

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK JARVIS ATWOOD, Petitioner

vs.

STATE OF ARIZONA, Respondent.

**APPLICATION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF *CERTIORARI***

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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Mr. Atwood requests a stay of execution to permit this Court sufficient time to consider the meritorious arguments raised in this Petition for Writ of Certiorari. For the reasons stated herein, Mr. Atwood has met the standard warranting a stay of execution under 28 U.S.C. § 2251, 28 U.S.C. § 1651, and Supreme Court Rule 23.

This Court must consider four factors in evaluating whether to grant a stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar). In the present context, there must be “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted).

Concerning the first requirement, there is a strong probability that should this Court consider the merits of Mr. Atwood’s claim, the Court will grant relief. As discussed in the concurrently filed Petition for Writ of Certiorari, the prosecution withheld a key piece of evidence that cemented the case against a third-party suspect, in an already shaky circumstantial case. That rendered Mr. Atwood’s trial fundamentally unfair and unreliable.

The second factor—whether the applicant will be irreparably injured absent a stay—is necessarily met because the state will execute an innocent man who did not

receive a fair trial absent this Court’s granting a stay, and “foreclos[ing] . . . review” constitutes “irreparable harm.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) (noting that the irreparable harm requirement “is necessarily present in capital cases”). The Court has recognized that a stay is generally warranted when mootness is likely to arise during the pendency of the litigation—as it will if Mr. Atwood is executed on Wednesday June 8, 2022. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013).

Turning to the third factor, a stay will not substantially injure the opposing party. The relative harm to the state in terms of delaying Mr. Atwood’s execution is negligible. It was the State’s failure to disclose a piece of material exculpatory evidence—for over 30 years—that created this problem. The brief delay necessary for the Court to hear and resolve this claim adds very little to that.

Finally, the community as a whole will suffer harm if no stay is granted. The public interest is not served by executing Mr. Atwood before he has the opportunity to avail himself of the legal process to challenge the constitutionality of his conviction. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *In re Ohio Execution Protocol*, 860 F.3d 881, 901 (6th Cir. 2017). Indeed, allowing government misconduct to go unremedied will erode the public’s confidence that the court system offers a level playing field, providing a forum to redress grievous wrongs. And there is an “overwhelming public interest” in “preventing unconstitutional executions.” *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005)

(citation omitted). A stay of execution, in fact, will serve the strong public interest—an interest the government shares—in executing only those who are guilty and received fundamentally fair trials.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Atwood a stay of execution, or, in the alternative, enjoin Respondents from executing him until a trial in this case can be held.

Dated: June 8, 2022

Respectfully submitted,

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