No. 22–6055

In the Supreme Court of the United States

MURRAY HOOPER,

Petitioner,

v.

STATE OF ARIZONA

Respondent.

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

BRIEF IN OPPOSITION

CAPITAL CASE

EXECUTION SCHEDULED FOR NOVEMBER 16, 2022 AT 10:00 A.M. (MST)/12:00 P.M. (EST)

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Supreme Court err by denying relief on a *Brady* claim that was premised entirely on a misstatement in a prosecutor's letter that was immediately clarified where the claim had "no evidentiary support and no basis in fact"?

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STATEMENT OF THE CASE

A. *Hooper's crimes.*

On New Year's Eve 1980, Hooper, William Bracy, and Ed McCall forced their way at gunpoint into the home of Pat Redmond and his wife Marilyn Redmond. *Hooper v. Shinn (Hooper II)*, 985 F.3d 594, 599 (9th Cir. 2021). Pat, Marilyn, and Marilyn's mother, Helen Phelps, were inside preparing for a holiday dinner. Hooper and the other two intruders demanded valuables, forced the victims to lie face down on the bed in the master bedroom, and then bound and gagged the victims. The intruders then shot each victim in the head and slashed Pat Redmond's throat. Pat and Helen died, but Marilyn survived. *Id.*

Robert Cruz, the head of a Chicago crime organization, had hired the three perpetrators to kill Pat Redmond because Cruz wanted an interest in Pat's business but Pat had rejected Cruz's business offers. *Id.* at 600. Cruz first offered Arnold Merrill $10,000 to kill Pat, but Merrill refused him. *Id.* Cruz then flew Hooper and Bracy to Phoenix from Chicago, where they lived, to carry out the crime. *Id.* Merrill assisted by driving Hooper and Bracy around Phoenix, including to collect money from Cruz and to a gun store to obtain the murder weapons, letting Hooper and Bracy stay at his home for a period of time, and giving Bracy directions to Pat's home. *Id.* at 600–01. Immediately after the murders, Hooper, Bracy, and McCall went to Merrill's home before Hooper and Bracy were driven to the airport to fly back to Chicago. *Id.* at 601.

The day after the murders, McCall admitted to two women, Valinda Lee Harper and Nina Marie Louie (whom Merrill had introduced to Hooper and Bracy before the murders and in whose apartment the killers had been before leaving to commit the murders), how the murders had been committed, stating that it was a "contract … hit, not a robbery," and that Hooper had slashed Pat's throat and shot Marilyn. *Id.* McCall also described the crimes to Merrill. *Id.* On January 1, 1981, Harper called the police and told them Hooper, Bracy, and McCall had committed the murders. *Id.* at 601–02.

Marilyn initially told a responding police officer that "[t]hree black men came in and robbed us," but then stated that two of the intruders were black and one was white. *Id.* at 601. She also told police that one of the black males wore a tan leather jacket with dark pants. *Id.* Fifty-three days after the murders, Marilyn flew to Chicago where she identified Hooper and Bracy in lineups. *Id.* at 602.

B. *Hooper's Trial.*

Hooper and Bracy were each charged with conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary. *Id.* They were tried together. *Id.*

"The prosecution presented overwhelming evidence of Hooper's guilt." *Id.* at 603. "Marilyn provided very specific details about her lengthy encounter with the murderers," and identified Hooper, Bracy, and McCall as the killers. *Id.* "Her in-

court identifications were certain, and she did not waiver when the defense suggested she could be mistaken." *Id.*

Louie testified that she met Hooper and Bracy in December 1980 and that she overheard Bracy say that "he had a big job to do" for $50,000 and that "it wasn't going to be very pretty." *Id.* Hooper, Bracy, and McCall were at her apartment on New Year's Eve armed with guns, and Bracy said that they had "some business to take care of." *Id.* at 603–04. The next day, Louie testified, McCall came to her apartment and told her Marilyn was shot in the back of the head (not the face as a newscaster stated), that the victims were taped rather than tied up, and that only Pat's throat was slashed. *Id.* at 604. He also said that all three men wore gloves and that Hooper had shot Marilyn and cut Pat's throat. *Id.* Louie's testimony was corroborated by receipts found in McCall's vehicle for the purchase of three pairs of gloves and tape the day of the murders, testimony that a vehicle matching McCall's was seen near the Redmond home around the time of the murders, and testimony that Harper called police the day after the murders and implicated Hooper, Bracy, and McCall. *Id.*

Another witness, George Campagnoni, testified that on New Year's Eve he saw Merrill give Bracy a piece of paper with directions to the Redmond home and Pat's business and that he saw Hooper, Bracy, and McCall later that evening at Merrill's home with jewelry, "some of which looked very similar to a ring and watch owned by [Pat] Redmond." *Id.*

Merrill also testified. He explained Cruz's plan to have Redmond killed and said he refused Cruz's offer to kill Redmond for $10,000. *Id.* He described Hooper and Bracy's first trip to Phoenix in early December, during which he saw Cruz give the pair a stack of cash, took Hooper and Bracy to a gun shop where they picked up weapons (including a knife that looked like a knife found at the crime scene), and was present for Hooper's attempt to shoot Redmond from a car window which Merrill foiled by turning the vehicle. *Id.* Merrill also testified that, on December 30, he picked up Hooper and Bracy from the Phoenix airport at Cruz's direction and verified the addresses for Redmond's home and business. *Id.* at 605.

Merrill testified that Hooper, Bracy, and McCall came to his home at about 8:30 p.m. on New Year's Eve and had items (including a watch, ring, and gun holster) that may have come from the Redmond home. *Id.* McCall told him several days later that McCall, Hooper, and Bracy had committed the crimes at the Redmonds' home. *Id.*

In addition to these witnesses, the State presented other evidence, including testimony from employees of Pat Redmond's business who saw Cruz touring the company in 1980; testimony of a pilot whom Cruz hired on occasion who testified that in 1980 he heard Cruz say he wanted to take over a printing business and would have to "get rid of" an uncooperative business partner; testimony from a witness who purchased two tickets at Cruz's direction from Phoenix to Chicago for a flight on New Year's Eve and delivered them to Merrill's home; telephone records that supported that Hooper and Bracy were in Phoenix during the murders, rather

than Chicago; and evidence from which the jury "could infer that Hooper possessed both the murder weapon and the knife that was used to slash Redmond's throat." *Id.* at 606.

In their defense, Hooper and Bracy presented several alibi witnesses:

> Hooper's witnesses included Mary Jean and Michael Wilson, two friends of Hooper's brother, who testified that they had seen and spoken with Hooper on the day of the murders at a flea market in Chicago. Nelson Booker, another friend of Hooper's brother, testified that he had seen and spoken with Hooper at a New Year's Eve party at a Chicago club.

Id. at 608. "The jury did not believe the alibis." *Id.* at 621 n.20. Moreover, "[e]vidence that Hooper and Bracy were both in Phoenix on New Year's Eve, and thus, that they had created fake alibis, provided additional evidence of Hooper's guilt." *Id.* at 621.

The jury found Hooper and Bracy guilty of all charged counts. After conducting the necessary sentencing-related hearings, the trial court concluded that Hooper should be sentenced to death for the two first-degree murder convictions. *Id.* at 609–10.

C. ***Subsequent proceedings.***

Hooper spent the next four decades challenging his convictions and sentences in both state and federal court. First, the Arizona Supreme Court affirmed Hooper's convictions and death sentence on direct appeal. *State v. Hooper (Hooper I)*, 703 P.2d 482 (Ariz. 1985). Then, from 1986 through 2017, Hooper filed five petitions for postconviction relief. *See Hooper II*, 985 F.3d at 612. None was successful. Hooper

also filed a federal habeas petition in 1998, and that proceeding remained pending until the Supreme Court denied certiorari earlier this year. *See Hooper v. Shinn*, 142 S. Ct. 1376 (2022); *Hooper II*, 985 F.3d at 613.

Hooper spent the next four decades challenging his convictions and sentences in both state and federal court. First, the Arizona Supreme Court affirmed Hooper's convictions and death sentence on direct appeal. *State v. Hooper (Hooper I)*, 703 P.2d 482 (Ariz. 1985). Then, from 1986 through 2017, Hooper filed five petitions for postconviction relief. *See Hooper II*, 985 F.3d at 612. None was successful. Hooper also filed a federal habeas petition in 1998, and that proceeding remained pending until the Supreme Court denied certiorari earlier this year. *See Hooper v. Shinn*, 142 S. Ct. 1376 (2022); *Hooper II*, 985 F.3d at 613.

On August 26, 2022, the State filed a motion for warrant of execution in the Arizona Supreme Court, and on October 12, 2022, the Arizona Supreme Court issued a warrant of execution, with an execution date of November 16, 2022. On October 31, 2022, 19 days after the warranted issued, and only 16 days before his scheduled execution, Hooper filed his sixth petition for post-conviction relief, which presented claims of newly discovered evidence under Rule 32.1(e) and actual innocence under Rule 32.1(h). In his first claim, Hooper argued that the report of Geoffrey Loftus, an eyewitness identification expert, constituted newly-discovered evidence. His actual innocence claim was based on Loftus's report and other evidence he contended undermined Marilyn Redmond's identification of him as one of the assailants, trial evidence regarding the three alternative suspects, allegations

of prosecutorial misconduct that were litigated at trial, trial evidence impeaching three of the State's witnesses, a reassertion of the alibi he presented at trial, and an argument that the evidence was insufficient to support the A.R.S. § 13–751(F)(5) aggravating circumstance.

Several days later, Hooper filed another petition arguing that the State's letter to the Arizona Board of Executive Clemency revealed that the State had withheld information relating to Marilyn's identification of Hooper. Hooper argued

> 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.

Pet. App. A at 8.

At Hooper's clemency hearing, however, the State began its presentation to the Board by stating, "I made an error in that statement." *Id.* at 10. The State then explained 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.

Id. at 10.

The State also explained to the clemency board that "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.'" *Id.* at 11.

The postconviction court held an evidentiary hearing on other claims not at issue here. At the hearing, however, the State avowed that Marilyn Redmond had not been shown a printed lineup prior to her identification of Hooper and that there was no evidence that any such lineup existed. Pet. App. at 12, 85–86.

After the hearing, the postconviction court issued a decision finding that the claims Hooper raised were not colorable and dismissing Hooper's petition. Pet. App. 16–22. The court specifically found that Hooper's claims related to the purported paper lineup lacked a factual basis:

> 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.

Pet. App. at 22.

Hooper petitioned for review to the Arizona Supreme Court. Pet. App. 3–4. That court denied relief, finding that "the superior court's factual findings and legal analysis that [Hooper's] claim lacks a factual basis are not an abuse of the court's discretion." *Id.* at 11. The Arizona Supreme Court found that there was no suppressed photo lineup:

> As the superior court found, [Hooper] 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.

Id. at 9.

Further, the court found based on its review of the record, "that [Hooper'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*." *Id.* at 11–12 (emphasis added).

Hooper's petition for writ of certiorari and an accompanying application for stay of execution followed.

SUMMARY OF ARGUMENT

Hooper's petition rests on the premise that an inadvertent misstatement in a prosecutor's letter established a *Brady* and *Napue* violation, in spite of the State's almost immediately clarification of the misstatement on the record before the Arizona Board of Executive Clemency and in an avowal in the Maricopa County Superior Court. The Arizona Supreme Court thus correctly denied relief after finding that Hooper'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." Pet. App. at 11–12.

REASONS FOR DENYING THE PETITION

Hooper's petition rests on the premise that the State in his case "has admitted that material exculpatory evidence exists," i.e., a photo lineup in which the surviving victim failed to identify him. *See* Petition at 15. That premise, however, is based on an inadvertent misstatement made by a prosecutor that was clarified, both on the record before the Arizona Board of Executive Clemency and in an avowal in the Maricopa County Superior Court. Of course, a criminal defendant presents a colorable *Brady* claim by establishing that "[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). Here, however, the Arizona Supreme Court found that there was no evidence that the State suppressed evidence and that Hooper's repeated assertion to the contrary had "no evidentiary support and no basis in fact." Pet. App. at 11–12.

Hooper argues that the state court "turned *Brady* and *Napue* on their heads by allowing the state to ignore its obligation under this Court's long-standing precedents." Petition at 15. But once again, there is no evidence whatsoever in the record that the State has ignored its obligation to disclose exculpatory evidence. The state courts correctly denied relief because Hooper's claims lack any factual basis. His claim rested entirely on an inadvertent misstatement in the State's letter to the Arizona Board of Executive Clemency. Yet the State explained to the

Board of Executive Clemency and avowed to the postconviction court that the statement was erroneous and there was no paper/photo lineup involving Hooper. Hooper's contention that the State failed its obligation under *Brady* and—and the serious allegations of misconduct and unethical misdeeds he continues to level against multiple individuals in support of that claim—had no basis in fact and no evidentiary support. As a result, Hooper has failed to demonstrate that the Arizona Supreme Court "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or "an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Instead, the Arizona Supreme Court simply denied relief on a claim that had "no evidentiary support and no basis in fact." Pet. App. 11–12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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