ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. LEROY DEAN MCGILL, Appellant.	CR–04–0405–AP Maricopa County Superior Court No. CR2003–005315–001 Ninth Circuit No. 19–99002 U.S. District Court No. CV–12–01149–PHX–JJT **RESPONSE TO MOTION TO STAY** [CAPITAL CASE]

The State of Arizona opposes McGill's request to stay his warrant of execution pursuant to Arizona Rule of Criminal Procedure 32.18. McGill's request for a stay is premature because the superior court should be able to adjudicate McGill's successive petition before McGill's execution date, and this Court should direct it to do so. Furthermore, McGill fails to demonstrate that a stay is appropriate under Arizona Rule of Criminal Procedure 32.18.

I. PERTINENT FACTS AND PROCEDURAL HISTORY.

A. Trial, direct appeal, and collateral proceedings.

McGill was charged with the first-degree premeditated murder of Charles Perez, the attempted first-degree murder of Nova Banta, two counts of arson, and three counts of endangerment. *State v McGill* (*McGill I*), 213 Ariz. 147, 151, ¶ 9

(2006). This Court affirmed McGill's convictions and sentences on direct appeal in an opinion published on August 14, 2006. *Id.* at 163, ¶ 84. McGill then filed a petition for post-conviction relief on June 1, 2010, which was dismissed after a two-day hearing. McGill later sought federal habeas relief and filed a petition including Claims 3, 4, and 5 raised in McGill's successive petition for postconviction relief. *See McGill v. Ryan*, Ariz. Dist. Ct. No. 2:12-cv-01149-JJT, Docket # 30, at 93–98, 98–102, 104–07. McGill was ultimately unsuccessful.

B. Execution proceedings and the current petition for post-conviction relief.

On March 26, 2026, this Court issued a warrant of execution, setting May 20, 2026, as the date for McGill's execution. *State v. McGill*, Ariz. Supreme Court No. CR–04–0405–AP, Warrant of Execution (filed March 26, 2026). On March 31, 2026, McGill filed a successive petition for postconviction relief containing five claims. The State responded on April 8, 2026, and McGill filed his reply on April 17, 2026. The superior court held a status conference on April 20, 2026. In the normal course, the superior court was obligated to assign the now-at-issue petition to a judge for disposition. *See* Ariz. R. Crim. P. 32.10. Instead, the court stated that:

> Well, I appreciate the speed at which these pleadings were filed, but the other PCRs, the capital PCRs that I manage, take a very long time, and we have multiple status conferences, and I would normally assign it out. Then the judicial officer assigned would take a look at

> the pleadings and make a determination about whether or not an evidentiary hearing is appropriate. Most of these would not be resolved within 30 days' time, and I can't imagine that comes as a surprise to you.

R.T. 04/20/26, at 5–6 (Attached as Appendix A).

After McGill's counsel indicated that she would be willing to seek a stay from this Court under Rule 32.18, the court clarified that it was not asking for McGill to do that, but that the court did not "know what is going to happen on the merits with the petition, but I would not be doing my job if I let you believe I thought it was going to be resolved inside of May 20th." *Id*. at 6.

II. MCGILL IS NOT ENTITLED TO STAY HIS WARRANT OF EXECUTION.

Only this Court has authority to issue a stay when a defendant files a successive petition for post-conviction relief after an execution date is set. Ariz. R. Crim. P. 32.18. Rule 32.18 permits a stay only if the defendant demonstrates that he has presented claims that are not precluded under Rule 32.2:

> If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and *the application must show with particularity any claims that are not precluded under Rule 32.2.* If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Id. (emphasis added). *See also* A.R.S. § 13–4234(J).

Rule 32.18 requires that a defendant seeking a stay of execution demonstrate "with particularity any claims that are not precluded under Rule 32.2," but such a showing is merely a precondition to the issuance of a stay, it is not dispositive on the question. So, while McGill may be able to show that some of his claims are not precluded, he is not entitled to a stay on that fact alone. Instead, because McGill's petition is subject to summary dismissal, and because the superior court has not yet made that determination, this Court should decline to grant McGill the extraordinary remedy of a stay.

A. McGill's stay request is premature.

McGill's motion should be denied because it is premature or unripe. "Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280, ¶ 36 (2019); *see also Mills v. Arizona Bd. Of Technical Registration*, 253 Ariz. 415, 423, ¶ 24 (2022) ("Ripeness reflects the judiciary's reluctance to adjudicate hypothetical or abstract questions.") An issue is ripe if the claimant has incurred an injury, or if there is an actual controversy between the parties. *Id*.

McGill's petition was at issue more than 30 days before his execution date. There is ample time for the superior court to adjudicate McGill's claims, including by determining that his untimely petition should be summarily dismissed. The

State appreciates that these time periods are shorter than the normal time periods available to dispose of capital petitions for postconviction relief. But the unique circumstances of capital end-stage litigation demand more from all parties in consideration of the stakes. As the Supreme Court has remarked, "the grant of a stay of execution … imposes on [a] court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case." *In re Blodgett*, 502 U.S. 236, 240 (1992). It follows, then, in consideration of "the State's interest in the finality of its criminal judgment," *McCleskey v. Zant*, 499 U.S. 467, 493 (1991), that the superior court has a similar duty to promptly resolve the matter *before* the issuance of a stay.

Take, for instance, *State v. Hooper*, Maricopa County Superior Court No. CR-0000-121686. There, the defendant was scheduled for execution on November 16, 2022. He filed a successive petition for postconviction relief on October 31, 2022, the State responded on November 4, 2022, and Hooper replied on November 9, 2022. The PCR court then held an evidentiary hearing on November 10, 2022, took the matter under advisement, and denied relief by ruling on November 14, 2022. *Hooper* is merely one example of the practice that pervades capital end-stage litigation, but it demonstrates the balance between the State's interest in enforcing its judgments and a defendant's interest in having their claims heard.

Nothing here compels a deviation from this common practice, and this Court should instruct the superior court to adjudicate McGill's at-issue petition promptly and sufficiently before his May 20, 2026 execution date to allow for any appellate proceedings.

When a petitioner files an untimely notice of postconviction relief, as McGill did here, the notice itself is subject to summary dismissal if the petitioner has not explained why the claims were not raised in a prior notice or petition (or timely raised at all). Ariz. R. Crim. P. 32.2(b). And when a petition for postconviction relief is assigned, the court's first task is to determine whether the petition presents any precluded or untimely claims. *See* Ariz. R. Crim. P. 32.11 (a). Then, after disposing of the precluding and untimely claims, the court may still summarily dispose of the petition if there are no remaining claims raising material issues of fact or law that would entitle the petitioner to relief. Ariz. R. Crim. P. 32.11(a). None of this occurred in the superior court, and the trial court's impression of a hypothetical timeline where an evidentiary hearing might be granted is speculative.

As the State notes in its response to McGill's successive petition, *see* Motion to Stay Execution at Exhibit 2, all of McGill's claims are untimely by several years. Claims 1(A) and 1(B) are untimely by almost nineteen years because McGill could have raised them on direct appeal but did not. Claim 1(C) is

untimely by almost ten years, as McGill could have raised it at least by the Supreme Court's issuance of *Lynch v. Arizona* (*Lynch III*). Claim 2 is also untimely by almost ten years for the same reason. And McGill knew the basis of Claims 3, 4, and 5, for almost thirteen years, as he raised each of those claims in his 2013 federal habeas petition. Because Claims 1(A), 1(B), Claim 2, and Claim 3 are all cognizable under 32.1(a), he was required to file the notice of those claims within 30 days after the issuance of the mandate in his direct appeal. Ariz. R. Crim. P. 32.4(b)(3)(A). These claims are therefore untimely without excuse, because McGill has not adequately explained why the failure to raise them was not his fault, and McGill's petition may be summarily dismissed on timeliness alone. *See* Ariz. R. Crim. P. 32.2(b).

Additionally, a number of McGill's claims are precluded. Claims 1(A) and 1(B) are precluded under Arizona Rule of Criminal Procedure 32.2(a)(3) because they could have been raised on direct appeal but were not. Claims 2 and 3 are similarly precluded under 32.2(a)(3) because they should have been raised in McGill's initial postconviction proceedings, but were not. And none of these claims are of the type that required McGill's personal waiver under 32.2(a)(3) because they do not implicate the narrow category of rights of sufficient constitutional magnitude. *See State v. Traverso*, 576 P.3d 97, 105–06, ¶ 36 (2025). This Court has cataloged these rights where possible, and has held they include

"the rights to counsel, to a jury trial,… to a twelve-person jury," and the right to be "sufficiently informed of the prosecution's plea offer." *Id*. at 107, ¶ 41. And in interpreting this provision, while not expressly limiting it to only these circumstances, this Court has remarked that rights of sufficient constitutional magnitude are those rights personal to the defendant. *See e.g., Stewart v. Smith*, 202 Ariz. 446, 449–50, ¶ 9 (2002). Notably, however, in assessing what rights are of sufficient constitutional magnitude, this Court has remarked that claims requiring personal waiver flow from the Sixth Amendment or Art. II, § 23 of the Arizona Constitution.

Neither Claim 1(A) nor Claim 1(B) implicate the Sixth Amendment or the state right to a 12-person jury. Instead, they address sentencing reliability and accuracy concerns based on the jury instructions given in McGill's case. And while Claims 2 and 3 are ineffective assistance of counsel claims, the underlying rights at issue there fail to meet the same standard. In Claim 2 McGill alleges generally that counsel failed to request accurate instructions or request to inform the jury that he was ineligible for parole. The underlying rights at issue in Claim 2 are therefore the same as those in Claim 1, which do not meet the sufficient constitutional magnitude standard. Claim 3 founders on trial strategy, namely whether counsel was ineffective for failing to retain and present an expert witness to rebut the State's theory that he mixed gasoline with Styrofoam to create a more-

deadly accelerant. In matters of trial strategy, defense counsel is not required to consult with and receive the approval of their client in all but the exercise of the most personal rights. *See Taylor v. Illinois*, 484 U.S. 400, 418 (1988) ("[T]he lawyer has—and must have—full authority to manage the conduct of the trial.")

Ordinarily, claims for relief raised under Rules 32.1(b) through (h) are not subject to preclusion, however they are subject to summary dismissal where the petitioner fails to explain why they were not raised in a prior petition or notice, or timely raised at all. *See* Ariz. R. Crim. P. 32.2(b). Because McGill has not offered any explanation, Claims 1(C), 4, and 5 are subject to summary dismissal under Rule 32.2(b), even though the claims have been raised under provisions not ordinarily subject to preclusion.

Despite Rule 32.18's focus on preclusion as a precondition for the issuance of a stay, the fact that McGill's petition is subject to summary dismissal based on timeliness and preclusion demonstrate why McGill's request for a stay is premature. The superior court has not made those initial determinations, which are critical in predicting how long it will take to dispose of McGill's petition. Furthermore, as illustrated by the reference to the end-stage litigation in *Hooper*, the superior court is capable of adjudicating a capital petition for postconviction relief on an accelerated timeline, even where an evidentiary hearing is involved (and no such hearing will be needed here). The issue is therefore not ripe because

there is no injury, and the trial court's reliance on the typical timelines in capital postconviction matters does not change the posture of this case.

This Court should deny McGill's request to stay his warrant of execution and direct the superior court to assign McGill's successive petition for postconviction relief. This Court should also impress on the superior court the importance of a speedy disposition in recognition that McGill's execution is scheduled for May 20, 2026.

Respectfully submitted this 23rd day of April, 2026.

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