect that the ADOC might have mental health records for Owden. In the course of prosecuting Owden for his role in the murders of Harville and the Mabins, the prosecution team filed a motion in the Circuit Court of Dallas County to have Owden evaluated for competency to stand trial. That evaluation was performed by Dr. Ronan on November 14, 1997, and the results were supplied to the District Attorney, Owden's counsel, and the court.[81] The Owden evaluation, the only mental health–related document possessed by the prosecution team at the time of trial, found "no indication that Mr. Owden [was] suffering from any type of

80. To the extent that Ray argues that the prosecutor's "open file" policy bears upon his failure to independently investigate Owden's mental health, his argument rests on the false premise that a reasonable attorney would expect the district attorney's file to contain records all possibly relevant records from independent state agencies that played no part in the investigation and were not under the control of the prosecutor. This Court has declined to extend *Brady* to require prosecutors to seek out information from such independent agencies.
81. R32 C. 306.

major psychiatric disorder."[82] The Owden evaluation also found "no information . . . to indicate that Mr. Owden was suffering from any type of major psychiatric disorder" at the time of the offense.[83]

Because Ray seeks nothing more than fact-bound error correction of the circuit court's ruling, and because Ray's substantive claim is still pending in state court, this Court should deny Ray's petition and his request for stay.

B. RAY KNEW OR COULD HAVE DISCOVERED THE ALLEGED *BRADY* EVIDENCE.

It was clear upon the face of the record that Ray was aware that Owden had received psychiatric care prior to Ray's trial. On at least two occasions, Ray stated that Owden was "crazy" and had a psychiatrist.[84] Ray's stated belief was confirmed by Owden's statement to Dr. Ronan.[85] Consequently, Ray was in possession of sufficient information to investigate and ascertain Owden's mental state.

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82. R32 C. 314.
83. R32 C. 315. To the extent that the Owden evaluation references other records, the State notes that Ray received the Owden evaluation during the pendency of his original Rule 32 action. Ray and his counsel could have pursued any *Brady* claim regarding those documents at that time. The circuit court correctly held that his failure to do so operates as a bar to any claim regarding those documents. ALA. R. CRIM. P. 32.2(c). Further, documents that "did not find that [a witness] was suffering from a mental defect" would not be "material to [] guilt or punishment." *United States v. Russell*, 378 F. App'x 884, 890 (11th Cir. 2010).
84. C. 286; 1st R32 C. 3026.
85. R32 C. 309.

The courts, both federal and Alabama, have consistently refused to find a *Brady* violation in cases where the defendant "had within his knowledge information by which he could have ascertained" the allegedly suppressed information.[86] Ray has shown no conflict between those decisions and the decisions of this Court. Simply put, Ray could have investigated and discovered the information allegedly suppressed by the State in this matter concerning Owden's mental health prior to and at the time of trial.[87] Indeed, the fact that Ray has successfully obtained Owden's ADOC records and the Taylor Hardin records tends to indicate that he could have successfully discovered these facts far earlier, had he chosen to do so. Consequently, the circuit court correctly found that Ray's claim was meritless.

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86. *See, e.g.*, *Jennings v. McDonough*, 490 F.3d 1230, 1238 (11th Cir. 2007) (citing *United States v. Griggs*, 713 F.2d 672, 674 (11th Cir. 1983)) ("Where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government."); *Lynch v. State*, 229 So. 3d 260, 264 (Ala. Crim. App. 2016) (*Brady* does not apply in situations where defendant knew of allegedly suppressed fact, and claim defaulted where petitioner could have pursued claim at time of trial); *Flowers v. State*, 922 So. 2d 938, 951 (Ala. Crim. App. 2005) (no *Brady* violation where "suppressed information [was] within [Petitioner]'s own knowledge").
87. "Moreover, Ellender could have easily subpoenaed the pertinent prison records. We have held that where the defendant's own lack of reasonable diligence is the sole reason for not obtaining the pertinent material, there can be no Brady Claim." *United States v. Ellender*, 947 F.2d 748, 757 (5th Cir. 1991).

C. RAY DID NOT DISPLAY THE DILIGENCE REQUIRED BY *BRADY*.

Ray also failed to show that he was diligent in seeking the information allegedly suppressed. He and Owden knew each other well. In the circuit court, Ray failed to allege facts showing that he was unaware of any mental health condition that Owden suffered from or of any treatment that Owden had received. Moreover, at the time of Ray's trial, Owden had already been tried, convicted, and sentenced. Just as Ray's current counsel interviewed Owden and obtained his records, Ray could have obtained Owden's then-current records through trial counsel.[88] Because the allegedly impeaching information regarding Owden was "discoverable through reasonable diligence," Ray has not plead facts that, if true, would establish the required diligence.[89]

As discussed above, Ray's misleading argument that the State suppressed evidence and violated discovery orders is meritless. Consequently, it provides no excuse for his lack of diligence. Because Ray failed to plead facts that, if proven, would show that he could not have obtained any information possessed by the

88. Indeed, the State notes that current counsel had to contend with privacy protections and restrictions imposed by the Health Insurance Portability and Accountability Act, which became effective on April 14, 2003. Because Ray's trial was before that date, trial counsel would not have faced the same obstacles.

89. *United States v. Rigal*, No. 17-13068, 2018 WL 4182117, at *3 (11th Cir. Aug. 30, 2018) (finding no *Brady* violation where defendant could have interviewed government witness but chose not to).

ADOC or Owden, the circuit court correctly found that Ray failed to plead facts that would meet the second *Brady* requirement and correctly dismissed his claim.

D. THE FACTS ALLEGED IN RAY'S PETITION, IF TRUE, DO NOT SHOW THAT THE ALLEGED *BRADY* EVIDENCE WAS MATERIAL AND ADMISSIBLE.

Finally, as a matter of state law, Ray failed to allege sufficient facts that, if true, would have shown that any of the allegedly suppressed evidence was material for *Brady* purposes. Ray asserts that evidence of Owden's mental state would be admissible for impeachment if it merely "tends to show the witness's reliability would be affected."[90] First, the allegedly suppressed documents do not contain any formal diagnosis; at best, they contain references to a possible diagnosis. Second, Ray failed to show that evidence regarding Owden's post-incarceration mental health issues would have been admissible as impeachment.

Under Alabama law, it is well established that mental health evidence that "merely tend[s] to show a mental condition or mental treatment at a time prior to the trial, or not contemporaneous to the matter being testified about, [is] not admissible as impeaching the credibility of a witness."[91] Nothing in the progress

90. R32 C. 48, 81; Appellant's Br. 27, 31.

91. *Garrett v. State*, 105 So. 2d 541, 547 (1958); *see also Gratton v. State*, 456 So. 2d 865, 868 (Ala. Crim. App. 1984) ("The credibility of a witness may be impeached by proving mental derangement or insanity but only if such mental incapacity exists at the time the witness takes the stand to testify or at the time

note, or any other document that existed at the time of trial, shows that Owden was suffering from any major mental health condition either at the time he and Ray raped and murdered Harville or at the time that Owden testified about their actions. Obviously, the vast majority of Owden's ADOC records are not contemporaneous to his testimony, much less to Harville's murder. As such, they are irrelevant for the purposes of assessing *Brady* materiality.[92]

Further, *Kyles* instructed that the materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[93] In the present case, the supposed impeachment evidence does not contradict any of Owden's testimony. Indeed, his testimony about the essential facts of the crime is corroborated by Ray's own admission that Tiffany was raped before she was

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he observed the facts to which he has testified on direct."). Ray's misstatement of the law to the circuit court is perhaps explained by the fact that the cases he cited there did not directly address the standard for admissibility of a witness's mental health records. Instead, they addressed, in a discovery context, the trial court's duty to review materials in camera before production when there are questions of privilege and privacy at issue. *See Brooks v. State*, 33 So. 3d 1262, 1269 (Ala. Crim. App. 2007); *D.P. v. State*, 850 So. 2d 370, 374 (Ala. Crim. App. 2002); *Schaefer v. State*, 676 So. 2d 947, 948–49 (Ala. Crim. App. 1995). Further, the State notes that in *Brooks*, the Court of Criminal Appeals held on return from remand that the victim's records were properly withheld when "the records contain nothing remotely exculpatory or inconsistent with the victim's statements or with her trial testimony." 33 So. 3d at 1270.

92. *United States v. Agurs*, 427 U.S. 97, 106, (1976), *holding modified by United States v. Bagley*, 473 U.S. 667, (1985) (*Brady*'s materiality test concerns only "exculpatory information in the possession of the prosecutor").

93. *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

murdered, that Ray participated in the abuse of Tiffany, and that Ray stabbed Tiffany below her breast.[94] For these reasons, Ray failed to plead facts that, if proven, would have shown that the prosecution team suppressed evidence that, under Alabama law, would have been admissible in impeachment at the time of trial. Consequently, the circuit court correctly dismissed it.[95] This Court should not grant certiorari to second-guess an Alabama court's determination of *Brady* materiality based on Alabama law of evidence.

III. RAY HAS NOT PRESENTED A GENUINE CIRCUIT SPLIT.

Ray urges this Court to grant certiorari review based on an alleged circuit split regarding the extent (if any) of a prosecutor's duty to obtain and disclose any prison or records of an inmate witness that might be useful in impeachment. Even if a genuine split existed, Ray's petition would be an exceedingly poor vehicle to address it because, as shown above, Ray's petition was untimely, lacked diligence, and was barred by independent and adequate state rules.

Moreover, Ray's claim regarding the extent of the circuit split falls apart under scrutiny. Ray cites only to the Second and Ninth Circuits as endorsing his position that information held by a statewide agency that did not play a role in the investigation can be imputed to a local prosecutor. Ray claims that the Second

94. R. 558–60.
95. ALA. R. CRIM. P. 32.3, 32.6(b), 32.7(d).

Circuit has taken his position, citing *United States v. Coppa*,[96] but in doing so, he crosses the bounds of argument and ventures into the realm of fiction. Ray incorrectly claims that *Coppa* held that prosecutors "must search the files of "agencies reasonably expected to have [Brady] information." It did not. Rather, *Coppa* generally described this court's precedent and quoted *Kyles* for the proposition that a "prosecutor can "suppress" evidence even if he has acted in good faith and even if the evidence is "known only to police investigators and not to the prosecutor."[97] The injunction that prosecutors "must search files" of **any** agencies that are reasonably expected to have *Brady* information is Ray's own invention. *Coppa* simply does not speak to the issues at play here and contributes nothing to the alleged circuit split. Moreover, the Second Circuit has specifically disavowed Ray's expansive view of what may be properly imputed to the prosecution, holding, "We will not infer the prosecutors' knowledge simply because some other government agents knew about the [*Brady* material]."[98]

Thus, Ray is left with a single Ninth Circuit case to support his supposed circuit split: *Carriger v. Stewart*.[99] But *Carriger* is readily distinguishable. In that case, the Ninth Circuit held the prosecution responsible for disclosing the prison records of their witness, Dunbar:

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96. 267 F.3d 132, 140 (2d Cir. 2001).
97. *Id.* (quoting *Kyles*, 514 U.S. at 438).
98. *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993).
99. 132 F.3d 463, 480 (9th Cir. 1997).

> Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career burglar and six-time felon, with a criminal record going back to adolescence. When the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility.[100]

The record was not "conclusive" that the prosecutors "actually possessed" Dunbar's files. However, the court noted that Carriger's counsel was readily able to show that Dunbar was well known as "a pathological liar, with a reputation for manipulation and deceit well beyond even that expected in the generally dishonest prison environment."[101] Further, evidence that Dunbar was the guilty party was extensive and compelling.[102] By contrast, in the present case, Owden had no such reputation for dishonesty, his testimony was corroborated by Ray's confession, and the district attorney had an affirmative basis to believe that Owden did not suffer from mental health based credibility issues. Clearly, *Carriger* was a singular case with facts that are simply not analogous to those here, and it hardly stands for the general proposition that every prosecutor is always responsible for searching out all records related to witnesses they expect to call.

Because Ray's petition is a poor vehicle and, in any case, fails to present a genuine circuit split, this Court should not grant his petition for certiorari or his stay request.

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100. *Id.*
101. *Id.* at 470.
102. *Id.*

IV. THE EQUITIES ARE AGAINST A STAY OF EXECUTION.

Ray has filed a certiorari petition and a request for a stay of execution for this Court to review the denial of his time-barred, successive Rule 32 petition in state court. This Court should refuse to grant Ray's request because his appeal is attacking the circuit court's dismissal of his petition on state procedural grounds. The circuit court found Ray's *Brady* claim was procedurally barred under Alabama law because it could have been, but was not, raised at trial.[103] It was also dismissed because the claim was filed well beyond the applicable statute of limitations.[104] Finally, the circuit court dismissed the claim under Alabama's rule barring successive postconviction petitions.[105]

Ray waited for weeks after the State moved the Alabama Supreme Court to set his execution date to file his time-barred, successive petition. In addition to implicating Alabama's procedural grounds for bringing such claims, Ray's conduct implicates considerations of equity. The fact that this Court would not be able to review the state-court proceedings—assuming the certiorari petition presents a federal claim—is directly attributable to Ray's delay in filing his claim.

103. *See* ALA. R. CRIM. P. 32.2(a) (3).
104. ALA. R. CRIM. P. 32.2(c).
105. ALA. R. CRIM. P. 32.2(b).

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."[106] This is so that "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'"[107] Federal courts "can and should protect the State from dilatory or speculative suits."[108] Respectfully, this Court should exercise that equitable authority now to swiftly deny Ray's request for a stay.

CONCLUSION

The State respectfully requests that this Honorable Court deny Ray's petition for writ of certiorari and a stay of execution.

Respectfully submitted,

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106. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).
107. *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).
108. *Id*. at 585.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2019, I did serve a copy of the foregoing on the attorneys for Domineque Ray by electronic mail, addressed as follows:

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