

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON EUGENE BUSH

Petitioner

vs.

STATE OF ARIZONA

Respondent

On Petition for a Writ of Certiorari
to the Arizona Superior Court, Pima County

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Arizona follows the rule of *Kyles v. Whitley* requiring prosecutors to investigate and disclose exculpatory evidence from all participating investigative agencies in accordance with the due process clause of the Fourteenth Amendment.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The decision of the Pima County Superior court, the highest state court to review the merits, appears at Supplemental Sealed Appendix 1 to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided this case was August 16, 2018. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on September 6, 2018. A copy of the order denying rehearing appears at Appendix B. The present Petition for Certiorari is due on December 5, 2018. S. Ct. R. 13.3.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Arizona Rules of Criminal Procedure 15.1

(f) Scope of the State's Disclosure Obligation. The State's disclosure obligation extends to material and information in the possession or control of any of the following:

(1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff;

- (2) any law enforcement agency that has participated in the investigation of the case and is under the prosecutor's direction or control; and
- (3) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

3. Arizona Rules of Criminal Procedure 15.1 (2018)

(f) Scope of the State's Disclosure Obligation. The State's disclosure obligation extends to material and information in the possession or control of any of the following:

- (1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff;
- (2) any state, county, or municipal law enforcement agency that has participated in the investigation of the case; and
- (3) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

STATEMENT OF THE CASE

This is a capital case. Bush was one of three defendants convicted of two murders in 2009. Bush was sentenced to death and timely appealed. The facts of

the case are recounted in *State v. Bush*, ___ Ariz. ___, 423 P.3d 370, No. CR-11-0107-AP, 2018 WL 391068 (Aug. 16, 2018).

While Bush's appeal was pending, the Arizona Supreme Court issued the decision in Bush's co-defendant's case. *State v. Forde*, 233 Ariz. 543, 315 P.3d 1200 (2014). Reviewing that opinion, Bush's attorneys learned for the first time of the existence of FBI reports disclosed in 2011 pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), right before the start of Forde's trial. *Forde*, at 549-550, 315 P.3d at 1206-1207. Information in those FBI reports tended to exculpate Bush. After securing the reports, Bush moved to stay his appeal and remand to the trial court to supplement the record.

On May 29, 2014, the Arizona Supreme Court stayed Bush's appeal and remanded the case for post-conviction relief limited to a claim of the alleged nondisclosure or inadequate disclosure of 234 pages of FBI reports to Bush's trial counsel. (Suppl. Sealed Appendix 2.)

Because the disclosed FBI reports were redacted, Bush requested the prosecutors to provide unredacted copies of the reports. The prosecutors declined and advised Bush to contact the FBI directly. Thereafter, Bush moved the trial court to have the prosecutors provide unredacted copies of the reports to Bush. (Suppl. Sealed Appendix 3.) The court denied the motion observing Arizona's requirement that in state post-conviction relief a petition must be first filed before

discovery may be sought. *See Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005).

Bush filed a special action in the Arizona Supreme Court noting that the petition-first before discovery requirement of *Canion v. Cole* did not apply to *Brady* material. (Suppl. Sealed Appendix 4.) The Arizona Supreme Court denied Bush's special action without comment. (Appendix C.)

Bush then filed his petition for post-conviction relief, and again requested the prosecutors to provide unredacted copies of the FBI reports disclosed as *Brady* materials, and to submit to interviews. (Suppl. Sealed Appendix 5.) The State again objected saying it had given Bush everything in its possession and control and that it could not make the FBI do anything. The trial court again denied Bush's motion, this time citing the State's response and quoting from *State v. Forde*:

[N]either Rule 15.1 nor *Brady* requires the state to disclose evidence outside its possession or control. See Ariz. R.Crim. P. 15.1(b) (requiring the state to disclose material "within the prosecutor's possession or control"); *State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975) ("The prosecutor cannot be deemed to have concealed information relating to the guilt or innocence of the accused, or punishment if he does not procure materials in the custody of the FBI, an agency which is not under the control of the prosecutor.").

(Suppl. Sealed Appendix 6.); *Forde* at 558, ¶ 41, 315 P.3d at 1215.

Bush filed a second special action seeking the reports unredacted. (Suppl. Sealed Appendix 7.) The Arizona Supreme court again denied review without comment. (Appendix D.)

The trial court denied Bush's petition for post-conviction relief. (Suppl. Sealed Appendix 8.) Bush filed a petition for review including the issue of not receiving unredacted reports under *Brady*. (Suppl. Sealed Appendix 9.) The petition for review was consolidated with Bush's appeal. On August 16, 2018, the court affirmed Bush's convictions and sentences. The same day the court denied Bush's petition for review of the denial of post-conviction relief without comment. (Appendix E.) On September 6, 2018, the court denied Bush's motion for reconsideration. (Appendix B.)

REASONS FOR GRANTING THE PETITION

I. Arizona does not follow *Brady* doctrine as set forth by *Kyles v. Whitley*.

A. *Brady* Doctrine.

The State has a constitutional and ethical obligation to disclose material exculpatory evidence, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). This duty exists even though no requests were made for the evidence. *United States v. Agurs*, 427 U.S. 97 (1976). The *Brady* rule is based on the requirement of due process. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (plurality opinion).

Under *Brady* doctrine, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Bagley*, 473 U.S. at 671-73, 677-78 (prosecutor should have obtained impeachment evidence possessed by federal agency); *Giglio v. United States*, 405 U.S. 150, 152-55 (1972) (*Brady* violation when one prosecutor did not disclose deal unknown to him between key witness and another prosecutor.) Favorable, exculpatory evidence includes impeachment evidence. *Bagley*, 473 U.S. at 676. Whether a prosecutor succeeds or fails in that obligation, his responsibility for failing to disclose known evidence rising to a material level of importance is inescapable. *Kyles* at 437-438.

B. Arizona’s Interpretation of *Brady* doctrine.

Arizona claims that it not only follows *Brady*, but its interpretation of *Brady* as found in Arizona Rules of Criminal Procedure, 15.1 is broader than the requirements of *Brady* itself. *See State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981) (“[T]he disclosure requirements of Arizona Rules of Criminal Procedure, 15.1 are more extensive than those of *Brady*.”) More recently, in *Canion v. Cole ex rel. County of Maricopa*, 208 Ariz. 133, 137, ¶ 15, 91 P.3d 355, 359 (App. 2004), the Arizona Court of appeals noted that, like *Brady*, Rule 15.1 was an

expression of due process, and reiterated that the disclosure requirements under the rule are more extensive than those of *Brady*. *Id.* (citing *State v. Jones*, 120 Ariz. 556, 560, 587 P.2d 742, 746 (1978) and *Jessen*, 130 Ariz. 1, 633 P.2d 410).

However, Rule 15.1(f) which specifically outlines an Arizona prosecutor's disclosure obligation of exculpatory materials is not broader than the requirements of *Brady*. In Arizona, the obligation only extends to disclosure of information from participatory law enforcement agencies "under the prosecutor's direction or control. The rule states:

The State's disclosure obligation extends to material and information in the possession or control of any of the following:

(1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff;

(2) any law enforcement agency that has participated in the investigation of the case and is under the prosecutor's direction or control; and

(3) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

As a result, Arizona is able to evade its *Brady* obligations where, as here, it can claim that a law enforcement agency who participated in the case is not under the prosecutor's direction or control, thus, it has no obligation to disclose

exculpatory material from that agency. This view is in direct violation of *Kyles v. Whitley*, 514 U.S. 419 (1995).

Under the recently overhauled Arizona Rules of Criminal Procedure, effective in January, 2018, the new rule expanded its disclosure requirements to cover any state, county, or municipal law enforcement agency that has participated in the investigation of the case, but the prosecutor is still able to evade her *Brady* responsibilities for participating federal law enforcement agencies. The new 15.1(f) states:

The State's disclosure obligation extends to material and information in the possession or control of any of the following:

- (1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff;
- (2) any state, county, or municipal law enforcement agency that has participated in the investigation of the case; and
- (3) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

Thus, while the new rule has included any state, county, or municipal law enforcement agency that has participated in the investigation of the case, it does not include federal agencies. Hence, any federal investigator or agency that has participated in the investigation is exempt from Arizona's *Brady* disclosure

requirements by virtue of not being under the prosecutor's direction or control.

This Arizona anomaly directly contravenes the rule in *Kyles*.

This incongruity is not abstract. In Bush's co-defendant's case, the issue was raised on appeal. There, co-defendant Forde argued that the trial court's denial of her request for the FBI source file violated her rights to due process, to present a defense, and to confront witnesses by denying her motion. She contended that disclosure was required by Arizona Rule of Criminal Procedure 15.1 and *Brady v. Maryland*. *State v. Forde*, 233 Ariz. 543, 558, ¶ 41, 315 P.3d 1200, 1215 (2014). In affirming the trial court the Arizona Supreme Court observed:

[N]either Rule 15.1 nor *Brady* requires the state to disclose evidence outside its possession or control. See Ariz. R. Crim. P. 15.1(b) (requiring the state to disclose material "within the prosecutor's possession or control"); *State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975) ("The prosecutor cannot be deemed to have concealed information relating to the guilt or innocence of the accused, or punishment if he does not procure materials in the custody of the FBI, an agency which is not under the control of the prosecutor.").

Bush has never asserted that he is entitled to the FBI's source files. Instead, Bush maintains that *Brady* requires the prosecutors to review the FBI's files unredacted and disclose all exculpatory information therein. Because the

prosecutors here did not do that, it is unknown whether additional exculpatory information exists from the FBI's investigation of and involvement in the case.

Bush was denied due process under the Fourteenth Amendment by Arizona's failure to follow *Brady* doctrine. The superior court's refusal to order the prosecutors to review unredacted FBI reports, disclose all exculpatory material, and submit to defense interviews precluded counsel's from fully investigating whether the 234-page FBI report was disclosed or adequately disclosed, as ordered by the Arizona Supreme Court.

Review of the redacted FBI reports provided to counsel gives rise to legitimate suspicions that the redacted portions also contain exculpatory information. Bush received redacted FBI reports in 2009. Only two pages of the 234-page FBI report discuss the alternate suspect information identified as exculpatory to Bush. Both pages were duplicated for some reason. Of the two duplicate pages, one is redacted, the other is not. All four pages were disclosed to Bush. While both pages reveal the existence of an alternate suspect or suspects who may have been involved in the murders, on the redacted copy of one of the pages, there is a large redacted paragraph at the bottom of the page. (Suppl. Sealed Appendix 10.) The duplicate, unredacted page contains a discussion of the

alternate suspect being involved in another shooting on the California border. (Suppl. Sealed Appendix 11.)

Similarly, the second duplicated page shows two redacted paragraphs and two partially redacted sentences. (Suppl. Sealed Appendix 12.) Again, the unredacted duplicate discloses information about the alternate suspects being involved in a violent shooting on the California/Mexico border. (Suppl. Sealed Appendix 13.) Moreover, the redacted version of Suppl. Sealed Appendix 12 says that the page is “1 of 2” pages. But the unredacted version has no such “1 of 2” at the bottom. Both of the unredacted pages are exculpatory in that they show the alternate suspects being involved in another murder. Based on the context and locations of the redacted pages as opposed to the unredacted pages, there is a reasonable likelihood that the reports contain other substantive *Brady* material sufficient to require the prosecutors to at least review them unredacted.

These FBI reports were denominated as *Brady* materials by the prosecutors. At a pretrial hearing one said, “We were able to tab those portions of the source file that pertain to this case, that look like they could remotely involve *Brady* material.” (Suppl. Sealed Appendix 14.) If the portions the prosecutors selected even “remotely” involved *Brady* material, that information increases the possibility that the redacted portions also likely contain *Brady* material.

Those tabbed excerpts became the 234 pages of FBI reports at issue here. Consequently, the question of the adequacy of the disclosure which was central to the Arizona Supreme Court's remand order could not be fully answered without access to the 234 pages unredacted.

The trial court's refusal to order the prosecutors to review unredacted reports and disclose all exculpatory information had ripple effects. In the interlocutory post-conviction proceeding, the court's denial prevented Bush from fully investigating and discovering the disclosure and adequacy of Brady disclosure in order to support his claims of a *Brady* violation, and to show the prejudice.

Because the trial court would not order the prosecutors to cooperate and interview with Bush's attorneys, Bush was unable to properly investigate and develop his claim of a *Brady* violation and to show prejudice.

Similarly, on appeal, Bush raised an issue of prosecutorial misconduct for the prosecutors' failure to review unredacted copies of the FBI reports, and assist Bush in investigating, developing, and presenting his *Brady* violation claims. Without complete, unredacted reports, Bush could not show the materiality of the non-disclosed material, or its prejudice to Bush.

CONCLUSION

This Court has held that the due process clause of the Fourteenth Amendment requires “that criminal defendants be afforded a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 484 (1984). This imposes a “constitutional duty on the prosecution to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt.” *Id.* Such evidence is considered material if its exculpatory value was apparent before the evidence was destroyed and is “of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 488 (citing *United States v. Agurs*, 427 U.S. 97 (1976)).

The prosecution’s responsibilities go beyond a duty to convict. *Berger v. United States*, 295 U.S. 78, 88 (1935) (The prosecution’s interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.... It is as much [the prosecution’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

From the time Bush filed his Motion to Stay Appeal in 2014 upon discovery that FBI reports existed, the prosecutors made only a single phone call to the FBI in which the FBI made assurances that it had “vetted” the source materials,

implying that the FBI had thereby adequately protected Bush's constitutional rights. (Appendix F.) But because the FBI was not the prosecuting agency here, and therefore had neither the ethical nor professional responsibilities owed by the prosecutors, nor the intimate knowledge of the case necessary to understand which evidence was potentially exculpatory, such assurances were meaningless.

The fact that these prosecutors found such assurances satisfactory without themselves having viewed unredacted copies of the source files demonstrates their non-compliance with and their misunderstanding of their own obligations. Their failure to fulfill those obligations, and the Arizona courts' refusal to enforce them, violated Bush's Fourteenth Amendment rights under *Brady* and *Kyles*.

The petition for a writ of certiorari should be granted.

Respectfully submitted: December 1, 2018.

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