No. 22A425

In the Supreme Court of the United States

MURRAY HOOPER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

EXECUTION SCHEDULED FOR NOVEMBER 16, 2022 AT 10:00 AM MST

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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In his eleventh-hour Application for Stay of Execution, Petitioner Murray Hooper seeks to prevent Arizona from carrying out his lawfully-imposed sentence of death scheduled for a few hours from now, at 10:00 a.m. on Wednesday, November 16, 2022. As grounds, Hooper continues his baseless accusation that the County Attorney possesses "exculpatory evidence" in its file in the form of a "paper lineup" that does not exist. Petitioner doubles down again on a claim that the Arizona Supreme Court minced no words in dismissing: ". . . Petitioner's claim the State has failed to disclose a paper lineup, including allegations of misconduct and unethical conduct *has no evidentiary support and no basis in fact*." (Pet. App. at 14–15, emphasis added.) Because the state court correctly applied state procedural bars, and, further, because the underlying claim is without merit, this last-minute request for a stay of execution should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. *Hooper's crimes.*

On New Year's Eve 1980, Hooper, William Bracy, and Ed McCall forced their way at gunpoint into the home of Pat Redmond and his wife Marilyn Redmond. *Hooper v. Shinn (Hooper II)*, 985 F.3d 594, 599 (9th Cir. 2021). Pat, Marilyn, and Marilyn's mother, Helen Phelps, were inside preparing for a holiday dinner. Hooper and the other two intruders demanded valuables, forced the victims to lie face down on the bed in the master bedroom, and then bound and gagged the victims. The intruders then shot each victim in the head and slashed Pat Redmond's throat. Pat and Helen died, but Marilyn survived. *Id.*

Robert Cruz, the head of a Chicago crime organization, had hired the three perpetrators to kill Pat Redmond because Cruz wanted an interest in Pat's business but Pat had rejected Cruz's business offers. *Id.* at 600. Cruz first offered Arnold Merrill $10,000 to kill Pat, but Merrill refused him. *Id.* Cruz then flew Hooper and Bracy to Phoenix from Chicago, where they lived, to carry out the crime. *Id.* Merrill assisted by driving Hooper and Bracy around Phoenix, including to collect money from Cruz and to a gun store to obtain the murder weapons, letting Hooper and Bracy stay at his home for a period of time, and giving Bracy directions to Pat's home. *Id.* at 600–01. Immediately after the murders, Hooper, Bracy, and McCall went to Merrill's home before Hooper and Bracy were driven to the airport to fly back to Chicago. *Id.* at 601.

The day after the murders, McCall admitted to two women, Valinda Lee Harper and Nina Marie Louie (whom Merrill had introduced to Hooper and Bracy before the murders and in whose apartment the killers had been before leaving to commit the murders), how the murders had been committed, stating that it was a "contract … hit, not a robbery," and that Hooper had slashed Pat's throat and shot Marilyn. *Id.* McCall also described the crimes to Merrill. *Id.* On January 1, 1981, Harper called the police and told them Hooper, Bracy, and McCall had committed the murders. *Id.* at 601–02.

Marilyn initially told a responding police officer that "[t]hree black men came in and robbed us," but then stated that two of the intruders were black and one was white. *Id.* at 601. She also told police that one of the black males wore a tan

leather jacket with dark pants. *Id.* Fifty-three days after the murders, Marilyn flew to Chicago where she identified Hooper and Bracy in lineups. *Id.* at 602.

B. *Trial.*

Hooper and Bracy were each charged with conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary. *Id.* They were tried together. *Id.*

"The prosecution presented overwhelming evidence of Hooper's guilt." *Id.* at 603. "Marilyn provided very specific details about her lengthy encounter with the murderers," and identified Hooper, Bracy, and McCall as the killers. *Id.* "Her in-court identifications were certain, and she did not waiver when the defense suggested she could be mistaken." *Id.*

Louie testified that she met Hooper and Bracy in December 1980 and that she overheard Bracy say that "he had a big job to do" for $50,000 and that "it wasn't going to be very pretty." *Id.* Hooper, Bracy, and McCall were at her apartment on New Year's Eve armed with guns, and Bracy said that they had "some business to take care of." *Id.* at 603–04. The next day, Louie testified, McCall came to her apartment and told her Marilyn was shot in the back of the head (not the face as a newscaster stated), that the victims were taped rather than tied up, and that only Pat's throat was slashed. *Id.* at 604. He also said that all three men wore gloves and that Hooper had shot Marilyn and cut Pat's throat. *Id.* Louie's testimony was corroborated by receipts found in McCall's vehicle for the purchase of three pairs of

gloves and tape the day of the murders, testimony that a vehicle matching McCall's was seen near the Redmond home around the time of the murders, and testimony that Harper called police the day after the murders and implicated Hooper, Bracy, and McCall. *Id.*

Another witness, George Campagnoni, testified that on New Year's Eve he saw Merrill give Bracy a piece of paper with directions to the Redmond home and Pat's business and that he saw Hooper, Bracy, and McCall later that evening at Merrill's home with jewelry, "some of which looked very similar to a ring and watch owned by [Pat] Redmond." *Id.*

Merrill also testified. He explained Cruz's plan to have Redmond killed and said he refused Cruz's offer to kill Redmond for $10,000. *Id.* He described Hooper and Bracy's first trip to Phoenix in early December, during which he saw Cruz give the pair a stack of cash, took Hooper and Bracy to a gun shop where they picked up weapons (including a knife that looked like a knife found at the crime scene), and was present for Hooper's attempt to shoot Redmond from a car window which Merrill foiled by turning the vehicle. *Id.* Merrill also testified that, on December 30, he picked up Hooper and Bracy from the Phoenix airport at Cruz's direction and verified the addresses for Redmond's home and business. *Id.* at 605.

Merrill testified that Hooper, Bracy, and McCall came to his home at about 8:30 p.m. on New Year's Eve and had items (including a watch, ring, and gun holster) that may have come from the Redmond home. *Id.* McCall told him several

days later that McCall, Hooper, and Bracy had committed the crimes at the Redmonds' home. *Id.*

In addition to these witnesses, the State presented other evidence, including testimony from employees of Pat Redmond's business who saw Cruz touring the company in 1980; testimony of a pilot whom Cruz hired on occasion who testified that in 1980 he heard Cruz say he wanted to take over a printing business and would have to "get rid of" an uncooperative business partner; testimony from a witness who purchased two tickets at Cruz's direction from Phoenix to Chicago for a flight on New Year's Eve and delivered them to Merrill's home; telephone records that supported that Hooper and Bracy were in Phoenix during the murders, rather than Chicago; and evidence from which the jury "could infer that Hooper possessed both the murder weapon and the knife that was used to slash Redmond's throat." *Id.* at 606.

In their defense, Hooper and Bracy presented several alibi witnesses:

> Hooper's witnesses included Mary Jean and Michael Wilson, two friends of Hooper's brother, who testified that they had seen and spoken with Hooper on the day of the murders at a flea market in Chicago. Nelson Booker, another friend of Hooper's brother, testified that he had seen and spoken with Hooper at a New Year's Eve party at a Chicago club.

Id. at 608. "The jury did not believe the alibis." *Id.* at 621 n.20. Moreover, "[e]vidence that Hooper and Bracy were both in Phoenix on New Year's Eve, and thus, that they had created fake alibis, provided additional evidence of Hooper's guilt." *Id.* at 621.

The jury found Hooper and Bracy guilty of all charged counts. After

conducting the necessary sentencing-related hearings, the trial court concluded that Hooper should be sentenced to death for the two first-degree murder convictions. *Id.* at 609–10.

C. *Subsequent proceedings.*

Hooper spent the next four decades challenging his convictions and sentences in both state and federal court. First, the Arizona Supreme Court affirmed Hooper's convictions and death sentence on direct appeal. *State v. Hooper (Hooper I)*, 703 P.2d 482 (Ariz. 1985). Then, from 1986 through 2017, Hooper filed five petitions for postconviction relief. *See Hooper II*, 985 F.3d at 612. None was successful. Hooper also filed a federal habeas petition in 1998, and that proceeding remained pending until the Supreme Court denied certiorari earlier this year. *See Hooper v. Shinn*, 142 S. Ct. 1376 (2022); *Hooper II*, 985 F.3d at 613.

On August 26, 2022, the State filed a motion for warrant of execution in the Arizona Supreme Court, and on October 12, 2022, the Arizona Supreme Court issued a warrant of execution, with an execution date of November 16, 2022. On October 31, 2022, 19 days after the warranted issued, and only 16 days before his scheduled execution, Hooper filed his sixth petition for post-conviction relief, which presented claims of newly discovered evidence under Rule 32.1(e) and actual innocence under Rule 32.1(h). In his first claim, Hooper argued that the report of Geoffrey Loftus, an eyewitness identification expert, constituted newly-discovered evidence. His actual innocence claim was based on Loftus's report and other evidence he contended undermined Marilyn Redmond's identification of him as one

of the assailants, trial evidence regarding the three alternative suspects, allegations of prosecutorial misconduct that were litigated at trial, trial evidence impeaching three of the State's witnesses, a reassertion of the alibi he presented at trial, and an argument that the evidence was insufficient to support the A.R.S. § 13–751(F)(5) aggravating circumstance.

Several days later, Hooper filed another petition arguing that the State's letter to the Arizona Board of Executive Clemency revealed that the State had withheld information relating to Marilyn's identification of Hooper. (Pet. App. at 137–57.) The State's letter stated that Marilyn had been unable to identify Hooper in a photo lineup before the live lineup in Chicago. (Pet. App. at 116.) At Hooper's clemency hearing, however, the prosecutor explained that the letter's reference to a printed lineup was an error, and that Marilyn had never been shown a printed lineup. (Pet. App. at 11–15.)[1]

The post-conviction court on other claims not relevant here. However, at the hearing, the State avowed that Marilyn Redmond had not been shown a printed lineup prior to her identification of Hooper and that there was no evidence that any such lineup existed. (Pet. App. at 12, 85–86.)

After the hearing, the post-conviction court denied Hooper's newly-discovered evidence claim based on the State's letters opposing clemency, which stated that

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[1] *See also* Video of Arizona Board of Executive Clemency Hearing, November 2, 2022, at 4:20:22 at https://boec.az.gov/hearings.

Marilyn "had previously been unable to pick them out of a paper lineup." (Pet. App. at 22.) The court noted that the State explained at Hooper's clemency hearing and avowed at the postconviction evidentiary hearing that the reference to a paper lineup in the letter was mistaken and that there was no evidence Marilyn Redmond was shown a printed lineup including Hooper before she identified him in person. (*Id.*) Having accepted the State's avowal, the court found that this claim lacked a factual basis and denied relief. (*Id.*)

Hooper then filed a petition for review in the Arizona Supreme Court, and that court likewise denied relief, affirming "the superior court's order finding all of the Petitioner's claims are not colorable and summarily dismissing Petitioner's consolidated petitions for post-conviction relief" and denying his motion for stay of execution. (Pet. App. at 4–15.)

In addition to affirming the denial of Hooper's other claims, the Arizona Supreme Court rejected Hooper's "*Brady*" claim regarding a nonexistent "paper lineup" in which victim Marilyn Redmond failed to identify Hooper:

> As the superior court found, Petitioner has not demonstrated that the State violated the second prong of the *Brady* analysis—that evidence was suppressed by the State, either willfully or inadvertently. Petitioner has presented no evidence to refute the Deputy County Attorney's explanation that she made the statement by mistake and confused composite sketches and paper lineups shown to Marilyn Redmond concerning co-defendants Bracy and McCall, and the State's avowal that no such paper lineup including Petitioner was shown to Mrs. Redmond prior to her identification of Petitioner in person.

(Pet. App. at 12.) The state supreme court then detailed the questioning at the ABOEC Hearing that made absolutely clear that the County Attorney's

misstatement in the letter to the Clemency Board did *not* reveal any sort of viable *Brady* claim, much less "newly discovered evidence" that justifies any relief, much less eleventh-hour relief. (*Id.* at 12–15.) Indeed, the authoring Chief Justice of the Arizona Supreme Court took pains to not only find that "the superior court's factual findings and legal analysis that Petitioner's claim lacks a factual basis are not an abuse of the court's discretion," but further stated:

> **THE COURT FINDS** based on this Court's review, that Petitioner's claim the State has failed to disclose a paper lineup, including allegations of misconduct and unethical conduct has no evidentiary support and no basis in fact.

(*Id.* at 14–15.) The court also denied Petitioner's motion for stay of execution. (*Id.* at 15.)

II. HOOPER'S REQUEST FOR A STAY SHOULD BE DENIED.

Because, as established in the Brief in Opposition, the Arizona courts correctly denied Hooper's wholly baseless requests for post-conviction relief, this Court should likewise deny his eleventh-hour request for a stay of execution.

A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 1760 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 1761 (citing cases). While a stay involves the exercise of judicial discretion, it is not unbridled discretion; legal principles govern the exercise of discretion. *Id*. Moreover, "a stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong

interest in enforcing its criminal judgments[.]" *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Id*. (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). Equity does not tolerate last-minute abusive delays "in an attempt to manipulate the judicial process." *Nelson*, 541 U.S. at 649 (quoting *Gomez*). "Repetitive or piecemeal litigation presumably raises similar concerns" as litigation that is "speculative or filed too late in the day." *Hill*, 547 U.S. at 585. *See also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

To be entitled to a stay, a movant must demonstrate (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Ramirez v. Collier*, ___ U.S. ___, 142 S. Ct. 1264, 1275 (2022) (citing *Winter v. Natural Res. Def. Council, Inc*, 129 S. Ct. 365, 374, 376 (2008)); *McDonough*, 547 U.S. at 584; *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005). The burden of persuasion is on the movant, who must make a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997 (per curiam).

These principles apply when a capital defendant asks a federal court to stay his pending execution. *Hill*, 547 U.S. at 584. A stay of execution is an equitable remedy and "equity must be sensitive to the State's strong interest in enforcing its

criminal judgments without undue interference from the federal courts." *Id*. A court can consider "the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Beardslee*, 395 F.3d at 1068 (quoting *Gomez v. United States District Court*, 503 U.S. 653, 654 (1991)). Thus, courts "must consider not only the likelihood of success on the merits and the relative harm to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Id*. (quoting *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)).

Moreover, last minute stays of execution—as Hooper requests here, mere hours before his scheduled execution—are particularly disfavored, as well-worn principles of equity attest. Late-breaking changes in position, last-minute claims arising from long-known facts, and other "attempt[s] at manipulation" can provide a sound basis for denying equitable relief in capital cases. *Ramirez*, ___ U.S. ___, 142 S. Ct. at 1282 (citing *Gomez v. United States Dist. Court for Northern Dist. of Cal*., 503 U.S. 653, 654 (1992) (*per curiam*) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."); see also *Hill*, 547 U.S. at 584 ("A court considering a stay must also apply 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." (cleaned up)).

As explained in the Brief in Opposition, Hooper's last-minute claim consists entirely trumped-up, unethical accusation of "misconduct" and evidence suppression based on a misstatement. The Arizona Chief Justice's word choice was deliberate

and bears repeating—Hooper's claim that "the State has failed to disclose a paper lineup, including allegations of misconduct and unethical conduct *has no evidentiary support and no basis in fact*." (Pet. App. at 14–15; emphasis added.) This Court should not countenance such argument in any case, and it certainly does not support a stay of execution in this case.

CONCLUSION

The request for a stay should be denied.

Respectfully submitted,

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