No. 21–8085

In the Supreme Court of the United States

FRANK JARVIS ATWOOD,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

CAPITAL CASE

EXECUTION SCHEDULED FOR JUNE 8, 2022 AT 10:00 A.M. (MST)/1:00 P.M. (EST)

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QUESTION PRESENTED FOR REVIEW

Did the Arizona courts correctly deny Atwood's eleventh-hour post-conviction petition alleging an untimely and factually-unsupported due process/*Brady* claim?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules

INTRODUCTION

In 1987, Appellant Frank Atwood was sentenced to death for the 1984 murder of 8-year-old V.L.H. During the ensuing 30 years, Atwood pursued his appeals in the state and federal courts, including filing four petitions for post-conviction relief. On May 3, 2022, the Arizona Supreme Court issued a warrant for his execution, setting his execution for June 8, 2022. Following the denial of his *fifth* post-conviction petition, and the Arizona Supreme Court's denial of review of that dismissal, Atwood petitions this Court for certiorari. His untimely and factually unsupported claim alleging a due process and *Brady*[1] violation have been correctly, and repeatedly, denied in both state and federal court.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

The facts of this aged, high-profile case are well-known and have been repeatedly litigated for almost four decades. Eight-year-old V.L.H. disappeared from her Tucson neighborhood on the afternoon of September 17, 1984, after riding her pink bicycle to a nearby mailbox. *State v. Atwood (Atwood I)*, 832 P.2d 593, 609 (Ariz. 1992). In April 1985, her skeletal remains were discovered in the desert northwest of Tucson. *Id.* at 611. At trial, the State established Atwood's guilt through eyewitness testimony, scientific evidence, and Atwood's own statements, consisting of the following:

> • During a previous incarceration in 1982,[2] Atwood lamented to his pen pal Ernest Bernsienne that he was "still attracted to kids" but could not "handle another arrest." *Id.* at 613, 654–55;
>
> • When Atwood was paroled from the California prison system in 1984, he absconded and traveled the country with his friend Jack McDonald, living out of his black 1975 Datsun 280Z. *Id.* at 593. He told Bernsienne of his wish to "pick[] up" a child and vowed that "this time he would make sure the child wouldn't talk." *Id.* at 613, 655;
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> • Atwood was seen in his black Datsun 280Z mere feet from where V.L.H. disappeared and within seconds of her last being seen; a teacher at a nearby school, disturbed by Atwood's behavior as he sat in his car, recorded his license plate number. *Id.* at 609–10, 614, 657;
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> • Three people saw Atwood driving toward northwest Tucson with a small child in his car's passenger's seat. *Id.* at 611–12;

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[2] Before killing V.L.H., Atwood assaulted two children in California in separate incidents years apart. *See Atwood v. Ryan (Atwood IV)*, 870 F.3d 1033, 1039–40 (9th Cir. 2017); *Atwood I*, 832 P.2d at 610.

• Shortly after V.L.H. disappeared, Atwood appeared at De Anza Park with blood on his hands, clothes, and knife and cactus needles in his arms and legs. *Id*. at 610, 613, 652–53. He claimed to have stabbed a man in a drug-related altercation, after which he left the man's body in the desert. *Id*. at 613, 652–53;

• Atwood and McDonald left Tucson, bound for New Orleans, the night of V.L.H.'s abduction and encountered car trouble in rural Texas; Atwood told his mother over the telephone, "Even if I did do it, you have to help me," and later explained to McDonald that the police "were trying to stick something on him about a little girl." *Id*. at 610, 613, 653–54;

• After Atwood was arrested in Texas and his car impounded, the Federal Bureau of Investigation (FBI) determined based on scientific testing that a smear of pink paint on Atwood's front bumper came from V.L.H.'s bicycle, and that the bicycle bore nickel particles that had been transferred from Atwood's bumper. *Id*. at 612; and

• An accident-reconstruction expert opined that the paint smear on Atwood's bumper was at a height consistent with the bumper having impacted the bicycle, that the paint on the bumper appeared to match the bicycle, and that marks on Atwood's car's gravel pan were consistent with the car having struck the bicycle at low speed, causing the bicycle to lodge beneath the car. *Id*.

Relevant here, Atwood presented a third-party culpability defense, based on witnesses who believed they had seen V.L.H. at the Tucson Mall after her disappearance in the company of a woman proposed to be local resident Annette Fries, at a time when Atwood's whereabouts were known. *See id*. at 626; *see also Atwood v. Schriro (Atwood II)*, 489 F. Supp. 2d 982, 1032–33 (D. Ariz. 2007). Unpersuaded, the jurors found Atwood guilty of kidnapping and first-degree murder. *Atwood I*, 832 P.2d at 608–09. A judge later found the A.R.S. § 13– 703(F)(1) (1984) aggravating factor proven and, after finding no mitigation sufficiently substantial to warrant leniency, sentenced Atwood to death for murder

and to a concurrent term of life imprisonment for kidnapping. *Id*. at 608, 663–65, 674.

Atwood unsuccessfully sought relief in state court on direct appeal and through a first post-conviction petition. *See Atwood IV*, 870 F.3d at 1044; *Atwood I*, 832 P.2d at 677. In 1998, he initiated a federal habeas proceeding, which consumed 20 years. *See Atwood IV*, 870 F.3d at 1044. During the course of the habeas case, he returned to state court to file a second post-conviction petition, arguing that police had "planted" on the bumper of his car the pink paint used to convict him.[3] *Id*. at 1045, 1050. The post-conviction court found this claim devoid of any "'link to provable reality.'" *Id*. at 1050 (quoting state-court ruling).

After years of additional federal litigation, including an evidentiary hearing on counsel's alleged ineffectiveness at sentencing, the district court denied habeas relief, *see Atwood v. Ryan (Atwood III)*, 2014 WL 289987 (D. Ariz. Jan. 27, 2014), and the Ninth Circuit affirmed, *see Atwood IV*, 870 F.3d at 1039–79. Atwood failed to file a timely petition for writ of certiorari, ending his decades-long appellate odyssey. *See Atwood v. Ryan (Atwood V)*, 139 S. Ct. 298 (Oct 1, 2018) (Mem.)

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[3] Atwood specifically proposed that Pima County Sheriff's Department detectives secretly traveled to Texas (where Atwood's car was impounded in FBI custody), removed the bumper from the vehicle, flew it to Tucson on a commercial flight, applied paint from V.L.H.'s bicycle (at precisely the correct height, even considering the degree to which Atwood's car was weighed down at the time of the collision), returned the bumper to Texas, reaffixed it to the car, and then manipulated various paint samples and photographs to cover their tracks. *Atwood IV*, 870 F.3d at 1050–51.

(denying motion to direct clerk to file petition for writ of certiorari out of time); *see generally* Ariz. R. Crim. P. 31.23(b) ("On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.").

Shortly thereafter, Atwood initiated a third post-conviction proceeding, in which he raised various sentencing claims, including an allegation that the (F)(1) aggravating factor was constitutionally infirm. The post-conviction court denied relief, and the Arizona Supreme Court denied review.

On June 25, 2021, Atwood initiated a fourth post-conviction proceeding, asserting that new testing of the paint evidence would show that the paint on his bumper did not match the paint on V.L.H.'s bicycle. Litigation on this petition included Atwood's unsuccessful attempts to obtain special action relief from the Arizona appellate courts. The post-conviction court denied relief on February 1, 2022, and Atwood did not seek review of that ruling.

On May 3, 2022, the Arizona Supreme Court issued a warrant for Atwood's execution, which is scheduled for June 8, 2022. Atwood has filed actions in various levels of the state and federal courts related to his execution. Relevant here, Atwood filed in the Ninth Circuit a Motion for Order Authorizing District Court to Consider a Second or Successive Habeas Petition. *See Atwood v. Shinn*, Ninth Circuit Case No. 22-70084. Atwood asserted, among other claims, that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a memorandum memorializing an anonymous tip received on September 19, 1984, two days after

V.L.H. went missing. After briefing, the Ninth Circuit held argument on May 24, 2022, and on May 27 the court denied Atwood's motion in a published opinion. *See Atwood v. Shinn*, ___ F.4th ___, 2022 WL 1714349 (9th Cir. May 27, 2022).

On June 1, 2022, Atwood filed a fifth petition for post-conviction relief asserting the same *Brady* claim he presented in the Ninth Circuit on May 4, 2022. He then sought a stay from this Court under Arizona Rule of Criminal Procedure 32.18. On June 6, 2022, the superior court dismissed Atwood's petition, concluding that the claims were precluded and/or untimely. The court further found that "it appears likely that Petitioner intentionally refrained from raising [his claims] sooner in hopes that raising a new claim at this late stage might persuade the Arizona Supreme Court to issue a stay of execution." Pet. App. C, at 2. The Arizona Supreme Court denied the motion for stay as moot, and Atwood then sought review of the superior court's dismissal of his petition for post-conviction relief.

The Arizona Supreme Court denied review on June 7, 2022, in a detailed Minute Order. Pet. App. 1–15.

SUMMARY OF ARGUMENT

Atwood's strategic choice to wait until days before his execution to bring a fifth successive post-conviction petition raising a factually unsupported and untimely due process/*Brady* claim was correctly denied by the Arizona post-conviction court. This Court should deny certiorari because Atwood has presented no federal claim and because, even were the claim properly presented, the alleged *Brady* material would not have changed the outcome of Atwood's trial finding him guilty of the murder of 8-year-old V.L.H. Moreover, even if there is a material difference between how states apply *Brady v. Maryland*, this is a poor vehicle to address it because the decision below rests on state procedural law, and the *Brady* claim is plainly meritless.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Atwood presents none. Atwood has not established that the Arizona Supreme Court has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or "decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b), (c). In fact, Atwood fails to present a federal question. Because the decision below rested on independent and adequate state procedural law grounds and Atwood presents only a question of state law, this Court should deny certiorari.

I. ATWOOD PRESENTS NO FEDERAL QUESTION.

A. The decision below rests on independent and adequate state procedural preclusion grounds.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). A state law ground is independent of the merits of the federal claim when resolution of the state procedural law question does not "depend[] on a federal constitutional ruling." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). And a state procedural rule constitutes an adequate bar to federal review if it was "firmly

established and regularly followed" when applied by the state court. *Ford v. Georgia*, 498 U.S. 411, 424 (1991).

Atwood asserted in his petition for post-conviction relief that the State had violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a memorandum memorializing an anonymous tip received on September 19, 1984, two days after V.L.H. went missing.[4] In the tip, the caller indicated that she had seen V.L.H. in a vehicle, providing the license plate of the vehicle. A report attached to the memorandum showed that the vehicle was registered to Richard Rhoads, who lived next door to property owned by Annette Fries. Atwood alleged at trial, and has continued to allege for almost 40 years, that Annette Fries is the person who kidnapped and killed V.L.H. Atwood discovered this memorandum during his review of the State's file in the summer of 2021.

In finding Atwood's eleventh-hour post-conviction *Brady* claim precluded under Arizona Criminal Procedural Rule 32.1(a), the post-conviction court concluded that Atwood had clearly waived the claim by not raising it sooner:

> Petitioner waived this claim because he did not raise it at trial, on appeal, or in any previous post-conviction proceeding. Although Petitioner could not have raised the issue at trial or on appeal if he only discovered it in the summer of 2021, he certainly could have raised it in his Fourth Petition for Post-Conviction Relief filed on November 19, 2021. Having had the opportunity to raise the issue in a previous Petition, and having failed to do so, Petitioner's claim is waived and therefore precluded under Rule 32.2(a)(3).

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[4] Respondents do not concede that they failed to disclose the memorandum or that the memorandum constitutes *Brady* material.

Pet. App. At 16. Atwood does not attempt to explain why he waited until one week before his execution to present the claim, especially if he believes the evidence proves his innocence. As the trial court observed:

> Given the procedural posture of this case, including Petitioner being scheduled for execution on June 8, 2022, it appears likely that Petitioner intentionally refrained from raising the issue sooner in hopes that raising a new claim at this late stage might persuade the Arizona Supreme Court to issue a stay of execution.

Id.

The Arizona Supreme Court echoed this conclusion, pointing out Atwood's unexplained delaying tactics:

> [Atwood] having had the opportunity to raise the claim either in a previous post-conviction proceeding and, at a minimum, at an earlier date than June 2, 2022, and having failed to do so, the claim is waived and therefore precluded under Rule 32.2(a)(3). Moreover, even if we ignore that the claim is precluded under Rule 32.2(a)(3), it nevertheless is untimely because Appellant failed to "adequately explain[] why the failure to timely file [the] notice was not the defendant's fault." Ariz. R. Crim. P. 32.4(b)(3)(D).

Pet. App. At 5.

In sum, the state court correctly found Atwood's due process/*Brady* claim precluded, or otherwise untimely, under Arizona's Rule 32, and further, also meritless because the alleged *Brady* material would not have altered Atwood's guilty verdict.

B. Atwood's underlying due process/*Brady* claim lacks merit.

On the basis of a tenuous third-party allegation, Atwood disingenuously asserts actual innocence and a violation of his due process rights. Further, the

claim is diluted by Atwood's failure to diligently present the claim in state court. Atwood discovered the basis of the claim in the summer of 2021, after asking to review the State's files. Nevertheless, he failed to include it in the fourth petition for post-conviction relief he filed in November 2021. Nor did he present it at any other time that would have permitted the post-conviction court to consider the claim without requiring a stay. This is so even though he filed a motion in the Ninth Circuit on May 4, 2022, unsuccessfully attempting to present the *same* claim in a successive habeas petition. Due process does not require this Court to allow Atwood to ignore all applicable state and federal rules and wait until days before his scheduled execution to raise a claim that has been available for months.

The Arizona Supreme Court agreed, explaining that "due process does not require this Court to allow Appellant to wait until days before his scheduled execution to raise a claim that has been known and fully investigated, at least since May 4, 2022." Pet. App. At 5. Agreeing with the State, the Arizona Supreme Court concluded there was no force behind Atwood's assertion that an operation of state post-conviction preclusion rules against his alleged *Brady* claim amounted to a due process violation:

> . . . [Atwood] did not include [the claim] in his petition for post-conviction relief filed in November 2021, or at any other time that would have permitted the superior court to consider the claim without requiring a stay of execution from this Court—even though [Atwood] did file a motion in the Ninth Circuit Court of Appeals on May 4, 2022, attempting to present the same claim in a successive habeas corpus petition.

Pet. App. At 5–6. The state supreme court then reiterated the superior court's conclusion that Atwood did not have to personally waive his "due process right to disclosure," as that is not akin to other rights of "sufficient constitutional magnitude" so as to require a personal waiver. *Id.* at 6. *See Stewart v. Smith*, 46 P.3d 1067, 1071, ¶ 9–10 (Ariz. 2002) (fundamental rights to counsel, to a jury trial, and to a twelve-person jury require a defendant's personal waiver).

Moreover, to prevail on a *Brady* claim, Atwood must demonstrate that the State withheld material favorable to him and that there is a reasonable probability that he would not have been convicted had the evidence been disclosed. *See Smith v. Cain*, 565 U.S. 73, 75 (2012). Here, Atwood cannot demonstrate a reasonable probability that the memorandum would have likely changed the verdict. As explained earlier, the memorandum contained a tip from an anonymous caller claiming that the caller saw V.L.H. in a car two days after her disappearance. The caller provided the vehicle's license plate, and the vehicle was found to have been registered to a neighbor of Annette Fries. But Atwood did not suggest that this tip establishes that V.L.H. was actually seen in the car two days after she disappeared. Instead, he asserted that Annette Fries called in the tip because she had been publicly identified as a suspect in this case and had been contacted by investigators. Thus, Atwood reasoned, Fries called in the anonymous tip "to throw police off her trail," providing the license plate of her neighbor's vehicle. In making this argument, however, Atwood illogically asserted that Fries both made the call to "throw police off her trail" *and* gave her neighbor's license plate, which tied her to

the anonymous tip. Even if Atwood is correct that Fries was the anonymous tipster and had a motive for calling in the tip, this does not establish that Fries kidnapped and murdered V.L.H. At most, it establishes that Fries was unhappy that she had been identified as a suspect in the kidnapping.

There is no reasonable probability that the allegedly-undisclosed memorandum would have changed the verdict in Atwood's case. Even if the memorandum permits the inference that Atwood draws, it does not add significantly to the evidence Atwood already possessed to support his theory that Fries was the killer. Nor does the memorandum contradict the evidence of Atwood's guilt that was presented at trial, including the fact that paint from V.L.H.'s bicycle was found on the bumper of his car. *See State v. Atwood*, 171 Ariz. 576, 594–96 (1992) (summarizing the evidence). There is no reasonable probability that the jury would not have convicted Atwood had the memorandum been disclosed, and therefore Atwood cannot prevail on his *Brady* claim.

The Arizona Supreme Court agreed. Citing this Court's case law regarding the "reasonable probability" and "materiality" requirements (*see Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. at 290–91 (1999), the state court concluded:

> [Atwood] has not demonstrated that there is a reasonable probability that the result of the trial would have been different if the anonymous tip memorandum had been disclosed to the defense. [Atwood] contends that it is likely that Annette Fries or someone connected to her called in the tip about the vehicle identified in the memorandum. Such supposition and conjecture is insufficient to establish the showing required in light of the quantum of evidence presented at trial. Moreover, based on all the information [Atwood] presented concerning

> Ms. Fries at the time of his trial, the Court finds it unlikely that the disclosure of the anonymous phone call memorandum would have probably changed the jury verdict.

Pet, App. at 8. Finally, citing the Ninth Circuit's opinion denying Atwood's attempt to initiate a second or successive habeas petition on this same evidence, the court recited the evidence Atwood had possessed and presented regarding the allegedly culpable third party—Fries—and agreed with the federal appellate court:

> This Court agrees with the Ninth Circuit that if "all of this evidence did not sway the jury, it is unlikely that the anonymous phone call would have made a difference, even after it was determined that the reported license plate belonged to Fries's neighbor."

Id. at 9 (quoting *Atwood v. Shinn*, ___ F. 4th ___, 2022 WL 1714349, *4 (9th Cir., May 27, 2022)). The new "*Brady*" evidence also would not have undermined confidence in the verdict given the evidence at trial of Atwood's guilt. *Id.* (citing *Atwood I,* 832 P.3d at 616).

The Arizona Supreme Court likewise agreed with the post-conviction court's dismissal of Atwood's similarly factually-based claims regarding the anonymous tip "third-party" evidence under alternate subsections of Arizona's post-conviction Criminal Rule 32 not subject to preclusion and found them untimely and substantively wanting, or "not colorable." Pet. App. at 9–14. Notably, the court concluded that Atwood had failed to show by "clear and convincing evidence" that he was actually innocent:

> First, the phone call is not evidence that Appellant did not commit the murder. Second the phone call is not evidence that someone else committed the murder. Appellant simply supposes that the phone call was made by Ms. Fries or her son with the intent of leading the investigators away from Ms. Fries.

> At best, the memorandum would have allowed Appellant to argue to the jury that Ms. Fries called in the tip and was the true killer. Further, even if Appellant's suppositions and conjecture were true and Appellant could prove it, the memorandum would still not be clear and convincing evidence that Appellant is innocent, and certainly does not clearly and convincingly rebut the evidence showing that Appellant kidnapped and killed V.L.H.

Id. at 14.

Independent and adequate state procedural rules support the Arizona Supreme Court's grant of review, but denial of relief, from the post-conviction court's dismissal of Atwood's fifth successive post-conviction petition. Moreover, the underlying claim implicating due process and *Brady* is without merit. This Court should deny Atwood's petition for certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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