

**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 FOR  
WARRANT OF EXECUTION**

(Capital Case)

Murray Hooper, through counsel, responds to the State’s Motion for Warrant of Execution (“Motion”), filed August 26, 2022. The Court should deny the Motion. First, Hooper’s longtime counsel withdrew from his case on April 29, 2022, and newly appointed replacement counsel requires time to learn the voluminous file to fulfill her statutory and constitutional obligations to Hooper. Second, pending in the Maricopa County Superior Court is Hooper’s Motion for Postconviction DNA and Advanced Forensic Testing. Third, issuing an execution warrant under these circumstances would violate Hooper’s state and federal rights.

## **I. Argument**

### **A. Counsel needs time to effectively represent Hooper in all proceedings stemming from the State's efforts to seek a warrant of execution**

Both of Hooper's long-time lawyers—Dale Baich and Thomas Phalen—recently withdrew from his case, Baich after having left the Federal Public Defender's Office (FPD) and Phalen after retiring. Newly appointed undersigned counsel, Kelly Culshaw, began working at the FPD on March 28, 2022. Since that time, 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 District of Arizona. Four days after she filed Gomez's federal habeas petition, the State moved to seek a briefing schedule for a warrant of execution in Hooper's case. Further, until the State sought a briefing schedule for a warrant, other counsel, Cary Sandman, had no prior involvement with Hooper's case. Sandman's other case responsibilities limit his role in these proceedings to one that is supervisory only, in relation to continuing duties as sponsor of Culshaw's pro hac representation.

While Culshaw has been reviewing Hooper's case as quickly as possible, this is no small feat. Hooper's case file is old and voluminous, comprising nearly 100 bankers' boxes. His case involved multiple offenses, five charged co-defendants, and an array of characters so complex the trial prosecutor noted, “[i]t may be

difficult, perhaps to keep some of the parties straight[.]” (Tr. 11/2/1982 at 6.)<sup>1</sup> While additional attorneys have been assigned to assist, they are in the same position—working on a massive case with which they are unfamiliar.

Proceeding at this pace starkly contrasts with the Court’s treatment of Frank Atwood, who the State recently executed. There, the State moved for a briefing schedule on January 5, 2022. Based on the death of one of his attorneys in late January, however, Atwood’s remaining attorneys received several extensions of time to file Atwood’s cross-reply to his motion to remand for evidentiary development regarding the lethal injection drugs. In all, Atwood was afforded an additional 54 days to prepare his case. *See State v. Atwood*, No. CR-87-0135-AP. Hooper received none of the time requested in his Response to the State’s motion requesting a briefing schedule.

In both cases, the impact of losing long-time counsel deprives the client of an attorney with a fount of historical knowledge about their case. *All* counsel representing Hooper are new to his case, which was not true for Atwood. Hooper deserves counsel with a meaningful opportunity to review his complex case and assess challenges to his execution.

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<sup>1</sup> The reporter’s transcripts of the state court proceedings are referenced as “Tr.” followed by the date and page number of the transcript.

**B. Pending litigation may produce exculpatory evidence supporting Hooper's steadfast statements of innocence**

For 40 years, Hooper has maintained he did not commit the offenses for which he was convicted and sentenced to death. He was convicted based on flawed and unreliable witness testimony, in a case which lacked any inculpatory forensic evidence. Based on now-available technology, he is pursuing fingerprint and DNA testing in the state superior court to support his claim of innocence. (Exhibit 1, Motion for Postconviction DNA and Advanced Forensic Testing (“DNA motion”).)

As detailed in Hooper's testing motion, his conviction and sentence were based on a flawed eyewitness identification and the testimony of co-conspirators who received immunity and extensive benefits including money, and illegal perks such as sex and drugs.

Witness Marilyn Redmond was shot in the head but survived the home invasion. *See State v. Bracy*, 145 Ariz. 520, 525 (1985). She gave a series of inconsistent descriptions of the perpetrators. (Tr. 11/8/1982 p.m. at 73–75; Tr. 11/3/1982 at 171, 180, 184, 221–22, 230–31, 237–38, 248; Tr. 8/27/1982 at 69–70.) These inconsistencies were unsurprising since she initially explained to detectives she could not identify any perpetrators because she was afraid to look at them. (Tr. 11/30/1982 p.m. at 73; Tr. 8/26/1982 at 141–42.) Despite her admission that she lacked ability to identify anyone, Redmond was flown to Chicago several months

after the events. She identified Hooper and William Bracy<sup>2</sup> during an unrecorded live line-up conducted by Chicago detectives in a corrupt department, with a well-deserved reputation for engaging in inappropriately coercive and suggestive witness identification practices, including the use of physical force, undue psychological pressure, and threats, in order to induce false evidence and unreliable witness identifications.<sup>3</sup>

The State also relied on three witnesses whose testimony was secured through extraordinary benefits. Witness Arnie Merrill was a Valium-dependent drug dealer, a fence for stolen goods, and a burglary mastermind. (Tr. 11/29/1982 a.m. at 11; Tr. 11/24/1982 at 110–11; Tr. 11/16/1982 at 154; Tr. 11/18/1982 at 21–22, 171.) Merrill testified he knew about a plan to kill Redmond, helped procure weapons, and drove the killers to the Redmond’s house and business. (Tr. 11/17/1982 at 9–11, 15–16,

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<sup>2</sup> According to the Innocence Project, mistaken eyewitnesses are the “leading factor in wrongful convictions[,]” with witness misidentification resulting in 75% of wrongful convictions overturned by DNA testing. <https://innocenceproject.org/in-focus-eyewitness-misidentification/> (last visited Sept. 15, 2022).

<sup>3</sup> These practices were extensively documented in dozens of exonerations. *See, e.g., Summary of Judicial, Executive, and Administrative Findings and Admissions Concerning Systemic Chicago Police Torture at Area 2 and 3*, The Invisible Institute, available at: [https://www.dropbox.com/sh/ch5e6i674shwpr8/AAANdI2LMWFVsKJ-xB0pdtZDa/02.%20Torture.Findings.Admissions.Decisions.Docs.Opinions.Pleadings?dl=0&preview=8.10.06.Summary+of+Judicial%2C+Administrative+and+prosecutorial+Findings+and+Admissions.wpd&subfolder\\_nav\\_tracking=1](https://www.dropbox.com/sh/ch5e6i674shwpr8/AAANdI2LMWFVsKJ-xB0pdtZDa/02.%20Torture.Findings.Admissions.Decisions.Docs.Opinions.Pleadings?dl=0&preview=8.10.06.Summary+of+Judicial%2C+Administrative+and+prosecutorial+Findings+and+Admissions.wpd&subfolder_nav_tracking=1) (last visited Sept. 9, 2022).

28–32, 44.) In exchange for his testimony, the State absolved Merrill of any responsibility. (Tr. 11/16/1982 at 152–54.)

George Campagnoni testified he was with Hooper and Bracy at Merrill’s house on New Year’s Eve. (Tr. 11/29/1982 a.m. at 19; Tr. 11/24/1982 at 53–55, 83–84, 117–18.) Campagnoni claimed he formed a burglary ring with Merrill, McCall, and others and committed a spree of burglaries in 1980. (Tr. 11/24/1982 at 54–55, 110–11.) Campagnoni possessed property stolen from the Redmonds (Tr. 11/24/1982 at 92–93; Tr. 11/16/1982 at 125–27), but in exchange for his accusations he was given total immunity (Tr. 11/29/1982 a.m. at 14–15).

Nina Marie Louie was a prostitute and drug dealer. (Tr. 11/23/1982 at 88–90, 105–07, 138–39.) Louie testified in exchange for State paid monetary compensation that she saw Hooper and Bracy at her Phoenix apartment on New Year’s Eve. (Tr. 11/23/1982 at 30, 64–68; Tr. 12/20/1982 at 7–8.)<sup>4</sup>

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<sup>4</sup> False informant testimony is frequently connected to wrongful convictions. See Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Conviction*, 53 Am. Crim. L. Rev. 737, 738 (Summer 2016). The incentives offered to Merrill, Campagnoni, and Louie were extensive. The size of a prosecutor’s incentive “often relates to the value of the information provided”—“[p]rosecutors ‘pay’ more for information perceived as highly valuable, and one key ingredient of value is the prosecutor’s need for the evidence.” Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 Ohio St. J. Crim. Law 519, 551 (Spring 2009).

Meanwhile Hooper presented evidence of an alibi placing him in his hometown of Chicago at the time of these offenses. (See Tr. 12/8/1982 p.m. at 4–5, 36; Tr. 12/8/1982 a.m. at 74.) The case against Hooper was and remains insubstantial and on shaky ground.

Subjecting available physical evidence to current methods of forensic testing can controvert the State’s fraught case<sup>5</sup> while supporting Hooper’s steadfast protestations of innocence. First, multiple fingerprints were collected from the crime scene, which were not linked to Hooper, Bracy, or his other purported co-defendant, Edward McCall. Significant technological advances in fingerprint identification have occurred since 1982. (See Exhibit 1 at 8-9.) These advanced forensic testing methods may identify the actual perpetrators and exclude Hooper.

Second, a knife used and left at the scene was collected by law enforcement. DNA testing was unavailable at the time of Hooper’s 1982 trial, and this evidence has never been tested. But it can be now under A.R.S. § 13-4240. DNA testing can identify the perpetrators and exclude Hooper.

The U.S. and Arizona Constitutions demand heightened reliability where life and death hang in the balance. *See Woodson v. North Carolina*, 428 U.S. 280, 305

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<sup>5</sup> Hooper’s trial defense was also hampered by extensive prosecutorial misconduct, including suppression of evidence. *See, e.g., Bracy*, 145 Ariz. at 528 (“As to the benefits Arnold Merrill received, we find that they were exculpatory in nature and were never disclosed to defendant.”).

(1976). Where no forensic evidence links Hooper to the crimes for which he is sentenced to die, but available testing of forensic evidence may completely undermine the State's evidence, the Eighth Amendment demands such now-available testing be conducted.

**C. Issuing a warrant of execution under these circumstances would violate Hooper's state and federal rights**

Given the important role clemency plays in the capital system, counsel is charged with pursuing clemency and other litigation in a timely and persuasive fashion. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. ed. 2003), Guideline 10.15.2.C; *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998) (clemency is “historic remedy for preventing miscarriages of justice”); *Herrera v. Collins*, 506 U.S. 390, 412 (1993); *Harbison v. Bell*, 556 U.S. 180 (2009) (clemency is fail safe in criminal justice system). Counsel's pursuit of clemency must be tailored to the facts. *Id.* Here, a warrant would trigger clemency proceedings for which Hooper cannot adequately prepare and would amount to an arbitrary denial of meaningful access to clemency.

The crux of due process is the guarantee of adequate notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Samiuddin v. Nothwehr*, 243 Ariz. 204, 211, ¶ 20 (2017). That guarantee extends to capital clemency proceedings: 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.”).

Arizona’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, ¶ 39 (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 Arizona Supreme Court’s ultimate responsibility to interpret meaning and application of Arizona Constitution).

The circumstances in Hooper’s case warranted a reasonable postponement of the briefing schedule on the State’s motion for warrant of execution. As it stands now, Hooper’s counsel will not have sufficient time to effectively prepare for clemency. A continued refusal to postpone these proceedings will deny meaningful access to clemency and other 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, ¶ 39; U.S. Const. amend. XIV; Ariz. Const. art. II, § 4. Issuing a warrant will arbitrarily deprive 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 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 Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (holding due process violation in state clemency proceeding can occur where 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").

For these reasons, Hooper asks the Court to deny the State's request for a warrant of execution. *See Hayes*, 218 F.3d at 853 ("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.").

## **II. Conclusion**

Hooper respectfully asks that the Court deny the State's Motion for Warrant of Execution.

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RESPECTFULLY SUBMITTED this 23rd day of September, 2022.

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