

**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
Capital Case*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. The Arizona Supreme Court issued its decision adjudicating the merits of Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on June 10, 1985. This Court's decision in *United States v. Bagley*, 473 U.S. 667 (1985), was issued later, on July 2, 1985. Did the court below nonetheless err by concluding that *Bagley* was not clearly established at the time the state court rendered its decision for purposes of 28 U.S.C. § 2254(d)(1)?

2. Did the court below err by concluding that the state court reasonably determined that undisclosed benefits to a witness were not material where the witness's testimony was corroborative and non-pivotal and the witness was severely impeached at trial with evidence firmly establishing that he was biased and motivated to lie?

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INTRODUCTION

Hooper was convicted of two counts of first-degree murder and other offenses, and sentenced to death, due to his participation in the execution-style murders of Pat Redmond and Helen Phelps, and the attempted murder of Marilyn Redmond, at the behest of a Chicago crime organization on New Year's Eve 1980. Arnold Merrill, a cooperating witness who was involved in the conspiracy, was thoroughly impeached at trial on a number of topics, but the State failed to disclose additional benefits Merrill received. The Arizona Supreme Court concluded on direct appeal that the trial court did err by denying Hooper's motion for new trial based on the nondisclosure because, although the benefits had impeachment value and were suppressed, they were not material under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

On habeas review under AEDPA, the court below held that the state court's decision was a reasonable application of *Brady* and *Agurs* and based on a reasonable determination of the facts under 28 U.S.C. § 2254(d). The court of appeals likewise rejected Hooper's argument that *United States v. Bagley*, 473 U.S. 667 (1985), was the applicable clearly established federal law governing *Brady* materiality because it was decided over a month after the state court adjudicated Hooper's claim. Hooper challenges these conclusions, but has presented no compelling reason for this Court's intervention. The court of appeals' conclusion regarding *Bagley* was based on a straightforward application of *Greene v. Fisher*, 565 U.S. 34 (2011), and the state court's lack of materiality finding was not "beyond

any possibility for fairminded disagreement.” *Shinn v. Kayer*, 592 U.S. --- (2020)
(per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

STATEMENT OF THE CASE

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. Pet. App. 6a. 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 being shot. *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 7a. 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 7a–8a. 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 8a.

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 8a–9a.

Marilyn initially told a responding police officer that “[t]hree black men came in a robbed us,” but then stated that two of the intruders were black and one was white. *Id.* She also told police that one of the black males wore a tan leather jacket with dark pants. *Id.* at 8a. Fifty-three days after the murders, Marilyn flew to Chicago where she identified Hooper and Bracy in lineups. *Id.* at 9a.

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.*

As the court below observed, “[t]he prosecution presented overwhelming evidence of Hooper’s guilt.” *Id.* at 10a. “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 10a–11a. 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 11a. 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 12a.

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.*

As the court below recognized, "Merrill was severely impeached." *Id.* The jury heard that the State gave him immunity for his involvement in the Redmond crimes, including the first-degree murders of Pat and Helen, for which he could have received the death penalty, and immunity for other, unrelated crimes. *Id.* The jury thus "knew Merrill had a very strong personal stake in the case and motive to lie." *Id.* The jury also heard that Merrill received special treatment from the State: he was "placed in a more inmate-friendly, out-of-state prison as part of his deal"¹; the State's investigator "did not immediately arrest him in New York

¹ Merrill's deal involved pleading guilty to an unrelated burglary and theft for an 8-year sentence. *Id.* at 605 n.3.

even though he was wanted for first-degree murderer”; and the State’s investigator “allowed him to travel unrestrained from New York to Arizona despite being a wanted murder” and “took Merrill out of jail for a conjugal visit.” *Id.* The defense also showed that the State’s investigator had stopped his tape-recorded interview with Merrill more than 20 times, and neither Merrill nor Ryan could plausibly explain why. *Id.* The defense argued the investigator used the breaks to coach Merrill on what to say. *Id.*

The defense cast additional doubt on Merrill’s credibility to showing that “he had previously lied to the police in this case and had initially helped cover up the crimes; he was part of a group that committed burglaries and robberies, and he had sold stolen property; he had hired someone to commit arson for Cruz; he was a drug dealer and had a long history of abusing prescription medications; and Merrill’s friend, Campagnoni, testified that Merrill was a braggart, and even Merrill’s own brother, Kleinfeld, testified that he was a ‘story teller, liar, [and] bragger.’” *Id.*

The defense impeached Merrill even further by emphasizing inconsistencies between his testimony and his prior statements:

For example: Merrill testified that he did not get together with Campagnoni to make up a story, but Merrill had previously stated that he told Campagnoni to deny to the police that any black individuals had been at his home; Merrill testified that the bullets he threw away in a canal could not have been the same type that killed Redmond, but he previously testified that they could have been; and he testified that he was not the leader of a criminal group, which contradicted his prior testimony. Parts of Merrill’s testimony also contradicted other evidence, giving the jury even more reasons to disbelieve him. For example, Kleinfeld testified that Merrill picked out the knife at the Gun Trader, not Hooper, and Campagnoni testified that Merrill gave

Bracy .38 caliber ammunition on New Year's Eve, but Merrill denied giving any bullets to Hooper, Bracy, or McCall.

Id. at 12a–13a.

In addition to these witnesses, the State presented other evidence, including employees of Pat Redmond's business who saw Cruz touring the company in 1980; 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; 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 13a.

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 16a–17a.

C. Direct Appeal and Hooper's Brady claim.

Among other claims, Hooper presented on direct appeal a claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose benefits to Merrill. Pet. App. 54a. Hooper and Bracy both had moved to vacate the judgment after trial based on the non-disclosure and, after conducting hearings on the motion, the trial court found that the State had never disclosed that:

- 1) Prior to trial, Dan Ryan, county attorney investigator, made car payments for Arnold Merrill's wife, Cathy Merrill, totaling over \$800.00 for which Ryan received only partial reimbursement;
- 2) Mrs. Merrill also received approximately \$3,000 from the Maricopa County Attorney's Protected Witness Program;
- 3) Arnold Merrill made approximately twenty-two long distance phone calls from the county attorney's office, some of which were with Dan Ryan's knowledge, others of which Merrill made while left unattended in Ryan's custody, and none of which he paid for.

Id. The trial court denied the motion “because independent reliable evidence tied [Hooper] to the conspiracy and to the murders and because the undisclosed evidence was cumulative.” *Id.*

The Arizona Supreme Court affirmed, finding that although the benefits Merrill received were exculpatory and never disclosed, they were not material. *Id.* at 55a. The state appellate court noted that, under *United States v. Agurs*, 427 U.S. 97, 112 (1976), because Hooper had specifically requested discovery of any benefits received by state witnesses in exchange for their testimony, the benefits were material if “the suppressed evidence might have affected the outcome of the trial.” *Id.* at 55a. The court concluded that the undisclosed benefits did not meet this standard of materiality.

First, the additional benefits were cumulative “in view of the great wealth of impeaching evidence against Arnold Merrill showing both bad character and bias,” and thus the court did “not believe the disclosure of benefits equaling several thousand dollars would have had any effect upon the outcome of the trial.” *Id.* at 56a. Second, and in the state court’s view “more importantly,” “the strong eyewitness testimony of Mrs. Redmond in combination with independent evidence

of [Hooper's] participation in the conspiracy is more than sufficient to uphold the conviction." Additionally, the court found that "Arnold Merrill's testimony in the instant case was merely corroborative and not pivotal," the undisclosed impeachment of Merrill "had no effect upon the key testimony of Marilyn Redmond," and other witnesses, such as Campagnoni, provided important testimony linking Hooper to the conspiracy. *Id.* Thus, the court did "not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond and the other evidence. Nor would it have had any effect on whatever opinion the jury had of Merrill's credibility." *Id.*

D. Habeas corpus proceedings.

Hooper subsequently filed a petition for writ of habeas corpus asserting, among other claims, the *Brady* violation based on the nondisclosed benefits to Merrill. Pet. App. 20a. The district court determined that the clearly established federal law for purposes of 28 U.S.C. § 2254(d)(1) was *Brady*, *Agurs*, and *United States v. Bagley*, 473 U.S. 667 (1985). *Id.* The court found that the Arizona Supreme Court's decision that the Merrill benefits were not material was not contrary to or an unreasonable application of that precedent. *Id.* Hooper appealed.

The Ninth Circuit affirmed the district court's denial of habeas relief. First, the court concluded that because the Arizona Supreme Court issued its decision in Hooper's case on June 10, 1985, and *Bagley* was decided later, on July 2, 1985, *Bagley* was not clearly established at the time of the state court decision and the

district court therefore erred in relying on it. Pet. App. 22a. The court reached this conclusion although the State appeared to concede that *Bagley* was clearly established by citing to it in its briefing. *Id.*

Next, addressing Hooper's *Brady* claim under 28 U.S.C. § 2254(d)'s relitigation bar, the court of appeals noted that *Agurs* listed three categories of nondisclosure to which *Brady* applies:

(1) where the undisclosed evidence shows “that the prosecution’s case includes perjured testimony and that the prosecution knew, or should have known, of the perjury,” [*Agurs*,] 427 U.S. at 103, 96 S.Ct. 2392, (2) where the defense makes a specific request, and the prosecutor fails to provide responsive evidence, *id.* at 104, 96 S.Ct. 2392, and (3) where the defense makes a general request or no request, and the prosecutor suppresses favorable evidence, *id.* at 106–07, 96 S.Ct. 2392.

Id. at 23a. Hooper's case involved the second category and, while *Agurs* created different materiality standards for categories one and three, it did not create a specific materiality standard for category two, but explained that “material” means that “the suppressed evidence might have affected the outcome of the trial.” *Id.* (quoting *Agurs*, 427 U.S. at 104). In other words, under the clearly established federal law applicable at the time of the Arizona Supreme Court's decision in Hooper's case, to prove the materiality element of a *Brady* claim the defendant had to show that the suppressed evidence might have affected the outcome of the trial. *Id.*

The Ninth Circuit first concluded that the Arizona Supreme Court's finding that the Merrill benefits were not material was not an unreasonable application of clearly established law under § 2254(d)(1). *Id.* at 24a. The Arizona court properly

found that Marilyn’s testimony was the key to Hooper’s convictions and that Merrill’s testimony was “merely corroborative and not pivotal.” *Id.* Marilyn was an eyewitness and certain in her identifications, and she had had ample time to view the men while they were in her home. *Id.* Moreover, the testimony of numerous other witnesses strongly supported Hooper’s guilt. *Id.* It was also reasonable for the state court to determine that the Merrill benefits would not have affected the jury’s view of his credibility because he was strongly impeached with evidence that he was a “known liar, self-interested criminal, and drug dealer and user,” in addition to evidence that he had lied to the police and had a strong motive to lie about the crimes. *Id.* Given the overwhelming evidence of Hooper’s guilt and the unlikelihood that the benefits would have changed the jury’s view of Merrill, the Arizona Supreme Court reasonably concluded that Hooper failed to show that the benefits might have affected the outcome of his trial. *Id.* Thus, the court below was barred from reviewing Hooper’s claim de novo by § 2254(d)(1). *Id.*

The court of appeals likewise rejected Hooper’s argument that the state court’s decision involved an unreasonable determination of fact under § 2254(d)(2). *Id.* at 24a–25a. The court concluded that the Arizona Supreme Court’s determination that the undisclosed benefits were cumulative impeachment was a reasonable determination based on the defense’s severe impeachment of Merrill at trial. *Id.* at 25a. The additional benefits would have made it “more likely that he was biased and motivated to life,” but it was “already firmly established that Merrill was biased and motivated to life.” *Id.* Finally, the court below found that,

even if reviewed de novo, Hooper's *Brady* claim would fail "because there is no reasonable probability that the trial outcome would have been different had the evidence been disclosed." *Id.* Hooper now asks this Court to review the Ninth Circuit's decision.

REASONS FOR DENYING THE PETITION

This Court grants certiorari “only for compelling reasons,” Sup. Ct. R. 10, and Hooper presents none. In particular, Cruz has not established that the court of appeals created a circuit split or “decided an important federal question in a way that conflicts with relevant decisions of this Court.” *Id.* 10(a), (c). Even if Cruz’s arguments were correct (and, as demonstrated below, they are not), at most he contends only that the court below misapplied “a properly stated rule of law” and made “erroneous factual findings,” reasons for which certiorari is “rarely granted.” *Id.* 10. Because the decision below correctly applied *Greene v. Fisher*, 565 U.S. 34 (2011), and correctly determined that the Arizona Supreme Court reasonably found that the undisclosed benefits were not material, this Court should deny certiorari.

I. **BECAUSE *BAGLEY* WAS DECIDED AFTER THE ARIZONA SUPREME COURT ISSUED ITS OPINION ADJUDICATING THE MERITS OF HOOPER’S CLAIM, IT WAS NOT CLEARLY ESTABLISHED FEDERAL LAW UNDER § 2254(D)(1).**

Hooper’s habeas petition is governed by AEDPA; thus he was not entitled to habeas relief unless he established that the Arizona Supreme Court’s decision on his Brady claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court, 28 U.S.C. § 2254(d)(1), or “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *id.* § 2254(d)(2). “[C]learly established Federal law” under § 2254(d)(1) refers to “this Court’s precedents as of ‘the time the state court renders its decision.’” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003)).

In *Greene v. Fisher*, 565 U.S. 34 (2011), this Court addressed and rejected almost the very argument Hooper makes here—whether a decision by this Court issued after the state court decision that adjudicated a petitioner’s federal habeas claim on the merits, but before the petitioner’s case became final, is “[c]learly established” under § 2254(d)(1). There, the petitioner argued that *Gray v. Maryland*, 523 U.S. 185 (1985), which was decided three months after the last state-court adjudication on the merits of his habeas claim, was clearly established because it was decided before his case became final. *Greene*, 565 U.S. at 38–40. This Court rejected the petitioner’s contention that “because finality marks the temporal cutoff for *Teague*² purposes, it must mark the temporal cutoff for ‘clearly established Federal law’ under AEDPA.” *Id.* at 39. The Court noted that AEDPA did not codify *Teague* and that *Teague* does not alter AEDPA’s plain meaning. *Id.* This Court thus affirmed that § 2254(d)(1) requires federal courts to “measure state-court decisions ‘against this Court’s precedents *as of the time the state court renders its decision.*’” *Id.* at 38 (quoting *Pinholster*, 563 U.S. at 182) (emphasis in original).

Notwithstanding *Greene*’s bright-line, temporal rule, Hooper argues that *Bagley*, decided over a month after the Arizona Supreme Court’s decision denying his *Brady* claim on the merits, was clearly established at the time of the state court rendered its decision because the state court mandate had yet to issue. Pet. at 11–

² *Teague v. Lane*, 489 U.S. 288 (1989) (prisoner seeking federal habeas relief may rely on new constitutional rules of criminal procedure announced before conviction became final).

14. This argument is an indistinguishable variation of the argument this Court rejected in *Greene*. Hooper contends that a state court does not actually “render its decision” on the date its decision is issued, but only later, when a mandate issued. *Id.* at 13. His interpretation tortures the plain meaning of the phrase “renders its decision” and is not meaningfully different from the argument this Court rejected in *Greene* which asserted that a state court decision is not “rendered” until it becomes final. Hooper’s interpretation of the phrase “renders its decision” would also lead to inconsistent application of § 2254(d)(1) depending on particularities of state appellate court procedure. *Greene*’s bright-line rule, in contrast, makes clear that “[c]learly established Federal law” consists of the law existing on the date the state court issues its adjudication on the merits of the claim.

Moreover, as in *Greene*, Hooper’s “predicament” is “one of his own creation.” 565 U.S. at 41. Hooper notes that, after the Arizona Supreme Court published its decision on June 2, 1985, he filed a rehearing petition, which was denied on August 20, 1985, with *Bagley* being decided in the interim. Pet. at 14. But Hooper does not contend—nor does the record reflect—that he cited *Bagley* in his rehearing petition, or otherwise sought to bring that decision to the Arizona Supreme Court’s attention while his rehearing petition was pending. Thus, like the petitioner in *Greene*, Hooper forewent an “obvious means of asserting his claim,” and instead asks this Court “to provide him relief by interpreting AEDPA in a manner contrary to both its text and [this Court’s] precedents.” 565 U.S. at 41. This Court should reject his request to do so, and deny certiorari.

II. THE ARIZONA SUPREME COURT REASONABLY CONCLUDED THAT THE UNDISCLOSED BENEFITS WERE NOT MATERIAL.

Whether reviewed under the *Agurs* “might have affected the outcome” standard, or *Bagley*’s “undermines confidence in the outcome of the trial” standard, the court of appeals correctly determined that the Arizona Supreme Court reasonably concluded that the undisclosed benefits were not material. Hooper argues to the contrary based on his assertions that Merrill was the State’s key witness, Marilyn’s testimony was unreliable, and the undisclosed benefits were not cumulative. Pet. at 15–22. However, he fails to demonstrate that the state court’s materiality determination was “beyond any possibility for fairminded disagreement.” *Shinn v. Kayer*, 592 U.S. --- (2020) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

In finding the undisclosed benefits immaterial, the state court noted that “the strong eyewitness testimony of Mrs. Redmond in combination with independent evidence of defendant’s participation in the conspiracy is more than sufficient to uphold the convictions.” Pet. App. 56a. The court concluded that Marilyn’s testimony was “particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home,” and that “evidence apart from that presented through Merrill 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.” *Id.* Thus, the state court found, Merrill’s testimony “was merely corroborative and not pivotal.” *Id.*

Hooper argues that these findings were unreasonable because Merrill—not Marilyn Redmond—was the State’s key witness and that her testimony was unreliable. Pet. at 16–20. He first asserts that Merrill was the State’s “key” witness, referring to the number of times the prosecutor and the court of appeals referred to Merrill’s testimony. *Id.* at 16–17. But the fact that Merrill was an important witness does not by itself mean that his testimony was not “merely corroborative and not pivotal.” Hooper fails to acknowledge the court of appeals’ finding that the State presented overwhelming evidence of his guilt apart from Merrill’s testimony. *See* Pet. App. 24a; *see also id.* at 10a–11a, 13a (detailing trial evidence). Moreover, while Merrill provided testimony as a member of the conspiracy with inside knowledge of what occurred, the Arizona Supreme Court was reasonable to conclude that Marilyn’s testimony as both a victim and eyewitness who identified Hooper, Bracy, and McCall as the men who entered her home and committed the crimes “was particularly strong.” Pet. App. 56a.

Hooper also argues that the state court unreasonably concluded that Marilyn’s testimony was strong because her initial descriptions of the assailants were inconsistent and her identifications “highly suspect.” Pet. at 17–20. He fails to acknowledge, however, that “Marilyn provided very specific details about her lengthy encounter with the murderers”:

Marilyn explained that they gave her directions and asked her several questions. She looked at their faces each time they spoke to her. At one point during the encounter, she was positioned ‘[e]lbow to elbow’ with Hooper and she looked at him. She described the clothing that each murderer wore. Bracy was wearing a tan leather jacket, dark

slacks, and a dark shirt. Hooper was wearing a darker brown sports or leather coat and dark slacks. McCall was wearing a light tan suit.

Pet. App. At 10a. When the defense pointed out the inconsistencies between her testimony and her prior statements, Marilyn “testified that she did not recall making the prior statements or that they were wrong or had been misinterpreted.”

Id. Furthermore, Louie’s testimony corroborated Marilyn’s descriptions of the men’s clothing. *Id.* Given this record it was reasonable for the Arizona Supreme Court to characterize Marilyn’s testimony as “strong” and conclude that it was “particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home.” *Id.* at 55a.

Marilyn’s identification of Hooper and Bracy as two of the three intruders was also corroborated by multiple other witnesses independent of Merrill. For example, Louie testified that McCall told her the day after the murders that he, Hooper, and Bracy had committed the crimes, and Campagnoni testified that he saw Hooper and Bracy at Merrill’s home on New Year’s Eve, saw Merrill give Bracy a piece of paper with directions to the Redmond home, and saw Hooper, Bracy, and McCall later that night with jewelry, “some of which looked very similar to a ring and watch owned by Redmond.” *Id.* at 11a. Given Marilyn’s eyewitness testimony based on interacting with the killers, along with evidence that corroborated her testimony and established Hooper’s participation, the Arizona Supreme Court reasonably characterized Marilyn as the State’s key witness and Merrill’s testimony as corroborative rather than pivotal.

Finally, Hooper challenges as unreasonable the Arizona Supreme Court's finding that the undisclosed benefits to Merrill were cumulative to the extensive impeachment evidence presented to the jury. Petition at 20–22. As the court below observed, the defense portrayed Merrill “as a serial liar with strong incentives to fabricate his testimony against Hooper and Bracy to avoid a potential life sentence for his own involvement in the Redmond crimes and to continue to receive favorable treatment from the State.” Pet. App. At 25a. While the undisclosed benefits “would have shown that Merrill received monetary benefits from the State and Ryan, making it more likely that he was biased and motivated to lie ... it was already firmly established that Merrill was biased and motivated to lie.” *Id.* The reasonableness of the state court's finding was supported by Ninth Circuit decisions. *See Gentry v. Sinclair*, 705 F.3d 884, 903 (9th Cir. 2013) (undisclosed evidence that the state intervened with parole board to secure witness's parole cumulative because witness was substantially impeached at trial with evidence of “many past crimes, including his conviction for perjury” and “his extensive history of using false names”); *Barker v. Fleming*, 423 F.3d 1085, 1096–97 (9th Cir. 2005) (undisclosed convictions cumulative to evidence portraying witness as a “serial liar,” a “career criminal desperate to escape from jail time,” and had made a deal with the state on multiple occasions).

Hooper further asserts that the undisclosed benefits would have caused “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,” and “could have materially affected critical stages of [his] trial.” Petition at 21. Hooper fails to support these speculative suggestions with any evidence from the record. His assertion regarding Marilyn’s identifications fail to acknowledge the other evidence (independent from Merrill’s testimony) corroborating her identification of Hooper and Bracy and he does not explain how nondisclosure of the Merrill benefits “could” have affected his trial. Thus, Hooper fails to demonstrate that the Arizona Supreme Court’s determination that the Merrill benefits were cumulative impeachment evidence was unreasonable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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