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 APPENDIX

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November 15, 2022 * Counsel of Record

APPENDIX

Appendix I: Petition for Post-Conviction Relief, State v. Hooper, No. CR 0000-121686 (Maricopa Cnty. Super. Ct. Nov. 4, 2022)

Appendix J: Opening Brief at 6-30, Hooper v. Ryan, No. 08-99024 (9th Cir. Jan. 18, 2019), ECF No. 99

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,	)	Arizona Supreme Court
	)	No. CR-22-0268-PC
Plaintiff/Respondent,	)	
	)	Maricopa County
v.	)	Superior Court
	)	No. CR0000-121686
MURRAY HOOPER,	)	
	)	
Defendant/Petitioner.	)	**FILED 11/14/2022**
	)	

DECISION ORDER

Per Curiam

On October 31, 2022, Petitioner Murray Hooper filed a Petition for Post-Conviction Relief—Hooper's sixth petition. In the sixth petition Hooper argues that he is entitled to relief pursuant to Ariz. R. Crim. P. 32.1(e) and (h) based on "recent scientific literature undermining eyewitness identification[,] [which] constitutes newly discovered material facts and supports [his] innocence."

On November 4, 2022, Petitioner Murray Hooper filed an additional Petition for Post-Conviction Relief—Hooper's seventh petition. In the seventh petition Hooper argues that he is entitled to relief pursuant to Ariz. R. Crim. P. 32.1(e) alleging that based on "newly discovered material facts [ ] the State suppressed material exculpatory evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959), and deliberately deceived the trier of fact by failing to disclose that its sole testifying eyewitness Marilyn Redmond, excluded [ ] Hooper as a perpetrator and was unable to identify him in a pre-trial photo lineup."

Petitioner also filed an "Emergency Motion to Compel Discovery" on November 8, 2022, asking the superior court to issue an order that Petitioner's counsel be allowed "unfettered" access to the State's files and to interview the two Deputy County Attorneys who prepared a letter in opposition to Petitioner's request for clemency (specifically, Petitioner requested either commutation or reprieve). In the letter to the Arizona Board of Executive Clemency ("ABOEC"), the Deputy County Attorneys made a statement, regarding Mrs. Redmond's identification of Petitioner and William Bracy during live lineups in Chicago, Illinois, that Marilyn Redmond "had previously been unable to pick them out of a paper lineup." Petitioner's

additional petition, filed on November 4, 2022, is based on this statement.

The State filed responses to Petitioner's successive petitions on November 7, 2022, and November 8, 2022, respectively. Petitioner filed his consolidated reply on November 9, 2022. The superior court heard oral argument and considered the presented evidence on November 10, 2022.

Initially, the superior court, upon consideration of Petitioner's request for the order to compel discovery, denied the motion, finding that Petitioner had failed to demonstrate good cause for his discovery request. *See* Ariz. R. Crim. P. 32.6(b); *see also Canion v. Cole*, 210 Ariz. 598 (2005). The superior court stated that its finding that Petitioner failed to show good cause was based on the State's assertion regarding the Deputy County Attorneys' avowal to the ABOEC on November 3, 2022, that they were mistaken regarding the photo lineup, and the State's confirmation to the superior court that Petitioner was provided all materials the Deputy County Attorneys used to prepare the letter to the ABOEC. Additionally, the superior court noted that during the November 10, 2022, evidentiary hearing, the court received and accepted the State's avowal that Mrs. Redmond "was not shown a printed lineup prior to her live identification of Petitioner, [ ] no evidence of any such lineup exists," and the State's counsel "had personally verified the explanation given by the [Deputy County Attorneys] to the [ABOEC]."

The facts and procedural history of Petitioner's case are thoroughly set forth in *State v. Bracy*, 145 Ariz. 520 (1985), *State v. Hooper*, 145 Ariz. 538 (1985), *Hooper v. Schriro* (CV 98-2164-PHX-SMM), 2008 WL 4542782 (Not Reported in F.Supp.2d) (Ariz. 2008) (memorandum of decision and order), *Hooper v. Ryan* (CV-98-02164-PHX-SMM), 2018 WL 2426176 (Not Reported in Fed. Supp.) (Ariz. 2018) (order), and *Hooper v. Shinn*, 985 F.3d 594 (9th Cir. 2021).

Petitioner raised three claims in his October 31, 2022, and November 4, 2022, petitions for post-conviction relief. First, Petitioner contended that newly discovered evidence exists relating to eyewitness identification that would entitle him to relief under Ariz. R. Crim. P. 32.1(e). Second, Petitioner contended that this newly discovered evidence combined with Petitioner's claims regarding several other pieces of trial evidence "demonstrate by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the [Petitioner] guilty of the offense beyond a reasonable doubt." *See* Ariz. R. Crim. P. 32.1(h). Third, Petitioner contended that the State withheld information relating to Marilyn Redmond’s pretrial identifications, and that such information constitutes a newly

discovered material fact that would entitle him to relief under Ariz. R. Crim. P. 32.1(e). Here, Petitioner's claim includes allegations the State violated *Brady v. Maryland* and *Napue v. Illinois*.

On the first claim, the superior court found that Petitioner failed to meet the showing required by Ariz. R. Crim. P. 32.1(e) pursuant to *State v. Bilke*, 162 Ariz. 51 (1989), *State v. Amaral*, 239 Ariz. 217 (2016), and *State v. King*, 250 Ariz. 433 (App. 2021), and that the evidence "advanced by [Petitioner] in this claim is cumulative to that which he presented at trial and would not have substantially undermined Marilyn Redmond's testimony to such an extent that the judgment would have changed." The court found the claim is not colorable and summarily dismissed the claim. Additionally, the court found that Hooper failed to demonstrate diligence in bringing this claim to the court.

On the second claim, the superior court found that the "addition [ ] of cumulative impeachment evidence does not increase the weight and import of [ ] other [trial] evidence such that [Petitioner] establishes actual innocence[,]" therefore, the court found that the claim is not colorable and summarily dismissed the claim, holding that the court "will not, and indeed cannot, deviate from the dispositions handed down over the years by other courts in the examination of this evidence." *See State v. Evans*, 252 Ariz. 590, 598 ¶ 28 (App. 2022) ("Restating arguments about the trial record does not establish a Rule 32.1(h) claim.").

On Petitioner's third claim, the court accepted the Deputy County Attorney's explanation made during the ABOEC hearing that the statement made in the letter to the ABOEC about a "paper lineup" was a mistake and the State's avowals that Petitioner has received the same materials used by the State to prepare the letter opposing clemency and there is no evidence that Mrs. Redmond was shown a printed lineup that included Petitioner before Mrs. Redmond identified Petitioner in person in Chicago. Based on its findings and acceptance of the State's explanation and avowals, the court found that the claim is not colorable and summarily dismissed the claim.

On November 14, 2022, Petitioner filed his petition for review raising two claims: (1) The superior court abused its discretion in violation of Due Process when it denied the merits of Hooper's claims by accepting the State's self-contradictory, unsubstantiated avowal that its records disprove *Brady/Napue* claims, without requiring the State to produce those same records in discovery; and (2) The superior court abused its discretion when it denied relief under Ariz. R. Crim. P. 32.1(e) and (h) on Hooper's claims of newly discovered evidence of unreliable eyewitness testimony and actual innocence. Petitioner also filed a Motion for Stay of Proceedings

requesting that this Court issue a stay of Petitioner's execution scheduled for November 16, 2022, at 10:00 a.m.

Due to the exigency of the proceedings at issue in Petitioner's petition for review, the Court authorized the Staff Attorneys' Office to informally contact counsel for both the Petitioner and the State and advise the State any response to the petition for review and motion to stay proceedings was due by November 14, 2022, at 5:00 p.m. and the Court did not require a reply.

Standard of Review

This Court reviews the superior court's denial of post-conviction relief for an abuse of discretion. *State v. Gutierrez*, 229 Ariz. 573, 577 ¶ 19 (2012). To find an abuse of discretion, a reviewing court must find that the lower court's action was "clearly untenable, legally incorrect, or amount[s] to a denial of justice." *Bogard v. Cannon & Wendt Elec. Co., Inc.*, 221 Ariz. 325, 335–36 ¶ 39 (App. 2009) (internal quotation marks omitted). "Misapplication of law or legal principles constitutes an abuse of discretion." *Tobin v. Rea*, 231 Ariz. 189, 194 ¶ 14 (2013). However, this Court reviews alleged constitutional violations *de novo*. *State v. McGill,* 213 Ariz. 147, 159 ¶ 53 (2006).

Newly Discovered Evidence (Eyewitness Identification Research) Claim Pursuant to Ariz. R. Crim. P. Rule 32.1(e) and (h)

In his claim, Petitioner contends that advances in scientific research concerning eyewitness identification undermine the in-court identification and testimony of victim Marilyn Redmond.

Ariz. R. Crim. P. 32.1(e) allows a defendant to file a claim that "newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence." Ariz. R. Crim. P. 32.1(h) provides for relief for a defendant who "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." *See State v. Pineda-Navarro*, 2017 WL 4927692, at *2 (Ariz. App. Oct. 31, 2017) (mem.) ("[A]ctual innocence means factual innocence, not mere legal insufficiency.") (quotations omitted).

Preclusion

Claims raised under Rule 32.1(e) and (h) are not subject to preclusion under Rule 32.2(a)(3). *See* Ariz. R. Crim. P. 32.2(b). However, the superior court held that Petitioner failed to

demonstrate diligence in bringing his Rule 32.1(e) claim to the court. The superior court could have properly dismissed this claim solely on that basis.

Rule 32.1(e) Claim Not Colorable

Ariz. R. Crim. P. 32.1(e) states that "newly discovered" facts must be "discovered after the trial or sentencing," the defendant must have "exercised due diligence in discovering [the] facts," and the facts must be "material and not merely cumulative." This Court has further explained the requirements for a colorable claim of newly discovered evidence:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
>
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
>
> (3) the evidence must not simply be cumulative or impeaching;
>
> (4) the evidence must be relevant to the case;
>
> (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Amaral, 239 Ariz. 217, 219 ¶ 9 (2016) (citing *State v. Bilke*, 162 Ariz. 51, 52-53 (1989)).

Here, the superior court found that Petitioner "failed to establish that the evidence presented 'existed at the time of trial' but was discovered after trial." On this point, the court pointed to the State's argument that "issues with eyewitness identification were generally known at the time of trial, and were even testified to [at trial] by [Petitioner's] trial expert [Dr. Elizabeth Loftus]." *See id.*, 239 Ariz. at 221 ¶ 17; *State v. King*, 250 Ariz. 433, 440 ¶ 30 (App. 2021). Additionally, the superior court found that Petitioner "failed to establish that he was diligent in discovering the basis for the claim and raising it in this Court[,]" noting that "Dr. [Geoffrey] Loftus's[1] report details, and as he testified at the evidentiary hearing, much of the research forming the foundation of [Petitioner's] current claim was conducted decades ago."

[1] Dr. Geoffrey Loftus and Dr. Elizabeth Loftus are married.

The court further found that Petitioner "fails to demonstrate how Dr. [Geoffrey] Loftus's proposed testimony would significantly improve upon that which was testified to by [Petitioner's) trial expert [Dr. Elizabeth Loftus]." Next, the court found that, "[w]hile the scope of [Dr. Elizabeth Loftus's] testimony [at trial] was limited, Dr. [Geoffrey] Loftus's testimony at the evidentiary hearing and his report confirm that the foundation for [Petitioner's] current claim existed at or before the time of his trial."

Finally, in making its finding that the expert evidence Petitioner advanced in support of his claim is cumulative to the expert evidence presented at trial, the court found that it "would not have substantially undermined Marilyn Redmond's testimony to such an extent that the judgment would have changed." Specifically, the court noted that "[t]he jury heard extensive testimony from [Dr. Elizabeth Loftus] on the pitfalls of cross-racial identification, as well as the stages of memory, the effects that violence, stress, and fear have on memory, as well as the effects of 'post-event information' on memory[,] [and] [t]he jury still convicted [Petitioner] after hearing this testimony." Therefore, the court determined that "there is no reasonable likelihood that additional testimony on related topics would have changed that outcome."

Therefore, upon review of the superior court's ruling, and consideration of Petitioner's arguments in his petition for review and the State's response,

THE COURT FINDS THAT the superior court's factual findings and legal analysis of this claim are not an abuse of the court's discretion.

Accordingly,

THE COURT FURTHER FINDS that Petitioner is not entitled to relief under Rule 32.1(e).

Rule 32.1(h) Claim Not Colorable

In this claim Petitioner contends that he is actually innocent based on new evidence relating to the reliability of Marilyn Redmond's eyewitness identification coupled with "the multitude of evidence developed through the years undermining the State's case-in-chief." However, the "new" expert testimony about eyewitness identification does not demonstrate, by "clear and convincing evidence," that Petitioner is not guilty.

> The comment to Rule 32.1(h) states that a claim under that rule "is independent of a claim under Rule 32.1(e)," and

> that "[a] defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of Rule 32.1(h)."

State v. Miles, 243 Ariz. 511, 519 ¶ 35 (2018) (Pelander, J., concurring). Such an application of Rule 32.1(h) would be "at odds with interests of finality and victim rights." *Id.* (citing Ariz. Const. art. 2, § 2.1(A)(10) ("To preserve and protect victims' rights to justice and due process, a victim of crime has a right" to a "prompt and final conclusion of the case after the conviction and sentence"); and A.R.S. § 13-4401(19) (defining "victim" to include a murder victim's relatives "or any other lawful representative of the person")).

Petitioner has not made the necessary showing in support of his freestanding actual innocence claim. Petitioner has not established even a reasonable probability that the verdict would have been different had the cumulative expert testimony been presented at trial. Moreover, the cumulative expert testimony definitely does not provide clear and convincing evidence that "no reasonable fact-finder would find [Petitioner] guilty of the offense beyond a reasonable doubt." Ariz. R. Crim. P. 32.1(h).

As the superior court found in Petitioner's newly discovered evidence claim related to Marilyn Redmond’s identification of Petitioner, the evidence "is cumulative to the expert’s testimony given at trial, and beyond that is simply impeaching." Moreover, this Court strongly agrees with the superior court's finding that "[a]dditional impeachment for a witness that was heavily impeached and scrutinized at trial does not demonstrate that [Petitioner] is actually innocent." As the superior court noted, the "addition in this petition of cumulative impeachment evidence does not increase the weight and import of this other evidence such that [Petitioner] establishes actual innocence." *See State v. Evans*, 252 Ariz. 590, 598 ¶ 28 (App. 2022).

Therefore, upon review of the superior court's ruling and consideration of Petitioner's arguments in his petition for review and the State's response,

THE COURT FINDS THAT the superior court's factual findings and legal analysis of this claim are not an abuse of the court's discretion.

Accordingly,

THE COURT FURTHER FINDS that Petitioner is not entitled to relief under Rule 32.1(h).

Newly Discovered Evidence (Marilyn Redmond Pretrial Identification)

In this claim Petitioner asserts that the State's recent reference, in the State's letters to the ABOEC opposing clemency, to an undisclosed and previously unknown "paper lineup" shown to Marilyn Redmond constitutes newly discovered evidence and *Brady* material. Petitioner argues that a "paper lineup" in which Marilyn Redmond failed to identify Petitioner, severely undermines Mrs. Redmond's testimony and entitles him to relief under Ariz. R. Crim. P. 32.1(e). The comment by the State that Petitioner claims constitutes newly discovered evidence and *Brady* material, is "[Marilyn] had previously been unable to pick them out of a paper lineup." *See* Petitioner's "Petition for Post-Conviction Relief" Exhibits U and V, at 11; Defendant's Exhibits 1 and 2, admitted at 11/10/22 Evidentiary Hearing. Petitioner argues that this statement represents proof that Mrs. Redmond was shown a paper lineup prior to her in-person identification of Petitioner, and that she failed to identify him in that paper lineup.

As the superior court noted, the State responds that the statement made in the letters was a mistake, and points to recorded testimony of the clemency hearing where the Deputy County Attorney explains how she was mistaken. *See* State's "Response to 7th Petition for Post-Conviction Relief," Attachment A.

To present a colorable *Brady* claim, Petitioner must establish "[1] The evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence [was] suppressed by the State, either willfully or inadvertently; and [3] prejudice ... ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *see Brady v. Maryland*, 373 U.S. 83, 87 (1963).

To establish prejudice, Petitioner must demonstrate that "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler*, 527 U.S. at 289 (internal quotation marks omitted). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Woods v. Sinclair*, 764 F.3d 1109, 1127 (9th Cir. 2014) *cert. denied sub nom. Holbrook v. Woods*, No. 14-931, 2015 WL 435819 (U.S. May 18, 2015), *quoting United States v. Bagley*, 473 U.S. 667, 682 (1985).

Finally, as the United States Supreme Court made clear in *Kyles v. Whitley*, 514 U.S. 419 (1995), the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the

remaining evidence is sufficient to support the jury's conclusions. *Id.*, at 434–435.

> Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at 435.
>
> ** ** **
>
> ...As the District Court recognized, however, petitioner's burden is to establish a reasonable *probability* of a different result. *Kyles*, 514 U.S. at 434.

Strickler v. Greene, 527 U.S. at 290–91 (1999) (parallel citations omitted).

As the superior court found, Petitioner has not demonstrated that the State violated the second prong of the *Brady* analysis—that evidence was suppressed by the State, either willfully or inadvertently. Petitioner has presented no evidence to refute the Deputy County Attorney's explanation that she made the statement by mistake and confused composite sketches and paper lineups shown to Marilyn Redmond concerning co-defendants Bracy and McCall, and the State's avowal that no such paper lineup including Petitioner was shown to Mrs. Redmond prior to her identification of Petitioner in person.

Petitioner argues in his petition for review that "the superior court's reliance on the avowal was an abuse of its discretion and deprived [Petitioner] of a full and fair opportunity to litigate the claims." Petition at 14 (citing *State v. Woods*, 141 Ariz. 445, 455 (1984) (an avowal of counsel is not evidence). It is Petitioner's argument that "[e]lementary notions of due process and an opportunity to be heard require that [Petitioner] have access to the same records which supported each of the [Deputy County Attorneys'] contradictory assertions." Petition at 14 (*see also* footnote 5) (citing *Banks v. Dretke*, 540 U.S. 668 (2004) (*Brady* evidence uncovered despite earlier avowals that State had an open file policy and that all favorable evidence had been disclosed)).

Therefore, Petitioner contends that he "established good cause for the grant of discovery[,] and [t]he superior court's denial of that request was an abuse of discretion." Petition at 15–16 (citing *Canion v. Cole*, 210 Ariz. 598, 600 (2005) (noting trial judges have inherent authority to grant discovery requests in PCR proceedings upon showing good cause); *Smith v. Cain*, 565 U.S. 73 (2012) (the United States Supreme Court granted relief where Smith post-trial

discovered evidence demonstrating that the State's eyewitness could not identify the perpetrators who committed a home invasion robbery that resulted in the death of five of the eyewitness's friends)).

However, as the State argued below—and argues on review—"there was no 'paper lineup' involving Hooper." Response at 12. The facts available to the superior court were that, at the November 3, 2022, clemency hearing Petitioner's counsel argued that the State's letters in opposition reference to a previous 'paper lineup' means that there was a photo lineup in which Marilyn Redmond had failed to identify Petitioner that was never disclosed to Petitioner.

Subsequently, counsel for the State began the State's presentation to the ABOEC by stating, "I made an error in that statement." Response at 12, Attachment A at 1, line 31; Video of ABOEC Hearing on November 3, 2022, at 4:18:18.[2] The State then stated that Marilyn had been shown several composite sketches in the days after the murders, explaining that:

- The sketches were of a white man and an African-American man that were created from descriptions provided by a Long's Drug Store clerk. Attachment A at 1–2, lines 38–48; Video of ABOEC Hearing on November 3, 2022, at 4:19:07; *see also Hooper v. Shinn*, 985 F.3d 594, 604 (9th Cir. 2021); *State v. McCall*, 139 Ariz. 147, 154 (2013).

- Mrs. Redmond was not able to identify the subjects of the drawings. Attachment A at 2, lines 48–49; Video of ABOEC Hearing on November 3, 2022, at 4:20:10.

- The Long's Drug Store clerk later identified Bracy (but not Petitioner) as the African-American man she had described to the sketch artist. Attachment A at 2, lines 50–52; Video of ABOEC Hearing on November 3, 2022, at 4:20:22.

- Mrs. Redmond was shown two photo lineups containing McCall's photograph, but failed to identify him. Attachment A at 2, lines 52–54; Video of ABOEC Hearing on November 3, 2022, at 4:20:37.

- There was, however, "no paper lineup" containing Hooper. Attachment A at 2, line 73; Video of ABOEC Hearing on November 3, 2022, at 4:22:44.

[2] A link to the full video of the hearing is available on the website of the Arizona Board of Executive Clemency at: https://boec.az.gov/hearings.

The State also explained to the ABOEC that there was no paper lineup that included Petitioner, stating that "every page of the police report that the State possessed that we have in our 20 boxes at the County Attorney's Office is what I gave the, the Board here." Attachment A at 2, lines 59–61; Video of ABOEC Hearing on November 3, 2022, at 4:21:27. The Deputy County Attorney further noted that "there is nothing to request. Everything I have, [Petitioner's] Defense has in this packet." Attachment A at 2, lines 75–76; Video of ABOEC Hearing on November 3, 2022, at 4:22:58.

When the Chairperson of the ABOEC asked several follow up questions seeking to clarify the information provided by the State, the Deputy County Attorney answered:

> The sketches and the and unfortunately it was I was confused and the, the lineups of Mr. McCall. . .
>
> Not, so it was Mr. Bracey [sic] via the composite sketch and Mr. McCall in the three the two lineups and the composite sketch, and then Mr. McCall in the live lineup. I have no evidence in everything that I've reviewed that Ms. Redmond was ever shown oh, oh Ms. Redmond also said she saw Mr. McCall on the television briefly and then one of the officers in the room turned it off. But nothing I have, no evidence that I've reviewed, defense can point it out if they can find it, but that Ms. Redmond ever saw a paper lineup of Mr. Hooper or a photo of Mr. Hooper prior to going to Chicago for the live lineups.

Response at 13–14, Attachment A at 2–3, lines 82, 86–92; Video of ABOEC Hearing on November 3, 2022, at 4:23:21.

Therefore, upon review of the superior court's ruling and consideration of Petitioner's arguments in his petition for review and the State's response,

THE COURT FINDS THAT the superior court's factual findings and legal analysis that Petitioner's claim lacks a factual basis are not an abuse of the court's discretion. *See* Ariz. R. Crim. P. 32.11(a) (court must summarily dismiss petition if it presents no "material issue of fact or law that would entitle the defendant to relief"); *State v. Krum*, 183 Ariz. 288, 292 (1995) ("To obtain an evidentiary hearing, a petitioner must make a colorable showing that the [factual] allegations, if true, would have changed the verdict.").

THE COURT FURTHER FINDS based on this Court's review, that Petitioner's claim the State has failed to disclose a paper lineup,

including allegations of misconduct and unethical conduct has no evidentiary support and no basis in fact.

Accordingly,

THE COURT FURTHER FINDS that Petitioner is not entitled to relief under Rule 32.1(e).

Based on the foregoing,

IT IS ORDERED granting review and denying relief.

IT IS FURTHER ORDERED that the Court affirms the superior court's order finding all of Petitioner's claims are not colorable and summarily dismissing Petitioner's consolidated petitions for post-conviction relief.

IT IS FURTHER ORDERED that Petitioner's motion for stay of proceedings moving this Court to grant a stay of execution is denied.

DATED this 14th day of November, 2022.

For the Court:

/s/
ROBERT BRUTINEL
Chief Justice

Vice Chief Justice Timmer, Justice Lopez, and Justice Beene are recused and did not participate in the determination of this matter.

TO:
Jeffrey L Sparks
Jon M Sands
Cary S Sandman
Kelly L Culshaw
Murray Hooper, ADOC 047621, Arizona State Prison, Florence - Eyman Complex-Browning Unit (SMU II)
Therese Day
Amy Armstrong
Jason Lewis
Laura P Chiasson
Ginger Jarvis
David E Ahl

Clerk of the Superior Court
*** Filed ***
11/15/2022 at 8:00 a.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-121686 11/14/2022

HONORABLE HOWARD D. SUKENIC

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA JEFFREY LEE SPARKS

v.

MURRAY HOOPER (C)

CARY S SANDMAN
KELLY CULSHAW
NATHAN ALEXANDER MAXWELL
JON M SANDS

AZ SUPREME COURT
CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
JUDGE SUKENIC
VICTIM WITNESS DIV-AG-CCC

UNDER ADVISEMENT RULING / RULE 32 CLAIMS / CAPITAL CASE PCR

This Court has considered Defendant Murray Hooper's successive petition for post-conviction relief (filed on October 31, 2022), the State's response (filed on November 7, 2022), Defendant's additional claim (filed on November 4, 2022), the State's Response to Defendant's additional claim (filed on November 8, 2022), and Defendant's Reply (filed on November 9, 2022). This Court has also considered the evidence and arguments presented on November 10, 2022.

Additionally, in the course of litigating his successive petition for post-conviction relief, Defendant filed an "Emergency Motion to Compel Discovery" on November 8, 2022, asking that he be allowed complete access to the State's file and that he be able to interview the two prosecutors responsible for drafting a letter in opposition to his request for clemency. In the letter, the prosecutors state that victim Marilyn Redmond had been unable to identify Defendant in a printed lineup before she subsequently identified him in a live lineup. Based on this statement, Defendant raised his third claim with this Court, claiming that the statement was newly discovered evidence entitling him to relief under Arizona Rule of Criminal Procedure 32.1(e).

In its response to Defendant's additional claim, the State asserted that the prosecutors who drafted the letter were mistaken regarding the printed lineup, and that one of the prosecutors had explained as much to the Arizona Board of Executive Clemency at Defendant's clemency hearing on November 3, 2022. Additionally, the State explained that Defendant was in possession of all materials used in the preparation of the State's letter. Based on the explanation in the State's response, this Court found that Defendant had failed to demonstrate good cause for his discovery request and accordingly denied his motion.

Defendant filed a motion for reconsideration on November 10, 2022, arguing that: (1) the State stated that it had reviewed 20 boxes of materials in preparing its letter, while Defendant had only received 800 pages; (2) there is a history of prosecutor misconduct in this case, including a failure to turn over exculpatory evidence; and (3) one of the prosecutors responsible for the State's letter had recently made a misrepresentation to the Arizona Board of Executive Clemency in another proceeding before that body. This Court conducted an evidentiary hearing on Defendant's successive petition for post-conviction relief that same day that he filed his motion for reconsideration. During the hearing, this Court sought and obtained the State's avowal, through counsel Jeffery Sparks, that victim Marilyn Redmond was not shown a printed lineup prior to her live identification of Defendant, that no evidence of any such lineup exists, and that counsel Sparks had personally verified the explanation given by the prosecutor to the Arizona Board of Executive Clemency.

This Court accepts counsel Sparks's avowal and accordingly DENIES Defendant's motion for reconsideration.

Defendant raises three claims in his successive petition for post-conviction relief, all of which are not colorable and will be summarily dismissed. The basis for these findings is set forth below.

FACTUAL AND PROCEDURAL HISTORY

The facts, as set out by the Arizona Supreme court, are as follows:

> Pat Redmond and Ron Lukezic were partners in a successful printing business called Graphic Dimensions. In the summer of 1980, Graphic Dimensions was presented with the possibility of some lucrative printing contracts with certain hotels in Las Vegas. These deals fell through, however, when Pat Redmond and perhaps Ron Lukezic vetoed the idea.
>
> In September of 1980, Robert Cruz asked Arnold Merrill if he would kill Pat Redmond for $10,000. Merrill declined. Cruz wanted Redmond killed in order

to get Redmond's interest in Graphic Dimensions. Cruz ultimately planned to have Ron Lukezic killed as well and take complete control of Graphic Dimensions. In early December of 1980, Cruz and Merrill went to the Phoenix Airport and picked up [William Bracy] and Murray Hooper who arrived on a flight from Chicago. Cruz and Merrill then took [Bracy] and Hooper to a hotel in Scottsdale, and Cruz gave [Bracy] a key to one of the rooms.

[Bracy] and Hooper stayed in the Valley for several days, during which time Merrill drove the two men to various locations. On one occasion, Merrill took [Bracy] and Hooper to see Cruz, and Cruz gave [Bracy] a stack of $100 bills, some of which [Bracy] gave to Hooper. That same day Merrill, at Cruz's direction, took [Bracy] and Hooper to a gun store owned by Merrill's brother, Ray Kleinfeld. Hooper picked out a large knife and [Bracy] told Kleinfeld to put it on Cruz's account. Kleinfeld gave [Bracy] a paper bag containing three pistols. [Bracy], Hooper, and Merrill subsequently drove to the desert, where [Bracy] took target practice with the guns while Hooper rested in the back of Merrill's car. [Bracy] and Hooper later moved from the hotel into Merrill's house, where they met Ed McCall.

A few days later, [Bracy], Hooper, and Merrill followed Pat Redmond's car as Redmond left a bar. When they neared Redmond's car, Hooper attempted to shoot Redmond. The attempt failed, however, when Merrill, who was driving, intentionally swerved the car. Cruz, [Bracy], and Hooper were upset at Merrill for his actions. After the failed attempt, [Bracy] and Hooper moved out of Merrill's home and into the apartment of Valinda Lee Harper and Nina Marie Louie, two women Merrill had introduced to [Bracy] and Hooper. On December 8, 1980, McCall told Merrill he was “joining up” with defendant and Hooper. [Bracy] and Hooper returned to Chicago shortly thereafter.

[Bracy] and Hooper returned to Phoenix on December 30, 1980. On the evening of December 31, 1980 [Bracy], Hooper, and McCall went to the Redmond home and forced their way in at gunpoint. Pat Redmond, his wife Marilyn, and Marilyn Redmond's mother, Helen Phelps, were present. [Bracy], Hooper, and McCall eventually herded the Redmonds and Mrs. Phelps into the master bedroom where they bound, gagged, and robbed them. After forcing the Redmonds and Mrs. Phelps to lie face down on the bed, one or all of the intruders shot each victim in the head. One of the intruders also slashed Pat Redmond's throat. Pat Redmond and Mrs. Phelps died from their wounds, but Marilyn Redmond lived.

State v. Bracy, 145 Ariz. 520, 524–25 (1985).

In December of 1982, a jury found Defendant guilty of one count of 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 three counts of burglary in the first degree. As to the two counts of first degree murder, this Court found that the State proved five aggravating circumstances beyond a reasonable doubt, that Defendant had failed to prove any mitigating circumstances, and that Defendant should accordingly be sentenced to death. *State v. Hooper*, 145 Ariz. 538, 550 (1985). The Arizona Supreme Court affirmed Defendant's death sentences after conducting an independent review and a proportionality review. *Id*. at 550–51.

Defendant subsequently filed five petitions for post-conviction relief with this Court, all of which were denied. *See Hooper v. Shinn*, 985 F.3d 594, 612 (9th Cir. 2021). Defendant also initiated federal habeas proceedings during this time, but the district court ultimately denied his petition and the Ninth Circuit affirmed the denial. *Id*. at 634. After the Supreme Court denied certiorari in that matter, the State filed a motion for a warrant of execution with the Arizona Supreme Court. The Arizona Supreme Court granted the State's motion on October 12, 2022, issued a warrant of execution, and set an execution date of November 16, 2022. *State v. Hooper*, No. CR-83-004-AP (Ariz. Oct. 12, 2022). Defendant filed the instant petition, his sixth petition for post-conviction relief, on October 31, 2022.

Post-Conviction Claims for Relief

In the current petition, Defendant has raised three claims. Defendant first claims that newly discovered evidence exists relating to eye witness identification that would entitle him to relief under Arizona Rule of Criminal Procedure 32.1(e). Next, Defendant argues that the purportedly newly discovered evidence relating to eye witness identification coupled with several other pieces of evidence establish that he is actually innocent and entitled to relief under Arizona Rule of Criminal Procedure 32.1(h). In his final claim, Defendant argues that the State withheld information relating to eyewitness and victim Marilyn Redmond's pretrial identifications, and that such information constitutes a newly discovered material fact that would entitle him to relief under Arizona Rule of Criminal Procedure 32.1(e).

Claim 1: Newly Discovered Evidence (Eye Witness Identification Research)

Defendant raises his first claim for relief under Arizona Rule of Criminal Procedure 32.1(e), contending that advances in scientific research concerning eyewitness identification undermine the in-court identification and testimony of victim Marilyn Redmond.

In order to obtain relief under Rule 32.1(e), Defendant must establish that the foregoing material (1) was discovered after the trial or sentencing, (2) was discovered through Defendant's exercise of due diligence, and (3) would have substantially undermined a witness's testimony on

an issue of such critical significance that the impeachment evidence probably would have changed the judgement or sentence. Ariz. R. Crim. P. 32.1(e)(1)-(3); *State v. Amaral*, 239 Ariz. 217, 219 ¶ 9 (2016).

"A defendant is entitled to an evidentiary hearing regarding a claim of newly discovered evidence if he or she presents a 'colorable claim.'" *Amaral*, 239 Ariz. at 219 ¶ 9. The five requirements for presenting a colorable claim of newly discovered evidence are:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
>
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
>
> (3) the evidence must not simply be cumulative or impeaching;
>
> (4) the evidence must be relevant to the case; [and]
>
> (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Id. (citing *State v. Bilke*, 162 Ariz. 51, 52–53 (1989)).

First, Defendant has failed to establish that the evidence presented "existed at the time of trial" but was discovered after trial. This is so because, as the State argues, issues with eye witness identification were generally known at the time of trial, and were even testified to by Defendant's trial expert. *See id*., 239 Ariz. at 221 ¶ 17; *State v. King*, 250 Ariz. 433, 440 ¶ 30 (App. 2021). Next, Defendant has failed to establish that he was diligent in discovering the basis for the claim and raising it in this Court. As Dr. Loftus's report details, and as he testified at the evidentiary hearing, much of the research forming the foundation of Defendant's current claim was conducted decades ago. Defendant fails to demonstrate how Dr. Loftus's proposed testimony would significantly improve upon that which was testified to by Defendant's trial expert. While the scope of the trial expert's testimony was limited, Dr. Loftus's testimony at the evidentiary hearing and his report confirm that the foundation for Defendant's current claim existed at or before the time of his trial. Additionally, Dr. Loftus testified at the evidentiary hearing that much of the research cited in his report was developed in the 1990s and 2000s. Defendant, however, fails to explain why his claim based on this research was not brought before this Court during that time period. Defendant has accordingly failed to demonstrate diligence.

Finally, the Court finds that the evidence advanced by Defendant in this claim is cumulative to that which he presented at trial and would not have substantially undermined Marilyn Redmond's testimony to such an extent that the judgment would have changed. The jury heard extensive testimony from Defendant's trial expert on the pitfalls of cross-racial identification, as well as the stages of memory, the effects that violence, stress, and fear have on memory, as well as the effects of "post-event information" on memory. The jury still convicted Defendant after hearing this testimony, and there is no reasonable likelihood that additional testimony on related topics would have changed that outcome.

Claim 1 is accordingly DISMISSED.

Claim 2: Actual Innocence

In his second claim, Defendant contends that he is actually innocent based on new evidence relating to the reliability of Marilyn Redmond's eye witness identification coupled with "the multitude of evidence developed through the years undermining the State's case-in-chief." (Petition, at 15.)

Arizona Rule of Criminal procedure 32.1(h) provides relief where "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752." As this Court found in Claim 1, Defendant's evidence relating to Marilyn Redmond's identification is cumulative to his expert's testimony given at trial, and beyond that is simply impeaching. Additional impeachment for a witness that was heavily impeached and scrutinized at trial does not demonstrate that Defendant is actually innocent.

Defendant admits in his petition that the other evidence in support of this claim has already been "developed through the years," and as the State notes, has been rejected as a basis for relief. Defendant's addition in this petition of cumulative impeachment evidence does not increase the weight and import of this other evidence such that he establishes actual innocence. This Court will not, and indeed cannot, deviate from the dispositions handed down over the years by other courts in the examination of this evidence. And, as the State repeatedly notes, "[r]estating arguments about the trial record does not establish a Rule 32.1(h) claim." *State v. Evans*, 252 Ariz. 590, 598 ¶ 28 (App. 2022).

Claim 2 is accordingly DISMISSED.

Claim 3: Newly Discovered Evidence (Marilyn Redmond Pretrial Identification)

In his final claim for relief, Defendant asserts that the State's recent reference to a previously unknown printed or paper lineup shown to Marilyn Redmond constitutes newly discovered evidence and *Brady* material. The fact of a paper lineup in which Marilyn Redmond failed to identify him, Defendant argues, severely undermines Mrs. Redmond's testimony and entitles him to relief under Arizona Rule of Criminal Procedure 32.1(e).

The foundation for Defendant's claim stems from the State's letters opposing clemency for Defendant. In the letters, the State comments that "[Marilyn] had previously been unable to pick them out of a paper lineup." (*See* Defendant's "Petition for Post-Conviction Relief" Exhibits U, V at 11; Defendant's Exhibits 1 and 2, admitted at 11/10/22 Evidentiary Hearing.) This statement, in Defendant's estimation, represents proof that Mrs. Redmond was shown a paper lineup prior to her in person identification of Defendant, and that she failed to identify Defendant in that paper lineup. The State responds that the statement made in the letters was a mistake, and points to recorded testimony of the clemency hearing where the prosecutor explains how she was mistaken. (*See* State's "Response to 7th Petition for Post-Conviction Relief" Attachment A.) As the prosecutor explains, she made the statement by mistake and confused composite sketches and paper lineups shown to Marilyn Redmond concerning codefendants Bracy and McCall. Attorney for the State, Jeffery Sparks, avowed to such at the evidentiary hearing.

This Court accepts the State's explanation of the misstatement, the State's avowal that Defendant is in possession of the same materials used by the State to prepare its letter opposing clemency, and 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. Lacking a factual basis for this claim, Defendant is not entitled to the relief he seeks

Claim 3 is accordingly DISMISSED.

Due to the urgency of the matter, IT IS ORDERED emailing the present Ruling to Counsel immediately.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR0000-121686
	)	
MURRAY HOOPER,	)	
	)	
	)	
Defendant.	)	
	)	
	)	

Phoenix, Arizona
November 10, 2022

BEFORE THE HONORABLE HOWARD D. SUKENIC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EVIDENTIARY HEARING

COPY

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A P P E A R A N C E S

FOR THE STATE:

BY: MR. JEFFREY SPARKS, ESQ.
Attorney General's Office

BY: MR. DAVID ALL, ESQ.
Attorney General's Office

FOR THE DEFENDANT:

BY: MS. KELLY CULSHAW, ESQ.

BY: MR. NATHAN MAXWELL, ESQ.

I N D E X

Phoenix, Arizona
November 10, 2022

P R O C E E D I N G S

(Whereupon, the following proceedings commenced in open court:)

THE COURT: And good afternoon. This is CR0000-121686, State of Arizona v Murray Hooper.

May I have counsel for the State announce.

MR. SPARKS: Good afternoon, Your Honor. Jeff Sparks and David All from the Attorney General's Office for the State.

THE COURT: Thank you. Good afternoon.

MS. CULSHAW: Kelly Culshaw and Nathan Maxwell for Mr. Hooper.

THE COURT: Okay.

All right. Is the defense prepared?

MS. CULSHAW: Yes, Your Honor.

THE COURT: And you may proceed.

MS. CULSHAW: Thank you, Your Honor.

I just wanted to give a brief opening.

THE COURT: Sure.

MS. CULSHAW: We thank the Court for the opportunity to present evidence in support of Mr. Hooper's pending post-conviction petitions.

While there are a variety of claims raised in these petitions the central focus among all of them is Marilyn Redmond's identification. In support of Mr. -- Mr. Hooper's claims today, he will offer the testimony of Sandy Zahirieh, Z-A-H-I-R-I-E-H, and Dr. Geoffrey Loftus. We believe at the end we will have shown the Court that Mr. Hooper has met the requirements of 32.1(e) and (h).

And with that I'll turn things over to Mr. Maxwell.

THE COURT: Thank you.

MR. MAXWELL: The defense calls Sandra Zahirieh to the stand.

MR. SPARKS: Your Honor, I would object. We've had no notice of this witness. There were no declarations or affidavits from this witness supporting any of the petitions or motions that have been filed.

THE COURT: Okay. Response?

MR. MAXWELL: Go ahead.

MS. CULSHAW: Your Honor, we just offer San -- Ms. Zahirieh's testimony to authenticate two letters that were written by the Maricopa County Attorney's Office to a clemency board. If this Court doesn't wish to have Ms. -- Ms. Zahirieh authenticate those, I observe that the two Maricopa County attorney -- deputy

county attorneys are present and could do the same.

THE COURT: Oh, I've read -- I read both letters. Maybe the State will just stip -- I -- I assume you're just going to stipulate to the authenticity of those letters, are you not?

MR. SPARKS: Yes, Your Honor. Yeah, of course. We can stipulate to that.

THE COURT: Any problem with that?

MS. CULSHAW: Not at all, Your Honor.

THE COURT: Do you have the letters marked? I know I have them appended to -- to the motions. But you don't have to mark them. I can take notice of them as well.

MS. CULSHAW: They are marked, Your Honor, as Exhibits -- are we using letter or numbers? We've got both.

THE COURT: Andy?

THE CLERK: Numbers.

MS. CULSHAW: 1 and 2.

THE COURT: Okay.

MS. CULSHAW: Defense Exhibits 1 and 2.

THE COURT: No objection?

MR. SPARKS: No objection.

THE COURT: Okay. 1 and 2 are admitted.

Okay. Thank you.

MS. CULSHAW: Thank you, Your Honor.

THE COURT: Next -- next witness.

MS. CULSHAW: Next witness. Moving right along.

The defense would call Dr. Geoffrey Loftus.

THE COURT: Okay.

(WHEREUPON, the witness is present in the courtroom and duly sworn.)

THE COURT: Mandy, do you have water for him too?

THE BAILIFF: Yes.

THE COURT: Okay. There's water up there for you.

And whenever you're ready.

MS. CULSHAW: Okay. Thank you, Your Honor.

GEOFFREY LOFTUS,

called as a witness herein, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CULSHAW:

Q. Dr. Loftus, can you please tell the Court what your occupation is.

A. I'm an emeritus professor at the University of Washington up in Seattle.

MS. CULSHAW: And I believe the State is willing to stipulate that Dr. Loftus is an expert in the areas of memory and perception.

MR. SPARKS: Correct.

THE COURT: Okay. The stipulation is accepted.

BY MS. CULSHAW:

Q. Dr. Loftus, have you done any -- done any work in the state of Illinois in regards to memory and perception?

A. I have. Actually, probably the majority of my work over the past five or six years has been in the state of Illinois, particularly in Chicago, where I've been involved in -- I don't know -- many, many cases and testified in about 30 of them I believe.

Q. And -- and in relation to Mr. Hooper's case, Dr. Loftus, how many reports have you prepared?

A. I believe I've prepared three.

Q. Thank you.

MS. CULSHAW: May I approach the witness, Your Honor?

THE COURT: You may.

BY MS. CULSHAW:

Q. I'm going to give you those.

A. Thanks.

THE COURT: What exhibit number is that?

MS. CULSHAW: That's Exhibit C, Your Honor.

THE COURT: C. C?

MS. CULSHAW: 3. Sorry.

THE COURT: 3. Okay. Yeah.

BY MS. CULSHAW:

Q. Dr. Loftus, do you recognize Exhibit 3?

A. I do.

Q. How are you familiar with it?

A. It's the most recent report that I wrote out of the three.

Q. And does that report -- does that exhibit fairly represent the -- the report as you recollect it?

A. Yes.

Q. Okay. We're going to talk in some detail about memory perception and its relevance to Mr. Hooper's case, but before we get started I would like to address a couple of preliminary issues.

Your report focused on what makes a witness's identification reliable; correct?

A. Correct.

Q. Briefly, does a witness's certainty about an identification mean that it is reliable?

A. There's been quite a bit of work done over the

past 20 or 30 years on exactly that question. I'm sure we're going to get into it in a little bit more detail later. The simplest answer to your question is that there are known circumstances under which, contrary to common sense, high confidence on the part of a witness does not lead to high accuracy. Unfortunately, these characteristics known to demolish the relation between confidence and accuracy are often those circumstances that are prevalent in forensically relevant events such as crimes, accidents, things like that.

Q. Based on the science of memory and perception, which you're going to discuss in more -- in more detail in a moment, if a witness has been held at gunpoint by three armed perpetrators, has witnessed one perpetrator pointing a gun at their spouse, who has witnessed their elderly mother being removed to another room, who has been bound and gagged is that a witness -- is that witness likely to have a reliable memory of the description of all of those perpetrators?

A. Based on those facts, no, it's not for reasons, I guess, that we'll get into in a bit.

Q. Can you estimate for the Court how many lineups you've reviewed when considering witness identifications?

A. This is a wild guess, but I would say maybe

1,500 or so over the past 30 or 40 years.

Q. And is there a difference between a photo array and a composite sketch, if you know?

A. Yes, of course.

Q. In your experience is it more common to have a witness attempt to identify a suspect from a photo array or from a composite sketch?

A. Well, typically witnesses don't identify suspects from a composite. Suspects make composites. So, it's more typical, in fact, universal that witnesses would identify suspects from photo arrays.

Q. And in your experience would it be common when a perpetrator is identified as a Black male for the witness to be shown a photo lineup of six White males?

A. No.

Q. Okay. Before we get into the meat of your testimony, Dr. Loftus, I want to clarify a couple of terms that we're going to be using. The first is nomenclature. As you know the main witness in this case is Marilyn Redmond. I'd just like to refer to her as Mrs. Redmond during these proceedings.

A. That's fine.

Q. And there are three intruders in this particular crime. In the police reports and elsewhere the intruder who is alleged to have been Mr. Hooper is

referred to as S, as in Sam, 2. So, I'll from time to time be making reference to S2 to avoid having to use the awkward phrase of "the alleged intruder who may have been Mr. Hooper."

A. That's fine.

Q. The second issue I wanted to clarify is with respect to Exhibit 3. What prompted you to update this report?

A. When I was down here a week ago I learned of an apparently completely new piece of evidence that I hadn't been aware of before -- neither had you I gather -- and that was a photo lineup that apparently had been shown to Mrs. Redmond prior to her identification of Mr. Hooper in the live lineup. In --

THE COURT: You -- you reviewed the -- the statement in the -- in the State's letter?

THE WITNESS: That's correct, Your Honor.

THE COURT: Okay. But you've never seen the lineup itself; right?

THE WITNESS: That's correct. I had never heard of such a lineup until I saw the allusion to it in the State's letter.

THE COURT: So, you're assuming that -- because the State is now asserting and -- and I'm going to have the State do so again when it's their turn -- they're

asserting that that was -- that was an error on their part. So, with -- with all that you're -- you're -- you're -- you're assuming that the State's first statement was the accurate statement, and disregarding their -- their avow that they made a mistake; is that correct?

THE WITNESS: That -- that's correct, Your Honor. Part of my testimony will presuppose that this eluded-to photo lineup actually took place.

THE COURT: Okay. So, I -- I -- I agree with you then, if -- if on that track then you say that would have affected things. Then -- then go ahead.

THE WITNESS: Correct. Yes.

Where was I?

Yeah. So, the revised report was meant to take into account the consequences if such a photo lineup had indeed been shown to Mrs. Redmond and if she indeed failed to recognize Mr. Hooper's picture in it.

BY MS. CULSHAW:

Q. Dr. Loftus, as you know the -- this hearing involves a case from 1982. Has there been significant research in the field of memory and perception in the intervening 40 years?

A. Yeah. I would say that the bulk of research in which issues having to -- our -- our scientific

knowledge of human perception and memory is applied to forensic issues, such as eyewitness memory, has been done in the past 30 or 40 years.

Q. Thank you.

If we could work that in as you discuss the following questions I think that would be helpful to the Court.

A. Sure.

Q. Can you briefly describe, Dr. Loftus, how memory works?

A. I can.

THE WITNESS: Your Honor, it would be useful if I did so via diagram, which I've begun to draw over here (indicating) --

THE COURT: Sure.

THE WITNESS: -- would that be okay if I could step down?

THE COURT: Yeah. I was thinking maybe what -- make -- make it easier. You want to get the reader up for him? Because that way we can display it on the screens while you draw on a piece of paper.

MS. CULSHAW: Oh, it's already drawn, Your Honor.

THE WITNESS: I started drawing on the --

THE COURT: Oh. It's already drawn?

THE WITNESS: Yeah.

THE COURT: Sorry about that. Yes.

THE WITNESS: I sort of pre-drew part of it anyway.

THE COURT: Okay. Well, watch your step and just to the --

THE WITNESS: Okay. Thank you.

THE COURT: Sure thing.

THE WITNESS: I'll turn it so that you can see it.

Can everybody see this okay?

All right. So, I want to very briefly describe a -- our scientific understanding of how human perception and memory work. This will be condensing basically a semester-long course into about five minutes, but I'll do the best I can.

So, any memory -- or most memories anyway -- begin with an event. The event could be a crime like the one that you're concerned with here. But it could be a basketball game or it could be an accident or it could be whatever. Any witness to this event has an eventual memory for the event.

You can think of the event as being made up of information, lots and lots and lots of information that I'm representing in green here (indicating).

Information in the event takes the form of things like lightwaves that carry the visual information, sound waves that carry the -- the auditory information and so on.

The information that makes up a witness's eventual memory for the event is also information. It's represented differently. It takes the form of things like neural connections and electrical patterns in the brain. But it's still information. And the main task of anybody who's trying to figure out how memory works is to try to figure out what the relation is between the information in the original event and the information in the witness's eventual memory for the event.

So, I am going to tell you about two routes by which information that is at least relevant to the experienced event makes its way into the witness's memory for the event. The first route is -- I'm -- I'm calling the conscious experience route. And by conscious experience I mean probably just what you think I mean. Whenever we experience an event, like the one that we're all experiencing right now, using sensory data from our sense organs we create a conscious representation in our brain of what the event is all about. And based on this conscious experience, this conscious representation we transfer some information

from the original event into memory.

I want to say two things about this conscious experience route before I go on. The first is that I've represented this conscious experience in green. This is meant to be kind of a mnemonic to remind you that conscious experience information is for the most part accurate. It faithfully reflects what actually happened in the event.

The second thing I want to say about it is that I've represented the amount of this conscious experience information in this hypothetical witness's eventual memory as being pretty sparse compared to the information in the original event.

That's true for two reasons. The first is that any event, even a simple one, mathematically speaking contains such a vast amount of information that it would be impossible under any circumstances for a normal human to acquire more than a small fraction of it.

The second reason is that there are often factors at work, some of which we'll be talking about later, that diminish the amount of conscious experience information a witness is able to get from the original event.

Just as an example, it's time limited. Once the event ends so does the witness's conscious

experience of it, and so does their ability to acquire information via this route. So, in short, when the event is over a witness typically has a relatively small amount of information about the event but information that is accurate.

There is, as I said, a second route by which witnesses can acquire and place into their memory information that is at least relevant to the event that they have experienced. And I've referred to that as the post-event information route. So, post-event information is as the name sort of implies, information that is available to a witness after the event itself is over that seems to be relevant to the event. Under the right circumstances witnesses can and do use post-event information as a way of plugging the gaps in the original memory, filling holes, creating a better understanding of what the event was all about.

So, I want to say three things about post-event information. The first is that I've represented it in red. Again, this is meant to be a mnemonic, not to indicate that post-event information is necessarily false but that it is dubious. Unlike this conscious experience information post-event information may be true but it may also be false.

The second thing is that I've represented there

as being quite a bit of post-event information in this hypothetical witness's memory compared to the amount of conscious experience information they got. The reason for this is that post-event information is usually acquirable by the witness under circumstances that are pretty easy to get the information and integrate it into memory. Also, unlike conscious experience information, post-event information is available to the witness for an indefinite time after the event itself is over.

The third thing I want to say about this general scheme of how perception and memory are understood to work is that this representation I've drawn here of this hypothetical witness's eventual memory is misleading in an important respect. When you look at it it's easy to tell which information came from conscious experience -- it's green -- versus which information came from post-event information -- it's red.

That's not the way it works for a normal witness. Normally at the end of the line a witness just has one homogeneous representation of the event in their memory, and they lose track of which of the information in their memory came from conscious experience via which came from post-event information. As far as the witness is typically concerned their eventual memory represents

what actually happened. And witnesses believe that their eventual memory was formed at the time that they were experiencing the original event, even though, in fact, a lot of it got formed after the event was over.

So, one of the critical consequences of this way in which memory is known to work for legal and other issues is that under the right circumstances witnesses are capable of developing eventual memories that seem very real to them, are very detailed, they're very strong, are expressed with a lot of confidence, but the memories are unbeknownst to the witness potentially false in important ways because, unbeknownst to the witness, the memory is based largely on post-event information which is of dubious accuracy.

So, in a nutshell that's how memory works.

THE COURT: Thank you. Appreciate it.

BY MS. CULSHAW:

Q. Based on that science, Dr. Loftus, could that include a witness who confidently identify -- confidently identifies a perpetrator of a crime as being the perpetrator when, in fact, they're not?

A. Yes. It -- it certainly can.

Q. Based on your research and work in this field have there been any -- have there been any demonstrations of this kind of misidentification in --

in the real world?

A. The best examples of this kind of situation in which a witness has a memory that they express with great confidence but is demonstratively false come from the so-called exoneration cases. I'm sure everybody in this courtroom knows what exoneration cases are. They're cases in which a person is put on trial, convicted and eventually exonerated, typically -- although not always -- based on a mismatch between DNA left by the actual perpetrator at the scene and DNA belonging to the convicted defendant.

The reason such cases are of interest to people who study memory is that in a large proportion of these exoneration cases there were eyewitnesss who at trial confidently and yet falsely identified the innocent defendant as the person that they saw commit the crime.

Q. I'd like to talk about some of the factors that affect a witness's ability to obtain accurate information -- the green route -- the conscious experience.

Can we start with attention. Can you explain to the Court what scientists mean by the term "attention"?

A. Sure. To answer that question I want to start

with two brief foundational pieces of information. The first is that at any given time any person is being bombarded by an enormous amount of information entering their brain from the world via their sense organs: Their ears, their eyes and so on.

The second piece of foundational information is that at any given time a person is typically trying to accomplish some goal. This goal could be as simple as holding a bottle of water. It could be as complicated as doing brain surgery. It could be anything in between. But we're always trying to accomplish something.

So, what that means is that of all the vast amount of information impinging on the brain at any given time only a small proportion of it is ever relevant to the goal that the witness is trying to accomplish. The vast majority is irrelevant. What this means is that we need some kind of filtering system to screen out the irrelevant information, let through only the small proportion of relevant information. If we didn't have this kind of filtering system there would be perpetual information overload and we would never get anything accomplished.

So, when you look at the various sense organs -- the ears, the eyes and so on -- and the pieces

of the brain that they're attached to what you discover is that a major design feature is a set of neurological filters designed to screen out incoming information in various flexible ways. And it is this collection of filters that we define to be attention.

To make the effects of attention a little easier to visualize it's useful to use a metaphor -- it's an imperfect metaphor, but it works pretty well -- and that is of an intentional spotlight beam that moves from one part of a person's sensory world to another. Whatever this metaphorical spotlight beam is falling on is what's being paid attention to. Whatever is outside of this metaphorical spotlight beam isn't being paid attention to.

So, again, in a nutshell that's what we mean when we talk about attention.

Q. Dr. Loftus, is there any relatively recent research that shows that paying attention to a person's appearance is necessary for remembering the person's appearance?

A. There's been quite a bit of research. Just to giver you a flavor for this research I can describe one example of an experiment. The experiment I had in mind took place on the campus of Cornell University and here's how it worked.

If I'm the experimenter I go out onto campus and I stop a random person walking around and I engage them in conversation. Perhaps I ask them for directions to a campus building. We'll call this person I'm talking to the witness. At this point the witness has no idea that he or she is participating in an experiment.

So, as I'm having my conversation with the witness two guys who are part of the experiment approached.

Sounds like you know about this.

THE COURT: I've read the pleading. Yeah, yeah.

THE WITNESS: Okay. So, just --

THE COURT: A criminal act, yeah.

THE WITNESS: -- very briefly then. These guys are carrying a door -- a standard-issue, opaque door -- and they come along and they walk directly between me and the witness, obscuring the witness's view of me for just a couple of seconds. During which time I exchange places with one of the guys carrying the door, walk off with my portion of the door leaving the witness talking to a completely different person.

THE COURT: I apologize, because I thought you were going to get into the -- the criminal act one where

the -- the person leaves and they had to make the identification.

So, you did a different one?

Okay.

THE WITNESS: All right. Probably the one that you're thinking of would do equally well. But I'll just finish the one I'm talking about.

So, the -- the new person -- the former door carrier -- continues the conversation with the witness. And the relevant and somewhat surprising outcome of this and related experiments is that for the most part the witness doesn't realize that the person they're talking to at the end of the conversation isn't the person they started the conversation with. Even when they're explicitly asked, Am I the guy you started this conversation with, the witness typically says, Yeah. I mean, why wouldn't you be?

So, what this demonstrates is that even having a face-to-face couple of minute conversation with a person isn't sufficient for the person to memorize what you look like even well enough to notice that you've changed into a completely different person. In order to be able to remember what somebody looks like you have to explicitly pay attention to what the person looks like.

In this experiment these witnesses had no

reason to pay attention to the experimenter's appearance. It wasn't part of the goal that they were trying to accomplish.

So, as I said, there were a number of experiments that follow this general pattern, all of which demonstrate that explicitly paying attention to appearance is necessary although not sufficient for being able to remember the person later on.

BY MS. CULSHAW:

Q. Based on the science of memory and perception when would a witness fail to pay attention to something important like a perpetrator's appearance?

A. So, the -- the most important aspect of attention that allows me to answer your question is the serial nature of it. Going back to my spotlight analogy, you can think of a spotlight as moving around from one place in the sensory world to another. So, the way attention works is that the attentional spotlight beam will fall on whatever aspects of the event are relevant to the goal that you're trying to accomplish, and generally speaking won't fall on aspects of the event that are irrelevant to the goal you're trying to accomplish.

So, if you do not pay attention to some particular element of an event then you won't remember

it later on.

Q. So, regarding limited attention I want you to suppose a couple of factors. Assume that there's a person in a home with their spouse and elderly -- elderly mother. That three armed men invade the home. That one holds a gun on the person's spouse. Another ushers the mother into the bedroom. A third takes this person to the hall closet. Then one of the perpetrators binds and gags the person and their family, after which she hears two shots.

Based on the science of memory and perception what would a witness faced with this situation tend to pay attention to?

A. Well, I should say that absent putting electrodes in somebody's brain you can't tell for sure what anybody is paying attention to at any given moment. But, based on a lot of research on attention you can make some pretty good predictions about what somebody would be paying attention to in any of a number of situations including that one.

So, in the one that you described the -- in this horrific situation it's almost certainly true that the main goal of the witness would be to try to not get killed. To try to not get killed herself or to one way or another keep her relatives from getting killed.

Given this goal there would be a number of elements of the event that would be relevant. Are there potential escape routes? If I'm tied up can I get out? Is there some way I can surreptitiously call 9-1-1? Is there somebody else who might be coming to the house who could help me? And if not what are escape routes? What about any weapon in the scene? What about a gun? Where is it pointing and so on.

So, all of these things are likely elements of the event that the witness would pay attention to in quest of accomplishing her main goal of keeping herself and her relatives safe.

Q. You mentioned a weapon, Dr. Loftus. Could you explain to the Court the phenomenon of weapon focus?

A. Yeah. Over the last 20 or 30 years there has been a little cottage industry of research that has been termed "weapon focus" which refers to the general finding that when there is a weapon in the scene people's attentional spotlight beam is drawn to it. And to the degree that a person's attentional spotlight beam is on the weapon it's not on other aspects of the scene, such as the appearance of the person who is holding the weapon.

Q. You also mentioned stress, Dr. Loftus. In what way or does very-high stress affect memory?

A. Right. So, I have to start with a caveat which is that for obvious reasons studying very-high stress scientifically is a challenge. There are obvious ethical constraints that prevent us, even if we would like to, from taking normal people, putting them in extremely high-stress situations where they think, for example, that their lives might be in danger. You can't do that -- or normally you can't.

Nevertheless, there have been a number of studies -- some of them done in the military -- that have examined situations of very-high stress. And the consensus of these studies is that under very-high stress people's mental functioning is diminished compared to being under conditions of more moderate stress.

There was one seminal article that presented research done on naval recruits. This was published in the late '90s demonstrating that this breakdown of mental functioning under conditions of very high stress includes the ability to memorize the appearance of people who are around you.

Q. I want to draw your attention back, Dr. Loftus, to the hypothetical home invasion we discussed a moment ago. Would that qualify as a highly-stressful experience?

A. Well, I -- I think just from a common sense point of view almost anybody would agree that these people were in about the highest-stressed situations imaginable.

Q. I'd ask you to suppose, Dr. Loftus, that the -- the surviving witness had told law enforcement that she was too scared to look at the perpetrators and couldn't identify them. In the field of memory and perception what meaning would you ascribe to those statements?

A. I would take that simply as confirmation of the common sense conclusion that I alluded to a second ago. That under these conditions somebody almost certainly would be under conditions of very high stress, and the statements made by the witness to police simply confirmed that.

Q. Dr. Loftus, can you talk about the -- the belief that in a highly-stressful event the memory and details of the event become stamped into a witness's memory? I'm wondering if that's consist with the science of memory and perception as you know it?

A. Sure. As you've just said most people, certainly including me, have had the experience of undergoing some extremely stressful event -- being in a bad car accident, let's say -- and then later on

thinking back on the event and being able to recall it in vivid detail. That almost seems in these situations that the brain has somehow taken a -- a flashbulb snapshot of the event as it was unfolding and emblazing it into memory.

And superficially this is inconsistent with what I just finished saying, which is that under conditions of very high stress your ability to carry out any sort of mental functioning, including memorizing what's going on around you, is diminished.

I think the resolution of this seeming paradox is can -- can be seen in this picture of memory that I drew over here, and rests on the fact that for most people a very -- a very stressful event is also a very salient event in their lives. So, a very stressful event is one that the witness who had it typically thinks about a lot after it's over, talks to people, perhaps gets interviewed about, perhaps seeks out accounts of the event in the news media and so on.

All of these recountings of this stressful event allow the witness to be able to supplement their likely originally hazy memory of what happened -- their green route memory -- with post event information of various sorts. So, the end result is that the witness winds up with a memory like this, a memory that doesn't

contain very much original conscious experience information acquired while the stressful event was taking place, but a lot of post-event information that was put into memory after the fact. And it turns into one of those situations that I alluded to earlier: A memory that is very vivid, very detailed, very real seeming, but a memory that is potentially false because it's based largely on post-event information whose accuracy is unknown.

Q. Dr. Loftus, could you -- could you please explain the phenomenon of cross-racial identification?

A. Sure. Cross-racial identification is simple. It refers to the results of a large number of experiments done over a long period of time, indicating that in general people are better able to identify and recognize members of their own race than they are able to identify and recognize members of other races.

Q. And, just so the record is clear, is it your understanding, Dr. Loftus, that Mrs. Redmond is Caucasian while Mr. Hooper and S2 are both identified as Black?

A. That's my understanding, yes.

Q. I'd like you to suppose, Dr. Loftus, that the witness's -- the home invasion witness that we've talked about earlier, her initial statement to the police

included what was pretty vague and generic descriptions, including -- and differing descriptions. For example, that she was too afraid to look at the suspects. That there were three Black men. That there were two Black men and one White man. That they were wearing masks. That they weren't wearing masks. That -- how would that affect your opinion of the initial conscious experience memory?

A. Right. This is consistent with what you would expect based on the circumstances that you have already described, namely that the original conscious experience information in the witness's memory would be pretty sparse. That she wouldn't have much of an accurate memory, an initial -- an original memory of what happened, including what the perpetrators looked like. That means depending which -- on which post-event information drift in and out of her memory that she uses to supplement her original memory she could remember one thing or another. She could remember that she hadn't -- she had been too scared to look at him, which would be most consistent with a sparse memory to begin with. She might then for whatever reason come to believe that they were wearing masks. She might come to believe that they were of one configuration of races or another.

So, in other words, both a lack of -- an

expressed lack of memory to begin with as well as inconsistent later memories are entirely consistent with this way in which I've described memory as working.

Q. And if that witness is shown a picture of S2, who the State believes is Mr. Hooper, and is unable to identify that person as the perpetrator what does that tell us from the science of memory and perception?

A. Well, that would be consistent with the proposition that the witness's original memory of S2 didn't match Mr. Hooper's appearance. If it had, then had she been shown a picture of him either by itself or as part of a photo lineup, she would have identified him. If she didn't that is most consistent with the proposition that she didn't have much of a memory of what the intruders looked like to begin with.

Q. And if we start with the proposition of inconsistent descriptions to law enforcement, followed by the purported failure to identify Mr. Hooper in a lineup -- in a paper lineup, if the witness then comes to identify Mr. Hooper in a physical lineup what would this mean when you consider the science of perception and memory?

A. Well, of most importance I think is what the situation you've described would tell us about the reliability of the witness's eventual identification

from the live lineup. In order to make sense of that I have to provide a definition of what it means for an identification to be reliable.

If I could do that?

So, by my definition -- or the definition of just about anybody I know -- a witness's identification of a suspect or a defendant can be construed as reliable only if from that identification you can unambiguously conclude that there must have been a strong match between the witness's memory of the perpetrator on the one hand and the appearance of the identified suspect or defendant on the other hand. If you can't unambiguously make that conclusion then you can't view the identification as being reliable.

Now, I -- I believe you asked what are the implications of the hypothetical situation that you've been constructing on the eventual reliability? So, to begin with there would be evidence in the situation that you've constructed that the witness had a fairly sketchy memory of what the perpetrators looked like to begin with. So, the facts of the crime that you described -- the horrific facts -- mean that, as I said, it's likely that the witness wouldn't have been paying attention to what the perpetrators looked like because her limited attention was more usefully directed to other elements

of the scene that would underlie her goal of trying to keep herself and her relatives straight. It was a cross-racial situation, she was under very high stress and so on.

So, all of these factors would imply that the witness wouldn't have had much of a memory of what the perpetrators looked like to begin with.

If you accept the proposition that the witness had an -- only a sketchy memory of what the perpetrators looked like to begin with it would not be possible for there to be a strong match between this hazy memory that the witness has of any one of the perpetrators, say S2, and anybody.

THE COURT: Can I just ask you this?

THE WITNESS: Sure.

THE COURT: How -- how much of this stuff that you're telling me right now up to this point is -- is new?

THE WITNESS: Well, all of this way of looking at how memory works is part of the general research that's been applying our knowledge of human perception and memory to forensic issues. And this research has been accumulating over the past 30 or 40 years.

THE COURT: Okay. So, you're -- you're not able to tell me -- because, I mean, I can go back to the

'90s and -- and figure I've heard just about all of this before; would that be correct?

THE WITNESS: Yeah. I would say that the major basis of what I've been telling you was established in the '90s, and then it was supplemented throughout the 2000s and in more recent years.

THE COURT: Okay. Fantastic.

Thank you.

THE WITNESS: Yeah.

BY MS. CULSHAW:

Q. And, to be clear, Dr. Loftus, it's your understanding that Mr. Hooper was tried in 1982?

A. That's my understanding, yes. Right. So, right.

THE WITNESS: Let me -- let me just continue if I could, Your Honor --

THE COURT: Sure.

THE WITNESS: -- with what I was saying?

That the witness would have had a hazy memory of the perpetrators would be confirmed by her fairly sparse and at times inconsistent descriptions of the perpetrators that she provided to police. That her original memory of S2 did not match Mr. Hooper's appearance was, again, confirmed by her failure to identify Mr. Hooper's picture in this photo lineup.

What all of this means is that no identification by the witness of anybody, including Mr. Hooper, in subsequent identification procedures, including the lineup that she participated in in Chicago and including any eventual in-court identifications of him, could be reliable. In none of those situations could you unambiguously conclude that her identification was based on a strong match between her original -- what I've described as the green route conscious experience -- memory of the actual perpetrator on the one hand and Mr. Hooper's appearance on the other hand.

BY CULSHAW:

Q. Dr. Loftus, does corroborating evidence have any impact on how the science of memory and perception look at the reliability of a witness's memory?

A. It does not. A -- let me -- let me just elaborate on that a bit if I could.

Let's imagine that you have a witness who makes an identification and for a variety of reasons you conclude that the identification was unreliable, sort of as I've been doing so far.

Now, let's suppose that some corroborating evidence comes along that bolsters the proposition that the identified suspect or defendant is actually guilty. So, this increased belief in the identified suspect's

guilt would increase, of course, one's belief that the identification was accurate. But this doesn't mean that you can take the increased belief in the witness's accuracy and use it as yet more evidence that the identified person is guilty. This would be circular reasoning.

So, the bottom line is that corroborating evidence has a lot to do with the accuracy of the identification but it had -- has nothing to do with the reliability of the identification.

Q. How is it possible then that a witness could make a positive identification of a suspect if they don't have any memory or very limited memory of what the perpetrator actually looks like?

A. They could do it if the identification procedure was biased in one form or another.

THE COURT: Well, I mean, like, actively biased? Like, taking the witness's finger and going like that (indicating)? Or --

THE WITNESS: That would be an extreme form.

THE COURT: -- or circumstances that you create once --

THE WITNESS: Yeah. As -- as Your Honor is I'm sure aware, there are many ways in which lineups can be biased. And I think we'll probably talk about a couple

of them.

THE COURT: Okay.

BY MS. CULSHAW:

Q. That was actually my next question.

Can you provide a definition of what a biased lineup is?

A. Sure. So, to define a biased lineup you have to assume that the suspect is innocent, not the person seen by the witness. If that is true then a lineup is biased if the witness's chances of falsely identifying the innocent suspect are greater than her chances of falsely identifying any of the equally innocent fillers. That would be the definition of a biased lineup.

Q. Thank you.

And could you explain what a double identification is?

A. Yes. A double identification refers to a lineup in which there is as usual a suspect in some number of fillers, typically five fillers. But the suspect is the only person whom the witness has seen before -- has -- has seen the suspect himself or the suspect's picture in some situation other than the crime.

So, a typical example of this would be exactly what we've been talking about. When the witness sees

the suspect's picture in a photo lineup and then sees a live lineup in which the same suspect appears and is surrounded by fillers whom the witness is guaranteed to have never seen before. The witness may choose the suspect, but you can't rule out the possibility that the witness's identification of the suspect in such a lineup was based not on a match between her memory of the actual perpetrator and the suspect's appearance, but rather on a match between her prior memory of the suspect by virtue of having seen him in the photo lineup and the appearance of the very same suspect standing in the live lineup.

Q. Dr. Loftus, can you explain what a double blind procedure is in the context of a lineup?

A. Yeah. Let -- let me elaborate on double blind procedures just a little bit. Again, as Your Honor is I'm sure aware, double blind procedures have their origins in the medical literature where certain kinds of medical experiments -- where, for example, you are evaluating the effectiveness of some treatment versus a placebo is being investigated. In these kinds of experiments these -- doing a double blind is obligatory. In other words, the experimenters who are handing out the substances to the suspects must not know who is getting what, who is getting the treatment, who is get

the placebo. The reason for that is pretty well known. It's well known that people are perfectly capable of transmitting information to other people in ways that are subtle and unconscious, nonverbal and so on. The only way to avoid that in the medical literature is to carry out the experiment double blind.

Exactly the same logic that had its origins in the medical literature applies to police lineups, where if the police officer conducting the lineup knows who the suspect is then you can't rule out the possibility that a positive identification of the suspect by the witness is based in whole or in part on information one way or another; either overtly as you mentioned before or more likely covertly provided by the police officer or officers to the witness about who they should be choosing, who the -- who the suspect is.

So, as I said, going back to the medical literature if an experiment doing let -- investigating, let's say, a treatment versus a placebo were not carried out double blind nobody would take it seriously. It would never get published. Because the logic that originated in the medical literature applies exactly to police lineups in a perfect world the same would be true. That a police lineup that was not done double blind should not be taken seriously in terms of the

results of any identification that came out of it.

Q. Dr. Loftus, could you tell us what the consequences of picking a witness -- the witness's picking a suspect from a biased lineup, whether it be a consciously biased or covertly biased?

Sorry?

A. So, there are two consequences. The first is the obvious one. That if there's bias in the lineup in any way, shape or form that would increase the witness's inclination to falsely identify an innocent suspect or even a guilty suspect.

The other consequence is more subtle, which is that if the witness identifies a suspect from any lineup, biased or not, the witness is in a position to use the appearance of the just identified suspect as a form of post-event information. In other words, even if the witness went into the lineup procedure with a hazy memory of what the actual perpetrator looked like the witness can use the appearance of the person they've just identified as a means of reconstructing their memory of what --

THE COURT: So -- so, you -- so, my question there is so it then provides more detail? The lineup provides more detail to the hazy memory, thus sharpening the memory and -- and the certainty for the -- for the

later identification?

THE WITNESS: Exactly what I was going to say. Yes.

THE COURT: So, let me ask you this though. But -- but there's a record of -- of these identifications for comparison to -- to a fact finder. Somewhere along the way that's going to be challenged; correct?

THE WITNESS: Well, if I understand you correctly, that's often what I do when I come in and testify to describe to the trier of fact exactly what I've just described to you in the hopes that the jury or the trier of fact in general can use this way of understanding how memory works as a -- sort of a caution in how they interpret whatever confidence the witness expresses in the in-court identification of the suspect who then becomes the defendant.

THE COURT: And I know you didn't testify in this case in the trial, but -- but isn't that what -- what happened? I mean, the jury was able to weigh those -- those two different things? I mean, it seems like it -- this -- this is the same kind of attack that would have happened --

THE WITNESS: Right.

THE COURT: -- did the jury have this

information and they used other information and -- and -- and presumably sifted through all of that in coming up with their verdicts?

THE WITNESS: Right. So, there was an expert in that -- in Mr. Hooper's trial 40 years ago. That expert was my former wife and now close friend and colleague, Elizabeth Loftus. My understanding is that she was extremely limited in what she could say about how memory works. Essentially, all she could say is that cross-racial identification diminishes a witness's ability to accurately form a memory of what a perpetrator looked like.

As you saw I also talked about cross-racial identification but I talked about it only as a pretty small piece in the context of a much larger picture. And it is my belief of these, based on Elizabeth Loftus's testimony back then that was, as I said, severely constrained, that the jury wasn't able to get the kind of what I would immodestly call a bigger, more comprehensive picture that they should be paying attention to in order to evaluate the reliability of the in-court identification that was eventually provided by Mrs. Redmond.

THE COURT: Appreciate that.

Thank you.

BY MS. CULSHAW:

Q. Dr. Loftus, let me ask you this: If you testified at Mr. Hooper's trial in 1982, and if the trial court had restricted you to talking about the process of memory and perception through a lens of cross-racial identification, would you feel that the jury had received all that they would need to be able to assess the reliability of the identification in this case?

A. No, for -- for reasons that I just tried to articulate. I think in order to really understand how they should treat the reliability of any identification, including an in-court identification of a defendant by a witness, the witness should be privy to all of this information that I've been trying to describe in the last -- whatever it's been -- hour or so.

MS. CULSHAW: With that, Your Honor, I would move to admit Exhibit 3, Dr. Loftus's report and CD.

THE COURT: Any objection?

MR. SPARKS: No objection.

THE COURT: Okay. 3 is admitted.

MS. CULSHAW: Thank you.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. SPARKS:

Q. Good afternoon.

A. Good afternoon.

Q. All right. You -- toward the beginning of your direct examination you were given a hypothetical with a very specific set of facts, and asked under those circumstances is it likely that a witness's identification would be reliable. And, correct me if I -- I'm wrong, but I believe your answer was to the effect of not likely; is that correct?

A. Correct.

Q. Okay. That doesn't mean it's impossible though; is that right?

A. It doesn't mean it's impossible. No.

Q. So, it could be accurate --

A. Yes.

Q. -- or it could be reliable?

A. Could be reliable. But unlikely, yeah.

Q. You were given a very similar hypothetical set of facts, and you I believe said that under those facts a person's -- you could make predictions about a person's attention -- what their attention would be on in that situation. You said you could make predictions,

but ultimately you can't know exactly what their attention was on. Would you say that?

A. Correct. Absent putting them in a brain scanner.

Q. Okay.

All right. I want to turn to your report that was just admitted. And, just to make sure we're on the same page, when I talk about your report I'm talking about the November 4th version --

A. Right.

Q. -- that was just admitted.

You wrote in your report that, Much foundation for the opinions I have expressed were carried out prior to 1982; is that right? That's in your report?

A. I -- I'm sorry. Could -- could you read that again or let me have a look at it?

Q. Sure. And I believe that's on page 11 of Exhibit 3.

A. Okay.

Okay. And I'm sorry. What were you saying?

Q. I -- I believe the -- the quote from your report is, Much foundation for the opinions I have expressed were carried out prior to 1982?

A. I'm sorry. I -- I'm not seeing that. You're saying it's on page 11?

Q. Yeah. It's Roman numeral five, Research timeline --

A. Yeah.

Q. -- it's in that paragraph there.

A. I've expressed where although much -- right, right. I see what you're saying. Yes, yes, yes. I did say that.

Q. Okay. And you -- you said today also that much of the basis of what you've testified to here today was developed in the '90s. I -- did -- am I getting that correct?

A. Correct. '90s and early 2000s.

Q. Okay. So, you could have provided testimony very similar to what you provided here today at that point in time in the '90s?

A. Well, I could have present -- provided a lot of what I've talked about today. Not all of it.

Q. Okay. And am I correct that you have presented very similar testimony to what you presented today on attention and on biased lineups, you know, as -- as long as 20 years ago; am I --

A. Yes.

Q. -- correct?

A. Yes.

Q. All right. And on a similar topic do you

recall testifying in approximately 2005 that there is a -- a theory in the scientific community of how perception and memory work that has been guiding our understanding of human perception and memory for about 30 years?

A. Yes.

Q. That sounds accurate?

A. Yes.

Q. Okay. So, that -- that was in 2005, so 30 years prior to that would be, I guess, about 1975; do I have that right?

A. Correct.

Q. Okay. And I -- I -- I did hear you refer earlier that you -- I believe you reviewed the trial testimony of Elizabeth Loftus in this case?

A. Yes.

Q. Okay. So, you're aware that she -- while her testimony was limited to subjects related to cross-racial identification she did provide testimony on the -- kind -- kind of the effect of memory in violent circumstances or during violent events?

A. High stress, yeah.

Q. Okay.

A. She did. That was prior to when there had been a similar article that, as I said, was published in

1998 as I recall demonstrating that the effects of stress on mental functioning in general included effects of high stress on memorizing the appearance of people that you are interacting with.

Q. All right. Thank you.

And you -- you discussed, let's see, the -- the effects of biased lineups a -- a few minutes ago. You're aware that the -- the lineup that was conducted in this case was challenged during the trial and was something that was also raised in the appeal of that trial by the defendant, Mr. Hooper?

A. Yeah. I would hope so.

Q. Okay.

Okay. Now, prior to the report that was admitted today that's dated November 4th you had two previous versions dated October 25th and November 2nd; is that correct?

A. Yes.

Q. Okay. And am I correct that your October 25th and November 2nd reports refer to a declaration by John Castro, and you stated in those two versions that John Castro's report relates an account of Detective Ronald Quaif (phonetic) who was present at the lineup?

A. Yes. I believe that was the most recent

version of the report, the one I'm looking at here (indicating).

Q. Well, I want to have you take a look at -- so, you have your current report. If you could look at page 9 for me. That's Exhibit 3.

A. Okay.

Q. I believe about three paragraphs down in -- in the current November 4 report you write, A report written by John Castro relates an account of Detective Ronald Quaif that during the lineup, and -- and I won't go on -- is that an accurate --

A. Yes.

Q. Okay.

And in your two prior versions, however, you had stated in that same section that Detective Ronald Quaif was present at the lineup --

A. Yeah.

Q. -- am I correct?

A. I misunderstood the exact configuration.

Q. Okay.

Okay. So, you changed that because Detective Quaif was not actually present at the lineup --

A. Correct.

Q. -- correct?

A. Yeah.

Q. Okay. Am I correct that your November 2nd report included -- as well as November 4th -- included a subheading that -- that reads, Prior exposure to the suspect's appearance --

A. Yes.

Q. -- does that sound correct?

Okay. And that subheading did not appear in your original October 25th report --

A. Correct.

Q. -- correct?

Okay. And in that section in both the November 2 and November 4 versions you wrote that, Prior to participating in the live lineup Mrs. Redmond had participated in the photo lineup and had failed to identify Mr. Hooper's picture from it; is that right?

A. Yes.

Q. And what is that assertion based on?

A. It's based on the letter that your office wrote to the clemency board. I was quite surprised to see any illusion to a photo lineup -- I think it was called a paper lineup -- in your letter, because I hadn't been aware that there had been any kind of identification procedure that was carried out with Mrs. Redmond prior to her identification of Mr. Hooper

in Chicago.

Q. Okay. And then you wrote next that, Thus, Mr. Hooper was the only live lineup member that Mr. Redmond had seen before, and for that reason would have looked more familiar than the fillers; is that right?

A. Correct. Yes.

Q. Okay. Thank you.

Let's see. So, you -- you first wrote that on November 2nd. Were you present at the defendant's clemency board hearing on November 3rd, a week ago --

A. Yes --

Q. -- today?

You were there?

A. -- I was.

Q. Okay.

So, did you hear Ms. Valenzuela tell the clemency board that that statement that you referred to in her letter was an error?

A. No. I -- I had to leave. I had a plane to catch before the State testified.

Q. Okay. Had -- had anyone made you aware that she said that?

A. Subsequently the counsel I'm working with pointed out that you guys had characterized that as an

error.

Q. Okay. Did -- have you watched the video of the hearing or anything? Or this is just what was told to you?

A. What was told -- told to me.

Q. Okay. So, did anyone tell you that Ms. Valenzuela also stated to the board of executive clemency that day that there was no evidence that Mrs. Redmond was ever shown a photo lineup of Hooper?

A. Yes. Which is why I was --

Q. Is that a yes or a no?

A. That's a -- yes, I was aware.

Q. Thank you.

Okay. And then you recreated a -- a new version -- we've talked about that -- of your report on November 4th. And I think we went over this, but your November 4th report contains the same subheading, Prior exposure to the suspect's appearance; right?

A. Correct. I -- I believe my November 2nd and November 4th reports were identical, except for correcting the officer -- the Detective Quaif configuration.

Q. Okay. Thank you. That -- that's helpful.

So, you said that you were told about Ms. Valenzuela's statements about the -- the error

regarding the photo lineup in the letter. Were you told that before you authored the November 4th report?

A. No. I was told afterward.

Q. You were told after the November 4th report?

A. Yeah --

Q. Okay.

A. -- as soon -- so, I learned about the statement on -- on -- on November 2nd. That was a -- wait -- on November 3rd. I guess, a week ago when I was testifying at the hearing. And basically on the flight back I rewrote the report to take this into consideration.

Q. Okay. So, your -- your final version, November 4th, you -- you had been told at that time about Ms. Valenzuela's statements on November 3rd about the -- any photo lineup?

A. So, to be honest, I can't remember the exact sequence of events. I -- I immediate -- because this -- because the potential of Mrs. Redmond having seen this supposed photo lineup was relevant to my assessment of the issues in the case I rewrote the report to take that into account. As I said, I -- I may have even rewritten it on the plane going back up to Seattle, and sent the revised report to Ms. List (phonetic).

And then at some point -- I can't remember

exactly when, some number of days after -- I said, Well, what is this? You know, how could they have inserted such a surprising fact into their official letter and the revision of their letter? And that's when she told me, Well, it's their assertion that it was put there by mistake.

Q. Okay. Thank you.

So, let me turn back to the statement where you concluded, based on there being, you know, a purported photo lineup, Thus, Mr. Hooper was the only live lineup member that Mrs. Redmond had seen before, and for that reason would have looked more familiar than the fillers.

If Mrs. Redmond never had seen a photo of Hooper prior to the live lineup that statement is incorrect --

A. That's right.

Q. -- is that right?

A. That source of bias would be absent.

Q. Okay. Now, in all of the versions of your report you wrote that when you testify you do not issue judgments about whether a witness's identification of a suspect is correct or incorrect; is that right?

A. Normally that's true, yeah. Oh, correct or incorrect, absolutely --

Q. Okay.

A. -- I would never do that.

Q. All right. In -- in your report of November 4th there are several times throughout where you refer to the actual S1 and S2. Are you suggesting that S1 and S2 -- or, I'm sorry -- that Mr. Hooper is not S2 when you say "actual"?

A. I -- I think it's important to clarify that there is Mr. Hooper and there is S2. And the main question at issue here is were they one in the same person? And for describing the issues in the case it's useful to refer to them in different ways. Mr. Hooper is Mr. Hooper and S2 is S2. Obviously, the prosecution case is that they're the same person. Mr. Hooper's case is that they're not the same person. But in order to sort it all out I found it useful to refer to them in different ways.

Q. Okay. I understand.

Okay. And you -- you talked about this a little bit towards the end of your direct examination this afternoon. You write in your report that the judgment of a defendant's guilt or innocence from any -- any perspective must be based on all the case evidence, of which eyewitness identification is only a part; is that correct?

A. Correct, yes.

Q. All right. Have you reviewed all of the evidence in this case?

A. I have. I mean --

Q. Okay.

A. -- with a -- with a focus on the eyewitness evidence, because that's what I was concerned with and that's what I had planned on testifying about.

Q. Understand.

Have you reviewed any court decisions that have been issued by the various courts that have reviewed Mr. Hooper's trial and his convictions?

A. I probably have, but I can't remember them explicitly as I sit here.

Q. All right. Let me ask you something specific about one of them. Are you aware that in a decision from January of last year the Ninth Circuit Court of Appeals stated that the prosecution presented overwhelming evidence of Hooper's guilt?

A. Yes.

Q. Okay. And from that same decision are you aware that that same court wrote that Mrs. Redmond's testimony was corroborated by substantial evidence, other than Merrill's (phonetic) testimony, which showed that Hooper and Bracy were in Phoenix on New Year's Eve

and involved in the Redmond crimes? Are you familiar with that comment?

A. Yes, I am.

Q. And are you aware that in the almost 40 years since the jury found the defendant guilty all of the courts who have heard his appeals and reviewed his case have affirmed the jury's finding that he is guilty?

A. Yes.

Q. Okay. You also state in your report that a witness's identification of a defendant is correct if and only if the defendant is guilty. Do I have that right?

A. Yes.

Q. Okay. And you're aware that the jury found Hooper guilty of the crimes in this case --

A. Yes.

Q. -- correct?

And you're aware that Hooper appealed that finding by the jury to the Arizona Supreme Court, and then that court affirmed the jury's finding of guilt?

A. Yes.

MR. SPARKS: No more questions.

THE COURT: Thank you.

Redirect?

MS. CULSHAW: Briefly.

Thank you, Your Honor.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MS. CULSHAW:

Q. All right. Dr. Loftus, does your opinion in this case on the unreliability of Marilyn Redmond's identification, is it dependant on her having reviewed a paper lineup in advance of identifying Mr. Hooper in the live lineup?

A. No. It's certainly a factor -- which is why I rewrote the report -- a factor to be considered for the reasons that I tried to articulate earlier. But it isn't -- had I not known about that so-called paper lineup -- which, I hadn't when I wrote the first version of the report -- it would still be my opinion that Ms. -- Mrs. Redmond's identification was unreliable for a variety of reasons that had nothing to do with the supposed paper lineup.

Q. And I know you indicated that you reviewed Dr. Elizabeth Loftus's testimony in this matter. If you assume that we learned last week that there was a potential paper lineup shown to Mrs. Redmond in advance, that's not something that she would have been able to

address in her testimony in 1982?

A. No.

MS. CULSHAW: Thank you, Doctor.

THE COURT: Thank you.

Okay. May this witness be excused?

MS. CULSHAW: Yes. Thank you.

THE COURT: Thank you, Doctor.

THE WITNESS: Thank you, Your Honor.

(WHEREUPON, the witness is excused form the courtroom.)

THE COURT: So, how -- any -- any other witnesses?

MS. CULSHAW: Sorry. The defense rests, Your Honor.

THE COURT: Okay.

Does the State have any witnesses?

MR. SPARKS: No witnesses, Your Honor.

THE COURT: Okay. So, just argument?

MR. SPARKS: That's right.

THE COURT: Let me just check with the court reporter.

Want to take a little break?

THE STENOGRAPHER: (No oral response.)

THE COURT: We'll take a 15-minute break, and then we'll come back for argument.

THE BAILIFF: All rise.

(WHEREUPON, a recess was taken.)

THE COURT: Okay. So, we're back on the record.

And -- oh, there she is.

Okay. We've got the FTR running. Okay?

Back on the record.

So, no further witnesses.

The only thing I have for the -- for the State is I would like an -- an avow that you have consulted with Ms. Valenzuela and -- and that everyone is confident on the State's side that that -- that lineup never existed.

MR. SPARKS: Yes, Your Honor. I have spoken with Ms. Valenzuela extensively on this issue, and I -- I will avow to you today that we are absolutely confident that there was no such photo lineup containing Murray Hooper, and that the reference to one in the letter was simply an inadvertent error.

I -- I -- we take this kind of thing very, very seriously; myself, my office, Ms. Valenzuela and her office. I know. So, I mean, this is something -- something that's of the utmost seriousness, and we recognize that and appreciate that. And, you know, with that context I -- I can avow to the Court that we are

confident that there -- there was no such lineup.

THE COURT: Okay. And that was the minute -- the error was -- was -- Ms. Valenzuela's attention was drawn to the error. She -- she immediately corrected it --

MR. SPARKS: Correct, Your Honor.

THE COURT: -- is that right?

All right. Thank you.

Okay. Closing statements by the defense?

MS. CULSHAW: Thank you, Your Honor.

It is the position of Mr. Hooper that he's carried his burden and has demonstrated that he's entitled to relief under Rule 32.

The State in its response to his second post-conviction petition failed to address any of the substantive claims that he made. If the State's admission that there was a paper lineup, which they've avowed is not the case, was not disclosed to the defense there is no defense to those claims. Certainly, the State had the opportunity to call and put under oath the attorneys who made that representation in the clemency hearing. They didn't.

THE COURT: Well, I -- that's why I asked for the avow. As -- as an officer of the court I -- you don't accept that?

MS. CULSHAW: I -- I don't feel that I can in this case, Your Honor, and this is why. We've explained it in both of our petitions. Mr. Hooper's trial was replete with prosecutor misconduct from the Maricopa County Attorney's Office, belated disclosures, failure to give up Brady. At the clemency hearing what I heard said was that they had reviewed 20 boxes. What they provided to the clemency board was 800 pages of materials. So, we haven't seen what's in those 20 boxes.

Given the substantial prosecutor misconduct that occurred in this case, on Mr. Hooper's behalf I don't think that we can accept an avow. We deserve and meet the standard for discovery in this matter.

I would also note that in a -- in our Motion to Reconsider this morning -- which I'm -- I'm not even sure the Court has had a chance to review --

THE COURT: I have -- I've absolutely read it. Yeah.

MS. CULSHAW: Yeah. That there has been a prior history of misrepresentation in front of the clemency board by this office. And that was a reference to a Larry Hammond letter that was presented during Clarence Dixon's clemency proceeding.

So, short of discovery I don't feel that we

can -- can accept the avow, and I don't think that Mr. Hooper without discovery has had the opportunity to fully and fairly litigate his claims.

Mrs. Redmond's testimony was the critical piece of evidence in this case. And Dr. Loftus's opinion also now incorporating this paper lineup is newly discovered.

Also, what is newly discovered since trial is the extensive misconduct of the Chicago Police Department in particular in reference to torture, abuse and basically cheating in lineups, Your Honor. That was not something that was available to Dr. Elizabeth Loftus at the time of her trial, nor was the change in the law in Chicago to address the misdeeds of the Chicago Police Department. So, the fact that this lineup was -- took place in Chicago and that there have been these -- these scandals of corruption, abuse and cheating as well as the change in the law is new.

I would just refer to our briefing to argue that this evidence isn't cumulative. As Dr. Loftus explained Mrs. Redmond's identification is unreliable. Just because she believes it's correct doesn't mean that it is correct.

Dr. Loftus in discussing the topic as it relates to cross-racial identification -- Dr. Elizabeth Loftus -- she was restricted to talking about

cross-racial identification. That's reflected in both the trial court's minute entry and in the Arizona Supreme Court's opinion in the direct appeal in this matter. She was allowed to talk about memory and perception but only thru a lens of cross-racial identification, which is very different than what the Court saw here today.

Mr. Hooper's omnibus claim is that he's innocent. There were extraordinary benefits given to the witnesses in this case. The corroborating evidence that the State sites to does not identify Mr. Hooper. And the key to the State's case was Marilyn's Redmond's identification, which is dramatically undermined by both the new evidence and the disclosure of the paper lineup.

This Court knows more than the jury knew. This Court knows more than all of the appellate courts -- even the Ninth Circuit -- knew about Mr. Hooper's case.

Loftus's testimony and the revelation of the paper lineup are new. Based upon Mr. Hooper's pleadings and evidence offered today we believe Mr. Hooper has met his burden under Rule 32.

Minimally, discovery is appropriate in this case, and Mr. Hooper requests that the Court reconsider that request. As I explained only 800 pages of documents were given to the board when they said 20

boxes were reviewed. They said all the police reports were turned over, Your Honor, but it is entirely possible that the Maricopa County investigator, Dan Ryan, who committed a substantial amount of misconduct in this case, could have shown Mrs. Redmond a paper lineup, and that would not be in a police report because he is not a police officer.

THE COURT: Right. Well, that may be so under your theory, but we have the representation now that -- twice now -- twice over that there was no -- there was no paper lineup. So -- so, that doesn't have Detective Ryan in the equation. You would have to be directly asserting that these two attorneys -- three were committing fraud in front of the Court right now.

Can you do that?

MS. CULSHAW: I think we have a good faith basis to request discovery and that we've demonstrated good cause for the ability to get discovery.

I think the other thing that I would just submit to this Court that I can avow to is that if this Court grants discovery and we're given access to those boxes tomorrow we will get through them by Saturday and be able to proffer a response to the Court by Sunday. So, this won't cause any delay in the case, which I know

is -- is the consistent mantra in capital cases. That we're about delay. We just want to look at these boxes, make sure that there isn't a paper lineup in there, because it makes every sense that there was a paper lineup shown to Mrs. Redmond. A paper lineup was shown to other witnesses.

THE COURT: Let me ask you one more question to just -- let's assume -- and I'm -- I'm making absolutely no assertion that something rotten is occurring here. But under your theory that -- that they're acting so nefariously I would assume if they had any sense at all they would remove that -- that document from those 20 boxes and you would never find it anyways.

MS. CULSHAW: I mean, I would hope that's not the case, Your Honor, particularly since at the -- at the trial they were repeatedly found to have hidden evidence and -- and it's -- it still managed to surface, so.

THE COURT: Well, I'm just saying --

MS. CULSHAW: Yeah.

THE COURT: -- that seems to make it a -- a futile effort. Even if I were to grant the motion I would -- would assume a clever soul who's -- who is deceiving the Court would remove that document and therefore you wouldn't find it.

MS. CULSHAW: I would hope that isn't the case, Your Honor. I would hope that any avow is -- is -- is accurate. But I don't think given the history in this case, given the showing that we've made that -- that Mr. Hooper should be denied the opportunity to conduct discovery. And without it he's been denied an opportunity to fully and fairly litigate these issues.

And with that I will submit that Mr. Hooper has met his standard under Rule 32, and we would request that the Court grant relief.

THE COURT: I appreciate your arguments and your presentation as well as the very good briefing.

MS. CULSHAW: Thank you.

THE COURT: Thank you.

State?

So, let me ask the State first off.

MR. SPARKS: Yes?

THE COURT: I assume now the Attorney General's Office has all the original evidence; is that correct?

MR. SPARKS: I -- we have copies of most of the evidence. I believe the original files are -- are still with the Maricopa -- Maricopa County Attorney's Office. I think over the years there's been exchanges back and forth. So, we have much of it. I -- I'm not sure I could say we have all of it.

THE COURT: Okay. What about the -- the things that Ms. Valenzuela reviewed before writing the letter?

MR. SPARKS: I -- I have copies of them that I've received recently. I -- I can't say for -- 100 percent sure that I have all of those documents in our file.

THE COURT: Okay. Would that have made a -- well, let me change my -- my line of questioning.

So, then, are you confident then -- and I have no reason to disbelieve anybody here. I want to make that certain. But I want to get this for the record. Are you confident then that -- that Ms. Valenzuela is accurate in her representation that this lineup didn't exist?

MR. SPARKS: I am confident, Your Honor.

THE COURT: Okay.

MR. SPARKS: I -- I've seen -- in my review of this case over many years in all of the records that we do have I haven't seen anything to suggest that there exists a lineup like that or in any --

THE COURT: And I'm in no way asserting anybody on either side has acted nefariously. But I think it's important --

MR. SPARKS: I understand.

THE COURT: -- to make that record.

MR. SPARKS: Thank you, Your Honor.

THE COURT: Okay. Go ahead.

MR. SPARKS: I -- and I just wanted to -- to briefly touch on one additional thing. I know that to the extent counsel is -- is, you know, relying on misconduct -- misconduct that was found to have occurred previous in this -- in this case, that was decades ago. I don't condone that -- that misconduct, and I know Ms. Valenzuela doesn't either. We've talked about it. That was years ago. That was litigated early on in the case. It -- and it came out, and I don't think that that has any bearing on the conduct of myself or Ms. Valenzuela.

Turning to the -- the claims at issue, and I just wanted to touch on one point that was made. The reason that we didn't feel we needed to respond to the substance of the claims in the second petition that was filed last week is because they all rested on the existence of a photo lineup. You know, as we've stated that doesn't exist, and I -- I believe that the claims rise or fall on whether that existed.

THE COURT: Because if it did -- if it did then that certainly would be enough to -- to -- to dive right back into everything don't you think?

MR. SPARKS: Absolutely, Your Honor. I do

agree with that. Yes.

THE COURT: Okay. Go ahead.

MR. SPARKS: I don't want to repeat the arguments that we have made in our response to the petition. Just to -- to touch on a few things as they relate to the testimony today, I think, you know, as the Court of Appeals laid out in the King decision that we sited, I think that's very analogous to the situation we have here. Dr. Loftus wrote in his report and confirmed today that -- that many of the ideas and concepts that he is testifying to here today did exist at the time of Hooper's trial.

And as he -- as he conceded and is apparent from the record, Dr. Elizabeth Loftus testified to some of those ideas. I know that Hooper has pointed out that she was limited to those concepts as they related to cross-racial identification, but I believe we've addressed that. The King decision, the Court of Appeals wrote that evidence is not new under Rule 32.1(e) merely because it was not introduced at a defendant's trial.

So, I think the limitation on her testimony is a separate issue from whether or not Dr. Geoffrey Loftus's testimony today is -- is newly discovered or not.

Aside from the fact that -- that that

information existed and -- and could have been presented at trial and, in fact, to a large extent was -- meaning it's not newly discovered -- the second prong does go to diligence. And he testified here today that much additional understanding came about in the '90s. So, I understood his testimony as saying he could have testified 25 years ago, for example, to many of the same things he testified to today.

And I think -- so, to the extent there is new information in what he's presenting, Hooper can't meet the diligence requirement of Rule 32.1(e) because this is a claim he could have brought many years ago.

And, finally, just because it is mostly cumulative to the testimony presented at trial, and the fact that Mrs. Redmond was impeached with Elizabeth Loftus's testimony at trial, and the fact that the jury heard so much evidence that, you know, reviewing courts over the years have acknowledged that corroborates -- not just corroborates but it -- it shows that she was correct in identifying Mr. Hooper because we have so many other pieces of evidence and other witnesses implicating his guilt in the crime.

So, given that, there's -- there's -- Mr. Hooper can't meet the standard of showing that the testimony we heard today would have made a difference at

his trial.

THE COURT: Thank you.

Last word?

MS. CULSHAW: No.

Thank you, Your Honor.

THE COURT: Thank you.

Then I will take this matter under advisement. There will be a ruling on the petitions as well as the Motion For Reconsideration either sometime later tomorrow or -- or Monday. But not later than -- than noon on Monday for sure. Okay?

Does that satisfy the State?

MR. SPARKS: It does, Your Honor.

Thank you.

THE COURT: Defense?

MS. CULSHAW: Thank you, Your Honor.

THE COURT: All right. Thank you then.

Thank you. Well done both of you.

(Proceedings adjourned.)

C E R T I F I C A T E

I, ***KRISTYN L. LOBRY,*** Official Certified Reporter herein, hereby certify that the foregoing is a true and accurate transcript of the proceedings herein all done to the best of my skill and ability.

Dated at Phoenix, Arizona, this 13th day of November, 2022.

/s/ Kristyn L. Lobry
Kristyn L. Lobry, RPR
Certified Reporter No. 50954
Official Court Reporter
Maricopa County
Superior Court
Phoenix, Arizona 85003
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Clerk of the Superior Court
*** Electronically Filed ***
11/10/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 0000-121686 11/09/2022

HONORABLE HOWARD D. SUKENIC

CLERK OF THE COURT
A. Gonzalez
Deputy

STATE OF ARIZONA

JEFFREY LEE SPARKS

v.

MURRAY HOOPER (C)

CARY S SANDMAN
KELLY CULSHAW
THOMAS J PHALEN
NATHAN ALEXANDER MAXWELL
JON M SANDS

CAPITAL CASE MANAGER
COURT ADMIN-CRIMINAL-PCR
JUDGE SUKENIC
VICTIM WITNESS DIV-AG-CCC

RULING / CAPITAL CASE PCR

This Court has reviewed Defendant's Motion to Compel, filed November 8, 2022. Because the motion adequately describes the issue presented, the Court will not require a response from the State.

In his motion, Defendant requests "an order compelling the State to provide unfettered access to any and all boxes and files for this and related cases, including but not limited to, the twenty boxes the State relied on in preparation of its clemency letter and to provide for interviews of the staff who prepared that clemency letter. (Motion to Compel, at 5.) This request, as Defendant explains, relates to his third claim regarding information pertaining to victim Marilyn Redmond's eye-witness identification.

"After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim." Ariz. R. Crim. P. 32.6(b). While Defendant has identified the claim to which the

requested discovery relates, he has failed to establish reasonable grounds to believe that the requested discovery would lead to evidence material to the claim. First, as shown in Exhibit 4 to Defendant's motion, the State has indicated that Defendant is in possession of "all of the police reports [the Maricopa County Attorney's Office] possesses and relied on to prepare the clemency letter." Additionally, the same exhibit indicates that the prosecutor who drafted the letter spoke at Defendant's clemency hearing on the very topic Defendant seeks discovery for. Because Defendant is in possession of the materials relied on by the State to draft its clemency letter, and because the prosecutor who drafted the letter spoke on the topic of Marilyn Redmond's eye-witness identification, this Court finds that good cause does not exist to grant Defendant's motion for discovery.

Defendant's motion is accordingly **DENIED**.

IT IS ORDERED affirming the Evidentiary Hearing date of NOVEMBER 10, 2022 at 1:30 p.m. for three (3) hours before Honorable Howard D. Sukenic. The time reserved for the evidentiary hearing shall be allotted equally.

Evidentiary Hearing re: Defendant's **consolidated** [Successive] Petition for Post-Conviction Relief (10/31/2022) and Petition for Post-Conviction Relief (11/4/2022).

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. MURRAY HOOPER, Defendant.	CR 0000-121686 MOTION TO RECONSIDER EMERGENCY MOTION TO COMPEL DISCOVERY Honorable Howard Sukenic (Expedited Review Requested)

Murray Hooper, through undersigned counsel, respectfully requests this Court to reconsider its denial of Mr. Hooper's emergency order directing the State disclose the entirety of its file, specifically the twenty boxes used in preparing its letter for the Arizona Board of Executive Clemency. This Court denied Mr. Hooper's request on

November 10, 2022. This motion to reconsider follows.

MEMORANDUM

This Court determined that Mr. Hooper has not shown good cause, finding that Mr. Hooper is in possession of all materials used to prepare the Maricopa County Attorney's Office (MCAO) clemency letter, and finding the deputy county attorney spoke on this topic at the clemency.

Mr. Hooper asks this Court to reconsider based on two points. First, Mr. Hooper does not have all of the materials reviewed prior to preparation of the MCAO's letter. They represented to the clemency board that they reviewed 20 boxes of materials. (Second Response at 5.) They provided to the Clemency Board just over 800 pages of documents, which is certainly less than 20 boxes of materials.

Second, there is a history of substantial prior prosecutor misconduct in Mr. Hooper's case, including multiple failures to disclose exculpatory impeachment evidence in this case. (First Successor at 19–26.) As the trial court noted, when presented with additional undisclosed benefits to the MCAO's witnesses post-trial:

> [A]t every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit.

(ROA 1265 at 4–5.)

Moreover, there is a history of misrepresentation by the MCAO during clemency proceedings. Attached as Exhibit 5 is a letter to MCAO Deputy County Attorney Ellen Dahl (one of the two county attorneys who presented at Mr. Hooper's clemency hearing). During Clarence Dixon's clemency proceedings, Ms. Dahl read into the record a letter written by attorney Larry Hammond. (Exhibit 5.) She stated that Mr. Hammond did not believe the case was one of actual innocence. However, as the Arizona Justice Project stated in its letter to Ms. Dahl, the letter she read into the record related to a different conviction entirely. (Exhibit 5 at 1.)

The Maricopa County Attorney unambiguously stated that Ms. Redmond was unable to identify Mr. Hooper from a paper lineup. This representation was made based on evidence in its own records. In the narrow and more limited set of records the Maricopa County Attorney gave to the Clemency Board, **none of it can be construed as explaining why the County Attorney represented there had been a previous photo lineup**. This means that neither the records given to the Clemency Board, nor the more recent unsubstantiated claim by the County Attorney that they made a mistake, controvert the earlier unambiguous assertion that Mrs. Redmond failed to identify Mr. Hooper in a photo lineup. The Court relies on the statement made by the County Attorneys saying, "all of the police reports [the Maricopa County Attorney's Office] possesses and relied on to prepare the clemency letter." (Order at 2). But if Investigator Dan Ryan had showed her the photographs or some photo lineup, documentation of such would be in the MCAO's files, not the POLICE reports.

At best, there are "questions of fact" as to whether the complete set of records (not the minimal records disclosed to the Clemency Board) contain evidence that would substantiate the existence of the prior photo lineup, or at the very least explain how a mistaken representation as to its occurrence was made. It follows that ultimate factfinding by this Court cannot reasonably be made on a partial, incomplete portion of the State's file. The State's continued suppression of its file is not the answer, and this Court's condoning the same will deprive Mr. Hooper of a full and fair hearing on his claim.

Conclusion

There is nothing in the records provided by the MCAO to the Clemency Board, that can rationally explain their assertion that Mrs. Redmond *ever* failed to identify Mr. Hooper. Undersigned avers that should this Court grant Mr. Hooper's discovery request, he can secure sufficient staff to ensure that review of the 20 boxes is completed in two days. If the order is given and the materials are provided to Mr. Hooper on November 11, 2022 that review will be complete by November 12, 2022. Mr. Hooper

can then file an appropriate pleading with this Court on Sunday, November 13, 2022. Suspension of the proceedings for this brief period will not prejudice the State, but it will ensure Mr. Hooper has a full and fair opportunity to litigate his claims in a case where his life is at stake.

Wherefore, Mr. Hooper requests this Court reconsider its order denying the requested discovery and enter an order (1) compelling the State to immediately provide unfettered access to the twenty boxes the State relied on to conclude Mrs. Redmond failed to identify Mr. Hooper in a photo lineup and (2) compelling the staff who prepared that clemency letter to submit to an interview forthwith.

RESPECTFULLY SUBMITTED this 10th day of November, 2022.

JON M. SANDS
Federal Public Defender

Cary Sandman
Kelly L. Culshaw
Nathan Maxwell
Assistant Federal Public Defenders

s/Kelly L. Culshaw
Counsel for Murray Hooper

Proof of Service

I hereby certify that on November 10, 2022, an original and copies of the foregoing Motion to Reconsider Emergency Motion to Compel Discovery was electronically filed with:

Clerk of the Maricopa County Superior Court
Phoenix, Arizona 85003

And emailed to:

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Arizona Board of Executive Clemency
4000 North Central, Suite 2300
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Re: Murray Hooper
DOC:#047621
Maricopa County Superior Court No. CR-121686(C)

Dear Board Members:

There comes a time when an individual has made so many criminal, destructive and selfish choices that the only thing one can do is allow them to face the consequences of those decisions. Murray Hooper, by each harmful choice he has made, each violent decision that has impacted the lives of so many others, has chosen to forfeit his right to exist in society. A Judge determined this and lawfully sentenced Murray Hooper to death on February 11, 1983. Hooper has exhausted all of his appellate rights. (See Attachment 7-Special Verdict, Attachment 9- Court Documents Arizona Murders and Attachment 8- 2022 Maricopa County Superior Court Decision). At every stage the courts of our land have affirmed this inmate's convictions and sentences. He has been provided more than ample due process. The time is now for justice to be administered. The State urges you deny the request for commutation – after almost 43 years, it is time for Murray Hooper to face his long overdue and just punishment for what he chose to do to Pat Redmond, to Helen Phelps, to Marilyn Redmond, to their devastated families and to our community.

Introduction

On November 3rd, 2022, this Board will consider whether to recommend clemency to the Governor for Murray Hooper. That decision is a matter of grace.[1] The decision will be based on whether this Board believes Hooper merits mercy or that this Board must function as a

"fail safe" for the criminal justice system.[1] The Maricopa County Attorney's Office will address these two questions —whether this Board should exercise its grace to recommend clemency as a matter of mercy or as a fail-safe. It should not.

This case shocked the community with its calculated brutality. Two innocent victims were executed for money and a third barely survived, her life forever altered. Additionally, Hooper's criminal history is violent and lengthy. Starting with an arrest in 1963, Hooper's victimization of the community as an adult began. His history shows that he robbed, he attempted to kill, he killed and killed again in more than one state. Each time he was given the chance at parole he re-offended within weeks or months of his release. He has been held responsible and sentenced for the deaths of six different people and the attempted murders of two other people. This lengthy and violent history culminated with the murder for hire executions of Pat Redmond and Helen Phelps and the attempted murder of Marilyn Redmond. Mercy is not warranted.

This Board need not act as a fail-safe for the justice system either. Hooper was sentenced to death nearly 40 years ago. The Arizona Supreme Court independently reviewed his sentence and concluded the death penalty should be imposed. Over the following decades of litigation, Hooper has thoroughly challenged his convictions and sentence in both state and federal courts. He has exhausted all appellate remedies after lengthy and numerous post-conviction proceedings. The justice system has not failed Hooper.

This letter discusses the facts of the murder. It briefly outlines Hooper's lengthy criminal history and discusses, in more detail, the facts of some of the crimes to demonstrate his character. The documents, photos and records submitted together with this letter provide the basis for the summaries and information provided here. If the Board feels it needs to see any other documents, the State will be happy to provide those upon request. This letter anticipates that Hooper will argue to this Board that both mercy and "fail safe" intervention are necessary, claiming, as he has done since the offense, that he is innocent and that there was misconduct in the case. This letter addresses why those arguments fail and should be rejected by this Board. Hooper's convictions have stood the test of time. His claims of innocence and the ground upon which they lie have failed at all levels of the judicial system, despite being

[1] *Wigglesworth v. Mauldin*, 195 Ariz. 432, 435, ¶ 9 (App. 1999) ("Arizona's present unstructured gubernatorial commutation procedure thus exposes 'the heart of executive clemency, which is to grant clemency as a matter of grace.'" (quoting *Ohio Adult Parole Auth. v. Woodard*, 532 U.S. 272, 280–81 (1998))).

[2] *Harbison v. Bell*, 566 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993))).

repackaged and repeated for nearly 40 years. His claims of misconduct have not been found sufficient to undermine the verdicts and the sentence in all of the 40 years of review this case has been subjected to as well. The Board will hear nothing new presented at the hearing – and if there is something "new", why wasn't it presented before by his attorneys in the last four decades?

Criminal History

The attached presentence report (See Attachment 4) included Hooper's extensive criminal history. Hooper has victimized numerous victims and this criminal history is truly extraordinary. The assigned trial prosecutors listed, in their written recommendation included at the end of Attachment 4, only Defendant's felony convictions that he chose to commit prior to the murders in the case at hand due to space limitations:

1. September 23, 1981. Three counts of Murder in the First Degree, three counts of Armed Robbery, three counts of Aggravated Kidnapping, Cook County Circuit Court, Illinois, Cause No. 81-C-1204. The dates provided are dates of conviction.

2. April 28, 1978. Unlawful Use of Weapons, Cook County Circuit Court, Illinois, Cause No. 78-16159.

3. February 18, 1977. Attempted Murder, Cook County Circuit Court, Illinois, Cause No. 75-3695.

4. December 17, 1969. Voluntary Manslaughter, Cook County Circuit Court, Illinois, Cause No. 69-1666.

5. November 16, 1965. Attempted Robbery, Cook County Circuit Court, Illinois.

6. October 6, 1964. Robbery, Cook County Circuit Court, Illinois.

Voluntary Manslaughter – June, 1968

On June 5, 1968, in the early evening, Hooper went to see 22-year-old victim Marvina Grant at her mother's home at 4746 W. Congress Parkway in Chicago. Marvina was at the local park with her 3 children and her sister told her that Hooper was coming over to visit her. Hooper and Marvina had been dating for approximately a year. Marvina's sister heard the couple arguing and then multiple shots ring out. Marvina stumbled into the home and told her sister, "Call the police, Hooper shot me." According to the Coroner Pathologist, Marvina had been shot 4 times (once above the right eyebrow, bullet exiting the back of the neck; one in upper lip, bullet lacerating tongue and recovered in upper neck, twice in the naval). When officers responded, Marvina was still alive, and she was taken to the hospital. She died 30 minutes later leaving her three children and other family members behind. (These facts can be found in the original police report located in Attachment 17).

On May 22, 1969, a grand jury charged Hooper with the murder of Marvina Grant. On December 17, 1969, Hooper pled guilty to Voluntary Manslaughter for his role in her death. He was sentenced to 5 to 15 years in prison. This crime occurred only a year after Hooper had been paroled on May 23, 1967, from the Joliet State Penitentiary.

Three *Vacated* Convictions for Murder in the First Degree in Illinois – November 1980

On the morning of November 13, 1980, victims Frederick Lacey (age 35), R.C. Pettigrew (age 42) and Richard Holliman (age 28) were found dead from gunshot wounds under a bridge in Chicago. Holliman was found in the backseat of a red Oldsmobile – his hands were bound with blue and white cloth, and he had sustained three bullet wounds to the chest and one execution style shot to the back of the neck. Lacey had been shot in the back of the head (contact wound) and in his back. He was found lying on the ground outside the driver's side of the car. Pettigrew was lying under the front bumper with binding around his right wrist. He had been shot in the face – there were bullet wounds in the right upper lip (stippling noted). He had also been shot in the chest and leg and suffered four shotgun wounds in his back. (These facts can be found in the original police reports in Attachment 15 and in the Illinois Court Documents in Attachment 10).

When the bodies were found, it was noted that Pettigrew was not wearing socks, underwear or a shirt. It appeared that the Pettigrew was bound with brown t-shirt. Holliman appeared to be bound with the cloth that looked like the style and pattern of underwear worn by Pettigrew. A pair of white crew socks were found in the backseat of the vehicle that Holliman was found in.

Based on the investigation, it appeared that the victims were involved in both drug use and drug trafficking. A witness indicated that Pettigrew and Holliman were together on the evening before their murders. Pettigrew told the witness that he had between $18,000 to $20,000 on him to buy heroin and cocaine. Holliman said that he wanted to buy five pounds of marijuana from her.

Another witness was interviewed and stated that on the evening of November 12, 1980, she saw a group of men walk out of the residence of the alleged leader of the "Royal Family" group. There were at least six men and two of the men were bound. She identified Hooper and Nellum as two of the men taking the victims. She recognized Hooper and Nellum because they grew up in the area. She said the men were known drug traffickers and they were feared by the other residents of the building.

Another witness said that she saw men leaving from the residence on the night of November 12, 1980 – there were about four or five men and one of the men was bound with some dark binding behind his back and had a white piece of cloth hanging from his mouth. She also saw a second man walking with his hands behind his back as if he was bound but she could not see the bindings. She identified Pettigrew as the man she saw bound and led by the other men.

On February 20, 1981, Hooper was contacted by police investigators at an apartment in Chicago. When Hooper opened the door, he stated, "You got me now. Be cool. Be cool." He also said, "My clothes are in the back and there are some guns back there." In a bedroom,

officers found a .32-caliber revolver and a shotgun. After being read his *Miranda* rights, Hooper stated, "You got me now. I am going to tell you everything." Hooper then asked who else was taken into custody and was told that his close friend Bracey. Hooper angrily responded, "I know that's how you found me. Bracey freaked on me. He told you where I was at." When asked if it was about the murders under the bridge, Hooper said, "I know what you are talking about." Hooper then directed the police to where an accomplice was located.

After being read his Miranda rights again at the police station, Hooper said that he went to an apartment and met Bracey and 2 other accomplices. One of the victims, Lacey was there along with 2 other men he did not know. Hooper said the victims were there to buy drugs and they were going to do a "rip-off" and that he wanted to get a "piece of the action." Bracey was armed with a sawed-off shotgun and Hooper and another accomplice each chose to arm themselves with .38 caliber revolvers.

Initially, Hooper denied getting out of the car under the overpass and then later admitted that he "shot into the back seat of the car at the guy in the back." When questioned by a prosecutor at the station, Hooper then adjusted his story about how the accomplices and victims drove in the two vehicles to the murder site. He did admit that Bracey fired the shotgun at the victims, and he chose to shoot the victim in the back seat of the car. After the murders, he also said that he was given $300 of the money that was taken from the victims. Hooper gave conflicting versions of what happened.

When Hooper testified at trial, he said that he did not recall where he was on the night of the murders and alleged that that he was abused by law enforcement officers.

On July 24, 1981, a jury found Hooper guilty of three counts of Armed Robbery, three counts of Aggravated Kidnapping and three counts of First-Degree Murder. The jury found that there were no mitigating factors and the circuit court sentenced Hooper to death on the three murder convictions. He also was sentenced to 60 years in prison for the Armed Robbery convictions and 60 years in prison for the Aggravated Kidnapping convictions. On appeal, the Aggravated Kidnapping convictions were later reduced to 15 years in prison. The death verdicts were vacated, and the case was remanded for a new penalty phase trial because of improper arguments by the prosecutor in the second phase of the trial.

On June 18, 1993, another Illinois jury found that there were no mitigating factors sufficient to preclude the imposition of the death sentence. On July 16, 1993, he was again sentenced to death. That sentence was eventually commuted as part of a large group commutation by the Illinois governor of 167 inmates on death row at that time.

In 2013, the Seventh Circuit vacated the Illinois district court's denial of Hooper's habeas petition. Hooper v. Ryan, 729 F.3d 782, 787 (7th Cir. 2013). The court determined that the Illinois Supreme Court had unreasonably applied Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). 729 F.3d at 787. The court remanded the case to the district court for an evidentiary hearing and an independent Batson determination as to what had occurred at the trial, thirty-two years before. Id. On remand, the prosecution declined an evidentiary hearing, and so the district court granted the writ and vacated the Illinois

convictions and life sentences (the Governor of Illinois had commuted all Illinois death sentences, including Hooper's). Final Judgment, Hooper v. Ryan, No. 10-CV-01809 (N.D. Ill. Dec. 16, 2013), ECF No. 81; see also People ex rel. Madigan v. Snyder, 208 Ill.2d 457, 281 Ill. Dec. 581, 804 N.E.2d 546, 550 (2004) (denying writ of mandamus challenging then-Governor's grant of blanket clemency to over 160 inmates who had been sentenced to death. Illinois has not retried Hooper.

The New Year's Eve Executions – December 1980

On New Year's Eve in 1980, Marilyn Redmond, her husband Pat and her mother Helen Phelps decided to have company in for an impromptu dinner and a card game. Helen was in town visiting from Iowa. Helen's husband Percy, Marilyn's dad, couldn't make it due to a recent surgery. Marilyn and her mom were making food in the kitchen of Pat and Marilyn's home at 320 West El Camino in Phoenix, Arizona. Pat was playing on the floor in the living room with Beauregard, the family dog. The two invited couples, both longtime friends of the Redmond's, were to arrive sometime between 7 and 7:30pm. Around 7 Marilyn heard a knock on the door. She thought it was one of the guests, so she let Pat get the door as she went to her room to grab her cigarettes and quarters for the card game. She soon heard Pat call for her. As she came back out of the bedroom, she found her husband being held at gunpoint. Murray Hooper, Billy Bracey and Ed McCall had invaded her home to rob and execute them. (See Attachment 11-Police Report Arizona Murders, Attachment 5-Crime Scene Photos, Attachment 13-Marilyn Redmond's Trial Testimony, Attachment 12- State's Opening Statement, Attachment 14-State's Closing Argument, Attachment 16-Photos of Murray Hooper).

Bracey ordered Marilyn to close the blinds and grab the family dog. She put him in the bathroom. Her mom and husband were taken to the bedroom. She was asked where the jewelry was. She showed them. Hooper said it was junk and wanted to know where the good stuff was. Hooper asked where their guns were, and she showed him. Pat gave them his wallet that had several hundred dollars in it. Marilyn volunteered she had money in her purse and Bracy started going through it. They demanded they all hand over their jewelry. They took a watch and ring from Pat. Helen tried to sneak her wedding ring under the pillow, but they caught her and took it from her. They wanted to gag them, and Marilyn was trying to delay them, stalling, hoping her friends would arrive and summon help. She told them there were socks in the drawer. She also told them guests were to arrive at any moment. They responded that they'd heard that before. She urged them to look at the food cooking in the kitchen, not realizing they never stood a chance. As the food burned, Hooper chose to bind their hands. He is the one that wrapped their wrists with medical tape, and he chose to shove socks in their mouths. Her 70-year-old mother was forced to lie face down on the bed. Her 46-year-old husband was forced to kneel next to the bed with his head on the bed. Marilyn was then forced to lay down face down on the bed as well. Then Marilyn heard a voice say that "We don't need these two anymore." Two shots rang out and it all went dark.

Marilyn became conscious again around 7:15pm. Her mother and her husband weren't moving or talking. She wanted to get help. She sort of rolled off the bed and scooted on her stomach to the living room. It was hard because her hands were bound behind her back. She passed out

on the living room floor. When she again became conscious again, one of the couples they were expecting had arrived, Marshall and Verna Kelley. They grabbed a knife from the kitchen and cut the bindings off her wrists. They grabbed some paper towels and attempted to wipe the blood off her face. Marilyn told Verna that three African American males had come in and robbed them. Marshall went into the bedroom. He rolled Helen over to check for a heartbeat and found none. She had been face down on the bed and there was a bloody sock underneath her head. He found Pat still kneeling by the bed and rolled him over. He saw that his face was completely bloody, and Pat's throat had been slit wide open. A large, bloody butcher style knife lay on the ground nearby. Marshall listened to Pat's chest, but his heart was no longer beating. His mouth was shoved full of a bloody sock. Marshall came out and told Verna that they were dead, and they needed to call 911.

Police responded, and fire came to treat Marilyn. She had been shot in the back of the head. As she slipped in and out of consciousness, she repeated the description of the three black males who had chosen to come in and rob them. She later corrected it to one white male and two black males possibly wearing masks and the white male had a brown valise. A doctor at the Good Samaritan Hospital where she was taken handed over a copper jacket to a police officer and said he removed it from her wound. She had been shot one time in the back of the head and it came out her left cheek. Among other things, she suffered permanent nerve damage. At the scene, Pat's pockets had been turned out. His wallet was on the bed next to a roll of medical tape and had no money in it. Helen's purse and other items were emptied out and scattered about the floor. A large butcher knife with type O blood on it was laying on the bedroom floor also. Pat also had type O blood.

Autopsies were conducted. Helen Genevieve Phelps was 70 years old, 5'2 and 128 pounds. Her hands were bound behind her back with surgical tape. She had a contact gunshot wound over her left cheek that came out her right cheek. There was powder tattooing around the entrance wound which tells you this was a close to contact shot. The medical examiner said that this shot perforated the nasal sinuses and shattered the right zygoma. Because he found blood in her lungs that meant this was the first shot and would not have been fatal. The second shot entered over her left eye and cut through the cervical cord. This one would have been fatal. One bullet was obtained from her face. A second projectile was obtained from the pillow she was lying face down on in the bedroom. William Patrick "Pat" Redmond was 46 years old. He was 5'10 and weighed 147 pounds. His hands were bound behind his back with surgical tape. He had a sock shoved in his mouth. He was shot in the head at close range twice and then his neck was slit wide open. The medical examiner removed two large caliber bullet jackets from his head. The medical examiner believed that the shots came first and then the throat slitting as there was not a significant amount of bleeding from the throat.

This was a planned execution style ambush of Pat Redmond at his home on New Year's Eve. The brutality of it all would send a message and Hooper and his chosen crew were skilled killers who were committed to getting the job done. They didn't care who was collateral damage. The day after the murders, as Marilyn lay in the ICU, Lorna Avery, an employee of Long's drug store on 1838 Baseline in Mesa called police and said that she saw the murders on the news. It drew her attention as a white male and two African American males came in her store earlier in the day New Year's Eve behaving suspiciously. She said the white male

bought six gloves and paid cash for it. She said one of the two African American males bought white surgical tape. She said one of two African American males was acting very nervous. She gave detailed descriptions. That same day Valinda Harper, known as "Bindi," also contacted the police anonymously. She later was convinced to identify herself. She told them that Ed McCall "Preacher", Billy Bracey and Murray Hooper were involved in this killing and that it was a murder for hire. They had come to stay at her place for a few days in early December and again just before the murders. They were introduced to her by a person she knew named Arnie Merrill and Preacher. She had also met Preacher through Arnie Merrill. She met all of them through George Campagnoni, a man she had dated. They first met at Show Girl, a club she worked at as an employee.

Originally, McCall, Bracey and Hooper were asking her to give them names and locations of drug dealers as they wanted to rob and kill them and take over the local drug trade. Later, Bracey, who she described as having a romantic interest in her, told her that they were being paid $50,000 to get rid of someone he called Mr. Big Shot. Her roommate Tina Marie Louie "Ree" overheard this conversation and also relayed it to police. Bindi gave police a brown valise with a gun in it. She said that Ed McCall had given it to her to get rid of. She said McCall showed up on New Year's Day and made admissions about the three of them being involved in the killing. She said when they were watching the news about it that the news had it wrong, that the victim wasn't shot in the face she was shot in the back of the head. Ree said she also heard this conversation and that during this news report McCall said you can't carry a stethoscope around, if you shoot them in the head you gotta assume they're going to die. He also said that he took care of the Big Shot, referring to Pat Redmond.

Additionally, Bindi provided information on a separate armed robbery from Scottsdale that Ed McCall, George Campagnoni and Arnie Merrill's associate Mickey Gill, were involved in. This was a robbery on October 22, 1980, where an older couple had been tied up and almost $40,000 of property had been stolen from them. Using the info from the Scottsdale robbery, police were able to corroborate Bindi's information and reliability. The victim from Scottsdale not only picked McCall out of a photo lineup but also identified the brown valise as the one the man who robbed him was holding. It was unique as it had an Amway symbol on it. Further, fingerprint analysis was done on two maps and some papers in the valise Bindi had turned over. McCall's print came back on one of the maps of Phoenix that was in the valise. This map appeared to have Pat Redmond's address marked on it. Bindi said McCall asked her to get rid of the valise and to hold on to the gun that belonged to Hooper.

Bindi also said that "Fat Boy" (later identified as Bobby Cruz) hired McCall, Bracey and Hooper to kill Pat Redmond as he stood in the way of a million-dollar jewelry deal. Arnie had told her that he worked for Fat Boy. She told police that Ree's boyfriend had also met McCall and Hooper. A friend of hers that had been at her home, Isaac Harris, had met Arnie, McCall, Hooper and Bracey. She said they were at her house on New Year's Eve. Hooper was dressed in Levi's and a black jacket and had a .38 colt. Bracey had on grey dress pants and a brown jacket and had a .22 with a clip. McCall was in a suit and had a 9 mm. McCall let Bindi and Ree use his car at dinnertime, but said they needed to be back with it quickly as they had an appointment to get to. When asked why they did not tell the police initially, both Bindi and Ree indicated they were afraid they were going to be killed. In fact, they had both written

letters with information about the crimes and gave them to loved ones to hold on to in case anything happened to them. Later both Bindi and Ree identified Hooper, Bracey and McCall.

Based on this information, on January 4th, a warrant was done on McCall's home and car. In his car were two receipts that were identified as coming from the Long's Drug Store printer on the cash register in the same amounts as the purchases described by Lorna. An Amway book was found at McCall's home, a gun, white medical tape and plastic gloves and paperwork in the trash that dealt with flights from Chicago. Marilyn was shown the brown valise and said it looked similar, but she thought the one at her house had a slightly different color. Ed McCall had a car repossession business. Arnie Merrill, George Campagnoni and Mike Gill were all listed as employees. Another witness indicated that the repossession business was a way of laundering money. Armed with the names provided by Bindi, police were able to do follow up, establish connections and conduct several other interviews that corroborated what Bindi and Ree had told them.

Local private pilot, Michael Tompkins was interviewed. He was a local private pilot who also did remodeling/construction type work. He knew Artie Ross. Artie introduced him to Bobby Cruz. Through Bobby he met Arnie Merrill and Ron Kleinfeldt. Michael worked on some remodeling of offices for Bobby from April to August of 1980. One of the offices in a building he worked on belonged to Joyce Lukezic who was Artie's sister. She had also dated Arnie Merrill back in high school. Michael heard Bobby talking with a 3rd party about the printing business and having to get rid of a third person because they were losing money, He later realized that Artie Ross had a brother-in-law in the printing business, Ron Lukezic. Bobby owed him a lot of money for the work he had done for him. At the end of November Bobby called him and another contractor Dwayne Connelley to the office and told them that he would have the money he owed them on 1/5. He had a big deal going through and that he would be getting $300,000 to $400,000.

He said Bobby instructed him to rent a plane that he had two guys from Chicago coming in to do a thing and they didn't want to fly out commercial to be seen at the airport. He said the two guys were here to collect money and the people they were collecting from would be upset. Arnie Merrill was to bring them to the airport early December. Michael and Bobby went to a local hangar to rent a plane, but it fell through. They went back to offices. Hal Ross was there (Artie Ross's son) Bobby was screaming at Hal in Joyce Lukezic' s office. Later, they walked outside, and Arnie pulls up in a Cadillac and Bobby gets in car. Bobby Cruz came back about 30-45 minutes later. Later that month, on December 28, 1980, Bobby paged Michael to the office building again. Bobby wanted Michael to rent another plane- for the two black guys from Chicago. Bobby then canceled on him again the next day and said they were going to go commercial. Bobby never paid Michael at least $40,000 that he owed him.

George Campagnoni was interviewed. He said that Arnie Merrill introduced him to Bracey, Hooper and McCall. He said Bracey and Hooper were cell mates in Joliet, Illinois prison. They first came to Phoenix in early December or late November. They came back on December 30th at 1130pm on American Airlines. Bobby Cruz brought them into town. Ed McCall picked them up at the airport. Arnie called him and asked him to watch them at his house, so he went over

there. On December 31 at 10am, McCall showed up at Arnie's and picked up Hooper and Bracey. George said Bobby Cruz called at 11am on December 31 and said plane tickets would be dropped off for Bracey and Hooper. The tickets were under other names and the flight was on January 1, 1982, at 150am. George drove them to airport. After the murders Ed McCall came over and talked with Arnie on another day for about 8 hours.
When Ed left Arnie told George that Ed was asking if George knew about the murders at which point, he was shocked because he thought it was a drug deal. After George was identified in the Scottsdale robbery, police came back and re-interviewed him, and he provided more details. He said he had met Bindi at the Show Girl in October 1980 and started seeing her. Arnie was introduced to her for drug deals. Arnie introduced Hooper and Bracey to Bindi. Arnie told him Bracey, and another were coming in to do a hit. Arnie said that Bobby Cruz and Bracey had been cellmates in Illinois and that is how they met. Bracey and the other individual were to arrive on December 10th, and they did.

George said that on December 14th Arnie introduced Bracey and Hoop to Bindi and Ree. The next day George took Bracey to Bobby Cruz's office to pick up plane tickets to go back to Chicago they flew out on 12/17 at 1250am. Arnie told him that they were going to come back to do a hit on Buckeye, and then one on Redmond. Arnie said that he and McCall, Hoop and Bracey had stalked Pat Redmond outside a bar he frequented. They followed him on Central. Hoop offered to shoot him then but didn't. Later a business associate of Pat's told police that Pat had been annoyed one day at work in mid-December saying that someone had followed him the night before, but he was able to lose them. Arnie told him he didn't want to be involved in the hit on Redmond anymore. Arnie then called George on 12/30 and told him to come stay at the house while guys from Chicago were here. They were there to do the hit on Redmond but were to make it look like a robbery. George said that he and Arnie drove around and got addresses for Pat's business and home to give to the Chicago guys.

George went on to say that Hoop and Bracey were dropped off around midnight. During the morning of 12/31 he saw Arnie give ammo to Bracey and Hoop had a large butcher knife. Ed showed up on 12/31 around 10am and had a brown valise with him, a 9mm and some papers in it. Shortly after that they left. Bobby called and said plane tix would be dropped off. Dean dropped them off at 12pm. Ed, Hoop and Bracey got back at 7:30pm and went in the back room on the phone with Cruz and Arnie was with them. George saw them with some jewelry, a man's watch and matching ring, and a woman's diamond wedding ring, Campagnoni loaned Bracey a piece of American Tourister luggage to transport the jewelry and guns. This suitcase was later found by police with Hooper when he was arrested in Chicago. George and the three of them watched tv and drank wine until 1230am then he dropped them at airport for 1:50 am flight Arnie got home from a New Year's Eve party at 2 and told him 3 people were hit not just Redmond.

Arnie told him to get rid of a holster and a watch. George took it to a dry canal near the house and pitched it. He later took police to where he had thrown it and they recovered it. The man who sold it to Pat Redmond later identified it when police showed it to him. George said that on 1/1 Ed called Arnie upset saying Bindi made a comment about him being busy the night before. On January 2nd Ed came over and had an 8-hour conversation with Arnie. The next day Arnie gave George more details Ed had relayed. Ed told him food was cooking when they

arrived, and they planned on killing any guests that arrived while they were there. He said the first guests got there 5 mins after they left. He said that Pat Redmond's neck was slashed. George said Arnie was scared as they had told him so much and was wearing a bullet proof vest. On January 4th Arnie very upset when Ed arrested.

Police investigation revealed that Arnie was associated with a web of individuals with ties to the mob in Chicago, including Bobby Cruz, and some shady business dealings in Las Vegas. Arnie knew a person named Artie Ross. Ross was the brother of Joyce Lukezic. Joyce was the fifth wife of Ron Lukezic, Pat Redmond's longtime friend and 50/50 partner in their successful business, Graphic Dimensions. Joyce was said to want to do the Vegas deal with her brother. It appeared to be using Graphic Dimensions to help launder money with few details. Among the various witnesses, police gleaned that Pat was reticent to be involved in the detail as something seemed off about it. He stood in the way of making a lot of money for certain individuals.

On February 21, 1981, Hooper and Bracey were arrested in Chicago. Marilyn was flown out and participated in live line ups with them. She had previously been unable to pick them out of a paper lineup. During the live lineups, where the individuals were also asked to speak, she identified Hooper as guy who asked where do you keep the guns and said this is all junk. She also said he is the one who taped and gagged them. She identified Bracey as the soft spoken one who told her to hold the dog and then said "We don't need these two anymore" he dumped her purse out on the floor.

Hooper was living with his girlfriend's mother at the time. The girlfriend's mother confirmed this in a Chicago interview. Testimony indicated that phone records from Arnie's home showed communication to that apartment during the trip where Hooper, McCall and Bracey murdered Pat Redmond and Helen Phelps. An accomplice of Hooper back in Chicago by the name of Morris Nellum was also interviewed. He said he drives Hooper around as he doesn't drive. He drove Hoop to Bracey's the day before New Year's Eve- he said Hoop said he was on way to Arizona and came back no more than 48 hours later. On 1/1/81 Hoop called Nellum at 6-7am and asked to get picked up at Bracey's. Hoop told him that he and Bracey went to Arizona to do a contract killing. Hoop said a man was the target, but 2 other people were randomly present, so they were also killed. Hoop said he was mad at Bracey because he was being a Casanova with some females in Arizona and running his mouth. Hoop showed him a 9 mm he had taken in the from the victim, a gold and black watch, a ring and a women's ring that he had in his pocket. Hoop said he got items from home where killing happened. Hoop said he didn't mess around he got it over with and got out of there.

Hoop told Nellum they searched house for guns and jewelry. He said Hoop mentioned that during the prior trip to Arizona they were provided the guns. Hoop said that Bracey had been waiting for Hoop to get out of jail to go to Phoenix with him. Hoop was sick the prior time in Arizona. Hoop said they had been picked up at airport and taken to Arnie's house where they stayed a few days. He tried to kill victim then but one of the guys in the car chickened out. They said the area was too open with too many witnesses. Hoop was mad the job wasn't done and no longer trusted Arnie. Hoop showed him 9mm gun and saw it was loaded with 4 rounds. Nellum and Bracey were with Hoop in Chicago when he sold the jewelry to fence. Hoop later

got $1000 from some lawyer's office. He said that he and Bracey were to get 5,000 each and then monthly payments to kill a partner in the business. He had heard Bracey and Hoop talk about the "fat man" "Cruz" "Bob". He did not speak to Bracey about killings.

An ex-girlfriend of Bracey's Christina Nowell was also interviewed in Chicago. She said she met Bracey in April'80. He would take phone calls at the King Midas lounge. After one particular phone call he said he spoke to "Fat Man" and that the call involved 10,000 or more. He told her if he had to kill someone for money he would- she could not date the call. Another time she saw a celebration occurring at King Midas Bracey, Hooper and Cochise and 2 unknown females were celebrating and proposing toasts to each other Bates 299 – Bracey told her he had killed some people and took care of a job they were paid for. Billy was buying people drinks. She could not date this incident.

Maricopa County Superior Court Presiding Criminal Judge Jennifer Green, in denying the most recent evidentiary processing request from Defendant Hooper just a few days ago, summarized, in depth, the factual and procedural history in her attached minute entry (Attachment 8). In addition to the detailed factual and procedural summary provided by Judge Green in her minute entry above, the State's Brief, included along with other Arizona Court Documents in Attachment 9, discusses why other *Brady* allegations fall flat in an even more detailed analysis.

This Defendant has successfully avoided facing the consequences of his actions for almost 4 decades. It is said justice delayed is justice denied. Neither grace, mercy or a fail-safe function are necessary or called for here. He has had multiple courts review his case multiple times. They have not found any reason, ever, to set aside his sentence. It is time for this serial killer to face the punishment ordered just shy of 40 years ago.

Sincerely,

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RACHEL H. MITCHELL

October 28, 2022

Arizona Board of Executive Clemency
4000 North Central, Suite 2300
Phoenix, AZ 85012

Re: Murray Hooper
DOC: 047621
Maricopa County Superior Court No. CR-121686(C)

Dear Board Members:

There comes a time when an individual has made so many criminal, destructive and selfish choices that the only thing one can do is allow them to face the consequences of those decisions. Murray Hooper, by each harmful choice he has made, each violent decision that has impacted the lives of so many others, has chosen to forfeit his right to exist in society. A Judge determined this and lawfully sentenced Murray Hooper to death on February 11, 1983. Hooper has exhausted all of his appellate rights. (See Attachment 7-Special Verdict, Attachment 9- Court Documents Arizona Murders and Attachment 8- 2022 Maricopa County Superior Court Decision). At every stage the courts of our land have affirmed this inmate's convictions and sentences. He has been provided more than ample due process. The time is now for justice to be administered. The State urges you deny the request for commutation – after almost 43 years, it is time for Murray Hooper to face his long overdue and just punishment for what he chose to do to Pat Redmond, to Helen Phelps, to Marilyn Redmond, to their devastated families and to our community.

Introduction

On November 3rd, 2022, this Board will consider whether to recommend clemency to the Governor for Murray Hooper. That decision is a matter of grace.[1] The decision will be based on whether this Board believes Hooper merits mercy or that this Board must function as a

"fail safe" for the criminal justice system.[1] The Maricopa County Attorney's Office will address these two questions —whether this Board should exercise its grace to recommend clemency as a matter of mercy or as a fail-safe. It should not.

This case shocked the community with its calculated brutality. Two innocent victims were executed for money and a third barely survived, her life forever altered. Additionally, Hooper's criminal history is violent and lengthy. Starting with an arrest in 1963, Hooper's victimization of the community as an adult began. His history shows that he robbed, he attempted to kill, he killed and killed again in more than one state. Each time he was given the chance at parole he re-offended within weeks or months of his release. He has been held responsible and sentenced for the deaths of six different people and the attempted murders of two other people. This lengthy and violent history culminated with the murder for hire executions of Pat Redmond and Helen Phelps and the attempted murder of Marilyn Redmond. Mercy is not warranted.

This Board need not act as a fail-safe for the justice system either. Hooper was sentenced to death nearly 40 years ago. The Arizona Supreme Court independently reviewed his sentence and concluded the death penalty should be imposed. Over the following decades of litigation, Hooper has thoroughly challenged his convictions and sentence in both state and federal courts. He has exhausted all appellate remedies after lengthy and numerous post-conviction proceedings. The justice system has not failed Hooper.

This letter discusses the facts of the murder. It briefly outlines Hooper's lengthy criminal history and discusses, in more detail, the facts of some of the crimes to demonstrate his character. The documents, photos and records submitted together with this letter provide the basis for the summaries and information provided here. If the Board feels it needs to see any other documents, the State will be happy to provide those upon request. This letter anticipates that Hooper will argue to this Board that both mercy and "fail safe" intervention are necessary, claiming, as he has done since the offense, that he is innocent and that there was misconduct in the case. This letter addresses why those arguments fail and should be rejected by this Board. Hooper's convictions have stood the test of time. His claims of innocence and the ground upon which they lie have failed at all levels of the judicial system, despite being

[1] *Wigglesworth v. Mauldin*, 195 Ariz. 432, 435, ¶ 9 (App. 1999) ("Arizona's present unstructured gubernatorial commutation procedure thus exposes 'the heart of executive clemency, which is to grant clemency as a matter of grace.'" (quoting *Ohio Adult Parole Auth. v. Woodard*, 532 U.S. 272, 280–81 (1998))).

[2] *Harbison v. Bell*, 566 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993))).

repackaged and repeated for nearly 40 years. His claims of misconduct have not been found sufficient to undermine the verdicts and the sentence in all of the 40 years of review this case has been subjected to as well. The Board will hear nothing new presented at the hearing – and if there is something "new", why wasn't it presented before by his attorneys in the last four decades?

Criminal History

The attached presentence report (See Attachment 4) included Hooper's extensive criminal history. Hooper has victimized numerous victims and this criminal history is truly extraordinary. The assigned trial prosecutors listed, in their written recommendation included at the end of Attachment 4, only Defendant's felony convictions that he chose to commit prior to the murders in the case at hand due to space limitations:

1. September 23, 1981. Three counts of Murder in the First Degree, three counts of Armed Robbery, three counts of Aggravated Kidnapping, Cook County Circuit Court, Illinois, Cause No. 81-C-1204. The dates provided are dates of conviction.

2. April 28, 1978. Unlawful Use of Weapons, Cook County Circuit Court, Illinois, Cause No. 78-16159.

3. February 18, 1977. Attempted Murder, Cook County Circuit Court, Illinois, Cause No. 75-3695.

4. December 17, 1969. Voluntary Manslaughter, Cook County Circuit Court, Illinois, Cause No. 69-1666.

5. November 16, 1965. Attempted Robbery, Cook County Circuit Court, Illinois.

6. October 6, 1964. Robbery, Cook County Circuit Court, Illinois.

Voluntary Manslaughter – June, 1968

On June 5, 1968, in the early evening, Hooper went to see 22-year-old victim Marvina Grant at her mother's home at 4746 W. Congress Parkway in Chicago. Marvina was at the local park with her 3 children and her sister told her that Hooper was coming over to visit her. Hooper and Marvina had been dating for approximately a year. Marvina's sister heard the couple arguing and then multiple shots ring out. Marvina stumbled into the home and told her sister, "Call the police, Hooper shot me." According to the Coroner Pathologist, Marvina had been shot 4 times (once above the right eyebrow, bullet exiting the back of the neck; one in upper lip, bullet lacerating tongue and recovered in upper neck, twice in the naval). When officers responded, Marvina was still alive, and she was taken to the hospital. She died 30 minutes later leaving her three children and other family members behind. (These facts can be found in the original police report located in Attachment 17).

On May 22, 1969, a grand jury charged Hooper with the murder of Marvina Grant. On December 17, 1969, Hooper pled guilty to Voluntary Manslaughter for his role in her death. He was sentenced to 5 to 15 years in prison. This crime occurred only a year after Hooper had been paroled on May 23, 1967, from the Joliet State Penitentiary.

Three Convictions for Murder in the First Degree in Illinois – November 1980

On the morning of November 13, 1980, victims Frederick Lacey (age 35), R.C. Pettigrew (age 42) and Richard Holliman (age 28) were found dead from gunshot wounds under a bridge in Chicago. Holliman was found in the backseat of a red Oldsmobile – his hands were bound with blue and white cloth, and he had sustained three bullet wounds to the chest and one execution style shot to the back of the neck. Lacey had been shot in the back of the head (contact wound) and in his back. He was found lying on the ground outside the driver's side of the car. Pettigrew was lying under the front bumper with binding around his right wrist. He had been shot in the face – there were bullet wounds in the right upper lip (stippling noted). He had also been shot in the chest and leg and suffered four shotgun wounds in his back. (These facts can be found in the original police reports in Attachment 15 and in the Illinois Court Documents in Attachment 10).

When the bodies were found, it was noted that Pettigrew was not wearing socks, underwear or a shirt. It appeared that the Pettigrew was bound with brown t-shirt. Holliman appeared to be bound with the cloth that looked like the style and pattern of underwear worn by Pettigrew. A pair of white crew socks were found in the backseat of the vehicle that Holliman was found in.

Based on the investigation, it appeared that the victims were involved in both drug use and drug trafficking. A witness indicated that Pettigrew and Holliman were together on the evening before their murders. Pettigrew told the witness that he had between $18,000 to $20,000 on him to buy heroin and cocaine. Holliman said that he wanted to buy five pounds of marijuana from her.

Another witness was interviewed and stated that on the evening of November 12, 1980, she saw a group of men walk out of the residence of the alleged leader of the "Royal Family" group. There were at least six men and two of the men were bound. She identified Hooper and Nellum as two of the men taking the victims. She recognized Hooper and Nellum because they grew up in the area. She said the men were known drug traffickers and they were feared by the other residents of the building.

Another witness said that she saw men leaving from the residence on the night of November 12, 1980 – there were about four or five men and one of the men was bound with some dark binding behind his back and had a white piece of cloth hanging from his mouth. She also saw a second man walking with his hands behind his back as if he was bound but she could not see the bindings. She identified Pettigrew as the man she saw bound and led by the other men.

On February 20, 1981, Hooper was contacted by police investigators at an apartment in Chicago. When Hooper opened the door, he stated, "You got me now. Be cool. Be cool." He also said, "My clothes are in the back and there are some guns back there." In a bedroom, officers found a .32-caliber revolver and a shotgun. After being read his *Miranda* rights, Hooper stated, "You got me now. I am going to tell you everything." Hooper then asked who else was taken into custody and was told that his close friend Bracey. Hooper angrily responded, "I know that's how you found me. Bracey freaked on me. He told you where I was at." When asked if it was about the murders under the bridge, Hooper said, "I know what you are talking about." Hooper then directed the police to where an accomplice was located.

After being read his Miranda rights again at the police station, Hooper said that he went to an apartment and met Bracey and 2 other accomplices. One of the victims, Lacey was there along with 2 other men he did not know. Hooper said the victims were there to buy drugs and they were going to do a "rip-off" and that he wanted to get a "piece of the action." Bracey was armed with a sawed-off shotgun and Hooper and another accomplice each chose to arm themselves with .38 caliber revolvers.

Initially, Hooper denied getting out of the car under the overpass and then later admitted that he "shot into the back seat of the car at the guy in the back." When questioned by a prosecutor at the station, Hooper then adjusted his story about how the accomplices and victims drove in the two vehicles to the murder site. He did admit that Bracey fired the shotgun at the victims, and he chose to shoot the victim in the back seat of the car. After the murders, he also said that he was given $300 of the money that was taken from the victims. Hooper gave conflicting versions of what happened.

When Hooper testified at trial, he said that he did not recall where he was on the night of the murders and alleged that that he was abused by law enforcement officers.

On July 24, 1981, a jury found Hooper guilty of three counts of Armed Robbery, three counts of Aggravated Kidnapping and three counts of First-Degree Murder. The jury found that there were no mitigating factors and the circuit court sentenced Hooper to death on the three murder convictions. He also was sentenced to 60 years in prison for the Armed Robbery convictions and 60 years in prison for the Aggravated Kidnapping convictions. On appeal, the Aggravated Kidnapping convictions were later reduced to 15 years in prison. The death verdicts were vacated, and the case was remanded for a new penalty phase trial because of improper arguments by the prosecutor in the second phase of the trial.

On June 18, 1993, another Illinois jury found that there were no mitigating factors sufficient to preclude the imposition of the death sentence. On July 16, 1993, he was again sentenced to death. That sentence was eventually commuted as part of a large group commutation by the Illinois governor of 167 inmates on death row at that time.

The New Year's Eve Executions – December 1980

On New Year's Eve in 1980, Marilyn Redmond, her husband Pat and her mother Helen Phelps decided to have company in for an impromptu dinner and a card game. Helen was in town visiting from Iowa. Helen's husband Percy, Marilyn's dad, couldn't make it due to a recent surgery. Marilyn and her mom were making food in the kitchen of Pat and Marilyn's home at 320 West El Camino in Phoenix, Arizona. Pat was playing on the floor in the living room with Beauregard, the family dog. The two invited couples, both longtime friends of the Redmond's, were to arrive sometime between 7 and 7:30pm. Around 7 Marilyn heard a knock on the door. She thought it was one of the guests, so she let Pat get the door as she went to her room to grab her cigarettes and quarters for the card game. She soon heard Pat call for her. As she came back out of the bedroom, she found her husband being held at gunpoint. Murray Hooper, Billy Bracey and Ed McCall had invaded her home to rob and execute them. (See Attachment 11-Police Report Arizona Murders, Attachment 5-Crime Scene Photos, Attachment 13-Marilyn Redmond's Trial Testimony, Attachment 12- State's Opening Statement, Attachment 14-State's Closing Argument, Attachment 16-Photos of Murray Hooper).

Bracey ordered Marilyn to close the blinds and grab the family dog. She put him in the bathroom. Her mom and husband were taken to the bedroom. She was asked where the jewelry was. She showed them. Hooper said it was junk and wanted to know where the good stuff was. Hooper asked where their guns were, and she showed him. Pat gave them his wallet that had several hundred dollars in it. Marilyn volunteered she had money in her purse and Bracy started going through it. They demanded they all hand over their jewelry. They took a watch and ring from Pat. Helen tried to sneak her wedding ring under the pillow, but they caught her and took it from her. They wanted to gag them, and Marilyn was trying to delay them, stalling, hoping her friends would arrive and summon help. She told them there were socks in the drawer. She also told them guests were to arrive at any moment. They responded that they'd heard that before. She urged them to look at the food cooking in the kitchen, not realizing they never stood a chance. As the food burned, Hooper chose to bind their hands. He is the one that wrapped their wrists with medical tape, and he chose to shove socks in their mouths. Her 70-year-old mother was forced to lie face down on the bed. Her 46-year-old husband was forced to kneel next to the bed with his head on the bed. Marilyn was then forced to lay down face down on the bed as well. Then Marilyn heard a voice say that "We don't need these two anymore." Two shots rang out and it all went dark.

Marilyn became conscious again around 7:15pm. Her mother and her husband weren't moving or talking. She wanted to get help. She sort of rolled off the bed and scooted on her stomach to the living room. It was hard because her hands were bound behind her back. She passed out on the living room floor. When she again became conscious again, one of the couples they were expecting had arrived, Marshall and Verna Kelley. They grabbed a knife from the kitchen and cut the bindings off her wrists. They grabbed some paper towels and attempted to wipe the blood off her face. Marilyn told Verna that three African American males had come in and robbed them. Marshall went into the bedroom. He rolled Helen over to check for a heartbeat and found none. She had been face down on the bed and there was a bloody sock underneath her head. He found Pat still kneeling by the bed and rolled him over. He saw that his face was

completely bloody, and Pat's throat had been slit wide open. A large, bloody butcher style knife lay on the ground nearby. Marshall listened to Pat's chest, but his heart was no longer beating. His mouth was shoved full of a bloody sock. Marshall came out and told Verna that they were dead, and they needed to call 911.

Police responded, and fire came to treat Marilyn. She had been shot in the back of the head. As she slipped in and out of consciousness, she repeated the description of the three black males who had chosen to come in and rob them. She later corrected it to one white male and two black males possibly wearing masks and the white male had a brown valise. A doctor at the Good Samaritan Hospital where she was taken handed over a copper jacket to a police officer and said he removed it from her wound. She had been shot one time in the back of the head and it came out her left cheek. Among other things, she suffered permanent nerve damage. At the scene, Pat's pockets had been turned out. His wallet was on the bed next to a roll of medical tape and had no money in it. Helen's purse and other items were emptied out and scattered about the floor. A large butcher knife with type O blood on it was laying on the bedroom floor also. Pat also had type O blood.

Autopsies were conducted. Helen Genevieve Phelps was 70 years old, 5'2 and 128 pounds. Her hands were bound behind her back with surgical tape. She had a contact gunshot wound over her left cheek that came out her right cheek. There was powder tattooing around the entrance wound which tells you this was a close to contact shot. The medical examiner said that this shot perforated the nasal sinuses and shattered the right zygoma. Because he found blood in her lungs that meant this was the first shot and would not have been fatal. The second shot entered over her left eye and cut through the cervical cord. This one would have been fatal. One bullet was obtained from her face. A second projectile was obtained from the pillow she was lying face down on in the bedroom. William Patrick "Pat" Redmond was 46 years old. He was 5'10 and weighed 147 pounds. His hands were bound behind his back with surgical tape. He had a sock shoved in his mouth. He was shot in the head at close range twice and then his neck was slit wide open. The medical examiner removed two large caliber bullet jackets from his head. The medical examiner believed that the shots came first and then the throat slitting as there was not a significant amount of bleeding from the throat.

This was a planned execution style ambush of Pat Redmond at his home on New Year's Eve. The brutality of it all would send a message and Hooper and his chosen crew were skilled killers who were committed to getting the job done. They didn't care who was collateral damage. The day after the murders, as Marilyn lay in the ICU, Lorna Avery, an employee of Long's drug store on 1838 Baseline in Mesa called police and said that she saw the murders on the news. It drew her attention as a white male and two African American males came in her store earlier in the day New Year's Eve behaving suspiciously. She said the white male bought six gloves and paid cash for it. She said one of the two African American males bought white surgical tape. She said one of two African American males was acting very nervous. She gave detailed descriptions. That same day Valinda Harper, known as "Bindi," also contacted the police anonymously. She later was convinced to identify herself. She told them that Ed McCall "Preacher", Billy Bracey and Murray Hooper were involved in this killing and that it was a murder for hire. They had come to stay at her place for a few days in early December

and again just before the murders. They were introduced to her by a person she knew named Arnie Merrill and Preacher. She had also met Preacher through Arnie Merrill. She met all of them through George Campagnoni, a man she had dated. They first met at Show Girl, a club she worked at as an employee.

Originally, McCall, Bracey and Hooper were asking her to give them names and locations of drug dealers as they wanted to rob and kill them and take over the local drug trade. Later, Bracey, who she described as having a romantic interest in her, told her that they were being paid $50,000 to get rid of someone he called Mr. Big Shot. Her roommate Tina Marie Louie "Ree" overheard this conversation and also relayed it to police. Bindi gave police a brown valise with a gun in it. She said that Ed McCall had given it to her to get rid of. She said McCall showed up on New Year's Day and made admissions about the three of them being involved in the killing. She said when they were watching the news about it that the news had it wrong, that the victim wasn't shot in the face she was shot in the back of the head. Ree said she also heard this conversation and that during this news report McCall said you can't carry a stethoscope around, if you shoot them in the head you gotta assume they're going to die. He also said that he took care of the Big Shot, referring to Pat Redmond.

Additionally, Bindi provided information on a separate armed robbery from Scottsdale that Ed McCall, George Campagnoni and Arnie Merrill's associate Mickey Gill, were involved in. This was a robbery on October 22, 1980, where an older couple had been tied up and almost $40,000 of property had been stolen from them. Using the info from the Scottsdale robbery, police were able to corroborate Bindi's information and reliability. The victim from Scottsdale not only picked McCall out of a photo lineup but also identified the brown valise as the one the man who robbed him was holding. It was unique as it had an Amway symbol on it. Further, fingerprint analysis was done on two maps and some papers in the valise Bindi had turned over. McCall's print came back on one of the maps of Phoenix that was in the valise. This map appeared to have Pat Redmond's address marked on it. Bindi said McCall asked her to get rid of the valise and to hold on to the gun that belonged to Hooper.

Bindi also said that "Fat Boy" (later identified as Bobby Cruz) hired McCall, Bracey and Hooper to kill Pat Redmond as he stood in the way of a million-dollar jewelry deal. Arnie had told her that he worked for Fat Boy. She told police that Ree's boyfriend had also met McCall and Hooper. A friend of hers that had been at her home, Isaac Harris, had met Arnie, McCall, Hooper and Bracey. She said they were at her house on New Year's Eve. Hooper was dressed in Levi's and a black jacket and had a .38 colt. Bracey had on grey dress pants and a brown jacket and had a .22 with a clip. McCall was in a suit and had a 9 mm. McCall let Bindi and Ree use his car at dinnertime, but said they needed to be back with it quickly as they had an appointment to get to. When asked why they did not tell the police initially, both Bindi and Ree indicated they were afraid they were going to be killed. In fact, they had both written letters with information about the crimes and gave them to loved ones to hold on to in case anything happened to them. Later both Bindi and Ree identified Hooper, Bracey and McCall.

Based on this information, on January 4th, a warrant was done on McCall's home and car. In his car were two receipts that were identified as coming from the Long's Drug Store printer on the cash register in the same amounts as the purchases described by Lorna. An Amway book was found at McCall's home, a gun, white medical tape and plastic gloves and paperwork in the trash that dealt with flights from Chicago. Marilyn was shown the brown valise and said it looked similar, but she thought the one at her house had a slightly different color. Ed McCall had a car repossession business. Arnie Merrill, George Campagnoni and Mike Gill were all listed as employees. Another witness indicated that the repossession business was a way of laundering money. Armed with the names provided by Bindi, police were able to do follow up, establish connections and conduct several other interviews that corroborated what Bindi and Ree had told them.

Local private pilot, Michael Tompkins was interviewed. He was a local private pilot who also did remodeling/construction type work. He knew Artie Ross. Artie introduced him to Bobby Cruz. Through Bobby he met Arnie Merrill and Ron Kleinfeldt. Michael worked on some remodeling of offices for Bobby from April to August of 1980. One of the offices in a building he worked on belonged to Joyce Lukezic who was Artie's sister. She had also dated Arnie Merrill back in high school. Michael heard Bobby talking with a 3rd party about the printing business and having to get rid of a third person because they were losing money, He later realized that Artie Ross had a brother-in-law in the printing business, Ron Lukezic. Bobby owed him a lot of money for the work he had done for him. At the end of November Bobby called him and another contractor Dwayne Connelley to the office and told them that he would have the money he owed them on 1/5. He had a big deal going through and that he would be getting $300,000 to $400,000.

He said Bobby instructed him to rent a plane that he had two guys from Chicago coming in to do a thing and they didn't want to fly out commercial to be seen at the airport. He said the two guys were here to collect money and the people they were collecting from would be upset. Arnie Merrill was to bring them to the airport early December. Michael and Bobby went to a local hangar to rent a plane, but it fell through. They went back to offices. Hal Ross was there (Artie Ross's son) Bobby was screaming at Hal in Joyce Lukezic' s office. Later, they walked outside, and Arnie pulls up in a Cadillac and Bobby gets in car. Bobby Cruz came back about 30-45 minutes later. Later that month, on December 28, 1980, Bobby paged Michael to the office building again. Bobby wanted Michael to rent another plane- for the two black guys from Chicago. Bobby then canceled on him again the next day and said they were going to go commercial. Bobby never paid Michael at least $40,000 that he owed him.

George Campagnoni was interviewed. He said that Arnie Merrill introduced him to Bracey, Hooper and McCall. He said Bracey and Hooper were cell mates in Joliet, Illinois prison. They first came to Phoenix in early December or late November. They came back on December 30th at 1130pm on American Airlines. Bobby Cruz brought them into town. Ed McCall picked them up at the airport. Arnie called him and asked him to watch them at his house, so he went over there. On December 31 at 10am, McCall showed up at Arnie's and picked up Hooper and Bracey. George said Bobby Cruz called at 11am on December 31 and said plane tickets would be dropped off for Bracey and Hooper. The tickets were under other names and the flight was

on January 1, 1982, at 150am. George drove them to airport. After the murders Ed McCall came over and talked with Arnie on another day for about 8 hours.
When Ed left Arnie told George that Ed was asking if George knew about the murders at which point, he was shocked because he thought it was a drug deal. After George was identified in the Scottsdale robbery, police came back and re-interviewed him, and he provided more details. He said he had met Bindi at the Show Girl in October 1980 and started seeing her. Arnie was introduced to her for drug deals. Arnie introduced Hooper and Bracey to Bindi. Arnie told him Bracey, and another were coming in to do a hit. Arnie said that Bobby Cruz and Bracey had been cellmates in Illinois and that is how they met. Bracey and the other individual were to arrive on December 10th, and they did.

George said that on December 14th Arnie introduced Bracey and Hoop to Bindi and Ree.
The next day George took Bracey to Bobby Cruz's office to pick up plane tickets to go back to Chicago they flew out on 12/17 at 1250am. Arnie told him that they were going to come back to do a hit on Buckeye, and then one on Redmond. Arnie said that he and McCall, Hoop and Bracey had stalked Pat Redmond outside a bar he frequented. They followed him on Central. Hoop offered to shoot him then but didn't. Later a business associate of Pat's told police that Pat had been annoyed one day at work in mid-December saying that someone had followed him the night before, but he was able to lose them. Arnie told him he didn't want to be involved in the hit on Redmond anymore. Arnie then called George on 12/30 and told him to come stay at the house while guys from Chicago were here. They were there to do the hit on Redmond but were to make it look like a robbery. George said that he and Arnie drove around and got addresses for Pat's business and home to give to the Chicago guys.

George went on to say that Hoop and Bracey were dropped off around midnight. During the morning of 12/31 he saw Arnie give ammo to Bracey and Hoop had a large butcher knife. Ed showed up on 12/31 around 10am and had a brown valise with him, a 9mm and some papers in it. Shortly after that they left. Bobby called and said plane tix would be dropped off. Dean dropped them off at 12pm. Ed, Hoop and Bracey got back at 7:30pm and went in the back room on the phone with Cruz and Arnie was with them. George saw them with some jewelry, a man's watch and matching ring, and a woman's diamond wedding ring, Campagnoni loaned Bracey a piece of American Tourister luggage to transport the jewelry and guns. This suitcase was later found by police with Hooper when he was arrested in Chicago. George and the three of them watched tv and drank wine until 1230am then he dropped them at airport for 1:50 am flight Arnie got home from a New Year's Eve party at 2 and told him 3 people were hit not just Redmond.

Arnie told him to get rid of a holster and a watch. George took it to a dry canal near the house and pitched it. He later took police to where he had thrown it and they recovered it. The man who sold it to Pat Redmond later identified it when police showed it to him. George said that on 1/1 Ed called Arnie upset saying Bindi made a comment about him being busy the night before. On January 2nd Ed came over and had an 8-hour conversation with Arnie. The next day Arnie gave George more details Ed had relayed. Ed told him food was cooking when they arrived, and they planned on killing any guests that arrived while they were there. He said the first guests got there 5 mins after they left. He said that Pat Redmond's neck was slashed.

George said Arnie was scared as they had told him so much and was wearing a bullet proof vest. On January 4th Arnie very upset when Ed arrested.

Police investigation revealed that Arnie was associated with a web of individuals with ties to the mob in Chicago, including Bobby Cruz, and some shady business dealings in Las Vegas. Arnie knew a person named Artie Ross. Ross was the brother of Joyce Lukezic. Joyce was the fifth wife of Ron Lukezic, Pat Redmond's longtime friend and 50/50 partner in their successful business, Graphic Dimensions. Joyce was said to want to do the Vegas deal with her brother. It appeared to be using Graphic Dimensions to help launder money with few details. Among the various witnesses, police gleaned that Pat was reticent to be involved in the detail as something seemed off about it. He stood in the way of making a lot of money for certain individuals.

On February 21, 1981, Hooper and Bracey were arrested in Chicago. Marilyn was flown out and participated in live line ups with them. She had previously been unable to pick them out of a paper lineup. During the live lineups, where the individuals were also asked to speak, she identified Hooper as guy who asked where do you keep the guns and said this is all junk. She also said he is the one who taped and gagged them. She identified Bracey as the soft spoken one who told her to hold the dog and then said "We don't need these two anymore" he dumped her purse out on the floor.

Hooper was living with his girlfriend's mother at the time. The girlfriend's mother confirmed this in a Chicago interview. Testimony indicated that phone records from Arnie's home showed communication to that apartment during the trip where Hooper, McCall and Bracey murdered Pat Redmond and Helen Phelps. An accomplice or Hooper back in Chicago by the name of Morris Nellum was also interviewed. He said he drives Hooper around as he doesn't drive. He drove Hoop to Bracey's the day before New Year's Eve- he said Hoop said he was on way to Arizona and came back no more than 48 hours later. On 1/1/81 Hoop called Nellum at 6-7am and asked to get picked up at Bracey's. Hoop told him that he and Bracey went to Arizona to do a contract killing. Hoop said a man was the target, but 2 other people were randomly present, so they were also killed. Hoop said he was mad at Bracey because he was being a Casanova with some females in Arizona and running his mouth. Hoop showed him a 9 mm he had taken in the from the victim, a gold and black watch, a ring and a women's ring that he had in his pocket. Hoop said he got items from home where killing happened. Hoop said he didn't mess around he got it over with and got out of there.

Hoop told Nellum they searched house for guns and jewelry. He said Hoop mentioned that during the prior trip to Arizona they were provided the guns. Hoop said that Bracey had been waiting for Hoop to get out of jail to go to Phoenix with him. Hoop was sick the prior time in Arizona. Hoop said they had been picked up at airport and taken to Arnie's house where they stayed a few days. He tried to kill victim then but one of the guys in the car chickened out. They said the area was too open with too many witnesses. Hoop was mad the job wasn't done and no longer trusted Arnie. Hoop showed him 9mm gun and saw it was loaded with 4 rounds. Nellum and Bracey were with Hoop in Chicago when he sold the jewelry to fence. Hoop later got $1000 from some lawyer's office. He said that he and Bracey were to get 5,000 each and

then monthly payments to kill a partner in the business. He had heard Bracey and Hoop talk about the "fat man" "Cruz" "Bob". He did not speak to Bracey about killings.

An ex-girlfriend of Bracey's Christina Nowell was also interviewed in Chicago. She said she met Bracey in April'80. He would take phone calls at the King Midas lounge. After one particular phone call he said he spoke to "Fat Man" and that the call involved 10,000 or more. He told her if he had to kill someone for money he would- she could not date the call. Another time she saw a celebration occurring at King Midas Bracey, Hooper and Cochise and 2 unknown females were celebrating and proposing toasts to each other Bates 299 – Bracey told her he had killed some people and took care of a job they were paid for. Billy was buying people drinks. She could not date this incident.

Maricopa County Superior Court Presiding Criminal Judge Jennifer Green, in denying the most recent evidentiary processing request from Defendant Hooper just a few days ago, summarized, in depth, the factual and procedural history in her attached minute entry (Attachment 8). In addition to the detailed factual and procedural summary provided by Judge Green in her minute entry above, the State's Brief, included along with other Arizona Court Documents in Attachment 9, discusses why other *Brady* allegations fall flat in an even more detailed analysis.

This Defendant has successfully avoided facing the consequences of his actions for almost 4 decades. It is said justice delayed is justice denied. Neither grace, mercy or a fail-safe function are necessary or called for here. He has had multiple courts review his case multiple times. They have not found any reason, ever, to set aside his sentence. It is time for this serial killer to face the punishment ordered just shy of 40 years ago.

Sincerely,

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. MURRAY HOOPER, Defendant.	CR 0000-121686 EMERGENCY MOTION TO COMPEL DISCOVERY Honorable Howard Sukenic (Expedited Review Requested)

Murray Hooper, through undersigned counsel, respectfully requests this Court to enter an emergency order directing the State disclose the entirety of its file, specifically the twenty boxes used in preparing its letter for the Arizona Board of Executive Clemency. The Motion should be granted for the reasons explained below. Mr. Hooper seeks to develop facts and evidence supporting his October 31, 2022 and November 4,

2022 successor postconviction petitions. This matter is scheduled for a hearing on Thursday, November 10, hence the emergency nature of this motion.

MEMORANDUM

As explained in Mr. Hooper's November 4, 2022 successor postconviction petition, material exculpatory and impeaching evidence was disclosed by the State during proceedings in front of the Arizona Board of Executive Clemency. On October 28, 2022, the Maricopa County Attorney's Office (MCAO) provided a letter to the Arizona Board of Executive Clemency opposing Murray Hooper's request for clemency. (Exhibit 1.) It revised its letter to the Board on November 1, 2022. (Exhibit 2.) Both letters provide information never disclosed—that Marilyn Redmond was shown a paper lineup that included Mr. Hooper and could not identify him. (Exhibits 1 & 2 at 11.)

Mr. Hooper received Exhibit 1, on October 31, 2022 via a public records request. After reviewing the materials on November 1, 2002, undersigned counsel obtained Mr. Hooper's signature on a public records request at their earliest opportunity and on November 2, 2022, made a request in writing to the Maricopa County Attorney's Office requesting to view the file. (Exhibit 3.) That request has gone unanswered. On November 7, 2022, undersigned counsel contacted the Attorney General's Office requesting assistance in resolving this matter, asking for access to the 20 boxes relied on by the State in preparing its clemency letter and for interviews of the Maricopa County Attorney's Office staff who prepared the letter. (Exhibit 4.) In their response, the Attorney General, Jeff Sparks, indicated that they will not provide the county attorney's files and they object to allowing an interview of the Deputy County Attorneys who prepared the letter. (Exhibit 4).

It is apparent from Exhibits 1 and 2, that with the knowledge of prosecutors at the Maricopa County Attorney's Office, Mrs. Redmond and law enforcement officers concealed that such a photo lineup had taken place and supplanted this collusion with

false and perjured testimony that a photo lineup had never occurred. In the process, Mr. Hooper's jury as well as numerous state and federal court judges have been grievously misled and Mr. Hooper has been wrongfully convicted and incarcerated on death row for some forty years.

Given the undisputed evidence of substantial prior prosecutor misconduct, including multiple failures to disclose exculpatory impeachment evidence, and other erroneous representations, "oops I must have made a mistake" simply cannot resolve this matter. The circumstances give rise to the necessity of discovery.

Mr. Hooper has presented several claims that stem from the newly discovered evidence that, if proven, would entitle him to relief. In the federal court system, "good cause" exists to obtain discovery when (1) the petitioner makes credible allegations of a constitutional violation, and (2) the requested discovery will enable the petitioner to investigate and prove his claims. *See Bracy v. Gramley*, 520 U.S. 899, 904, 908–09 (1997). When there is "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id*.; *see also McDaniel v. U.S. Dist. Court for the Dist. of Nevada*, 127 F.3d 886, 888 (9th Cir. 1997) (per curiam) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)); *Payne v. Bell*, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000) ("Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."); *Id*. at 971 ("Indeed, it may be impossible to prove even a meritorious claim without such court ordered discovery.")

The discovery essential to Mr. Hooper's claim is no small matter. The MCAO attorneys advised the Clemency Board they had reviewed some twenty boxes to prepare their letter for the Board. Mr. Hooper needs unfettered access to those boxes. Due process demands that Mr. Hooper be given adequate time to review and investigate the facts supporting his claim. It is only upon access to the unfettered file and the staff who

prepared the clemency letter, that Mr. Hooper can fully prepare and present his claim.

The crux of the Fourteenth Amendment's due process guarantee is adequate notice and an opportunity to be heard that is meaningful. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *see also Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 (2017). Although arguably more sweeping than its federal counterpart, the Arizona Constitution's due process guarantee likewise requires that any opportunity to be heard afforded by the state occur "in a meaningful time and in a meaningful manner." *See San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 196 (1999) (citing Ariz. Const. art. II, § 4); *see also State v. Youngblood*, 173 Ariz. 502, 508 (1993) (Feldman, J., concurring and dissenting in part) (recognizing that the majority "applies the due process clause of the Arizona Constitution in the same manner as its federal counterpart" while "not, however, agree[ing] with the state's position that the two clauses are coterminous[]" and "[i]nstead, [ ] reaffirm[ing] this court's ultimate responsibility to interpret the meaning and application of the Arizona Constitution in light of our own reading of each clause").

Because "due process, unlike some legal rules, is not a technical conception with a fixed content[,]" whether an opportunity to be heard is meaningful is context dependent and not "unrelated to time, place and circumstances." *See Mathews*, 424 U.S. at 334 (internal quotations omitted); *see also Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In *Mathews*, the Supreme Court explained that in order for "a person in jeopardy of serious loss" to meaningfully be heard "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard[.]" 424 U.S. at 348–49 (cleaned up). The circumstances presented warrant this Court's granting

of Mr. Hooper's emergency motion to compel discovery.

It is clear the trial judges have inherent authority to grant discovery requests in PCR proceedings upon a showing of good cause. *Canion v. Cole*, 210 Ariz. 598, 600, 115 P.3d 1261, 1263 (2005); Cf. *State v. Van Den Berg*, 164 Ariz. 192, 196, 791 P.2d 1075, 1079 (App.1990); accord *Carriger v. Stewart*, 132 F.3d 463, 466 (9th Cir.1997) (interpreting Arizona law, referencing "court-ordered discovery" during post-conviction proceedings).

Conclusion

A rule declaring that a "'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants' due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Mr. Hooper is not at fault for failing to discover this concealed evidence. The Supreme Court has confirmed the defendant's right to rely on the prosecution's representation that all *Brady* material was provided. *Id.* at 693 (finding that defendant rightfully relied on prosecution's representations that all *Brady* material was provided). The prosecution in *Banks* "asserted, on the eve of trial, that it would disclose all *Brady* material." *Id*. The Court found no fault in Banks' reliance on this representation. *Id*. (citing *Strickler v. Greene*, 527 U.S. 263, 283–84 (1999)); *see also Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam) (affirming defendant's right to rely on prosecution's representations regarding the record). Here, the State lied. It told the defense the evidence they believed existed, did not. Like Banks, Mr. Hooper relied on the State's representation that no photo lineup had occurred. It is for these reasons, the State should be compelled to turn over its entire file and to submit to interviews with defense counsel so Mr. Hooper may have unfettered access to information necessary to fully investigate and present his claims.

Wherefore, Mr. Hooper requests this Court enter an order compelling the State to provide unfettered access to any and all boxes and files for this and related cases, including but not limited to, the twenty boxes the State relied on in preparation of its clemency letter and to provide for interview the staff who prepared that clemency letter.

RESPECTFULLY SUBMITTED this 8th day of November, 2022.

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Federal Public Defender

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Kelly L. Culshaw
Nathan Maxwell
Assistant Federal Public Defenders

s/Kelly L. Culshaw
Counsel for Murray Hooper

Proof of Service

I hereby certify that on November 8, 2022, an original and copies of the foregoing Emergency Motion to Compel Discovery was electronically filed with:

Clerk of the Maricopa County Superior Court
Phoenix, Arizona 85003

And emailed to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. MURRAY HOOPER, Defendant.	CR 0000-121686 PETITION FOR POST-CONVICTION RELIEF (Evidentiary Hearing Requested) (Honorable Howard Sukenic) (Expedited Review Requested)

Murray Hooper, through undersigned counsel, files this Petition for Post-Conviction Relief pursuant to Rule 32.1(e) of the Arizona Rules of Criminal Procedure. Rule 32.1(e) provides for relief after "newly discovered material facts" are discovered. Ariz. R. Crim. P. 32.1(e). As explained below, newly discovered material facts disclosed by the Maricopa County Attorney's Office on October 28, 2022, just several days ago,

revealed that the State suppressed material exculpatory evidence, and deliberately deceived the trier of fact by failing to disclose that its sole testifying eyewitness Marilyn Redmond, excluded Mr. Hooper as a perpetrator and was unable to identify him in a pre-trial photo lineup. With the knowledge of prosecutors at the Maricopa County Attorney's Office, Mrs. Redmond and law enforcement officers concealed the fact that such a photo lineup had taken place and supplanted this collusion with false and perjured testimony that a photo lineup had never occurred. In the process numerous state and federal judges have been grievously misled and Mr. Hooper has been wrongfully convicted and incarcerated on death row for some forty years. The newly disclosed evidence proves a most serious violation of due process. Further, as explained below, the constitutional violation requires a new trial because it is reasonably possible the withheld evidence could have affected the judgment of the jury. *Napue v. Illinois*, 360 U.S. 264, 271 (1959); *United States v. Bagley*, 473 U.S. 667, 680 (1985); *see also Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Hooper is entitled to a new, constitutional trial. U.S. Const. amends. V, VIII, XIV; Arizona Const. art. 2, §§ 4, 15.

As noted, the State first asserted and disclosed there had been a photo lineup in its October 28 letter. But when suddenly confronted with the coverup of this evidence *without any warning* from Mr. Hooper's defense team, during Mr. Hooper's clemency hearing on November 3, the author of the letter claimed her assertion that there had been a secret photo lineup must have been a mistake. How could she possibly know it was a mistake? The State's sudden claim at Mr. Hooper's clemency hearing, that this was a mistake in their interpretation of their own records is insufficient to resolve this issue. Not until Mr. Hooper's defense team has unfettered access to the identical records, from which the County Attorney concluded there had been a paper lineup, can the issue be settled. Particularly, given the undisputed evidence of substantial prior prosecutor misconduct, including multiple failures to disclose exculpatory impeachment evidence, and other erroneous representations, "oops I must have made a mistake" is simply insufficient to resolve this matter. The state said to the clemency board, "…And defense

can point it [evidence of the paper lineup] out if they can find it." No that is not correct. The defense cannot identify evidence of the lineup, the existence of which was unambiguously identified in the October 28 letter, until the Defense obtains unrestricted access to the prosecution file. The circumstances give rise to the necessity of discovery and an evidentiary hearing, as further demonstrated below. For now, until discovery and a full airing of the issue can be completed, we take the Maricopa County Attorney at its word: there was a paper lineup. (*See* Exhibits U & V at 11).

Mr. Hooper faces a November 16, 2022 execution date. Therefore, he requests expedited briefing and review of this matter.

I. Introduction

For forty years, Murray Hooper has steadfastly maintained his innocence of these offenses. For just as long, reviewing courts have relied on Marilyn Redmond's eyewitness identification testimony to sustain the conviction. But the tables have finally turned. On October 28, 2022, the Maricopa County Attorney's Office revealed for the first-time what Mr. Hooper has long suspected and urged at trial—that Mrs. Redmond's identification was seriously mistaken, tainted and unreliable. Now, just over two weeks before Mr. Hooper's scheduled execution and forty years after trial, in its submission to the Arizona Board of Executive Clemency, the Maricopa County Attorney's Office revealed that Marilyn Redmond was shown a photographic lineup and she could not identify Mr. Hooper; thereby implicitly excluding him as a perpetrator of the crime. (*See* Exhibits U & V at 11.) This puts the lie to pre-trial and trial sworn testimony from multiple State witnesses that no such lineup had been administered.

II. PROCEDURAL HISTORY AND RELATED FACTS

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*, 145 Ariz. 520, 525, 703 P.2d 464, 469 (1985). Redmond's wife, Marilyn, was shot in the head but survived. *Id*. In what Mr. Hooper contends was a frameup by the actual perpetrators, the State

rapidly focused on him, as well as William Bracy, and Edward McCall. All three were eventually convicted substantially based on Mrs. Redmond's eyewitness identification, and the testimony of several paid government witnesses and co-conspirators, who (Mr. Hooper contends) testified falsely in exchange for extraordinary consideration and benefits from the State, including immunity from serious crimes, money, drugs, and unsupervised trips away from jail for conjugal visits. (*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.) Mr. Hooper presented alibi witnesses who testified he was in Chicago at the time of the crimes.

Long before we arrived here with newly discovered evidence of gross State misconduct, this case was branded as one bearing the earmarks of substantial prosecution misconduct—including the failure to disclose material exculpatory impeachment evidence regarding the enriched compensated witnesses—as the Arizona Supreme Court earlier found. *State v. Hooper*, 145 Ariz. 538, 543–45, 703 P.2d 482, 487–89 (1985) (adopting the facts and reasoning of *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985)). Mr. Hooper's conviction was not overturned then, only because Mrs. Redmond's eyewitness identification was deemed sufficiently reliable. *Id.*; *State v. Bracy*, 145 Ariz. 520, 529, 703 P.2d 464, 473 (1985). In light of the earlier documented prejudicial misconduct, *id.*, the newly discovered evidence, revealing the perjury of Mrs. Redmond and other law enforcement witnesses, takes on heightened resonance.

From the very beginning, Mrs. Redmond gave every indication that she could not identify Mr. Hooper with a semblance of reliability. Early on, she had reported that she had not looked at the faces of any of the intruders and that they were wearing masks, so she would not have been able to see Mr. Hooper's face in the first instance. (Tr. 11/8/82 at 241, 272; Tr. 11/30/82 at 73.) Her original statements concerning the race of the assailants did not match the races of the three persons actually charged. Eventually, her statements changed to correspond to the races of those indicted. (*See, e.g.*, Tr.

11/3/1982 at 222; Tr. 11/8/1982 at 190; Tr. 11/10/1982 at 71.) What was unknown until just a few days ago: the police and Mrs. Redmond knew but failed to disclose and then testified falsely covering up the fact that she had failed to identify Mr. Hooper in a photo lineup. (*See* Exhibits U & V at 11.) The results of the photo lineup should have ended any law enforcement pressure on Mrs. Redmond to identify Mr. Hooper. But that is not what happened.

Instead, some two months after the offense, and after the photo lineup, an in-person lineup was arranged and administered by Chicago police detectives, where Mrs. Redmond is said to have identified Mr. Hooper. (Tr. 12/20/82 at 65–70; Tr. 11/30/82 p.m. at 58–61.) The lineup identification is notable, if only for the level of Chicago police corruption now known to have persisted at that time, in the early 1980s, including torture induced false confessions and other misconduct used to obtain false witness accusations and tainted, unreliable identifications by supposed eyewitnesses.[1]

Mr. Hooper was indicted on one count of 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. (ROA 1.) He was convicted and sentenced to death. (ROA 1116.) Mr. Hooper's federal appeals were exhausted on March 21, 2022, when the Supreme 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-

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[1] This corruption, torture, and coercion practices are extensively documented and no longer disputable, having resulted in dozens of exonerations and hundreds of millions of dollars in civil lawsuit payouts to the victims. The Invisible Institute, a nonprofit journalism production company in Chicago, has made information detailing the corrupt and abusive practices publicly available via DropBox. *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://www.dropbox.com/sh/ch5e6i674shwpr8/AAANdI2LMWFVsKJ-xB0pdtZDa/02.%20Torture.Findings.Admissions.Decisions.Docs.Opinions.Pleadings?dl=0&preview=8.10.06.Summary+of+Judical%2C+Administrative+and+prosecutorial+Findings+and+Admissions.wpd&subfolder_nav_tracking=1 (last visited Sept. 9, 2022).

0044-AP (Ariz. Oct. 12, 2022).

II. CLAIMS FOR RELIEF

A. Newly Discovered Material Facts

Arizona Rule of Criminal Procedure 32.1(e) allows for relief when "newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence." Under Arizona law, "the preclusion provisions in Rule 32.2(a) do not apply to claims based on newly discovered evidence under Rule 32.1(e)[.]" *State v. Gutierrez*, 229 Ariz. 573, 580 ¶ 35, 278 P.3d 1276, 1283 (2012).

On October 28, 2022, the Maricopa County Attorney's Office presented a letter to the Arizona Board of Executive Clemency opposing Mr. Hooper's request for clemency. (Exhibit U.) They revised that letter on November 1, 2022. (Exhibit V.) For decades, the State's gospel had been: Marilyn Redmond was not asked to identify Mr. Hooper (by being shown his photograph) before viewing the lineup in Chicago. Mrs. Redmond and law enforcement officers testified to this as a fact. (Tr. 11/30/82 p.m. at 71 (Marilyn Redmond testifying she did not view photographs before trial); Tr. 8/27/82 at 60 (Phoenix Police Detective Martinsen testified that he did not show Mrs. Redmond a photograph of Mr. Hooper); Tr. 8/27/82 at 91 (Maricopa County Attorney's Office Investigator Dan Ryan testified that he did not show Mrs. Redmond a photograph of Mr. Hooper and was not present if that ever did occur).) But their testimony is now provably false. The Maricopa County Attorney's Office finally revealed what Mr. Hooper has long suspected: Marilyn Redmond was shown a "paper [photographic] lineup" (before viewing a live lineup) where she implicitly excluded Mr. Hooper as a perpetrator of this offense. (Exhibits U & V at 11.) Given this new evidence of widespread collusion between the prosecutor, Mrs. Redmond, and law enforcement to conceal the photo lineup, extending to multiple instances of perjury in order to hide the truth, there is a compelling inference that the live-lineup identification itself was probably tainted by suggestive police misconduct with or without Redmond's complicity.

Rule 32.1(e) provides for relief when:

> newly discovered material facts probably exist and those facts probably would have changed the judgment or sentence.
>
> Newly discovered material facts exist if:
>
> (1) the facts were discovered after the trial or sentencing;
>
> (2) the defendant exercised due diligence in discovering these facts; and
>
> (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.

Mr. Hooper satisfies Rule 32.1(e). The facts upon which this Petition rests were first included in a letter provided to the Arizona Board of Executive Clemency on October 28, 2022, some 40 years after Mr. Hooper was convicted and sentenced.

Mr. Hooper exercised due diligence in discovering these facts. Despite Mr. Hooper's explicit inquiries, the State, Mrs. Redmond, and law enforcement officers repeatedly denied that she had viewed a photograph of Mr. Hooper prior to the in-person lineup. *See* Claim One, *infra*. A rule declaring that a "'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants' due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Finally, as discussed in more detail *infra*, the newly discovered facts are material, not merely cumulative or impeaching, and where those facts are relevant to impeachment, the evidence of impeachment is of such critical significance it probably would have changed the judgment or sentence.

B. Claim One: The State violated *Brady v. Maryland*

Marilyn Redmond's eyewitness identification was a hotly contested trial issue. Her purported identification later served as the "key" evidence, relied on by state and federal courts, to reject a host of errors that occurred at Mr. Hooper's trial, including

other documented instances of prosecutorial misconduct and *Brady* violations. *See, e.g.*, Minute Entry at 4; *State v. Hooper*, No. CR 0000-121686 (Maricopa Cnty. Super. Ct. Oct. 21, 2022); *Hooper v. Shinn*, 985 F.3d 594, 617 (9th Cir. 2022); *State v. Bracy*, 145 Ariz. 520, 529, 703 P.2d 464, 473 (1985). Only now have we discovered that all of these courts were materially misled. The State's failure to disclose the evidence of Mrs. Redmond's implicit exclusion of Mr. Hooper as a perpetrator—her failure to identify him in a photographic lineup—and her uncorrected false testimony regarding the same—violates *Brady v. Maryland*, 373 U.S. 83 (1963). These concealed disclosures require relief from Mr. Hooper's convictions and death sentence.

1. The *Brady* standard

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bath faith of the prosecution." *Brady*, 373 U.S at 87. A *Brady* claim has three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (internal quotation omitted). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (internal quotation omitted). However, Arizona applies a considerably more favorable test under certain circumstances. "[W]here a pretrial request has been made for specific evidence, the judgment must be vacated if the suppressed evidence *might have affected the outcome of the trial*[.]" *Bracy*, 145 Ariz. at 528, 703 P.3d at 472. Here, the *Bracy* standard applies. As explained below, Mr. Hooper made inquiries pre-trial and during the trial itself, to learn whether Mrs. Redmond had been shown a photo of Mr. Hooper before the in-person lineup.

a. The State suppressed evidence

The trial court granted Mr. Hooper's pretrial motion to disclose impeaching information and ordered a *Dessureault* Hearing on Mrs. Redmond's identification. (ROA 329 at 1, 3.) ***At the hearing, in response to Mr. Hooper's inquiry, Marilyn Redmond denied being shown any photographs of Mr. Hooper before viewing the live lineup in Chicago***. (Tr. 8/26/82 at 31, 43–44.) In furtherance of the coverup, the prosecutor objected to defense counsel asking Detective Martinsen and Investigator Ryan, if either had shown Mrs. Redmond a photograph of Mr. Hooper before the live lineup in Chicago, but the trial court obviously allowed the defense inquiry. (Tr. 8/27/82 at 57–59.) Detective Martinsen testified that he did not show Marilyn Redmond a photograph of Mr. Hooper. (Tr. 8/27/82 at 60.) Maricopa County Investigator Dan Ryan testified, "Let me say this. I didn't [give Marilyn Redmond a photographic display] and I was never present if that did occur." (Tr. 8/27/82 at 91.)

On September 22, 1982, the trial court found that Mrs. Redmond's pretrial identification was not unduly suggestive and denied the motion to suppress her pretrial identification. (ROA 748 at 2–3.)

Mr. Hooper is not at fault for failing to discover the concealed evidence. The Supreme Court has confirmed the defendant's right to rely on the prosecution's representation that all *Brady* material was provided. *Banks v. Dretke*, 540 U.S. 668, 693 (2004) (finding that defendant rightfully relied on prosecution's representations that all Brady material was provided). The prosecution in *Banks* "asserted, on the eve of trial, that it would disclose all Brady material." *Id*. The Court found no fault in Banks' reliance on this representation. *Id*. (citing *Strickler v. Greene*, 527 U.S. 263, 283–84 (1999))*; see also Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam) (affirming defendant's right to rely on prosecution's representations regarding the record). Here, the State lied. It told the defense the evidence they believed existed, did not. Like Banks, Mr. Hooper could rely on the State's representation that no photo lineup had occurred.

This evidence was suppressed.

b. This evidence is favorable

The second *Brady* prong, favorability, is straightforward. Evidence is favorable to the accused because it is exculpatory or because it impeaches the prosecution's case. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is favorable if it: (a) establishes a defense, *Cone v. Bell*, 556 U.S. 449, 451 (2009) (suppressed evidence supported defendant's insanity defense and bolstered his mitigation case); (b) impeaches the prosecution's case, *Banks*, 540 U.S. at 699–700 (suppressed evidence impeached witness's penalty phase testimony); or (c) supports either a verdict of not guilty, or imposing a lesser sentence, *Brady*, 373 U.S. at 87 (prosecution must disclose favorable evidence material to guilt or punishment). Suppressed evidence is favorable if a reasonable probability exists that it would have provided the defense with an opportunity to challenge the thoroughness and good faith of the State's case. *See Kyles*, 514 U.S. at 445 (the effective impeachment of even one eyewitness can call for a new trial because it lessens the strength of that witness' statements, and also raises questions about other probative evidence and "even the good faith investigation" of the case).

Time and again, the State, its agents, and its witnesses proclaimed that Marilyn Redmond's singular attempt to identify Murray Hooper occurred in February 1981 at a Chicago police station and that it was during this singular attempt that Marilyn Redmond definitively identified Mr. Hooper as one of the perpetrators of this offense. These representations were false, and Mrs. Redmond's denial of the existence of the photographic lineup amounted to perjury. The suppressed evidence completely guts the credibility of the State's sole eyewitness identification.

During trial, the State took pains to establish the power of Marilyn Redmond's exceptional memory. (*See* Tr. 11/30/82 p.m. at 7–8 ("Q. Were you kind of the visual Rolodex of Bonanza Airlines? A. Yes, I was."; *see also* Tr. 12/20/82 at 220.) Dan Ryan

and Detective Martinsen[2] also testified that no photographs were shown to Mrs. Redmond before she viewed the live lineups. (Tr. 11/9/82 at 203; Tr. 12/20/82 at 70.) The entire case was built around a lie.

Mrs. Redmond's positive identification of Mr. Hooper was the key evidence against Mr. Hooper; courts have repeatedly recognized this. The Arizona Supreme Court rejected Mr. Hooper's and co-defendant Bracy's request for a new trial after post-trial disclosure of material, exculpatory evidence that investigator Dan Ryan had made car payments for a State's witness's wife and a variety of other undisclosed benefits because: "the undisclosed information impeaching [alleged co-conspirator Arnold Merrill] and Dan Ryan had no effect upon the key testimony of Marilyn Redmond." *State v. Bracy*, 145 Ariz. 520, 529, 703 P.2d 464, 473 (1985); *see also id.* ("we do not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond").

The Ninth Circuit Court of Appeals accepted the Arizona Supreme Court's assessment that Mrs. Redmond's identification was "crucial":

> The Arizona Supreme Court properly found that Marilyn's testimony was key. Marilyn was an eyewitness to the crimes and was certain in her trial identifications of Hooper and Bracy. She had also identified both in pretrial lineups.

Hooper v. Shinn, 985 F.3d 594, 617 (9th Cir. 2022).

In rejecting Mr. Hooper's recent requests for DNA and advanced forensic testing of fingerprints (now subject to review on Special Action) the Maricopa Superior Court relied on the Ninth Circuit's analysis of the significance of Mrs. Redmond's testimony. Minute Entry at 4, *State v. Hooper*, No. CR 0000-121686 (Maricopa Cnty. Super. Ct. Oct. 21, 2022) ("The victim who survived, Marilyn Redmond, "was the only one who saw the intruders in her home," later identified Defendant, Bracy, and McCall as the

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[2] Detective Martinsen accompanied Mrs. Redmond and took notes during the lineups (Tr. 11/9/82 at 184-85), however, these notes were not disclosed, despite defense requests (Tr. 11/4/82 at 40-41).

murderers, and provided details of the incident." (citing *Hooper*, 985 F.3d at 603).) The recently discovered perjury tainted identification not only affected Mr. Hooper's convictions, but it has also affected the decision of every court to subsequently review his case for constitutional error.

The State's eleventh-hour revelation that Mrs. Redmond could not identify Mr. Hooper from a photographic lineup is of critical significance—particularly in light of statements she made after the crime, that she did not see the faces off the perpetrators because they wore masks. In *Smith v. Cain*, 565 U.S. 73 (2012), the United States Supreme Court granted relief in similar circumstances. Post-trial, Smith discovered evidence demonstrating that the State's eyewitness could not identify the perpetrators who committed a home invasion robbery that resulted in the death of five of the eyewitness's friends. *Id.* at 74–75. As in *Smith*, the newly discovered evidence directly contradicts Marilyn Redmond's eyewitness identification and was "plainly material." *Id.* at 76. It would have dramatically undermined the State's key witness.

In addition to undermining Mrs. Redmond's identification, this new evidence would have bolstered Mr. Hooper's misidentification defense. The trial court limited Mr. Hooper's eyewitness identification expert at trial; her testimony was restricted to addressing cross-racial identification alone. *State v. Hooper*, 145 Ariz. 538, 546, 703 P.2d 482, 490 (1985). However, had the trial court been made aware that Mrs. Redmond had failed to identify Mr. Hooper in a photographic lineup before viewing a live lineup that included Mr. Hooper, the court would have had the necessary foundation to allow additional expert testimony to include the implications and impact of Mrs. Redmond having seen a picture of Mr. Hooper before the Chicago lineup. Dr. Geoffrey Loftus explains in his report (updated on November 2, 2022 and November 4, 2022) that exposure to visual information in particular biases a lineup:

> Prior to participating in the live lineup, Mrs. Redmond had participated in the photo lineup and had failed to identify Mr. Hooper's picture from it. Thus Mr. Hooper was the only live lineup member that Mrs. Redmond had seen before and for that reason would have looked more familiar than the fillers. ***In other words, one cannot distinguish whether Mrs. Redmond identified Mr. Hooper at the live lineup based on her original memory of S2 or whether she identified Mr. Hooper based on her memory of Mr. Hooper's picture in the photo lineup***.

(Exhibit W & X at 7–8.) (emphasis added).

The *Brady* element of favorability is clearly satisfied.

c. The suppressed evidence was material

The test for materiality under *Brady* was originally set forth in *Bagley*, 473 U.S. at 678:

> 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 verdict."

Kyles, 514 U.S. at 434 (quoting *Bagley*); *Strickler*, 527 U.S. at 289 (quoting *Kyles*). However, as explained above, Arizona applies a considerably more favorable test under certain circumstances. Where a pretrial request has been made for specific evidence, the judgment must be vacated if the suppressed evidence "*might have affected the outcome of the trial*." *Bracy*, 145 Ariz. at 528, 703 P.2d at 472 (emphasis added). It is this latter more favorable test which applies here, since specific inquiry was made as to the existence of the photo lineup during pre-trial hearings and at trial. (ROA 260; Tr. 8/27/82 at 60 (Det. Martinsen testified that he did not show Mrs. Redmond a photograph of Mr. Hooper); Tr. 8/27/82 at 91 (Investigator Ryan testified that he did not show Mrs. Redmond a photograph of Mr. Hooper, and was not present if that ever did occur); Tr. 11/4/82 at 40-41 (Grant Woods asks for any physical evidence they have in their possession or that law enforcement have which is contradictory to the departmental reports or other written material).)

When assessing materiality: (a) the defendant need not demonstrate that the suppressed evidence would lead to his acquittal, (b) it is not a sufficiency of the evidence test, (c) harmless error analysis is not to be conducted, and (d) the test focuses on the cumulative impact of all suppressed evidence. *Kyles*, 514 U.S. at 434–36. The suppressed evidence need not undercut every aspect of the prosecution's case to be material. *Id.* at 451 (it is unnecessary that "every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed").

Marilyn Redmond's implicit exclusion of Mr. Hooper as a perpetrator and her failure to identify him in a photographic lineup *before* viewing him in a live lineup in Chicago, satisfies the materiality requirement, especially in light of her perjured testimony denying she had seen the photo array. When combined with her earlier insistence that she never saw the offenders' faces, the materiality of the new evidence arises to the level of compelling.[3] What is more, the discovery of the photo lineup would have corrupted the testimony of the case-related law enforcement officers, who would have also been caught-up in the big lie. At that point, the lavish benefits the State had heaped on the other witnesses would have been seen in a harsher light.

This newly discovered suppressed evidence is material. Specific inquiries were made for the suppressed evidence and therefore, Mr. Hooper readily satisfies the showing that the evidence "*might have affected the outcome of the trial*." *Bracy*, 145 Ariz. at 528, 703 P.2d at 472 (emphasis added). Indeed, once the jury learned that Mrs. Redmond had continually lied about the absence of a photo lineup, it is irrefutable that her deceit might have affected the verdict. *Id.* With the single eyewitness caught in an

[3] Redmond initially reported she could not identify the intruders, 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 described the perpetrators as three Black men, two of them wearing masks. (Tr. 11/8/82 p.m. at 73; Tr. 11/3/82 at 171, 180, 184, 221–22, 230–31, 237–38; Tr. 8/27/82 at 69–70.) Later, she changed her story to conform to the charged suspects, claiming that two Black men and one white man committed the crime. (Tr. 11/3/82 at 221, 231, 248.) Despite the fact that Redmond first reported that two of the suspects were wearing masks—proving she could not identify them—she turned the tables and described the suspects as clean-shaven. (Tr. 11/8/82 p.m. at 74–75.) Still, Mrs. Redmond could not describe the assailants' facial features. (Tr. 11/4/82 at 50; Tr. 11/3/82 at 221–22, 230.)

outright lie, it is obvious that at least a single juror's verdict might have been affected. No forensic evidence tied Mr. Hooper to the crime. And at trial, Mr. Hooper presented three eyewitnesses who testified he was in Chicago at the time of these offenses. (Tr. 12/8/82 a.m. at 73–74, 93, 95; Tr. 12/8/82 p.m. at 5, 33–37.) A disinterested air traveler, on the flight that the State alleged Mr. Hooper took after the offense, affied that Mr. Hooper was not on that flight. (ROA 1691, Ex. F.)

C. Claim Two: The State knowingly presented false evidence

False evidence was presented by the State, both in pre-trial proceedings and at trial. During the *Dessureault* Hearing Detective Martinsen, Investigator Ryan, and Marilyn Redmond all testified falsely that she did not view a photograph of Mr. Hooper before she viewed the live lineup in Chicago. (Tr. 11/30/82 p.m. at 71 (Marilyn Redmond testifying she did not view photographs before trial); Tr. 8/27/82 at 60 (Phoenix Police Detective Martinsen testified that he did not show Mrs. Redmond a photograph of Mr. Hooper); Tr. 8/27/82 at 91 (Maricopa County Attorney's Office Investigator Dan Ryan testified that he did not show Mrs. Redmond a photograph of Mr. Hooper and was not present if that ever did occur).) At trial, this same false testimony was presented to the jury.

1. A conviction may not rest on known false evidence

The courts have long recognized that a prosecutor cannot secure a conviction through the presentation of false testimony. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), the United States Supreme Court held that "deliberate deception of court and jury by the presentation of testimony known to be perjured" violates the defendant's due process rights. The Court expanded that notion in *Napue v. Illinois*, 360 U.S. 264 (1959), in which the Court said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*. at 269. Under the standard articulated in *Napue*, a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Id*. at 271. As applied, this means a new trial is required when it is reasonably possible the withheld

evidence could have affected the judgment of the jury. *United States v. Bagley*, 473 U.S. 667, 680 (1985); *United States v. Freeman*, 650 F.3d 673, 680–81 (7th Cir. 2011) (finding reasonable possibility that perjured testimony affected jury decision). *See also Bracy*, 145 Ariz. at 528, 703 P.2d at 472 ("In those cases in which the prosecution has knowingly used perjured testimony, the conviction must be set aside if there exists a reasonable likelihood that the false testimony *could have affected the jury's verdict*[.]") (emphasis added)).

The elements of the claim require proof that "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) … the false testimony was material." *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (internal quotation marks and citations omitted).

a. The evidence was false

As discussed in an earlier section, Marilyn Redmond, Detective Martinsen, and Investigator Ryan all testified that Mrs. Redmond did not view Mr. Hooper's photograph before viewing the live lineup in Chicago during pretrial proceedings and at the trial itself. In two letters to the Arizona Board of Executive Clemency, the Maricopa County Attorney's Office stated, "Marilyn [Redmond] was flown out [to Chicago] and participated in live line ups with [Murray Hooper and William Bracy]. She had previously been unable to pick them out of a paper lineup." (Exhibits U & V at 11.) This eleventh hour disclosure by the State demonstrates the falsity of these testimony.

b. The prosecutor knew or should have known that the testimony was actually false

A letter drafted by the Maricopa County Attorney's Office is the source of Mr. Hooper's claim. (Exhibits U & V at 11.) Clearly, the prosecutor has evidence of the photo lineup and knew this testimony was false.

c. The false testimony was material

In assessing materiality under *Napue*, the court determines whether there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury[.]" *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Bagley*, 473 U.S. at 680; *Freeman,* 650 F.3d at 680–81; *Bracy,* 145 Ariz. at 528, 703 P.2d at 472. The question is not whether the petitioner would have received a different verdict, "whether … he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434 490. For brevity and to avoid repetition, Mr. Hooper incorporates his arguments in Section B.1.c., *supra*, regarding materiality. For the same reasons the State's failure to disclose Mrs. Redmond's inability to identify Mr. Hooper in a photo lineup was material under *Brady*, the State's knowing presentation of false evidence was material.

Multiple State's actors and Redmond herself committed perjury testifying falsely that Marilyn Redmond only identified Mr. Hooper in a single lineup, live in Chicago, where she identified Mr. Hooper. Each witness lied when they insisted she had not viewed a photograph of Mr. Hooper before the Chicago lineup. Each witness lied when they failed to disclose that Redmond had previously excluded Mr. Hooper as a perpetrator when viewing the photo lineup. The prosecutor's actions in presenting this false evidence, and failing to correct it, deprived Mr. Hooper of his due process and equal protection rights. And it is inarguable that a jury learning that multiple witnesses, including Redmond, had conspired to cover up of this evidence "could have affected the verdict." *Bracy* 145 Ariz. at 528, 703 P.2d at 529. The State's knowing presentation of perjured testimony demands a new trial, as well as appropriate evidentiary hearings, discovery, and the appointment of counsel.

D. Claim Three: Marilyn Redmond's pretrial identification was unduly suggestive, inadmissible, and tainted her in court identification of Mr. Hooper such that it should have been precluded

The admission of pretrial identification testimony violates a defendant's rights to due process when "the circumstances surrounding the pretrial identification created a "substantial likelihood of irreparable misidentification," *Simmons v. United States*, 390 U.S. 377, 384 (1968), and when the government was sufficiently responsible for the suggestive pretrial identification to trigger due process protection. "It is the likelihood of misidentification which violates a defendant's right to due process. . . ." *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *see also State v. Bracy*, 145 Ariz. 520, 530–31, 703 P.2d 464, 474–75 (1985).

The *Biggers* court laid out a totality of the circumstances test for determining the reliability of an identification, directing that the court consider the "likelihood of misidentification" based on "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id*. at 199-200. The Supreme Court has also previously held unreliable "pretrial confrontations . . . so arranged as to make the resulting identifications virtually inevitable." *Foster v. California*, 394 U.S. 440, 443 (1969) (finding that putting petitioner in a lineup with two shorter men, followed by a one-on-one meeting with eye witness, and a subsequent lineup where petitioner was the only person from the first lineup to appear again was an unfair lineup procedure).

"Making a defendant the only common person in both a photo spread and a live lineup can be unduly suggestive." *State v. Lehr*, 201 Ariz. 509, 520–21, 38 P.3d 1172, 1183 (2002), *supplemented*, 205 Ariz. 107, 67 P.3d 703 (2003) (citing *State v. Via*, 146 Ariz. 108, 119, 704 P.2d 238, 249 (1985)). As in *Lehr*, Mrs. Redmond viewed a paper lineup and did not identify Mr. Hooper, or presumably anyone. *See Lehr*, 201 Ariz. at

521, 38 P.3d at 1183. Subsequently, she identified Mr. Hooper in a live lineup. Because the live lineup in Chicago otherwise comprised police officers, employees, and arrestees present in the Chicago Police precinct on that date, Mr. Hooper would have been the only person common to the paper lineup and the live lineup. *See id.* "This arrangement was arguably unduly suggestive." *Id.*

On direct appeal to the Arizona Supreme Court, it found that Mrs. Redmond's identification of Mr. Hooper was reliable:

> In the instant case, in light of Mrs. Redmond's ample opportunity to observe defendant at the time of the crime, her high level of attention at the time of the crime, and her good level of certainty at the lineup, Mrs. Redmond's identification of defendant fifty-three days after the crime was not unreliable.

Bracy, 145 Ariz. at 532, 703 P.2d at 476. Minimally, the level of certainty upon which Mrs. Redmond identified Mr. Hooper has come into question. As Dr. Geoffrey Loftus explains in his report, exposure to visual information in particular biases a lineup. (Exhibit W & X at 7–8.) The Court cannot know if Mrs. Redmond's level of certainty stems from her memory of the perpetrators or her memory of Mr. Hooper's photograph in the paper lineup. (*See* Exhibit W & X at 7–8.) Given Mrs. Redmond's inconsistent descriptions of her ability to identify the perpetrators, her different descriptions of the perpetrators, and her inability to identify Mr. Hooper in a paper lineup undermines the reliability of her determination. Further, that the State hid the paper lineup lends more weight to Mr. Hooper's position that Mrs. Redmond's identification was unreliable.

Admission of Marilyn Redmond's pretrial and in court identifications violated Mr. Hooper's due process rights. The admission of this evidence demands a new trial, as well as appropriate evidentiary hearings, discovery, and the appointment of counsel.

Conclusion

In light of the arguments above and the exhibits filed with this Petition, Mr. Hooper has demonstrated he is entitled to relief under Rule 32.1. The newly discovered evidence under 32.1(e) offers sufficient evidence to raise colorable claims as to all claims

presented herein. The Court should order that the State, including the Maricopa County Attorney's Office immediately provide the defense with unhindered access to the entirety of its files, and grant such other discovery which becomes necessary, and finally, grant an evidentiary hearing.

RESPECTFULLY SUBMITTED this 4th day of November, 2022.

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Proof of Service

I hereby certify that on November 4, 2022, an original and copies of the foregoing Petition for Post-Conviction Relief was electronically filed with:

Clerk of the Maricopa County Superior Court
Phoenix, Arizona 85003

And emailed to:

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No. 08-99024

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MURRAY HOOPER,
Petitioner-Appellant,

vs.

CHARLES L. RYAN, et al.,
Respondents-Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:98-CV-02164-SMM

PETITIONER-APPELLANT'S REPLACEMENT OPENING BRIEF

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STATEMENT OF THE CASE

Murray Hooper's case has been plagued with governmental misconduct from the outset. He was convicted and sentenced to death following a trial where prosecutors had a pattern and practice of hiding evidence and making excuses for their repeated misconduct. At the Arizona sentencing proceeding where Hooper was abandoned by counsel, he was sentenced to death based upon since-vacated prior Illinois convictions imposed by a corrupt judge. Following his Arizona sentencing, Hooper brought to light more evidence of prosecutorial misconduct. Although the Arizona courts recognized this pattern of misconduct, they did not remedy it.

Over the years, Hooper has watched his co-defendants obtain relief on the same constitutional infirmities he 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, however, unlike Cruz, Hooper was denied relief. Similarly, while co-defendant Joyce Lukezic obtained relief based on the State's misconduct and *Brady* violations (ER 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* ECF No. 22-1, Ex. A.)

For over thirty-six years, Hooper has been asking courts to take a long, hard

look at the unfairness of his trial.[2] Hooper filed pro se pleadings to supplement deficient counsel. When the courts denied investigative support, habeas counsel used personal funds to hire an investigator in an effort to adequately represent Hooper. (Declaration of Philip A. Seplow, *Hooper v. Lewis*, No. 91-cv-1495-PHX-SMM (D. Ariz. June 26, 1992), Doc. 31 ("1991 Dist. Ct.").) The time has come for a court to recognize that the justice system failed Murray Hooper.

A. The crime

On December 31, 1980, William 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). Redmond's wife, Marilyn, was shot in the head but survived. *Id.* That night, an anonymous caller told police that one of the assailants was African-American with a slim build and a wart on his nose, and within hours of the crime, a person matching this description was arrested with two associates nearby for the unlawful possession of weapons and drugs. (ER 949-51.) The men were never charged. (ER 1062-67.) Much of this information was not disclosed to Hooper.

On January 1, 1981, an anonymous caller, who subsequently revealed herself as Valinda Harper, contacted Phoenix police about the Redmond crime. This was

[2] To execute Hooper after so long on death row, largely in solitary confinement, violates the Eighth and Fourteenth Amendments. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari); *Smith v. Ryan*, 137 S. Ct. 1283 (2017) (Breyer, J., respecting denial of certiorari).

considered a major break in the case. (ER 1088-89.) Harper, a prostitute and Phoenix drug trade fixture, claimed to have information about the crimes, assailants, and co-conspirators.[3] (ER 309-10, 987-91.) Harper said that Robert Cruz hired Edward McCall, William Bracy, and Hooper to kill Redmond. (ER 307.) Cruz was allegedly connected to McCall through Arnie Merrill, a known fence and drug dealer. (ER 310, 988.) Harper stated that George Campagnoni, a mentally ill drug addict and burglar (ER 930-31, 955-57, 964, 970-71), may have been involved (ER 310), and that her roommate Nina Marie Louie, also a prostitute and drug user, knew about the murders. (ER 311, 317, 994-95). Harper gave police a case containing a gun and maps, which Harper said was McCall's. (ER 309, 1082-86.)

During their investigation, police identified and compensated four informants: Merrill, Louie, Harper, and Campagnoni. In exchange for their testimony, the four received significant benefits and immunity from prosecution for the Redmond/Phelps homicides and other crimes. These informants became the State's key witnesses.

B. The arrest

Nearly two months after the crime, Hooper was arrested by Chicago police for Illinois charges and the Arizona murders. (ER 1267-72.) The State's misconduct

[3] Harper later stated that police officers fed her information about the homicides. (ER 352.)

began early: on the way to the police station, officers beat Hooper and told him he did not deserve an attorney when he requested one.[4] Officers coerced Hooper into making statements, later suppressed at trial with the State's consent. (ER 1372, 1376, 1265, 1276-77.)

C. Pretrial events

McCall, Cruz, Bracy, Hooper, and Joyce Lukezic, another alleged co-conspirator, were indicted. Hooper and Bracy, both African-American, were indicted together on one count of conspiracy to commit first-degree murder; two counts of first-degree murder; one count of attempted first-degree murder; three counts of kidnaping; three counts of armed robbery; and one count of first-degree burglary. (ER 283.) The Arizona trial was delayed due to pending Illinois charges.[5]

Lukezic was prosecuted by Joseph Brownlee and Michael Jones of the

[4] An officer who arrested Hooper, Michael Hoke, was later granted immunity for testimony about Chicago police torturing suspects. *3 Cops Get Immunity in Torture Case*, Chi. Trib., Dec. 2, 2005. A federal court recognized that "beatings and other means of torture occurred as an established practice, not just on an isolated basis[.]" *United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999).

[5] Hooper was tried in Illinois before the Honorable Thomas Maloney. At the time of Hooper's trial, Maloney was actively taking bribes from defendants, and treated harshly defendants (like Hooper) who did not bribe him. *See United States v. Maloney*, 71 F.3d 645, 650-51 (7th Cir. 1995); *Bracy v. Gramley*, 520 U.S. 899, 901-02 (1997). Hooper was convicted and sentenced to death. *See State v. Hooper*, 703 P.2d 482, 494 (Ariz. 1985); (ER 252). These convictions were vacated due to a *Batson* violation, *Hooper v. Ryan*, 729 F.3d 782 (7th Cir. 2013); Final Judgment, *Hooper v. Ryan*, No. 10 C 1809 (N.D. Ill. Dec. 17, 2013), ECF No. 81.

Maricopa County Attorney's Office with the assistance of Investigator Dan Ryan. Lukezic's case was heard by Judge Rudy Gerber. During Lukezic's trial, evidence of prosecutorial misconduct came to light. The prosecution was threatening witnesses, discouraging them from interviews with defense attorneys, and giving them undisclosed benefits. (ER 1350-65.) As a result of the prosecution's conduct during Lukezic's trial, contempt charges were filed against Brownlee, Jones, and Ryan. (ER 1368-69.)

The same team that tried Lukezic prosecuted Hooper and Bracy before the Honorable Cecil Patterson. Grant Woods, a deputy public defender, was assigned to represent Hooper. (ROA 85.) Stephen Rempe, a private attorney, was appointed to represent Bracy. (ROA 102.)

The State's misconduct continued leading to Hooper and Bracy'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. (ER 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 altogether. (ER 1206, 1278-80.)

Additionally, in arguing pretrial motions, the State said that a Chicago attorney named Michael Green would testify that he was given money to pay to

Hooper for the Redmond crime, and that Hooper appeared to retrieve the payment. (RBER 358-62.) The State never called Green to testify, however. Police reports showed Green could not identify Hooper as the man who appeared.

"[M]assive, sustained publicity" focused on the case in the months before trial. *Cruz*, 857 P.2d at 1250 n.1; (ER 1249-50.)

D. The trial

1. Prosecutorial misconduct

The prosecution's unethical conduct persisted through trial. The prosecution violated court orders, made improper arguments to the jury, and continuously failed to disclose evidence.

When trial commenced, the State committed misconduct. During opening statements, Brownlee told the jury that Nina Marie Louie had previously identified Hooper and Bracy. (ER 1187-89.) Woods moved for a mistrial because of pending motions on excluding that identification. (ER 1188-89.) The court denied the motion but warned the prosecution: "If you overreach again, I am going to consider seriously citing you for contempt because that was clearly overreaching." (ER 1191.) The court eventually ruled this identification inadmissible because it was unduly suggestive. (ER 1002.) Woods again moved for a mistrial, which the court denied. (ER 1003.)

2. Prosecution Investigator Dan Ryan

Brownlee assigned Investigator Dan Ryan to the case. (ER 558.) Ryan had extensive contact with witnesses and used coercive tactics, including intimidating them and their friends and families (ER 725, 742, 745-47, 1366), giving them money (ER 745), and helping them obtain lenient plea deals in exchange for testimony (ER 752-55, 760-61, 928-29, 941, 955-56, 1001, 1382-88). Ryan told one witness that if he did not give a statement, he "would break both of his legs and make sure that his children were placed in a foster home where he would never see them again." (ER 1366.)

Ryan instructed one witness, Wally Roberts, to not cooperate with the defense. (ER 750.) Ryan allowed Roberts to review his statements to police but told Roberts to lie about this. (ER 739-40.) Ryan and Brownlee facilitated a meeting between Roberts and another potential witness, and Ryan gave Roberts a loaded gun. (ER 717, 749.) Roberts became so fearful of Ryan that before testifying in the Lukezic case, he demanded protection from Ryan. (ER 743-46.)

Ryan helped broker pleas and lenient penalties for other witnesses by falsifying presentence reports. After Ryan arrested Campagnoni (ER 962-63), he promised him a lenient plea with probation despite Campagnoni's involvement in a string of burglaries and the Redmond/Phelps murders (ER 927). Ryan took Campagnoni to his presentence interview and helped falsify his presentence report.

(ER 752, 758-59, 928-29, 941.) Campagnoni's extensive criminal conduct and time in a mental institution were not disclosed. (ER 756-58, 1382-83.)

Ryan's coercive tactics and the prosecution's misconduct led to contempt proceedings. The court ruled jurors not be told this. (ER 643-52, 729-30.)

3. State's case

The State theorized that Cruz wanted Redmond killed because Redmond was blocking a lucrative deal involving Las Vegas casinos. (ER 1183-84.) Cruz wanted to take over Redmond's interest in his business. (ER 1027.) The State claimed Cruz recruited Hooper, Bracy, and McCall to kill Redmond.

The State's case centered on Merrill. Merrill, according to the State, participated in all aspects of the crime except for carrying it out. Merrill helped plan the crime, provided transportation, and secured weapons. (ER 1035-45, 51.) He was the only source for much of the information necessary for the State's case against Hooper. The State also presented testimony from Louie and Campagnoni. These critical witnesses had every incentive to testify against Hooper. None came forward, but had to be tracked down and compensated for testifying. (ER 962, 977-79, 1005.)

At trial, Marilyn Redmond identified Hooper and Bracy as two of the assailants. (ER 807-906.) However, Redmond's early descriptions of the assailants were inconsistent and vague. Redmond initially indicated she could not identify the intruders, since she was too afraid to look at them. (ER 877, 949; RBER 420-21.)

She described the perpetrators as three black men, some wearing masks. (ER 1147, 1171-79, 1289-90.) Later, she stated that two black men and one white man committed the crime. (ER 1174, 1177, 1180.) Redmond stopped referencing the masks and began describing the suspects as clean-shaven. (ER 1148-49.) Redmond never described anything else about the assailants' facial features. (ER 1160, 1174-76.) Redmond noted that one of the black men wore a gold chain and another wore a leather-like jacket. (ER 1114, 1123-24.) Despite her varying descriptions, six weeks later, Redmond was flown to Chicago to identify Hooper and Bracy in a police station lineup. (ER 710-15, 862-65.)

Redmond was met at the airport by Ryan, Brownlee, and Chicago police. (ER 1293.) All witness identifications in this case were recorded, except for this one. (ER 1119-21.) Officers gave inconsistent descriptions of their roles in the lineup, the lineup procedure, and the timing of Redmond's identification. (ER 733, 1141, 1150, 1291-97.) Redmond did not immediately identify anyone and only after she returned from a private office did she state that one assailant, Hooper, was present in the lineup.[6] (ER 1139.) By the trial, however, Redmond appeared confident in her ability to identify the intruders.

[6] Phoenix Detective Larry Martinsen accompanied Redmond and took notes during the lineups (RBER 402-03), however, these notes were not disclosed, despite defense requests (ER 496-97), and could have impeached Redmond's testimony. Hooper was denied counsel at the lineup. (RBER 339-40.)

Redmond said the intruders did not wear gloves. (ER 873, 889.) Hooper's fingerprints were not found at the scene (ER 1077), and no physical evidence was presented to corroborate Redmond's testimony.

The State's star witness, Arnie Merrill, was a Valium-dependent drug dealer, fence for stolen goods, and mastermind of burglaries. (ER 315, 334, 919, 964-65, 1073.) His own brother did not trust Merrill and noted his long history of psychiatric problems. (ER 1366.) In exchange for testimony, Merrill only had to plead to one of his many burglaries and thefts, and was guaranteed immunity for all other crimes including arson, armed robbery, and burglaries. (ER 1071-74.) 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. (ER 1014-23, 1035-45, 1051.) Despite his key role, the State absolved Merrill of responsibility for the deaths. (ER 1071-73.)

Similarly, Campagnoni testified he was with Hooper and Bracy at Merrill's house on New Year's Eve in exchange for another sweetheart deal. (ER 925, 955-59, 967-68.) Campagnoni formed a burglary ring with Merrill, McCall, and others and committed a spree of burglaries in October 1980. (ER 956-57, 964-65.) The State only had Campagnoni plead to one burglary and one theft. (ER 731-32, 925, 1384.) Although Campagnoni possessed property stolen from the Redmonds (ER 960-61, 1069-70), he was given immunity (ER 922-23).

Nina Marie Louie was a prostitute and sold drugs. (ER 991-98.) Louie said she saw Hooper and Bracy at her apartment in Phoenix on New Year's Eve. (ER 976.) The State compensated Louie for her testimony. (ER 685-86, 980-84.)

Despite the State's elaborate theory, at the close of the State's case there was no evidence apart from Redmond's questionable identification and the compensated co-conspirator testimony that Hooper and Bracy were involved in the crime or were in Phoenix on New Year's Eve. In fact, as the defense noted, Hooper and Bracy were not together on New Year's Eve, and were in Chicago.

4. The defense

Hooper has maintained his innocence and does so today. His defense was that he was not in Phoenix when the crime was committed. Multiple people saw Hooper and Bracy in Chicago before, during, and after the time of the crime. Mary Jean and Michael Wilson were in a tavern with Hooper midday, and Nelson Booker celebrated New Year's Eve at a club with Hooper. (ER 786-88, 805.) George Barron saw Bracy that night when he towed Bracy's car. (ER 784.) Bracy's wife and cousin were present and remembered Bracy getting his car towed. (ER 765-72.) Later that night, Bracy and his son brought food to a friend in jail. (ER 763-64.)

5. Hooper's convictions

On December 24, 1982, the jury convicted Bracy and Hooper on all counts. Both were then arraigned on prior convictions. Defense counsel Woods waived a

jury trial on Hooper's prior Illinois convictions. (ER 669.) Within a few days, Allen Gerhardt, another county public defender, appeared as counsel for Hooper, for reasons not in the record. Woods was absent for the entire aggravation/mitigation hearing. Gerhart moved to withdraw Woods's jury trial waiver on the prior convictions, but the court denied the request. (ER 656-59, 665.)

At the trial on the priors, the prosecutor in Hooper's Illinois case testified regarding Hooper's Illinois convictions. (ER 659-61.)

E. Aggravation/mitigation hearing

At the aggravation/mitigation hearing, the State focused on Hooper and Bracy's Illinois convictions. (ER 640.) Gerhardt presented no mitigation and did not counter the State's aggravators.

The day the judge was to announce his findings on aggravation/mitigation and sentence Hooper, Woods reappeared and asked to address the court. Woods made a general plea for leniency based on the judge's moral duty and argued the death penalty was unnecessary because of Hooper's Illinois sentences. (ER 622-25.)

The court stated: "Hooper neither presented any evidence, nor had a statement to make concerning mitigating factors or any other facet of his presentation in court." (ER 628.) The court found five aggravators: 1) convicted of another offense where life or death was imposable; 2) convicted of a felony involving threat of violence; 3) grave risk of death of persons in addition to the victims; 4) expectation of pecuniary

gain; and 5) especially heinous, cruel, or depraved.[7] (ER 629-32.) As discussed below, three of these have been voided. The court found no mitigating circumstances sufficiently substantial to warrant leniency and sentenced Hooper to death. (ER 625-26, 633-34.)

F. Motion to vacate

After Hooper's sentencing, new evidence of undisclosed benefits to witnesses was discovered. Almost two months later, co-defendant Joyce Lukezic's motion for a new trial was granted because the State failed to disclose car payments the State's investigator Dan Ryan made for Merrill's wife, Kathy; the delivery of drugs to Merrill while he was in custody; and the alteration of Merrill's and Campagnoni's presentence reports. (ER 617-18.) Based on these revelations, and on the court granting Lukezic a new trial because of them, Hooper filed a motion to vacate the judgments. (ER 614-15.)

The trial court held an evidentiary hearing on this motion. (ER 547.) Hooper raised additional undisclosed facts that were discovered: the Merrills had visits outside of jail, the visits were long in duration, and other relatives were present at some visits. (ER 554-55, 561-64, 609-13.) Three witnesses were key in describing the State's misconduct: Ryan, Kathy Merrill, and defense counsel Woods.

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[7] *See* Arizona Revised Statutes (hereinafter "A.R.S.") § 13-703(F)(1), (2), (3), (5) and (6). This brief cites the version of the A.R.S. in place at the relevant time. In 2008, Arizona's capital sentencing statute was renumbered at A.R.S. § 13-751.

1. Ryan

Ryan testified that in 1982, he made Kathy Merrill's car payments. (ER 575.) Categorically denying using his own money, Ryan claimed Kathy Merrill would send him money that he would use to make the payments. (ER 578, 595.) Deputy County Attorney Brownlee asserted: "there is absolutely no indication other than bald innuendo by various defense counsel in trying to smear the state that anyone's money was used other than Cathy [sic] Merrill's." (ER 597.) This was false.

Ryan took Merrill to visit his wife and other people for several hours at a time. (ER 561-62, 569-70.) To facilitate visits between the Merrills, Ryan dropped Merrill off at various locations to eat, talk, and have sex. (ER 564-66, 608, 581.) When Ryan testified the county paid for Kathy Merrill to stay at hotels where Merrill would visit her, the court was shocked to discover this information. (ER 584-88.)

These visits were a well-established routine from when Merrill was taken into custody throughout 1982. (ER 561, 574-75.) Ryan did not check for weapons or drugs before returning Merrill to jail. (ER 572-73.) Nor did Ryan get permission from the court to release Merrill to meet his wife. (ER 564, 574-75, 589.) Ryan acknowledged he facilitated the visits as a favor to Merrill, to keep a witness happy. (ER 589.)

During the second day of Ryan's testimony, it became apparent he was testifying based on undisclosed records regarding payments for Merrill's wife's

lodging. (ER 541-42.) As a result, the defense moved for disclosure of the materials. (ER 542.) The court expressed frustration:

> [W]e are not going [to] play any games of hide and seek. If he is coming up here testifying on material which rightfully should be disclosed, then he should make it available and he should make it available immediately, if not before his testimony on it, so that they will have the ability to examine them. . . . You know, we are getting back in the same old routine we were in last year this time and I'm just not going to tolerate it.

(ER 543-44.)

The court stated it had "a serious, serious concerning [sic] about other revelations of this nature not having been made," and it had "expressed to the state's attorneys present that it wanted very strongly to know whether or not there were any other items" regarding Kathy Merrill that had not been disclosed. (ER 544-45.) As a result of the new disclosure, the court ordered a recess. (ER 545.) The court stated: "T]he revelations seem to never end. And I wanted the record perfectly clear that I asked in no uncertain terms if there were any other things which the court could expect to come out at the recessed hearing in this matter." (ER 546.)

At the next hearing, still more was discovered about Ryan's payments to GMAC, which financed Kathy Merrill's car, and other payments to her. She received more than $3,000. (ER 257-58.)

At an interview with the defense the week before the hearing, Ryan said he did not recall Kathy Merrill ever giving him cash. (ER 507-08.) At the hearing,

however, Ryan specifically remembered receiving cash at least twice. (ER 508, 511.) Ryan's recollection was refreshed on the day the County Attorney's Office received records of Ryan's payments to GMAC. (ER 507-08.)

Ryan testified repeatedly he never advanced money to Kathy Merrill. (ER 513-17, 595.) However, at the hearing, Ryan was confronted with bank records showing he made a GMAC payment from his personal funds. (ER 509-11.) Ryan admitted he may have made the GMAC payment before receiving money from Kathy Merrill. (ER 512, 517.)

Ryan also testified that Arnie Merrill was permitted to make at least twenty-two long-distance calls to his wife at county expense.[8] (ER 518.) Ryan testified that he did not give Merrill any special benefits and only gave him what he was entitled to as a prisoner. (ER 519.) The court expressed incredulity, asking Ryan how many prisoners he allowed to be alone with their wives while in custody with outstanding charges. (ER 521.) Later, a supervisory County Attorney testified that this case was the only instance where he was aware of an investigator handling witnesses' relatives' money or loaning witnesses money. (ER 487-90.)

2. Kathy Merrill

When asked about the car payments, Merrill contradicted her prior statements.

[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.

In an interview with defense attorneys two weeks before the continued hearing, she claimed she gave Ryan a $1,000 money order at the end of September 1981. (ER 527-28.) At the hearing, she claimed she gave Ryan $414 in cash at the end of August or early September 1981.[9] (ER 526, 529.)

She admitted that prosecutors had shown her the GMAC records the morning of the hearing. (ER 533.) Thirty minutes later, she changed her testimony and claimed she had not seen the documents that morning. (ER 534.) Throughout the hearing, Merrill continued to contradict her previous statements, telling a story better fitting the records discovered by the defense. (ER 522-24, 535-37.)

3. Woods

Woods, Hooper's trial lawyer, testified about the benefits not disclosed to him at the time of trial. (ER 491-95.)

Woods believed that the disclosure of the evidence presented during the motion to vacate proceedings would have affected the verdict. (ER 497.) The defense theory at trial was that prosecutorial misconduct had tainted Redmond's identification of Hooper. (ER 496-97.) Evidence that would have impeached Ryan's credibility and cast doubt on his conduct with witnesses was essential to this theory. (ER 497.) Woods believed such evidence would have been powerful since the

[9] This testimony also contradicted Kathy Merrill's statements in a deposition taken during Lukezic's motion for new trial. (ER 607.)

State's case for guilt was based on circumstantial evidence. (ER 501.)

G. The decision

While ultimately denying the motion to vacate, the court found that the prosecution had failed to disclose benefits to witnesses. (ER 257-61.) The court acknowledged that prosecutorial misconduct had pervaded Hooper's trial: "at every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit." (ER 260-61.) However, the court found that the trial's outcome would not have been different had the evidence been disclosed.[10] (ER 259-60.)

When provided with nearly the same evidence of non-disclosure, the judge in Lukezic's case vacated her conviction. (ROA 1167.) At a retrial, Lukezic was acquitted, as she could present the previously withheld evidence. (ROA 1487.)

H. Direct appeal

Hooper appealed. His appeals were consolidated with Bracy's.[11] (ER 605.)

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[10] The judge threatened a mistrial but failed to grant one at least twice at trial. (ER 1190-91; SSER, Ex. A at 253-57.) He noted the State's improper conduct repeatedly. (ER 1134-37; RBER 313-36, 343-48, 382-401.)

[11] From indictment through federal proceedings, Hooper and Bracy's cases were often considered and ruled on together. (ER 153, 232, 376, 1213.) They unsuccessfully sought to sever their cases and the State repeatedly opposed. (RBER 366-72, 407-08, 412, 415-17, 422-24, ROA 345, ROA 755, ROA 802 at 4, ROA 808, ROA 859, Tr. 11/30/82am at 5-11.)

On appeal, Hooper was represented by Alan Gerhardt, who represented Hooper during sentencing and post-trial motions. Shortly after oral argument, Gerhardt withdrew to take a position in the County Attorney's Office. (Direct Appeal ("DA") Doc. 51.) Another lawyer was appointed. (*See* DA Doc. 56.)

The Arizona Supreme Court affirmed Hooper's convictions and death sentences, despite noting its disapproval of the prosecution's actions. *Hooper*, 703 P.2d 482; (ER 231-55); *see also Bracy*, 703 P.2d 464, 470-71, 474. The court vacated the (F)(3) aggravator (grave risk of death to others), leaving four aggravators. *Hooper*, 703 P.2d at 494; (ER 253); *Bracy*, 703 P.2d at 481.

I. State post-conviction proceedings

Following the denial of his appeal, Hooper filed a pro se post-conviction relief petition in 1986. (ER 468-76.) Philip Seplow was appointed to represent Hooper and filed a twelve-page supplemental petition relying mainly on the arguments in Hooper's pro se petition. (ER 454-65.) Seplow noted he was having difficulty accessing the entire record. (ER 454.) Seplow filed multiple supplements. (ER 450-53.)

Hooper's and Bracy's post-conviction proceedings were considered together. The post-conviction court, presided over by the trial judge, summarily denied the majority of Hooper's claims. (ER 219-25.) The court ordered a hearing on the ineffective-assistance-of-counsel claim alleging Hooper's defense was adversely

affected by Bracy's counsel, who was abusing drugs and alcohol during trial and engaged in sexual activity with a potential witness. (ER 225, 447, 449.) After a status conference, the court reconsidered and summarily dismissed the petitions. (ER 217-18.) Hooper's petition for review was denied. (ER 215.)

In 1992, Hooper filed a second post-conviction petition. (ER 385-89.) Bracy had recently filed a second post-conviction petition, and Hooper joined in all claims Bracy raised. (ER 390.) Seplow continued to represent Hooper in post-conviction proceedings, but Seplow alleged he himself was ineffective for failing to raise an ineffective-assistance-at-sentencing claim during Hooper's first post-conviction proceedings. (ER 382-83.) He argued that sentencing counsel was ineffective for failing to present mitigation evidence. (ER 378-81.)

The post-conviction court held an evidentiary hearing on Rempe's misconduct, and denied relief despite finding that Rempe slept with a potential witness. (ER 175, 195-99, 362.) The court deemed several other claims precluded. (ER 165, 173-75, 205-06.) Hooper filed a motion for reconsideration and a petition for review. (ER 355, 357.) Both were denied. (ER 150-52.)

In 1996, Hooper filed a third post-conviction relief petition that was denied without a hearing. (ROA 1741.) His petition for review (ROA 1771) was also denied (ER 145).

In 1999, Hooper filed a fourth post-conviction relief petition pursuant to an

order by the district court based on challenges to the Illinois convictions upon which Hooper's Arizona death sentences were partially based. (*See* Dist. Ct. ECF No. 106-1, Ex. A.) Hooper supplemented his petition with a claim based on *Ring v. Arizona*, 536 U.S. 584 (2002). (*See* ER 142.) The post-conviction court denied Hooper's petition (ER 141-43), and the Arizona Supreme Court denied Hooper's petition for review (ER 140).

In 2017, Hooper filed a fifth post-conviction petition. He claimed the State knowingly presented false testimony, by never calling attorney Michael Green to testify despite representing to the trial court that it would, and also regarding Marilyn Redmond's identification of Hooper. The court denied the claims on procedural grounds and on the merits. (RBER 045.) Hooper filed a petition for review in the Arizona Supreme Court, presently pending.

J. Federal habeas proceedings

Hooper filed a federal habeas corpus petition in 1991. (1991 Dist. Ct. Doc. 1.) The district court appointed Philip Seplow, who was state post-conviction counsel and admitted he was ineffective in those proceedings, as federal habeas counsel. (1991 Dist. Ct. Doc. 8.) Hooper acknowledged some claims raised in his habeas petition were unexhausted. (1991 Dist. Ct. Doc. 25 at 3-9.) In 1992, when Hooper filed his second post-conviction petition, the district court dismissed the habeas petition without prejudice for Hooper to exhaust state remedies. (1991 Dist. Ct. Doc.

39.)

In 1996, while Hooper's third state post-conviction petition was pending, Hooper filed a second-in-time petition for federal habeas corpus relief. (*Hooper v. Stewart*, No. 96-cv-00987-PHX-SMM (D. Ariz.), Doc. 1 ("1996 Dist. Ct.").) This petition was dismissed without prejudice to allow Hooper to exhaust claims raised in his state petition. (1996 Dist. Ct. Doc. 2.)

In 1998, Hooper filed the petition for federal habeas corpus relief that commenced the instant proceedings. (Dist. Ct. Doc. 1.) Seplow continued to represent Hooper. Thomas Phalen was appointed as co-counsel. (Dist. Ct. Doc. 7.) In his amended petition, Hooper raised thirty-nine claims. (Dist. Ct. Doc. 29.) Claim 16 challenged the validity of Hooper's death sentences because they were based partially on prior Illinois convictions tainted by judicial corruption. (Dist. Ct. Doc. 29 at 9.) The district court found this claim unexhausted and ordered Hooper to withdraw the claim to exhaust it in state proceedings. (ER 137.) The district court ordered Hooper's federal habeas proceedings stayed while Hooper litigated the claim in state court. (ER 137.)

Pursuant to this order, Hooper filed a fourth post-conviction relief petition in Arizona court in 1999. (*See* Dist. Ct. ECF No. 106-1, Ex. A.) The Arizona post-conviction court stayed proceedings due to the pendency of a post-conviction relief petition in Illinois challenging his Illinois convictions. (ER 127.) While the case

remained stayed in the Arizona post-conviction court, the district court inexplicably vacated its stay in habeas proceedings. (ER 127.) The district court subsequently denied Hooper's motion to reconsider its ruling and motion for an interlocutory appeal. (ER 126, 292-95.) When the Illinois post-conviction court and then Arizona courts denied relief, Hooper attempted to amend his habeas petition with the newly exhausted claim. (Dist. Ct. ECF Nos. 102, 106.) The district court denied his motion to amend. (ER 083-95.)

Hooper requested the assistance of an investigator. (Dist. Ct. Doc. 68.) The court denied this request. (Dist. Ct. Doc. 70.) Hooper filed a motion for evidentiary development (Dist. Ct. ECF No. 79), which the court denied (ER 096-125). The district court denied relief on all claims. (ER 003-82.)

Hooper filed a timely notice of appeal from the denial of habeas corpus relief in 2008. (ER 001.) The parties filed their briefs in this Court. (ECF Nos. 22, 33, 39.) Hooper then filed a motion requesting this Court stay the appeal and remand his case to the district court in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), to permit him to litigate habeas Claim 4: whether the ineffective assistance of his post-conviction attorney constituted cause for his failure (as found by the district court) to exhaust his ineffective-assistance-of-sentencing-counsel claim in his federal habeas petition. (ECF No. 61.)

While the request was pending, the Seventh Circuit ruled on Hooper's

challenges to his Illinois convictions and sentences, holding that "the Supreme Court of Illinois made at least four errors that were unreasonable applications of the Supreme Court's decisions, if not outright contradictions of them." *Hooper v. Ryan*, 729 F.3d 782, 785 (7th Cir. 2013) (relying on 28 U.S.C. § 2254(d)). The court determined Hooper was entitled to an evidentiary hearing on his claim based upon *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id*. at 787. The State of Illinois declined its opportunity to offer nondiscriminatory reasons at a hearing. (*See* Mot. for Entry of Final Judgment, *Hooper v. Ryan*, No. 10-CV-1809 (N.D. Ill. Dec. 12, 2013), ECF No. 76-1.) As a result, the district court issued a writ of habeas corpus and vacated Hooper's Illinois convictions and sentences. (Final Judgment, *Hooper v. Ryan*, No. 10-CV-1809 (N.D. Ill. Dec. 17, 2013), ECF No. 81.)

The issuance of the writ invalidated two of four remaining aggravators in the Arizona case. Hooper then requested this Court remand his case to the district court with instruction to grant the writ on his claim that his sentences were based on invalid prior convictions. (ECF No. 76-1.)

This Court granted Hooper's motions. (ECF No. 80.) The parties filed their district court briefs. (Dist. Ct. ECF Nos. 147, 152, 157.) As to Claim 4, the district court held that, despite *Martinez*, the claim remained procedurally barred. (RBER 022.) As to Claim 16, the district court found that despite five aggravators being reduced to two, amendment of the petition would be futile. (RBER 027.) The court

issued a COA on both claims. (RBER 030.) This Court allowed filing of replacement briefs. (ECF No. 86, 98.)