Nos. 21A799, 21–8083

In the Supreme Court of the United States

In Re

FRANK JARVIS ATWOOD,

Petitioner,

CAPITAL CASE

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

RESPONSE TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

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STATEMENT OF THE CASE

The facts of this aged, high-profile case are well-known and have been repeatedly litigated for almost four decades. 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. At trial, the State established Atwood's guilt through eyewitness testimony, scientific evidence, and Atwood's own statements, consisting of the following:

- 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;
- 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 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;

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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.

- 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.*

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).

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 this Court 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)

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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.

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. 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. On May 4, 2022, Atwood an application for leave to file a second or successive petition for writ of habeas corpus. The Ninth Circuit denied the application on May 27, 2022.

REASONS FOR DENYING THE PETITION

Petitioner Frank Atwood has filed an original petition for writ of habeas corpus in this Court, asserting that no valid aggravating circumstance applies to his conviction and asking this Court, on the literal eve of his execution, to stay his execution.[3] Because Atwood's attempt is nothing more than an out-of-time petition for certiorari on the state courts' rejection of the claim, and an end-run around his inability under 28 U.S.C. § 2244(b)(3)(E) to seek a writ of certiorari on the Ninth Circuit's denial of authorization of a second or successive petition for writ of habeas corpus, this Court should deny Atwood's petition.

A. THE PETITION IS AN OUT OF TIME PETITION FOR WRIT OF CERTIORARI.

On January 13, 2020, Atwood filed a successive petition for post-conviction relief in the Arizona superior court alleging, as relevant here, that the sole aggravating factor supporting his death sentence was not properly found by the trial court and as a result his death sentence was improperly imposed. On June 22, 2020, the post-conviction court found the claim both untimely and precluded under Arizona's procedural rules. It so found because "[a]ll of the facts and the law applicable to this claim were available to Petitioner at the time of his sentencing, appeal, and prior [R]ule 32 post-conviction proceedings." 6/22/20 Ruling, at 3. Atwood sought review in the Arizona Supreme Court, but that request was denied

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[3] Atwood challenges the method by which the state courts determined that his prior conviction in California satisfied the aggravating circumstance. He agreed in his Ninth Circuit briefing that the claim has been available to him for at least 20 years.

on May 4, 2021. Supreme Court Rule 13 provides that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." This time for filing is jurisdictional. Atwood did not seek a writ of certiorari in this Court within 90 days of the Arizona Supreme Court's denial of review.[4] His effort to obtain review of his claim now is simply an inappropriate attempt at an end-run around this Court's lack of jurisdiction over the matter. This Court should reject Atwood's petition.

B. THE PETITION IS AN END RUN AROUND THE NINTH CIRCUIT'S DENIAL OF A SECOND OR SUCCESSIVE HABEAS PETITION.

Atwood also presented this claim in his recent attempt to obtain authorization from the Ninth Circuit to file a second or successive petition for writ of habeas corpus. The Ninth Circuit denied his application, finding Atwood failed to satisfy the requirements of 28 U.S.C. § 2244(b). *Atwood v. Shinn*, 2022 WL 1714349 (9th Cir. May 27, 2022). As did the state court, the Ninth Circuit observed that the claim has been available to Atwood since his trial. *Id.* at * 2–3. 28 U.S.C. § 2244(b)(3)(E) prohibited Atwood from seeking a writ of certiorari from this Court,

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[4] It is unclear why Atwood believes that he has "made every effort to expeditiously bring this claim to federal court in a timely fashion after exhausting it in state court." *See Petition*, at 19.

and his current attempt at an original habeas petition is merely an end-run around the statutory prohibition.

C. ATWOOD HAS FAILED TO COMPLY WITH SUPREME COURT RULE 20.

Atwood fails to comply with Rule 20's requirements that he explain his reasons for not making this application in the district court, explain specifically where and how he exhausted state court remedies, and show that exceptional circumstances warrant exercise of this Court's discretionary powers and that adequate relief cannot be obtained in any other form or from any other court.

First, Supreme Court Rule 20 also requires that a petition seeking a writ of habeas corpus must comply "with the provision in the last paragraph of [29 U.S.C.] § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.'" Atwood has failed to do so. In fact, he fails to explain why he did not present this claim—which the state court found was available to him since the time of sentencing—in the original habeas corpus proceeding that he initiated in district court in 1997. *See* Petition at 3.

Rule 20 also requires that, if a petition for habeas corpus filed in this Court seeks relief from a state court judgment, it must "set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)." Atwood cannot comply with this requirement because the claim is unexhausted. Proper exhaustion requires a prisoner to "invok[e] one complete round of the State's established appellate review

process," *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), raising his or her claim "in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting the court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). As the state post-conviction court observed, this claim was available to Atwood since his sentencing and direct appeal. As a result, the state court found the claim precluded under Rule 32.2 under the Arizona Rules of Criminal Procedure. The claim is therefore procedural defaulted and not subject to habeas review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court.").

Finally, Rule 20 requires a petitioner to "show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Atwood does not attempt to meet this requirement, nor can he. As the post-conviction court found, Atwood could have presented this claim at sentencing and in his direct appeal. He sought to do so, it also would have been properly exhausted and therefore available for review in his initial petition for writ of habeas corpus. However, Atwood failed to take advantage of any of these avenues for relief. Instead, he waited decades and sought to present the claim in a successive petition for post-conviction relief, where it was precluded under state procedural rules, then presented it in an application to file a second or successive habeas petition which was rejected by the Court of Appeals, and now, after those avenues have failed, attempts to present the claim to

this Court. Atwood's lack of diligence in presenting this claim in a procedurally appropriate manner is not an exceptional circumstance warranting this Court's exercise of its discretionary powers.

D. THIS COURT SHOULD DENY ATWOOD'S MOTION TO STAY.

Atwood seeks a stay of his execution "to permit this Court sufficient time to consider" his petition. Petition at 19. But Atwood has deprived this Court of "sufficient time" to consider this claim (even if it is properly presented) by waiting until the literal day before his execution to present a claim that has been available since his trial. Moreover, injunctive relief such as a stay "is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018) (quotation marks omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Thus, even if a plaintiff can show a likelihood of success on the merits, "a [stay] does not follow as a matter of course." *Benisek*, 138 S. Ct. at 1943. These principles apply "even in the context of an impending execution." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012); *see also Hill v. McDonough*, 547 U.S. 573, 583–84 (2006) ("Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course.").

First, for the reasons explained above, Atwood has failed to show a likelihood of success on the merits. Moreover, Atwood could hardly have shown less diligence in pursuing this claim. As both the state court and the Ninth Circuit have found, and Atwood agreed, this claim has been available to Atwood at least since 1998. Yet he has waited until the day before his execution to present it to this Court.

Moreover, Atwood has failed to demonstrate that a stay is in the public interest. *Benisek*, 138 S. Ct. at 1944. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. 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.[5]

Denying Atwood's petition and stay, and allowing the execution to proceed on June 8, 2022, will violate none of Atwood's rights and will ensure the long-awaited

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[5] Given the short response time afforded by Atwood's late presentation of this claim in this Court, Respondents do not address every argument in Atwood's petition. Instead, they assert the most compelling arguments for denying the petition and the motion to stay. Their failure to address every argument in the petition should not be construed as concessions.

conclusion to Atwood's kidnapping and murder of an 8-year-old girl almost 40 years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

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