

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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DEFENDER
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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 appeal filed in Ninth Circuit and pending Petition for Writ of Certiorari.

The State of Arizona intends to execute Murray Hooper, a 76-year-old Black man, despite active controversy at the Ninth Circuit considering Mr. Hooper's second-in-time federal petition for writ of habeas corpus. That petition lays out clearly that an eleventh hour admission by the state that the sole eyewitness had failed to identify Mr. Hooper in a paper lineup prior to later identifying him in a live lineup was new evidence of a violation of Mr. Hooper's rights under *Brady v. Maryland*. The District Court found that,

The factual predicate for Hooper's *Brady* and *Napue* claims—the alleged failure to disclose the photo lineup and the alleged false testimony that Mrs. Redmond was not shown such a lineup—existed long before he filed his first habeas petition.

Hooper v. Shinn, et al., Case 2:22-cv-01935-SMM, Order, Doc. 8 at 9. The District Court's reasoning ignores this Court's clear rule that a defendant has a right to rely on the prosecution's representation that all *Brady* material was provided. *Banks v. Dretke*, 540 U.S. 668, 693 (2004). This Court has rejected the rule that a 'prosecutor may hide, defendant must seek' as

being untenable “in a system constitutionally bound to accord defendants due process.” *Id.* at 696. The District Court failed to explain how Mr. Hooper could have raised this claim in light of the State continuously asserting for forty years that this evidence did *not* exist.

Mr. Hooper was granted a certificate of appealability on three issues, and the Ninth Circuit is considering his appeal presently. However, given the complexity of the case and the seriousness of the matter, this Court should grant a stay to allow the Ninth Circuit time to decide the case.

If this Court does not grant a stay, Mr. Hooper’s pending appeal will become moot when his execution is carried out as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J., concurring). Because his case remains an active controversy and because there is a likelihood that the District Court’s order will be overturned, Mr. Hooper urges this Court to grant his Application for a Stay of Execution to allow his claims to be fully and fairly heard.

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). The District Court issued its opinion and order on November 15, 2022 at 5:34pm Mountain Standard Time (MST). Mr. Hooper filed his Notice of Appeal on November 15, 2022 at 6:24pm MST. Mr. Hooper filed his Opening Brief to the Ninth Circuit on November 15, 2022 at 8:55 pm MST. Mr. Hooper has not delayed in bringing this motion.

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

B. 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 appeal in the Ninth Circuit per this Court's Rule 23, which says, "A stay may be granted by a Justice as permitted by law," and 28 U.S.C. § 2101(f), which allows for a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." In this case, the District Court's clearly erroneous order is likely to be overturned on appeal, which will require the District Court to begin again in its review of Mr. Hooper's claims—a process necessarily requiring some amount of time, particularly if that court again denies the petition. But if that erroneous order is *not* overturned, Mr. Hooper will have to seek writ of certiorari on the issue.

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 the lower courts may complete their review, and he may seek writ of certiorari in this Court, if necessary.

Respectfully submitted,

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November 15, 2022