ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. MURRAY HOOPER, Appellant.	No. CR–83–0044–AP Maricopa County Superior Court No. CR–0000–121686 Ninth Circuit No. 08–99024 U.S. District Court No. CV–98–02164–PHX–SMM **RESPONSE TO MOTION TO SET BRIEFING SCHEDULE FOR MOTION FOR WARRANT OF EXECUTION** (Capital Case)

Murray Hooper, through undersigned counsel, hereby responds to the State of Arizona's Motion to Set Briefing Schedule for Motion for Warrant of Execution (hereinafter Motion), which was filed on July 19, 2022.[1] The State's Motion should be denied, first, because Mr. Hooper's longtime counsel withdrew from his case on April 29, 2022, and newly appointed replacement counsel requires time to familiarize herself with Mr. Hooper's voluminous case file in order to fulfill her statutory and constitutional obligations to Mr. Hooper; and second, because

[1] As an initial matter, counsel respectfully provides notice to the Court that Justices Beene, Lopez, and Montgomery may have conflicts of interest in this case due to their prior employment and/or involvement in this case.

proceeding with a briefing schedule under these circumstances would violate Mr. Hooper's state and federal rights.

I. Factual Background

The State asks this Court to set a briefing schedule for an execution warrant for Mr. Hooper. Undersigned counsel respectfully requests this briefing schedule be extended to accommodate newly assigned counsel who will be representing Mr. Hooper in what is a large and complex case.

For the last fourteen years, attorney Dale Baich has served as Mr. Hooper's counsel. Baich has left the Office of the Federal Public Defender (FPD) and is no longer working on Mr. Hooper's case. Attorney Thomas Phalen also represented Mr. Hooper in court proceedings. Phalen has retired from the practice of law and is no longer working on Mr. Hooper's case. Undersigned counsel has never represented Mr. Hooper either. There is however a new counsel assigned to Mr. Hooper's case and undersigned counsel is facilitating her admission pro hac vice for these proceedings.

The newly assigned counsel, attorney Kelly Culshaw began working at the FPD on March 28, 2022. Shortly thereafter, she was assigned to Mr. Hooper's case. During the four months that Culshaw has been employed at the FPD, her work has been focused on compliance with a statutory deadline in *Gomez v. Shinn*, No. CV-21-01529-PHX-MTL, a capital habeas case in the United States District Court for

the District of Arizona. Four days after Mr. Gomez's federal habeas petition was filed in federal district court, the State filed its Motion in Mr. Hooper's case. Culshaw must now acquaint herself with the legal issues in Mr. Hooper's case and, minimally, prepare for clemency proceedings.

This is no small feat. Mr. Hooper's case file is large and his case is old. His files have been ordered from off-site storage and comprise nearly 100 bankers boxes. His trial involved multiple offenses and an array of characters so complex that the trial prosecutor noted that "[i]t may be difficult, perhaps to keep some of the parties straight[.]" (Tr. 11/2–11/3/1982 at 6.) Any attorney assigned to assist in this matter will be in the same position as Culshaw, working on a massive case with which they are unfamiliar.

II. Argument

Clemency is an act of grace that allows the consideration of broad reaching factors. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998). It "is the historic remedy for preventing miscarriages of justice" when the judicial process is no longer available. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (footnotes omitted); *see also Harbison v. Bell*, 556 U.S. 180 (2009). Clemency is "the 'fail safe' of our criminal justice system." *Harbison*, 556 U.S. at 192. (citation and footnote omitted).

Given the important role clemency plays in the capital system, counsel is charged with pursuing clemency in both a timely and persuasive fashion under the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed. 2003). *See* Guideline 10.15.2.C. In particular, counsel's pursuit of clemency should be tailored "to the characteristics of the particular client, case and jurisdiction." *Id*. Developing that tailored approach necessitates that clemency counsel conduct reasonably necessary investigation under Guideline 10.7. If not reasonably postponed, a briefing schedule on the State's anticipated Motion for Warrant of execution, which will trigger clemency proceedings for which Mr. Hooper has not been able to prepare, would amount to an arbitrary denial of meaningful access to clemency in violation of his state and federal due process rights.

The crux of the Fourteenth Amendment's due process guarantee is adequate notice and an opportunity to be heard that is meaningful. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *see also Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 (2017). That guarantee extends to executive clemency proceedings in capital cases where there is "no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does." *Woodard*, 523 U.S. at 290–91 (Stevens, J.,

concurring and dissenting in part); *id.* at 288–89 (O'Connor, J., concurring in part and in the judgment) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life.")[2]; *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (due process requires "notice and an opportunity to be heard" before one is deprived of a constitutionally protected interest).

Although arguably more sweeping than its federal counterpart, the Arizona Constitution's due process guarantee likewise requires that any opportunity to be heard afforded by the state occur "in a meaningful time and in a meaningful manner." *See San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 196 (1999) (citing Ariz. Const. art. II, § 4); *see also State v. Youngblood*, 173 Ariz. 502, 508 (1993) (Feldman, J., concurring and dissenting in part) (recognizing that the majority "applies the due process clause of the Arizona Constitution in the same manner as its federal counterpart" while "not, however, agree[ing] with the state's position that the two clauses are coterminous[]" and "[i]nstead, [ ] reaffirm[ing] this court's ultimate responsibility to interpret the

[2] Justice O'Connor's concurrence in *Woodard* reflects "the narrowest ground[]" for the decision and therefore represents the holding of the case. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"); *see also Wellons v. Comm'r, Georgia Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (per curiam) (recognizing Justice O'Connor's concurrence in *Woodard* as "binding precedent").

meaning and application of the Arizona Constitution in light of our own reading of each clause").

Because "due process, unlike some legal rules, is not a technical conception with a fixed content[,]" whether an opportunity to be heard is meaningful is context-dependent and not "unrelated to time, place and circumstances." *See Mathews*, 424 U.S. at 334 (internal quotations omitted); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In *Mathews*, the Supreme Court explained that in order for "a person in jeopardy of serious loss" to have a meaningful opportunity to be heard "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard[.]" 424 U.S. at 348–49 (cleaned up).

The circumstances present in Mr. Hooper's case warrant a reasonable postponement of the briefing schedule on the State's anticipated motion for warrant of execution so he may meaningfully access the clemency proceedings the State affords him, as guaranteed under the Arizona and Federal Constitutions. *See Mathews*, 424 U.S. at 333; *Woodard*, 523 U.S. at 288–89 (O'Connor, J., concurring

in part and in the judgment); *see also San Carlos Apache Tribe*, 193 Ariz. at 196; U.S. Const. amend. XIV; Ariz. Const. art. II, § 4. The utter unfamiliarity of Mr. Hooper's counsel with his case as they seek to pursue clemency relief under the "fail safe" of the United States' criminal justice system demonstrates that time is needed for counsel to effectively represent Mr. Hooper. As such, Mr. Hooper requests this Court commence any briefing schedule in this matter to begin six-months from issuing its order. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) ("The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it[.]"); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per curiam) ("[I]f the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated.").

Proceeding with, rather than postponing for a reasonable period, a briefing schedule on the State's anticipated motion for warrant of execution under current circumstances would arbitrarily deprive Mr. Hooper of meaningful access to clemency in violation of his state and federal rights. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and in the judgment) (finding a capital prisoner's due process rights could be violated "where the State arbitrarily denie[s] a prisoner any access to its clemency process[]"); *see also Hayes*, 218 F.3d at 853 (holding

that due process violation in state clemency proceeding can occur where the state "unconscionably interferes with a process that the State itself has created[]"); *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (due process requires affording someone "a chance to marshal the facts in his defense").

III. Conclusion

For the foregoing reasons, Mr. Hooper respectfully asks that the Court deny the briefing schedule requested in the State's Motion and grant Mr. Hooper a six-month extension of time so that newly assigned counsel can be prepared to competently represent Mr. Hooper in these and related proceedings.[3]

RESPECTFULLY SUBMITTED this 5th day of August, 2022.

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[3] Counsel for Mr. Hooper attempted to obtain the State's position on Mr. Hooper's request, but received an out of office reply indicating counsel would not be available to respond until after the due date for this Response.