No. 22-15821A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK JARVIS ATWOOD,
Plaintiff-Appellant,

v.

DAVID SHINN, Director, Arizona Department of Corrections, Rehabilitation & Reentry; et al.,
Defendants-Appellees.

On Appeal from the United States District Court
For the District of Arizona
District Court Case No. 2:22-cv-00860-PHX-MTL (JZB)

DEATH PENALTY CASE

MOTION FOR STAY OF EXECUTION
Execution Scheduled for June 8, 2022, at 10:00 a.m. PDT

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INTRODUCTION

Plaintiff-Appellant Frank Jarvis Atwood moves this Court for a stay of his scheduled execution on June 8, 2022, at 10:00 a.m. PDT. Appellant presents this Court with a grave problem in its jurisprudence that, if left unremedied, will ensure his unconstitutional death. By this motion, Appellant hereby seeks a stay of execution to permit the relief necessitated by his accompanying brief and request for hearing *en banc*.

On June 4, 2022, at 7:23 p.m. PDT, the District Court denied Appellant's motion for a preliminary injunction relating to his Amended Complaint and the two counts, concerning Arizona's hydrogen cyanide lethal gas method, dismissed from that pleading in the same order. Doc. 46. Generally, this Court reviews such a denial for abuse of discretion. *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999). Appellant established that his action was likely to succeed on the merits and he faced irreparable injury and, further, the counts in question, which concern Defendants-Appellees' designation of hydrogen cyanide gas as a method of execution, raise "serious questions" for which Appellant's "balance of hardships tips sharply in his favor." *Johnson v. Cal. State Bd. Of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

ARGUMENT

The Supreme Court made it clear in *Barefoot v. Estelle* that a stay should be

granted when necessary to "give non-frivolous claims of constitutional error the careful attention that they deserve." 463 U.S. 880, 888 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c). When a court cannot "resolve the merits of [a claim] before the scheduled date of execution," a stay must be granted. *Id.* at 889. It is axiomatic that a court may grant a stay of execution if the moving party establishes that: (1) he has a strong likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the balance of hardships tips in his favor; and (4) if issued, the injunction would further the public interest. *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005) (per curiam); *see also Glossip v. Gross*, 576 U.S. 863, 875–76, *reh'g denied*, 576 U.S. 1090 (2015) (stating that a plaintiff seeking preliminary injunction must show "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"). Consideration of these factors in Appellant's case dictates a finding that a stay of execution is warranted.

First, there is a strong likelihood that Mr. Atwood will succeed on the merits. Arizona law provides that Mr. Atwood must be permitted to select between lethal injection and lethal gas. Ariz. Const. Art. 22 Sec. 22; A.R.S. § 13-757(B). Defendants have rendered that election a Hobson's choice by designating a torturous

method this Court has previously found unconstitutional,[1] cyanide gas, as the sole means of carrying out lethal gas executions in Arizona. Current law in this circuit, however, effectively denies Mr. Atwood or any future similarly situated inmate from challenging a facially unconstitutional method such as cyanide gas. This Court has "suggested that a constitutional challenge to an execution method becomes ripe when the method is chosen." *Beardslee v. Woodford*, 395 F.3d 1064, 1069 n.6 (9th Cir. 2005), *citing LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999). However, if an inmate chooses a given method of execution, he waives his ability to challenge that method's constitutionality. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (per curiam).

This is a classic Catch-22. Mr. Atwood cannot challenge Arizona's facially unconstitutional designation of cyanide gas as its lethal gas method unless he selects it as his method of execution. But if he selects it, he waives his ability to mount a constitutional challenge of it. Arizona law gives Mr. Atwood the right to choose between lethal gas and lethal injection, and it is axiomatic that where there is a right, there is a remedy. Arizona cannot avoid its legal obligation to provide a constitutional lethal gas option by designating an unconstitutional method in a posture that effective precludes review of that designation. Yet that is precisely what

[1] *Fierro v. Gomez*, 77 F.3d 301, 302 (9th Cir. 1996), *vacated on other grounds by Gomez v. Fierro,* 519 U.S. 918 (1996).

the State and Defendants have done. Because this state of affairs is patently untenable, it must be corrected by this Court. Mr. Atwood is therefore likely to prevail on the merits.

Second, Mr. Atwood will suffer irreparable injury unless the injunction issues. Again, Arizona law gives Mr. Atwood the right to choose between lethal injection and lethal gas, yet the Hobson's choice created by Defendants' designation of cyanide gas means that he has never had a meaningful opportunity to make that selection. If a stay does not issue, Mr. Atwood will be executed without ever having had the ability to exercise his right to choose between methods. This is a particularly salient concern because Mr. Atwood reasonably fears, due to his debilitating spinal condition and Defendant's failure to ensure the reliability of its drugs, that a lethal injection execution would also be torturous.

Third, the balance of hardships tips strong in Mr. Atwood's favor. Mr. Atwood is being denied the meaningful choice between lethal gas and lethal injection that he is guaranteed by State law. Proceeding with his execution without giving him that choice creates a grave risk he will be subjected to a lethal injection execution that would cause him extreme pain. The hardships he faces are great.

The hardships a stay would occasion against Defendants, by contrast, are minor. Defendants would perhaps not be able to execute Mr. Atwood on his current execution date, but the State could always seek a new warrant and new execution

date once they have provided Mr. Atwood with a meaningful lethal gas choice. Moreover, Defendants' hands are unclean. Despite multiple revisions to Arizona's execution procedure over the decade since this Court found cyanide gas unconstitutional, they have persisted in designating cyanide as Arizona's lethal gas rather than designating a lawful and easily implemented gas method, such as nitrogen. To the extent delay causes Defendants any hardship, they have only themselves to blame. The balance of hardships clearly favors Mr. Atwood.

Finally, staying Mr. Atwood's execution to permit time for review of this matter would further the public interest. When state law confers a right to an individual, surely the public interest is not furthered by the State's legal gamesmanship effectively denying the individual his ability to exercise that right. Moreover, Mr. Atwood is not alone in being confronted with this catch-22. More than a dozen other Arizona prisoners have the right to make the same selection as Mr. Atwood. Because this problem is certain to repeat unless and until Arizona provides a constitutional lethal gas option, the public interest favors resolving this matter now, instead of allowing this plain due process violation to play out again and again.

Mr. Atwood is likely to prevail on the merits. He will suffer irreparable injury if a stay is not issued. The balance of hardships strongly favors him over defendants. And the public interest strongly favors a stay so that this issue may be

resolved now, rather than serially repeating itself time and again in the months and years ahead. In short, every factor favors granting a stay. *Barefoot*, 463 U.S. at 888.

CONCLUSION

For the reasons explained above, granting a stay is appropriate. Accordingly, Mr. Atwood respectfully requests that this Court stay his execution pending this Court's review of this matter.

Respectfully submitted,

DATED June 5, 2022:

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on June 5, 2022, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record.

s/Amy P. Knight
AMY P. KNIGHT