No. 18-7796, 18A-813

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

REPLY SUPPORTING PETITION FOR CERTIORARI

EXECUTION SCHEDULED FOR FEBRUARY 7, 2019

PETER M. RACHER *
THERESA M. WILLARD
JOSHUA S. TATUM
Counsel for Petitioner
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700
pracher@psrb.com
* Counsel of Record

CHRISTOPHER K. FRIEDMAN
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203-2104

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REASONS FOR GRANTING THE WRIT

The State raises four arguments in opposition to Ray's petition, none of which are sufficient to conclude that the write should be denied. First, it asserts that Ray has failed to diligently pursue his claim, which was dismissed on what the State asserts are independent and adequate state-law grounds. Second, it asserts that Ray's *Brady* claim is meritless. Third, it disputes that a genuine circuit split exists. Fourth, it asserts that the equities disfavor a stay.

Ray's petition raises important federal constitutional questions that should be resolved by this Court, to answer whether *Brady v. Maryland* allows the State to avoid its *Brady* obligations by maintaining helpful, material evidence in a correctional institution files and whether *Brady* obligations extend beyond a conviction.

I. This Court should grant a stay to allow the Alabama Courts to proceed through their normal process.

As the State correctly points out, "Ray's appeal … is currently pending in the Alabama Court of Criminal Appeals." The State does not dispute Ray has diligently pursued his postconviction claims since filing his petition in September 2018. He has operated on an expedited basis at every stage of litigation. He asked the Alabama Court of Criminal Appeals to expedite briefing before that court, to provide it an opportunity to decide Ray's appeal on the merits. It denied that motion. Only then did Ray file his motion seeking relief in the Alabama Supreme

Court. In that motion, Ray raised his federal *Brady* claims. Contrary to the State's assertions, Ray has pursued his claims diligently.

Despite Ray's diligence, the Alabama courts have not decided Ray's claims through their normal process. Typically, the Alabama Court of Criminal Appeals issues a reasoned opinion. A losing party is then required to file an application for rehearing before petitioning for a writ of certiorari with the Alabama Supreme Court. None of that has yet happened here. A stay is required to allow that normal procedure to play out because that appeal becomes moot upon Ray's death.

Ray presented federal constitutional claims to the Alabama Supreme Court. In his motion for relief from his unconstitutional conviction and sentence and motion to vacate his execution date, Ray asserted that he was entitled to relief based on *Brady v. Maryland*. That court rejected his claim without any indication that its decision was based on any of the procedural issues the State raises here.

II. The Alabama courts did not decide Ray's claims on independent and adequate state grounds.

The State contends the decision below is based on "adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). The State's own arguments reveal that this is untrue and premised on a mischaracterization of Ray's petition.

As this Court has held, "dismissal is inappropriate 'where there is a strong indication … that the federal constitution as judicially construed controlled the decision below.'" *Long*, 463 U.S. at 1040 (quoting *Minnesota v. Nat'l Tea Co.*, 309

U.S. 551, 679 (1940)). Moreover, this Court presumes that a federal issue is presented unless the state-law issue is "clear from the face of the opinion." *Id.* at 1040–41. "A state court that wishes to look to federal law for guidance or an alternate holding while still relying on an independent and adequate state ground can avoid the presumption by stating 'clearly and expressly that [its decision] is … based on a bona fide separate, adequate, and independent ground." *Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (quoting *Long*, 463 U.S. at 1041). There is no such statement either in the Dallas County circuit court's dismissal of Ray's Rule 32 petition or in the Alabama Supreme Court's denial of Ray's motion for relief.

The State faults Ray for not meeting the due-diligence standard imposed by Rule 32.2(b). (Br. in Opp'n at 8–14.) But as Ray points out in his petition, the court below applied the *same* due-diligence requirement in the substantive *Brady v. Maryland* analysis. This is because the Eleventh Circuit incorporates a fourth, due-diligence element to all *Brady* claims. *Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002). Thus, it appears from the face of the lower court's ruling that it considered the Rule 32.2(b) analysis and the *Moon v. Head* analysis to be identical.

This Court has made it crystal clear that it has jurisdiction to review a case "where the non-federal ground is so interwoven with the [federal ground]" so that they are not truly independent of one another. *Long*, 463 U.S. at 1038 n.4. The court below did not "clearly and expressly" state that its construction of Alabama law was independent of *Moon* and *Meros*'s misconstruction of *Brady* law. *See Coleman*, 501 U.S. at 733. And Ray's petition is based squarely on the position that *Moon* and

Meros are not only wrong, but—as the en banc Third Circuit forcefully held—are "contrary to" and an "unreasonable application of" this Court's *Brady* cases. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 293 (3d Cir. 2016) (en banc). Though the lower court found that Ray was not "diligent," the federal rule on which Alabama law is based *does not require* such extraordinary diligence. This is not an independent basis sufficient to thwart this Court's review.

The State's *Osborne* argument amounts to a simple assertion that Ray "is mistaken" about *Osborne*'s holding. (Br. in Opp'n at 19.) But this is not a state-law ground, let alone an adequate one. The lower court's wrongful extension of *Osborne* is a federal error that this Court can review. If Ray is right about *Osborne*'s holding, then the State violated the Constitution during his initial postconviction hearing, and none of the State's procedural arguments hold water.

The State claims that Ray failed to invoke the postconviction discovery procedures in his initial petition. This is wrong. He *did* use discovery tools, and he *did* request information that plainly included the records at issue here. The State refused to respond to that discovery and even forced Ray to file a motion to compel. *Osborne* does not allow the State to provide discovery remedies, refuse to comply with them, and then plead *Osborne* in its defense. The State's overly cramped construction of Ray's discovery requests does not shield them from federal scrutiny either—if Ray is correct in arguing that *Osborne* imposes postconviction duties on the State, whether the State complied with those duties is, again, a *federal* issue.

The State's attempt to invoke the statute of limitations is similarly flawed. When a federal right *accrues*—so that the statute of limitations begins to run—is a *federal* issue. *Wallace v. Kato*, 549 U.S. 384, 387–88 (2007). That decision was in the § 1983 context, but the same reasoning applies in state postconviction court. Here, the lower courts botched the accrual analysis on federal claims—it held that Ray had sufficient information to raise his claims at trial, on appeal, at the first postconviction hearing, or at some time before he filed his petition, in disregard of Alabama's stringent pleading requirements that require the petitioner to marshal and present substantially all his evidence at the time the Rule 32 petition is filed.

If Ray wins on the federal accrual issue, then the state grounds are no longer adequate, because his petition was timely filed. If Ray wins on the *Osborne* issue, then his petition was timely filed as well: the State's violation of *Osborne* in the first postconviction hearing requires the clock to be turned back to when Ray's first petition was filed. And, as noted above, the state due-diligence issue (which permeates the statute-of-limitations question) is so inextricably mixed with the *Moon-Dennis* split that it cannot truly be independent of the federal question. If the Court clarifies that the Eleventh Circuit has been following the wrong, courtesy and federalism demands that the state courts be given the opportunity, on remand, to evaluate whether they wish to construe their laws to impose greater burdens than this Court does itself.

At bottom, the State simply disagrees with Ray's arguments on certiorari, rather than raising a truly adequate and independent bar to this Court's review. Those are questions for a merits brief, not grounds for denying certiorari.

III. The State's argument that the lower court's Order was based on factual findings ignores the underlying federal question regarding whether the State's *Brady* obligations are suspended unless a defendant displays the requisite degree of discovery diligence.

The State argues the Court should not get involved because the decision in the lower courts was based on factual findings[1]. But even if that is so, and even assuming the lower court's factual findings are correct[2], the essential underlying question is a federal one: what is the scope of the *prosecutor's* duty under *Brady* and its progeny, including *Kyles*[3], *Strickler*[4], and *Banks*[5]? Is the Eleventh Circuit correct in adding a *fourth* factor to *Brady* that imposes prerequisite obligations on the defendant before the prosecutor's *Brady* obligations are activated? Or are the Third and Ninth Circuits correct that *Brady* is about the obligations of the prosecutor to

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[1] There are no true "factual findings" in this case. No evidentiary hearing was held, and the Taylor Hardin records, the existence and content of which the State completely ignores, shows the circuit court's findings are incorrect. This Court owes no deference to "factual findings" written in the Attorney General's proposed order and adopted verbatim by the circuit court without conducting any actual fact-finding.

[2] Ray disputes this.

[3] *Kyles v. Whitley*, 514 U.S. 419 (1995).

[4] *Strickler v. Greene*, 527 U.S. 263 (1999).

[5] *Banks v. Dretke*, 540 U.S. 668, 691 (2004)

search for and disclose exculpatory and material evidence, regardless of the defendant's discovery efforts? Alabama has adopted the Eleventh Circuit's prerequisite test (see circuit court opinion at ¶ 15). But *Kyles*, *Strickler*, and *Banks* do not suspend the prosecutor's duty unless a defendant exhibits some requisite level of diligence–to the contrary, in those cases this Court expressly held defendants should be able to rely on the integrity of the prosecutor when he says he has disclosed everything. If that is so, then the Eleventh Circuit—and the Alabama courts in relying on its holdings—are wrong, and there is no fourth prong to a *Brady* claim – just as the Third and Ninth Circuits have interpreted *Brady, Kyles*, *Strickler*, and *Banks*. *See Dennis v. Sec'y,Pa. Dep't of Corr*., 834 F.3d 263, 289-93 (3d Cir. 2016); *Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002).[6]

IV. The State may not compartmentalize itself to undermine *Brady*.

The State, citing to *Kyles*, contends (and Ray does not disagree) that "the materiality standard of Brady 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." The suppressed evidence in this case would have done precisely that. Had the State produced the Owden mental health records, it would have been clear that the Ronan Report's conclusions (Owden had no serious mental illness)

[6] The State asks the Court to limit its prosecutorial disclosure duties to produce evidence in other state files to evidence the prosecutor has reason to know about absent a search. Even if the Court adopts that standard, the State still had a duty to produce the ADOC and Taylor Hardin records. The State admits the prosecutor had the Ronan Report at time of time of trial (although it did not produce it until Ray's postconviction proceedings) and argues the Report provided sufficient clues to suggest there might be more related Owden mental health records. If that is so, as the State claims, then the State knew or should have known to look for those records—that is, framed in the State's proposed test, knowledge should be imputed to the prosecutor.

were wrong and that Owden's mental health needed to be investigated. But the State's insistence that Owden "had no mental impairment," combined with the State's assurance it had observed an "open file" policy and that all case-related information had been shared, gave Ray no reason to know or even suspect Ronan's conclusions were wrong.[7]

The State argues that *Brady* countenances a State's decision to compartmentalize evidence in various state agency files and that the prosecutor has no obligation to examine any of it, beyond his own files, for possible *Brady* material. But that would undermine the *Brady* line of decisions. This case invites the Court to make clear that in cases involving important prosecution witnesses in prison or otherwise confined, the prosecutor may not cordon off the prison/confinement files from *Brady* scrutiny. Different cases may require prosecutors to make different assessments of what non-prosecution records require attention. For example, in a case where the defendants and the key prosecution witnesses were all Post Office employees, it may be necessary for the prosecutor to look for *Brady* material in the Post Office personnel files. *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files). "We do not

[7] The State of course did nothing in Ray's initial postconviction proceeding to correct this misperception by failing to respond fully to Ray's discovery requests, or to provide any indication (like a privilege log) to show that the scope of the State's document production was less than all potentially available *Brady* documents.

suggest … that the government was obliged to obtain evidence from third parties, but there is no suggestion in *Brady* that different 'arms' of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities." *United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984). See also *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) (prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case).

V. There is a genuine split between the circuits regarding the scope of the State's duty to examine files of related agencies for exculpatory or impeachment evidence.

The State accuses Ray of manufacturing a circuit split on the extent to which prosecutors must search for exculpatory or impeachment evidence in the files of related government agencies. The State claims Ray misrepresented the Second Circuit's position in *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001), that prosecutors must search the files of "agencies reasonably expected to have [*Brady*] information." *Id.* at 140. That is incorrect. That language is a direct quote from *Coppa,* 267 F.3d at 140, characterizing this Court's holding in *Kyles*, where this court held that prosecutors must inquire with the police about exculpatory evidence. It is clear, then, that the Second Circuit viewed the facts in *Kyles* as illustrative of a prosecutor's broader duty to go beyond his own files when locating exculpatory evidence. It is therefore *exactly* what Ray explained—evidence that the Circuits disagree about what *Kyles* means. Alabama here contends that the prosecutor's

obligations are limited to his own files and the files of the police. The Second Circuit clearly reads *Kyles* differently. The State's citation to *Losacscio*, 6 F.3d at 924; Br. in Opp. at 31 n.98, is irrelevant on this point—that case simply stated, generally, that a prosecutor is not required to disclose what *all* government agents know. *Id.* at 949. Ray does not contend a prosecutor's duty extends so far. But at least two circuits agree it does extend to related agencies reasonably expected to have possession of *Brady* information. That other circuits disagree is precisely why the Court should grant certiorari and resolve this issue.

CONCLUSION

The Court should grant certiorari and stay Ray's scheduled execution to address the critical questions raised in his petition.

Respectfully submitted,

/s/ Peter M. Racher
PETER M. RACHER*
THERESA M. WILLARD
JOSHUA S. TATUM
Counsel for Petitioner
PLEWS SHADLEY RACHER & BRAUN, LLP
1346 N. Delaware St.
Indianapolis, IN 46202
(317) 637-0700
pracher@psrb.com

CHRISTOPHER K. FRIEDMAN
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203-2104

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* Counsel of Record