No. 22A431

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 Ninth Circuit correctly found that Hooper's habeas claims were second or successive and without merit, this last-minute request for a state 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 this Court denied certiorari earlier this year. *See Hooper v. Shinn*, 142 S. Ct. 1376 (2022); *Hooper II*, 985 F.3d at 613.

D. *Relevant successive PCR proceeding*

In July, 2022, about four months after this Court denied Hooper's habeas proceeding, the State began the process to seek a warrant of execution. 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 which merely sought to relitigate

issues that the jury and various courts have rejected during the decades of litigation in this aged capital case.

A few days later, Hooper filed another petition, this time asserting claims of newly-discovered evidence under Rule 32.1(e) based on *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. Illinois*, 360 U.S. 264, 271 (1959), and an allegedly unreliable pretrial identification. The sole basis for this latest attempt to avoid his impending execution was a single, inadvertent misstatement in the State's submission to the Arizona Board of Executive Clemency. The single erroneous sentence stated that the surviving victim, Marilyn Redmond, who identified Hooper as one of the murderers in a live lineup and in court at trial, "had previously been unable to pick them out of a paper lineup."

In fact, Marilyn never viewed a paper or photo lineup that included Hooper's photograph—the first time she had the opportunity to view Hooper was at a live lineup in Chicago 53 days after the murders. Hooper and his counsel knew this when the filed the state petition and they know this now. At his clemency proceeding, counsel for the State acknowledged the mistake and explained it. The State's counsel noted that none of the police reports or records in the case file suggested Marilyn had ever viewed a paper or photo lineup that included Hooper, and explained that the misstatement was attributed to Marilyn having failed to identify *co-defendants Ed McCall and William Bracy*; McCall in photo lineups and a composite sketch and Bracy in a composite sketch.

At a November 10 hearing on Hooper's post-conviction claims, the State avowed that the prosecutor's explanation at the clemency hearing was correct and that there was no evidence that Marilyn Redmond had ever been shown a photo lineup that included Hooper prior to identifying him in the live lineup. *See State v. Hooper*, CR0000-121686, Maricopa County Superior Ct., dated 11/14/22. The superior court denied Hooper's claims based on the clemency letter. 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 petitioned the Arizona Supreme Court for review, and that court found that "the superior court's factual findings and legal analysis that [Hooper's] claim lacks a factual basis are not an abuse of the court's discretion." *State v. Hooper*, Arizona Supreme Court No. CR-22-0268-PC, Decision Order dated Nov. 14, 2022. Further, the Arizona Supreme Court found, "based on this Court's review, that [Hooper'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 11–12 (emphasis added).

E. ***Petition for writ of certiorari and habeas petition.***

Despite the fact the Arizona Supreme Court warned Hooper that his claims have "no evidentiary support and no basis in fact," on the morning before his

scheduled execution, Hooper filed a Petition for Writ of Certiorari in this Court challenging the Arizona Supreme Court's denial of relief, which this Court has already denied. But, apparently discontent to litigate this issue in this Court alone, minutes later Hooper filed a second or successive petition for writ of habeas corpus in Arizona District Court asserting four claims: (1) a violation of *Brady v. Maryland* based on the allegation that the State suppressed a photo lineup in which Marilyn Redmond failed to identify him; (2) a claim asserting that the State presented false evidence that Marilyn was not shown a photograph of Hooper before identifying him in person in a live lineup; (3) a claim that Marilyn Redmond's pretrial identification of Hooper was unreliable, based on the assertion that she failed to identify him in a photo lineup; and (4) actual innocence.

The district court denied the habeas petition, certifying three issues for appeal. First, the court found that the factual predicate of Claims 1 and 2, alleging violations of *Brady* and *Napue*, existed long before Hooper filed his first habeas petition and therefore constituted a second or successive habeas petition for which Hooper failed to seek the required permission from this Court under 28 U.S.C. 2244(b)(3). Next, the court found that "the basic thrust or gravamen" of Claim 3, which asserted that Mrs. Redmond's pretrial identification was unduly suggestive and tainted her in-court identification of Hooper, was the same as Claim 19 of his initial habeas petition, in which Hooper challenged the admissibility of the pretrial lineup identification, alleging it was unduly suggestive in violation of due process. (citing *Babbitt v. Woodford*, 177 F.3d 744, 745 (9th Cir. 1999)). Thus, Claim 3 was

second or successive and must be dismissed under 28 U.S.C. § 2244(b)(1). Finally, the court denied Claim 4, which asserted actual innocence, as non-cognizable under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and *Herrera v. Collins*, 506 U.S. 390 (1985). Moreover, the court concluded, even if the claim were cognizable, it did not meet the standard for an actual innocence claim because his evidence is not reliable and most of the evidence he cited "has been presented either to the jury at his trial, or to the state and federal courts in the decades since his conviction, and rejected by all."

The Ninth Circuit permitted simultaneous briefing and affirmed the district court's dismissal of the due process and actual innocence claims, agreeing that the *Brady* and *Napue* claims are second or successive claims subject to § 2244(b)(2). Construing Hooper's notice of appeal as an application to file a second or successive petition regarding those claims, the Ninth Circuit denied Hooper's request. Further, the Ninth Circuit panel held that the factual predicate supporting Hooper's *Brady* and *Napue* claims (the prosecutor's retracted and corrected misstatement to the Arizona Board of Clemency) does not exist, so his claims fail (and also do not make a prima facie showing under § 2244(b)(2)). Moreover, the facts underlying those claims all accrued before Hooper filed his first petition, making the claims second or successive. Finally, the Ninth Circuit panel noted that Hooper's freestanding actual innocence claim (even if cognizable on federal habeas review) fails in light of the overwhelming evidence of his guilt. The Ninth Circuit also denied Hooper's motion for a stay of execution.

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

Because the district and Ninth Circuit courts correctly denied Hooper's wholly baseless and/or second or successive habeas claims, this Court should likewise deny his additional 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)).

Hooper's last-minute claims for relief are second or successive and are essentially based on an entirely trumped-up, unethical accusation of "misconduct" and evidence suppression based on an honest 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 renewed request for a stay of execution should be denied.

Respectfully submitted,

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