

TOTORO, J., concurring

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**APPELLATE DIVISION
OF THE BROADVIEW COUNTY COURT**

453324343434 *v.* PEOPLE OF FLORIDA

ON APPLICATION FOR STAY

No. 23-03. Decided June 10, 2023

JUDGE TOTORO, with whom THE CHIEF JUDGE, JUDGE XIQAQ, and JUDGE ZIAXUN join, concurring in the denial of the application for stay.

I concur in the denial of the application for stay. I write to address an important issue that arose in the Petitioner’s application regarding the proper test for stay applications.

From the outset, the relief Petitioner sought from this court was unclear. Petitioner requested “preliminary injunctive relief” and stated that this Court “is requested to stay the proceedings within the case.” See Petitioner’s Request for Preliminary Injunctive Relief at 1. What Petitioner appears to have desired was a stay pending the filing of a petition for a writ of certiorari, not an injunction. To some, this distinction may appear purely semantical. Yet, in this case, it proved fatal.

A preliminary injunction is a judicial prohibition granted to prevent one party from adversely and irreparably injuring the other while litigation proceeds. For example, if a landlord was imminently about to demolish a building, an interested party might seek an injunction to prevent the landlord from taking such an irreversible action while litigation ensues.

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Injunctions, however, are not imposed by higher courts on lower courts whose decisions are being appealed. For an injunction to be enforceable, it needs a person who it can be enforced upon. However, injunctions cannot be entered against a state court or its judges. *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021). Rather, a party seeking to pause the judgement of a lower court while it pursues an appeal must apply for a stay pending the filing of a writ of certiorari. While such a stay would be functionally equivalent to what Petitioner sought when he mistakenly requested an injunction, the difference matters here. The tests to receive these forms of relief differ.

In his application, Petitioner lays out the traditional four-factor test required for injunctions that one might seek in the lower courts. That test requires the movant to show (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of injunction relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public's interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7 (2008). Whether Petitioner satisfied this four-factor test is irrelevant, because it's the wrong test for a stay pending appeal.

When a Petitioner seeks to stay a lower court's ruling pending the filing of a petition for a writ of certiorari, he must instead demonstrate that: (1) a reasonable probability that two Judges will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.¹ See, e.g., *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U. S. 1301, 1305 (1974) (Powell, J., in

¹ The first prong of this test requires a showing that "two Judges will consider the issue sufficiently meritorious to grant certiorari or note probable jurisdiction." Before the United States Supreme Court, this number would be four. In both cases, the number of Judges/Justices is the number required to grant a writ of certiorari.

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chambers); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). In close cases, the issuing Judge or Court should consider the balance of equities and weigh the relative harms to both parties. *Id.*, see also *Lucas v. Townsend*, 486 U. S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg*, 448 U. S. 1306, 1308 (1980) (Brennan, J., in chambers).

Since Petitioner has applied the incorrect test, he has failed to demonstrate that two Judges will consider the issue sufficiently meritorious to grant certiorari and that a fair prospect that a majority of the Court will vote to reverse the judgment below.

Consequently, I voted to deny Petitioner's application for a stay.