No. 21A801

In the Supreme Court of the United States

FRANK JARVIS ATWOOD,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

CAPITAL CASE

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

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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 Arizona court improperly denied his fifth successive post-conviction petition, this one based on an alleged due process/*Brady* violation arising from a memorandum he discovered about a year ago yet waited to use as a basis for relief until days before his execution. Because the state courts correctly applied state procedural bars, and, further, because the underlying untimely claim is without merit, his eleventh-hour request for a stay of execution should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND.

Eight-year-old V.L.H. disappeared from her Tucson neighborhood on the afternoon of September 17, 1984, after riding her pink bicycle to a nearby mailbox. *State v. Atwood (Atwood I)*, 832 P.2d 593, 609 (Ariz. 1992). In April 1985, her skeletal remains were discovered in the desert northwest of Tucson. *Id.* at 611.

> • During a previous incarceration in 1982,[1] Atwood lamented to his pen pal Ernest Bernsienne that he was "still attracted to kids" but could not "handle another arrest." *Id.* at 613, 654–55;
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> • When Atwood was paroled from the California prison system in 1984, he absconded and traveled the country with his friend Jack McDonald, living out of his black 1975 Datsun 280Z. *Id.* at 593. He told

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[1] Before killing V.L.H., Atwood assaulted two children in California in separate incidents years apart. *See Atwood v. Ryan (Atwood IV)*, 870 F.3d 1033, 1039–40 (9th Cir. 2017); *Atwood I*, 832 P.2d at 610.

Bernsienne of his wish to "pick[] up" a child and vowed that "this time he would make sure the child wouldn't talk." *Id.* at 613, 655;

• Atwood was seen in his black Datsun 280Z mere feet from where V.L.H. disappeared and within seconds of her last being seen; a teacher at a nearby school, disturbed by Atwood's behavior as he sat in his car, recorded his license plate number. *Id.* at 609–10, 614, 657;

• Three people saw Atwood driving toward northwest Tucson with a small child in his car's passenger's seat. *Id.* at 611–12;

• Shortly after V.L.H. disappeared, Atwood appeared at De Anza Park with blood on his hands, clothes, and knife and cactus needles in his arms and legs. *Id.* at 610, 613, 652–53. He claimed to have stabbed a man in a drug-related altercation, after which he left the man's body in the desert. *Id.* at 613, 652–53;

• Atwood and McDonald left Tucson, bound for New Orleans, the night of V.L.H.'s abduction and encountered car trouble in rural Texas; Atwood told his mother over the telephone, "Even if I did do it, you have to help me," and later explained to McDonald that the police "were trying to stick something on him about a little girl." *Id.* at 610, 613, 653–54;

• After Atwood was arrested in Texas and his car impounded, the Federal Bureau of Investigation (FBI) determined based on scientific testing that a smear of pink paint on Atwood's front bumper came from V.L.H.'s bicycle, and that the bicycle bore nickel particles that had been transferred from Atwood's bumper. *Id.* at 612; and

• An accident-reconstruction expert opined that the paint smear on Atwood's bumper was at a height consistent with the bumper having impacted the bicycle, that the paint on the bumper appeared to match the bicycle, and that marks on Atwood's car's gravel pan were consistent with the car having struck the bicycle at low speed, causing the bicycle to lodge beneath the car. *Id.*

Relevant here, Atwood presented a third-party culpability defense, based on witnesses who believed they had seen V.L.H. at the Tucson Mall after her disappearance in the company of a woman proposed to be local resident Annette Fries, at a time when Atwood's whereabouts were known. *See id.* at 626; *see also*

Atwood v. Schriro (Atwood II), 489 F. Supp. 2d 982, 1032–33 (D. Ariz. 2007). Unpersuaded, the jurors found Atwood guilty of kidnapping and first-degree murder. *Atwood I*, 832 P.2d at 608–09. A judge later found the A.R.S. § 13– 703(F)(1) (1984) aggravating factor proven and, after finding no mitigation sufficiently substantial to warrant leniency, sentenced Atwood to death for murder and to a concurrent term of life imprisonment for kidnapping. *Id.* at 608, 663–65, 674.

Atwood unsuccessfully sought relief in state court on direct appeal and through a first post-conviction petition. *See Atwood IV*, 870 F.3d at 1044; *Atwood I*, 832 P.2d at 677. In 1998, he initiated a federal habeas proceeding, which consumed 20 years. *See Atwood IV*, 870 F.3d at 1044. During the course of the habeas case, he returned to state court to file a second post-conviction petition, arguing that police had "planted" on the bumper of his car the pink paint used to convict him.[2] *Id.* at 1045, 1050. The post-conviction court found this claim devoid of any "'link to provable reality.'" *Id.* at 1050 (quoting state-court ruling).

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[2] Atwood specifically proposed that Pima County Sheriff's Department detectives secretly traveled to Texas (where Atwood's car was impounded in FBI custody), removed the bumper from the vehicle, flew it to Tucson on a commercial flight, applied paint from V.L.H.'s bicycle (at precisely the correct height, even considering the degree to which Atwood's car was weighed down at the time of the collision), returned the bumper to Texas, reaffixed it to the car, and then manipulated various paint samples and photographs to cover their tracks. *Atwood IV*, 870 F.3d at 1050–51.

After years of additional federal litigation, including an evidentiary hearing on counsel's alleged ineffectiveness at sentencing, the district court denied habeas relief, *see Atwood v. Ryan (Atwood III)*, 2014 WL 289987 (D. Ariz. Jan. 27, 2014), and the Ninth Circuit affirmed, *see Atwood IV*, 870 F.3d at 1039–79. Atwood failed to file a timely petition for writ of certiorari, ending his decades-long appellate odyssey. *See Atwood v. Ryan (Atwood V)*, 139 S. Ct. 298 (Oct 1, 2018) (Mem.) (denying motion to direct clerk to file petition for writ of certiorari out of time); *see generally* Ariz. R. Crim. P. 31.23(b) ("On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.").

Shortly thereafter, Atwood initiated a third post-conviction proceeding, in which he raised various sentencing claims, including an allegation that the (F)(1) aggravating factor was constitutionally infirm. The post-conviction court denied relief, and the Arizona Supreme Court denied review.

On June 25, 2021, Atwood initiated a fourth post-conviction proceeding, asserting that new testing of the paint evidence would show that the paint on his bumper did not match the paint on V.L.H.'s bicycle. Litigation on this petition included Atwood's unsuccessful attempts to obtain special action relief from the Arizona appellate courts. The post-conviction court denied relief on February 1, 2022, and Atwood did not seek review of that ruling.

On May 3, 2022, the Arizona Supreme Court issued a warrant for Atwood's execution, which is scheduled for June 8, 2022. Atwood has filed actions in various

levels of the state and federal courts related to his execution. Relevant here, Atwood filed in the Ninth Circuit a Motion for Order Authorizing District Court to Consider a Second or Successive Habeas Petition. *See Atwood v. Shinn*, Ninth Circuit Case No. 22-70084. Atwood asserted, among other claims, that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a memorandum memorializing an anonymous tip received on September 19, 1984, two days after V.L.H. went missing. After briefing, the Ninth Circuit held argument on May 24, 2022, and on May 27 the court denied Atwood's motion in a published opinion. *See Atwood v. Shinn*, ___ F.4th ___, 2022 WL 1714349 (9th Cir. May 27, 2022).

On June 1, 2022, Atwood filed a fifth petition for post-conviction relief asserting the same *Brady* claim he presented in the Ninth Circuit on May 4, 2022. He then sought a stay from this Court under Arizona Rule of Criminal Procedure 32.18. On June 6, 2022, the superior court dismissed Atwood's petition, concluding that the claims were precluded and/or untimely. The court further found that "it appears likely that Petitioner intentionally refrained from raising [his claims] sooner in hopes that raising a new claim at this late stage might persuade the Arizona Supreme Court to issue a stay of execution." Pet. App. C, at 2. The Arizona Supreme Court denied the motion for stay as moot, and Atwood then sought review of the superior court's dismissal of his petition for post-conviction relief.

On June 7, 2022, the Arizona Supreme Court granted review, but denied relief in a detailed Minute Order. Pet. App. 1–15. For the reasons stated in the accompanying Brief in Opposition to Atwood's Petition for Writ of Certiorari, the

Arizona courts correctly applied state procedural law to deny Atwood's precluded and/or untimely and factually unsupported due process/*Brady* claim in all of its iterations presented under Arizona's criminal procedural Rule 32.

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

Because, as established in the Brief in Opposition, the Arizona courts correctly denied Atwood's strategically untimely post-conviction claim regarding the alleged *Brady* evidence, this Court should likewise deny his eleventh-hour request for a stay of execution.

"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 hours 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)).

This is particularly so where Atwood reserved this alleged *Brady* claim to file now—days before execution—instead of last summer when he learned of the memorandum he claims would credibly point to a third party. Atwood does not attempt to explain why he waited until one week before his execution to present the claim, particularly when he asserts that the evidence proves his innocence. As the post-conviction court observed:

> Given the procedural posture of this case, including Petitioner being scheduled for execution on June 8, 2022, it appears likely that Petitioner intentionally refrained from raising the issue sooner in hopes that raising a new claim at this late stage might persuade the Arizona Supreme Court to issue a stay of execution.

Pet. App. at 17. The Arizona Supreme Court agreed. *Id.* at 4.

Finally, as detailed in the Brief in Opposition, even were Atwood's claim(s) timely, it would not have likely changed the verdict because it does not add

significantly to the evidence that Atwood already possessed to support his third-party culpability theory. But more importantly, the memorandum does not contradict the evidence of Atwood's guilt that was presented at trial, including the fact that paint from V.L.H.'s bicycle was found on the bumper of his car. *See State v. Atwood*, 171 Ariz. 576, 594–96 (1992) (summarizing the evidence). As the post-conviction court, the Arizona Supreme Court, and the Ninth Circuit have all concluded, here is no reasonable probability that the jury would not have convicted Atwood had the memorandum been disclosed, and therefore Atwood cannot prevail on his *Brady* claim. As such, this Court, like all previous courts, should deny Atwood's request for a last-minute stay of execution.

CONCLUSION

The request for a stay should be denied.

Respectfully submitted,

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