

**In the
Supreme Court of the United States**

FRANK JARVIS ATWOOD,
Petitioner,

v.

DAVID SHINN, Director, Arizona Department of Corrections,
Rehabilitation and Reentry, et al.
Respondents.

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE

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

MARK BRNOVICH
Attorney General of Arizona

JOSEPH A. KANEFIELD
Chief Deputy and Chief of Staff

BRUNN W. ROYSDEN III
Solicitor General

JEFFREY L. SPARKS
*Deputy Solicitor General
Section Chief of Capital Litigation
(Counsel of Record)*

LAURA P. CHIASSON
GINGER JARVIS
Assistant Attorneys General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
Capital Litigation Section
2005 N. Central Avenue
Phoenix, Arizona 85004
(602) 542-4686
CLDocket@azag.gov

Counsel for Respondents

In 1987, 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. Now, in his last-minute Application for Stay of Execution, Petitioner Frank Jarvis Atwood seeks to prevent Arizona from carrying out his lawfully-imposed sentence of death scheduled for a few hours from now, at 10:00 a.m. on Wednesday, June 8, 2022. As grounds, Atwood asserts that the court of appeals improperly denied a stay of execution on his claims arising from his spinal condition and his challenge to the gas chamber. Because the court of appeals correctly determined that the district court's denial of injunctive relief after an evidentiary hearing was not clear error, and correctly determined that Atwood lacks standing to challenge the gas chamber since that method will not be used for his execution, Atwood's his eleventh-hour request for a stay of execution should be denied.

I. STANDARD FOR INJUNCTIVE RELIEF.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id.* Moreover, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments[.]" *Hill v. McDonough*, 547 U.S. 573,

584 (2006). “Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). Equity does not tolerate last-minute abusive delays “in an attempt to manipulate the judicial process.” *Nelson*, 541 U.S. at 649 (quoting *Gomez*). “Repetitive or piecemeal litigation presumably raises similar concerns” as litigation that is “speculative or filed too late in the day.” *Hill*, 547 U.S. at 585. *See also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the “last-minute nature of an application” or an applicant’s “attempt at manipulation” of the judicial process may be grounds for denial of a stay).

To be entitled to a stay, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Ramirez v. Collier*, ___ U.S. ___, 142 S. Ct. 1264, 1275 (2022) (citing *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374, 376 (2008)); *McDonough*, 547 U.S. at 584; *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make a “clear showing.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997 (per curiam)).

These principles apply when a capital defendant asks a federal court to stay his pending execution. *Hill*, 547 U.S. at 584. A stay of execution is an equitable remedy and “equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Id.* A court

can consider “the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.” *Beardslee*, 395 F.3d at 1068 (quoting *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991)). Thus, courts “must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

Moreover, last minute stays of execution—as Atwood requests here, mere days before his scheduled execution—are particularly disfavored, as well-worn principles of equity attest. Late-breaking changes in position, last-minute claims arising from long-known facts, and other “attempt[s] at manipulation” can provide a sound basis for denying equitable relief in capital cases. *Ramirez*, ___ U.S. ___, 142 S. Ct. at 1282 (citing *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*) (“A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”); see also *Hill*, 547 U.S. at 584 (“A court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” (cleaned up)).

II. ATWOOD’S REQUEST FOR A STAY SHOULD BE DENIED.

First, as established in the Brief in Opposition, Atwood has failed to show likely success on the merits. Because Atwood bears the burden of “demonstrat[ing] that it meets all four” factors in order to obtain a stay of execution, *DISH Network*

Corp. v. F.C.C., 653 F.3d 771, 776-77 (9th Cir. 2011), his motion should be denied based on his failure to meet the first factor.

Even if a plaintiff can show a likelihood of success on the merits, however, “a preliminary injunction does not follow as a matter of course.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018). Rather, a court must also consider whether the movant has shown “that he is likely to suffer irreparable harm in the absence of preliminary relief....” *Id.* at 1944. Atwood asserts irreparable harm because he will be executed “in an unconstitutional manner.”

As explained in the Brief in Opposition, however, Atwood will be restrained on the lethal injection table in a position that the district court found is not “substantially different from the position he assumes in his cell” when he is at rest. Accordingly, he will not suffer the severe pain—and thus irreparable harm—he fears, and this Court should deny injunctive relief.

Atwood also argues that without a stay to litigate his lethal gas claims they will become moot after his execution. But if Atwood does not receive a stay of execution, then he will be executed by lethal injection, not lethal gas. His lethal gas claims would be moot because that method was not used. Atwood faces no risk of irreparable harm from an inability to litigate a method of execution that will not be used on him. And the State, which has a strong interest in timely enforcement of its criminal judgments, would be harmed by delaying a lawful execution in order to litigate a method of execution that will not be used on Atwood.

Before granting a stay, this Court must also determine that the balance of equities tips in [Atwood's] favor." *Benisek*, 138 S. Ct. at 1944. Atwood argues that "[t]he relative harm to the state in terms of delaying [his] execution is negligible." Application at 3. But this ignores the principle that "[e]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584.

Moreover, "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944. Atwood has known for more than a year that the State was seeking a warrant for his execution. The Arizona Supreme Court issued the warrant on May 3, 2022, setting his execution for June 8, 2022. Yet Atwood filed the instant complaint in district court 19 days before his scheduled execution—17 days after the Arizona Supreme Court issued its warrant. He waited another 6 days (until 13 days before his execution) to file a motion for a preliminary injunction in the court below, doing so only after this Court ordered him to indicate whether he intended to file a such a motion. *See* Dist. Ct. Dkt. 5, 16.

And rather than request the same reasonable accommodation he now uses to lie comfortably on his back, Atwood sought a new method of execution that he knows cannot be accomplished by his June 8 execution date. Thus, Atwood's true goal in the motion below, and here, is not to minimize the pain he will experience during his execution, but to delay the execution indefinitely by requesting alternative methods he knows the State is unable to provide absent significant

changes to its execution protocol and to the state constitution. Atwood has not acted equitably in seeking a stay, and this Court should deny his request.

Finally, to obtain a stay Atwood must show that “an injunction is in the public interest.” *Benisek*, 138 S. Ct. at 1944. Atwood asserts that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” Application at 4 (quotation marks omitted). But because Atwood’s constitutional rights will not be violated during his execution, this truism is irrelevant.

Moreover, “[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence.” *Hill*, 547 U.S. at 584. In particular, Arizona has provided victims a constitutional right “to be free from intimidation, harassment, or abuse, throughout the criminal justice process” and to “a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.” Ariz. Const. art. II, § 2.1(1), (10). Atwood’s victims waited 30 years for Atwood to complete his appeals. Now that he has, this Court should consider their right (and the State’s) to a speedy resolution of this already drawn-out case.

Denying Atwood’s motion and allowing the execution to proceed on June 8, 2022, will violate none of Atwood’s rights and will ensure the long-awaited conclusion to Atwood’s kidnapping and murder of an 8-year-old girl almost 40 years ago.

CONCLUSION

The request for a stay of execution should be denied.

Respectfully submitted,

MARK BRNOVICH

Attorney General of Arizona

JOSEPH A. KANEFIELD

Chief Deputy and Chief of Staff

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Solicitor General

JEFFREY L. SPARKS

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