No. 21A801

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

STATE OF ARIZONA, Respondent.

REPLY TO OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

To the Honorable Elena Kagan,
Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

CAPITAL CASE – EXECUTION SCHEDULED FOR JUNE 8, 2022 AT 10:00 AM MST

DAVID A. LANE
Killmer, Lane & Newman, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
Tel: (303) 571-1000
dlane@kln-law.com

SAM KOOISTRA
Arizona Capital Representation Project
25 S. Grande Ave.
Tucson, Arizona 85745
Tel: (520) 229-8550
sam@azcapitalproject.org

AMY P. KNIGHT*
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

**Counsel of Record*

Dated: June 8, 2022

Respondent rest its opposition to a stay of execution long enough to permit a full review of his claim on the assertion that "Atwood does not attempt to explain why he waited until one week before his execution to present the claim, particularly when he asserts that the evidence proves his innocence." That is false.

For one thing, Respondent ignores the nature of the claim it accuses Mr. Atwood of sitting on between last summer and this May: its own suppression for decades of a piece of evidence that credibly implicates a third party and could not only have itself swayed the jury in what was by all accounts a close case pitting two circumstantial versions of events against each other, but also would likely have altered the course of the defense investigation. The trial prosecutor was ordered to, and claimed he had, disclosed all the tips the State had received, and indeed, he disclosed many irrelevant ones—but not this one. The State had the memorandum from September 19, 1984 until the summer of 2021. Mr. Atwood had it for less than a year, time he spent gathering all of the evidence he needed to explain why the tip was so important.

Moreover, Respondent willfully ignores Mr. Atwood's perfectly cogent explanation for why the claim was not filed sooner. As explained in his petition at 6, Mr. Atwood's counsel "focused their investigation on Fries in order to establish the withheld memo's materiality," an investigation continuing to yield new information supporting the hotly contested materiality prong, regularly interpreted in a disingenuous and impossible to satisfy manner in Arizona, "as late as April 2022." Even now, Respondent adamantly insists the evidence of materiality is not enough,

yet faults Mr. Atwood for working to bolster it as much as possible before coming into court. By Respondent's count, there would be no way to prevail on a *Brady* claim where it successfully withheld the evidence for so long, because it would always be too soon and too late at the same time.

Respondent complains that Mr. Atwood filed his claim in federal court first. As Respondent well knows, this decision was designed to *streamline* the litigation, not to slow it down; had the claim proceeded rather than being rejected on grounds of stringent federal court limitations on subsequent petitions, Respondent, were it truly interested in expediency, could have waived exhaustion to reduce by half the amount of litigation needed on that claim.

Respondent's final claim is that the suppressed memorandum "does not contradict the evidence of Atwood's guilt that was presented at trial." Opp. At 10. But this claim just further illustrates Arizona's mistaken view of the materiality requirement. Contradicting trial evidence is not the only way evidence could be material, especially in a case that consisted primarily of competing circumstantial narratives. The evidence against Mr. Atwood was circumstantial, and much of it shaky, with witnesses contradicting their own statements and otherwise being thoroughly impeached. Where physical evidence would have been expected, such as inside the car in which he allegedly transported the abducted child, there was none. The timeline the State posited was all but impossible. In contrast, the evidence against the alternate suspect, Fries, was of a similar character, although not, at trial, as robust as it would have been if the State had complied with its obligations. The

jury was tasked with deciding, faced with the evidence against each, whether it could be certain beyond a reasonable doubt it was one and not the other. Adding evidence against Fries could have a profound effect on that calculation.

In sum, the last-minute nature of these proceedings is regrettable, but Mr. Atwood cannot be blamed for that when the State sat on this evidence for so long. This Court needs an opportunity to examine what occurred below, and that requires at least a brief stay of execution.

Respectfully submitted,

AMY P. KNIGHT*
Knight Law Firm, PC
3849 E Broadway Blvd, #288
Tucson, AZ 85716-5407
Tel: (520) 878-8849
amy@amyknightlaw.com

JOSEPH J. PERKOVICH
Phillips Black, Inc.
PO Box 4544
New York, NY 10163
Tel: (212) 400-1660
j.perkovich@phillipsblack.org

SAM KOOISTRA
Arizona Capital Representation Project
25 S. Grande Ave.
Tucson, Arizona 85745
Phone (520) 229-8550
sam@azcapitalproject.org

Counsel for Petitioner