A19 ____

IN THE

Supreme Court of the United States

—— ♦ ——

DOMINEQUE RAY,
Applicant,
v.

STATE OF ALABAMA,
Respondent.

—— ♦ ——

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

—— ♦ ——

APPLICATION FOR A STAY OF EXECUTION PRESENTED TO THE HONORABLE CLARENCE THOMAS AS CIRCUIT JUSTICE

—— ♦ ——

EXECUTION SCHEDULED FOR FEBRUARY 7, 2019

—— ♦ ——

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February 6, 2019

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APPLICATION FOR STAY OF EXECUTION

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

No physical evidence connected Applicant Domineque Ray to the crimes for which he was convicted. Ray's conviction was based on the testimony of a single witness, Marcus Owden. Owden told police he and Ray committed the murder, rape and robbery and that he had confessed because "I began to seek the Lord" and "my heart started to hurting because of what we had did, because of what God put in my heart."

Nearly two decades later, after the conclusion of Ray's initial postconviction appeal, Ray discovered for the first time that Owden was schizophrenic at the time of trial. Owden, who was sentenced to life in prison and thereby avoided the death penalty, was observed in custody both before and after trial to suffer from religious delusions, claimed he could hear the voices of God and the devil, experienced auditory hallucinations and delusions, flapped his arms, stared into space, and manifested other symptoms of mental illness. Ray discovered that the State had suppressed evidence of Owden's schizophrenia in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and was controlling his symptoms through medication at the time of trial. Ray promptly sought relief under Alabama's postconviction procedures, but has been denied relief.

Ray respectfully requests a stay of his execution to give him a "reasonable time … to obtain a writ of certiorari" from this Court on the claim described above. 28 U.S.C. § 2101(f). Ray is scheduled to be executed tomorrow, Thursday, February

7, 2019. At the time the Alabama Supreme Court set Ray's execution date, Ray's *Brady* petition was pending in an Alabama trial court. Ray's appeal from the dismissal of his petition is currently pending in the Alabama Court of Criminal Appeals, which refused Ray's request for expedited briefing and has not rendered a decision. On February 1, 2019, Ray filed a *Motion for Relief from Unconstitutional Conviction and Sentence and Motion to Vacate Execution Date* with the Alabama Supreme Court. Ray's motions were denied on February 5, 2019.

Ray's petition for certiorari is filed concurrently with this application. The Court should grant a stay while it considers Ray's petition.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which a stay is sought is *Ex parte Ray*, No. 1001192, an unpublished order of the Alabama Supreme Court dated February 5, 2019, which denied Ray's timely *Motion for Relief from Unconstitutional Conviction and Sentence and Motion to Vacate Execution Date* ("Motion for Relief"). (Exhibit A.)

JURISDICTION

This Court has jurisdiction to enter a stay under 28 U.S.C. § 1651, 28 U.S.C. § 2101(f), and Supreme Court Rule 23.

This Court can enter a stay "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on a writ of certiorari." 28 U.S.C. § 2101(f). The Court has certiorari jurisdiction over "[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" granted by federal law. 28 U.S.C. § 1257(a).

A decision is final when it "leaves nothing for the court to do but execute the judgment." *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015). The Alabama Court of Criminal Appeals has not acted on Ray's appeal but the Alabama Supreme Court has denied Ray's *Motion for Relief*. This Court therefore has certiorari jurisdiction and can enter a stay while it considers Ray's petition. If this Court does not do so, there will be no opportunity to review Ray's appeal until Ray is dead—at which time, the case will be moot. *See Gregg v. Georgia*, 50 L.Ed.2d 30 (1976) (Powell, J., in chambers).

Ray's postconviction appeal is based on the State's unconstitutional suppression of records – including pretrial records produced by Taylor Hardin for the first time on January 4, 2019—revealing Owden to have been schizophrenic and delusional at the time he implicated and testified against Ray. Ray's trial and postconviction counsel served discovery to elicit records precisely like the ones concerning Owden's mental condition. If this Court does not act, Ray's claims will become moot on February 7, depriving Ray of his fundamental right to due process of law. U.S. Const. amend. XIV, § 1; *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007); *McDonald v. Missouri*, 464 U.S. 1305, 1306-07 (1984) (Blackmun, J., in chambers). A stay is necessary "in aid of the appellate jurisdiction which [will] otherwise be defeated." *FTC v. Dean Foods*, 384 U.S. 597, 603 (1966).

If this Court were to determine for any reason that it lacks jurisdiction to consider Ray's petition for certiorari, it should still grant this application for stay to protect its jurisdiction and prevent Ray from being executed before a final judgment

is subject to this Court's review. This Court can protect its own jurisdiction from delay in a lower court. 28 U.S.C. § 1651; *Dean Foods*, 384 U.S. at 603 (the All Writs Act empowers the Court to protect its "potential jurisdiction … where an appeal is not then pending but may be later perfected.") *see also, e.g.*, *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1331, 1333-34 (1978) (finding stay jurisdiction where delay would practically extinguish a core First Amendment right). This has been the case since Chief Justice Marshall's time. *Dean Foods*, 384 U.S. at 603. Since then, Justices have intervened in lower court proceedings—state and federal—when there was a legitimate concern that delay would thwart this Court's ability to review a constitutional issue. *E.g.*, *Fare v. C.*, 439 U.S. 1310 (1978) (Rehnquist, J.); *In re Bart*, 82 S. Ct. 675 (1962) (Warren, C.J.). *Cf. Nat'l Socialist Party v. Skokie*, 434 U.S. 1327 (1977) (Stevens, J.).

REASONS FOR GRANTING THE STAY

This Court uses four factors to guide its discretion in issuing a stay: (1) whether the applicant has shown a strong likelihood of success on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether the stay will substantially injure the opposing parties, and (4) whether the public interest weighs in favor of a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Particularly in death-penalty cases, stays should be granted to "give nonfrivolous claims of constitutional error the careful attention they deserve," and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution … to permit due consideration of the merits." *Barefoot v. Estelle*, 463 U.S. 880, 888–89

(1983). Applying these factors, the Court should grant the application and stay Ray's execution until this Court can consider his petition for certiorari.

I. Relevant Background

Initially, Rodney "Tye-Dye" Suttle was arrested for the murder of Tiffany Harville. Witnesses had observed Suttle and Harville together shortly before the murder, and Suttle had bragged about killing her for smoking his marijuana without having sex with him. According to witnesses, Suttle said he'd stabbed Harville, consistent with forensic evidence later found at the crime scene, and he knew she was dead before her remains were discovered. But Owden subsequently confessed to the murder and implicated Ray as his accomplice. Alabama thereafter dismissed the murder charge against Suttle and charged Owden and Ray. Owden pleaded guilty and was sentenced to life in prison without parole in exchange for his testimony against Ray. Ray, who maintains his innocence, was convicted and sentenced to death.

Nearly twenty years later, Ray learned that Owden was psychotic and suffered from schizophrenia, hallucinations, and delusions and was being managed with medication at the time he testified against Ray. Documents revealing this were in the files of the Alabama Department of Corrections (ADOC) and the Taylor Hardin Secure Medical Facility since before the trial, but the State failed to produce them. Instead, the State told Ray's trial counsel that it maintained an "open-file" policy. During Ray's postconviction proceeding, in response to court-ordered discovery which included requests on psychological records on all State witnesses, the State produced a competency report stating that Owden showed "no signs or

symptoms of major mental illness" but did not produce any records documenting Owden's schizophrenia.

During a prison visit with Owden in 2017, Owden volunteered that he was being treated for schizophrenia. Owden consented to the release of his prison records, which were produced September 6, 2017. Although the records showed a long-standing history of mental illness that appeared to extend back to the beginning of Owden's incarceration, the records, with limited exceptions, postdated Ray's trial. Owden's records from and leading up to Owden's testimony against Ray were not produced until January 4, 2019, when Taylor Hardin finally responded to a subpoena served during Ray's current postconviction proceeding.

In affirming the dismissal of Ray's *Brady* claims, the Alabama Supreme Court committed constitutional errors, as more fully described in Ray's petition for certiorari and summarized here. ***First***, the court held that *Brady* did not require the State to ask ADOC or Taylor Hardin about Owden's mental fitness. This holding highlights the importance of an existing split between the Ninth and Eleventh Circuits about the scope of a prosecutor's *Brady* obligations, which this Court should resolve. ***Second,*** the court improperly held that pursuant to *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), Ray no longer had any *Brady* claim notwithstanding the continuing suppression of Owden's mental-health records. This holding is contrary to the Seventh Circuit's well-reasoned holding in *Whitlock v. Brueggemann*, 682 F.3d 567, 687–88 (7th Cir. 2012). The court also held that *Osborne* precluded any claim, under *Brady* or more generally under the due process

clause, arising from suppression of Owden's records. ***Third*,** the court found that Ray should have second-guessed the State's open-file policy and independently investigated for evidence of Owden's mental condition, contrary to *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999), again highlighting serious division between the Ninth and Eleventh Circuits about the elements of a *Brady* claim and the State's obligations to respond to Ray's discovery. ***Fourth*,** it held that Ray's claim accrued at a time when he could not have actually brought the claim in court, a topic which has frustrated at least five panels of the Court of Appeals. ***Fifth*,** it adopted a rule preventing defendants from vindicating their due process rights by effectively banning all *Brady* impeachment claims if not brought within one year of direct review—even when the evidence is being suppressed at that time.

II. There is at least a reasonable probability that this Court will grant certiorari and at least a fair prospect that Ray will succeed on the merits.

In the context of a stay pending certiorari to this Court, the applicant need show only a "reasonable probability" that this Court will grant certiorari on a decisive issue and a "fair prospect" that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). All of the issues presented in Ray's petition merit this Court's close attention.

On two of the questions presented, the Ninth and Eleventh Circuits are in irreconcilable conflict. *Compare Carriger v. Stewart*, 132 F.3d 463, 479–80 (9th Cir. 1997), *with United States v. Battle*, 264 F. Supp. 1088, 1202), *aff'd*, 2005 WL 1561799, *withdr. and superseded*, 419 F.3d 1292 (11th Cir. 2005); *compare also*

Benn v. Lambert, 283 F.3d 1040, 1061 (9th Cir. 2002), *with Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002). These dueling cases, which are at the center of Ray's claims, target two core issues of the *Brady* analysis: How far does the State's duty to search for exculpatory evidence extend? *Carriger*, 132 F.3d at 479-80; *Battle*, 264 F. Supp. at 1202. And under what circumstances is a defendant required to disbelieve the State's representations that it has produced all the *Brady* evidence it has? *Benn*, 283 F.3d at 1061; *Moon*, 285 F.3d at 1308.

These issues are worthy of careful scrutiny by the Court because they affect nearly every postconviction case filed across the country. Prosecutors need to know if they need to talk to the department of corrections as well as the police when searching for exculpatory evidence, such as mental health records on an important prosecution witness being held in custody. And defense lawyers need to know how skeptical they must be when a prosecutor represents it has maintained an open-file policy and that the State's *Brady* disclosure is complete. That standard is not clear either.

Alabama's resolution of Ray's appeal raises a third *Brady* issue. In *Osborne*, this Court rejected the Ninth Circuit's holding that a defendant who received a fair trial retains *Brady* rights in the postconviction context. Since *Osborne*, the Seventh Circuit has correctly observed that *Brady* still applies in postconviction when the defendant did *not* receive a fair trial. *Whitlock v. Brueggemann*, 682 F.3d 567, 687–88 (7th Cir. 2012). The fair-trial violation continues through postconviction, or until it is cured. In this case, the Alabama courts have held that *Brady* never applies to

postconviction proceedings and that there is no due process violation when the State breaches its obligation to respond truthfully to postconviction discovery. Review of Ray's claims will answer significant questions that *Osborne* left open.

This case is ideal for addressing these three issues, so there is a "reasonable probability" that this Court will grant certiorari and reverse. *King*, 567 U.S. at 1302. If Ray prevails, none of Alabama's state-law defenses matter, and his *Brady* claim must be heard on the merits. Moreover, if Ray has the rights he claims, the State has clearly violated them: It admits to the existence of the records, it admits to Owden's mental illness, and it admits it did not disclose the information. The State also does not dispute that the prosecution knew of Owden's mental illness. This case is also ideal from a practical perspective—presently, this is Ray's only route to a new trial. If he loses, he will be executed. This urgency will sharpen the Court's consideration of the issues in a way other vehicles cannot.

Aside from the core *Brady* issues, the petition offers two more substantial questions. The law is not clear on when a *Brady* claim accrues to a postconviction petitioner. Five circuits have held that a *Brady* claim ripens at the time the state suppresses *Brady* evidence, notwithstanding that the defendant did not know evidence was suppressed. *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). After conceding that *Tompkins* controlled, another panel of the Eleventh Circuit thought that case

was so misguided that it spent twelve extra pages explaining why. *Velez-Scott v. United States*, 890 F.3d 1239, 1247–59 (11th Cir. 2018). That error has recurred here. Ray cannot be prevented by a state's construction of its postconviction rules from asserting a meritorious *Brady* claim.

Finally, the judgment below imposes a new gloss on Alabama's statute of limitations that insulates convictions from nearly all *Brady* review. The net effect of this new ruling is to preclude review of all *Brady* impeachment claims if the prosecutor manages to suppress it until the time for filing an initial petition has passed. And under Alabama's definition of actual innocence, it's not even clear that the evidence in *Brady* itself would have qualified. *Ex parte Ward*, 89 So. 3d 720, 726-27 (Ala. 2011) (holding that the new evidence must "destroy or obliterate" the State's proof); *Brady v. Maryland*, 373 U.S. 83, 84 (1963) (addressing a codefendant's confession, which the jury would have been free to disbelieve). States are given broad latitude to regulate the postconviction process and to protect federal rights. *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011); *Nevada v. Hicks*, 533 U.S. 353, 365 (2001). But erecting a procedural bar to a federal claim, triggered by the State's own unconstitutional acts, is a bridge too far and violates fundamental fairness. *Id.*; *Osborne*, 557 U.S. at 70; *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.").

In sum, the petition presents serious questions of constitutional law that will lead to Ray's death if decided incorrectly. A stay is justified so that the Court can consider Ray's claims before his execution.

II. Ray will be irreparably injured without a stay of execution.

Ray is scheduled to be executed on February 7, 2019. Unless this Court intervenes, Ray will be dead before the Court is able to review the questions presented. *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (mem.) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted).

III. Issuing a brief stay will not substantially injure the state, and the public interest lies in favor of granting the stay.

When the government is the opposing party, the final elements of the stay analysis merge. *Nken*, 556 U.S. at 435. Issuing a brief stay of execution serves the public's interest in due process and the state's interest in seeing that justice is actually done.

Stays should be granted to "give nonfrivolous claims of constitutional error the careful attention they deserve" when a Court cannot "resolve the merits [of a claim] before the scheduled date of execution." *Barefoot*, 463 U.S. at 888–89. Traditional notions of due process support this practice. *See Frank v. Mangum*, 237 U.S. 309, 326 (1915) (due process requires "a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Panetti*, 551 U.S. at 949–50; *McDonald*, 464 U.S. at 1306–07 (1984) (Blackmun, J.,

in chambers) (stating that any person with a right to review, "no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty."). And "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

Moreover, Ray's claims raise serious questions about the reliability of his conviction. Although the Court has not decided whether executing the innocent is itself unconstitutional, it has held that the object of our criminal justice system is "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935); *Hererra v. Collins*, 506 U.S. 390, (1993) (acknowledging this as the "central purpose" of our criminal justice system while recognizing that it might not require a freestanding actual-innocence claim). Chief Justice Rehnquist observed in *Herrera* that *Brady* rights (which Ray was denied) are one of the essential "safeguards" warranting deference to the outcome of the judicial process. 506 U.S. at 390. And in *Crawford v. Washington*, Justice Scalia potently explained why effective cross-examination, rather than abstract "reliability," is the lodestar for getting at the truth. 541 U.S. at 61–62. The State's *Brady* violation stole this right from Ray as well—by concealing evidence that would have allowed effective cross-examination and destroyed the credibility of the only witness implicating Ray in the murder. The public interest thus supports entering a stay.

CONCLUSION

For the foregoing reasons, the Court should grant this Application and stay Ray's impending execution until the disposition of his Petition for a Writ of

Certiorari, or, in the alternative, to allow final resolution of his claims by the Alabama Court of Criminal Appeals.

/s/ Peter M. Racher
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February 6, 2019 * Counsel of Record

Exhibit A

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.

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