No. 18–7235

IN THE
SUPREME COURT OF THE UNITED STATES

JASON EUGENE BUSH,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPERIOR COURT, IN AND FOR THE COUNTY OF PIMA

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

O.H. SKINNER
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL

DAVID R. COLE
SENIOR LITIGATION COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
2005 N. CENTRAL AVE.
PHOENIX, ARIZONA 85004-1580
CADOCKET@AZAG.GOV
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENTS

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Is Petitioner entitled to relief under *Brady v. Maryland* and its progeny?

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The Pima County Superior Court's May 17, 2016, order denying the relief sought by Petitioner appears at Petitioner's Supplemental Sealed Appendix 8. The Arizona Supreme Court denied Petitioner's Petition for Review on August 16, 2018. The order denying review appears as part of Petitioner's Appendix A. Petitioner's request for reconsideration was denied on September 6, 2018; that order appears at Petitioner's Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution

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.

STATEMENT OF THE CASE

On May 29, 2009, Petitioner shot and killed nine-year-old Brisenia Flores and her father, Raul Flores. He also shot Gina Flores, Brisenia's mother, but she survived. A jury convicted Petitioner of two counts of first-degree murder, two counts of aggravated assault, and one count each of attempted first-degree murder, first-degree burglary,

armed robbery, and aggravated robbery. The jury imposed death sentences in connection with the murders of Brisenia and Raul and a cumulative term of 78 years imprisonment for the non-capital crimes.

Ultimately, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. *State v. Bush*, 244 Ariz. 575, 423 P.3d 379 (2018). In January 2014, while Bush's appeal was pending, the Arizona Supreme Court issued an opinion affirming co-defendant Shawna Forde's convictions and sentences. *State v. Forde*, 233 Ariz. 543, 315 P.3d 1200 (2014). One of Forde's claims on appeal was that her right to due process was denied because State's counsel failed to timely disclose some FBI reports, referred to in various documents as "source files." The Arizona Supreme Court rejected Forde's claim. 233 Ariz. at 558, 315 P.3d at 1215. On May 29, 2014, the Arizona Supreme Court granted Petitioner's request to stay his appeal and remanded the matter to the superior court for limited post-conviction relief proceedings concerning whether the alleged failure to disclose the source files deprived Petitioner of his right to due process. (Petitioner's Supplemental Sealed Appendix 2.)

The superior court held an evidentiary hearing on April 26, 2016, for the limited purpose identified in Petitioner's Supplemental Sealed Appendix 2. Before the testimony began, the parties stipulated that, in 2009, State's counsel disclosed an FBI report dated June 17, 2009. (Respondent's Sealed Appendix, pp. 21–23.) During the course of the evidentiary hearing, the source files were admitted as Hearing Exhibit 18. (Id., pp. 12, 26.) Following the hearing, on May 17, 2016, the superior court issued an order denying relief. (Petitioner's Supplemental Sealed Appendix 8.)

REASON FOR DENYING THE WRIT

Petitioner urges that Arizona courts violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995). The Petition lacks merit and should be dismissed.

I. ARIZONA COURTS RECOGNIZE AND PROPERLY APPLY *KYLES V WHITLEY*

To the extent Petitioner urges that Arizona courts either do not recognize or fail to properly apply *Kyles v. Whitley*, he is mistaken. *See State v. Eddington*, 228 Ariz. 361, 364, 266 P.3d 1057, 1060 (2011); *Milke v. Mroz*, 236 Ariz. 276, 282, 339 P.3d 659, 665 (App. 2014).[1]

II. *BRADY V. MARYLAND* DOES NOT ENTITLE PETITIONER TO RELIEF

It is incumbent upon prosecutorial officials, as a matter of due process, to disclose material exculpatory evidence to persons charged with crime. To be entitled to relief under *Brady*, a defendant must establish that (1) the State suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material. *Brady*, 373 U.S. at 87. Evidence is considered "material" if, and only if, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "Reasonable probability" in this context has been defined as "a probability sufficient to undermine confidence in the outcome." *Id.; see Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

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[1] Respondent's counsel's research reflects that, between 2008 and 2017, the Arizona Court of Appeals issued thirteen (13) memorandum decisions that cite *Kyles v. Whitley*. This is a further indication that Petitioner's assertion is incorrect.

Petitioner's efforts to satisfy these requirements fall short of the mark. First, he has failed to show that the State suppressed evidence. The superior court found that the State disclosed the very information contained in the "source files" in November 2009; furthermore, the source files themselves were made available to Petitioner's trial counsel 14 months later. (Petitioner's Supplemental Sealed Appendix 8.) Even if that were not so, the Federal Bureau of Investigation ("FBI") is outside the control of the Pima County Attorney, who prosecuted Petitioner. The prosecutor cannot be held responsible for the activities of an agency that operates wholly independently of that prosecutor. The Arizona Supreme Court said as much when it rejected Petitioner's codefendant's *Brady* claim in *State v. Forde*, 233 Ariz. 543, 558, 315 P.3d 1200, 1215 (2014).[2] Petitioner assigns particular significance to the fact that the documents in question were redacted before they were provided to the State and the defense; however, that process was carried out by the FBI, and that agency refused to disclose unredacted materials to the State.

Second, Petitioner has not demonstrated that the evidence in question was favorable to him. Even if he had done so, he has failed to show materiality, which is the third requirement in *Brady*. The information contained in the source files had nothing whatsoever to do with the crimes with which Petitioner was charged. That the information might have resulted in further investigation by Petitioner's trial counsel does not magically transform immaterial information into material evidence, nor does the possibility that further investigation might have provided counsel with other avenues to challenge the eyewitness testimony or Petitioner's confession to his crimes. According to

[2] There is no question that the source files referred to in the Arizona Supreme Court's opinion in *Forde* are the same files

this Court in *United States v. Agurs,* 427 U.S. 97 (1976), "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of a trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109–10.

III. KYLES V. WHITLEY DOES NOT ENTITLE PETITIONER TO RELIEF

Petitioner's heavy reliance on *Kyles* is misplaced. Curtis Kyles was found guilty of first-degree murder and sentenced to death by a Louisiana jury. Any resemblance between Kyles's circumstances and Petitioner's ends with the nature of the convictions and resulting sentences. On state collateral review, it was discovered that prosecutors had failed to disclose information that was favorable to Kyles. After the Louisiana courts denied relief, Kyles filed a petition for writ of habeas corpus in federal district court. The district court denied relief and the Fifth Circuit affirmed. This Court granted Kyles's petition for writ of certiorari and ultimately held that Kyles was entitled to a new trial. The Court found that, despite having knowledge of the existence of the following items of evidence before Kyles's trial began, the State failed to disclose them:

(1) "six contemporaneous eyewitness statements taken by police following the murder";

(2) "records of Beanie's[3] initial call to the police";

(3) a tape recording of a conversation among Beanie and two police officers;

(4) a "typed and signed statement given by Beanie the day following his conversation with the two police officers;

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at issue here.

[3] "Beanie," whose true name was Joseph Wallace, was a police informant who, according to the *Kyles* Court, "seemed eager to cast suspicion on Kyles." 514 U.S. at 425.

(5) a "computer printout of license numbers of cars parked near" the scene of the crime on the night the murder occurred;

(6) an "internal police memorandum calling for the seizure" of certain items of rubbish after Beanie told officers that he had seen Kyles put a purse where the rubbish was located; and

(7) "evidence linking Beanie to other crimes" in the immediate area where the murder in question occurred, including an unrelated murder of a woman that was committed eight months before the murder at issue.

514 U.S. at 428–29.

After conducting a thorough analysis of Kyles's *Brady* claim in light of the nature of the State's case and Kyles's defense, the Court granted relief. In so doing, the Court made this critical observation: "[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Id.* at 453 (emphasis added). The Court then listed six findings that the jury would have been entitled to make had it heard and seen the undisclosed evidence. *Id.* at 453–54. Identification of the perpetrator was a key issue in Kyles's case; although the six eyewitnesses agreed that it was a black man, their descriptions "differed significantly" when it came to the perpetrator's "height, age, weight, build, and hair length." *Id.* at 423. One is hard pressed to imagine a case where undisclosed evidence is any more "material" in the sense that term is used in *Brady* and its progeny.

In stark contrast, the ostensibly undisclosed evidence in Petitioner's case falls far short of satisfying the materiality requirement. Bush was identified as the man who shot and killed his victims. His DNA was found at the scene of the crimes. He confessed to his role. The fact that another man who had red hair and, like Petitioner, had the nickname

"Red" was involved in an unrelated shooting in another state was not then, and is not now, material to Petitioner's case.

IV. PETITIONER HAS FAILED TO IDENTIFY A CIRCUIT SPLIT OR DISAGREEMENT BETWEEN STATE COURTS OF LAST RESORT THAT MIGHT WARRANT AN ORDER GRANTING THE PETITION

It is to be expected that some courts will interpret and apply *Brady* and its progeny differently from other courts. Conspicuous by its absence here, however, is any showing that Arizona courts (1) consistently misinterpret and misapply the law, or (2) misapplied the law in Petitioner's case and did so to his detriment. None of the considerations that govern review on writ of certiorari is present here. SUP. CT. R. 10.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARK BRNOVICH
Attorney General

O.H. Skinner
Solicitor General

Lacey Stover Gard
Chief Counsel

Jeffrey L. Sparks FOR
David R. Cole
Senior Litigation Counsel
(Counsel of Record)

Attorneys for Respondents

#7711701