

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

David Shinn, Director, Arizona Department of Corrections, Rehabilitation & Reentry; James Kimble, Warden, ASPC-Eyman; Jeff Van Winkle, Warden, ASPC-Florence; Lance Hetmer, Assistant Director for Prison Operations, Arizona Department of Corrections, Rehabilitation & Reentry; Mark Brnovich, Attorney General of Arizona; John Doe, Arizona-licensed Pharmacist, Respondents.

**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**

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Dated: June 8, 2022

In opposing Mr. Atwood’s request that this Court pause to consider the merits of his claims before allowing the State to proceed with killing him, Respondents talk at length about how stays of execution are generally disfavored, without acknowledging that Respondents are the primary reason Mr. Atwood’s concerns about his ability to lie on the execution table have not already been adequately addressed. They have not acknowledged that Mr. Atwood sought their assistance in adopting an appropriate alternative back in April, nor that they failed to offer any accommodation at all before June 3, just five days prior to today’s execution date, and suggested a different one two days later.

Next, they blithely assert that, because the district court found that a laid-flat, restrained position with a wedge pillow under the torso and both legs restrained to the table is similar to a one-knee-up supported position Mr. Atwood has assumed for unknown periods of time (potentially as short as an instant) in his cell, “he will not suffer the severe pain. . . he fears.” Opp. At 5. Their confidence is of no comfort to Mr. Atwood, whose medical expert sharply disagreed, uncontradicted, at the preliminary injunction hearing. Respondents’ conduct and the lower courts’ handling of this claim has created incredible uncertainty, and Respondents’ certainty that the execution will not be painful is a fantasy.

Either Mr. Atwood’s legs are going to be strapped down in a straight position—a position he *never* assumes because of the excruciating pain it would cause in his spine—or he is going to be positioned in some yet-known fashion that does not account for the likelihood of involuntary movements during IV insertion, especially in the

event that Respondents invoke the portion of their protocol that permits them to insert a femoral central line in Mr. Atwood's groin. Failed femoral lines have been responsible for several of the recent horrifically botched executions, including those of Clayton Lockett and Joseph Wood. As it stands, Respondents may very well attempt that on Mr. Atwood, even as he is already in agony from being strapped to the table, and his extreme pain significantly magnifies the chances of something going wrong. Alternatively, if they attempt some form of the accommodation they suggested for the first time before the Court of Appeals, in which Mr. Atwood is propped on a wedge pillow and, somehow, keeps one leg bent, an attempt to insert a central line could cause serious injury not only to Mr. Atwood, but to the executioners, should he suffer involuntary movements while not appropriately restrained, in the presence of needles, scalpels, and other sharp objects.

Because the lower courts continued to engage in tinkering with the protocol, it is now not at all clear what Respondents can and will do later this morning. What seems certain is that they do not intend to allow Mr. Atwood to be restrained in his wheelchair, which would minimize his pain, and they have not agreed to any defined procedure that will allow him to safely keep one leg bent. This Court should stay the execution to permit an orderly assessment of Respondent's proposed method and Mr. Atwood's proposed alternatives, rather than allowing the process to barrel forward in this cloud of uncertainty created by Respondents and the lower courts.

As for Respondents' treatment of the lethal gas claims, their only argument is that they are going to execute Mr. Atwood by lethal injection, not lethal gas. But that

argument simply assumes that Respondents will prevail, and does nothing to address the need to keep Mr. Atwood alive while this Court determines if they are in fact correct.

There is now a serious risk that a lethal injection execution carried out under the direction of lower courts that, due largely to Respondents' inconsistent positions, did not have all the necessary evidence to assess the issues will go badly awry, whether simply because the restraint involved is excruciatingly painful, or because that pain causes other dangers and risks major problems with IV line insertion. It is in no one's interest to produce yet another gruesome, botched execution. This Court can and should prevent that.

Respectfully submitted,

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