No.

IN THE
Supreme Court of the United States

MURRAY HOOPER,
Petitioner,

v.

DAVID SHINN, et al.,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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November 15, 2022 * Counsel of Record

CAPITAL CASE: EXECUTION SCHEDULED NOVEMBER 16, 2022 AT 12PM EST

QUESTION PRESENTED

Less than three weeks before Petitioner Murray Hooper's scheduled execution date, an attorney with the Maricopa County Attorney's Office revealed *for the first-time* to the Arizona Board of Executive Clemency, that the sole eyewitness to the crime had excluded Petitioner as a perpetrator when she was unable to identify him in a pre-trial photo lineup. This exculpatory evidence flatly contradicts and puts the lie to the state's pretrial and trial witnesses who falsely testified that no such lineup had ever been administered. The prosecution's failure to disclose this evidence is a clear violation of *Brady v. Maryland* and *Napue v. Illinois*.

Once Petitioner accused the State of withholding the exculpatory evidence, the State dissembled and claimed its disclosure of the lineup was mistaken—averring the contents of its file proved the mistake. When Petitioner's counsel asked to review the file, allegedly proving the mistake, the State refused. At an evidentiary hearing on Petitioner's newly discovered *Brady/Napue* claim, the attorney representing the State avowed that he was "absolutely confident that there was no such photo lineup" while at the same time he admitted that he was not sure if he had "all of those documents" in his own file. At that same hearing, the State's attorney also agreed that Petitioner's claim will "rise or fall" on the existence of the photo lineup and agreed that if the evidence exists, it "certainly would be enough to . . . dive right back into everything."

The Arizona postconviction court had evidence before it that showed the State's unequivocal admissions as to the existence of the exculpatory evidence, but it

denied Petitioner relief in reliance on a self-serving and admittedly uninformed avowal by the State's attorney as to the purported contents of the State's files, while denying Petitioner access to the same files. The Arizona Supreme Court affirmed.

Accordingly, in defiance of this Court's clearly established precedents on disclosure of exculpatory evidence, the state courts denied the claim, by suppressing the very evidence required to prove the claim.

This case presents the following question: Once the state has admitted that material exculpatory evidence exists, does it have a duty to provide a defendant access to that evidence?

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

Arizona v. Hooper, No. CR-22-0268-PC (Arizona Supreme Court) (order denying petition for review of lower court's order denying post-conviction relief, dated Nov. 14, 2022).

Hooper v. Shinn, No. 21-6593 (Supreme Court of the United States) (order denying petition for a writ of certiorari, dated Mar. 21, 2022).

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 Arizona Supreme Court.

OPINIONS AND ORDERS BELOW

The opinion of the Maricopa County Superior Court dated November 14, 2022, is attached as Pet. App. B. The Arizona Supreme Court order denying review dated November 14, 2022, is attached at Pet. App. A.

STATEMENT OF JURISDICTION

The judgment of the Maricopa County Superior Court was entered on November 14, 2022. Petitioner filed a timely petition for review in the Arizona Supreme Court, which was denied on November 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII § 1.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

INTRODUCTION

The State of Arizona intends to execute Petitioner Murray Hooper, a 76-year-old black man, on Novem-

ber 16, 2022. For forty years, Petitioner has steadfastly maintained his innocence. For just as long, reviewing courts have relied on surviving victim Marilyn Redmond's eyewitness identification testimony to sustain the conviction. Mrs. Redmond was "[t]he most important witness…, as she was the only one who saw the intruders in her home. [She] identified Hooper" and his two codefendants. *Hooper v. Shinn*, 985 F.3d 594, 603 (9th Cir. 2021). This identification, according to the state, occurred during an in-person lineup arranged and administered by Chicago police detectives *nearly two months* after the crime took place. (Tr. 12/20/82 at 65–70; Tr. 11/30/82 p.m. at 58–61.)[1]

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[1] The lineup identification occurred in 1981, an era in which the Chicago Police Department was tainted by corruption, torture, and coercive practices, which have been extensively documented and resulted in dozens of exonerations and hundreds of millions of dollars in civil lawsuit payouts to the victims. *See, e.g.*, Summary of Judicial, Executive, and Administrative Findings and Admissions Concerning Systemic Chicago Police Torture at Area 2 and 3, The Invisible Institute, *available at* https://tinyurl.com/3udcmxx3 (last visited Nov. 13, 2022). While in custody, Mr. Hooper was beaten (*See* ROA 382 at 1–3), denied access to a lawyer (Tr. 9/1/82 at 106–11), and coerced to make a false statement (ROA 382 at 3, 7). One of the officers who arrested Hooper, Michael Hoke, was later granted immunity from prosecution in exchange for his testimony about the torture of suspects by Chicago police. *3 Cops Get Immunity in Torture Case*, Chi. Trib., Dec. 2, 2005. A federal court has recognized that "beatings and other means of torture occurred as an established

(continued . . .)

Petitioner has long surmised that Mrs. Redmond had been shown a photograph of him prior to viewing him in a live lineup. And with good reason. He learned the Phoenix Police showed photographs of suspects, including of Petitioner, as soon as they could, to multiple witnesses. (Tr. 11/9/82 at 178–79, 203.) The state's detective explained that "it really wasn't necessary to show Mrs. Redmond any photo lineup" because they had already developed evidence from showing photographs to other witnesses. (Tr. 11/9/82 at 203.) Mrs. Redmond, however, was the sole eyewitness; no physical evidence linked Petitioner to the crime. The other witnesses who testified against Petitioner received monetary compensation, conjugal visits, and immunity despite being implicated in this and other violent crimes. (*See, e.g.*, 12/17/82 at 47; Tr. 12/20/82 at 25–26, 35–38, 54–55, 172; Tr. 7/21/83 at 63–68, 71–72, 83, 99–103; Tr. 12/16/82 16–19, 35–37, 40, 55–56; Tr. 11/29/82 a.m. at 24–26; Tr. 11/24/82 at 53–55; ROA 1167; Trial Ex. 209.)

Because her eyewitness testimony was so critical, "[t]he accuracy of Mrs. Redmond's description was hotly contested at trial." *State v. Hooper*, 703 P.2d 482, 488 (Ariz. 1985). And her memory was less than consistent. Her "first description of her assailants indicated that three black men, two of whom were masked, were the murderers." *Id.* Although she "initially said that all three men were black" (a description that was

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practice, not just on an isolated basis" in the Area 2 Chicago Police Station, the station from which Hoke had transferred before Hooper's arrest. *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999); *see also* John Conroy, *The Police Torture Scandal: A Who's Who*, Chicago Reader, June 16, 2006.

"not particularly detailed"),[2] Mrs. Redmond later "corrected herself" and indicated one of the assailants was white. *Id.* And while "some [investigating police] accounts [indicated] that Mrs. Redmond initially stated that one or two of the assailants wore masks," she "herself never recalled mentioning masks." *Id.*

Despite Petitioner litigating the constitutionality of his conviction for decades, it was not until a letter dated October 28, 2022, that the Maricopa County Attorney's Office revealed *for the first-time* that Mrs. Redman had excluded Petitioner as a perpetrator when she was unable to identify him in a pre-trial photo lineup. In its submission to the Arizona Board of Executive Clemency, the Maricopa County Attorney's Office stated—*twice*—that Mrs. Redmond was shown a paper photo lineup yet failed to identify Petitioner, thereby implicitly excluding him as a perpetrator of the crime.[3] The prosecutor's belated admission flatly contradicts the state's pretrial and trial assertions that no such lineup had ever been administered. And the admissions were not woven from whole cloth or imagined, they rested on the prosecutors' interpretation of their own files.

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[2] Petitioner's codefendant William Bracy was black, and Edward McCall was white. Mrs. Redmond, along with her husband and mother, were white.

[3] The County Attorney stated that "Hooper and [codefendant] Bracey were arrested in Chicago. [Mrs. Redmond] was flown out and participated in live line ups with them. *She had previously been unable to pick them out of a paper lineup*." Pet. App. F at 11. The County Attorney submitted a second letter on November 1, 2022, to correct several errors in its previous letter. Notably, the second letter repeated the affirmation of the photo lineup. Pet. App. G at 11.

STATEMENT[4]

1. On December 31, 1980, William "Pat" Redmond and his mother-in-law, Helen Phelps, were shot and killed by three home invaders. *State v. Bracy*, 703 P.2d 464, 469 (Ariz. 1985).[5] Mr. Redmond's wife, Marilyn, was shot in the head but survived. *Id.* In what Petitioner has consistently maintained was a frameup by the actual perpetrators, the State relied upon self-serving testimony of two others implicated in the crime to build a case against Petitioner, and two codefendants: William Bracy, and Edward McCall. All three men were eventually convicted substantially based on Mrs. Redmond's eyewitness identification, and the testimony of several paid government witnesses and co-conspirators, whose testimony was provided in exchange for extraordinary consideration and benefits from the State, including immunity from serious crimes (including this one), as well as money, drugs, and sex. (*See, e.g.*, 12/17/82 at 47; Tr. 12/20/82 at 25–26, 35–38, 54–55, 172; Tr. 7/21/83 at 63–68, 71–72, 83, 99–103; Tr. 12/16/82 16–19, 35–37, 40, 55–56; Tr. 11/29/82 a.m. at 24–26; Tr. 11/24/82 at 53–55; ROA 1167; Trial Ex. 209.)

Despite her in-person identification of Petitioner, Mrs. Redmond's early descriptions of the assailants

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[4] For a more detailed summary of Petitioner's case, see the "Statement of the Case" from Petitioner's Opening Brief in the Ninth Circuit. Hooper v. Shinn, No. 08-99024. Pet. App. J.

[5] "[Petitioner] was tried jointly with William Bracy. The facts in [Petitioner's] case are identical to those in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985)." *State v. Hooper*, 703 P.2d 482, 487 (Ariz. 1985).

were inconsistent and vague. For example, shortly following the crime, she indicated that she could not identify the intruders at all, since she was too afraid to look at them. (Tr. 11/30/82 p.m. at 73; Tr. 8/26/82 at 141–42.) She then told the police that "three black men" committed the crime (Tr. 11/3/82 at 171, 180) but later stated that two black men and one white man committed the crime (Tr. 11/3/82 at 221, 231, 248). She also indicated that some of the assailants were wearing masks (Tr. 8/27/82 at 69–70), but then stopped referencing masks and began describing the suspects as clean-shaven (Tr. 11/8/82 p.m. at 74–75). 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) (Tr. 11/30/82 p.m. at 37–38), she had previously stated that there was *no* bedroom lighting and that it was too dark to see any faces (Tr. 11/30/82 p.m. at 79).

During the police station lineup, Mrs. Redmond did not initially identify anyone in the lineup, in which Hooper was present. (Tr.11/8/82 at 17.) 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.*) The identification of Hooper was also the only identification in this case that was not recorded. (Tr. 11/10/82 at 181–83.)

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 (Tr. 11/30/82 p.m. at 69, 85), neither Hooper's fingerprints, nor any other corroborative physical evidence, was found at the scene (Tr. 11/15/82 at 16). Mrs. Redmond testified that Hooper taped her hands (Tr. 11/30/82 p.m. at 45–47), but his fingerprints were not found on the recovered

tape (Tr. 11/15/82 at 12). She also testified that the family room television was off that night (Tr. 11/30/82 p.m. at 31, 34, 88–89), but crime-scene photographs showed that the television was on (Tr. 11/30/82 p.m. at 89).

Besides Mrs. Redmond, other witnesses who directly implicated Petitioner—Arnie Merrill, George Campagnoni, Valinda Harper,[6] and Nina Marie Louie[7]—were all heavily incentivized to provide a highly coordinated testimony that absolved them all from suspicion. Merrill and Campagnoni admitted involvement in the planning or commission of the crime. (*See* 10/31/22 Successor Petition at 26–27.) Merrill testified that he knew about the plan to kill Redmond, drove the killers to Redmond's house and business, and helped them procure weapons. (Tr. 11/17/82 at 9–11, 15–16, 28–32, 44–51, 64–65, 72, 106.)[8] Despite his

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[6] Harper, an aspiring madam, drug user, and fixture in the Phoenix drug trade, contacted police anonymously and claimed to have information about the crimes, the assailants' identities, and co-conspirators. (Tr. 11/23/82 at 84–85, 87–88; ROA 1763 at 68–69.) Harper later claimed that police officers fed her information about the Redmond homicides. (ROA 1741 at 7–8.)

[7] Nina Marie Louie was a prostitute who sold drugs. (Tr. 11/23/82 at 88–90, 105–07, 138–139.) The State compensated Louie for her testimony. (Tr. 12/20/82 at 7–8; Tr. 11/23/82 at 64–68.)

[8] "Merrill was a serial liar, a criminal, and had received significant benefits from the State for his cooperation, including a deal that ensured he would not be

(continued . . .)

key role, the State absolved Merrill of responsibility for the deaths. (Tr. 11/16/82 at 152–54.) Although Campagnoni possessed property stolen from the Redmond home (Tr. 11/24/82 at 92–93; Tr. 11/16/82 at 126–27), he too was given full immunity for that offense (Tr. 11/29/82 a.m. at 14–15.)[9]

Moreover, the Maricopa County Attorney's Office did not have clean hands in this case. The jury learned that investigator Dan Ryan committed serious misconduct including:

- taking Merrill "out of jail to have sex with his wife," *Hooper*, 985 F.3d at 621;
- "stopped his tape-recorded interview with Merrill more than twenty times for no apparent reason other than to coach Merrill on what he should say," *id.;*
- "threatened a witness with physical violence," *id.;*
- "directed a witness to lie to the police and gave that witness money," *id.;* and
- "lied to a probation officer to secure a reduced sentence for Campagnoni." *Id.*

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sentenced to death for the Redmond murders and an out-of-jail visit so he could have sex with his wife." *Hooper v. Shinn*, 985 F.3d 594, 620 (9th Cir. 2021).

[9] Campagnoni had formed a robbery/burglary ring with Merrill, McCall, and others and committed a spree of crimes in October 1980. (Tr. 11/24/82 at 54–55, 110–11.) The State allowed Campagnoni to plead to one burglary and one theft; he was sentenced to ten years of probation despite the fact that he had been facing more than 100 years in prison. (Tr. 11/24/82 at 53–54.)

Not surprisingly, the jury struggled in deciding the case. Twice they asked about reasonable doubt during their several-days-long deliberations. (Tr. 9/15/83 at 45; ROA 1063); *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." *United States v. Agurs*, 427 U.S. 97, 113 (1976).

2. On direct appeal, the Arizona Supreme Court found that the prosecution suppressed exculpatory evidence regarding benefits Merrill received, but denied relief finding that suppression of evidence was "cumulative" to the known benefits he received. *State v. Bracy*, 703 P.2d 464, 472-73 (Ariz. 1985). But more important than cumulative finding was the court's reliance on "the strong eyewitness testimony of Mrs. Redmond" Id. at 473.

3. After challenging his convictions and sentence, Petitioner exhausted his federal habeas proceedings on March 21, 2022, when this Court denied certiorari. *Hooper v. Shinn*, 142 S. Ct. 1376 (2022) (mem.). The Arizona Supreme Court issued a warrant for execution on October 12, 2022, setting the execution for November 16, 2022. Warrant of Execution, *State v. Hooper*, No. CR-83- 0044-AP (Ariz. Oct. 12, 2022).

4. Despite Petitioner litigating the constitutionality of his conviction for decades, it was not until a letter dated October 28, 2022, sent to the Arizona Board of Executive Clemency, that the Maricopa County Attorney's Office revealed *for the first-time* that Mrs. Redman had excluded Petitioner as a perpetrator when

she was unable to identify him in a pre-trial photo lineup. The prosecutors sent a second letter dated November 1 repeating the averments as to the photo lineup. In its submission to the Arizona Board of Executive Clemency, the Maricopa County Attorney's Office stated—*twice*—that Mrs. Redmond was shown a photo lineup yet failed to identify Petitioner, thereby implicitly excluding him as a perpetrator of the crime. Pet. App. F at 11; Pet. App. G at 11. The prosecutor's belated admission flatly contradicts the state's pretrial and trial assertions that no such lineup had ever been administered.

On November 4, 2022, Petitioner filed in Maricopa County, a petition for postconviction relief alleging that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963); that the State knowingly presented false evidence at trial in violation of *Napue v. Illinois*, 360 U.S. 264, 271 (1959); and that Mrs. Redmond's pretrial identification was unduly suggestive, inadmissible, and tainted her in court identification such that it should have been precluded. Pet. App. I.

Petitioner also filed a motion to compel discovery of the Maricopa County Attorney's Office file—the same file that Office relied on to twice to aver there had been a photo lineup. Pet. App. H. The discovery motion was denied, and a motion for reconsideration, was also denied. Pet. App. D, Pet. App. E, Pet. App. B at 2. Thus, the state court suppressed discovery of the very evidence that would substantiate the claim On November

10, 2022, the Maricopa County Superior Court held an evidentiary hearing. Pet. App. C.[10]

During the hearing, Petitioner presented documentary evidence that attorneys from the Maricopa County Attorney's Office admitted that prior to traveling to Chicago for an in-person lineup up of Petitioner and his black codefendant, Mrs. Redmond "had previously been unable to pick them out of a paper lineup." Pet. App. F at 11.

However, in response, the State's attorney offered no evidence to support his argument that the County Attorney made a mistake in stating twice that Mrs. Redmond had failed to identify Mr. Hooper in a paper lineup. The State failed to present evidence supporting its unsubstantiated argument, even though the prosecuting attorneys who signed the letters were present in the courtroom throughout the evidentiary hearing.

The superior court asked the State's attorney to avow that the County Attorney's representation was a mistake and that no paper lineup exists. Pet. App. C at 63. The State's attorney avowed that he was "absolutely confident that there was no such photo lineup" while at the same time admitted that he "can't say for – 100 percent sure" that he had "all of those documents" in his file. Pet. App. C at 63, 70–71. The State's

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[10] Prior to raising the *Brady/Napue* claims, Petitioner had filed a separate postconviction petition under Arizona's newly discovered evidence law regarding eyewitness identification. *See State v. Hooper*, No. CR 0000-121686 (Maricopa Cnty. Sup. Ct. Oct. 31, 2022). The state court consolidated the two petitions and heard evidence supporting both. Petitioner, however, is not seeking review of the denial of that petition for relief in this Petition.

attorney also agreed that Petitioner's claim will "rise or fall" on the existence of the photo lineup and agreed that if the evidence exists, it "certainly would be enough to . . . dive right back into everything." Pet. App. C at 63.

5. The superior court issued an ordering denying Petitioner relief. Pet. App. B. In doing so, the court accepted the State's avowal "that there is no evidence that Marilyn Redmond was shown a printed lineup including Defendant before she identified him in person." Pet. App. B. at 7. The court justified its denial of relief because the claim was "lacking a factual basis." Pet. App. B. at 7.

6. On November 14, 2022, the Arizona Supreme Court denied review. Pet. App. A. In its opinion, the court found that Petitioner "has presented no evidence to refute the Deputy County Attorney's explanation that she made the statement by mistake…." Pet. App. A at 9. The court affirmed Petitioner's claim lacked a factual basis. Pet. App. A at 11-12.

REASONS FOR GRANTING THE PETITION

Petitioner was wrongfully convicted and has been incarcerated on death row for over forty years. The newly disclosed evidence substantiates what he's argued for years: that Petitioner's convictions were based on false testimony.

The unique circumstances in this case present a rare but egregious example of the breakdown of the adversarial process in the criminal justice system. Petitioner's trial was tainted by abusive police misconduct and unjust procedures used to secure a conviction at all costs. It is uncontested that the state actors engaged in extraordinary misconduct, as the Arizona Supreme Court found on direct appeal, *Bracy*, 703 P.2d

at 472 (Ariz. 1985), and as summarized in part by the Ninth Circuit, *Hooper*, 985 F.3d at 620-21.

Despite the state misconduct that occurred during before and during trial, Petitioner's convictions were upheld based primarily on the strong testimony of Mrs. Redmond. Because of the new admission from the Maricopa County Attorney's Office regarding that witness, Petitioner finally has proof to obtain the relief he has been repeatedly and unjustly denied.

However, because the state courts imposed a heightened evidentiary standard that flies in the face of this Court's long-standing precedent, they created an impossible burden for defendants to meet. Given the serious nature of this case including the fact that a wrongfully convicted man will be executed, the Court should grant review. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 422 (1995) (explaining that review of Petitioner's *Brady* claim was appropriate in as it is the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case") (citation omitted).

This Court should grant review in this capital case to reverse the Arizona Supreme Court's decision defying this Court's precendents and to correct the fundamental miscarriage of justice that resulted in Petitioner's wrongful conviction.

This Court has long recognized the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor is a represenative of the State, "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974).

Consistent with these priciples, this Court's well-established precedent holds that if the prosecution suppresses material evidence to a defendant's guilt or punishment, then it has violated the defendant's due process rights. *Brady*, 373 U.S. at 87. Nor can the State knowingly present false testimony to secure a conviction. *Napue*, 360 U.S. at 269; *Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'") (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

The *Brady* rule functions in our criminal legal system "to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). This Court has repeatedly made clear that when a *Brady* violation *does* occur, the courts must ask "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." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Where the state suppresses evidence, a defendant "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry v. Cain*, 577 U.S. 385, 392 (2016). Rather "a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (cleaned up). This Court

has reiterated time and again that the "reasonable probability" standard is not the same as the "more likely than not" standard, but rather it is a lower standard. *Kyles*, 514 U.S. at 434 (citing cases).

The standard provided in *Napue* is even lower: a new trial is required if the false testimony "may have had an effect on the outcome of the trial." *Napue*, 360 U.S. at 272.

In the proceedings below, the Arizona Supreme Court has turned *Brady* and *Napue* on their heads by allowing the state to ignore its obligation under this Court's long-standing precedents. Here, the state courts required Petitioner to prove that the county attorneys were "mistaken" when they disclosed that the sole eyewitness had failed to identify Petitioner in a paper photo lineup. However, Petitioner had no way to disprove the statement without having access to the files, which he requested and was denied. This Court has long rejected the rule that a 'prosecutor may hide, defendant must seek'" as being untenable "in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Once the state has admitted that material exculpatory evidence exists, then it has a duty to provide a defendant access to that evidence. However, the Arizona courts instead have required Petitioner to prove that the State's initial representation—that an exculpatory paper photo lineup exists—is true, all the while denying access to the state's prosecutorial files. This newly created rule is incompatible with this Court's bedrock decisions that make clear that the burden is on the state, not the defendant, to produce exculpatory evidence. If left to stand, the Arizona Supreme Court's decision will result not only in the execution of a wrongfully convicted man but will apply to all future *Brady/Napue* claims litigated in Arizona.

Because this holding is incompatible with due process and the right to be free from cruel and unusual punishment, this Court should grant review this Court should grant review "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675..

CONCLUSION

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

Respectfully submitted,

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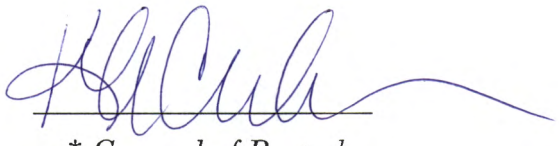

November 15, 2022

* *Counsel of Record*