No. 21-6593

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the petition explained, this Court's intervention is needed first to clarify that, for purposes of what constitutes "clearly established Federal law" under 28 U.S.C. § 2254(d)(1), a state court "renders its decision," *Greene v. Fisher*, 565 U.S. 34, 38 (2011), when it issues its mandate. Pet. 11-14. This Court's intervention also is needed to correct the court of appeals' erroneous holding that the prosecution's suppression of evidence of numerous significant and unusual benefits to its key cooperating witness (Alfred Merrill) was insufficiently material to warrant federal habeas relief. Pet. 15-22.

Notably, the State does not dispute the importance of either question. Indeed, it would be hard-pressed to do so. The rule for determining which decisions of this Court qualify as "clearly established Federal law" will often be case-dispositive, broadly applies to all federal habeas petitions, and may mean life or death in many cases. While the second question presented is necessarily fact-bound, "death is different," *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991), and this is a capital case in which petitioner Murray Hooper's life does depend on the answer to that question.

The State's opposition to certiorari thus boils down to its assertions that the court of appeals' resolution of both questions was correct. BIO 18. But as shown in the petition and in greater detail below, neither was. Hooper is entitled to relief based on the prosecution's suppression of the Merrill benefits regardless how this Court might resolve the first question presented and thus regardless whether he is entitled to the benefit of this Court's decision in *United States v. Bagley*, 473 U.S. 667 (1985). Moreover, the State does not dispute that *Bagley* "relaxed the applicable materiality stand-

ard." Pet. 9-10, 11 n.11, 16. That makes Hooper's entitlement to relief even more obvious if the Court resolves the first question presented in Hooper's favor and *Bagley* were to apply.

ARGUMENT

I. *BAGLEY* WAS CLEARLY ESTABLISHED WHEN THE ARIZONA SUPREME COURT "RENDERED ITS DECISION," AND *GREENE* DOES NOT DICTATE OTHERWISE

As shown in the petition and in greater detail below, the court of appeals erred when it *sua sponte* rejected the holding of the district court and the State's concession in its answering brief, invoked *Greene*, and declared that this Court's invigoration of the *Brady* materiality standard in *Bagley* was not clearly established because it issued 22 days after the Arizona Supreme Court initially released its opinion in Hooper's case—but 50 days before it issued its mandate. *See* Pet. 11-14.

Contrary to the court of appeals' suggestion in its opinion and the State's suggestion in its brief in opposition that *Greene* foreclosed Hooper's reliance on *Bagley* (Pet. App. 21a-23a; BIO 19-20), *Greene* addressed a different and broader question than the question that Hooper presents here. As the petition explained (Pet. 12), the *Greene* petitioner asked this Court to declare its decision in *Gray v. Maryland*, 523 U.S. 185 (1998), "clearly established Federal law" on the basis that *Gray* intervened before the *Greene* petitioner's case became "final" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). That the Court answered that question in the negative is not surprising.

Finality occurs for *Teague* purposes when direct state appeals have been exhausted and a petition for a writ of certiorari from this Court has become time barred or has been disposed of. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Thus, under the *Greene* petitioner's position, "clearly established Federal law" could include—and state courts would be faulted for failing to anticipate—decisions of this Court decided during the 90-day period for filing a petition for a writ of certiorari when neither the state court nor any other court had jurisdiction over the defendant's case.

That concern is not implicated by the question Hooper presents. Rather, Hooper asks whether "clearly established Federal law" includes decisions from this Court that intervene before the state court issued its mandate and while that court "is the only court with the power and ability"—*i.e.*, jurisdiction—to apply this Court's intervening precedent. Pet. 13. Moreover, the question Hooper presents is not hypothetical. As the petition explained, the Arizona Supreme Court has exercised its power and ability to recall a previously published opinion and issue a new one addressing this Court's intervening precedent. Pet. 13-14. It could have and should have done so here too: *Bagley* was issued before the Arizona Supreme Court issued its mandate in *Hooper*'s case and, thus, before that court "render[ed] its decision." *Greene*, 565 U.S. at 38.

In resisting Hooper's proffered rule, the State complains that "Hooper's interpretation of the phrase 'renders its decision' would . . . lead to inconsistent application of § 2254(d)(1) depending on particularities of state appellate court procedure." BIO 20. But that complaint has it backwards. This Court has explained that "federal courts owe" "respect" to "the States and

the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991); *see also Gonzalez v. Thaler*, 565 U.S. 134, 152 (2012) ("Gonzalez argues that AEDPA's federalism concerns and respect for state-law procedures mean that we should not read § 2244(d)(1)(A) to disregard state law. We agree.").

Nor should it matter, as the State insists, that "Hooper does not contend—nor does the record reflect—that he cited *Bagley* in his [Arizona Supreme Court] rehearing petition." BIO 20. When the Arizona Supreme Court first applied this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), it did so to "31 capital cases pending . . . at various stages of the process on direct appeal." *State v. Ring*, 2002 Ariz. LEXIS 102, at *2 (June 27, 2002). That included some in which, like Hooper's case, "the court had already issued its opinion, but the mandate had not issued," and there is no indication that in each of those cases, the prisoners had cited *Ring* in a rehearing petition. Pet. 13.

II. THE ARIZONA SUPREME COURT UNREASONABLY DETERMINED THAT THE MERRILL BENEFITS WERE INSUFFICIENTLY MATERIAL

As detailed in the petition, the State provided its key cooperating witness (Arnie Merrill) numerous unique and problematic benefits. Pet. 6-7. These included multiple long, unsupervised visits to eat, talk, and have sex with his wife at various locations, including sometimes in hotel rooms paid for by the county. C.A.E.R. 554-55, 561-70, 581, 608-13. The State also permitted Merrill to make 22 long-distance, and sometimes unsupervised, phone calls to his wife on the prosecutor's phone. C.A.E.R. 258-59, 518. And the State provided Merrill's wife with over $3,000 and set up a

system to make hundreds of dollars of car payments for her. C.A.E.R. 258, 592. Nonetheless, the jury heard about only a singular conjugal visit. *Compare* C.A.E.R. 561-88 *with* Pet. App. 56a (discussing a single, "private out-of-jail visit.").

As also explained in the petition, the suppression of these highly unusual benefits was material, their suppression prejudiced Hooper, and the Arizona Supreme Court's contrary conclusion was unreasonable. This is so under the pre-*Bagley* "might have affected the outcome of the trial" standard articulated in *United States v. Agurs*, 427 U.S. 97, 104 (1976), and incorrectly applied by the Arizona Supreme Court (*see* Pet. App. 56a), and even more so under the correct "undermines confidence in the outcome" standard from *Bagley* that the Arizona Supreme Court failed to apply. Pet. 15. That is because, as the petition also explained, Merrill was a—if not, *the*—key witness for the prosecution, particularly in light of Mrs. Redmond's highly suspect identification of Hooper as one of the intruders and the lack of physical evidence to corroborate her testimony, and because the suppressed evidence was of such a different character than the evidence offered by Hooper to impeach Merrill at trial. Pet. 16-22.

The State disputes the materiality of the suppressed impeachment evidence on the bases that the prosecution's evidence was "overwhelming" because Mrs. Redmond's testimony identifying Hooper as one of the assailants was "'particularly strong'" (BIO 21-23 (quoting Pet. App. 55a & 56a)); she was thus *the* "key witness" (BIO 22-23); her testimony "was . . . corroborated by multiple other witnesses independent of Merrill" (BIO 23); Merrill's testimony "was merely corroborative and not pivotal" (BIO 22 (quoting Pet. App. 56a)); and the suppressed impeachment material was "cu-

mulative to the extensive impeachment evidence presented to the jury" (BIO 24). Each of these assertions is contradicted by the record.

As a threshold matter and as demonstrated by the petition and below, the evidence supportive of Hooper's guilt was far from "overwhelming." In suggesting otherwise, the State parrots the court of appeals' characterization of the prosecution's case in that light. BIO 22 (citing Pet. App. 24a). But neither the jury nor the reviewing Arizona courts, both of which were much closer to this case than the court of appeals, saw the case that way. The jury, which asked twice about reasonable doubt during their several-days-long deliberations, clearly struggled with the strength of the prosecution's evidence. *See* Pet. 15. And none of the reviewing Arizona courts ever described the prosecution's case as "overwhelming." Moreover, even the State, in defending Hooper's conviction, appears to have never gone so far as to describe its case that way until the court of appeals did so in the first instance in its opinion below and the State decided that it was advantageous to seize on that muscular characterization here.

In any event, the evidence was far from "overwhelming" but instead rested on "thin circumstantial evidence—most notably, [an] inconsistent and dubiously conducted line-up identification and testimony of informants who received money and other compensation." Pet. 15. Chief among that thin evidence, as the petition explained, was Mrs. Redmond's highly suspect identification of Hooper. *See* Pet. 17-19. The State points to her "very specific details about her lengthy encounter with the murderers," including that she "looked at their faces" and "was positioned 'elbow-to-elbow' with Hooper and looked at him." BIO 22 (quoting Pet App. 10a, and cleaned up). But as explained in

the petition, Mrs. Redmond's identification of Hooper wavered at every turn, including regarding:

- whether she could identify the intruders at all either because she was too "afraid to look at them" (C.A.E.R. 949; *see also* C.A.R.B.E.R. 420-21) or because "[t]he room was dark, I couldn't see"[1] (C.A.E.R. 883);
- to the extent she could see them, whether the intruders were "three black men" (C.A.E.R. 1171-73) or two black men and one white man (C.A.E.R. 1174, 1177, 1180);[2] and
- to the extent she could see them, whether some of the assailants were wearing masks (C.A.E.R. 1289-90) or clean-shaven (C.A.E.R. 1148-49).

In attempting to brush aside these inconsistencies, the State again parrots a characterization of the record from the court of appeals—not embraced by the reviewing Arizona courts—when it asserts that Mrs. Redmond "'testified that she did not recall making the prior [inconsistent] statements or that they were

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[1] Detective Varela, the first officer on the scene, testified that the lights were "off" in the bedroom where the murders took place that he had to "use [his] flashlight to look around that room." C.A.S.E.R. Vol. B. 234-35.

[2] Bracy was black, McCall was white, and Hooper is black. Three black male suspects, all of whom matched Redmond's initial description and one of whom matched another description, were arrested at 9 p.m. the night of the murders near the Redmond home, but they were ruled out as suspects. Pet. App. 14a-15a. The State suppressed the timing of their arrests until mid-trial. In denying Hooper relief on the issue, the Arizona Supreme Court held that "[w]hen previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no *Brady* violation." Pet. App. 55a.

wrong or had been misinterpreted.'" BIO 23 (quoting Pet. App. 10a). But neither the State nor the court of appeals explained how Mrs. Redmond could "not recall" some of those statements or how they could have been "wrong" or "misinterpreted." Some were made shortly after the crime when, in her own words, she was "thinking clearly" (C.A.R.R.E.R. 57), and others were made *under oath* at co-defendant Ed McCall's January 14, 1981, preliminary hearing (C.A.E.R. 883).

These very problems with Mrs. Redmond's identification of Hooper are likely why the prosecution itself remarked at a mid-trial hearing that someone other than Mrs. Redmond—Lora Avery, a Long's Drugstore customer who saw one white man and two "very dark black" men buying surgical gloves and surgical tape on the night of the murders (C.A.P.S.E.R. 10)—"is the strongest witness we have as far as identification goes" and that her testimony would be "critical" because she was "really the non-coconspirator that would show any acts of these defendants"[3] (C.A.P.S.E.R. 45-49).

Ignoring these prior concessions about the relative importance of Mrs. Redmond's testimony and the Arizona Supreme Court's and court of appeals' failure to so much as acknowledge them, the State points to the testimony of Nina Marie Louie and George Campagnoni as corroborative of Mrs. Redmond's. BIO 23 (citing Pet. App. 10a, 11a). Yet again, however, the reviewing Arizona courts did not find Louie's or Campagnoni's testimony corroborative of Mrs. Redmond's. And they did not so find for good reason. Nei-

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[3] The prosecution so characterized Avery notwithstanding her *inability* to identify Hooper and limited exposure to the suspects. C.A.P.S.E.R. 9-12, 45. As noted above, Avery described one white man and two "very dark black" men; Hooper is light complexioned. C.A.P.S.E.R. 10.

ther witness—both cooperating alleged co-conspirators—reasonably could be considered to have provided reliable corroboration of anything.

Louie was a prostitute and drug user and seller (C.A.E.R. 994-95) who refused to come forward, but instead had to be tracked down (ER 977-79), given immunity, and compensated over $800 for testifying (C.A.S.E.R. Vol. G 77, 80, 109-11.) Louie was caught in multiple lies under oath, and changed her story throughout cross-examination. C.A.S.E.R. Vol. G 89-96, 105.

Campagnoni was a mentally ill drug addict and burglar (C.A.E.R. 930-31, 955-57, 964, 970-71) and, both as Merrill's close friend (C.A.E.R. 940) and someone who possessed property stolen from the Redmond residence (C.A.E.R. 960-61, 1069-70), had an even greater incentive to lie than Louie. In exchange for his testimony, he too got immunity for the Redmond/Phelps murders, as well all but one burglary and one theft, despite having committed a spree of burglaries two months before the murders. C.A.E.R. 731-32, 925, 956-57, 964-65, 1384.

In light of Mrs. Redmond's highly suspect identifications, the lack of physical evidence tying Hooper to the scene,[4] and Louie's and Campagnoni's unreliability, Merrill was the glue that held the prosecution's case together. He provided, as even the State acknowledges now, "important . . . . testimony as a member of the

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[4] As explained in the petition, 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 also 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).

conspiracy with inside knowledge of what occurred." BIO 22. Indeed, the prosecution described him as "one of the State's most important witnesses." (C.A.R.R.E.R. 47.) And the trial court, which was best-positioned to observe Merrill's relative import at trial, agreed that Merrill was "one of the key state's witnesses." (C.A.E.R. 258.) These characterizations directly refute the State's (BIO 23) and the court of appeals' (Pet. App. 24a) assertions that the Arizona Supreme reasonably concluded that Merrill's testimony was "merely corroborative and not pivotal" (Pet. App. 56a).

Finally and equally unreasonable was the Arizona Supreme Court's finding that the suppressed Merrill benefits were "merely cumulative" of other impeachment evidence. Pet. App. 56a. As the petition explained, "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 that the other benefits [he received] did not." Pet. 20. None of the various forms of impeachment cited by the Arizona Supreme Court—Merrill's "plea bargain with the state; his extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police officers; and [a singular] private out-of-jail visit with his wife" (Pet. App. 56)—could convey to the jury how cozy the Merrills had become with the prosecution and how Merrill had an incentive to lie not only for himself, but for his wife too. *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).

Moreover, as the petition also explained, "even if the Merrill Benefits were somehow cumulative with respect to *his* credibility," they would have strengthened

Hooper's ability to more-persuasively attack the investigation and prosecution as a whole by demonstrating the great lengths to which the prosecution team would go to pin the murders on him. Pet. 21. Contrary the State's rejoinder that such a suggestion is "speculative" (BIO 25), the petition cited cases (*see* Pet. 21-22) in which courts, including this Court, have found suppressed evidence material where it would have "dampened the prosecution's zeal," *Banks*, 540 U.S. at 699, or "added to the force of cross-examination and defense counsel's closing argument," *Amado v. Gonzalez*, 758 F.3d 1119, 1139 (9th Cir. 2014). That could have led the jury to reject Mrs. Redmond's identification of Hooper as being the product of coaching and pressure (*see* Pet. 21; *see also id.* at 18 (describing how Mrs. Redmond identified Hooper following a "closed door" "discussion" in "the lieutenant's office" after initially not identifying anyone) and/or reject the testimony of Louie and Campagnoni as being purchased—like Merrill's was.

Both with respect to Merrill's incentives to lie and with respect to the integrity of the investigation and prosecution as a whole, the suppressed Merrill Benefits were material.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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