No. 21-________

IN THE
SUPREME COURT OF THE UNITED STATES

In Re:
FRANK JARVIS ATWOOD, Petitioner

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE III § 2 OF THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 28 U.S.C. §§ 2241, 2254, AND MOTION FOR STAY OF EXECUTION

CAPITAL CASE

EXECUTION SCHEDULED FOR JUNE 8, 2022

MOTION FOR STAY OF EXECUTION

AMY P. KNIGHT
Counsel of Record
KNIGHT LAW FIRM
3849 E. Broadway Blvd., #288
Tucson, AZ 85716-5407
(520) 878-5407
amy@amyknightlaw.com

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612

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INTRODUCTION

Frank Jarvis Atwood's eligibility for a sentence of death is premised on a single aggravating circumstance, that his prior conviction was one "for which under Arizona law a sentence of life imprisonment or death was imposable." Ariz. Rev. Stat. § 13-703(F)(1) (West 1984). Put another way, absent this aggravating circumstance, his death sentence is unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

No prior counsel of Mr. Atwood's identified a fatal flaw with this aggravating circumstance: that Mr. Atwood's prior conviction does not qualify him for a sentence of death under the only aggravating circumstance purporting to do so. Arizona state courts engage in a categorical approach for assessing whether another state's criminal conviction qualifies under this aggravating circumstance, as it has since long before Mr. Atwood's conviction became final. This approach was never undertaken in Mr. Atwood's case. Had it been, Mr. Atwood would not today be facing imminent execution. Indeed, he would not be eligible for a sentence of death at all. The two statutes in question contain different elements from each other, which can be met by conduct covered in one statute but not the other. Namely, the Arizona statute requires the act to be in "any unnatural manner," which Arizona courts have held extends to fellatio, cunnilingus, or homosexual conduct; the California statute does not. Under the controlling categorical approach, the California conviction cannot render Mr. Atwood death eligible.

This original writ is the only opportunity for merits review of this claim. Mr. Atwood's current counsel presented this claim to Arizona state courts, where the state

Superior Court held the claim was procedurally barred. App. 3a. He then presented it to the Ninth Circuit Court of Appeals in a request for permission to file a second or successive petition for a writ of habeas corpus. That request was denied because the Ninth Circuit is among those circuits where, after the passage of AEDPA, where "innocence of the death penalty" is no longer a gateway for considering a second or successive petition, as set forth in *Sawyer v. Whitley*, 505 U.S. 333 (1992). App. at 13a (citing *Thompson v. Calderon*, 151 F.3d 918, 923–24 (9th Cir. 1998) (en banc), *as amended* (July 13, 1998)).[1] But as it stands, he must resort to this Court's jurisdiction and request that it invoke its equitable powers to issue a writ of habeas corpus to stop the state from taking the life of a person who, according to the state's own laws, is not eligible to be put to death. *See Felker v. Turpin*, 518 U.S. 651, 660 (1996) (explaining that AEDPA "has not repealed our authority to entertain original habeas petitions").

STATEMENT OF THE CASE

Following a jury trial, Petitioner Frank Jarvis Atwood was found guilty of one count each of kidnapping and first-degree murder. The State sought the death penalty, and just one aggravating factor was found: under former Arizona Revised Statute § 13-703(F)(1), that Mr. Atwood had previously been convicted of a sentence punishable in Arizona by life imprisonment or death. The State only presented

[1] If Mr. Atwood was in the jurisdictions that still held open that equitable gateway, the jurisdictional concerns arising from having no consideration of the merits his claim that he is not eligible for his death sentence would fall away. *See* Brandon Garrett, *Accuracy in Sentencing*, 87 Cal. L. Rev. 499, 525 n.125 (2014) (noting courts are "divided" on treatment of *Sawyer* claims after the passage of AEDPA).

regarding that factor, a fingerprint examiner who testified that Mr. Atwood’s fingerprints matched those from the California conviction. PCR Ex. 71, RT 3/26/87 at 18–20. In its sentencing pleading, the State quoted California’s and Arizona’s lewd/lascivious statutes to show that both statutes allowed sentences of up to life in prison. PCR Ex. 72. No one—not the judge, not the prosecutor, and not defense counsel—actually considered each element of the two statutes or recognized the significant differences between the elements, as discussed below.

The trial court, having found the presence of this aggravating factor, also found no mitigating evidence sufficient to call for leniency and imposed a death sentence in May, 1987.

The Arizona Supreme Court affirmed Mr. Atwood's conviction and sentence. *State v. Atwood*, 832 P.2d 593 (Ariz. 1992). Thereafter, Mr. Atwood filed a post-conviction petition. The state court denied all claims for relief on January 28, 1997. Mr. Atwood then filed a petition for writ of habeas corpus in United States District Court, pursuant to 28 U.S.C. § 2254. Habeas proceedings were temporarily stayed to allow Mr. Atwood to exhaust certain claims in a successive post-conviction petition in state court, which was denied on January 2, 2009. The District Court thereafter denied Mr. Atwood’s habeas petition on January 27, 2014. *Atwood v. Ryan*, No. CV-98-116-TUC-JCC, 2014 WL 289987 (D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed. *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017).

Mr. Atwood then filed a pro se successive post-conviction notice and petition in state court on April 23, 2019, raising the issue he seeks to raise here regarding the

invalidity of his sole aggravating factor. After the appointment of counsel and filing of an amended petition, the state trial court denied relief on June 22, 2020, finding the claim precluded. App. at 3a ("The Court finds that this claim is precluded by Rule 32.2(a)(3) . . . and no exception to preclusion applies."). It further held that the claim had been "impliedly considered and rejected" by the Arizona Supreme Court during direct appeal proceedings, although the claim was not briefed on direct appeal and was not discussed in the direct appeal opinion. App. at 3a. On May 4, the Arizona Supreme Court denied Mr. Atwood's petition for review. App. at 7a.

The day before, on May 3, 2022, the Arizona Supreme Court had issued the execution warrant, scheduling Mr. Atwood's execution for June 8, 2022.

CLAIM FOR RELIEF:

Without a legally valid aggravating factor, Mr. Atwood's death sentence violates the Eighth and Fourteenth Amendments.

A. Mr. Atwood Is Not Death Eligible Because His Crime Does Not Fall Within the Narrow Class of Murders Designated As Such, As the Eighth and Fourteenth Amendment Require

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court required that a valid death penalty scheme must meaningfully narrow the class of murders for which the death penalty may be imposed. *See also Gregg v. Georgia*, 428 U.S. 153, 196–97 (1976) (approving Georgia's new death penalty scheme because it "narrow[ed] the class of murders subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can be imposed."). Like Georgia, Arizona

accomplished that by creating a list of aggravating circumstances, at least one of which must be found before a death sentence is possible; if at least one is found, the court would then proceed to considering any of the aggravating circumstances, and whether any of five statutory mitigating circumstances was "sufficiently substantial to call for leniency." At the time Mr. Atwood was sentenced, nine aggravating factors existed. The trial court found just one: the existence of a prior conviction for an offense "for which under Arizona law a sentence of life imprisonment or death was imposable." Ariz. Rev. Stat. § 13-703(F)(l) (West 1987). The problem is that Mr. Atwood's prior conviction, on which his death eligibility was premised, was not such a crime. Accordingly, just as in cases where the qualifying prior conviction is vacated, this prior does not satisfy the (F)(1) aggravating circumstance, and, regardless of the fact that that aggravator was found at trial, it cannot support a death sentence.

1. Under Arizona law, a foreign conviction only satisfies the (F)(1) aggravator if the statutory elements for the statute of conviction would establish eligibility for a life sentence, without reference to the facts of the individual crime.

Statues that give consequences to prior convictions, especially where they might come from other jurisdictions, predictably raise the question of how to determine which foreign convictions qualify. This quandary is familiar in federal courts from the "categorical approach" cases that have repeatedly arisen in recent years under the Armed Career Criminal Act, federal sentencing guidelines, § 237(a) of the Immigration and Nationality Act, and others. *See, e.g., Burden v. United States*, 141 S. Ct. 1817 (2021); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 576 U.S. 591 (2015). For many of these statutes, federal courts have adopted

a “categorical approach” or “elements test” where the prior conviction suffices only if its elements, on their face, would meet the requirements, and there is no way to violate the underlying statute without also satisfying the requirement. Arizona has adopted the same approach for its (F)(1) aggravating factor.

Long before Mr. Atwood’s 1987 sentencing, the Arizona Supreme Court specifically held that the statutory elements approach, in which the evidence underlying the foreign conviction does not matter, applied to (F)(l). First, in *State v. Lee*, 559 P.2d 657 (Ariz. 1976), the court prohibited introduction of facts underlying a prior conviction to prove (F)(1), explaining "[t]he proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the conviction . . . and establish the defendant as the person to whom the document refers.” *Id.* at 661 (citations omitted).

In *State v. Smith*, the court again looked only to the elements, not the underlying facts, in deciding a Texas murder with malice conviction supported (F)(l):

> The court below did not err in considering appellant’s prior conviction for murder as an offense for which under Arizona law a sentence of life imprisonment was imposable, since murder with malice is as a minimum second degree murder and punishable under [former] § 13-453 by imprisonment in the state prison for not less than ten years.[2]

State v. Smith, 610 P.2d 46, 51 (Ariz. 1980).

[2] Arizona’s indeterminate sentencing scheme, repealed in 1978, permitted life imprisonment when a statute set no maximum term. *State v. Jordan*, 561 P.2d 1224, 1228 (Ariz. 1976), *vacated on other grounds*, 436 U.S. 911, 911–12 (1978).

Next, in *State v. Greenawalt*, 624 P.2d 828 (Ariz. 1981), the court reaffirmed *Lee* in even clearer language. In *Greenawalt*, the state alleged the (F)(2) aggravator, which required conviction of a felony "involving the use or threat of violence on another person." Greenwalt argued that the court could not consider the underlying facts to determine if his prior crime was violent, but the court rejected the argument as applicable only to the (F)(l):

> Appellant interprets our decision in [*Lee*] as precluding the sentencing court from receiving any evidence other than certified copies of prior convictions. Appellant errs in his interpretation of our decision in *State v. Lee*, *supra*. There, we were concerned with the introduction of evidence of prior convictions as they related to the first aggravating circumstance, A.R.S. § 13-454(E)(l) (now § 13-703(F)(l)) . . . The limitation on proof which was adopted in [*Lee*] has no application to the second aggravating circumstance.

Id. at 849.[3]

Arizona courts have also consistently applied this analysis in a range of contexts calling for the use of foreign convictions. *See, e.g., State v. Bible*, 858 P.2d 1152, 1207 (Ariz. 1993) (holding error to find (f)(2) satisfied because "neither the use nor the threat of violence was a *necessary* element for sexual assault.") (emphasis in original); *State v. Roque*, 141 P.3d 368, 391 (Ariz. 2006), *quoting State v. Henry*, 176 Ariz. 569, 587 (1993) ("statutory definition of the prior crime, not its specific factual basis" used to determine whether foreign conviction established (F)(2)) (internal quotation omitted); *State v. Wilson*, 152 Ariz. 127, 128, 131 (1986) (former A.R.S. §

[3] Two years later, the Arizona Supreme Court clarified that as with (F)(1), only the prior conviction's elements can establish the aggravator, but underlying facts may be considered to determine the *weight* that aggravator receives. *See State v. Gillies*, 662 P.2d 1007, 1018 (Ariz. 1983).

13-604(I)); *State v. Ault*, 157 Ariz. 516, 518 (1988) (former Ariz. Rev. Stat. § 13-604(N), "historical felony conviction")); *Cherry v. Araneta*, 203 Ariz. 532, 535 ¶11 (App. 2002) (applying test to "violent crime" exempting defendant from mandatory probation); *State v. Kuntz*, 209 Ariz. 276, 279 ¶9 (App. 2004) (determining whether new resident must register as sex offender); *State v. Muran*, 232 Ariz. 528, 533–34, ¶15–16 (App. 2013) (prior conviction element of aggravated DUI under Ariz. Rev. Stat. § 28-1383).

Although overlooked in Mr. Atwood's appeal, decided in 1992, the Court continued applying the statutory elements test to (F)(l). *See State v. Spencer*, 176 Ariz. 36, 42–43 (Ariz. 1993) (recognizing (F)(l) focuses on "merely the elements of the offense"); *State v. Murdaugh*, 209 Ariz. 19, 30 (2004) (newly recognized right to jury trial on aggravators inapplicable to (F)(l) "because they involve a legal determination that may be made by a judge, rather than a factual determination required to be made by a jury."); *accord*, *Ault*, 157 Ariz. at 520 (statutory elements test presents "purely a legal question").

Arizona's courts have repeatedly recognized that the statutory elements test is not an arbitrary rule, but rather is necessary to satisfy the Arizona and United States Due Process Clauses, Ariz. Const. Art. II, § 4, and U.S. Const. Amend. XIV, confirming that the (F)(l) aggravator cannot somehow be excluded from this ubiquitous rule. *See Roque*, 213 Ariz. at 216 ¶ 81 quoting *State v. Schaaf*, 169 Ariz. 323, 333–34 (1991) ("To protect 'a criminal defendant's due process rights,' a court 'may not consider other evidence[] or bring in witnesses' to establish the offense."); *Atwood*, 171 Ariz. at 654 (trial court "is forbidden on due process grounds from

considering the facts underlying a defendant’s prior convictions for purposes of establishing [(F)(2)]”); *State v. Hinchey*, 165 Ariz. 432, 437 (1990) (“[C]ourt may consider only evidence of the conviction; allowing other evidence to establish the violence element violates defendant's due process rights.”); *Gillies*, 135 Ariz. at 511 (“[Statutory elements] reading of the statute guarantees due process to a criminal defendant.”); *Kuntz*, 209 Ariz. at 279 ¶ 9 (citing due process in rejecting prosecution argument elements test be limited to sentence enhancements). The test ensures capital defendants receive sufficient notice of aggravating evidence and are sentenced based on accurate evidence that is not unduly inflammatory.

In summary, Arizona's courts uniformly apply the statutory elements test whenever a foreign conviction may impose duties or aggravate sentences. Mr. Atwood was and is entitled to the same treatment as every other defendant. Notably, in the litigation on this issue, the State has not actually argued that the statutory elements test does not apply to the (F)(1). Rather, it has painstakingly argued only that the state court should not consider the merits of the claim, and that there was no Arizona Supreme Court opinion explicitly stating the statutory elements test applied to the (F)(1), insisting Mr. Atwood simply “vastly overstate[d] his position’s strength.” Exhibit 74, State's PCR Response at 46. This reticence signals the State’s recognition there is a constitutional problem with a foreign-prior-conviction aggravator that cannot pass the elements test.

Indeed, the State of Arizona has recently taken the position that the statutory elements test is broadly applicable when considering foreign prior convictions, even

conceding error and agreeing to a resentencing in the Court of Appeals. In *State v. Mora*, 252 Ariz. 122 (App. 2021), the State took the position that the non-capital sentencing enhancement statute, A.R.S. § 13-705, requires that "an out-of-state felony must strictly conform to an Arizona felony for sentencing purposes." Exhibit 75, State's Supplemental Brief at 6. The State argued that the use of foreign convictions in various contexts required that the foreign conviction "includes every element that would be required to prove an enumerated Arizona offense," and that a prior opinion specifically stating that in one sentencing context, "its holding was not limited to" that statute. *Id.* at 7–8. Finally, it explicitly conceded there was no "strict conformity" between a Texas statute on "indecency with a child" and an Arizona statute for molestation of a child, explaining, "[i]f under any scenario it would have been legally possible for the defendant to have been convicted of the foreign offense but not the Arizona offense, then the foreign offense fails the comparative elements test," and the Texas statute applied to contact with any child under 17, where the Arizona law required the victim to be under 15. *Id.* at 12–13. The State recognized that because the requisite contact with a 15- or 16-year-old would violate the Texas but not the Arizona statute, the Texas convictions could not be used for the sentencing enhancement. In its *Mora* briefing, the State was clear, thorough, and explicit, revealing its true position. It seems to have carefully avoided taking a directly contrary position here—an act that would raise serious due process questions.

2. Mr. Atwood's California conviction indisputably does not qualify as an offense for which under Arizona law a sentence of life imprisonment or death was imposable.

Mr. Atwood's foreign conviction was under California Penal Code § 288, California's version of the "lewd and lascivious conduct" law that in Arizona appeared in Arizona Revised Statute § 13-652 (at the time that offense was committed, in 1974). While the two statutes have a lot in common, it is indisputably possible to violate the California statute without violating the Arizona one. Notably, the Arizona statute, unlike the California statute, requires that the act be committed in "an unnatural manner."[4]

The inclusion of this additional element in the Arizona statute makes sense. The Arizona statute applies to everyone, adults and children alike, albeit with dramatically harsher sentences if the person is a child. Assuming the "unnatural manner" requirement has some meaning (and it does, as explained below), it is

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[4] The Arizona statute reads in full:

> A person who willfully commits, **in any unnatural manner**, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female person, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of such persons, is guilty of a felony punishable by imprisonment for not less than one nor more than five years. If such person commits the act as described in this section **upon or with a child under the age of fifteen years**, such person shall be punished by imprisonment in the state prison for not less than five years nor more than life without the possibility of parole until minimum sentence has been served.

Ariz. Rev. Stat. § 13-652 (emphasis added).

The California statute reads in full:

> Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, **of a child under age of fourteen years**, with the intent of arousing, appealing to or gratifying the lust or sexual desires of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term from one year to life.

Cal. Penal Code § 288 (emphasis added).

possible to violate the California statute without violating the Arizona one. Accordingly, it fails the statutory elements test, and, in creating death eligibility, Mr. Atwood's California conviction cannot stand in for an Ariz. Rev. Stat. § 13-652 conviction.

The Arizona Supreme Court has explicitly stated the language imposes an additional requirement: "Under this statute there is the requirement not only that the act be lewd and lascivious but also that it be done in an 'unnatural manner.'" *State v. Valdez*, 23 Ariz. App. 518, 522 (1975) (rejecting conviction based on defendant "rubbing his penis on the victim's buttocks and splashing water on her vagina" on grounds those acts "were not 'unnatural'"). In terms of what, exactly, that restriction entails, "unnatural manner" has only ever been interpreted to extend to fellatio, cunnilingus, or homosexual conduct.[5] That leaves a wide swath of conduct criminalized by California's, but not Arizona's, statute.

The history of§ 13-652 illuminates the centrality of the "unnatural manner" element. Its precursor, "An Act Prohibiting Unnatural Sexual Relations," was

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[5] *State v. Jeruusek*, 121 Ariz. 420, 423 (1979) (cunnilingus); *State v. Pickett*, 121 Ariz. 142, 145 (1978) (fellatio); *State v. Bateman*, 25 Ariz. App. 1, 2-3 (1975) (fellatio); *State v. Callaway*, 25 Ariz. App. 267, 268 (1975) ("oral intercourse"), *vacated on other grounds by State v. Bateman*, 113 Ariz. 107 (1976); *State v. Williams*, 111 Ariz. 511, 513 (1975) (fellatio); *State v. King*, 110 Ariz. 36, 38 (1973) (cunnilingus, fellatio); *State v. Taylor*, 109 Ariz. 481, 482 (1973) (fellatio); *State v. Mortimer*, 105 Ariz. 472 (1970) ("masturbation by one adult male upon another adult male"); *State v. Hill*, l04 Ariz. 238, 238 (1969) (cunnilingus, fellatio); *State v. Zakhar*, 105 Ariz. 31, 31 (1969) (fellatio); *State v. Phillips*, 102 Ariz. 377, 381 (1967) (fellatio); *State v. Howard*, 97 Ariz. 339, 341 (1965) (fellatio, cunnilingus); *State v. Sheldon*, 91 Ariz. 73, 74 (1962) (fellatio); *State v. Thomas*, 79 Ariz. 355, 357 (1955) (cunnilingus); *State ex rel. Junes v. Superior Court*, 78 Ariz. 367, 373–74 (1955) (fellatio); *Faber v. State*, 62 Ariz. 16, 17–18 (1944) (fellatio); *State v. Farmer*, 61 Ariz. 266, 268 (1944) (fellatio, cunnilingus); *Dutzler v. State*, 41 Ariz. 436, 436 (1933) (fellatio); *State v. Bridges*, 123 Ariz. 452, 453 (App. 1979) (fellatio); *State v. Snyder*, 25 Ariz. App. 406, 407 (1976) (fellatio, anal copulation); *State v. Morris*, 26 Ariz. App. 342, 343 (1976) (fellatio); *State v. Baker*, 26 Ariz. App. 255, 256–57 (1976) (fellatio); *State v. Natzke*, 25 Ariz. App. 520, 523 (1976) (cunnilingus); *State v. Smallwood*, 7 Ariz. App. 266, 267 (1968) (fellatio).

materially identical to §13-652, including the "unnatural manner" element and no age requirement. Laws 1917, §1, Ch. 2; Ariz. Rev. Code § 4651 (1928); *see State v. Farmer*, 61 Ariz. 266, 268 (1944). It targeted "acts between same-sex partners." *May v. Ryan*, 245 F. Supp. 3d 1145, 1153 n.3 (D. Ariz. 2017), *rev'd in part on unrelated grounds*, *May v. Ryan*, 766 Fed. App'x 505 (9th Cir. 2019).

3. The legal invalidity of the sole aggravating factor requires vacating Mr. Atwood's death sentence.

Because the only aggravator was not legally valid, the sentence must be vacated. As the Supreme Court has recognized, ineligibility for the death penalty is assessed "under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). The state's statutory aggravating circumstances "play a constitutionally necessary function." *Zant v. Stephens*, 462 U.S. 862, 878 (1983).

In *Zant*, the Supreme Court clearly distinguished the situation where the sole aggravator is invalid from those where other aggravators were validly found. *Id*. at 884 ("[A] death sentence supported by at least one valid aggravating factor need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."); *see also Brown v. Sanders*, 546 U.S. 212 (2006) (in a state that explicitly weighs aggravators and mitigators, finding of invalid aggravators subject to harmless error analysis). In a very recent Ninth Circuit case from Arizona involving an analogous situation-two aggravating circumstances were based on invalid convictions-the Arizona court's and Ninth Circuit's reason for upholding the sentence was that "[t]wo valid aggravating

circumstances remain after excluding the two that were based on the invalid convictions." *Hooper v. Shinn*, 985 F.3d 594 (9th Cir. 2021). Obviously, if the narrowing function is constitutionally required, and the mechanism set up for doing that has not been satisfied, the sentence cannot stand.

B. Mr. Atwood's death sentence is unconstitutional even if Arizona did not require a statutory elements test because no evidence whatsoever of the facts of the prior conviction were presented, and the California statute covered conduct that would not produce a life sentence in Arizona

The Eighth and Fourteenth Amendments require sufficient evidence not only to convict, but also to aggravate, something plainly missing here. For convictions, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord State v. Portillo*, 182 Ariz. 592, 594 (1995), *quoting In re Winshi*p, 397 U.S. 358, 364 (1970) ("It is well established that the Due Process Clause protects criminal defendants against conviction 'except upon proof beyond a reasonable doubt' of every element of the crime charged.") (footnote omitted).

The Eighth and Fourteenth Amendments impose the same requirement for capital sentencing aggravators. *Kansas v. Marsh*, 548 U.S. 163, 170 (2006), quoting *Walton v. Arizona*, 497 U.S. 639, 650 (1990) ("So long as a State's method of allocating the burdens of proof does not lessen the State's burden . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated").

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the jury found three aggravating factors, one of which was that the defendant "was previously convicted of a felony involving the use or threat of violence to the person of another," based on a prior assault conviction in another state. The State's only evidence on that aggravator was an authenticated copy of a sentencing order; no evidence about the underlying crime or conduct was presented. 486 U.S. at 581, 585 ("The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct - the document submitted to the jury proved only the facts of conviction and confinement, nothing more."). That aggravating factor was subsequently invalidated as to the defendant, because the prior assault conviction was reversed by the state that had issued it. It thus could not be validly considered in aggravation-which required resentencing even in a case where two other valid aggravating factors had been found and left undisturbed. *Id.* at 586 (recognizing "a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'"). Where the evidence supporting the aggravator consists of only the fact of foreign conviction, and the foreign statute of conviction is broader than the Arizona statute, the evidence is inherently insufficient. A Mississippi court has recently come to the same conclusion. In *Gillett v. State*, 148 So.3d 260 (Miss. 2014), the jury found, as one of four aggravating factors, that the defendant "had been convicted of a felony involving the use or threat of violence to the person," based on an out-of-state conviction for

aggravated escape. The court had recognized on direct appeal that "not every escape can be considered a crime of violence under the Kansas statute, and the facts surrounding and supporting the Kansas conviction for attempted aggravated escape are unknown," *id*. at 264, which meant the state had not presented sufficient evidence to support the prior-violent-felony aggravator. (The court had then found that error harmless, given the three other aggravators, but that decision was reversed in postconviction proceedings, and resentencing was ordered).

This (F)(l) error renders Mr. Atwood innocent of the death penalty. Permitting his execution would be "so wantonly and so freakishly imposed" as to violate the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

C. No adequate state ground bars this Court's review.

The state trial court (affirmed without comment by the state supreme court) had two bases for refusing to consider the merits of the claim: first, it was not a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant, and second, that on deciding the direct appeal of the case in 1992, the state supreme court, sub silentio, considered and rejected this claim that neither side had presented to it in conducting an independent review of the appropriateness of the death sentence. Neither is an adequate state ground.

In the direct appeal opinion, the Arizona Supreme Court stated, "We have found no mitigating circumstances sufficiently substantial to call for leniency, and we have found no fundamental error. We therefore affirm the trial court's finding of one

aggravating circumstance, A.R.S. § 13-703(F)(l).” That was all it said about the aggravator.

The court was engaging in what it called “fundamental error review,” something it did, at the time of Mr. Atwood's appeal, in every case (under a statute, Ariz. Rev. Stat. § 13-4035, since repealed in 1995, and as the court’s practice, *see State v. Mann*, 188 Ariz. 220 (1997) (ending the practice)). If that general review constituted an implied rejection of the merits on every conceivable claim, there would be no such thing as either (1) a claim that was unexhausted upon reaching federal court or (2) state postconviction review, which has never been allowed for a claim already considered on direct appeal. But Arizona, of course, has always taken the position that claims must be actually presented to the state court to be considered adjudicated for either of these purposes. The trial judge’s maneuver here was a true innovation-exactly the sort of “infrequent, unexpected, or freakish” application that renders a ground inadequate. *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994).

Nor did the “independent review” the Arizona Supreme Court was obligated to conduct at the time constitute an implicit rejection of the claim on the merits. In the very case the state invoked in state court proceedings to suggest independent review constituted an implicit rejection of claims not raised, this court found 17 constitutional claims were not exhausted. *See Roseberry v. Ryan*, 2019 WL 3556931 at *3, *5 (D. Ariz. Aug. 5, 2019). The state did not argue otherwise. If the Arizona Supreme Court’s independent review had constituted a consideration and rejection of those claims, they would have been exhausted by virtue of that independent review.

In short, if the rule applied by Arizona here were actually used, no constitutional claim could ever be raised in a case where the Arizona Supreme Court had affirmed the conviction and sentence on direct appeal. But of course, the fact that a court has never accepted an argument that has never been put to it simply cannot establish that it has been resolved on the merits.

Regarding the non-waivable right, the right at issue here is the Eighth Amendment's requirement that a state capital punishment scheme genuinely narrow the class of murders for which a death sentence can be imposed. It is hard to see how that right could be waived at all, let alone without a personal waiver that is knowing, intelligent, and voluntary-is the State free to execute anyone who volunteers for it, no matter what their crimes (or lack thereof)?

Giving up appeals in a capital case requires not only a personal waiver, but proceedings to determine the defendant's competency to make such a decision and the voluntariness of the decision, requirements far beyond the waiver simply being a personal one. *See, e.g., Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000). There is no indication Arizona has ever treated the right to be free from cruel and unusual punishment as waivable. To suddenly do so as grounds for rejecting a federal claim is not adequate.

D. Timeliness

This Petition is premised on this Court's equitable power to issue a writ of habeas corpus. As such, the timeliness limitations present in 28 U.S.C. § 2244(d)(1) simply do not apply. Moreover, as discussed *supra*, this petition is also based on Mr.

Atwood's innocence of the death penalty, which is itself a sound basis for permitting an otherwise time-barred habeas petition. *See generally Sawyer*, 505 U.S. 333 (1992). Mr. Atwood also made every effort to expeditiously bring this claim to federal court in a timely fashion after exhausting it in state court. Regardless, because Mr. Atwood is innocent of the death penalty, timeliness concerns should not bar this Court's review.

MOTION FOR STAY OF EXECUTION

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 Habeas Corpus. 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 *supra*, Mr. Atwood is ineligible for execution.

The second factor—whether the applicant will be irreparably injured absent a stay—is necessarily met because the state will take Mr. Atwood's life 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 provide Mr. Atwood with competent counsel that has given rise to the need to press this issue at this late date. And claim in question undermines any valid interest in executing Mr. Atwood, as expressed by the State's own policies. Mr. Atwood has pursued this issue as soon as his counsel recognized it, and the procedural underpinnings of this petition were brought as expeditiously as possible.

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 legality of his sentence. "[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 administering capital punishment in a manner consistent with the Constitution and the expressed policies of the State.

CONCLUSION

WHEREFORE, this Court should order a stay of execution, order further briefing on this case, remand the case to the District of Arizona to conduct an evidentiary hearing on Mr. Atwood's claim, and order any other relief just and necessary.

Respectfully submitted this 7th day of June, 2022.

AMY P. Knight
**Counsel of Record*
KNIGHT LAW FIRM
3849 E. Broadway Blvd., #288
Tucson, AZ 85716-5407
(520) 878-5407
amy@amyknightlaw.com

JOSEPH J. PERKOVICH
PHILLIPS BLACK, INC.
P.O. Box 4544
New York, NY 10163

JOHN R. MILLS
PHILLIPS BLACK, INC.
1721 Broadway, Suite 201
Oakland, CA 94612

Counsel for Petitioner