No.

IN THE
Supreme Court of the United States

MURRAY HOOPER,
Petitioner,

v.

DAVID SHINN,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

APPLICATION FOR STAY OF EXECUTION

SCHEDULED FOR NOVEMBER 16, 2022 AT 12PM ET

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

The State of Arizona has scheduled the execution of Murray Hooper for November 16, 2022, at 10:00 AM Mountain Standard Time. Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Mr. Hooper respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari filed along with this application for stay.[1]

The State of Arizona intends to execute Murray Hooper, a 76-year-old Black man, despite the County Attorney informing him—*for the first time in forty years and less than three weeks ago*—that the only eyewitness failed to identify Mr. Hooper in a photo lineup. The prosecution's suppression of material evidence material and the presentation of false testimony violated his due process rights under this Court's long-standing precedent. *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). As the State's attorney admitted in the hearing below: if the photoline up evidence exists, then Mr. Hooper would be entitled to "dive right back into everything." Nonetheless, the Arizona courts denied relief.

If this Court does not grant a stay, Mr. Hooper's pending petition for review will become moot if his execution is carried out as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J., concurring). For the reasons explained below, Mr.

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[1] Mr. Hooper asked the Arizona Supreme Court to stay his execution pending this Court's review of his petition for certiorari. That request was denied.

Hooper urges this Court to grant his Application for a Stay of Execution.

A. Mr. Hooper did not delay in bringing this claim.

There is 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." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citation omitted). Through no fault of Mr. Hooper, he is seeking review of his *Brady* and *Napue* claims on the eve of his execution. And not because of delay tactics, but because the State withheld exculpatory evidence in defending Mr. Hooper's convictions for the past four decades. Indeed, Mr. Hooper has made no "last-minute attempts to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653, 654 (1992) (per curium)).

Prior to and during trial, Mr. Hooper made explicit inquiries seeking information regarding the procedures related to Mrs. Redmond's identification of him. But the prosecutor, law enforcement officers, and even Mrs. Redmond repeatedly denied that she had viewed a photograph of Mr. Hooper prior to the in-person lineup. Despite his best efforts, he did not learn that this representation was false until less than three weeks ago.

As soon as he learned that the County Attorney possessed exculpatory evidence in its file, Mr. Hooper sought relief from the state courts. In anticipation of his clemency hearing scheduled on November 3, 2022, Mr. Hooper obtained two letters through an open records request that were from the County Attorney to the Clemency Board, one dated October 28, 2022, and the other dated November 1, 2022. In both of those letters,

the prosecutor represented that "Hooper and [codefendant] Bracey were arrested in Chicago. [Mrs. Redmond] was flown out and participated in live line ups with them. *She had previously been unable to pick them out of a paper lineup*." Pet. Apps. F, G at 11.

On November 2, 2022, Mr. Hooper's counsel met with him and obtain a signed release form. *See* Pet. App. H at 2. On that same day, Mr. Hooper's team sent a request for disclosure to the Maricopa County Attorney's Office. Pet. App. H. On November 4, Mr. Hooper filed for post-conviction relief in the state courts. The state actors—including attorneys with County Attorney and Attorney General offices—have refused to allow Mr. Hooper access to their files.

This Court's "decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). Mr. Hooper cannot control the fact that the County Attorney never disclosed that Mrs. Redmond viewed a photo lineup until it filed its submission opposing clemency. Thus, he cannot be blamed for the delay in his request to receive a fair trial. Principles of equity favor staying the execution in this case.

B. Mr. Hooper can satisfy the factors necessary for a stay of execution.

In deciding whether to grant a stay of execution pending appeal, the Court considers four factors: "(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, 434 (2009) (quoting *Hilton v. Braunskill*,

481 U.S. 770, 776 (1987)); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006) (similar). As set forth below, these factors weigh in favor of staying Mr. Hooper's execution.

1. Mr. Hooper is likely to succeed on the merits.

As Mr. Hooper has laid out in his Petition for Writ of Certiorari, the Arizona Supreme Court has turned *Brady* and *Napue* on their heads by allowing the state to ignore its obligation under this Court's long-standing precedents. Here, the state courts required Petitioner to prove that the county attorneys were "mistaken" when they disclosed that the sole eyewitness had failed to identify Petitioner in a paper photo lineup. However, Petitioner had no way to disprove the statement without having access to the files, which he requested and was denied. This Court has long rejected the rule that a 'prosecutor may hide, defendant must seek'" as being untenable "in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Once the state has admitted that material exculpatory evidence exists, then it has a duty to provide a defendant access to that evidence. However, the Arizona courts instead have required Petitioner to prove that the State's initial representation—that an exculpatory paper photo lineup exists—is true, all the while denying access to the state's prosecutorial files. This newly created rule is incompatible with this Court's bedrock decisions that make clear that the burden is on the state, not the defendant, to produce exculpatory evidence.

Where the state suppresses evidence, a defendant "need not show that he 'more likely than not' would

have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 577 U.S. 385, 392 (2016). Rather "a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (cleaned up). This Court has reiterated time and again that the "reasonable probability" standard is not the same as the "more likely than not" standard, but rather it is a lower standard. *Kyles*, 514 U.S. at 434 (citing cases).

The standard provided in *Napue* is even lower: a new trial is required if the false testimony "may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272.

The state court ignored clearly established precedents. Mr. Hooper is likely to succeed on the merits of his claim.

2. The balance of harm weighs in Mr. Hooper's favor.

The second and third factors—whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding—weigh in Mr. Hooper's favor. If this Court does not issue a stay, Mr. Hooper will be executed without the opportunity to fully litigate his meritorious claim that the State withheld exculpatory evidence for over forty years. Because an "execution is the most irremediable and unfathomable of penalties," the harm caused by carrying out an unjust execution is necessarily "irremediable." *Ford v. Wainwright*, 477 U.S. at 411; *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (recognizing that irreparable harm "is necessarily present in capital cases").

Allowing the State of Arizona to execute Mr. Hooper while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984). Because "'the normal course of appellate review might otherwise cause the case to become moot,' . . . issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)).

As to the third factor, a stay will not substantially injure the opposing party. Had the State complied with its obligations to disclose exculpatory information before trial, or even in the thirty-plus years that this case has been on appeal, then Mr. Hooper would not be in the position of seeking a stay from this Court. It would now be fundamentally unfair to hold the State's suppression of evidence against Mr. Hooper in considering injury to the opposing party.

3. A stay of execution will serve the public interest.

A stay here would further the public interest, which is served by enforcing constitutional rights and by the prompt and accurate resolution of disputes regarding constitutional rights. *See, e.g.*, *Cooey v. Taft*, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006) ("[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.") Because of the constitutional violation alleged here—the prosecutor's suppression of evidence that supported Mr. Hooper's innocence, undermined the only eye witness testimony, and compounded the improper actions taken in obtaining this conviction—a stay will servce the public interest of ensuring the fair administration of justice.

This Court has recognized the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor is a represenative of the State, "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). The *Brady* rule functions in our criminal legal system "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). It would be a miscarriage of justice to execute a man who learned only three weeks ago that the State withheld material evidence that, had it been disclosed before trial, would have undermined the outcome of his case.

A stay of execution, therefore, will serve the strong public interest—an interest the State shares—in administering criminal justice and capital punishment in a manner consistent with due process.

C. An administrative stay is appropriate pending the disposition of Mr. Hooper's petition for writ of certiorari.

This Court can stay the case pending disposition of Mr. Hooper's petition for writ of certiori if it finds "(1) a reasonable probability that four Justices 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." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

There is a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari. And, upon granting certiorari and resolving the constitutional issues presented, Mr. Hooper asserts that there is a fair prospect that five Justices are likely to reverse the decision below. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983). Further, without a stay, Mr. Hooper will be executed causing irreparable harm.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Hooper's application and stay his execution so it will be able to review the pending petition for writ of certiorari.

Respectfully submitted,

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November 15, 2022