No. 21-

IN THE

Supreme Court of the United States

MURRAY HOOPER,

Petitioner,

v.

DAVID SHINN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DALE A. BAICH
ASSISTANT FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, AZ 85007
(602) 382-2816

THOMAS J. PHALEN
P.O. Box 25053
Phoenix, AZ 85002
(602) 340-0865

JEAN-CLAUDE ANDRÉ*
BRYAN CAVE LEIGHTON PAISNER LLP
120 Broadway
Suite 300
Santa Monica, CA 90401
(310) 576-2148
jcandre@bclplaw.com

J. BENNETT CLARK
SAMUAL A. GARNER
BRYAN CAVE LEIGHTON PAISNER LLP
One Metropolitan Square
St. Louis, MO 63102
(314) 259-2000

* Counsel of Record

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this Court should clarify its holding in *Greene v. Fisher*, 565 U.S. 34, 38 (2011), to reflect that the state court decision by which "clearly established federal law" is measured within the meaning of 28 U.S.C. § 2254(d)(1) is not "rendered" until the state court issues its mandate, which in this case, would result in this Court's intervening decision in *United States v. Bagley*, 473 U.S. 667 (1985), being clearly established federal law when the Arizona Supreme Court "rendered its decision" in petitioner's case.

2. Whether the prosecution's suppression of evidence regarding significant and unusual financial benefits and other repeated favors for a key witness—when there was a specific request for such evidence, the verdict was already of questionable validity, eye witness testimony was of questionable reliability, and the investigation and trial was otherwise littered with prosecutorial misconduct—is sufficient to undermine confidence in the outcome of petitioner's trial under *Bagley*.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Murray Hooper, a prisoner incarcerated at the Arizona State Prison Complex Florence, Central Unit.

Respondent is David Shinn, Director, Arizona Department of Corrections.

There are no corporate parties involved in this case.

STATEMENT OF RELATED PROCEEDINGS

Hooper v. Shinn, No. 08-99024 (United States Court of Appeals for the Ninth Circuit) (opinion affirming district court's judgment, filed on January 8, 2021; order denying rehearing filed on July 15, 2021).

Hooper v. Shinn, No. 21-70995 (United States Court of Appeals for the Ninth Circuit) (order denying application to file a second or successive habeas corpus petition, filed on June 1, 2021).

Arizona v. Hooper, No. CR-18-0248-PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing post-conviction relief, dated July 28, 2020).

Hooper v. Schriro, No. CV 98-2164-PHX-SMM (United States District Court for the District of Arizona) (judgment denying petition for writ of habeas corpus, entered October 10, 2008).

Hooper v. Arizona, No. 06-5381 (Supreme Court of the United States) (order denying petition for a writ of certiorari, dated October 2, 2006).

Arizona v. Hooper, No. CR-05-0493-PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing post-conviction relief, dated April 20, 2006).

Arizona v. Hooper, No. CR-97-0410-PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing post-conviction relief, dated June 25, 1998).

Hooper v. Arizona, No. 98-9288 (Supreme Court of the United States) (order denying petition for a writ of certiorari, dated Oct. 2, 1995).

Arizona v. Hooper, No. CR-94-0281-PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing post-conviction relief, dated Dec. 22, 1994).

Hooper v. Arizona, No. 89-5633 (Supreme Court of the United States) (order denying petition for a writ of certiorari, dated June 28, 1990).

Arizona v. Hooper, No. CR-88-0393-PC (Arizona Supreme Court) (order denying petition for review of lower court's order dismissing post-conviction relief, dated May 23, 1989).

Hooper v. Arizona, No. 85-5705 (Supreme Court of the United States) (order denying petition for a writ of certiorari, dated January 13, 1986).

Arizona v. Hooper, No. 5810 (Arizona Supreme Court) (opinion affirming lower court judgment, filed November 7, 1983; order denying motion for reconsideration, filed August 20, 1985; mandate issued August 22, 1985).

Arizona v. Hooper, No. 121686 (Maricopa County Superior Court) (judgments of guilt and sentences, dated February 11, 1983).

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PETITION FOR A WRIT OF CERTIORARI

Murray Hooper respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a)[1] is reported at 985 F.3d 594. The order of the district court (Pet. App. 81a) is not published in the Federal Supplement but is available at 2008 WL 4542782.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 8, 2021. Pet. App. 1a. Petitioner filed a timely petition for rehearing and/or rehearing en banc, which the court of appeals denied on July 15, 2021. Pet. App. 161a. This Court then issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the order denying the petition for rehearing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

[1] "Pet. App." refers to the Petition Appendix filed contemporaneously with this petition; "C.A.E.R." refers to petitioner's original Excerpts of Record, filed with the court of appeals on September 11, 2009 (Dkt. No. 23); "C.A. Repl. Op. Br." refers to petitioner's Replacement Opening Brief, filed with the court of appeals on January 18, 2019 (Dkt. No. 99); "C.A. Repl. Ans. Br." refers to the State's Replacement Answering Brief, filed with the court of appeals on March 19, 2019 (Dkt. No. 105); "C.A.R.B.E.R." refers to petitioner's Replacement Brief Excerpts of Record, filed with the court of appeals on December 21, 2018 (Dkt. No. 93); and "C.A.R.R.E.R." refers to petitioner's Replacement Reply Brief Excerpts of Record, filed with the court of appeals on May 9, 2019 (Dkt. No. 114). Each such reference is followed by the applicable page reference.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the U.S. Code provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim…resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

INTRODUCTION

When the State investigated and prosecuted Petitioner Murray Hooper for the murders of Pat Redmond and Helen Phelps, criminal defendants were suffering from a well-documented "epidemic of *Brady* violations."[2] In no jurisdiction was this epidemic more acute than in the State of Arizona and in particular, Maricopa County, where the Redmond/Phelps murder investigation and Hooper's prosecution took place.[3]

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[2] *United States v. Olsen*, 737 F.3d 625, 626, 631-32 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc).

[3] *See Milke v. Ryan*, 711 F.3d 998, 1013-15 (9th Cir. 2013) (detailing rampant misconduct in Maricopa County throughout the 1980s).

The investigation and prosecution of Hooper was among the most egregious examples of this problem.[4]

Among other things,[5] the State withheld evidence of countless benefits that it provided to its key cooperating witness (known fence and drug dealer, Arnie Merrill, who supposedly brokered the murders-for-hire yet at times was allowed to be at liberty) and photographs of, and police reports concerning, three suspects (other

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[4] Notably, Hooper has watched his co-defendants obtain relief on the same constitutional infirmities he has pressed. Like co-defendant Robert Cruz, *State v. Cruz,* 857 P.2d 1249, 1253-54 (Ariz. 1993), Hooper challenged the State's discriminatory jury selection practices, but unlike Cruz, Hooper was denied relief. Similarly, while co-defendant Joyce Lukezic obtained relief based on the State's misconduct and *Brady* violations (C.A.E.R. 617-18), Hooper was denied relief on similar facts. Hooper, like co-defendant Edward McCall, was denied effective assistance of counsel at sentencing, yet McCall obtained relief and Hooper did not. *See* C.A. Repl. Op. Br. at 6.

[5] The State's misconduct began early: on the way to the police station, officers beat Hooper and told him that he did not deserve an attorney when he requested one. Officers coerced Hooper into making statements, later suppressed at trial with the State's consent. C.A.E.R. 1372, 1376, 1265, 1276-77. The State's misconduct continued leading to Hooper's trial. Because the State failed to make prosecution witnesses available for defense interviews, despite the court ordering it to do so, the defense filed multiple sanctions motions and a motion to dismiss the prosecution. C.A.E.R. 1308-10, 1319-20, 1347-48, 1378, 1380-81. The prosecution's conduct was so egregious that the court sanctioned the State by limiting one witness's testimony and threatening to preclude another witness from testifying altogether. C.A.E.R. 1206, 1278-80.

than Hooper and his prosecuted co-defendants) who were arrested for the murders.[6]

It is thus unsurprising that the Arizona courts that addressed Hooper's case acknowledged in stern rhetoric that the State "play[ed] games of hide and seek" (C.A.E.R. 543-44 (trial)) "at every discovery and evidentiary gathering effort undertaken by the defense" (C.A.E.R. 260-61 (motion to vacate); *see also id.* at 260 ("a cavalier, almost holier-than-thou attitude existed on the part of some of the prosecution team as evidenced by the overreaching, 'I didn't think it mattered' blasé at times, disinterested, its-none-of-your-business attitudes" (motion to vacate)). *See* Pet. App. 57a ("We share the . . . displeasure at the prosecution's disclosure policies in this case." (Arizona Supreme Court)).[7]

Nonetheless, in evaluating the prejudicial effect of the State's serial *Brady* violations and finding them insufficient to warrant federal habeas relief, the court of appeals *sua sponte* rejected both the analysis of the district court and the State's concession before the

[6] The State also suppressed Detective Larry Martinsen's "verbatim notes" of Marilyn Redmond's (Pat Redmond's widow) lineup identification of Hooper, which would have allowed Hooper to impeach her identification (*see* note 15, *infra*), and a police report showing that the State knowingly misled the court when it said attorney Michael Green could identify Hooper as having retrieved the alleged payment for the homicides. These *Brady* violations were the subject of Hooper's application to the court of appeals for authorization to file a second or successive section 2254 petition. The court of appeals denied the application on June 1, 2021. *Hooper v. Shinn*, 859 Fed. Appx. 79 (9th Cir. 2021).

[7] Hooper's constitutional arguments were addressed in the decision in co-defendant William Bracy's case, issued the same day. *See* Pet. App. 47a-65a.

court of appeals that Hooper's claims should be evaluated under the standard articulated by this Court in *United States v. Bagley*, 473 U.S. 667, 678 (1985), that, for cases like this one in which the State suppresses favorable evidence despite the defense's specific request for it, relief is warranted when the suppressed evidence "undermines confidence in the outcome of the trial."

In doing so, the court of appeals invoked this Court's decision in *Greene v. Fisher*, 565 U.S. 34 (2011), and erroneously concluded that, for purposes of 28 U.S.C. § 2254(d)(1), "clearly established Federal law" is frozen in time when the highest state court issues its opinion and, because *Bagley* post-dated the Arizona Supreme Court's publication of its opinion in Hooper's case by 22 days, it was not clearly established.

This was an erroneous expansion of *Greene*. The relevant test for what constitutes "clearly established Federal law" under *Greene* is when the state court "renders its decision." *Id.* at 38. The Arizona Supreme Court did not render its decision in Hooper's case until after *Bagley* because Hooper's petition for rehearing remained pending before the Arizona Supreme Court for over a month-and-a-half after *Bagley*'s issuance. The Arizona Supreme Court was thus the only court with jurisdiction to consider and apply *Bagley*, and (although it did not do so here) the Arizona Supreme Court does recall its opinions in cases in which it still has jurisdiction to apply intervening decisions from this Court clarifying constitutional criminal law.

Because the rule for determining which decisions qualify as "clearly established Federal law" will often be case-dispositive, in this case (and other cases) may mean life or death, and broadly applies to all federal habeas petitions, this Court's review is warranted. The Court should thus grant the petition to clarify that

the state court decision by which "clearly established Federal law" is measured within the meaning of 28 U.S.C. § 2254(d)(1) is not "rendered" until the state court issues its mandate, as well as to correct the court of appeals' erroneous determination that the State's numerous *Brady* violations did not entitle Hooper to federal habeas relief.

STATEMENT

In the early 1980s, a Maricopa County jury convicted Hooper and Bracy of the Redmond/Phelps murders, and the trial court sentenced Hooper to death. *See* Pet. App. 9a, 16a-17a.

After trial and sentencing, Hooper learned that the State provided Merrill, a "key" witness in the words of the trial court, with numerous unique and problematic benefits. C.A.E.R. 258-59. After a hearing, the trial court found that Maricopa County investigator Dan Ryan would routinely drop off Merrill—then in custody for the Redmond/Phelps murders—at various locations—sometimes hotel rooms paid for by the county, sometimes the homes of Merrill family members—for long, unsupervised visits to eat, talk, and have sex with his wife. C.A.E.R. 554-55, 561-70, 581, 608-13. These routine visits were well beyond the singular conjugal visit disclosed and used at trial. *Compare* C.A.E.R. 561-88 *with* Pet. App. 56a (discussing a single, "private out-of-jail visit.").

In addition to these highly unusual visits, the State permitted Merrill to make 22 long-distance calls to his

wife on the County Attorney's phone—sometimes unsupervised.[8] C.A.E.R. 258-59, 518. The State also provided Merrill's wife with over $3,000, and Ryan personally set up a system to make hundreds of dollars in car payments for her. C.A.E.R. 258, 592. At the hearing, Ryan lied repeatedly to cover up the payments. A supervisory County Attorney later testified that this case was the only instance in which he was aware of an investigator handling money for a witness's relatives or loaning witnesses money. C.A.E.R. 487-90.

The State disclosed none of this favorable impeachment evidence (the "Merrill Benefits") notwithstanding that Hooper had specifically asked for it in a "detailed discovery request." Pet. App. 55a.

Despite this widespread pattern of non-disclosure (*see* C.A.E.R. 614), the trial court denied Hooper's motion to vacate. The Arizona Supreme Court affirmed, finding the evidence not material because it would not have "affected the outcome," an incorrect and insufficiently protective standard. Pet. App. 56a; *see also* note 7, *supra*. It denied Hooper's petition for rehearing on August 20, 1985, and issued its mandate on August 22, 1985 (C.A.E.R. 229)—more than 50 days after *Bagley*, 473 U.S. at 678, clarified that the correct standard is whether the suppressed evidence "undermines confidence in the outcome of the trial."

Following exhaustion of state remedies, Hooper sought relief under 28 U.S.C. § 2254. Although the district court eventually denied Hooper's petition, it agreed that *Bagley* applied. *See* Pet. App. 90a n.7.

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[8] At the time, "[a] long-distance call was something special—and expensive." Christopher Stern, *So Long to Long-Distance?*, WASH. POST, Aug. 5, 2004, at E1.

Hooper appealed and, like the district court, the State agreed that *Bagley* applied. (C.A. Repl. Ans. Br. at 16-17.) Nonetheless, in affirming, the court of appeals *sua sponte* held that *Bagley* did not apply because the Arizona Supreme Court's decision affirming Hooper's conviction was published on June 10, 1985, and "clearly established law includes only the Supreme Court decisions issued by that date." Pet. App. 22a. The court of appeals then went on to reject Hooper's claim that the Arizona Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), because that court "identified the correct governing [pre-*Bagley*] legal principles in *Brady* and *United States v. Agurs*, 427 U.S. 97 (1976)" and did not apply *those* principles unreasonably. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted to both (1) clarify this Court's holding in *Greene* and correct the court of appeals' erroneous and broadly impactful holding that clearly established law includes only decisions of this Court released by the date that a state court publishes its decision even if, as with the Arizona Supreme Court, it retains jurisdiction and is therefore the only court capable of applying intervening precedent from this Court; and (2) the court of appeals' erroneous determination that the State's numerous *Brady* violations did not entitle Hooper to federal habeas relief.

I. *BRADY*, *AGURS*, AND *BAGLEY*

Brady v. Maryland established the well-known standard that, when the prosecution suppresses "material" evidence, it violates a defendant's due process rights. Subsequently, the Court in *Agurs* clarified that *Brady* applies (and a due process violation thus occurs) if, *inter alia*, (1) the State withholds evidence that a

defendant specifically requests, and (2) the withheld evidence is "material," insofar as it "might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104.

But in 1985, the Court further clarified and relaxed the applicable materiality standard.[9] In *Bagley*—also a specific-request case—the Court held that specifically requested evidence is material if "its suppression undermines confidence in the outcome of the trial." 473 U.S. at 678. This more-relaxed standard was appropriate, the Court explained, because "the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption." *Id.* at 682-83. Indeed, some courts have

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[9] For example, in *Kyles v. Whitley*, the Court explained that *Bagley*, "the third prominent case on the way to current *Brady* law," eliminated the distinctions between the categories in *Agurs*. 514 U.S. 419, 433 (1995). The Court emphasized that "*Bagley*'s touchstone of materiality is a 'reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434 (citation omitted). *See also United States v. Shaffer*, 789 F.2d 682, 688 (9th Cir. 1986) ("[F]ollowing the district court's determination, the Court set forth a *new standard* for determining when the withholding of Brady material requires the reversal of a conviction." (emphasis added) (citing *Bagley*, 473 U.S. 667)).

expressly interpreted *Bagley* to mean that the more specifically the defense requests certain evidence, the lower the *materiality* standard. *See, e.g.*, *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 827 (10th Cir. 1995) ("As the specificity of the defendant's request increases, a lesser showing of materiality will suffice to establish a violation.").

Here, the Arizona Supreme Court did not apply the *Bagley* standard. It instead applied *Agurs'* "might have affected the outcome of the trial" standard.[10] Pet. App. 55a. Because the Arizona Supreme Court failed to apply the federal constitutional standard that governed when Hooper's case was still pending under its review, section 2254 is no barrier to federal habeas relief. *See Johnson v. Williams*, 568 U.S. 289, 301 (2013) (if a state court applies a standard that "is less protective" than clearly established federal law, section 2254 does not bar review); *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000) (giving state court no deference where that court applied the wrong legal standard). Moreover, the State's conduct here was so egregious that, even if the *Agurs* standard applied (either

[10] Notably, on top of the *Agurs* materiality standard, the Arizona Supreme Court also employed the deferential abuse of discretion standard in its review of the trial court's denial of a new trial. Pet. App. 55a. This is an incorrect augmentation of the materiality standard and nowhere to be found in *Brady*, *Agurs*, or *Bagley*. Moreover, elsewhere, the Arizona Supreme Court appeared to apply a simple sufficiency-of-the-evidence analysis to the materiality issue. Pet. App. 56a (explaining that "the strong eyewitness testimony of Mrs. Redmond … is more than sufficient to uphold the convictions"). This is also an incorrect standard. *Kyles*, 514 U.S. at 434 ("The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test.").

because *Bagley* did not apply or because their differences were insufficiently stark), the Arizona Supreme Court's determination that the suppressed evidence was immaterial was objectively unreasonable.[11] Under either *Agurs* or *Bagley*, the State violated Hooper's due process rights, and the Arizona Supreme Court's contrary conclusion was objectively unreasonable.

II. BAGLEY WAS CLEARLY ESTABLISHED WHEN THE ARIZONA SUPREME COURT "RENDERED ITS DECISION."

For purposes of 28 U.S.C. § 2254(d)(1), when this Court propounds the meaning of federal constitutional rights, that "clearly established" law applies to criminal appeals then-pending on direct review, but will not necessarily be applied to previously determined (and

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[11] To the extent that the court of appeals attempted to brush aside the potential import of *Bagley* when it said "even if we are somehow incorrect in our determination that [*Agurs*] was clearly established federal law on this issue" at the relevant time, that statement addresses the wrong question. Pet. App. 23a n.14 (discussing *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004)). Whether *Agurs* was clearly established at the relevant time was not the issue that the court of appeals was asked to address. Indisputably, *Agurs* was clearly established—until the Court superseded and clarified that clearly established law with respect to "specific request" cases on July 2, 1985, in *Bagley*.

The issue here was and is whether *Bagley* was clearly established at the relevant time: when the Arizona Supreme Court "render[ed] its decision." (*See* Part II, *infra*.) As explained below, the Arizona Supreme Court "rendered its decision" when it issued its mandate in Mr. Hooper's case on August 22, 1985.

In any event, as discussed further below, under either standard (*Brady*/*Agurs* or *Brady*/*Bagley*), the Arizona Supreme Court's decision was an unreasonable application of clearly established federal law, and Hooper should have been afforded relief.

thus already final) state-court adjudications. That rule has its origins in *Cullen v. Pinholster*, 563 U.S. 170 (2011), where the Court held that review is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits. As the Court explained, section 2254(d)(1) has "backward-looking language," which requires federal courts to examine state-court decisions "against this Court's precedents as of 'the time the state court renders its decision.'" *Id.* at 182 (citation omitted). The following Term in *Greene*, the Court applied *Pinholster*'s logic to what constitutes "clearly established Federal law." The petitioner there sought the benefit of a Confrontation Clause decision (*Gray v. Maryland*, 523 U.S. 185 (1998)) decided by this Court after the Pennsylvania Superior Court resolved his appeal on December 16, 1997, but before his state-court proceedings became "final" when his deadline for petitioning for a writ of certiorari on direct review to this Court lapsed on July 28, 1999. *See Greene v. Palakovich*, 606 F.3d 85, 90, 91 (3d Cir. 2010).

In evaluating the petitioner's assertions on federal habeas review that *Gray* qualified as "clearly established Federal law" and that the Pennsylvania Superior Court should have applied it, this Court rejected the petitioner's argument that the relevant temporal benchmark was the finality rule of *Teague v. Lane*, 489 U.S. 288 (1989), for when a rule of constitutional criminal procedure is "new" or "old." *Greene*, 565 U.S. at 38-40. Because neither section 2254(d)(1) nor *Teague* "abrogates or qualifies the other," the Court concluded that the relevant test is what law was clearly established by this Court when the state court "'renders its decision.'" *Id.* at 38 (quoting *Pinholster*, 563 U.S. at 182).

The court of appeals here incorrectly assumed that a state court "renders its decision" on the date of the decision's release or publication. But that is not so: the publication date of an opinion is not when a decision is "rendered"—at least not with respect to Arizona appellate courts. By rule, an Arizona appellate court expressly "retains jurisdiction of an appeal until it issues the mandate." Ariz. R. Crim. P. 31.22(a). And the Arizona mandate will not issue—at least in a capital case—until either the condemned prisoner's deadline for seeking certiorari review has expired, his certiorari petition has been denied, or this Court issues a merits judgment. *See* Ariz. R. Crim. P. 31.22(c)(1)(A) & (B).

This rule is significant both as a jurisdictional matter and a practical matter. As a jurisdictional matter, because the Arizona appellate court reviewing a defendant's criminal judgment—in the case of Hooper's capital judgment, the Arizona Supreme Court—retains jurisdiction until proceedings before this Court have been foregone or concluded, that Arizona court is the only court with the power and ability to apply extant "clearly established Federal law." As a practical matter, that power is significant because the Arizona Supreme Court can use, and in the past has used, this power to recall a written opinion in order to reevaluate it in light of decisions from this Court issued prior to the issuance of the state-court mandate.

For example, the Arizona Supreme Court reconsidered decisions then-pending after this Court announced its decision in *Ring v. Arizona*, 536 U.S. 584 (2002). At the time, there were 31 such cases at various stages before the Arizona Supreme Court. *See State v. Ring*, 65 P.3d 915, 925 (Ariz. 2003) (citing *State v. Ring*, 2002 Ariz. LEXIS 102 (June 27, 2002)). In some, the court had already published its opinion, but the mandate had not issued. For example, *State v.*

Finch, 46 P.3d 421 (Ariz. 2002), was initially published on May 24, 2002. But following *Ring* (which was issued one month later), the Arizona Supreme Court recalled its initial *Finch* opinion and subsequently published a second opinion a year later addressing *Ring*. *See State v. Finch*, 68 P.3d 123 (Ariz. 2003).

Here, the Arizona Supreme Court published its decision adjudicating Hooper's *Brady* claims on June 2, 1985. Hooper filed a rehearing petition, which was not denied until August 20, 1985, with the mandate issuing two days later on August 22, 1985. In the interim—before the mandate issued—this Court decided *Bagley*.[12] The Arizona Supreme Court thus "render[ed] its decision" after *Bagley*, and it should have applied that case to Hooper's case. *Bagley* governs Hooper's case, as the district court found and the State conceded. The court of appeals erred and improperly expanded *Greene* in concluding otherwise.

[12] At the time that Hooper's case was under Arizona Supreme Court review, Arizona Rule of Criminal Procedure 31.22 had not been promulgated. Instead, Hooper's case was governed by then-Arizona Supreme Court Rule 14(a), which delayed the issuance of the Arizona Supreme Court mandate for "[f]ifteen days after giving notice of the filing of an opinion by this court" or when "a motion for rehearing . . . is disposed of," whichever is later. Ariz. Sup. Ct. R. 14(a) (1978). The effects of the old and current rules, however, are the same as applied to Hooper's case. Under the old rule, the Arizona mandate had not issued before *Bagley* because Hooper's petition for rehearing remained pending; under the current rule, the mandate would not have issued until this Court's denial of Hooper's petition for a writ of certiorari on January 13, 1986, *see Hooper v. Arizona*, 474 U.S. 1073 (1986), which was also after *Bagley*.

III. THE MERRILL BENEFITS WERE MATERIAL, AND THEIR SUPPRESSION PREJUDICED HOOPER.

The Merrill Benefits were material and their suppression prejudiced Hooper. This is true even under the *Agurs* "might have affected the outcome of the trial" standard incorrectly applied by the Arizona Supreme Court, and even more so under *Bagley*'s correct "undermines confidence in the outcome of the trial" standard.

Contrary to the conclusions of the Arizona Supreme Court and the court of appeals, the State's case against Hooper rested on thin circumstantial evidence—most notably, inconsistent and dubiously conducted line-up identification and testimony of informants who received monetary and other compensation. Thus, it is not surprising that the jury struggled with the case, asking twice about reasonable doubt during their several-days-long deliberations. C.A.E.R. 501, 670-74; *cf. United States v. Velarde-Gomez*, 269 F.3d 1023, 1036 (9th Cir. 2001) (en banc) (holding that prolonged jury deliberations weigh against a finding of harmless error because "lengthy deliberations suggest a difficult case" (internal quotation marks and brackets omitted)). "[I]f," as is the case here, "the verdict is already of questionable validity, additional evidence of [even] relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113.

In reaching their contrary conclusion, both the Arizona Supreme Court and the court of appeals found that the Merrill Benefits were not material because: (1) Merrill was not a key witness; (2) Marilyn Redmond (Pat Redmond's widow) was a key witness, and "the strong eyewitness testimony" she gave was "more than sufficient to uphold [Hooper's] conviction"; and

(3) in any event, the Merrill Benefits were "merely cumulative" of other disclosed impeachment evidence. Pet. App. 56a; *see also* Pet. App. 24a-25a, 28a-29a. These conclusions were objectively unreasonable.

Even under the pre-*Bagley* standard, when, as here, "the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106. To this end, courts—including this Court—have recognized that, even where some impeachment evidence has been disclosed, suppression of additional impeachment evidence is material, and may be even more so than when none had been disclosed. *See, e.g., Turner v. United States*, 137 S. Ct. 1885, 1895 (2017) ("We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence." (citing *Wearry v. Cain*, 577 U.S. 385, 393-94 (2016) (per curiam))); *Wearry*, 577 U.S. at 393-94 (finding suppressed impeachment evidence material even where witness had already been impeached because suppressed evidence "would have . . . further diminished" witness's credibility) *Silva v. Brown*, 416 F.3d 980, 989 (9th Cir. 2005) (a "conviction in spite of [defense counsel's] attempt at impeaching a key government witness demonstrates only the inadequacy of the impeachment material actually presented, not that of the suppressed impeachment material").

A. Merrill was a key witness.

Contrary to the Arizona Supreme Court's and the court of appeals' conclusions, Merrill was a—and arguably, the—key witness. The State readily admitted Merrill's central role to the trial court: "As the court has heard, Arnold Merrill is one of the State's most important witnesses. You probably heard, ad nauseam,

it's true, Arnold Merrill is an important State's witnesses [sic] in this case." C.A.R.R.E.R. 47. Even more significantly, the trial court, which was best-positioned to observe Merrill's considerable import at trial, expressly acknowledged as much. C.A.E.R. 258. Moreover, the factual background section of the court of appeals' opinion alone references Merrill and/or recounts his recitation of key facts nearly 100 times.

In its attempt to downplay Merrill's importance, the Arizona Supreme Court described the testimony of Mrs. Redmond as "key"[13] (Pet. App. 56a) and, parroting that court, the court of appeals described her as *the* "key witness" because her "in-court identifications of Hooper and Bracy as the intruders were certain and unwavering" (Pet. App. 28a). While Mrs. Redmond's identification of Hooper as one of the assailants was may have been highly accusatory, its questionable reliability renders it far from highly weighty.

B. Mrs. Redmond's testimony was of questionable reliability.

The Arizona Supreme Court stated that Mrs. Redmond's testimony was "particularly strong because [she] had ample opportunity to view all three [assailants] in her home." Pet. App. 56a. But Mrs. Redmond's early descriptions of the assailants were inconsistent and vague. For example, shortly following the crime,

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[13] Elsewhere, the Arizona Supreme Court acknowledged that it was through Merrill that the State presented the bulk of its other evidence: Merrill's testimony showed "defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond." Pet. App. 56a.

she indicated that she could not identify the intruders at all, since she was too afraid to look at them. C.A.E.R. 877, 949; C.A.R.B.E.R. 420-21. She then told the police that "three black men" committed the crime (C.A.E.R. 1171-73) but later stated that two black men and one white man committed the crime (C.A.E.R. 1174, 1177, 1180).[14] She also indicated that some of the assailants were wearing masks (C.A.E.R. 1289-90), but then stopped referencing masks and began describing the suspects as clean-shaven (C.A.E.R. 1148-49). And although Mrs. Redmond testified that there was sufficient bedroom lighting to clearly see the intruders (a fact critical to the prosecution being able to make a submissible case) (C.A.E.R. 841-42), she had previously stated that there was *no* bedroom lighting and that it was too dark to see any faces (C.A.E.R. 883).

During the police station lineup, Mrs. Redmond did not initially identify anyone in the lineup, in which Hooper was present. C.A.E.R. 1139. Only after she returned from "the lieutenant's office" where she and investigators had a "closed door" "discussion" did she state that one assailant, Hooper, was present. *Id.*[15]

[14] Hooper is black.

[15] This suspicious lineup identification is further called into question by the State's suppression of Detective Martinsen's "verbatim notes" taken during Mrs. Redmond's lineup identification of Hooper. These undisclosed notes would have enabled Hooper to impeach both Redmond's and Martinsen's testimony that Mrs. Redmond identified Hooper in the first lineup (Martinsen had testified in Hooper's Illinois case that Mrs. Redmond viewed Hooper's lineup twice and *did not* pick anyone the first time). Either way, Mrs. Redmond's identification of Hooper at the lineup

Mrs. Redmond's identification of Hooper (and related conversations) was also the only identification in this case that was not tape-recorded. C.A.E.R. 1119-21.

Other serious questions of factual accuracy exist with respect to Mrs. Redmond's trial testimony. For example, although Mrs. Redmond stated that the intruders did not wear gloves (C.A.E.R. 873, 889), neither Hooper's fingerprints, nor any other corroborative physical evidence, was found at the scene (C.A.E.R. 1077). Mrs. Redmond testified that Hooper taped her hands (C.A.E.R. 849-51), but his fingerprints were not found on the recovered tape (C.A.E.R. 1076). She also testified that the family room television was off that night (C.A.E.R. 835, 838, 892-93), but crime-scene photographs showed that the television was on (C.A.E.R. 893).

Given Mrs. Redmond's highly suspect identifications and other questionable testimony, Merrill's testimony was not "merely corroborative," as the Arizona Supreme Court unreasonably asserted (and the court of

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was also inconsistent with her prior statements that she was unable to identify any of the attackers. Either she lied to the police or she lied to the jury when she dubiously became able to identify Hooper with certainty. But without these notes, Hooper was unable to effectively address this issue, which would have undermined Redmond's trial identification and therefore "undermine[s] confidence in the outcome of the trial." *Smith v. Cain,* 565 U.S. 73, 75-76 (2012) (failure to disclose officer's notes that showed an eye-witness saying that he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them," which contradicted his testimony that he had "[n]o doubt" that Smith was the gunman he was "face to face" with on the night of the crime, required that the convictions be reversed for a *Brady* violation).

appeals here credited). Pet. App. 56a. When one witness's testimony is highly problematic, as Mrs. Redmond's was, corroboration of it with reliable evidence is critical.

Yet, the jury was prevented from learning the full extent to which Merrill's supposedly corroborative testimony was (literally) bought and paid for by Ryan and the State. The jury did not hear that Ryan would *routinely* take Merrill out of custody (despite being held on murder charges) for long, unsupervised visits to eat, talk, and have sex with his wife—sometimes at hotel rooms paid for by the county. C.A.E.R. 554-55, 561-66, 581, 608-13. Nor did the jury hear that the State permitted Merrill to make 22 long-distance calls to his wife on the County Attorney's phone. C.A.E.R. 258-59. And the jury did not hear that the State provided Merrill's wife with more than $3,000, and that Ryan personally set up a system to make hundreds of dollars in car payments for her. C.A.E.R. 258, 592.

C. The Merrill Benefits were not "merely cumulative."

In finding that the Merrill Benefits were "merely cumulative," the Arizona Supreme Court and the court of appeals here pointed to other impeachment evidence that had been disclosed, such as Merrill's "plea bargain with the state"; past drug use, criminality, and dishonesty with police; and a *singular* "visit with his wife." Pet. App. 56a; Pet. App. 27a.

But the Merrills' receipt of money and *routine* social and conjugal privileges (often paid for by the State and unsupervised) severely undermined Merrill's credibility in a way the other benefits did not, and so are decidedly *not* "merely cumulative." *See, e.g., Banks v. Dretke,* 540 U.S. 668, 702-03 (2004) (finding that impeachment evidence was not "merely cumulative"

where the withheld evidence was of a different character); *Horton v. Mayle,* 408 F.3d 570, 580 (9th Cir. 2005) (finding materiality where the suppressed benefits are "a wholly different kind of impeachment evidence"). For example, immunity is a typical benefit for informants. Similarly, many informants have histories of substance abuse, criminality, and dishonesty with investigators. None of these forms of impeachment evidence could capture the highly unusual nature of the State's relationship with Merrill.

Moreover, even if the Merrill Benefits were somehow cumulative with respect to *his* credibility, evidence of the *extent* to which Merrill's testimony had been purchased would still have been material in at least two other ways. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 270 (1959) ("[W]e do not believe that the fact that the jury was apprised of other grounds for believing that the witness ... may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."). First, it would have cast a cloud on the investigation and prosecution as a whole, potentially leading the jury to conclude that Mrs. Redmond's wavering identification of her assailants was the result of improper investigatory tactics and prosecutorial influence rather than independent memory. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 445-49 (1995) (finding suppressed evidence material where the defense could have used it "to throw the reliability of the investigation into doubt and to sully the credibility of [the detective]"); *Carriger v. Stewart,* 132 F.3d 463, 481 (9th Cir. 1997) (en banc) (finding suppressed evidence material where it would have cast doubt on the quality of the investigation and prosecution as a whole). Second, pre-trial disclosure could have materially affected critical stages of Hooper's trial. *See, e.g.,*

Banks, 540 U.S. at 699 (2004) (finding suppressed evidence material where it would have "dampened the prosecution's zeal" in making certain arguments); *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014) (finding suppressed evidence material where it could have "added to the force of the cross-examination and defense counsel's closing argument"); *United States v. Bundy*, 968 F.3d 1019, 1037 (9th Cir. 2020) (emphasizing the importance of pre-trial disclosure of *Brady* evidence so that the defense can "prepare their case fully, refine their voir dire strategy, and make stronger opening statements").

* * *

At a minimum, suppression of the myriad "unusual and improper" benefits that Merrill received, Pet. App. 56a, "undermines confidence in the verdict"—the applicable materiality standard that the Arizona Supreme Court failed to apply and that the court of appeals excused it from applying based on its unwarranted expansion of *Greene*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DALE A. BAICH
ASSISTANT FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, AZ 85007
(602) 382-2816

THOMAS J. PHALEN
P.O. Box 25053
Phoenix, AZ 85002
(602) 340-0865

JEAN-CLAUDE ANDRÉ*
BRYAN CAVE LEIGHTON PAISNER LLP
120 Broadway
Suite 300
Santa Monica, CA 90401
(310) 576-2148
jcandre@bclplaw.com

J. BENNETT CLARK
SAMUAL A. GARNER
BRYAN CAVE LEIGHTON PAISNER LLP
One Metropolitan Square
St. Louis, MO 63102
(314) 259-2000

Counsel for Petitioner

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* Counsel of Record