No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

State of Arizona, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the State withhold material exculpatory evidence of a tip received by law enforcement independently linking a known third-party suspect to the case, in violation of *Brady v. Maryland,* 373 U.S. 83 (1963)?

2. In conducting a materiality analysis under *Brady v. Maryland,* 373 U.S. 83 (1963), in a case where the suppressed evidence concerns a third-party culpability defense that was presented at trial, must courts evaluate the case in light of all of the evidence as a whole, or may it treat any further evidence in support of a defense already presented as cumulative?

RELATED PROCEEDINGS

1. *Atwood v. Shinn*, Motion for Authorization to File Second or Successive Habeas Corpus Petition Under § 2245, Ninth Cir. No. 22-70084. Application denied May 27, 2022.

2. *Atwood v. Shinn et al.,* action under the Religious Land Use and Institutionalized Persons Act and related provisions, District of Arizona No. 22-cv-00625-JAT-JZB. Case remains open; preliminary injunction issued June 6, 2022.

3. *Atwood v. Shinn et al.,* § 1983 challenge to methods of execution, Ninth Circuit No. 22-15821, Mandate issued June 7, 2022; Petition for Writ of Certiorari pending, No. 21-8084, with accompanying application for stay of execution, No. 21A800.

4. *In re Frank Jarvis Atwood,* Petition for Writ of Habeas Corpus, No. 21-8083, with accompanying application for stay of execution, No. 21A799.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Jarvis Atwood respectfully requests that this Court grant a writ of certiorari to review the decision of the Arizona Supreme Court.

OPINIONS BELOW

The Arizona Supreme Court's opinion in this case affirming the Pima County Superior Court's summary dismissal of Mr. Atwood's petition for post-conviction relief is attached at Pet. App. 1-15. The Pima County Superior Court's ruling summarily dismissing Mr. Atwood's post-conviction petition is attached at Pet. App. 16-17.

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered judgement against Mr. Atwood on June 7, 2022. He filed this petition the next day, which is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> No State shall… deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

I. Factual Background

In 1987, Frank Atwood was convicted and sentenced to death for the September 17, 1984, kidnap and murder of eight-year-old Vicki Lynne Hoskinson,

in Tucson, Arizona. From the start, the case against Mr. Atwood was a close one. As the Arizona Supreme Court observed, there was a dearth of direct evidence, and "the jury convicted [him] based on circumstantial evidence and, perhaps in part, based on the testimony of alcohol abusers and drug users[.]" *State v. Atwood*, 832 P.2d 593, 612, 670 (Ariz. 1993). The prosecution's theory of the crime required a razor-thin timeline due to the travel time necessitated by the location of the victim's disappearance and the remote desert location where her remains were recovered. Because witnesses could account for Mr. Atwood's location approximately one hour after the girl disappeared, the State's timeline was implausible. If, as the evidence suggested, her remains had been buried, the State's timeline was impossible.

In defense, Mr. Atwood presented a witness who established an alibi for him in the minutes just after the crime was committed—a passerby who positively identified him idling alone and unhurried in his car after the victim was known to have been kidnapped. He also called multiple witnesses who testified that they saw the victim (including accurate descriptions of her distinctively colored dress) and an unknown woman at a local shopping mall in the evening of September 17, long after Mr. Atwood had supposedly committed the crime. Pet. App. 18-25; Pet. App. 28-32. Nonetheless, Mr. Atwood was found guilty and later sentenced to death by a judge.

As Mr. Atwood's defense suggests, the specter of a third party—the woman at the mall—haunts this case. Based on the descriptions of one mall witness on the night of the disappearance, police produced a composite drawing of the woman. Pet. App. 26. After the drawing was publicized, numerous witnesses quickly and

independently identified the woman as Annette Fries—understandably, in light of the similarity to a contemporaneous photo. Pet. App. 33-37; Pet. App. 27. Fries was known to police, as she was charged in 1982 in connection with an arson and insurance fraud scheme. By the fall of 1984, however, those charges were dismissed without prejudice after she was diagnosed with schizoaffective disorder and deemed incompetent to stand trial and not restorable.

Police summoned Fries for an interview. She gave an alibi for her location on the afternoon and evening of September 17 that police knew even at the time to be a lie. Other evidence pointed to suspicious behavior by Fries. Days before the crime, a man named Abe Rodriguez observed Fries outside a bank in downtown Tucson, eyeing him suspiciously and standing next to a dark brown Datsun 280Z with blue and gold California plates. Other witnesses also placed Fries with a brown Datsun. Notably, that car was very similar to Mr. Atwood's black Datsun 280Z with blue and gold California plates. Rodriguez further told police that later on the same day as the first sighting, he observed Fries and the brown Datsun a second time, cruising outside an elementary school watching children on the playground.

Both before and after the Vicki Lynne's abduction, numerous witnesses reported attempted kidnappings of children in that part of Tucson which were committed either affirmatively by Fries or by a woman matching her description. Two of these attempted abductions, occurring the week before Vicki Lynne was kidnapped, were of children who lived in an apartment complex 100 feet from the intersection where the victim's bike was discovered on the day of the kidnapping.

Several witnesses also placed either Fries or her brown Datsun in the victim's neighborhood on the afternoon of September 17, including the neighborhood mailman, who an hour before the abduction saw a woman matching Fries' description in a dark brown car parked at a Circle K the victim visited just before disappearing. A clerk at the same Circle K reported that in the days before the crime, Fries frequented the store and talked to schoolchildren she encountered there.

Investigators' interest in Fries evaporated, however, as soon as Mr. Atwood became a suspect a few days after the disappearance. A witness observed Mr. Atwood near the victim's neighborhood shortly before the victim disappeared and, finding him suspicious, noted his license plate number. When the witness provided the plate to police, they discovered Mr. Atwood had a criminal history involving offenses against children. Mr. Atwood had been passing through Tucson on a trip from Los Angeles to points east, and he was quickly located in Texas and arrested.

II. The *Brady* Material

Despite the voluminous circumstantial evidence pointing to Fries, Mr. Atwood was never able to directly implicate her in the crime. This began to change last year, however. In July and August of 2021, the Arizona Attorney General's Office allowed defense counsel to examine their paper trial and appellate file. This review, which was conducted by attorneys, legal support staff, and volunteer interns, occurred over several weeks and flagged approximately 14,000 pages of documents which were suspected to be undisclosed based upon a comparison with

an electronic database of the defense file. The following September, these scans were provided to defense counsel, who began the process of determining whether the documents were genuinely withheld and, if so, whether they were exculpatory.

During the course of this review, counsel identified an undisclosed police report directly implicating Fries in the case. The report was a September 19, 1984, memorandum by FBI Special Agent Small (the "Small memorandum") that memorialized a tip phoned into the Phoenix police by an anonymous female earlier that day, stating that she had seen the victim in a car with Arizona license plate 3AM618. Appended to the memo was a license plate report showing that plate was registered to a 1980 Toyota owned by Richard Rhoads of 5742 N. Trisha Ln, Tucson. Pet. App. 41-42. Incredibly, Rhoads was Annette Fries' next-door neighbor.

The Small memorandum for the first time provided a concrete link between Fries and the crime. There is no indication that the victim was actually in Rhoads' car, so the logical implication is that someone who knew Rhoads called in his car for some reason. Fries was such a person, and she had good reason to place the call. The previous day, a drawing of her identifying her as the chief suspect in the crime was plastered across local media, and she had been contacted by police and summoned for an interview. The possibility of the prime suspect's next-door neighbor's license plate number being included in the tip simply by chance is too remote. The most reasonable interpretation is that Fries or an associate called in the tip in an ill-conceived effort to throw investigators off her trail, using a known license plate to do so.

Whatever the motive for the call, the tip was strongly confirmatory of the testimony of the mall witnesses, corroborating their accounts and rebutting the suggestion, argued to the jury by the prosecutor, their sightings were a case of well-meaning mistaken identity. Trial counsel had requested disclosure of this exact class of evidence—exculpatory tips called into the police—and while the prosecution disclosed records of some phone calls, the Small memorandum was not among them. *See Atwood*, 832 P.2d at 623-24.

III. Relevant Legal Background

Equipped with the Small memorandum, counsel focused their investigation on Fries in order to establish the withheld memo's materiality, as required under *Brady v. Maryland*, 373 U.S. 83 (1963). These efforts netted several witness declarations, some obtained as late as April 2022, which document Fries' troubling behavior, including witnesses who recalled a woman's accusation that Fries molested her when she was a child. *E.g.* Pet. App. 38-39.

On May 4, 2022, Mr. Atwood filed an application in the Ninth Circuit seeking to bring a second or successive habeas petition in the district court. *See* 28 U.S.C. §2244(b)(3). Lodged with that application was a proposed habeas petition including, *inter alia*, the *Brady* and actual innocence claims based on the Small memorandum and related evidence. After oral argument, the Ninth Circuit denied authorization to file a successive petition on May 27, 2022. *Atwood v. Shinn*, No. 22-70084, ___ F.4th ___, 2022 WL 1714349 (9th Cir 2022). Rehearing *en banc* was denied on May 31, 2022. *Id.*, Order (5/31/2022).

The next day, June 1, Mr. Atwood filed a state petition for post-conviction relief in Pima County Superior Court. The petition alleged a violation of due process under *Brady*, cognizable under Arizona Rule of Criminal Procedure 32.1(a), which provides a vehicle for raising claims based on violations of the state and federal constitutions. Such claims are generally barred in successive petitions under Rule 32.2(a)(3), but Mr. Atwood argued that the posture of the claim—a newly discovered *Brady* violation which required further investigation to establish materiality—as well as the fundamental nature of the right to disclosure established exceptions to that rule of preclusion. He further alleged that similar facts raised claims for relief as newly discovered evidence and actual innocence under Rules 32.1(e) and (h), but those provisions impose a more demanding standard of review than *Brady*. On June 6, the Superior Court summarily dismissed the post-conviction petition. Pet. App. 16-17.

On June 7, 2022, Mr. Atwood sought review of the Superior Court's decision in the Arizona Supreme Court. The same day, the Arizona Supreme Court granted review but denied relief. Pet. App. 1-15. It ruled that Mr. Atwood had not presented a colorable *Brady* claim because it found the withheld memorandum was only speculatively linked to the alternate suspect Fries, and because it was cumulative of other evidence presented that implicated her. Pet. App. 6-9.

REASONS FOR GRANTING THE WRIT

I. The State Withheld Material Exculpatory Evidence. The Arizona Supreme Court's Disingenuous Materiality Analysis Ignored or Misrepresented Every Fact Tending to Establish Materiality.

The Arizona Supreme Court supported its determination that Mr. Atwood's *Brady* claim was not colorable with summaries of the relevant facts that were disingenuous—incomplete, misleading, and in some instances flat out wrong. For example, the Court listed six factors implicating Fries which is asserts "did not sway the jury":

> (1) witnesses reported seeing V.L.H. at a local mall in the company of a woman matching Fries's description; (2) Fries "gave shifting information about her whereabouts at the time of the disappearance"; (3) Fries had been charged with crimes related to her attempt to burn down her trailer, but was found incompetent to stand trial; (4) a woman matching Fries's description was seen "in the days surrounding the disappearance driving a car very similar to Mr. Atwood's"; (5) witnesses described seeing a woman matching Fries's description attempt "to kidnap other children in the days surrounding the disappearance"; and (6) a defense witness "had experienced intimidation and harassment ... as potential revenge for her testimony on Mr. Atwood's behalf."

Pet. App. 8-9 (citation omitted). Yet most of these factors could not have swayed the jury one way or the other because only one of them, the first, was in front of the jury. The remaining were unpresented, not unpersuasive as the court assumed. Most notably, the final listed factor logically could not have been before the jury because it concerns events—the harassment of the defense witness who directly implicated Fries—that occurred after the trial was over. The Arizona Supreme Court's absurd inclusion of this item on its list of factors the jury purportedly found

unpersuasive is indicative of the overall lack of care—or sincere inquiry—displayed by the court in evaluating Mr. Atwood's *Brady* claim.

Similarly, the court concluded the Small memorandum was not material because, while Mr. 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[,]" "[s]uch supposition and conjecture is insufficient to establish the showing required in light of the quantum of evidence presented at trial." Pet. App. 8. This summary, however, omits the key fact that rendered the Small memorandum material: the car identified was owned by Fries' next-door neighbor. It was not some random vehicle connected to Fries only by speculation or wishful thinking. The notion that the tip would by coincidence reference a car that happened to be owned by neighbor of the woman who was at the time investigators' top suspect is beyond belief. By far the most rational explanation is that the tip was placed by Fries or an associate. The tip's timing further supports that theory, as it was made the day after a drawing resembling Fries was widely circulated and identified as a chief suspect, and after Fries was contacted by investigators and summoned for an interview. Unlike any of the evidence at the defense's disposal at trial, the Small memorandum provided an independent and concrete link between Fries and the case. This was strongly confirmatory of the evidence implicating Fries that *was* presented at trial, namely the mall witness sightings.

None of this entered the Arizona Supreme Court's analysis. Instead, it concluded the Small memorandum was not material by ignoring all of the reasons for its materiality.

The court completed its materiality analysis by quoting a passage of its own direct appeal opinion summarizing snippets of evidence, including witnesses who claimed to see Mr. Atwood with the victim or with blood on his hands and clothing. Pet. App. 9, quoting *Atwood*, 832 P.2d at 616. In light of these facts, the court held it "cannot conclude that the disclosure of the memorandum would have had any effect on Appellant's trial and conviction." *Id.*

Materiality analysis, however, is not performed by comparing the withheld evidence in a vacuum against evidence inculpating the defendant, as the court did here. Rather, the evidence must be considered as a whole. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Smith v. Cain*, 565 U.S. 73, 76 (2012). Here, witnesses who placed the victim with Mr. Atwood were impeached with their prior inconsistent statements. A witness who stated he saw blood was countered by a witness who said he saw none. Nor does the court's analysis factor in compelling evidence of Mr. Atwood's innocence presented at trial, including the implausibility of the State's timeline or the witness who positively identified Mr. Atwood lazily idling in a parking lot, alone in his car, at a time proved to be *after* the victim's kidnapping. Nor does the court grapple with the fact that if witnesses claiming to see the victim with Mr. Atwood inculpate him, then the mall witnesses who saw the victim with

Fries must also inculpate *her*—now, with the added confirmation provided by the Small memorandum.

By basing its materiality analysis on a disingenuous recounting of the record in rejecting Mr. Atwood's *Brady* claim, the Arizona Supreme Court disregarded fundamental principles of Due Process.

In *Brady* itself, this Court observed that "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant," in violation of Due Process. 373 U.S. at 87-88.

In *Kyles*, this Court held that a Due Process violation under *Brady* is established when a defendant shows "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435. And in *Smith*, this Court affirmed that the mere possibility that the jury might have disregarded the exculpatory value of the previously withheld evidence does not defeat the claim; if there is a reasonable probability that the new evidence might have altered the verdict, the defendant prevails. 565 U.S. at 76.

The Arizona Supreme Court's disingenuous reading of the evidence, which blatantly ignored the materiality of the suppressed evidence, misrepresented the strength of the prosecution's case, and misstated the evidence that was before the jury, represents an abdication of its duty to seriously address the grave due process violations in Mr. Atwood's case. As a result, the suppressed material exculpatory

evidence Mr. Atwood presents here, which was withheld by the State for decades, has never received meaningful consideration.

II. This Court Should Resolve Disagreements Among the States on How to Apply *Brady v. Maryland* to Circumstantial Third-Party Culpability Cases.

In rejecting Mr. Atwood's *Brady* claim, the Arizona Supreme Court relied on its assessment that the withheld evidence "adds little to the evidence available and already presented by Appellant that pointed to Ms. Fries as the person who kidnapped and murdered V.L.H." Pet. App. 13. In other words, it deemed the evidence cumulative, because it addressed a defense already presented, rather than considering the ways in which it might have significantly transformed or bolstered that defense. It further relied on the fact that the withheld evidence "does nothing to dispute the evidence at trial showing that" Mr. Atwood was the culprit, despite the fact that this was a purely circumstantial case with third-party guilt being the primary defense. Pet. App. 12.

In contrast, multiple states hold that evidence supporting a third-party-culpability defense that was already before the jury is material, especially in a circumstantial case. *See, e.g., Mazzan v. Warden, Ely State Prison*, 116 Nev. 48, 71–72, 993 P.2d 25, 39–40 (2000) (Nevada) (evidence that a known alternate suspect's alibi witness was connected to one of that alternate suspect's drug associates, and evidence that casts a known alternate suspect "a rather sinister light" is material); *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 344 (2013) (Missouri), as modified (Jan. 29, 2013) (evidence that a known third-party suspect had a violent

history material, especially in "a very thin and totally circumstantial case"); *People v. Bueno*, 2018 CO 4, ¶ 46, 409 P.3d 320, 330 (Colorado) (finding materiality where defendant "asserted an alternate-suspect theory of defense, and the undisclosed evidence pointed to alternate suspects"); *Harrington v. State*, 659 N.W.2d 509, 524-25 (2003) (Iowa) (new third-party evidence material where it makes a "concrete link between an alternative suspect and the victim;" "It was incumbent on the State to prove [the defendant's] guilt beyond a reasonable doubt; it was not [the defendant's] responsibility to prove that someone else murdered [the victim]. Therefore, if the withheld evidence would create such a doubt, it is material even if it would not convince the jury beyond a reasonable doubt that [the alternate suspect] was the killer.").

This Court should grant certiorari to clarify that Nevada, Missouri, Colorado, and Iowa's model for analyzing materiality of withheld third-party culpability evidence, in which its effect on the strength of the existing third-party culpability defense is assessed in light of the circumstantial nature of the case, is correct, and Arizona's is wrong.

CONCLUSION

The petition for writ of certiorari should be granted, the decision of the Arizona Supreme Court should be reversed, and this case should be remanded for further proceedings.

Dated: June 8, 2022

Respectfully submitted,

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