

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD,
Petitioner,

vs.

CHARLES L. RYAN,
Director of the Arizona Department of Corrections, et al.,
Respondents.

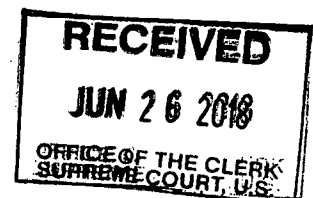
CAPITAL CASE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

UNOPPOSED MOTION TO FILE PETITION FOR WRIT OF CERTIORARI
OUT OF TIME

Larry A. Hammond (AZ Bar No. 4049)
Counsel of Record
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000 Telephone
(602) 640-9050 Facsimile
lhammond@omlaw.com

JON M. SANDS
Federal Public Defender
District of Arizona
Paula K. Harms (AZ Bar No. 022489)
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 Telephone
(602) 889-3960 Facsimile
Paula_Harms@fd.org



Petitioner Frank Jarvis Atwood electronically filed his Petition for Certiorari on June 7, 2018, but did not mail the paper copies until the next day, causing the Court to reject the filing as late. Atwood respectfully requests that the Court accept the late filing. Counsel for Respondents, Lacey Gard, does not object to the late filing of the petition.

BACKGROUND

Atwood was sentenced in Arizona state court for first-degree felony murder and received a sentence of death. Pursuant to Supreme Court Rules 13.5, 30.2 and 30.3, Atwood requested an extension of time of 60 days in which to file his Petition for Writ of Certiorari. The extension was granted to June 7, 2018. Petitioner's counsel electronically filed his Motion for Leave to Proceed *In Forma Pauperis*, Petition for Writ of Certiorari, and 439-page supporting Appendix through the Court's electronic filing system on June 7, 2018. Attached Exhibit A. The paper copies were sent by Federal Express on June 8, 2018. The delivery notifications from Federal Express state that the packages were delivered on Monday, June 11, 2018, at 9:38 a.m. and signed for by M. Hailey. Counsel then received notice from this Court on June 20, 2018, that the petition was filed out of time.

ARGUMENT

To determine whether a party's failure to meet a deadline constitutes excusable neglect, courts apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the moving party

acted in good faith. *Pioneer Invest. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S.380, 395 (1993).

Counsel, based upon electronic filing rules in other courts and their reading and understanding of the rules of this Court, were under the mistaken good faith belief that the documents would be considered properly filed on June 7, 2018, when they were submitted to the court electronically. Counsel was not aware that counsel's assistant was not preparing them for filing by mail on the same day. The length of the delay is minimal and counsel immediately drafted this Motion upon learning of the error. It should also be considered that this is a capital case and the last established step in the appellate process for Petitioner. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (noting that in the context of determining whether to issue Certificate of Appealability in a capital case, "the nature of the penalty is a proper consideration"). Counsel requests that the Court excuse their error and allow the Petition to proceed in light of the gravity of the consequences—that Petitioner will lose his last available chance at appellate relief and avoidance of execution, via the writ of habeas corpus, if the Petition is not allowed to be filed out of time. *See Lonchar v. Thomas*, 517 U.S. 314, 325 (1996) ("Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.").

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant the unopposed Motion and direct the clerk to file the Petition for Certiorari out of time.

Respectfully submitted this 22nd day of June, 2018.

OSBORN MALEDON, P.A.
Larry A. Hammond (AZ Bar No. 4049)
Counsel of Record
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000 Telephone
(602) 640-9050 Facsimile
lhammond@omlaw.com

JON M. SANDS
Federal Public Defender
District of Arizona

By 

Paula K. Harms (AZ Bar No. 022489)
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 Telephone
(602) 889-3960 Facsimile
Paula_Harms@fd.org

**Additional material
from this filing is
available in the
Clerk's Office.**