No. A19 ____

IN THE

Supreme Court of the United States

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DOMINEQUE RAY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

—— ♦ ——

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

—— ♦ ——

PETITION FOR CERTIORARI

—— ♦ ——

EXECUTION SCHEDULED FOR FEBRUARY 7, 2019

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February 6, 2019

CAPITAL CASE

QUESTIONS PRESENTED

A. Does *Brady v. Maryland* require the State to obtain and produce to the defense all available prison or other incarceration or institutional files comprising *Brady* evidence relating to an incarcerated or institutionalized person who is expected to be the star witness in a criminal case?

B. Did the Alabama courts wrongfully extend *District Attorney v. Osborne* by holding that *Brady* never applies to the postconviction context, even when a *Brady* violation deprived the petitioner of a fair trial, and where that fair-trial violation was perpetuated by the State in the postconviction process?

PARTIES TO THE PROCEEDING AND RULE 26.9 STATEMENT

Petitioner is Domineque Ray. Respondent is the State of Alabama. Neither party is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Domineque Ray petitions for a writ of certiorari to review the decision of the Alabama Supreme Court rejecting his claims under *Brady v. Maryland* and *Strickler v. Greene*.

OPINIONS BELOW

The Circuit Court in Dallas County, Alabama, dismissed Ray's postconviction petition on December 13, 2018 and denied Ray's motion for reconsideration on January 15, 2019. The relevant orders are unreported and are reproduced in the Appendix. Ray timely appealed that decision, as was his right, Ala. Code § 12-22-2; Ala. R. App. P. 3(a)(2), and asked for expedited briefing in the Alabama Court of Criminal Appeals. That motion was denied. The Court of Criminal Appeals has yet to rule on the case, even though Ray's execution is Thursday, February 7, 2019.

On Friday, February 1, 2018, Ray filed a motion to vacate his execution date with the Alabama Supreme Court. Ala. R. Crim. P. 8(d)(1). This motion sought time for a ruling on his appeal, or, in the alternative, for relief from his unconstitutional conviction and sentence on the merits. The Supreme Court has not ruled on that motion.

JURISDICTION

This Court can review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision may be had," provided that such a decision infringes upon "any title, right, privilege, or immunity" conferred by federal law. 28 U.S.C. § 1257(a). On February 5, 2019, the Alabama Supreme Court rendered a

final and appealable decision denying Ray's motion for relief from unconstitutional conviction and sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and the due process protections in the Fourteenth Amendment to the U.S. Constitution. The postconviction remedies provided by the Alabama Rules of Criminal Procedure also are at issue in this case. Ala. R. Crim. P. 32.1, 32.2.

STATEMENT OF THE CASE

At the time of Ray's capital-murder trial in 1999, Marcus Owden, the State's star witness, suffered from schizophrenia including misperceptions of reality, auditory hallucinations, and delusions. Documents supporting this diagnosis have been in Alabama's possession since before Ray's trial. No physical evidence connected Domineque Ray to the murder of Tiffany Harville.

Owden's testimony was the only evidence that Ray robbed, raped, and murdered the victim. The prosecutor told jurors that "there is no question" regarding Owden's sanity, and he emphasized Owden's credibility in closing. (claiming that Owden was mentally "fine" and was telling the "Gospel truth").

The State never disclosed Owden's mental health records to Ray. Instead, the State represented that it claimed it had maintained an "open file" policy, giving Ray access to everything the State had relating to the case. (*See* 2nd R32 C. 318–19,

620–21.)[1] But the State did not produce or make available Owden's mental-health records.

Shortly after Ray learned that these documents still existed, he filed a second postconviction petition, even though the State had not yet produced them. Before Ray obtained the documents, the state trial court dismissed his petition. Finally, on January 4, 2019, Ray obtained documents (Newly Released Records) that had been in the custody of the Taylor Hardin Secure Mental Health Facility in Tuscaloosa, at which Owden had been evaluated before Ray's trial. The trial court denied Ray's motion for reconsideration based on the Newly Released Records, and the Alabama courts have affirmed this ruling. The Alabama courts held that the deadline for filing his claim ran out a year after the conclusion of direct review—even though the State had not yet produced any *Brady* evidence at that time.

Domineque Ray was convicted of capital crimes based on the testimony of Marcus Owden and without the benefit of state records that showed Owden was schizophrenic.

On August 18, 1997, Marcus Owden told police he was involved in the 1995 death of Tiffany Harville. In his statement, he also implicated Ray. (1st R32 C. 2856–57, 2860–61.)[2] Based on Owden's claims, Ray was indicted in Dallas County, Alabama, under Ala. Code § 13A-5-40(a)(3)(1975) on two counts of capital murder

[1] Ray uses the following citation form for the record: (C. #) and (R. #) for the clerk's record and the trial transcript at trial, (1st R32 C. #) and (1st R32 R. #) for the clerk's record and the trial transcript for Ray's first Rule 32 petition, and (2nd R32 C. #) and (2nd R32 R. #) for his second Rule 32 petition.
[2] Ray uses the following citation form for the record: (C. #) and (R. #) for the clerk's record and the trial transcript at trial, (1st R32 C. #) and (1st R32 R. #) for the clerk's record and the trial transcript for Ray's first Rule 32 petition, and (2nd R32 C. #) and (2nd R32 R. #) for his second Rule 32 petition.

for Harville's death, pursuant to Ala. Code §§ 13A–5–40(a)(2) and (3) (1975) . (C. 5–6, 85.)

On January 29, 1998, Ray's trial counsel filed a motion for discovery requesting, "The results and reports of any scientific or other tests, analysis, experiments, or studies made in connection with the instant case." (C. 22.) Ray's counsel also requested "All information of whatever form, source, or nature which tends to exculpate the Defendant either through an indication of his innocence or through the potential impeachment of any state witness," "all information of whatever form, source, or nature which may lead to evidence which tends to exculpate the Defendant whether by indicating his innocence or impeaching the credibility of any state witness," and "all information which may become of benefit to the Defendant in preparing or presenting the merits of his defense or innocence at trial."(C. 22.) Ray's counsel also asked for "Statements of all person[s] including memoranda, summaries, recordings of such statements of any person, made to any law enforcement officer, or the investigative staff of any prosecutor in any way connected to the above-styled indictment." (C. 25.) They requested "Results of all reports of any medical examinations and diagnostic tests … and all copies of such reports." (C. 26.)

The State represented that it maintained an open-file policy at trial and that Ray had been given access to all case-related evidence the State possessed. But at that time, ADOC—where Owden was in custody—and Taylor Hardin possessed medical records documenting (1) Owden's propensity for lying; (2) Owden's

hallucinations and delusions, bizarre speech and cognition, and other signs of an emerging psychopathology; and (3) Owden's diagnoses of serious mental illness, psychosis, and schizophrenia. None of these files were produced to Ray's trial counsel, and the State did not reveal their existence or their contents. In his opening statement, the district attorney even emphasized that neither Owden nor Ray suffered from any mental impairment.[3]

On February 10, 1998, Owden's defense lawyers asked the trial court to appoint a clinical neuropsychologist to evaluate him and testify in his criminal case. The State objected, arguing Owden "has no mental impairment." Objection to Def.'s Mot. for Appointment of Clinical Neuropsychologist,.

Owden's testimony was the centerpiece of the State's case. (R. 596–623.) No physical evidence connected Ray to the crime. No other evidence placed Ray or Owden in Selma or Dallas County around the time of Harville's death. There is no physical evidence that Harville was raped or that she was robbed in connection with her death or at any time; the rape and robbery charges against Ray relied entirely on Owden's testimony.[4]

Ray was convicted by a Dallas County Circuit Court jury on July 28, 1999. (R. 721.) The next day the jury recommended a sentence of death by a vote of 11–1. (R. 780.) On September 27, 1999, the trial court held Ray's judicial sentencing hearing. (R. 784.) The court sentenced Ray to death by electrocution. (C. 284–92.) His

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[3] The D.A. stated in reference to Owden and Ray: "[I]n this case, ladies and gentlemen, there would be no issue of insanity. There is not even a question about anyone's mental ability. They are fine."
[4] The rape and robbery were aggravating factors later relied upon by the sentencing judge in imposing the death penalty.(C. 287–88.)

conviction was affirmed on direct appeal. *Ray v. State*, 809 So. 2d 875 (Ala. Crim. App. 2001), *cert. denied*, *Ex Parte Ray*, 809 So. 2d 891 (Ala. 2001), *cert. denied*, *Ray v. Alabama*, 534 U.S. 1142 (2002).

Ray challenged his conviction in state postconviction.

On August 26, 2003, still unaware that Owden had been diagnosed as a schizophrenic, Ray's postconviction counsel moved for discovery of information necessary for a fair postconviction hearing. The request sought all documents relating to the Harville crime. (1st R32 C. 242.) It sought "Any documents in the State's possession or available to the State" from any source that were exculpatory or favorable to Ray in any way related to the State's witnesses, among which Owden was the key witness, and "any and all information that would support a showing that the murder of Tiffany Harville was committed while the perpetrator or perpetrators were under the influence of extreme mental or emotional disturbance. …"(1st R32 C. 244–45.) Ray's counsel also requested "All physical or documentary evidence … in the possession of the prosecution, law enforcement personnel, any other State agency, or prosecution witness that may have impeached or otherwise contradicted, disproved, questioned, conflicted with, or challenged the testimony of any State witness, including Marcus Owden." (1st R32 C. 246.) Ray requested documents that clearly included Owden's mental-health records, including:

> All documents relating to any State witnesses at Domineque Ray's trial, including:

> all juvenile detention, jail, prison, parole, probation, and pre-sentence investigation records;
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> all records of any detention or court authority;
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> all psychiatric, psychological, and mental health records;
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> …
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> all other records and reports.

(1st R32 C. 247–48.)

On July 23, 2004, the postconviction court granted Ray's motion for discovery and ordered the State to produce the requested materials within thirty days. (1st R32 C. 521–22.) When the State failed to do so, Ray asked the court for an order compelling it to. (1st R32 C. 622–54.)

By this time, ADOC had even more records documenting Owden's schizophrenia and continuing delusions and hallucinations and confirming the enduring nature of Owden's psychosis. The State did not disclose those documents. Instead, it produced only a 1998 competency report ("Ronan Report") saying that Owden "shows no signs or symptoms of major mental illness." (*Id.* at B249.) Ray's trial counsel testified that he had never seen this report until the day of his testimony during the postconviction hearing. (1st R32 R. 432.) The Ronan Report

stated four times Owden did not suffer from any serious mental illness.[5] None of the data underlying the Ronan Report was produced.

An evidentiary hearing on Ray's postconviction petition was held September 27–29, 2006. Ray's petition ultimately was denied. The Alabama appellate courts affirmed. *Ray v. State*, 80 So. 3d 965 (Ala. Crim. App. 2011), *cert. denied, Ex parte Ray*, 80 So. 3d 997 (Ala. 2011).

Ray filed a habeas corpus petition.

Ray then timely filed a petition for habeas corpus in the United States District Court for the Southern District of Alabama, still in the dark about Owden's mental illness. The district court denied his petition. *Ray v. Thomas*, No. 11-0543-WS-N, 2013 U.S. Dist. LEXIS 138780, 2013 WL 5423816 (Sept. 27, 2013). The United States Court of Appeals for the Eleventh Circuit granted a certificate of appealability on the question of whether Ray received ineffective assistance where his trial lawyers failed to investigate or present mitigating evidence about Ray's background. The Eleventh Circuit affirmed the district court, even though the court was "troubled by the paucity of counsel's mitigation investigation," *Ray v. Ala. Dep't*

[5] Dr. Ronan stated, "There was no indication of a major psychiatric disorder noted during the current evaluation. … There was no indication of true hallucinatory or delusional thought processes." (1st R32 C. 2600.) "Based on the available information, I found no indication that Mr. Owden is suffering from any type of major psychiatric disorder. He does have a religious preoccupation, however, in my opinion this would not represent any type of delusion or psychotic type condition. Based on history, a diagnosis of Learning Disorder would be appropriate. There is perhaps a Personality Disorder, Not Otherwise Specified (with probable Schizotypal, Antisocial, Dependant, [sic] and Avoidant Features) as well. At the present time, he may suffer from an Adjustment Disorder with a Depressed and Anxious Mood." (1st R32 C. 2602.)

of Corr., 809 F.3d 1202, 1211 (11th Cir. 2016), and even though the omitted mitigation evidence was "profound and compelling." 809 F.3d at 1210.

On October 31, 2016, this Court denied certiorari. *Ray v. Ala. Dep't of Corr.*, 137 S. Ct. 417 (2016). It denied rehearing on January 23, 2017. *Ray v. Ala. Dep't of Corr.*, 137 S. Ct. 844 (2017).

Ray's counsel learn of Owden's current schizophrenia and seek Owden's mental-health records predating Ray's trial.

In May 2017, while Ray's counsel was visiting Owden in prison as part of their continuing investigation into Ray's case, Owden mentioned the Alabama Department of Corrections ("ADOC") was treating him for schizophrenia. (2nd R32 C. 347.) Counsel did not ask for this information. Owden volunteered it. Ray's counsel immediately began efforts to investigate Owden's unsolicited and unexpected revelation. (*Id.*) Owden signed releases to allow Ray's counsel to access his prison records, which counsel requested on May 17, 2017.

Four months later, on September 6, 2017, after repeated follow-up efforts by Ray's counsel, ADOC produced records showing Owden had been assessed and treated for years for schizophrenia, likely since before he testified against Ray ("2017 Production"). (2nd R32 C. 349–50, 352.)

The records reveal Owden has a significant history of serious psychosis and schizophrenia, including hallucinations, paranoia, and bizarre behaviors and beliefs, for which the State has been treating him. They include documents indicating the existence of additional materials predating Ray's trial. They support

the conclusion that Owden suffered from a serious mental illness at the time of the crime and at the time of Ray's trial. They show that ADOC continues to medicate Owden with antipsychotics and treat him for schizophrenia.

Counsel immediately sent those records to a consulting forensic psychologist for evaluation. The psychologist advised that more records from further back in time would be helpful in determining whether Owden suffered from schizophrenia at the time of Ray's trial. (2nd R32 C. 349–50 (submitted to the circuit court).)

Ray's counsel started searching for more records that would verify Owden's schizophrenia at the time he implicated and testified against Ray. Over the next eleven months, Ray's counsel corresponded with various state and local governmental agencies, including multiple exchanges with the Taylor Hardin, Alabama and Dallas County Department of Human Resources, Dallas County schools, and other agencies. They were told either that no such records existed (which later proved untrue) or that no responsive records could legally be produced, notwithstanding Owden's consent for their release.

In the summer of 2018, following their inability to procure additional Owden mental health records, Ray's counsel obtained expert opinions from their consulting psychologists that the available ADOC records, coupled with the fact that schizophrenia is incurable and enduring and typically manifests in men in their late teens or early twenties, were sufficient to show Owden suffered from schizophrenia at the time he testified against Ray, and likely at the time of the crime.

Dr. Catherine L. Boyer reviewed the records and confirmed that, directly contrary to the one document the State selected for production previously (the Ronan Report), Owden was seriously mentally ill and had been suffering from schizophrenia at the time of the offenses for which he and Ray were convicted, when he gave statements to investigators, and when he testified in Ray's trial. (2nd R32 C. 88–91.) Dr. Boyer noted records in the 2017 Production indicated Owden has suffered from schizophrenia from at least as long ago as 1997. (*Id.* at 88.) The records also "provide ample support" for the diagnosis of schizophrenia. (*Id.*) They show Owden demonstrates symptoms of schizophrenia even when medicated and otherwise stable. (*Id.* at 88–89.)

Dr. Boyer explained schizophrenia is a major mental disorder. (*Id.* at 90.) It involves significant impairment in brain functioning. (*Id.*) Symptoms of schizophrenia include delusions, meaning fixed false beliefs. (*Id.*) They also include hallucinations, disorganized speech, and deficits in language function, reasoning, judgment and attention—all traits that negatively affect a witness's ability to perceive and recall events, follow questioning, and accurately respond. (*Id.*)

Dr. Boyer noted that defendants and witnesses suffering from schizophrenia present special challenges in terms of reliability and validity of statements made during interrogation and testimony. (*Id.*) She cautioned, "Considerable care should be exercised in such cases in order to ensure accuracy, from the manner of asking questions (to ensure the individual understands the questions and is not being distracted by delusions or hallucinations or other symptoms) to identification of

symptoms present (so that if the individual is experiencing delusions, hallucinations, or other interferences, those symptoms are clearly identified and can be taken into account)." (*Id.* at 90–91.)

Dr. Boyer concluded "it is reasonable to conclude that Mr. Owden was suffering from this condition during the time frame of the offenses for which he was convicted, when he gave statements to investigators, and when he testified in the trial of his codefendant, Domineque Ray." (*Id.* at 91.)

Dr. Stanley L. Brodsky, a forensic psychologist from the University of Alabama, also reviewed the 2017 Production. Dr. Brodsky concluded, "Without exception the diagnoses and test results point to the presence of a serious mental illness that intrudes into [Owden's] thinking and functioning." (2nd R32 C. 100.) The ADOC records "indicate that in the early years of his imprisonment," including Ray's trial, Owden's "psychotic symptoms were more severe, and continuing administration of the anti-psychotic medications Prolixin and then Haldol and the passage of time have led to diminution of symptom severity." (*Id.* at 98.) Dr. Brodsky observed the 2017 Production referred to other records dating back to 1997, which still had not been produced. (*Id.* at 99.) Although most of the records in the 2017 Production postdated Ray's trial, Dr. Brodsky noted an evaluation administered to Owden in 1994, when he was 19, supported a timeline in which Owden "manifested early problem behaviors that likely developed into schizophrenia in the next year or two." (*Id.* at 6.) Dr. Brodsky further concluded, "The Jeffers findings, the MCMI-II results, and especially the DOC records strongly

indicate that at the time of Mr. Owden's interrogation and testimony his misperceptions of reality, auditory hallucinations, religious delusions, and other psychopathology compromised his ability to present information accurately, rationally and intelligently." Dr. Brodsky noted records in the 2017 Production "indicate that Mr. Owden has a chronic psychotic disorder of the sort that extends throughout adult life." (*Id.* at 102–03.) He opined that Owden's statements "were less credible and more suspect of diminished veracity than statements by a comparable person without a disorder." (*Id.* at 104.)

The State sought Ray's execution date.

As Ray's counsel were gathering information on Owden's previously undisclosed schizophrenia and its significance, the State of Alabama moved the Alabama Supreme Court to set an execution date. St. of Ala.'s Mot. to Set an Execution Date, *Ex parte Ray*, No. 1001192 (Ala. Aug. 6, 2018). The Supreme Court granted Ray's request for an extension of time to respond, setting the due date for his response for September 28, 2018. Order, *Ex parte Ray*, No. 1001192 (Ala. Sept. 28, 2018).

Ray learns of pretrial documents showing Owden's schizophrenia and seeks postconviction relief.

On August 24, 2018, Taylor Hardin (where Owden was evaluated in 1997 in connection with the State's prosecution of him for Harville's death) informed Ray's counsel it had no other Owden mental-health records.

But on September 5, 2018, Taylor Hardin revealed that it did, in fact, have

additional mental-health records for Owden going back to before Ray's trial and the crime at issue. Taylor Hardin did not produce the documents until January 4, 2019, and then only in response to a subpoena. (2nd R32 644–45, 662–65, 675–752.)

Twenty-two days after learning that Taylor Hardin had mental-health records predating Ray's trial, Ray filed his Rule 32 petition ("Petition") on September 27, 2018. (2nd R32 C. 44–132.) The next day, he submitted to the trial court's clerk his Subpoena for Documents under Rule 17 of the Alabama Rules of Criminal Procedure. (2nd R32 C. 660.) The subpoena was addressed to Taylor Hardin. (*Id.* at 662.) Ray also timely filed his opposition to the State's motion to set an execution date.

The Dallas County Circuit Court dismissed Ray's postconviction petition.

On October 12, 2018, the State moved to dismiss Ray's Petition. (2nd R32 C. 133–61.) The trial court heard argument on the State's motion to dismiss on November 19, 2018. (2nd R32 C. 133–61.) As part of counsel's presentation of Ray's case, Mr. Racher advised the court that more records existed at Taylor Hardin that still had not been produced. (2nd R32 R. 14.)

The trial court granted the State's motion, adopting the State's proposed order virtually verbatim. (2nd R32 C. 427–47.)

On November 6, 2018, the Supreme Court set Ray's execution date for February 7, 2019. Order, *Ex parte Ray*, No. 1001192 (Ala. Nov. 6, 2018).

At the close of the hearing on the State's motion to dismiss, the court ordered additional briefing on whether Ray's Petition was time-barred, as alleged by the

State, and set a briefing schedule. (2nd R32 C. 213.) Ray filed his supplemental brief on November 26. (2nd R32 C. 317–55.) The State responded on November 29. Per the court's order, Ray's Reply was due December 3. (2nd R32 C. 369–82.) On November 30, the State filed its proposed order and an amended motion to dismiss. (2nd R32 C. 413–26.) That same day, three days before Ray's Reply was due, the court granted the State's motion to dismiss, adopting virtually verbatim the State's proposed order. (2nd R32 C. 427–48.) When Ray reminded the court of the briefing schedule, the court agreed to hold its order in abeyance until Ray replied. (2nd R32 C. 449.) Ray filed his Reply on December 3. (2nd R32 C. 450–85.) On December 13, 2018, the court again ruled in the State's favor and reinstated the State's proposed order, virtually unchanged, as its own. (2nd R32 C. 626.)

On December 13, 2018, the trial court granted the State's motion to dismiss, reinstating its prior adoption of the state's proposed order. (2nd R32 626.)

Ray obtained State records predating Ray's trial that show Owden suffered from schizophrenia.

On January 4, 2019, after the trial court had dismissed Ray's Petition, Taylor Hardin responded to counsel's subpoena for Owden's as-yet undisclosed mental-health records ("Newly Released Records"). (2nd R32 C. 645.)

The Newly Released Records reveal Owden was exhibiting the signs and symptoms of schizophrenia, including hallucinations and delusions, at the time he implicated and testified against Ray. (*See* 2nd R32 C. 675–752.) The court did not have these documents at the time it dismissed Ray's second petition.

The Newly Released Records show Owden had never received psychiatric treatment before his arrest. Dr. Jeffer's notes from August 21, 1997, state, "There is no prior psychiatric hx that the patient can report."[6] (*Id.* at C.63.) Owden's lawyer wrote, "we have no history of any prior psychiatric treatment prior to his arrest in this case. … We have no history of any prior psychiatric treatment prior to his arrest in this case." (*Id* at 730.)

After reviewing the Newly Released Records, Ray's psychology expert Dr. Brodsky concluded:

> Had the Newly Released Records been provided to Mr. Ray's attorneys prior to his capital murder trial, or to Mr. Ray's post-conviction attorneys prior to the Rule 32 evidentiary hearing held in 2006, Mr. Ray would have been able to demonstrate through the assistance of an appropriate mental health expert (which expertise has been readily available in Alabama for decades) that (a) Mr. Owden, dating back at least to 1994, suffered from a psychopathology that disrupted and impaired his perception, thinking and functioning, (b) this psychopathology was the incipience of Mr. Owden's schizophrenia, which is well documented in the ADOC records, and (c) Mr. Owden's ability to provide accurate and reliable testimony at Mr. Ray's trial in 1999 was impaired by his illness and should have been disclosed to and addressed by the attorneys and court. By the time of Mr. Ray's trial in 1999, Mr. Owden's condition had been recognized and more fully described as "Mental-psychosis" by the Alabama Department of Corrections on Owden's chronic "Problem List," dated October 22, 1998. My first affidavit summarizes the ADOC records on Mr. Owden. The "Problem List" is an ADOC record of Mr. Owden's chronic (long term) problems from October 1998 through February 2013. The document includes multiple entries of psychosis and schizophrenia. "Mental-psychosis" is identified at the top of the page and dated 10/22/98.

(2nd R32 C. 670.)

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[6] *Hx* is a medical abbreviation for "history."

The state court did not change its decision based on the Newly Released Records.

Five days after receiving the Newly Released records, Ray moved the circuit court on January 9, 2019 to alter or reconsider the judgment. (2nd R32 C. 638–752.)

The court denied the motion for reconsideration on January 15, 2019. (2nd R32 C. 762.) The one-page Order states only "Although the Court disagrees with the State'[s] argument that because Mr. Ray and Mr. Owden were partners in crime, Mr. Ray should have been aware of Mr. Owden's potential mental deficit, the record has several references to instances pretrial and during trial that would have put Mr. Ray on notice to investigate such a claim if he wanted to pursue it." (*Id.*)

Ray appealed the dismissal and requested relief from his execution date.

Ray filed a timely Notice of Appeal to the Court of Criminal Appeals on January 17, 2019, the first day the Dallas County Circuit Court was open to accept it.[7] (2nd R32 C. 762–70.) He filed his Appellant's Brief on January 23, 2019.

On January 29, 2019, having had no response from the State, Ray moved the Court of Criminal Appeals to expedite briefing of the appeal, so it could be considered before Ray is executed. The court denied the motion.

On January 30, 2019, the State filed its Appellee's Brief. Ray filed his Reply the next day.

On February 1, 2019, Ray filed his Motion for Relief from Unconstitutional Conviction and Sentence and Motion to Vacate Execution Date in the Alabama

[7] Alabama does not permit notices of appeal to be filed electronically. All Dallas County courts are closed to the public—including filing attorneys—on Wednesdays, including January 16.

Supreme Court. The motion describes the constitutional flaws with the postconviction court's order and failure to reconsider. On February 4, 2019, the State responded. The next day, Ray submitted his reply. That same day, February 5, the Alabama Supreme Court issued its order stating, "the motions are DENIED." Ray requests the Court to grant certiorari over that February 5 order.

REASONS FOR GRANTING THE PETITION

This case presents interrelated questions regarding the scope of the government's duty under *Brady v. Maryland* to disclose evidence of a government witness's mental illness. There is a split among the Circuits with respect to the State's duty to disclose incarceration or other institutional files concerning the mental illness of a prosecution witness being held in custody. The Circuits also do not agree on whether the diligence standard imposed on defendants by the Alabama courts abrogates the State's *Brady* obligations in light of this Court's rulings in *Strickler* and *Kyles*. The Alabama courts' decision in this case also conflicts with the Seventh Circuit's holding that *Brady* rights are enforceable in postconviction proceedings where, as here, the State failed to cure a *Brady* violation that occurred at trial and is ongoing in postconviction. These issues implicate important principles of fundamental fairness and apply daily to courts and litigants across the nation. The divergence of authority muddies the Court's *Brady* jurisprudence and results in uneven due process protections depending on geography. The Court should grant certiorari to resolve the conflicts between the Circuits and state courts and provide important clarification to prosecutors and defense attorneys on the

State's duties to divulge custodial mental health records of an incarcerated prosecution witness.

The accrual of a *Brady* claim also is an important issue of federal law that the Alabama courts have decided incorrectly. Alabama's holding here undercuts this Court's *Brady* mandate by incentivizing prosecutors to prolong their suppression of exculpatory or impeachment evidence in order to substantially increase the requirements for asserting a *Brady* claim. This Court has never addressed the issue, and the most analogous cases provide conflicting guidance. A clear ruling from this Court will provide helpful guidance to petitioners seeking to protect their due process rights, diminish lengthy litigation over procedural issues, and promote speed and finality in the postconviction process.

I. THIS CASE PRESENTS MULTIPLE INTERRELATED URGENT ISSUES OF *BRADY* LAW AND FEDERALISM THAT WARRANT THIS COURT'S REVIEW.

A. Whether the State must produce prison records containing material *Brady* evidence when the State's star witness is incarcerated in the State's prisons is an issue that warrants review.

The State must produce exculpatory or impeachment evidence even in the absence of any request for such evidence. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). To comply with this constitutional obligation, the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case. *Strickler v. Greene*, 527 U.S. at 281, citing *Kyles*, 514 U.S. at 437. "But whether the prosecutor succeeds or fails in meeting this obligation . . . the

prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 437-38.

There is a longstanding disagreement among the circuit courts regarding what it means for a prosecutor to "possess" evidence such that his *Brady* obligation to disclose is triggered. The Second and Ninth Circuits have held that the prosecutor's actual awareness (or lack thereof) of exculpatory evidence in the government's hands is not determinative of the prosecution's disclosure obligations because the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (citing *Kyles*, 115 S. Ct. at 1567-68) (specifically applying *Brady* to a prosecution witness's corrections files); *United States v. Coppa*, 267 F.3d 132, 140 (2nd Cir. 2001) (prosecutor must search the files of "agencies reasonably expected to have [*Brady*] information."). The Seventh Circuit takes a more limited view, characterizing its rule as "similar" to *Kyles*, and holding the prosecutor has no duty to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue. *United States v. Morris*, 80 F.3d 1151, 1169-70 (7th Cir. 1996) ("[T]he prosecution team, which included investigating officers and agents, had no knowledge of the specific documents identified by defendants. The prosecutors therefore had no affirmative duty to discover those documents and to disclose them to defendants.") The Eleventh Circuit takes a much more restrictive view, holding that *Brady* and its progeny apply only to evidence possessed by the "prosecution team," which the Eleventh

Circuit defines as only information possessed by the prosecutor or anyone over whom he has authority. *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989). This is the view adopted by the Alabama courts in this case to hold the State had no duty to disclose the key prosecution witness's corrections files documenting his mental illness.

The Court should grant review to promote consistency in the midst of these divergent holdings and clarify that incarceration or other institutional files concerning the mental illness of a prosecution witness being held in custody fall within the constitutional mandate of *Brady*. This is consistent with the Court's long line of cases explaining the State's duties under *Brady*. The issue is worthy of careful scrutiny because it impacts every prosecutor in the country. Prisons are involved in most, if not all, criminal cases. Prosecutors need to know if they have a duty to talk to the department of corrections as well as the police when searching for exculpatory evidence. Existing law suggests the *Brady* line of decisions imposes this duty, but not all courts around the country agree. A bright-line rule on this issue would offer much-needed clarity for prosecutors, defense counsel and courts doing their best to protect the defendant's constitutional rights.

This case is an ideal vehicle for resolving this issue. The Alabama Department of Corrections is a state agency and a part of Alabama's criminal justice system. The State's star witness was incarcerated in a facility run by ADOC, as part of a plea deal with the prosecutor's office. ADOC keeps health records of its prisoners as a matter of course. As a practical matter, it is hard to believe a

competent prosecutor would not be aware of the mental fitness of a star witness in ADOC's custody. The State has not denied that the district attorney in Ray's case knew that the star witness, Marcus Owden, was schizophrenic at the time Owden testified against Ray. The State has only asserted that the D.A. did not have physical possession of Owden's mental health records.

It is undisputed that ADOC and the Taylor Hardin Secure Medical Facility maintained files on Owden that included mental-health records, including records predating Ray's trial. There is also no dispute that the State never produced the bulk of the pretrial records to Ray prior to January 4, 2019. Those records reveal that Owden was exhibiting the signs and symptoms of schizophrenia, including hallucinations and delusions, at the time he implicated and testified against Ray. The State does not dispute that Owden's schizophrenia renders his testimony unreliable.

Had these records been disclosed, there is a reasonable likelihood Ray would not have been convicted or sentenced to death. *Wearry v. Cain*, 136 S. Ct. 1002 (2016). Owden's testimony was the centerpiece of the State's case. No physical evidence connected Ray to the crime. There is no physical evidence that Harville was raped or that she was robbed in connection with her death or at any time, as Owden claimed; the rape and robbery charges against Ray relied entirely on Owden's testimony. No witness corroborated Owden's testimony. In his opening arguments, the prosecutor made special mention of Owden's mental fitness. In his closing arguments, the district attorney emphasized the importance of Owden's

testimony, and affirmed Owden's credibility over and over again. The State needed the jury to believe Owden, because without his testimony, the State could not have convicted Ray.

Ray had a right to present to the jury the evidence in ADOC's files and to use it on cross-examination to test Owden's reliability. *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *Davis v. Alaska*, 415 U.S. 308 (1974). The jury should have been informed that the State's star witness was schizophrenic, suffered from hallucinations and delusions, and was a compulsive liar. A jury hearing this evidence rationally—and reasonably—would have discounted his testimony. At a minimum, jurors would have been far less likely to recommend the harshest punishment, death, on the word of a man who often could not tell fact from fiction.

The State's case hinges on whether it had the obligation to search ADOC's and Taylor Hardin's records for exculpatory or impeachment evidence regarding an incarcerated prosecution witness. The Circuits disagree on the scope of this duty. This case invites the Court to resolve this disagreement. The Court should grant review.

B. Whether the state is excused from complying with *Brady* where the prosecutor claimed to be observing an "open file" policy and where defendant served discovery upon the state that should have elicited the suppressed *Brady* material, but did not otherwise independently attempt to ferret out such evidence.

This Court has long held there are three elements to a *Brady* claim: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been

suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999)). The Eleventh Circuit has fashioned its own test, adding a fourth element necessary to the *Brady* claim: that the defendant did not possess the evidence and could not obtain it with any reasonable diligence. The Eleventh Circuit's four-prong test has never been adopted by this Court. Nonetheless, the Alabama courts relied on the Eleventh Circuit test to absolve the State of any *Brady* obligations with respect to its failure to disclose evidence in state correctional and institutional files documenting the mental illness of the State's star witness. The Alabama courts held the Eleventh Circuit's diligence prong imposed on Ray an independent duty to recognize such records might exist, and to investigate and find them on his own. The court held this was so even where the prosecutor claimed to have maintained an "open file" policy.

The First and Second Circuits also have adopted a defense diligence requirement that insists a defendant must follow clues to ferret out undisclosed evidence in the State's possession. *See United States v. Pandozzi*, 878 F.2d 1526, 1529-1530 (1st Cir. 1989); *United States v. Le Roy*, 687 F.2d 610, 618-619 (2nd Cir. 1981). But this runs counter to this Court's holdings in *Strickler* and *Banks*. "In light of the State's open file policy, we noted, 'it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld.'" *Banks*, 540 U.S. at 695-696, quoting *Strickler*, 527 U.S. at 285. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed

Brady material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred." *Id.*

These courts continue to impose a burden on defendants that this Court has specifically rejected. The Third and Ninth Circuits, however, accede to this Court's authority. The Ninth Circuit has held that when Brady disclosure appears to be substantially complete, due diligence does not require the defendant to inquire further about evidence that should be in the State's possession. *Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002). *Benn* was an arson case where the State produced (A) an interim fire marshall's report concluding that the fire was an accident, and (B) an expert analysis performed as part of the prosecution's case, finding that the fire was deliberately set. The State did not disclose the final fire marshall's report, which also concluded that the fire was an accident. The defendant claimed this was *Brady* material. The State countered that he could have obtained it with due diligence. The Ninth Circuit held that the due-diligence requirement was questionable after what this Court said in *Strickler* and *Kyles*.

The Third Circuit also disagrees with the Eleventh Circuit. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 289-93 (3d Cir. 2016) ("All favorable material ought to be disclosed by the prosecution. To hold otherwise would, in essence, add a fourth prong to the inquiry, contrary to the Supreme Court's directive that we are not to do so."). "The United States Supreme Court has never recognized an affirmative due

diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be." *Id.* at 290. "[T]he duty to disclose under *Brady* is absolute—it does not depend on defense counsel's actions. *Brady*'s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense counsel's diligence." *Id*. at 291 (citations omitted). "The government must disclose all favorable evidence. Only when the government is aware that defense counsel already has the material in its possession should it be held to not have suppressed it in not turning it over to the defense. Any other rule presents too slippery a slope." *Id.* at 292.

The Court should grant review to enforce its own rulings and affirm the Third and Ninth Circuits' interpretation of the State's *Brady* obligations.

C. Whether the Alabama Courts improperly interpreted *Osborne* to prevent the assertion of *Brady* claims in postconviction proceedings where the petitioner was deprived of a fair trial due to the State's pretrial *Brady* violations.

In 2009, this Court clarified that *Brady* does not require the State to search for and disclose exculpatory evidence discovered for the first time after a fair trial. *Osborne v. District Attorney's Office for the Third Judicial District*, 557 U.S. 52 (2009). That case did not address whether a prisoner has *Brady* rights in a postconviction hearing when he alleges a trial-level *Brady* violation. It also did not address a case where the state flouts a postconviction discovery order designed to ferret out *Brady* evidence. The Seventh Circuit has held that *Brady* extends to such cases. The Alabama courts, in this case, held the opposite. This Court should grant review to resolve this disagreement. SUP. CT. R. 10(b).

The rationale provided by the Chief Justice in *Osborne* is simple and sound: "A criminal defendant proved guilty *after a fair trial* does not have the same liberty interests as a free man." *Id.* at 68 (emphasis added). "At trial, the defendant is presumed innocent and may demand that the government prove its case beyond a reasonable doubt. But once a defendant has been *afforded a fair trial* and convicted … the presumption of innocence disappears." *Id.* (cleaned up, emphasis added).

The Court denied Osborne relief on this basis. Osborne was seeking a federal order compelling the state to produce biological evidence for a new kind of DNA testing "more discriminating than the [methods] available at the time of Osborne's trial." *Id.* at 60. Under these circumstances, the Court stated that "*Brady* is the wrong framework" and held that his rights were only violated if the state's DNA-testing scheme violated fundamental fairness. *Id.* at 69–70. They did not, so this Court correctly reversed the Ninth Circuit's decision.

This case differs from *Osborne* in two important ways. First, Ray alleges a trial-level *Brady* violation. Osborne did not. 557 U.S. at 60. Second, Ray *tried* to vindicate his *Brady* claim in state postconviction court, but he was stymied by the State's violation of a discovery order. Osborne went straight to federal court and asked this Court to federalize DNA-testing requirements. 557 U.S. at 70-71. In contrast, Ray has given Alabama courts every opportunity to cure the *Brady* and postconviction discovery violations in this case.

Ray's case thus presents two critical, unanswered questions about the *Brady*/*Osborne* continuum.

First, does a trial-level *Brady* right persist throughout the post-conviction process, so that the State continues to violate *Brady* if it continues suppressing the evidence? The Seventh Circuit has concluded that it does. *Whitlock v. Brueggemann*, 682 F.3d 567, 687-88 (7th Cir. 2012) ("*Brady* continues to apply to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial."); *State v. Harris*, 296 Neb. 317, 336-37 (2017). When the *Whitlock* defendants claimed that *Osborne* eliminated any right to "exculpatory evidence [in] post-conviction proceedings," the panel replied:

> [Defendants] misunderstand the *Brady* right. It is a trial right; the reason there is a continuing obligation on the state to disclose evidence is not because of some special right associated with post-conviction or clemency but because the taint on the trial that took place continues throughout the proceedings, and thus the duty to disclose and allow correction of that taint continues.

Whitlock, 682 F.3d at 688. This stands in contrast to Alabama's position here, which is that *Osborne* bars all *Brady* claims arising from postconviction conduct.

Second, *Osborne* did not address any affirmative malfeasance in the postconviction process. Osborne refused to even try Alaska's DNA-testing rules, and so his case involved neither misconduct by the State nor any as-applied challenge to the adequacy of Alaska's processes. 557 U.S. at 70-72 ("These procedures are adequate on their face, and without trying them, Osborne can hardly complain they do not work in practice.") This case presents a different issue. Ray faithfully complied with Alabama's rules and attempted to use the discovery tools available to ferret out any *Brady* evidence the State might have. Rather than disclose the records now in counsel's possession, the State produced a misleading report

representing that Owden was mentally fit.

When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight. *Banks*, 540 U.S. at 675–76. *Osborne* reaffirmed that a state postconviction process is subject to scrutiny for "fundamental fairness." *Id.* at 70. The question in this case is whether the state may suppress *Brady* evidence in the trial phase then hide behind *Osborne* when its misconduct is revealed. The answer should be a resounding "No." For good reason, this Court has never sanctioned the State's misrepresentation of facts to a tribunal. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Giglio v. United States*, 405 U.S. 150 (1972). This is because a prosecutor is not merely "an ordinary party to a controversy," but represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). It is consistent with this line of cases to hold that a State may not misrepresent facts in postconviction discovery—the purpose of which is to examine whether the trial was fair—without running afoul of due process.

Consider *Miller v. Pate*, one of this Court's seminal cases on misrepresentation to a court. 386 U.S. 1 (1967). *Miller* was a rape trial where the State introduced "blood stained shorts" supposedly belonging to the victim. *Id.* at 4.

In the habeas proceeding that followed, the defendant discovered, and proved, that "the reddish-brown stains on the shorts were not blood, but paint." *Id.* at 5. This Court held, unanimously, that there "can be no retreat" from the principle forbidding the use of false evidence. *Id.* at 7.

But what would result if the State, in defending the habeas claim in *Miller*, continued withholding the evidence, as Alabama did here? Would this Court allow the conviction to stand? Under Alabama's view of the *Brady–Osborne* distinction, this is exactly what would be required.

This cannot be the law. The Court should grant review to say so, to conform the law to the correct view used by the Seventh Circuit, and to prevent Alabama's error from causing Ray's death.

Here, either the Alabama court meant that Ray's *Brady* claim expired because the case was beyond trial and in a successive postconviction proceeding—which conflicts with the Seventh Circuit's decision in *Whitlock*—or the court meant that the State's failure to comply with discovery requested by Ray and ordered by the court in postconviction was permitted. Neither of those interpretations of *Osborne* is correct. *Osborne* did not excuse an ongoing violation of *Brady*. It simply recognized that *Brady* was the wrong framework for the claim *Osborne* was making. *Osborne* does not sanction a state's violation of court-ordered discovery; to the contrary, *Osborne* recognized that a state's violation of postconviction discovery, which the state's postconviction framework expressly allows, potentially gives rise

to a due-process violation, depending on whether the violation offends notions of fundamental fairness.

The Court should grant review to clarify its holding in *Osborne* with respect to the State's pre- and post-trial obligations to disclose material exculpatory or impeachment evidence. The context of this case presents an ideal opportunity for the Court to clarify that *Brady* violations remain actionable for as long as the State continues to suppress *Brady* material and to illustrate *Osborne*'s instruction that the State's violations of its own postconviction framework offend due process.

Further, this case is an ideal vehicle for addressing the *Osborne* issue. The argument was squarely presented in the briefing to the trial court and has remained a vital component of the case since that time. The State's primary defense to Ray's *Brady* claim has been that his claim is time-barred. But if this Court agrees that the State violated Ray's rights during the first postconviction hearing, then the State's timeliness arguments become irrelevant. The State conceded that Ray's first petition was timely filed. The Owden records should have been produced at that time. If they had been disclosed, Ray would have litigated the *Brady* issue at that time. Having denied Ray that due process, the State should be ordered to provide it.

D. Whether a State can divest a petitioner of his right to assert a *Brady* claim by delaying its disclosure of suppressed evidence beyond the time permitted to assert the claim?

The date on which a *Brady* claim accrues to a postconviction petitioner is a question which warrants this Court's review. This Court has never squarely addressed when a *Brady* claim accrues for a postconviction petitioner. The facts of

this case demonstrate, in compelling terms, that this is an important issue with widespread applicability.

In the federal postconviction context, the Circuits have uniformly held that a *Brady* claim "ripens" at the time the constitutional violation occurs—i.e., at the time the State suppresses the evidence. *See Brown v. Muniz*, 889 F.3d 661, 672-73 (9th Cir. 2018); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257 (11th Cir. 2009). *See also In re Wogenstahl*, 902 F.3d 621, 626–27 (6th Cir. 2018); *In re Pickard*, 681 F.3d 1201 (10th Cir. 2012); *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000). *But see Velez-Scott v. United States*, 890 F.3d 1239, 1247-59 (11th Cir. 2018) (following the rule as the law of the Circuit but seriously questioning its correctness).

These decisions are in tension with this Court's statements about the accrual and availability of federal claims. Justice Scalia, writing for the Court in *Wallace v. Kato*, explained that "it is the standard rule that accrual occurs when the plaintiff has a *complete and present* cause of action . . . that is, when the plaintiff can file suit and obtain relief." 549 U.S. 384, 388 (emphasis added).

At least in the *Brady* context, the constitutional violation giving rise to the claim—i.e., the government's suppression of evidence—also prevents the petitioner from discovering and asserting it. This create a serious and urgent problem for capital defense lawyers. In a system that is increasingly concerned with finality, heightened pleading standards and shortened statutes of limitations have become the norm. *See* Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L.

REV. 655, 683 & n.198 (2005). Alabama is no exception. Ala. R. Crim. P. 32.2(c) (imposing a one-year or a six-month statute of limitations, depending on the claim type); *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006) ("The burden of pleading under [the Alabama Rules] is a heavy one. . . . The full factual basis for the claim must be included in the petition itself."). As a consequence, counsel must forge a path between filing a petition which is timely and filing one that is factually deficient. *See Velez-Scott*, 890 F.3d at 1250.

The facts of this case illustrate these difficulties. Ray discovered by chance that Owden was presently being treated for schizophrenia in May 2017. He received ADOC records in September 2017 confirming Owden's diagnosis and suggesting his schizophrenia likely existed at the time of Ray's trial in 1999. But the records were not clear. Ray promptly sought assistance from mental health experts and diligently attempted to uncover evidence of Owden's symptoms in 1999 or earlier, including from multiple State agencies. The search for more records was unsuccessful. The experts advised in the summer of 2018 that they agreed, based on the available but incomplete documents and the nature of schizophrenia, that Owden likely was schizophrenic at trial. In September 2018, Taylor Hardin, the State secure medical facility that evaluated Owden after his incarceration, revealed for the first time that it retained a collection of Owden's mental health records from before and leading up to the time of Ray's trial, including records compiled as part of the State's prosecution of Owden for the crime at issue here. Taylor Hardin finally produced the records on January 4, 2019. Those records confirmed Owden's prodromal

(emerging) schizophrenia suspected by Ray's experts. At what point does federal law say Ray had enough information to start the statute-of-limitations clock? The law does not currently provide an answer to that question.

An answer on this issue will help promote efficiency and finality in postconviction litigation. If undiscoverable *Brady* claims accrue at the time of the violation, courts and lawyers need not waste time investigating and litigating issues that are decades out of time. If they accrue later, a clear explanation of how and why that is the case will provide valuable assistance to lawyers trying to balance their judicial obligation to present meritorious claims with their client obligation to file within the limitations period.

E. Whether Alabama's statute-of-limitations scheme violates fundamental fairness as applied to Ray.

A state's postconviction scheme is always subject to scrutiny for "fundamental fairness." *Osborne*, 557 U.S. at 70. The case below presented a novel question of Alabama statute-of-limitations law, which was resolved in the State's favor. The net effect of this ruling is to bar all *Brady* impeachment claims that are undiscoverable during the first postconviction proceeding. In cases where the State's suppression precludes filing the *Brady* claim in an initial petition, such an absolute bar violates fundamental fairness. The Alabama courts have not corrected this defect. This Court should grant review to examine whether an effective ban on *Brady* impeachment claims due to the State's continuing *Brady* violations offends fundamental fairness. SUP. CT. R. 10(c).

This Court has repeatedly affirmed that *Brady* extends to impeachment and non-exonerating evidence. *Wearry v. Cain*, 136 S. Ct. 1002 (2016); *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Bagley*, 473 U.S. 667, 676 (1985) *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). Alabama law now effectively bars a prisoner from presenting any belatedly discovered *Brady* claim that is not exonerating. The Alabama Supreme Court has instructed that *Brady* claims may be brought under either of two procedural rules: Rule 32.1(a) and Rule 32.1(e). *Ex parte Pierce*, 851 So. 2d 606, 613 (Ala. 2000). 32.1(a) claims need only allege that the federal or state Constitution requires a new trial. Ala. R. Crim. P. 32.1(a). Such claims must be brought within one year after the conclusion of direct review. Ala. R. Crim. P. 32.2(c). 32.1(e) claims, however, require "[n]ewly discovered material facts" that, among other things, "establish that the petitioner is innocent of the crime for which the petitioner was convicted." Ala. R. Crim. P. 32.1(e)(5). These claims must be brought within six months of the "discovery" of the new evidence. Ala. R. Crim. P. 32.2(c).

Before this case, it appeared these limitations periods applied only to initial petitions. This is because Rule 32.2(b) contains a separate limit on successive petitions, without referring to Rule 32.2(c)'s temporal limitations periods. Rule 32.2(b) requires a successive petition to show that "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard," and it forbids review unless

the "failure to entertain the petition will result in a miscarriage of justice. Ala. R. Crim. P. 32.2(b).

The decision below held that *both* Rule 32.2(b) *and* Rule 32.2(c) apply to successive petitions. The import of this holding is that, now, a *Brady* claim must either: (1) be raised in an initial petition one year from direct review, or (2) exonerate the prisoner under Rule 32.1(e). Where, as here, the State suppresses the evidence until after the time for filing an initial petition has passed, the petitioner's only option is to file an exoneration claim. The Alabama Supreme Court has expressly stated that impeachment evidence does not suffice on this point. *Ex parte Ward*, 89 So. 3d 720, 726-27 (Ala. 2011). It must, instead, "destroy or obliterate" the state's proof on an essential element of the crime. *Id.* Not even the evidence in *Brady* would clear this hurdle. 373 U.S. at 84.

This Court rightfully hesitates to interfere with state policymaking. However, it is constitutionally obligated to do so when the state tramples on a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977); *Osborne*, 557 U.S. at 69. The judgment below infringes on one such principle of justice—the fundamental right to be heard on a constitutional claim—and warrants this Court's scrutiny.

The right to be heard on a recognized claim is at the core of traditional due process. *Scott v. McNeal*, 154 U.S. 34, 46 (1894) (due process requires "a tribunal competent . . . to pass upon the subject-matter of the suit"); *Frank v. Mangum*, 237

U.S. 309, 326 (1915) (due process requires "notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure."); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) ("notice and hearing . . . constitute basic elements of the constitutional requirement of due process of law."); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("The right to prior notice and a hearing is central to the Constitution's demand of due process."); *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007) ("[T]he protection afforded by procedural due process includes a fair hearing . . . and an opportunity to be heard.").

Due process forbids a state to bar a federal claim completely. The Constitution entrusts most criminal and postconviction law to the states, with the expectation that the states will respect and enforce federal rights. *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011); *Nevada v. Hicks*, 533 U.S. 353, 365 (2001); *Taffin v. Levitt*, 493 U.S. 455, 458 (1990). And since federal habeas corpus is simply a "guard against extreme malfunctions in the state criminal justice systems," states should at least permit a prisoner to bring a federal claim recognized by this Court, out of a "good-faith attempt[] to honor constitutional rights." *Harrington*, 562 U.S. at 102-03.

Here, Alabama's procedural mechanism barring Ray's federal claim is triggered by the State's own unconstitutional acts. It offends justice to allow the State to keep Ray out of court as a result of a prosecutor's own *Brady* wrongdoing. Variants of this rule are embedded firmly in Anglo-American criminal law. *E.g. Reynolds v. United States*, 98 U.S. 145, 158-59 (1879); *Crawford v. Washington*, 541

U.S. 36, 62 (2004) (forfeiture by wrongdoing). The Alabama courts themselves recognize this rule in other civil contexts. *Campbell v. Consumer Warehouse Foods*, 570 So. 2d 630, 631-32 (Ala. 1990) (holding that a party who induces his adversary to delay bringing suit is "estopped from raising the statute of limitations as a defense.").

The fairness issue here is palpable and warrants this Court's intervention. The judgment below allows—even encourages—prosecutors to suppress evidence until after it cannot be used to challenge the conviction. If the judgment against Ray stands, then a prosecutor can avoid nearly all *Brady* scrutiny by withholding crucial impeachment evidence for a year and a day after direct review. A *Brady* claim based on such evidence would always be dismissed as untimely.

This does not, and cannot, satisfy the minimal requirements of due process. This Court should grant review in order to say so.

II. THIS CASE IS A STRONG VEHICLE FOR ADDRESSING THE ISSUES.

The questions presented by this petition are squarely and crisply presented for the Court's review.

There are no factual disputes in this case. It presents pure issues of law about the scope of the State's *Brady* obligations. Moreover, if Ray has the constitutional rights he asserts, there can be no dispute that the State violated them. The State admits that the exculpatory records exist. It admits it did not disclose them. It admits that Owden is mentally ill. It does not deny that the

district attorney knew Owden was mentally ill at the time he testified; the State asserts only that the D.A. did not have Owden's mental health records. If the State was required to inquire about the corrections records, *Carriger*, 132 F.3d at 479-80, and if there is no fourth prong to the *Brady* analysis, *Dennis*, 834 F.3d at 289-93, then Ray has a claim that is meritorious on its face and must be addressed on remand.

Moreover, if this Court agrees with Ray's constitutional arguments, the state's Alabama-law arguments become irrelevant. The Circuit Court's refusal to consider the Taylor Hardin records at the core of Ray's claim was based exclusively on Ray's ostensible lack of reasonable diligence. But if this Court adopts the reasoning in *Dennis*, which it should, then the Circuit Court's logic cannot stand. That court did not specify whether it was relying on state or federal law, and the Alabama Supreme Court did not specify a ground at all. This Court has long held that federal review may be had "when it is not clear from the opinion itself" that it was based on state grounds. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). If Ray prevails on the federal issue, the case must be sent back for a hearing on the merits.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Judge: COLLINS PETTAWAY, JR.

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA V. RAY DOMINIQUE
27-CC-1997-000375.61

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IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1997-000375.61
	)	
RAY DOMINIQUE	)	
Defendant.	)	

FINAL ORDER

This matter comes before the Court on the State's Motion to Dismiss Petitioner Dominique Ray's Successive Rule 32 Petition (Doc.6). Upon considering Ray's Successive Rule 32 petition, the State's Answer and Motion to Dismiss, the pleadings and arguments of counsel, and the record on direct and collateral appeal, the Court finds that the State's Motion to Dismiss is well-taken and due to be Granted. Therefore, the Court **FINDS and ORDERS** as follows:

1. In 1995, Dominique Ray and Marcus Owden raped and murdered 15-year-old Tiffany Harville, leaving her body in a cotton field where it was later found skeletonized. On July 28, 1999, Dominique Ray was convicted of two counts of capital murder for the death of Tiffany Harville. Specifically, Ray was found guilty of murder during a robbery in violation of Alabama Code, §13A-5-40(a)(2), and murder during a rape in

violation of Alabama Code §13A-5-40(a)(3). (R. 721.) After the penalty phase of the trial, the jury recommended, by a vote of 11-1 that Ray receive the death penalty. (R. 780.) The trial court accepted the jury's recommendation and sentenced Ray to death. (R. 805.) On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Ray's conviction and death sentence. *Ray v. State*, 809 So. 2d 875 (Ala. Crim. App. 2001), *aff'd*, 809 So. 2d 891 (Ala. 2001). The United States Supreme Court denied Ray's petition for writ of certiorari. *Ray v. Alabama*, 534 U.S. 1142 (2002).

2. Ray filed his first petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure in February of 2003. (R32 C. 9.) An evidentiary hearing was held on the post-conviction petition. After the evidentiary hearing, the trial court denied the post-conviction petition. (R32 C. 1094.) The Alabama Court of Criminal Appeals affirmed the denial of the post-conviction petition. *Ray. State*, 80 So. 3d 965 (Ala. Crim. App. 2011.) The Alabama Supreme Court denied Ray's petition for writ of certiorari on September 16, 2011.

3. On September 27, 2018, Ray filed the instant 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 presents a single claim for relief, alleging that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce documents showing that Mr. Owden was suffering from schizophrenia at the time of trial.[1] (Successive Petition, ¶ 2.) Ray contends that the alleged failure to disclose this material resulted in a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution. This claim is summarily dismissed for the reasons given below.

I. Ray's Petition is Procedurally Defaulted.

4. Ray's *Brady* claim is procedurally defaulted because it could have been, but was not, raised at trial or on direct appeal. It is clear upon the face of the record that prior to trial, Ray was aware that Marcus Owden had been under the care of a psychiatrist. (C. 560, 564.) Ray was likewise aware that Mr. Owden was to be called as a witness for the State in his trial. With this knowledge, Ray could have investigated Owden's mental 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, this claim is procedurally barred is summarily dismissed. Rules 32.2(a)(3) & (5), 32.7(d); *see also Lynch v. State*, 229 So. 3d 260, 264 (Ala. Crim. App. 2016) (*Brady* are non-jurisdictional and are subject to procedural default).

II. Ray's Petition is Time-Barred.

5. Ray's *Brady* claim is presented under Rule 32.1(e), Ala. R. Crim. P. (Successive Petition, ¶ 47.) This Court recognizes that:

> A *Brady* claim may be raised in a post conviction 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).

Stallworth v. State, 171 So. 3d 53, 75 (Ala. Crim. App. 2013). Consequently, Ray's petition was due to be filed "within six (6) months after the discovery of the newly discovered material facts... ." Rule 32.2(d), Ala. R. Crim. P. In his petition, Ray alleges that evidence that Marcus Owden suffered from schizophrenia at the time of trial was discovered when trial counsel visited Marcus Owden and received permission to access mental health records of Mr. Owden, maintained by the Alabama Department of Corrections (hereinafter "DOC"). (Successive Petition, ¶¶ 35-36.) The Successive Petition alleges that Ray's counsel spoke with Mr. Owden and obtained his records "[a]fter ... the United States Supreme Court had denied certiorari in his habeas appeal," which occurred on January 23, 2017. *Id.* at ¶¶ 35, 76. Though the Successive Petition does not state when this meeting occurred. It is uncontested that Ray's counsel visited Mr. Owden and learned of his present mental health condition and treatment on May 15, 2017. Ray could have filed a Rule 32.1(e) petition asserting his *Brady* claim at any time

subsequent to that date. Ray did not do so, instead choosing to wait until after the State filed its motion to set Ray's execution date. However, this eleventh-hour petition is untimely and unavailing. Because Ray's petition was filed on September 27, 2018, over a year and four months after post conviction counsel admittedly learned of Mr. Owden's alleged mental illness, his petition is time-barred pursuant to Rule 32.2(c), Ala. Crim. P. Moreover, it is clear upon the face of the record that Ray himself know that Marcus Owden was "crazy" and had a psychiatrist as far back as 1997. (C. 560, 564.) This Court finds that, upon the face of the record, Ray had within his knowledge sufficient information to pursue these claims nearly two decades before May 15, 2017. The statement attached to the State's Brief (Doc.43) was available at trial. The statement contained enough information for Ray to have investigated the matters complained of in the pending Rule 32 Petition and could have formulated a strategy at Trial, or even an argument on appeal or in a Rule 32 Petition that should have been filed earlier. In light of these facts, 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, Ray's Successive Petition is summarily dismissed.

6. In the alternative, Ray argues that his *Brady* claim should be

considered as a constitutional challenge pursuant to Rule 32.1(a), Ala. R. Crim. P. However, Rule 32.2(c) imposes a limitations period of one year "after the issuance of the certificate of judgment by the Court of Criminal Appeals... ." The certificate of judgment in Ray's case was issued on February 19, 2002. Ray's Successive Petition, filed more than sixteen years after that date, is untimely pursuant to Rule 32.2(c), Ala. R. Crim. P. Consequently, in accordance with Rule 32.2(c)'s provision that a court "shall not entertain a petition" not filed within the limitations period, Ray's Successive Petition is summarily dismissed.

III. Equitable Tolling is not Warranted.

7. Equitable tolling is only available when there are "extraordinary circumstances" that prevent a petitioner from filing a timely petition. *Ex parte Ward*, 46 So. 3d 888, 897 (Ala. 2007). The "threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule." *Id.* The Petitioner must show that "**the circumstances** prevented him from filing his petition within the limitations period." *McLeod v. State*, 121 So. 3d 1020, 1032 (Ala. Crim. App. 2012) (emphasis added). Moreover, in *Ward*, the Supreme Court described the petitioner's burden:

> Because the limitations provision is mandatory and applies in all but the most extraordinary of circumstances, when a petition is time-barred on its face the petitioner bears the burden of demonstrating **in his petition** that there are such extraordinary

> circumstances justifying the application of the doctrine of equitable tolling.

Ward, 46 So. 3d at 897 (emphasis added). Ray did not even *mention* equitable tolling in either his petition or his response to the State's motion to dismiss, and the question of equitable tolling was not raised until the hearing on the State's motion to dismiss. However, out of an abundance of caution, this Court addresses the question of equitable tolling and finds, for the reasons below, that equitable tolling was not necessary to allow Ray to file a timely petition, and it is not warranted now.

8. In *Ward*, the "extraordinary circumstance" was that Ward's attorney "disregarded his client's express wishes" by failing to file a Rule 32 petition and causing Ward to miss the deadline for a timely filing. *Ward v. State*, 228 So. 3d 490, 501 (Ala. Crim. App. 2017). Similarly, in *Patrick v. State*, 91 So. 3d 756, 760 (Ala. Crim. App. 2011), equitable tolling was warranted where an attorney "falsely claimed that he had filed a Rule 32 petition" and caused his client to miss the limitations period.[2] *See also Frost v. State,* 76 So. 3d 862, 864 (Ala. Crim. App. 2011). It is easy to understand why equitable tolling is warranted in these cases, because the "extraordinary circumstance" **caused the late filing**. *McLeod*, 121 So. 3d at 1032.

9. The present case is much different from *Ward* because no "extraordinary circumstance" prevented Ray from filing a timely petition. Even without equitable tolling, Ray had a reasonable amount of time to file a timely petition: Rule 32.2's six-month limitations period. Indeed, Ray has known since before trial that Marcus Owden had received mental health treatment. Further, Counsel received documentation of Owden's pre-trial evaluation by Dr. Ronan in 2006, which should have informed them that Owden's mental health was an area of potential investigation. Moreover, it is uncontested that counsel knew that Marcus Owden was being treated for schizophrenia after they met with him on May 15, 2017. No alleged "suppression" by the State could excuse any failure to act after that date. Rule 32.2(c) allows six months for a claim to be brought after the discovery of new evidence. By November 15, 2017, six months later, Ray admits that he had obtained Owden's DOC records, consulted with Dr. Goff, provided records to Dr. Boyer, had multiple consultations with Dr. Boyer, and had been told that he could not obtain other records without a court order. (Ray's Brief, pp. 4-5.) In those six months, Ray had reasonable time and opportunity to file his petition, but he simply did not. Thus, equitable tolling was not necessary because no "extraordinary circumstance" prevented filing after May 15, 2017.

10. Equitable tolling also requires a petitioner to "exercise[] reasonable diligence in investigating and bringing [] claims." *Ward*, 46 So. at 897. For well over a decade Ray has known that Mr. Owden was evaluated by Dr. Kathy Ronan who discussed Owden's prior mental health treatment, including a prior record that Owden "may suffer from schizophrenia... ." (Ronan Evaluation, p. 5.) Moreover, Ray **himself** was aware that Owden was undergoing psychiatric treatment prior to the crime. (C. 560, 564.)[3] Ray could have investigated Mr. Owden's mental health at that time, or, indeed, at the time of trial. But he did not. The lack of any investigation, whether at trial or in postconviction, shows that Ray failed to meet the "high" standard for triggering equitable tolling. *Ward*, 46 So. 3d at 897.

11. Ray offers no meaningful excuse for this failure beyond a reliance on the State's supposed duty to search out and disclose exculpatory evidence in a post-conviction context.[4] This is not sufficient. Perhaps more importantly, Ray's pre-trial knowledge of Owden's mental health treatment shows that his claims of a *Brady* violation at the trial level are equally meritless because Ray had sufficient knowledge to ascertain the allegedly suppressed evidence prior to trial. The courts 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. *See e.g., Jennings v. McDonough*, 490 F.3d 1230, 1238 (11th Cir. 2007); *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.) Ray unquestionably had personal knowledge of Owden's mental health treatment prior to trial.

IV. Ray has not Shown the Required Diligence Under Rule 32.2(b).

12. Ray's petition seeks relief under a new ground: that the prosecution team violated *Brady v. Maryland* by withholding certain DOC records regarding Marcus Owden's mental health. Because this is a new ground, Ray must meet Rule 32.2(b)'s requirement that "good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard." Ray has failed to plead facts that would show that he could not have ascertained the grounds for his present *Brady* claim during the pendency of his original Rule 32 action. Moreover, it is plain upon the face of the record that Ray knew that Marcus Owden had received mental health treatment before trial. Additionally, during postconviction discovery, the State produced the only mental health-related material related to Mr. Owden that was in the District Attorney's possession: Mr. Owden's November 14, 1997 evaluation

at Taylor-Hardin Secure Medical Facility. (Rule 32 C. 2594-2604.) The evaluator, Dr. Kathy Ronan, concluded that Mr. Owden did not suffer from any major mental disorder. However, Ray was certainly put on notice that Mr. Owden's mental health was an issue of possible concern because Dr. Ronan noted that at least one psychiatrist believed that Mr. Owden "may suffer from schizophrenia." *Id*. at p. 6. Considering all these facts, a diligent petitioner could have further investigated Mr. Owden's psychiatric history or sought records from the DOC in time to bring this claim during the pendency of Ray's prior postconviction proceeding. Because Ray did neither, he has failed to show diligence and this claim is barred and dismissed pursuant to Rule 32.2(b), Ala. R. Crim. P.

13. In the alternative, Ray also failed to act diligently when he allegedly learned of Mr. Owden's mental health condition during counsel's May 15, 2017 visit. Ray did not file his successive petition within six months of that date. Nor did he file his petition within six months of obtaining Mr. Owden's current mental health records from the Department of Corrections. Instead, Ray waited until after the State filed its Motion to Set an Execution Date on August 6, 2018, over *one year* after Ray obtained Mr. Owden's records, to file anything at all. Even then, Ray further delayed before filing the present petition. Ray first filed a motion requesting that the Alabama

Supreme Court allow him to file a response to the Motion to Set an Execution Date on September 28, 2018. The present petition was not filed until September 27, 2018, one day before his deadline to file a response to the Motion to Set an Execution Date. This Court also notes that prior to hearing the arguments on the State's Motion to Dismiss on November 19, 2018, the Alabama Supreme Court granted the State's Motion to Set an Execution Date, setting Ray's execution date for February 7, 2019. This Court finds that by waiting over a year from the date that he learned of Mr. Owden's current mental health condition, Ray further demonstrated his lack of diligence and this claim is barred and dismissed pursuant to Rule 32.2(b), Ala. R. Crim. P.

14. In his Successive Petition, Ray attempts to excuse his lack of diligence by alleging that the State "selectively withheld" DOC records in defiance of a discovery order. (Successive Petition, ¶ 62.) He further alleges that this excuses his failure to investigate and raise the instant *Brady* claim during his original Rule 32 proceeding. Ray cites to and selectively quotes from his August 23, 2003 "Motion for Discovery of Prosecution Files, Records and Information." (Successive Petition, ¶¶ 21-24.) However, the Court notes that his discovery motion sought *only* those 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.) It is plain on the face of the record that Ray *did not specifically request* DOC records regarding persons other than Ray himself. Moreover, because the State produced the Ronan Report, which disclosed Owden's prior mental health treatment, Ray cannot rely on his allegation to excuse his own lack of diligence.

IV. Ray's Petition is Meritless on its Face.

15. In the alternative, Ray's Successive Petition also fails to plead a facially meritorious *Brady* claim. A petitioner seeking relief pursuant to *Brady* must meet a four-prong 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 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."

Moon v. Head, 285 F.3d 1301, 1308 (11th Cir. 2002). Ray's Petition is also meritless on its face because the facts he alleges, even if proven true, would not satisfy *Brady*'s requirements.

A. The Prosecution did not Possess Impeaching Information Regarding Marcus Owden.

16. As an initial matter, this Court notes that *Brady* does not apply

in a post-conviction context. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 69 (2009). For the purposes of evaluating Ray's *Brady* claim, the only relevant documents are those that existed prior to conviction. *Id.* Ray was convicted on July 28, 1999. Consequently, documents created after that date, which includes the vast majority of DOC records cited in Ray's petition, *could not* support Ray's allegation that the prosecution violated *Brady*.

17. With regard to the few documents that predate Ray's conviction, *Brady*'s first prong requires a showing that the prosecution actually possessed, or had imputable possession, of the alleged *Brady* evidence. To be imputable to the prosecution, the prosecutor must have "knowledge of and access to the documents responsive to the defendant's requests." *United States v. Libby*, 429 F. Supp. 2d 1, 11 (D.D.C. 2006). In the present case, Ray does not allege facts that, if true, would establish that the prosecution either possessed or had imputable possession of evidence that Mr. Owden suffered from psychosis or schizophrenia.

18. Ray's *Brady* claim is based on the alleged suppression of DOC records, only two of which could have existed before trial. (Successive Petition, ¶37.) First, Ray describes a "psychological progress note" (hereinafter "the note") that purportedly shows that a "Dr. Murbach"

diagnosed Mr. Owden with schizophrenia in 1997 or 1998. *Id.* Ray fails to allege when the note *itself* was created or that the note existed at the time of trial. Presumably, that is because, as the State has argued, the note was not created until January 31, 2007. Moreover, the note does not describe information or documents in DOC's possession. Rather, it describes Owden's *subjective* reporting that he was diagnosed in "1997/1998." *Id.* Because this document *did not exist* at the time of trial, the prosecution team did not suppress it. *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.")

19. Second, Ray describes a single-page "Problem List" bearing the notation "Mental-psychosis" and the date "October 22, 1998." (Successive Petition, ¶37.) Again, Ray does not plead facts that would show that the document existed at the time of trial, much less that the prosecution team had knowledge of it. The DOC is a separate state agency not under the authority or control of the Dallas County District Attorney. Ray does 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. Indeed, during Ray's original Rule 32 proceeding, the State produced in discovery the only mental health records regarding Mr. Owden that the District Attorney's file

contained: the Ronan Evaluation.

20. Moreover, the record demonstrates that the prosecution team would have had no cause to attempt to obtain mental health records from the DOC. In the course of prosecuting Mr. Owden for his role in the murders of Tiffany Harville, Reinhard Mabins, and Earnest Mabins, the prosecution team filed a motion in the Circuit Court of Dallas County to have Mr. Owden evaluated for competency to stand trial. That evaluation was performed by Dr. Kathy Ronan on November 14, 1997, and the results were supplied to the District Attorney, Mr. Owden's counsel, and the Court. The Ronan 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 major psychiatric disorder." *Id*. at p. 9. The Ronan 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. *Id.* at p. 10.[5] Because Ray has failed to allege sufficient facts that, if true, would show that the prosecution team possessed the Progress Note, the Problem List, or any other DOC records, Ray's claim fails to meet the first requirement of *Brady*, is not facially meritorious, and is dismissed. Rule 32.3, 32.6(b), 32.7(d), Ala. R. Crim. P.

B. Ray could have Discovered the Alleged *Brady* Evidence.

21. It is clear upon the face of the record that Ray was aware that Marcus Owden had received psychiatric care prior Ray's trial. On at least two separate occasions, Ray stated that Marcus Owden was "crazy" and had a psychiatrist. (C. 560, 564; R32 C. 3026). Consequently, it is clear upon the face of the record that Ray was in possession of sufficient information to investigate and ascertain Owden's mental state. The courts, both federal and state, 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. *See, e.g., Jennings v. McDonough*, 490 F.3d 1230, 1238 (11th Cir. 2007); *Flowers v. State*, 922 So. 2d 938, 951 (Ala. Crim. App. 2005) (no *Brady* violation where "suppressed was information [was] within [Petitioner]'s own knowledge.") This Court finds that it is clear upon the face of the record that Ray could have investigated and discovered the information allegedly suppressed by the State in this matter: Marcus Owden's mental health condition prior to and during the time of trial. Consequently, Ray cannot show a violation of *Brady*, and this claim is summarily dismissed. Rules 32.3, 32.7(d), Ala. R. Crim. P.

C. Ray did not Display the Diligence Required by *Brady*.

22. Ray also fails to plead facts that, if true, would show that he had

been diligent in seeking the information allegedly suppressed. Ray and Mr. Owden knew each other well, and Ray has failed to allege facts that, if true, would show that Ray was unaware of any mental health condition that Mr. Owden suffered from or of any mental health treatment that he had received. Moreover, at the time of Ray's trial, Mr. Owden had already been tried, convicted, and sentenced. Just as Ray's current counsel interviewed Mr. Owden and obtained his records, Ray could have obtained Mr. Owden's records through trial counsel. Because the allegedly impeaching information regarding Mr. Owden was "discoverable through reasonable diligence," Ray has not plead facts that, if true, would establish the required diligence. *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). In his brief, Ray discusses diligence for the purposes of Rule 32.2(b), Ala. R. Crim. P., but he makes no attempt to show that trial counsel exercised the diligence that *Brady* requires. Because Ray failed to plead facts that, if proven, would show that he could not have obtained any information possessed by the DOC or Mr. Owden, he has failed to plead facts that would meet the second *Brady* requirement, and has failed to plead a facially meritorious claim. Consequently, this claim is dismissed. Rules 32.3, 32.6(b), 32.7(d), Ala. R.

Crim. P.

D. The Facts Alleged in Ray's Petition, if True, do not Show that the Alleged *Brady* Evidence was Material.

23. Ray's Successive Petition also fails to allege sufficient facts that, if true, would show that the only DOC document that even possibly existed at the time of trial, the Problem List, is material for *Brady* purposes. Ray asserts that evidence of Mr. Owden's mental state would be admissible for impeachment if it merely "tends to show the witness's reliability would be affected." (Successive Petition, ¶¶ 5, 86.) First, the Problem List is not a diagnosis, it is, at best, a reference to a possible diagnosis. Second, Ray misstates the admissibility of mental health regarding a witness. 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."

Garrett v. State, 268 Ala. 299, 307, 105 So. 2d 541, 547 (1958); *see alsoGratton 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 he observed the facts to which he has testified on direct.")[6] Nothing in the Progress Note, or any other

document that existed at the time of trial, shows that Mr. Owden was suffering from any major mental health condition either at the time he and Ray raped and murdered Tiffany Harville or at the time that Mr. Owden testified about their actions. Obviously, the vast majority of Mr. Owden's DOC records are not contemporaneous to his testimony, much less to Miss Harville's murder. As such, they are irrelevant for the purposes of assessing *Brady* materiality. *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 2399, 49 L. Ed. 2d 342 (1976), *holding modified by United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (*Brady's* materiality test concerns only "exculpatory information in the possession of the prosecutor.") For these reasons, Ray has failed to plead facts that, if proven, would show that the prosecution team suppressed evidence that would have been admissible in impeachment at the time of trial. Because this claim is insufficiently pleaded and merit less on its face, it is dismissed. Rules 32.3, 32.6(b), 32.7(d), Ala. R. Crim. P.

Conclusion

This Court has reviewed Petitioner Dominique Ray's Successive Rule 32 Petition and finds that it is due to be summarily dismissed. For the reasons stated above, this Court finds that Petitioner Ray failed to act

diligently, that his *Brady* claim is procedurally defaulted, that his petition is time-barred, and that his petition is meritless on its face. Accordingly, he is due no relief from his capital murder convictions and death sentence, and his petition is dismissed.

It is, hereby, **ORDERED, ADJUDGED,** and **DECREED** that Ray's Successive Petition is **DISMISSED**.

DONE this 30th day of November, 2018.

/s/ COLLINS PETTAWAY, JR.
CIRCUIT JUDGE

[1] Ray also pleads that the *Brady* violation resulted in a violation of the Confrontation Clause. His argument depends entirely on the theory that the State's violation of *Brady* prevented him from cross-examining Marcus Owden regarding the alleged mental health conditions. Thus, it does not appear to be intended as a standalone claim. However, to the extent that Ray alleges a freestanding Confrontation Clause Claim, it is due to be dismissed for the same reasons as his *Brady* claim.

[2] Notably, Patrick "demonstrated in his Rule 32 petition that he was entitled to tolling of the applicable limitations provision." *Id. at* 760.

[3]This Court also notes that Ray confessed to stabbing Tiffany Harville in the same statement in which he communicated his knowledge that Owden was "crazy" and had a "psychiatrist."

[4] As in his successive petition and at the recent hearing, Ray again mistakenly relies on the false belief that *Brady* applies in post-conviction proceedings. (Ray's Brief, pp. 15-19.) As the United States Supreme Court has held, *Brady* **does not apply in a post-conviction context**. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 69 (2009).

Giglio v. United States, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995), both of which interpret and apply *Brady* allegations of failure to disclose evidence **to a criminal defendant who has not been convicted** simply don't apply here. Simply put, a petitioner cannot base his own failure to act diligently on a **non-existent** constitutional protection.

[5] To the extent that the Ronan Evaluation references earlier psychiatric records from "Cahaba Mental Health Center", Ray received the Ronan 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. His failure to do so operates as a bar to any claim regarding those documents. Rules 32.2(b) & (c), Ala. R. Crim. P. 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).

[6] Ray's misstatement of the law is perhaps explained by the fact that the cases he cites to do not directly address the standard for admissibility of a witness' mental health records. Instead, they address, 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); and *Schaefer v. State*, 676 So.2d 947, 948-949 (Ala. Crim. App. 1995). Further, 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." *Brooks*, 33 So. 3d at 1270.

AlaFile E-Notice

27-CC-1997-000375.61

Judge: COLLINS PETTAWAY, JR.

To: FRIEDMAN CHRISTOPHER KNOX
cfriedman@bradley.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA V. RAY DOMINIQUE
27-CC-1997-000375.61

The following matter was FILED on 12/13/2018 9:50:55 AM

Notice Date: 12/13/2018 9:50:55 AM

LYNNETHIA ROBINSON
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CIRCUIT COURT OF
DALLAS COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1997-000375.61
	)	
RAY DOMINIQUE	)	
Defendant.	)	

ORDER

This Court has carefully considered the arguments presented and the pleadings in the entire court file, and the Court **HEREBY GRANTS** the State's Motion to Dismiss the Rule 32 Petition (Doc.6) (overruling prior rulings by this Court on the Motion - Doc.8) and adopts the FINAL ORDER (Doc.49) as its factual findings, rulings and conclusions of law.

The Petition is simply Time Barred. The evidence complained of could have been discovered and acquired by the Defendant under other means, and was actually available to the point that the knowledge of the existence of certain psychiatric records of the co-defendant was readily available to the Defendant at trial, during the appeal and in time to timely file a Rule 32 Petition.

DONE this 13th day of December, 2018.

/s/ COLLINS PETTAWAY, JR.
CIRCUIT JUDGE

AlaFile E-Notice

27-CC-1997-000375.61

Judge: COLLINS PETTAWAY, JR.

To: FRIEDMAN CHRISTOPHER KNOX
cfriedman@bradley.com

NOTICE OF COURT ACTION

IN THE CIRCUIT CRIMINAL COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA V. RAY DOMINIQUE
27-CC-1997-000375.61

A court action was entered in the above case on 1/15/2019 3:54:18 PM

ORDER

[Filer:]

Disposition:	DENIED
Judge:	PET
Notice Date:	1/15/2019 3:54:18 PM

LYNNETHIA ROBINSON
CIRCUIT COURT CLERK
DALLAS COUNTY, ALABAMA
DALLAS COUNTY COURTHOUSE
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27-CC-1997-000375.61
CIRCUIT COURT OF
DALLAS COUNTY, ALABAMA
LYNNETHIA ROBINSON, CLERK

IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1997-000375.61
	)	
RAY DOMINIQUE	)	
Defendant.	)	

ORDER

MOTION TO RECONSIDER OR MODIFY filed by RAY DOMINIQUE is hereby DENIED.

Although the Court disagrees with the State' argument that because Mr. Ray and Mr. Owden were partners in crime, Mr. Ray should have been aware of Mr. Owden's potential mental deficit, the record has several references to instances pretrial and during trial that would have put Mr. Ray on notice to investigate such a claim if he wanted to pursue it.

DONE this 15th day of January, 2019.

/s/ COLLINS PETTAWAY, JR.
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA

February 5, 2019

1001192

Ex parte Dominique Ray. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Dominique Ray v. State of Alabama) (Dallas Circuit Court: CC-97-375; Criminal Appeals: CR-99-0135).

ORDER

The Domineque Ray's Motion for Relief from Unconstitutional Conviction and Sentence and Motion to Vacate Execution Date filed on February 1, 2019, having been submitted to this Court,

IT IS ORDERED that the motions are DENIED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell JJ., concur.

Witness my hand this 5th day of February, 2019.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

FILED
February 5, 2019
4:17 pm

Clerk
Supreme Court of Alabama

cc: D. Scott Mitchell
Collins Pettaway, Jr.
Dallas County Circuit Clerk's Office
Peter Michael Racher
Juliana Taylor
William W. Whatley, Jr.

IN THE SUPREME COURT OF ALABAMA

February 5, 2019

Steven Marshall
Richard D. Anderson
Beth Jackson Hughes