

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Samuel W. Swoopes,)	CV-93-471-TUC-DCB
)	
Petitioner,)	ORDER
)	
vs.)	
)	
Charles R. Ryan, et al.,)	
)	
Respondents.)	

This action was reversed and remanded by the Ninth Circuit Court of Appeals for what appeared to be an incorrect application of the relevant law at the time. *Swoopes v. Ryan, Memorandum*, No. 11-16918 (August 13, 2014). Petitioner filed his original federal petition in 1993, before the enactment of the AEDPA. The pre-AEDPA standard is deference to factual findings underlying a determination by the state court. *Mayfield v. Calderon*, 229 F.3d 895, 901 (9th Cir. 2000); 28 U.S.C. §2254(d)(1966). Petitioner urges this Court to review the legal issues without deference to the state court (de novo), but give deference to the state court factual findings on the merits and grant

the habeas petition.¹

BACKGROUND

Petitioner was convicted after a jury trial of first-degree burglary, sexual assault, aggravated robbery, three counts of armed robbery, and three counts of kidnapping. The trial court imposed a combined sentence totaling 42 years. At trial, the state presented evidence that Petitioner and two accomplices committed an armed home invasion. Petitioner was the only one of the three whose face was uncovered. The main issue at trial was identification. Petitioners' accomplices have never been identified.

This case involved a nightmarish home invasion. After forcibly breaking into their home, Petitioner, the gunman, ordered the victims, a married couple and their male guest, to lie down on the floor of the living room under a blanket. *Arizona v. Swoopes*, 155 Ariz. 432, 433 (App. 1987). After the victims were robbed of their money and jewelry, the robbers proceeded to ransack the house. At one point, one of the robbers took the wife into the bedroom and sexually assaulted her. Petitioner remained in the living room to keep the husband and friend from interfering. *Id.*

After the trial and sentencing, Petitioner filed a direct appeal arguing (1) "the court erred in imposing consecutive sentences," (2) "the court erred in convicting him of sexual assault as an accomplice, and (3) "the victims' in-court identification of him was tainted." *Arizona v. Swoopes*, 155 Ariz. 432, 434 (App. 1987). During the

¹ Both parties agreed to primarily rely on and refer to the briefs filed in the Ninth Circuit and Excerpts of Record on appeal. (Docs. 180, 181.)

1 briefing process, the appeal was inadvertently transferred to the
2 Arizona Supreme Court before being returned to the court of appeals.
3 During this period, Petitioner filed a supplemental brief arguing (4)
4 the prosecutor engaged in misconduct, (5) the court erred in
5 instructing the jury on the issue of identification evidence, (6) the
6 state improperly excluded counsel from the trial lineup, and (7) the
7 aggravated robbery conviction violated double jeopardy. The court of
8 appeals refused to entertain the additional claims. On July 21, 1987,
9 the court of appeals affirmed Petitioner's convictions and sentences in
10 *Arizona v. Swoopes*, 155 Ariz.432 (App 1987) (*Swoopes I*). The Arizona
11 Supreme Court denied review on January 13, 1988.

12 In his first post-conviction relief (PCR) petition, filed on
13 February 1, 1989, Petitioner argued (1) trial counsel was ineffective
14 for failing to investigate the alleged getaway car, (2) the trial
15 court erred in its instruction to the jury about identification
16 evidence, (3) he was denied counsel at all critical stages, (4) the
17 prosecutor engaged in misconduct at trial and suppressed evidence, (5)
18 the sentence was unconstitutional, and (6) he was denied due process
19 and equal protection. The trial court denied the petition on July 17,
20 1990. The court of appeals denied Petitioner's petition for review on
21 February 21, 1991. On February 21, 1991, Petitioner filed a special
22 action in the court of appeals raising the same issues presented in
23 his first post-conviction relief petition and arguing the trial court
24 erred procedurally and substantively in denying his petition. The
25 court of appeals denied the special action on April 18, 1991, and the
26 Arizona Supreme Court denied a petition for review on September 27,
27
28

1991.

On July 26, 1993, Petitioner filed in this court his original Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254(Petition). He claimed (1) the victims' in-court identification of him was tainted, (2) his due process and equal protection rights were violated by misconduct before the grand jury, (3) the trial court committed error at trial and in regard to a stipulation, (4) the prosecutor engaged in misconduct in part by withholding exculpatory evidence, (5) trial and appellate counsel were ineffective, and (6) his sentences violated the Double Jeopardy Clause. This court denied claim (1) on the merits and found the remaining claims procedurally defaulted. The Ninth Circuit affirmed in *Swoopes v. Sublett*, 163 F.3d 607 (9th Cir. 1998) (*Swoopes II*). The Supreme Court vacated *Swoopes II* and remanded in light of the recently decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). *Swoopes v. Sublett*, 527 U.S. 1001 (1999). On remand, the Ninth Circuit held that an ordinary habeas petitioner in Arizona exhausts his claims by presenting them to the court of appeals. *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999) (*Swoopes III*), cert. denied, 529 U.S. 1124 (2000). The Ninth Circuit remanded the case for this court to "determine which claims were properly exhausted, and not procedurally barred, and issue a decision on the merits of those claims." (Doc. 150 at 5.)

After a new round of briefing, Petitioner filed a motion to stay the petition and pursue discovery, which was granted by this court. By this point, Petitioner' counsel had discovered in the file the trial

1 court's response to the jury's mid-deliberation question. Petitioner
2 returned to state court and filed a second post-conviction relief
3 petition¹ on March 27, 2003. He argued, as follows: (1) the trial
4 court erred procedurally and substantively in its response to the jury
5 question; (2) trial and appellate counsel were ineffective in their
6 response to the jury question issue; and, (3)(a) the state violated
7 *Brady* by failing to disclose evidence that another suspect was
8 connected to the getaway car and (3)(b) the state failed to preserve
9 or destroyed evidence favorable to his defense. The trial court
10 granted relief on the ineffective assistance claim and ordered a new
11 trial. *Arizona v. Swoopes*, 216 Ariz. 390, 393 (App. 2007) (*Swoopes*
12 *IV*). On September 19, 2007, the court of appeals reversed the trial
13 court concluding that Petitioner's claims were precluded, not eligible
14 for any of the preclusion exceptions, and not of sufficient
15 constitutional magnitude that they could not be waived implicitly.
16 *Swoopes IV*. The Arizona Supreme Court denied review on June 3, 2008.
17 On September 22, 2009, Petitioner filed in this court his amended
18 Petition for Writ of Habeas Corpus, which combines certain claims from
19 his original habeas petition with claims newly raised in his second
20 post-conviction relief petition. He claims: (I) his due process rights
21 were violated by the trial court's use of unduly suggestive and
22 unreliable identification at trial; (II) the trial judge erred
23 procedurally and substantively in his response to a mid-deliberation
24 jury question; (III) his right to due process and equal protection was
25 violated by prosecutorial misconduct; and, (IV) trial counsel and
26 appellate counsel were ineffective.
27
28

1 On November 30, 2009, Respondents filed a Response to the amended
2 Petition for Writ of Habeas Corpus. On January 28, 2010, Petitioner
3 filed a Reply to the Response, pursuant to Rule 5 of the Rules
4 Governing Section 2254 Cases. On March 22, 2010, the Magistrate Judge
5 issued a Report and Recommendation (R&R) that the amended petition may
6 be denied on the merits. (Doc. 157.) On July 30, 2011, Petitioner's
7 Objections were filed. (Doc. 163, 164.) On August 13, 2010,
8 Respondents filed a Response to the Petitioner's Objections. (Doc.
9 165.) On August 19, 2010, Petitioner filed a Reply to the Respondents'
10 Response, which is not contemplated by the rules governing Section
11 2254 cases or reports and recommendations at Fed.R.Civ.P. 72, and no
12 leave of Court was requested. This Reply was stricken and Petitioner
13 then filed a Motion for Reconsideration on September 29, 2010. (Doc.
14 168.)
15

16 On July 22, 2011, this Court entered an Order adopting the Report
17 and Recommendation and dismissing the petition. On August 10, 2011, a
18 notice of appeal was filed. On August 13, 2014, in a brief *Memorandum*
19 *Order*, the court of appeals reversed and remanded for reconsideration
20 using the pre-AEDPA standard of review.² On December 19, 2014, an
21 Opening brief was filed; on January 9, 2015, a response brief was
22 filed; and, on January 23, 2015, a reply brief was filed. On
23 September 14, 2015, the Court heard oral argument and took the matter
24 under advisement. On September 21, 2015, a Supplement was filed and
25

26
27 ² The Magistrate Judge's Report and Recommendation (Doc. 157) was
28 detailed, unequivocally applied the correct standard of review, and
was adopted in its entirety by this Court as its findings of fact and
conclusions of law. (Doc. 169.)

1 on October 9, 2015, a response to the supplement was filed. The Court
2 now rules.

3 **Claims**

4 **A. Trial Judge's Response to Jury's Mid-Deliberation Question**

5 Petitioner argues that the Ninth Circuit's mandate requires that
6 this Court defer to the state post-conviction court's (Judge Dawley's)
7 factual findings on the merits in favor of a new trial based on the
8 trial judge's response to the mid-deliberation note. This directly
9 follows from the ruling on Petitioner's appeal because Petitioner
10 specifically cited, as error, this Court's failure to defer to Judge
11 Dawley's factual findings underlying the legal conclusion that
12 Petitioner was harmed by the trial judge's response to the mid-
13 deliberation note. (Docs. 180-1, 180-3.) Though Respondents conceded
14 that Judge Dawley's factual findings were the only findings regarding
15 the merits of this issue, the question whether his findings required
16 deference under the pre-AEDPA standard was a major issue on appeal.
17 *Id.*; Doc. 180-2. These factual findings underlying "harmlessness" were
18 the only ones that Petitioner argued were erroneously not deferred to
19 by this Court. Thus, the Memorandum's direction that this Court need
20 "not defer to the state court's ultimate determination...of
21 harmlessness," but should "defer to the factual findings underlying
22 such determinations," concerns Judge's Dawley's findings regarding the
23 response to the jury's mid-deliberation note. Under the applicable law
24 and pre-AEDPA standard of review, when those factual findings are
25 given deference and applied, Petitioner is entitled to a new trial
26 and, accordingly, to issuance of a writ of habeas corpus.
27
28

1 During deliberations, the jury sent a note stating, "We'd like to
2 see any statement made by Linda of a blemish before the physical
3 lineup." (E.R. N at 84.)³ The trial judge answered, "The statement is
4 not admissible. Rely on your collective memories." (*Id.*) Petitioner
5 argues that this response was either structural error, or, in the
6 alternative, prejudicial error. Respondents disagree with Petitioner
7 that structural error occurred because the response was made *ex parte*
8 and thus denied Petitioner his right to participate in a critical
9 stage of trial. Respondents argue that this argument is wrong in two
10 ways. As Petitioner admits, the Arizona Court of Appeals found that it
11 was routine practice at the time to discuss such matters in-chambers
12 and off-the-record and therefore concluded that Petitioner failed to
13 carry his burden of showing the proceedings were *ex parte*. *State v.*
14 *Swoopes*, 166 P.3d 945, 949-50 ¶¶ 10-14 (Ariz. App. 2007). That
15 finding is entitled to deference under pre-AEDPA standards, and
16 Petitioner can overcome it only by (1) providing "convincing evidence
17 to the contrary"; or (2) showing that it lacks "fair support in the
18 record." *Morales v. Woodford*, 388 F.3d 1159, 1167 (9th Cir. 2004).

19 Respondents argue and this Court agrees that Petitioner shows
20 neither. He does not argue there is "convincing evidence" the
21 proceedings were *ex parte*, nor can he; his trial attorney admitted he
22 had "no recollection of whether there was a hearing in court to
23 discuss the jury's mid-deliberation note or not." The state court's
24 findings regarding regular practices were appropriate and are entitled
25 to deference.

26
27 ³ The Ninth Circuit's Excerpts of Record (E.R.) were filed as
28 attachments to this Court's docket entry 181 and are cited according
to their original tabbing and pagination.

1 to deference. As discussed, the jury asked during deliberations "to
2 see any statement made by Linda of a blemish before the physical
3 lineup." (E.R. N at 84.) It is undisputed that Linda first mentioned a
4 scar or blemish at the police arranged lineup. The trial court
5 responded to the note by stating, "The statement is not admissible.
6 Rely on your collective memories." (E.R. N at 84.) This, according to
7 Petitioner, implicitly suggested that Linda *did* give a pre-lineup
8 statement about a blemish or a scar. (Doc. 182 at 3.) That, he argues,
9 improperly bolstered her identification and prejudiced Petitioner's
10 case. (*Id.*) The Arizona Court of Appeals "recognized" that a post-trial
11 statement from a juror existed. But it also held it could not consider
12 the statement because "it is improper to 'inquire into the subjective
13 motives or mental processes which led a juror to assent or dissent
14 from the verdict.'" *Swoopes*, 166 P.3d at 958 ¶ 43 n.12 (quoting Ariz.
15 R. Crim. P. 24.1(d)). It is similarly improper, under federal law,
16 for this Court to consider the statement on habeas review. See Fed. R.
17 Evid. 606(b); *Warger v. Shauers*, 135 S. Ct. 521, 525-28 (2014); *Henry*
18 *v. Ryan*, 720 F.3d 1073, 1087 (9th Cir. 2013) ("courts may not inquire
19 about the subjective impact of such misconduct on the jury"); *Fields*
20 *v. Brown*, 503 F.3d 755, 778 (9th Cir. 2007) ("Juror testimony about
21 consideration of extrinsic evidence may be considered by a reviewing
22 court, but juror testimony about the subjective effect of evidence on
23 the particular juror or about the deliberative process may not.").
24 Finally, many of Petitioner's arguments erroneously assume this Court
25 must defer to the state PCR trial court's factual findings, not the
26 state appellate court's.
27
28

1 First, many of Petitioner's "facts" are not facts at all.
2 Petitioner argues, for instance, that this Court must defer to the PCR
3 trial court's opinions about whether the trial court's alleged error
4 was "strong enough not to be neutralized by jury instructions,"
5 whether the identifications were "suggestive," and whether there was
6 "minimal corroborating evidence" in the case. (Doc. 182 at 3.) But
7 these are not "facts"; they are legal conclusions regarding mixed
8 questions of fact and law. As the Ninth Circuit noted in this very
9 case, such conclusions are not entitled to deference. *Swoopes*, 584
10 Fed. Appx. at 504.

11 Second, the Arizona trial court's decision is not entitled to
12 deference. Where "a lower state court issues a decision that the state
13 appellate court does not agree with," habeas courts "review the state
14 appellate court's decision only and do not consider the lower state
15 court's opinion." *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir.
16 2014). That is precisely what happened here; the Arizona Court of
17 Appeals reversed the trial court and expressly disagreed with the
18 lower court's analysis of petitioner's jury-response claim. *Swoopes*,
19 166 P.3d at 960, ¶ 48. Accordingly, this Court defers *only* to the
20 court of appeals' factual findings. Indeed, deferring to the PCR trial
21 court's factual findings would undermine Arizona law. The Arizona
22 Court of Appeals vacated the trial court's judgment. *Id.* Under Arizona
23 law, the "trial court's judgment . . . lost its effect when the court
24 of appeals vacated it." *Metzler v. BCI Coca-Cola Bottling Co. of Los*
25 *Angeles, Inc.*, 329 P.3d 1043, 1048 (Ariz. 2014).
26
27
28

1 This Court defers to the state courts regarding the facts—whether
2 a particular event occurred, how a particular event occurred, and
3 whether a particular witness was credible. It does not defer to the
4 *legal conclusions* to be drawn from those facts—whether error occurred,
5 whether an error was “harmless,” whether the evidence was closely
6 balanced, and whether an error was “prejudicial.” *See, e.g., Kimmelman*
7 *v. Morrison*, 477 U.S. 365, 388 (1986) (“both the performance and the
8 prejudice components of the ineffectiveness test are mixed questions
9 of fact and law and that therefore a state court’s ultimate
10 conclusions regarding competence and prejudice are not findings of
11 fact binding on the federal court”).

12 Petitioner repeatedly blurs this key distinction, because the
13 state PCR trial court issued a legal ruling in Petitioner’s favor, and
14 Petitioner wants the benefit of that legal ruling. However, that
15 ruling was vacated by a higher state court, and as a result, this
16 Court will not defer to it. (See Doc. 183 at 8.) In any event, this
17 Court only defers to the state courts’ findings of *fact*, not their
18 conclusions of law, so the question of deference makes little
19 difference. The core facts that bear on Petitioner’s jury note claim
20 are: (1) the evidence presented at trial; (2) the fact that jury asked
21 “to see any statement made by Linda of a blemish before the physical
22 lineup”; and (3) the fact that the trial court answered: “The
23 statement is not admissible. Rely on your collective memories.” (E.R.
24 N at 84.) Whether these facts rendered Petitioner’s trial
25 *unconstitutional* is a question of law for this Court to decide *de*
26 *novo*.
27
28

1 The Arizona Court of Appeals determined that the trial court's
2 response to the jury was not made *ex parte*. That determination is
3 entitled to deference, and Petitioner has not overcome it. Moreover,
4 any error in the instruction was harmless and did not render
5 Petitioner's trial unconstitutional. In sum, this claim fails.

6 **B. Alleged Exculpatory Evidence Under *Brady***

7 Petitioner argues that the Ninth Circuit's mandate requires this
8 Court only to reconsider its ruling under the correct pre-AEDPA legal
9 standards. First, this Court's review of the state post-conviction
10 court's denial of this *Brady v. Maryland*, 373 U.S. 83 (1963) claim on
11 the merits (Docs. 137,181) is *de novo*, because it was a legal ruling
12 based on uncontested underlying facts presented by Petitioner. This
13 Court had applied AEDPA's standard deferring to the state court's
14 legal ruling as not "objectively unreasonable" (Docs. 169,181.)
15 Second, this Court's review must apply *Brady's* standard, not the
16 demanding prosecutorial-misconduct one (Doc.169.) And to qualify
17 under *Brady's* low standard, the withheld evidence need not "exclude"
18 or "exonerate" Petitioner as the state court and Magistrate concluded.
19 Rather, all that is needed is that the withheld evidence "would tend
20 to exculpate" him in some way, by just weakening the strength of the
21 government's case or the credibility/reliability of its investigation-
22 to "cast a cloud of doubt" or to "alter[.]...one juror's assessment of
23 defendant's guilt." *Amado*, 758 F.3d at 1140.

24 Petitioner goes on to argue that the withheld evidence easily
25 meets *Brady's* low standard because it would have done much more than
26 just weaken or cast additional doubt on each prong of Arizona's case
27
28

1 against Petitioner. Consequently, applying the correct standard of
2 review to the uncontested facts about the withheld evidence, and in
3 light of the weakness of Arizona's case against Petitioner as found by
4 Judge Dawley, Petitioner urges this Court to conclude that Petitioner's
5 constitutional rights under *Brady* were violated and that he is
6 entitled to a new trial and issuance of a writ of habeas corpus.

7 Respondents argue that *Brady v. Maryland* requires prosecutors to
8 disclose all "evidence favorable to an accused" "where the evidence is
9 material either to guilt or to punishment." 373 U.S. at 87. "There are
10 three components of a true *Brady* [claim]: The evidence at issue must
11 be favorable to the accused, either because it is exculpatory, or
12 because it is impeaching; that evidence must have been suppressed by
13 the State, either willfully or inadvertently; and prejudice must have
14 ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A mere
15 possibility of prejudice is not enough; a petitioner's "burden is to
16 establish a reasonable probability of a different result." *Id.* at 291.
17 Moreover, "*Brady* does not require that police officers or prosecutors
18 explore multiple potential inferences to discern whether evidence that
19 is not favorable to a defendant could become favorable." *Harris v.*
20 *Kuba*, 486 F.3d 1010, 1016 (7th Cir. 2007). "Such is the work for
21 defense counsel, not the officers or prosecutors." *Id.* Here,
22 Petitioner contends that the State suppressed several exculpatory
23 facts in violation of *Brady*. His contention fails.

24
25 Petitioner first points to the fact that police initially
26 suspected that a man named John Wigglesworth might have been involved
27 in the crime. (Doc. 182 at 10.) There is no evidence, however, tying
28

1 Wigglesworth to *this* home invasion; police suspected him merely
2 because he committed other, apparently unrelated, home invasion
3 robberies in Tucson. (*Id.* at 10-11.) Nevertheless, Petitioner argues
4 that *Brady* required police to disclose their suspicions about
5 Wigglesworth before trial. (*Id.*) That cannot be. *Brady* does not
6 require that every suspect in every one of these cases be disclosed to
7 every defendant. Mere speculation is not enough; *Brady* only requires
8 disclosure of information that is materially exculpatory in the
9 particular case at hand. See *Wood v. Bartholomew*, 516 U.S. 1, 6, 8
10 (1995) ("[W]here, as in this case, a federal appellate court . . .
11 grants habeas relief on the basis of little more than speculation with
12 slight support, the proper delicate balance between the federal courts
13 and the States is upset to a degree that requires correction.");
14 *Barker v. Fleming*, 423 F.3d 1085, 1099 (9th Cir. 2005) ("The mere
15 possibility that an item of undisclosed information might have helped
16 the defense, or might have affected the outcome of the trial, does not
17 establish 'materiality' in the constitutional sense.")

18
19 Moreover, nothing about Wigglesworth was exculpatory. There was
20 nothing tying Wigglesworth to *this* crime. And even if there were, it
21 would merely show that someone else might have been involved in the
22 burglary. The jury, of course, already knew that—there were three
23 perpetrators present that night, and two of them were never caught.
24 The second piece of alleged *Brady* evidence is even less material.

25
26 Two of the victims identified the getaway car in this case as a
27 Plymouth Valiant. (E.R. N at 62, 107, 144, 148; E.R. P1 at 122-24,
28 158-62, 166-68, 188- 89; E.R. P2, at 77.) Petitioner argues that the

1 Valiant in this case was registered to Russell Clark, a man who denies
2 knowing Petitioner. (Doc. 182 at 9.) This, according to Petitioner,
3 proves that he had no connection to the Valiant. (*Id.*) In fact, it
4 proves nothing. There is evidence tying Petitioner to a Plymouth
5 Valiant. This included (1) the fact that a Valiant was found parked in
6 front of the house where Petitioner lived and (2) the fact that the
7 Valiant's license plate had been switched with the license plate from
8 a Chrysler belonging to Petitioner's aunt. (Doc. 183 at 2 (citing E.R.
9 N at 22-23; E.R. P2 at 27-28, 44-45).) Two of the victims saw
10 Petitioner drive away in the Valiant, and the car was later found
11 parked in front of the house where Petitioner lived, with Petitioner's
12 aunt's license plate on it. (E.R. N at 22-23; E.R. P2 at 27-28, 44-
13 45.) That amply established Petitioner's connection to the car. The
14 mere fact that the car was formally registered to someone else does
15 not undermine this connection. Indeed, it may even *inculpate*
16 Petitioner. Petitioner admits that Clark "had committed similar crimes
17 before," including burglary and robbery. (Doc. 182 at 9.) That
18 admission does not work in Petitioner's favor.

19
20 Petitioner makes heart felt yet irrelevant factual arguments
21 based on the benefit of hindsight and years of studying and analyzing
22 every aspect of this case. The evidence Petitioner claims should have
23 been disclosed was not exculpatory in any material sense.⁴ Indeed, even
24 re-readings of Petitioner's *Brady* argument fails to uncover any
25

26 ⁴ Petitioner also makes various claims regarding the ownership of, or
27 access to, the Valiant. Those claims, however, do not materially rebut
28 the fact it was seen parked in front of the residence where Petitioner
was staying, bearing the license plate of a car belonging to
Petitioner's aunt that Petitioner himself had recently driven.

discernible exculpatory value in it. (See E.R. A at 17 ("[I]t is not clear how the allegedly withheld evidence would have benefitted [Petitioner's] defense.") Its only conceivable purpose and effect, instead, would have been to confuse and distract the jurors from considering Petitioner's guilt by speculating on the guilt of others. Such evidence is not admissible in Arizona. See Ariz. R. Evid. 401 (defining relevant evidence); 402 (irrelevant evidence inadmissible at trial); 403 (even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusing or misleading the jury). See also *State v. Machado*, 226 Ariz. 281, 246 P.3d 632 (2011) (third-party culpability is admissible only if it tends to create a reasonable doubt as to the defendant's guilt and its probative value is not substantially outweighed by the danger of confusing, distracting, or misleading the jurors). *Brady* does not require the disclosure of such evidence. See *United States v. Kohring*, 637 F.3d 895 (2010) (*Brady* materiality applies only to evidence that is, or can lead to other evidence that is, admissible or capable of being used for impeachment purposes).

Upon further review, this claim also fails.

C. Alleged Unreliable Eyewitness Identification

Petitioner argues that the Ninth Circuit's mandate requires this Court to reconsider its ruling on this claim under the correct pre-AEDPA legal standards. Specifically, the issue whether "the challenged identifications [of Petitioner as the gunman] were sufficiently reliable" must be reviewed *de novo*, not with AEDPA deference of whether the "state court's determination...was not contrary to, or an

1 unreasonable application of, clearly established federal law" under
2 *Neil v. Biggers*, 409 U.S. 188 (1972). (Doc. 169.)

3 The question on remand is whether application of the *Biggers*
4 factors establishes the victims' identifications were too unreliable
5 to be admitted at Petitioner's trial, contrary to the Magistrate
6 Judge's analysis and conclusions (Doc.169 at 18-20) made utilizing the
7 proper pre-AEDPA standard and adopted entirely as the findings and
8 conclusions of this Court. (Doc.169.) Petitioner submits that the
9 legal analysis overlooked critical facts and principles, as follows:
10 no ample opportunity to observe; insufficient degree of attention;
11 inaccuracy of descriptions; and, impact of the lapse of time. In
12 summary, Petitioner argues that none of the *Biggers* factors weigh in
13 favor of a conclusion that the victims' identifications of Petitioner
14 as the gunman are reliable. In fact, the factors weigh heavily toward
15 the opposite conclusion: that their identifications were too
16 unreliable to be admitted at trial. Accordingly, under the correct *de*
17 *novo* standard of review of the claim, this Court should rule that
18 Petitioner' constitutional rights were violated and that he is
19 entitled to issuance of a writ of habeas corpus.
20

21 Respondents argue that Petitioner's suggestive-identification
22 claim is doubly flawed. Petitioner cannot show that any of the
23 eyewitness identifications in this case resulted from improper,
24 police-arranged procedures. Moreover, as discussed in the R&R (Doc.
25 157 at 6-9), the identifications were reliable. If the court finds a
26 pre-trial identification procedure was unnecessarily suggestive, the
27 court proceeds to determine whether the ultimate identification was
28

1 nevertheless sufficiently reliable. *Id.* at 198-99. If so, then its
2 admission at trial did not violate due process. *Id.* "[T]he central
3 question, [is] whether under the 'totality of the circumstances' the
4 identification was reliable even though the confrontation procedure
5 was suggestive." *Id.* at 199. "[T]he factors to be considered in
6 evaluating the likelihood of misidentification include the opportunity
7 of the witness to view the criminal at the time of the crime, the
8 witness' degree of attention, the accuracy of the witness' prior
9 description of the criminal, the level of certainty demonstrated by
10 the witness at the confrontation, and the length of time between the
11 crime and the confrontation." *Id.* at 199-200.

12 Assuming without deciding that the initial pre-trial
13 identification was unnecessarily suggestive, this Court concludes that
14 under the totality of the circumstance the identification was
15 sufficiently reliable. The three witnesses had an "ample opportunity"
16 to observe Petitioner during the robbery. *Arizona v. Swoopes*, 155
17 *Ariz.* 432, 435 (App. 1988); *see also Coley v. Gonzales*, 55 F.3d 1385,
18 1387 (9th Cir. 1995) ("[T]he state court's factual determinations are
19 presumed correct."). The witnesses were not mere bystanders but were
20 direct victims. Obviously, their degree of attention was heightened by
21 that fact. On the other hand, the court recognizes that the stress of
22 the robbery is a factor that could have impaired the witness's ability
23 to accurately remember details about the gunman's face. *See, e.g.,*
24 *Raheem v. Kelly*, 257 F.3d 122, 138 (2nd Cir. 2001) ("[I]t is human
25 nature for a person toward whom a gun is being pointed to focus his
26 attention more on the gun than on the face of the person pointing
27
28

1 it.").

2 The accuracy of the witnesses' prior description of the suspect
3 was at least fair. While none of the witnesses reported that the
4 suspect had a scar above his right eye, their descriptions were not as
5 vague as Petitioner argues. The husband described the suspect as
6 "negro," with a "flare[d]" nose, "slender" with a "good build"-
7 "weighed about 165." (Doc. 1, Ex. A.) He had "a mustache and maybe
8 long sideburns." *Id.* He wore a dark coat, tan or gray pants, and "like
9 a baseball cap" that was purple or black. *Id.* The wife described the
10 suspect as "black," "about 5'8" or 5'9", slim figure." *Id.* He wore a
11 black cap, brown jacket, brown pants, sneakers, and bellbottoms. *Id.*
12 The friend described the suspect as "a black male, approximately
13 5'11", "lighter colored curly hair, with "a mustache and a thin beard
14 around his chinline," "about 155, 160 pounds," "real nervous" with
15 "[n]o discernible accent." *Id.* He wore "dark pants" and "a maroon or
16 purple coat or shirt." *Id.* The witnesses' descriptions vary somewhat,
17 but they agree in the main. The degree of detail supplied by the
18 witnesses is some evidence that they had a good look at the suspect.
19 The degree of similarity between the witnesses' descriptions is some
20 evidence that their descriptions were accurate.

21
22 After viewing Petitioner in court, the two men were "absolutely
23 certain" that Petitioner was the gunman. *Arizona v. Swoopes*, 155 Ariz.
24 432, 433 (App. 1988). The wife later identified Petitioner at a live
25 lineup "without being told of the positive identification by her
26 companions." *Id.* at 434-35. The witnesses' degree of certainty is
27 further evidence that the identification was reliable. The courthouse
28

1 identification, however, was made approximately 16 months after the
2 crime. This is a considerable length of time and does not support
3 reliability. By itself, however, this lapse of time is not
4 dispositive. See, e.g., *U.S. v. Williams*, 596 F.2d 44, 49 (2nd Cir.
5 1979) ("[A]lthough the time lapse of two years and eight months
6 between the crime and the in-court confrontation is a somewhat
7 negative factor, it is outweighed by the other four *Manson* criteria. .
8 . .").

9 Based on the totality of the circumstances, the Court concludes
10 the identification testimony was not so unreliable that its admission
11 violated due process. Petitioner notes that the witnesses were shown
12 a photographic lineup shortly after the robbery, and although they
13 were shown his picture, were unable to make an identification. He
14 argues their later identification of him was likely a recollection of
15 seeing his photograph rather than an identification of the true
16 gunman. The Court agrees that the sequence of events is some evidence
17 that the witnesses' identification was unreliable. However, the Court
18 does not agree that this outweighs the other factors pointing to
19 reliability. See *U.S. v. Davenport*, 753 F.2d 1460, 1463 (9th Cir.
20 1985) ("The fact that Davenport was the only individual common to the
21 photo spread and the lineup cannot, without further indicia of
22 suggestiveness, render the lineup conducive to irreparable
23 misidentification."); *U.S. v. Johnson*, 820 F.2d 1065, 1073 (9th Cir.
24 1987); but see, e.g., *Foster v. California*, 394 U.S. 440, 442-43
25 (1969) (Lineup procedure was unfair where the witness finally made a
26 definitive identification after viewing a lineup, where the defendant
27
28

1 was the tallest of the three men and the only one wearing a leather
2 jacket, followed by a "one-to-one confrontation" with the defendant,
3 followed by a *second* lineup, where "[the defendant] was the only
4 person in this lineup who had also participated in the first
5 lineup.").

6 The husband testified that he was sober and clear-headed the
7 night of the robbery, and he had no difficulty seeing the gunman's
8 face. (Doc. 150, Ex. C at 108, 95, 97.) While he conceded he did not
9 pick Petitioner out of the photo lineup, he said he had no problem
10 recognizing Petitioner in the flesh. *Id.* at 132. He testified there
11 was no question in his mind that Petitioner was the gunman. *Id.* at
12 133, 142. The friend testified that while he may have had a couple of
13 beers, he was not in any way under the influence the night of the
14 robbery. *Id.* at 145, 146. The lighting was adequate, and he had no
15 trouble seeing the gunman's face. *Id.* at 149, 150, 161. He failed to
16 pick Petitioner out of a photo lineup, but he had no trouble
17 recognizing Petitioner in the courthouse. (Doc. 150 at 164, 165;
18 Exhibit D at 50.) He had no doubt that Petitioner was the gunman.
19 (Doc. 150, Ex. C at 186, 87.)

21 The Court finds that the police did not use unnecessarily
22 suggestive police identification procedures in connection with any of
23 the three victims who identified Petitioner, and the record simply
24 does not support any contention otherwise. The three victims'
25 identifications are reliable under *Biggers*. Examining the first two
26 *Biggers* factors, all three victims had an excellent opportunity to
27 view Petitioner, with a heightened degree of attention. Indeed, during
28

1 opening statement, Petitioner's counsel emphasized to the jury that
2 all three victims "got an excellent look" at Petitioner and that "they
3 all got a good look, they all got a special good look in a different
4 way." (E.R. P1 at 75-76.) He repeated essentially the same thing in
5 his closing argument- "there's no doubt as I told you in opening
6 statement that the three people . . . got a good look at that gunman."
7 (E.R. P2 at 113.) The facts corroborate this fully: when Petitioner
8 burst into the living room, gun in hand, his face was unmasked and the
9 room was well-lit; consequently, all three victims could and did
10 observe Petitioner clearly. (*Id.* at 95-97, 99, 148-52, 195-98, 205.)
11 Mark Hattoon's attention was "riveted" to Petitioner at this time.
12 (*Id.* at 149.) When Petitioner entered the bedroom after one of his
13 accomplices sexually assaulted Linda, he was almost face-to-face with
14 her when he forced her underneath the bed mattress, and she observed
15 him clearly. (*Id.* at 213, 205, 227.) And when Randy encountered
16 Petitioner in the front doorway just after Mark got up and fought his
17 way out of the house, Petitioner stood "framed, full-bodied in the
18 doorway with a light shining on his face" for considerable duration-
19 approximately 4 to 5 seconds, during which time Randy had a "real
20 close," almost face-to-face, unobstructed, and well-lit view of him-
21 before turning around and fleeing. (E.R. N at 45-46; E.R. P1 at 119-
22 122.)
23

24 The three victims' identifications of Petitioner were reliable.
25 The police, moreover, employed no procedures that served to "corrupt"
26 their identifications of him, let alone to the degree of a "very
27 substantial likelihood of irreparable misidentification." *Simmons v.*
28

1 *United States*, 390 U.S. 377, 382 (1968); *Perry v. New Hampshire*, 132
2 S.Ct. 716, 721-724 (2012). This Court unqualifiedly rejects
3 Petitioner's tainted-identification claim.

4 **CONCLUSION**


5 Under pre-AEDPA standards, "a federal habeas court does not defer
6 to state courts' ultimate determination of mixed questions of law and
7 fact" but "usually does defer to the factual findings underlying such
8 determinations." *Swoopes*, 584 Fed. Appx. at 504 (citing *Mayfield v.*
9 *Calderon*, 229 F.3d 895, 901 (9th Cir. 2000)). "[S]tate court judgments
10 of conviction and sentence carry a presumption of finality and
11 legality" under pre-AEDPA standards, and they "may be set aside only
12 when a state prisoner carries his burden of proving that his detention
13 violates the fundamental liberties of the person, safeguarded against
14 state action by the Federal Constitution." *Hayes v. Brown*, 399 F.3d
15 972, 978 (9th Cir. 2005).
16

17 Under these standards, the Petition will be denied.

18 Accordingly,

19 **IT IS ORDERED** that the Amended Petition for Writ of Habeas Corpus
20 is **DENIED** and this action is **DISMISSED**. A Final Judgment shall enter
21 separately. This case is closed. The Court declines to enter a
22 Certificate of Appealability.

23 Dated this 23rd day of February, 2016.
24

25 
26 _____
27 David C. Bury
28 United States District Judge

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF ARIZONA**

7 Samuel Swoopes,)
8 Petitioner,) CV-93-471-TUC-DCB
9 v.)
10 Charles L. Ryan, et al.,) **ORDER**
11 Respondents.)
12 _____)

13 This matter was referred to the United States Magistrate Judge
14 pursuant to 28 U.S.C. §636(b) and the local rules of practice of this
15 Court for a Report and Recommendation (R&R) on the Amended Petition for
16 Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. In the R&R, the
17 Magistrate Judge recommends to the Court that the amended petition should
18 be denied and the action should be dismissed. Before the Court is the
19 Magistrate Judge's R&R, Petitioner's Objections and Respondent's Response
20 to the Objections. Having conducted a de novo review, this Court will
21 adopt the Report and Recommendation in its entirety, deny the amended
22 habeas petition and dismiss this action.

23 **STANDARDS OF REVIEW**

24 When objection is made to the findings and recommendation of a
25 magistrate judge, the district court must conduct a de novo review.
26 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

27 On habeas review, a state court's findings of fact are entitled to
28 a presumption of correctness when fairly supported by the record.

1 *Wainwright v. Witt*, 469 U.S. 412, 426 (1985). The presumption of
2 correctness also applies to a state appellate court's findings of fact.
3 *Sumner v. Mata*, 449 U.S. 539, 546 (1981). The question presented in a
4 state prisoner's petition for a writ of habeas corpus is "whether the
5 state proceedings satisfied due process." *Jammal v. Van de Kamp*, 926
6 F.2d 918, 919-20 (9th Cir.1991).

7 Federal courts may entertain a state prisoner's petition for habeas
8 relief only on the grounds that the prisoner's confinement violates the
9 Constitution, laws, or treaties of the United States. *Reed v. Farley*, 512
10 U.S. 339 (1994). General improprieties occurring in state proceedings are
11 cognizable only if they resulted in fundamental unfairness and
12 consequently violated the petitioner's Fourteenth Amendment right to due
13 process. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the
14 province of a federal habeas court to reexamine state court
15 determinations on state law questions."); *Bonin v. Calderon*, 77 F.3d
16 1155, 1158 (9th Cir.1996). The Supreme Court has held in the habeas
17 context that "this Court will not review a question of federal law
18 decided by a state court if the decision of that court rests on a state
19 law ground that is independent of the federal question and adequate to
20 support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).
21 The provisions of the Anti-Terrorism and Effective Death Penalty Act
22 (AEDPA) govern this case and pose special burdens. *Chein v. Shumsky*, 373
23 F.3d 978, 983 (9th Cir.2004) (en banc). Under AEDPA, when reviewing a
24 state criminal conviction, a federal court may grant a writ of habeas
25 corpus only if a state court proceeding "(1) resulted in a decision that
26 was contrary to, or involved an unreasonable application of, clearly
27 established Federal law, as determined by the Supreme Court of the United

1 States; or (2) resulted in a decision that was based on an unreasonable
2 determination of the facts in light of the evidence presented in the
3 State court proceeding." 28 U.S.C. § 2254(d).

4 Under § 2254(d)(1), a state court decision is "contrary to" clearly
5 established Supreme Court precedent "if the state court applies a rule
6 that contradicts the governing law set forth" in Supreme Court cases or
7 "if the state court confronts a set of facts that are materially
8 indistinguishable from" a Supreme Court decision but "nevertheless
9 arrives at a result different from" that precedent. *Williams v. Taylor*,
10 529 U.S. 362, 405-06 (2000). A state court decision is an unreasonable
11 application of clearly established federal law if "the state court
12 identifies the correct governing legal principle" from a Supreme Court
13 decision "but unreasonably applies that principle to the facts of the
14 prisoner's case." *Id.* at 413. In considering whether a state court has
15 unreasonably applied Supreme Court precedent, "a federal habeas court may
16 not issue the writ simply because that court concludes in its independent
17 judgment that the relevant state-court decision applied clearly
18 established federal law erroneously or incorrectly. Rather, that
19 application must also be unreasonable." *Id.* at 411; *Bell v. Cone*, 535
20 U.S. 685, 694 (2002). In conducting habeas review, we "presum[e] that
21 state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S.
22 19, 24 (2002).

23 SUMMARY

24 The Court will adopt the thorough and complete Summary of the Case
25 in the R&R, as follows:

26 Swoopes was convicted after a jury trial of "first-degree burglary,
27 sexual assault, aggravated robbery, three counts of armed robbery, and
three counts of kidnapping." [doc. # 150, p. 2] The trial court imposed

1 a combined sentence totaling 42 years. *Id.* At trial, the state presented
2 evidence that Swoopes and two accomplices committed an armed home
3 invasion. [doc. # 150, p. 2] Swoopes was the only one of the three whose
4 face was uncovered. [doc. # 154, p. 3] The main issue at trial was
5 identification. Swoopes' accomplices have never been identified.

6 Swoopes, the gunman, ordered the victims, a married couple and their
7 male guest, to lie down on the floor of the living room under a blanket.
8 *Arizona v. Swoopes*, 155 Ariz. 432, 433, 747 P.2d 593, 594 (App. 1987);
9 [doc. # 154, p. 3]. After the victims were robbed of their money and
10 jewelry, the robbers proceeded to ransack the house. *Id.* [At] one point,
11 one of the robbers took the wife into the bedroom and sexually assaulted
12 her. *Id.* Swoopes remained in the living room to keep the husband and
13 friend from interfering. *Id.*

14 Approximately five minutes after the wife was taken away, the guest
15 decided to escape and summon help. [doc. 150, Exhibit C, p. 158] He
16 fought his way outside, broke free from two of the intruders, and ran for
17 help. *Id.*, pp. 158-160. He noticed a vehicle parked just adjacent to the
18 house. *Id.*, p. 167. The vehicle was gone two or three minutes later when
19 he returned to the house. *Id.*, p. 168.

20 When the husband heard the sounds of the struggle, he got off the floor
21 and ran to the front door intending to lock the intruders out and again
22 confronted Swoopes, who was standing in the doorway. *Id.*, p. 119. When
23 Swoopes left, the husband locked the door and went to check on his wife.
24 *Id.*, pp. 121-122. After determining that she was safe, he ran outside and
25 saw the robbers drive away in a mid to late '60s light colored Plymouth
26 Valiant. *Id.*, pp. 123-124 After the robbery, the three victims were
27 unable to clearly describe the gunman and failed to identify Swoopes in
28 a photographic lineup. *Arizona v. Swoopes*, 216 Ariz. 390, 393, 166 P.3d
945, 948 (App. 2007). None of the victims reported the gunman as having
any facial blemishes or scars. *Id.* It is undisputed that Swoopes has a
scar above his right eye.

16 Sixteen months after the robbery, the husband and his friend learned
17 that a similar home invasion occurred in their neighborhood on that same
18 night and a suspect in that crime was currently on trial. *Id.*; [doc. #
19 154, p. 3] The two men went to the courthouse and recognized Swoopes as
20 the man who robbed them. *Swoopes*, 216 Ariz. at 393, 166 P.3d at 948. The
21 police then arranged a live lineup for the wife, who identified Swoopes
22 explaining she was looking for a man with a facial scar. *Id.*

23 At trial, the three victims identified Swoopes as the gunman. *Id.* On
24 cross examination, the wife admitted that after the robbery she did not
25 tell police the gunman had a scar. [doc. # 150, Exhibit C, p. 228-230]
26 She was not specifically asked if she ever told police the gunman had a
27 blemish. During his closing argument, Swoopes' counsel reminded the jury
28 that the wife admitted that she told detectives the gunman had no scars.
[doc. # 150, Exhibit D, p. 119] He argued, this was strong evidence that
her later identification of Swoopes was erroneous.

1 The prosecutor tried to address this inconsistency in his rebuttal
2 closing. He conceded that the wife did not tell detectives the gunman had
3 a scar, but argued her identification was nevertheless accurate because
4 her memory was refreshed when she saw Swoopes in the physical lineup.

5 During deliberations, the jury sent a written question to the trial
6 judge asking to see "any statement made by [the wife] of a blemish before
7 the physical lineup." *Swoopes*, 216 Ariz. 390, 393, 166 P.3d 945, 948. The
8 court responded that "the statement is not admissible" and further
9 instructed the jurors to "rely on their collective memories." *Id.* It is
10 undisputed that the wife did not make a statement about a blemish to the
11 police immediately after the robbery.

12 After the trial and sentencing, Swoopes filed a direct appeal arguing
13 (1) "the court erred in imposing consecutive sentences," (2) "the court
14 erred in convicting him of sexual assault as an accomplice, and (3) "the
15 victims' in-court identification of him was tainted." *Arizona v. Swoopes*,
16 155 Ariz. 432, 434, 747 P.2d 593, 596 (App. 1987); [doc. # 150, p. 2, n.
17 1]. During the briefing process, the appeal was inadvertently transferred
18 to the Arizona Supreme Court before being returned to the court of
19 appeals. [doc. # 11, p. 3, n. 3] During this period, Swoopes filed a
20 supplemental brief arguing (4) the prosecutor engaged in misconduct, (5)
21 the court erred in instructing the jury on the issue of identification
22 evidence, (6) the state improperly excluded counsel from the trial
23 lineup, and (7) the aggravated robbery conviction violated double
24 jeopardy. [doc. # 11, p. 3, n. 3]; [doc. # 150, p. 2, n. 1] The court of
25 appeals refused to entertain the additional claims. *Id.*; [doc. # 7, p.
26 5, n.1] On July 21, 1987, the court of appeals affirmed Swoopes'
27 convictions and sentences in *Arizona v. Swoopes*, 155 Ariz.432, 747 P.2d
28 593 (App 1987) (*Swoopes I*). The Arizona Supreme Court denied review on
January 13, 1988. [doc. # 150, p. 2]

17 In his first post-conviction relief petition, filed on February 1,
18 1989, Swoopes argued (1) trial counsel was ineffective for failing to
19 investigate the alleged getaway car, (2) the trial court erred in its
20 instruction to the jury about identification evidence, (3) he was denied
21 counsel at all critical stages, (4) the prosecutor engaged in misconduct
22 at trial and suppressed evidence, (5) the sentence was unconstitutional,
23 and (6) he was denied due process and equal protection. [doc # 142, p.
24 4] The trial court denied the petition on July 17, 1990. [doc. # 142, p.
25 4] The court of appeals denied Swoopes' petition for review on February
26 21, 1991. [doc. # 150, p. 3] On February 21, 1991, Swoopes filed a
27 special action in the court of appeals raising the same issues presented
28 in his first post-conviction relief petition and arguing the trial court
erred procedurally and substantively in denying his petition. [doc. #
142, p. 5.] The court of appeals denied the special action on April 18,
1991, and the Arizona Supreme Court denied a petition for review on
September 27, 1991. *Id.*

26 On July 26, 1993, Swoopes filed in this court his original Petition for
27 Writ of Habeas Corpus pursuant to Title 28, United States Code, Section
28 2254. (Petition.) He claimed (1) the victims' in-court identification of
him was tainted, (2) his due process and equal protection rights were

1 violated by misconduct before the grand jury, (3) the trial court
2 committed error at trial and in regard to a stipulation, (4) the
3 prosecutor engaged in misconduct in part by withholding exculpatory
4 evidence, (5) trial and appellate counsel were ineffective, and (6) his
5 sentences violated the Double Jeopardy Clause. [doc. # 1, pp. 5-7]; [doc.
6 # 150, pp. 3-4, n. 3]

7 This court denied claim (1) on the merits and found the remaining
8 claims procedurally defaulted. [doc. # 150, pp. 4-5]. The Ninth Circuit
9 affirmed in *Swoopes v. Sublett*, 163 F.3d 607 (9th Cir. 1998) (*Swoopes*
10 *II*). The Supreme Court vacated *Swoopes II* and remanded in light of the
11 recently decided *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728
12 (1999). *Swoopes v. Sublett*, 527 U.S. 1001, 119 S.Ct. 2335 (1999). On
13 remand, the Ninth Circuit held that an ordinary habeas petitioner in
14 Arizona exhausts his claims by presenting them to the court of appeals.
15 *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999) (*Swoopes III*), cert.
16 *Denied*, 529 U.S. 1124 (2000). The Ninth Circuit remanded the case for
17 this court to "determine which claims were properly exhausted, and not
18 procedurally barred, and issue a decision on the merits of those claims."
19 [doc. # 150, p. 5]

20 After a new round of briefing, *Swoopes* filed a motion to stay the
21 petition and pursue discovery, which was granted by this court. [doc. #
22 150, pp. 5-6] By this point, *Swoopes'* counsel had discovered in the file
23 the trial court's response to the jury's mid-deliberation question.

24 *Swoopes* returned to state court and filed a second post-conviction
25 relief petition on March 27, 2003. [doc. # 142, p. 5] He argued (1) the
26 trial court erred procedurally and substantively in its response to the
27 jury question, (2) trial and appellate counsel were ineffective in their
28 response to the jury question issue, and (3) (a) the state violated *Brady*
by failing to disclose evidence that another suspect was connected to the
getaway car and (3) (b) the state failed to preserve or destroyed evidence
favorable to his defense. *Id.*, pp. 6-7. The trial court granted relief
on the ineffective assistance claim and ordered a new trial. [doc. # 137,
Exhibit B]; *Arizona v. Swoopes*, 216 Ariz. 390, 393, 166 P.3d 945, 948
(App. 2007) (*Swoopes IV*). On September 19, 2007, the court of appeals
reversed the trial court concluding that *Swoopes'* claims were precluded,
not eligible for any of the preclusion exceptions, and not of sufficient
[footnote omitted] constitutional magnitude that they could not be waived
implicitly. *Swoopes IV*. The Arizona Supreme Court denied review on June
3, 2008. [doc. # 150, p. 7] On September 22, 2009, *Swoopes* filed in this
court his amended Petition for Writ of Habeas Corpus, which combines
certain claims from his original habeas petition with claims newly raised
in his second post-conviction relief petition. He claims (I) his due
process rights were violated "by the trial court's use of unduly
suggestive and unreliable identification at trial," (II) "the trial judge
erred procedurally and substantively in his response to a [mid-
deliberation] jury question," [footnote omitted] (III) his right to due
process and equal protection was violated by prosecutorial misconduct;
and (IV) trial counsel and appellate counsel were ineffective. [doc. #
142].

1 (R&R at 2-6.)

2 On November 30, 2009, Respondents filed a Response to the amended
3 Petition for Writ of Habeas Corpus. On January 28, 2010, Petitioner filed
4 a Reply to the Response, pursuant to Rule 5 of the Rules Governing
5 Section 2254 Cases. On March 22, 2010, the Magistrate Judge issued a
6 Report and Recommendation that the amended petition may be denied on the
7 merits. (Doc. 157.) On July 30, 2011, Petitioner's Objections were
8 filed. (Doc. 163, 164.) On August 13, 2010, Respondents filed a Response
9 to the Petitioner's Objections. (Doc. 165.) On August 19, 2010,
10 Petitioner filed a Reply to the Respondents' Response, which is not
11 contemplated by the rules governing Section 2254 cases or reports and
12 recommendations at Fed.R.Civ.P. 72, and no leave of Court was requested.
13 This Reply was stricken and Petitioner then filed a Motion for
14 Reconsideration on September 29, 2010. (Doc. 168.)

15 **PETITIONER'S OBJECTIONS**

16 **A. The Magistrate Court Wrongly Denied Petitioner's Claim that the**
17 **Trial Judge's Response to the Jury's Mid-Deliberation Question Was**
18 **Prejudicial Error Because: (1) the State Post-Convictions Court's**
19 **Findings Underlying Its Ruling - i.e., that the Trial Court Responded**
20 **Incorrectly and Prejudicially to a Pivotal Jury Question - Are Supported**
21 **By The Record and Must Be Deferred To; and, (2) the Trial Judge's**
22 **Response to the Jury's Mid-Deliberation Question Was an Ex Parte**
23 **Communication.**

24 These Objections address the recommendation contained in the R&R,
25 as follows:

26 In claim (II), Swoopes argues "the trial judge erred procedurally and
27 substantively in his response to a mid-deliberation jury question" [doc.
28 # 142, p. 9]

First, Swoopes claims that when the jury sent out its question during
deliberations, the judge improperly communicated with the jury ex parte
without consulting Swoopes' attorney. [doc. # 142, p. 9]; [doc. # 1,
memorandum, pp. 22-24] The respondents concede this claim is timely, but
they argue it is procedurally defaulted. [doc. # 150, pp. 9, 21-22]

1 When Swoopes raised this claim in his second post-conviction proceeding,
2 the state appellate court found the claim precluded pursuant to
3 Ariz.R.Crim.P. 32.2. *Arizona v. Swoopes*, 216 Ariz. 390, 166 P.3d 945 (App
4 2008). A procedural bar imposed by the state below precludes federal
5 review only if it is adequate to support the judgment and independent of
6 federal law. *Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992). A
7 procedural bar is adequate if it was "firmly established and regularly
8 followed" at the time of the default. *Fields v. Calderon*, 125 F.3d 757,
9 760 (9th Cir. 1997), cert. Denied, 523 U.S. 1132 (1998). Here, the
10 default occurred when Swoopes failed to raise this claim in his direct
11 appeal or first postconviction relief petition. *Id.*, at 760-61. Because
12 procedural default is an affirmative defense, the respondents have the
13 burden to show the state's procedural bar is adequate and independent of
14 federal law. *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005).

15 In this case, the state court's procedural bar was not firmly
16 established and regularly followed at the time of the default. The state
17 court found Swoopes' claim precluded after applying the current version
18 of Rule 32.2. See *Arizona v. Swoopes*, 216 Ariz. 390, 397 (App. 2007)
19 (*Swoopes IV*). This version, which dates from 1992, did not apply at the
20 time of Swoopes' default because that default occurred before 1992, when
21 the previous version of the rule was in existence. *Id.* Accordingly, the
22 court concludes the procedural bar applied by the court of appeals (the
23 new rule) was not firmly established and regularly followed at the time
24 of the default (when the previous version of the rule applied). See *Scott*
25 *v. Schriro*, 567 F.3d 573, 580-82 (9th Cir. 2009), cert. denied, 130 S.Ct.
1014 (2009); *Clayton v. Gibson*, 199 F.3d 1162, 1171 (10th Cir. 1999)
("[T]he 1995 amendments do not constitute an 'adequate' state law ground
for procedural default purposes if they did not exist at the time of the
default."), cert. Denied, 531 U.S. 838 (2000).

16 Addressing the claim on the merits, the court concludes Swoopes is not
17 entitled to relief. Swoopes cannot show as a matter of fact that the
18 judge engaged in ex parte communications.

19 Swoopes raised this claim in his second post-conviction relief petition.
20 He submitted an affidavit from his trial counsel who stated that he had
21 no recollection of the jury's note or the judge's response but asserted
22 if he had seen the response, he would have objected because it was
23 misleading. *Arizona v. Swoopes*, 216 Ariz. 390, 395 (App. 2007). The state
24 court concluded that Swoopes' evidence amounted to no more than a mere
25 speculation that the judge engaged in ex parte communications. *Id.*
Because it was customary for the judge to contact counsel off the record
in such circumstances, the state court found that the judge probably did
just that and simply failed to make a subsequent record. *Id.* The court
will "presume that the state court's findings of historical fact are
correct and defer to those findings in the absence of convincing evidence
to the contrary or a demonstrated lack of fair support in the record."
Mayfield v. Woodford, 270 F.3d 915, 922 (9th Cir. 2001).

26 Swoopes cannot show as a matter of fact that the judge engaged in ex
27 parte communications. Accordingly, this claim should be denied.

1 Swoopes further argues the trial court should have "brought the jury
2 into open court in his and his attorney's presence and presented it with
3 the crucial and true evidence about [the wife's] unreliable
4 identification (in part by "holding the 'Dessureault' hearing in the
5 presence of the jury) that was needed to answer the jury's concern about
6 the reliability of the identification." [doc. # 142, p. 9] In support of
7 this claim, Swoopes cites *Rushen v. Spain*, 464 U.S. 114 (1983) and *State*
8 *v. Werring*, 523 P.2d 499 (1974). [doc. # 119, p. 7]

9 The gravamen of Swoopes' claim is not immediately apparent. *Rushen* and
10 *Werring* hold that the due process clause may be implicated if the trial
11 court responds to a jury's [mid-deliberation] question without allowing
12 counsel to participate. Neither holds that the court is obliged to supply
13 the jury with additional evidence whenever the jury requests it. In
14 *Dessureault*, the Arizona Supreme Court discussed certain procedures the
15 trial court should employ if there is an issue as to the admissibility
16 of a witness's identification. *Arizona v. Dessureault*, 104 Ariz. 380, 453
17 P.2d 951 (1969), cert. Denied, 397 U.S. 965 (1970). Among other things,
18 the court held that "if at the trial the proposed in-court identification
19 is challenged, the trial judge must immediately hold a hearing in the
20 absence of the jury to determine from clear and convincing evidence
21 whether it contained unduly suggestive circumstances." *Id.*, p. 384, 955
22 (emphasis added). *Dessureault* does not support Swoopes' claim either. See
23 also *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (Due process does not
24 always require the trial judge to conduct a hearing outside the presence
25 of the jury when identification evidence is at issue.).

26 Swoopes cannot show that the trial court's failure to hold an
27 evidentiary hearing in response to the jury's mid-deliberation question
28 violated his Constitutional rights. The claim should be denied.

Swoopes further argues the court substantively erred when it returned
to the jury an answer that was misleading.

The respondents argue this claim is untimely because it was not included
in the original petition, and the amended petition was filed after the
applicable one-year limitation period. See 28 U.S.C. § 2244(d)(1). This
issue was decided by the Ninth Circuit only after briefing on the
petition was concluded. Where the original habeas petition was filed
before the AEDPA effective date, the AEDPA's one-year limitation period
does not apply to the case at all, even to an amended petition filed
after the effective date. *Smith v. Mahoney*, __ F.3d __, 2010 WL 744271
* 12 .

As the court stated above, the state court's finding of preclusion does
not bar federal review. Nevertheless, the court finds the claim fails on
the merits.

A habeas petitioner complaining of trial error is entitled to relief
only if he can show the error "had a substantial and injurious effect or
influence in determining the jury's verdict." See *Brecht v. Abrahamson*,
507 U.S. 619, 63, 113 S.Ct. 1710, 1722 (1993). Swoopes cannot show the
trial court's response had such an effect or influence.

1 When the jury asked in mid-deliberation if the wife made any statement
2 about a blemish before the physical lineup, the trial court responded
3 that "the statement is inadmissible." *Swoopes*, 216 Ariz. 390, 393, 166
P.3d 945, 948 (App. 2007). Thus, the jury was told two things: (1) the
wife made a statement, and (2) that statement was not admissible.

4 The jury, however, was instructed to find the facts based only on the
5 evidence presented at trial. [doc. # 150, Exhibit D, p. 141] Evidence,
6 the jury was told, consists of the testimony of the witnesses and
7 exhibits. *Id.* An inadmissible statement is not evidence. Accordingly, the
8 wife's "statement" about a blemish was not evidence and would not have
9 been considered by the jury in their determination of the facts. Because
10 a jury is presumed to follow its instructions, the court must conclude
11 the trial judge's response to the jury's mid-deliberation question did
12 not have a "substantial and injurious effect or influence in determining
13 the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113
14 S.Ct. 1710, 1722 (1993); see also *Weeks v. Angelone*, 528 U.S. 225, 234,
15 120 S.Ct. 727, 733 (2000) ("A jury is presumed to follow its
16 instructions." "Similarly, a jury is presumed to understand a judge's
17 answer to its question.").

18 Moreover, even if the trial judge's response caused the wife's
19 identification testimony to be improperly bolstered, relief is not
20 available in light of the remaining evidence against *Swoopes*. The husband
21 testified that he was sober and clear-headed the night of the robbery,
22 and he had no difficulty seeing the gunman's face. [doc. # 150, Exhibit
23 C, pp. 108, 95, 97] While he conceded he did not pick *Swoopes* out of the
24 photo lineup, he said he had no problem recognizing *Swoopes* in the flesh.
25 *Id.*, p. 132. He testified there was no question in his mind that *Swoopes*
26 was the gunman. *Id.*, pp. 133, 142.

27 The friend testified that while he may have had a couple of beers, he
28 was not in any way under the influence the night of the robbery. *Id.*, pp.
145, 146. The lighting was adequate, and he had no trouble seeing the
gunman's face. *Id.*, pp. 149, 150, 161. He failed to pick *Swoopes* out of
a photo lineup, but he had no trouble recognizing *Swoopes* in the
courthouse. [doc. # 150, pp. 164, 165; Exhibit D, p. 50] He had no doubt
that *Swoopes* was the gunman. [doc. # 150, Exhibit C, pp. 186, 87]

29 The state also presented evidence connecting *Swoopes* to the vehicle
30 used the night of the robbery. At some point, *Swoopes* was arrested for
31 a traffic violation. [doc. # 150, Exhibit D, pp. 62-63] He was driving
32 his aunt's black over blue 4-door 1967 Chrysler, license number: TBT 387.
33 *Id.* He said he lived with his aunt at 2115 North Avenida El Capitan. *Id.*
34 Detective Skuta testified that he went to this address and saw outside
35 the residence the '67 Chrysler and a Plymouth Valiant. [doc. # 150,
36 Exhibit D, pp. 27-28] The Chrysler's licence plate was on the Valiant.
37 *Id.* The husband and friend testified that the 4-door Valiant looked like
38 the vehicle used by the robbers. [doc. # 150, Exhibit C, pp. 166-68, 188-
89]

39 Even without the wife's testimony, there was compelling evidence that
40 *Swoopes* was the gunman. The trial judge's response to the jury's mid-

1 deliberation question did not have a "substantial and injurious effect
2 or influence in determining the jury's verdict." See *Brecht v.*
Abrahamson, 507 U.S. 619, 637 (1993).

3 Swoopes further argues the effect of the erroneous response as
4 magnified by the prosecutor's statements during his rebuttal closing. The
5 court finds that the prosecutor's closing argument was somewhat
6 misleading but not as prejudicial as Swoopes argues.

7 During his closing argument, Swoopes' counsel reminded the jury that
8 the wife told detectives the gunman had no scars. [doc. # 150, Exhibit
9 D, p. 119] He argued, this was strong evidence that her later
10 identification of Swoopes was erroneous.

11 The prosecutor tried to address this inconsistency in his rebuttal
12 closing. He conceded the wife told detectives the gunman had no scars,
13 but argued her identification was nevertheless accurate because her
14 memory was refreshed when she saw Swoopes in the physical lineup. His
15 rebuttal closing reads in pertinent part as follows:

16 And then it's very nice, the lady's in the hospital, she has
17 been there for a couple hours, she's been through hell and
18 some officer is trying to get some statements, did he look
19 this way, did he have a scar, no, no, about five foot seven
20 or eight, same weight, same color, same size, she said on
21 that witness stand, how many of you listened to her? You all
22 did, You all did. The word blemish kept coming up. She saw
23 a blemish on his face. The guy is asking about a scar and
24 she's probably doped up at that time, as indicated. And you
25 are going to walsh [sic] him out of the Courtroom. You know,
26 when you see a person face to face, your memory gets
27 refreshed. When you see that person, it hits you that that's
28 the person. That's it.

29 . . . Then when a defense attorney gets you on the witness
30 stand, and put yourselves in the shoes of these victims,
31 here, naturally, any tiny discrepancy, blemish versus scar,
32 any thing will be picked on and hammered out. My God in
33 heaven she did not get her Polaroid out and photograph it.
34 Her mind did though. And sure, 1:00 o'clock in the morning,
35 when she's sedated and exhausted and in shock, she may not
36 have mentioned the scar. Her memory was refreshed when she
37 saw him. . . . And they did not commit perjury in this
38 Courtroom. You should resent being told that.

39 Now they told the police that very night about this scar.
40 That very day about that scar. Let me ask you this question.
41 Because this is the whole thing when you come right down to
42 it. It isn't the rhetoric, and it isn't the did you see a
43 mole on someone's chin, did you see a scratch here, do you
44 see a pox mark on the forehead, did you see that, it's the
45 totalitariness [sic] of the person how he looks, when you see
46 him, his size; . . . As she said on the witness stand, and

1 she told Detective Skuta, it wasn't just a blemish, it
2 wasn't just a scar, it was all these things when I saw him
3 with a gun and I had a chance to see him, that's the man.

4 . . .

5 [doc. 150, Exhibit D, pp. 133- 36]

6 According to Swoopes, the prosecutor falsely stated that the wife told
7 detectives immediately after the robbery that the gunman had a blemish.
8 The court does not agree. The prosecutor did make certain statements
9 about a blemish. He said: "The word blemish kept coming up." "She saw a
10 blemish on his face." *Id.* He never stated, however, that she told the
11 police the gunman had a blemish.

12 The meaning of these blemish statements is open to debate. Before the
13 statements, the prosecutor discussed the wife's testimony at trial.
14 Accordingly, the blemish statements may refer to the wife's admission at
15 trial that she recognized Swoopes in the lineup in part by his scar.

16 Immediately after making the blemish statements, however, the prosecutor
17 discussed the wife's interview at the hospital after the robbery. He
18 stated: "The guy is asking about a scar and she's probably doped up at
19 that time, as indicated." *Id.* Accordingly, the prosecutor may have been
20 suggesting the wife saw a blemish but did not mention it because she was
21 medicated at the time. Regardless of which of these interpretations is
22 correct, however, the court concludes the prosecutor never improperly
23 told the jury that the wife told police the gunman had a blemish
24 immediately after the robbery.

25 More problematic, however, are the prosecutor's following statements:
26 "Now they told the police that very night about this scar." "That very
27 day about that scar." [doc. # 150, Exhibit D, p. 136] These statements
28 are also something of a mystery. Immediately after the robbery, the
witnesses did not tell police the gunman had a scar. The prosecutor
conceded in his closing that the wife did not mention the scar and
explained in detail why her identification was nevertheless reliable.
Accordingly, it is unlikely that the prosecutor would deliberately
misrepresent the trial evidence, and simultaneously undermine his own
closing argument by asserting the exact opposite. The respondents suggest
the prosecutor was referring to a later time when the witnesses
recognized Swoopes and told the detectives about their respective
identifications. [doc. # 150, pp. 29-30, n. 8] This is a plausible theory
considering that the prosecutor's statements immediately following deal
with the process of identification.

But regardless of what these statements mean, the court concludes they
did not convince the jury that the wife told detectives about the scar
immediately after the robbery. If they had believed that, then they would
have had no reason to send out their mid-deliberation jury question
asking if the wife made any statements about a blemish. Their question
makes sense only if they believed the wife made no statements about a
scar but might have made one about a *blemish* instead.

1 The rebuttal closing was not a model of clarity, but the prosecutor did
2 not falsely tell the jury that the wife described the gunman as having
3 a blemish or a scar immediately after the robbery. It is possible that
4 the jury inferred from his argument that the wife's concession that she
5 did not mention a scar to the police did not foreclose the possibility
6 that she mentioned a blemish instead. This would explain the jury's mid-
7 deliberation question.

8 The court concludes that the trial court's response to the mid-
9 deliberation jury question, in light of all the trial proceedings, did
10 not have a "substantial and injurious effect or influence in determining
11 the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

12 Swoopes argues this court should defer to the determination of the
13 state court that the trial court's error was not harmless. The court
14 however must apply the pre-AEDPA standard of review, which requires us
15 to review mixed questions of law and fact de novo. The determination of
16 whether a trial error was harmless or not is a mixed question of law and
17 fact reviewed de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.
18 1988), cert. denied, 488 U.S. 901 (1988). Accordingly, this court may not
19 defer to the state court's resolution of this issue.

20 (R&R at 9 - 16.)

21 RULING

22 The Objections added nothing new to this claim that have not
23 already been addressed completely and accurately by the R&R and through-
24 out these proceedings. The Court finds no error in the Magistrate
25 Judge's analysis of the law. Both the trial court and the Arizona Court
26 of Appeals found that Petitioner failed to show an ex parte communication
27 occurred. *State v. Swoopes*, 216 Ariz. 390, 394-395 (Ariz. App. 2007).
28 The Objection is based on unsupported speculation. Viewing the totality
of the evidence against Petitioner, Petitioner cannot show that the trial
court's response "had a substantial and injurious effect or influence in
determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619
(1993); see also *Rushen v. Spain*, 464 U.S. 114, 117 (1983(subject to
harmless error analysis); *United States v. Madrid*, 842 F.2d 1090, 1093-94
(9th Cir. 1988)(no actual prejudice). The Court finds no unreasonable

1 application of established federal law. Thus, this Objection is
2 overruled.

3 **B. The Magistrate Court Wrongly Denied Petitioner's Claim that the**
4 **Prosecutor Violated his Due Process Rights by Failing to Disclose Clearly**
5 **Exculpatory Evidence Under Brady.**

6 This Objection addresses the following excerpt from the R&R:

7 [Swoopes] argues the prosecutor "withheld and failed to preserve or to
8 destroy substantially exculpatory evidence from the defense." [doc. #
9 142, p. 10] Specifically, Swoopes claims the prosecution failed to
10 disclose that police suspected another man, Wigglesworth, of committing
11 the home invasion. [doc. # 150, Exhibit A, 7-9] This claim was raised in
12 Swoopes' second post-conviction relief petition. It is neither time-
13 barred nor procedurally defaulted. The court concludes the claim should
14 be denied on the merits.

15 "[T]he suppression by the prosecution of evidence favorable to an
16 accused upon request violates due process where the evidence is material
17 either to guilt or to punishment, irrespective of the good faith or bad
18 faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
19 "The evidence is material [and reversal is required] only if there is a
20 reasonable probability that, had the evidence been disclosed to the
21 defense, the result of the proceeding would have been different." *U.S.*
22 *v. Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a
23 probability sufficient to undermine confidence in the outcome." *Id.*

24 Swoopes maintains the state failed to disclose a wealth of *Brady*
25 material that would have altered the verdict had it been presented at
26 trial. [doc. # 137, Exhibit A, pp. 9-10] Specifically, the state failed
27 to disclose that the Plymouth Valiant, identified by the husband and
28 friend as the getaway vehicle, was actually owned, not by Swoopes or his
aunt, but by a Harold McGrew. *Id.* This McGrew did not know Swoopes and
never lent him his car. *Id.* Moreover, McGrew sold the car to a Russell
Clark who had been arrested for burglary at one time. *Id.* Clark in turn
was associated with a John Wigglesworth, who later pleaded guilty to a
home invasion robbery. *Id.* Wigglesworth drove a Ford Thunderbird and used
the modus operandi of switching licence plates to avoid arrest. [doc. #
154, p. 49] Swoopes argues this Thunderbird could have been the getaway
vehicle because it more closely matched the victim's original description
than did the Valiant. *Id.* It is not clear how all this evidence would
have benefitted Swoopes.

At trial, Swoopes' counsel argued the husband and the friend were
mistaken when they identified the Valiant as the getaway car. [doc. #
150, Exhibit D, pp. 75, 126] Now, Swoopes believes counsel should have
conceded that the Valiant was the getaway car but should have argued the
car was associated with other possible suspects - Clark and Wigglesworth.
This new line of evidence, however, does not exonerate Swoopes. Swoopes
conducted his robbery with two accomplices. They have never been
identified. One of them could have been Clark or Wigglesworth, does not

1 mean the evidence also exonerates Swoopes. They may have committed the
2 robbery together. Moreover, if the Valiant was indeed the getaway car,
3 the fact that the Valiant was parked in front of Swoopes' house and
4 displayed the licence plate from Swoopes' aunt's car would have been
5 additional circumstantial evidence of his guilt. In the alternative,
6 Swoopes suggests his attorney should have introduced evidence that
7 Wigglesworth's Ford Thunderbird was the getaway vehicle. Again, it is
8 difficult to see how this alternate theory would have helped to exonerate
9 Swoopes. If the Thunderbird was the getaway vehicle, then Wigglesworth
10 was likely involved in the robbery. Wigglesworth, however, associated
11 with Clark, another robbery suspect. Clark, in turn, owned the vehicle
12 that was observed sitting in front of Swoopes' house sporting the licence
13 plate from Swoopes' aunt's car.[Footnote omitted.] The evidence tends to
14 prove that Swoopes knew both Clark and Wigglesworth and had access to the
15 Ford Thunderbird.

16 The court does not find "a reasonable probability that, had the
17 evidence been disclosed to the defense, the result of the proceeding
18 would have been different." See *U.S. v. Bagley*, 473 U.S. 667, 682 (1985);
19 but see *U.S. v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (Where bank
20 robbery was committed by a lone, Hispanic woman, *Brady* was violated when
21 the government failed to disclose the existence of second female,
22 Hispanic suspect.).

23 Swoopes further claims his due process rights were violated when the
24 state failed to preserve or destroyed evidence. Specifically he maintains
25 the state failed to preserve a record of all of the proceedings below
26 concerning his identification issue; destroyed or failed to preserve the
27 testimony of witnesses at the *Dessureault* suppression hearing of February
28 3, 1986 and February 24, 1986; destroyed trial exhibits such as mug
shots, photos of the physical lineup and getaway car; and destroyed
physical evidence such as the rape kit, a pillowcase and blouse.[doc. #
142, p. 7]

29 This evidence was destroyed some time after Swoopes' direct appeal and
30 initial postconviction relief petition. [doc. # 137, Exhibit B, ruling
31 3/16/06, p. 2] Nevertheless, Swoopes argues the absence of this material
32 hampers the "litigation of his post-conviction challenges to his
33 conviction." [doc. # 137, Exhibit A, memorandum in support of petition,
34 p. 16] This claim was raised in Swoopes' second post-conviction relief
35 petition. It is neither time-barred nor procedurally barred from federal
36 review. The court concludes the claim should be denied on the merits.

37 In order for the state's failure to preserve evidence to violate due
38 process the "evidence must both possess an exculpatory value that was
apparent before the evidence was destroyed, and be of such a nature that
the defendant would be unable to obtain comparable evidence by other
reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489
(1984). Moreover, if the state did not destroy the evidence in bad faith,
there is no due process violation. *Arizona v. Youngblood*, 488 U.S. 51,
58 (1988).

1 The Supreme Court has never clearly held that the due process clause
2 is implicated if the state destroys potentially exculpatory material
3 after trial. See *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007);
4 *Ferguson v. Roper*, 400 F.3d 635, 638 (8th Cir. 2005), cert. denied, 546
5 U.S. 1098 (2006). The court need not decide, however, whether or not
6 *Trombetta*, and *Youngblood* apply to Swoopes' claim because he is not
7 entitled to relief regardless. But see *Pennsylvania v. Finley*, 481 U.S.
8 551, 557 (1987) (The Constitution does not obligate the states to provide
9 post-conviction relief, and if they do, the Due Process Clause does not
10 guarantee the petitioner the same rights that would apply before trial).
11 Swoopes has made no showing that the state destroyed this evidence in bad
12 faith. See [doc. # 137, Exhibit B, ruling 3/16/06, p. 2] Accordingly, he
13 has not shown his due process rights were violated.

14 (R&R at 16 - 18.)

15 RULING

16 The Objection is repetitive of ongoing arguments and claims that
17 have been addressed by the R&R. The Court finds no error in the analysis
18 or application of the law. A constitutional violation arising from
19 prosecutorial misconduct does not warrant habeas relief if the error is
20 harmless. See *Sandoval v. Calderon*, 241 F.3d 765, 778 (9th Cir. 2000).
21 When a state court has found a constitutional error to be harmless beyond
22 a reasonable doubt, a federal court may not grant habeas relief unless
23 the state court's determination is objectively unreasonable. See *Mitchell*
24 *v. Esparza*, 540 U.S. 12, 17-18 (2003) (per curiam); *Cooper v. Brown*, 510
25 F.3d 870, 921 (9th Cir.2007). Under *Brady*, "suppression by the
26 prosecution of evidence favorable to an accused upon request violates due
27 process where the evidence is material either to guilt or to punishment,
28 irrespective of the good faith or bad faith of the prosecution." 373 U.S.
at 87. For a *Brady* claim to succeed, "[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*

1 v. Dretke, 540 U.S. 668, 691(2004) (quoting *Strickler v. Greene*, 527 U.S.
2 263, 281-82 (1999)). "The relevant question is whether the prosecutors'
3 [misconduct] 'so infected the trial with unfairness as to make the
4 resulting conviction a denial of due process.' " *Darden v. Wainwright*,
5 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S.
6 637, 643 (1974)). Assuming that is so, this Court need only decide
7 whether the prosecutor's misconduct so tainted the trial as to violate
8 due process and altered the result of the trial. *United States v.*
9 *Bagley*, 473 U.S. 667, 682 (1985). After reading the transcript of the
10 jury trial, the Court does not so find. The statement by the Petitioner
11 that the State withheld evidence that was both favorable to Swoopes and
12 material to the State's case against him and his defense is unsupported.
13 (Objection at 28.) The Court agrees that it is not clear how the
14 allegedly withheld evidence would have benefitted Swoopes' defense.
15 There was no error in how the prosecutor argued identification and the
16 getaway car; this was not an example of exploiting evidence wrongfully
17 withheld. (Objection at 29.) This Objection is overruled.

18 **C. The Magistrate Court Wrongly Denied Petitioner's Claim that the**
19 **Victims' Unduly Suggestive Identifications Were Sufficiently Reliable.**

20 This Objection is directed to this portion of the R&R:

21 Swoopes argues his due process rights were violated when evidence was
22 presented at trial of an "unduly suggestive and unreliable identification
at trial." [doc. # 142, p. 8] The parties agree that this claim should
be addressed on the merits.

23 This claim was raised in the original petition, which was filed before
24 the AEDPA's effective date, so the AEDPA standard of review does not
25 apply. *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). Pure
26 questions of law and mixed questions of law and fact are reviewed de
27 novo. *Id.* The court will "presume that the state court's findings of
historical fact are correct and defer to those findings in the absence
of convincing evidence to the contrary or a demonstrated lack of fair
support in the record." *Id.* (internal punctuation removed).

1
2 Evidence presented at trial of an out-of-court identification may
3 violate due process if the identification procedure created "a very
4 substantial likelihood of irreparable misidentification." *Neil v.*
5 *Biggers*, 409 U.S. 188, 198 (1972). "Suggestive confrontations are
6 disapproved because they increase the likelihood of misidentification,
7 and unnecessarily suggestive ones are condemned for the further reason
8 that the increased chance of misidentification is gratuitous." *Id.*
9 [Footnote omitted.] If the court finds a pre-trial identification
10 procedure was unnecessarily suggestive, the court proceeds to determine
11 whether the ultimate identification was nevertheless sufficiently
12 reliable. *Id.*, at 198-99. If so, then its admission at trial did not
13 violate due process. *Id.* "[T]he central question, [is] whether under the
14 'totality of the circumstances' the identification was reliable even
15 though the confrontation procedure was suggestive." *Id.* at 199. "[T]he
16 factors to be considered in evaluating the likelihood of
17 misidentification include the opportunity of the witness to view the
18 criminal at the time of the crime, the witness' degree of attention, the
19 accuracy of the witness' prior description of the criminal, the level of
20 certainty demonstrated by the witness at the confrontation, and the
21 length of time between the crime and the confrontation." *Id.* at 199-200.

22
23 Assuming without deciding that the initial pre-trial identification was
24 unnecessarily suggestive, the court concludes that under the totality of
25 the circumstance the identification was sufficiently reliable.

26
27 The three witnesses had an "ample opportunity" to observe Swoopes
28 during the robbery. *Arizona v. Swoopes*, 155 Ariz. 432, 435 (App. 1988);
see also *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995) ("[T]he
state court's factual determinations are presumed correct."). The
witnesses were not mere bystanders but were direct victims. Obviously,
their degree of attention was heightened by that fact. On the other hand,
the court recognizes that the stress of the robbery is a factor that
could have impaired the witness's ability to accurately remember details
about the gunman's face. See, e.g., *Raheem v. Kelly*, 257 F.3d 122, 138
(2nd Cir. 2001) ("[I]t is human nature for a person toward whom a gun is
being pointed to focus his attention more on the gun than on the face of
the person pointing it."), *cert. denied*, 534 U.S. 1118 (2002).

29
30 The accuracy of the witnesses' prior description of the suspect was at
31 least fair. While none of the witnesses reported [footnote omitted] that
32 the suspect had a scar above his right eye, their descriptions were not
33 as vague as Swoopes argues. The husband described the suspect as "negro,"
34 with a "flare[d]" nose, "slender" with a "good build"- "weighed about
35 165." [doc. # 1, Exhibit A] He had "a mustache and maybe long sideburns."
36 *Id.* He wore a dark coat, tan or gray pants, and "like a baseball cap"
37 that was purple or black. *Id.* The wife described the suspect as "black,"
38 "about 5'8" or 5'9", slim figure." *Id.* He wore a black cap, brown jacket,
brown pants, sneakers, and bellbottoms. *Id.* The friend described the

1 suspect as "a black male, approximately 5'11", "lighter colored curly
2 hair, with "a mustache and a thin beard around his chinline," "about 155,
3 160 pounds," "real nervous" with "[n]o discernible accent." *Id.* He wore
4 "dark pants" and "a maroon or purple coat or shirt." *Id.* The witnesses'
5 descriptions vary somewhat, but they agree in the main. The degree of
6 detail supplied by the witnesses is some evidence that they had a good
7 look at the suspect. The degree of similarity between the witnesses'
8 descriptions is some evidence that their descriptions were accurate.

9
10 After viewing Swoopes in court, the two men were "absolutely certain"
11 that Swoopes was the gunman. *Arizona v. Swoopes*, 155 Ariz. 432, 433 (App.
12 1988). The wife later identified Swoopes at a live lineup "without being
13 told of the positive identification by her companions." *Arizona v.*
14 *Swoopes*, 155 Ariz. 432, 434-35 (App. 1988). The witnesses' degree of
15 certainty is further evidence that the identification was reliable.

16
17 The courthouse identification, however, was made approximately 16
18 months after the crime. This is a considerable length of time and does
19 not support reliability. By itself, however, this lapse of time is not
20 dispositive. See, e.g., *U.S. v. Williams*, 596 F.2d 44, 49 (2nd Cir.
21 1979) ("[A]lthough the time lapse of two years and eight months between
22 the crime and the in-court confrontation is a somewhat negative factor,
23 it is outweighed by the other four *Manson* criteria"), cert.
24 denied, 442 U.S. 946 (1979). Based on the totality of the circumstances,
25 the court concludes the identification testimony was not so unreliable
26 that its admission violated due process.

27
28 Swoopes argues the witnesses' failure to report a scar on the face of
the gunman proves their later identification of him was not sufficiently
reliable. The court does not agree. It is undisputed that Swoopes has a
scar above his right eye. But while this scar is plainly visible under
ordinary conditions, it is not so prominent [footnote omitted] that it
could not have been missed during the tense and chaotic atmosphere of an
armed robbery.

Swoopes notes that the witnesses were shown a photographic lineup
shortly after the robbery, and although they were shown his picture, were
unable to make an identification. He argues their later identification
of him was likely a recollection of seeing his photograph rather than an
identification of the true gunman. The court agrees that the sequence of
events is some evidence that the witnesses' identification was
unreliable. However, the court does not agree that this outweighs the
other factors pointing to reliability. See *U.S. v. Davenport*, 753 F.2d
1460, 1463 (9th Cir. 1985) ("The fact that Davenport was the only
individual common to the photo spread and the lineup cannot, without
further indicia of suggestiveness, render the lineup conducive to
irreparable misidentification."); *U.S. v. Johnson*, 820 F.2d 1065, 1073
(9th Cir. 1987) (similar); but see, e.g., *Foster v. California*, 394 U.S.
440, 442-43 (1969) (Lineup procedure was unfair where the witness finally
made a definitive identification after viewing a lineup, where the

1 defendant was the tallest of the three men and the only one wearing a
2 leather jacket, followed by a "one-to-one confrontation" with the
3 defendant, followed by a *second* lineup, where "[the defendant] was the
only person in this lineup who had also participated in the first
lineup.").

4 (R&R at 6-9.)

5 **RULING**

6 A pretrial hearing was held on Petitioner's motion to preclude the
7 in-court identification pursuant to *State v. Dessureault*, 104 Ariz. 380
8 (1969), *cert. den.*, 397 U.S. 965 (1970). After taking the matter under
9 advisement, the court denied the motion. The test of a witness'
10 identification is whether or not it is reliable considering the totality
11 of the circumstances. *State v. Castaneda*, 150 Ariz. 382 (1986). The two
12 male victims identified Petitioner at his trial on an unrelated matter.
13 The female victim identified Petitioner at a police lineup without being
14 told of the positive identification by her companions. All three victims
15 had ample opportunity to observe Petitioner during the robbery. The trial
16 court held a *Dessureault* hearing and determined that the out-of-court
17 identifications were not unduly suggestive.

18 The state court's determination that the challenged identifications
19 were sufficiently reliable was not contrary to, or an unreasonable
20 application of, clearly established federal law. *Neil v. Biggers*, 409
21 U.S. at 199. The R&R accurately and thoroughly addresses and resolves the
22 identification issue. This Objection is overruled.

23 **D. The Magistrate Court Wrongly Denied Petitioner's Claim that the 24 Prosecutor Engaged in Misconduct By Injecting Racism into His Trial.**

25 Petitioner takes issue with the R&R's recommendation that his claim
26 of racism at trial be denied, as follows:

1 Swoopes further argues the prosecutor engaged in misconduct by the
2 introduction of "racially charged evidence and comments." [doc. # 142,
3 p. 10] The state concedes this claim is timely and was properly
4 exhausted. [doc. # 150, pp. 9, 17, 36] Because guilty verdicts must be
5 based on "solid evidence, not upon appeals to emotion," a prosecutor's
6 attempt to improperly inflame the passions of the jury by appealing to
7 racial or ethnic stereotypes may violate the defendant's Constitutional
8 right to due process. *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975);
9 *Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000), cert. denied, 531
10 U.S. 1037 (2000). A habeas petitioner complaining of trial error is
11 entitled to relief, however, only if he can show the error "had a
12 substantial and injurious effect or influence in determining the jury's
13 verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Bains*, 204
14 F.3d at 977-78.

15 At trial, the prosecutor elicited testimony from the wife about the
16 circumstances of the sexual assault. At some point during the crime, one
17 of the robbers pulled the wife off the living room floor, where the
18 victims were being held, and into the bedroom. [doc. # 150, Exhibit C,
19 p. 208] The gunman restrained the husband telling him: "Don't be a hero
20 or you will die and everybody in the house will die." *Id.*, p. 113. The
21 wife testified that the robber forced her to perform fellatio and told
22 her to act "like I like it." *Id.*, p. 210. He then asked for her name and
23 phone number explaining it was "[b]ecause he would like to have a good
24 white woman." *Id.* She testified she was afraid that the other men would
25 also abuse her. *Id.*, p. 211. During his closing argument, the prosecutor
26 described the sexual assault calling it a "[d]isgusting, reviling,
27 revolting thing that happened to this lady." [doc. # 150, Exhibit D, p.
28 92] He argued that Swoopes was guilty of the sexual assault because he
was an accomplice. *Id.*, p. 96-97. He explained as follows: If you aided,
if you made it possible you are equally guilty. Keep cool, man. Don't be
a hero, man. We are just taking your wife into the other room for a
little fun. [doc. # 150, Exhibit D, p. 97] Later, the prosecutor
described the sexual assault saying: What did he tell her to do? Act like
you enjoy it. Get an Oscar for that one. Act like you enjoy it. And then
what happens? Give me your phone number and she's scared to death, she
gives it, the phone number is right there on the phone anyway. She
doesn't want to get hurt any worse. Anymore. I would like a nice white
lady to fuck. Sure, Okay. [doc. # 150, Exhibit D, p. 103] Toward the end
of his argument, the prosecutor asserted that "this lady and this man and
their friend . . . have been through hell because of this defendant."
Id., p. 138. He urged the jury to "put an end to her nightmare" and
"[s]how her that the truth still exists" and "that justice exists." *Id.*,
p. 139. Swoopes argues that none of this testimony was relevant and it
was introduced into the trial for the sole purpose of inflaming the
racial prejudices of the jury. [doc. # 154, p. 72] The court does not
agree.

25 Testimony establishing the sexual assault and Swoopes' actions
26 facilitating the assault were necessary to prove the elements of the
27 offence. The state asserted Swoopes was guilty of sexual assault as an
28 accomplice. The state therefore was required to prove Swoopes "knowingly
and with criminal intent participat[ed], associat[ed], or concur[ed] with

1 another in the commission of [the rape]. *Arizona v. Swoopes*, 155 Ariz.
2 432, 434 (App. 1987). It was therefore relevant that the rape occurred,
3 that Swoopes knew of his accomplice's intentions, and facilitated the
4 rape by keeping the husband from interfering.

5 Certainly, argument that the assailant wanted the wife's phone number
6 because he wanted a "nice white lady to fuck" raised the specter of
7 certain racial prejudices that could have been used to improperly
8 influence the jury. [doc. # 150, Exhibit D., p. 103] Here, however, it
9 cannot be said that the prosecutor dwelt improperly on the racial
10 overtones of the assault. First, the prosecutor's presentation stuck
11 fairly faithfully to the actual words of the robbers. He did embellish
12 them to some extent, but primarily he stuck to the actual testimony. It
13 would be ironic to find that a prosecutor committed misconduct by
14 repeating in court the very words used by the perpetrators during the
15 underlying crime. See, e.g., *Fields v. Woodford*, 309 F.3d 1095, 1109 (9th
16 Cir. 2002) ("Finally, given the eyewitness testimony about what Fields
17 did to Cobb, there is no reasonable probability that the prosecutor's
18 emotional appeal affected the verdict."), amended by *Fields v. Woodford*,
19 315 F.3d 1062 (9th Cir. 2002).

20 Second, the court notes that the most potentially inflammatory
21 statements were attributed, not to Swoopes, but to the robber who
22 committed the sexual assault. Even if the jurors' passions were
23 improperly inflamed, their anger would have been directed primarily
24 toward the accomplice, not Swoopes. Swoopes, in fact, stopped the assault
25 from escalating by telling his accomplice that it was time to leave.
26 Moreover, the prosecutor discussed the sexual assault primarily in
27 racially neutral terms. The prosecutor's discussion was by no means mild.
28 He used words and phrases obviously calculated to emphasize the
degradation of the underlying crime. He called the assault, for example,
a "[d]isgusting, reviling, revolting thing." His language, however, did
not reference the race of the parties. He did not use the type of
racially loaded terms and argument that courts have previously found to
violate the Constitution. See, e.g., *Bains v. Cambra*, 204 F.3d 964, 975
(9th Cir. 2000) ("Here, the prosecutor relied upon clearly and concededly
objectionable arguments for the stated purpose of showing that all Sikh
persons (and thus Bains by extension) are irresistibly predisposed to
violence when a family member has been dishonored"); *Kelly v.*
Stone, 514 F.2d 18 (9th Cir. 1975) ("Because maybe the next time it won't
be a little black girl from the other side of the tracks; maybe it will
be somebody that you know"); *Miller v. State of N.C.*; 583 F.2d
701, 704 (1978) ("[The prosecutor] repeatedly referred to the defendants
as "these black men" and ultimately argued that a defense based on
consent was inherently untenable because no white woman would ever
consent to having sexual relations with a black."). Finally, the trial
court offered instructions to the jury that should have lessened whatever
prejudicial influence the prosecutor's arguments might have had. The jury
was specifically instructed that it was to find the facts from the
evidence presented in court. [doc. # 150, Exhibit D, p. 140] It was
instructed not to be influenced by sympathy or prejudice. *Id.*, p. 140.
Moreover, it was instructed that the arguments made by the lawyers are
not evidence, but should be considered only if they help the jury members

1 understand the law and the evidence. *Id.*, p. 142; see also *Id.*, pp. 94,
2 131 (where the prosecutor repeated these instructions to the jury).

3 Assuming the prosecutor's comments were improper, Swoopes cannot show
4 they "had a substantial and injurious effect or influence in determining
5 the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993);
6 see, e.g., *Moore v. Morton*, 255 F.3d 95, 114, n. 16 (3rd Cir. 2001)
(collecting cases); but see, e.g., *Kelly v. Stone*, 514 F.2d 18, 19 (9th
7 Cir. 1975).

8 (R&R at 19 - 22.)

9 Ruling

10 The prosecutor's comments at issue were fact based, derived from
11 the victim's testimony at trial. In recommending denial of this claim,
12 the R&R engages in a very thorough analysis of not just the evidence
13 presented at trial relating to this matter, but also the potential impact
14 it had on the jury. Based on its factual analysis, the R&R correctly
15 concludes that Petitioner fails to show that the comments at issue, if
16 improper, had a substantial or injurious effect or influence on the
17 verdicts. "[T]he touchstone of due process analysis in cases of alleged
18 prosecutorial misconduct is the fairness of the trial, not the
19 culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219
20 (1982). Closing argument reflected testimony during the trial of the
21 victims, including the victim that was sexually assaulted. (Tr. 210-
22 211.) The prosecutor did not make a personal opinion commentary. This
23 Objection is overruled.

24 **E. The Magistrate Court Wrongly Denied Petitioner's Claim that He 25 Received Ineffective Assistance of Counsel. (Objection at 35.)**

26 The Objection addresses Ground Four of the R&R, as follows:

27 Swoopes argues his trial counsel and appellate counsel were ineffective
28 in their handling of the mid-deliberation jury question. This issue was
raised in Swoopes' second post-conviction petition in 2003. It is neither
time-barred nor procedurally barred from federal review. The court
concludes the claim should be denied on the merits.

1 "The Sixth Amendment guarantees criminal defendants the right to
2 effective assistance of counsel." *Luna v. Cambra*, 306 F.3d 954, 961 (9th
3 Cir. 2002), reissued as amended, 311 F.3d 928 (9th Cir. 2002) (quoting
4 *Strickland v. Washington*, 466 U.S. 668 (1984)). Habeas relief, however,
5 is available only if "counsel's performance was deficient" and the
6 "deficient performance prejudiced the defense." *Id.* To show prejudice,
7 the petitioner "must demonstrate a reasonable probability that, but for
8 counsel's unprofessional errors, the result of the proceeding would have
9 been different." *Id.* "A reasonable probability is a probability
10 sufficient to undermine confidence in the outcome." *Id.* Because Swoopes
11 challenges his conviction, he must show "there is a reasonable
12 probability that, absent the errors, the fact finder would have had a
13 reasonable doubt respecting guilt." *Id.* "Judicial scrutiny of counsel's
14 performance must be highly deferential." *Strickland v. Washington*, 466
15 U.S. 668, 689 (1984). "A fair assessment of attorney performance requires
16 that every effort be made to eliminate the distorting effects of
17 hindsight, to reconstruct the circumstances of counsel's challenged
18 conduct, and to evaluate the conduct from counsel's perspective at the
19 time." *Id.* "Because of the difficulties inherent in making the
20 evaluation, a court must indulge a strong presumption that counsel's
21 conduct falls within the wide range of reasonable professional
22 assistance; that is, the defendant must overcome the presumption that,
23 under the circumstances, the challenged action might be considered sound
24 trial strategy." *Id.* (internal citation omitted).

25 First, Swoopes cannot show trial counsel's deficient performance caused
26 the trial court to give the misleading instruction. The trial court
27 concluded that the trial judge probably consulted counsel and then failed
28 to properly record the incident as was the customary practice. [doc. #
137, Exhibit B, p. 3] This finding, however, does not necessarily mean
that trial counsel approved the misleading instruction. As Swoopes
himself notes, it is possible the trial court told counsel of the
question, assured them that he would instruct the jury to rely on the
evidence already presented during the trial, and then constructed the
misleading instruction himself and so advised the jury. [doc. # 154, p.
41, n. 21] If this is what happened, and Swoopes has no evidence to the
contrary, then trial counsel's performance was not deficient. Moreover,
trial counsel's allegedly deficient performance did not cause Swoopes
prejudice. As the court already explained, the instruction should not
have influenced the jury's deliberation because the jury was already
instructed to base its findings on the evidence presented and it was
specifically instructed that the "blemish statement" was not evidence.

Moreover, the identification evidence from the husband and the friend
was more than sufficient to establish Swoopes' guilt. Assuming without
deciding that appellate counsel's failure to discover the judge's
response in the court file was deficient performance, Swoopes cannot show
prejudice. See *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (The
petitioner must show "that there is a reasonable probability that, but
for counsel's unprofessional errors, [he] would have prevailed on
appeal."). The misleading instruction should not have influenced the
jury's deliberation and identification evidence from the husband and the
friend was more than sufficient to establish Swoopes' guilt.

1 Swoopes also claims his trial counsel was ineffective for failing to
2 investigate the Valiant and failing to call investigator Gene Reedy
3 regarding the wife's lineup identification. These claims were included
4 in his original habeas petition. [doc. #1, Memorandum, pp. 32, 34]
5 Assuming without deciding that these claims were exhausted, Swoopes
6 cannot show trial counsel was ineffective. Assuming without deciding that
7 trial counsel's performance was deficient in failing to investigate the
8 Valiant, Swoopes cannot show he suffered prejudice. As the court
9 previously discussed, Swoopes now has evidence that the Plymouth Valiant,
10 identified by the husband and friend as the getaway vehicle, was actually
11 owned, not by Swoopes or his aunt, but by a Harold McGrew. [doc. # 137,
12 Exhibit A, pp. 9-10] He also has evidence that another man, John
13 Wigglesworth, could have been the gunman in part because Wigglesworth
drove a Ford Thunderbird, which Swoopes argues could have been the
getaway vehicle. *Id.*, [doc. # 154, p. 49] As discussed previously, the
court does not find a "reasonable probability" that had this evidence
been introduced at trial, "the fact finder would have had a reasonable
doubt respecting guilt." See *Luna v. Cambra*, 306 F.3d 954, 961 (9th Cir.
2002), reissued as amended, 311 F.3d 928 (9th Cir. 2002) (quoting
Strickland v. Washington, 466 U.S. 668 (1984)); see also *Benn v. Lambert*,
283 F.3d 1040, 1053 (9th Cir. 2002) (Ineffective assistance of counsel
claim employs the same analysis as a *Brady* claim.), cert. Denied, 537
U.S. 942 (2002). Swoopes cannot show his trial counsel's alleged failure
to investigate the Valiant caused him prejudice. Accordingly, trial
counsel was not ineffective.

14 Swoopes further argues trial counsel was ineffective for failing to
15 call Gene Reedy to testify. He argues Reedy's testimony would have been
16 relevant on the issue of suggestive identification procedures. [doc. #
17 52, p. 51] Reedy was an investigator who observed the conduct of the live
18 lineup. [doc. # 150, Exhibit D, pp., 32, 33, 42] Swoopes argues Reedy
19 would have testified that during the lineup the wife explained that she
20 "was looking for something in particular" and when the detective asked:
21 "What?", she responded: "A scar." [doc. # 52, p. 36] The court concludes
22 this testimony would have been cumulative. On cross-examination, trial
23 counsel established that, at the lineup, the wife did not make an
24 identification right away. *Id.*, pp. 235-37. She observed Swoopes for some
five minutes and then asked to have a closer look at the suspects. *Id.*
She announced her identification after she had that closer look. *Id.*
Immediately after the lineup, the wife made a statement to Detective
Skuta memorializing her identification and the factors that lead to her
identification. *Id.*, p. 240. Among other things, she said she wanted the
suspects to approach the window and turn sideways because she wanted to
see if any of them had a scar on the side of his face. *Id.*, p. 240. She
saw such a scar on Swoopes' face near his right eye. *Id.*, p. 243. She
said this scar helped her make her identification, but she also based her
identification on his height, weight, and color. *Id.*, pp. 239, 243, 245.

25 Reedy could have testified that the wife told Detective Skuta that she
26 wanted to have a closer look at the suspects because she was looking for
27 a scar. This fact, however, was established by counsel during his cross-
examination of the wife. Reedy's testimony would have been cumulative.
Failing to offer testimony that would have been cumulative is not

1 prejudicial. See *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir.
2 1998), cert. Denied, 525 U.S. 1159 (1999). Accordingly, Swoopes cannot
3 show trial counsel was ineffective.

4 (R&R at 22 - 26.)

5 **RULING**

6 The Report and Recommendation thoroughly and accurately resolved
7 this claim. The Court can see no reason to hold an evidentiary hearing
8 to resolve this issue. *Strickland v. Washington* and its progeny set a
9 high bar for a criminal defendant to establish that counsel's performance
10 was deficient. See *Strickland*, 466 U.S. at 689 ("[A] court must indulge
11 a strong presumption that counsel's conduct falls within the wide range
12 of reasonable professional assistance; that is, the defendant must
13 overcome the presumption that, under the circumstances, the challenged
14 action might be considered sound trial strategy." (internal quotation
15 marks and citation omitted)); accord *Matylinsky v. Budge*, 577 F.3d 1083,
16 1090-91 (9th Cir.2009). The Objection is overruled.

17 **CONCLUSION**

18 Accordingly, after conducting a de novo review of the record, which
19 included reading the entire record and the transcript of the trial,

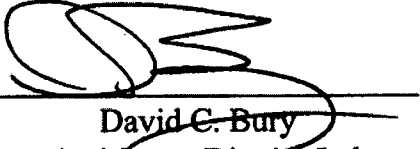
20 **IT IS ORDERED** that the Court **ADOPTS** the thorough, complete and
21 well-considered Report and Recommendation (Doc. 157) in its entirety.
22 The Objections (Docs. 163, 164) raised by the Defendant are **OVERRULED**.
23 Petitioner's Motion to Reconsider (Doc. 168) is **DENIED** as moot based on
24 this Order.

25 **IT IS FURTHER ORDERED** that the Court has determined, without need
26 for additional argument, to **DENY** the Certificate of Appealability. Rule
27 11, Rules Governing Section 2254 Cases. The Court has considered
28

1 specific issues that serve to satisfy the showing required by 28 U.S.C.
2 §2253(c)(2), and finds none present in this case.

3 **IT IS FURTHER ORDERED** that the Amended Petition for Writ of Habeas
4 Corpus is **DENIED** and this action is **DISMISSED**. A Final Judgment shall
5 enter separately. This case is closed.

6 DATED this 21st day of July, 2011.

7
8
9
10 
11 David C. Bury
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Samuel Swoopes,

Petitioner,

vs.

Charles L. Ryan; et al.,

Respondents.

No. CIV-93-471-TUC-DCB (GEE)

**REPORT AND
RECOMMENDATION**

On September 22, 2009, Samuel W. Swoopes, an inmate confined at the Arizona State Prison Complex in Florence, Arizona, filed an Amended Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254. [doc. # 142] Swoopes claims (I) his due process rights were violated “by the trial court’s use of unduly suggestive and unreliable identification at trial,” (II) “the trial judge erred procedurally and substantively in his response to a mid-deliberation jury question,” (III) his right to due process and equal protection was violated by prosecutorial misconduct; and (IV) trial counsel and appellate counsel were ineffective. *Id.* Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Edmonds for report and recommendation. The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order denying the amended petition on the merits.

1 Summary of the Case

2 Swoopes was convicted after a jury trial of “first-degree burglary, sexual assault,
3 aggravated robbery, three counts of armed robbery, and three counts of kidnapping.” [doc. #
4 150, p. 2] The trial court imposed a combined sentence totaling 42 years. *Id.*

5 At trial, the state presented evidence that Swoopes and two accomplices committed an
6 armed home invasion. [doc. # 150, p. 2] Swoopes was the only one of the three whose face was
7 uncovered. [doc. # 154, p. 3] The main issue at trial was identification. Swoopes’ accomplices
8 have never been identified.

9 Swoopes, the gunman, ordered the victims, a married couple and their male guest, to lie
10 down on the floor of the living room under a blanket. *Arizona v. Swoopes*, 155 Ariz. 432, 433,
11 747 P.2d 593, 594 (App. 1987); [doc. # 154, p. 3]. After the victims were robbed of their
12 money and jewelry, the robbers proceeded to ransack the house. *Id.* As one point, one of the
13 robbers took the wife into the bedroom and sexually assaulted her. *Id.* Swoopes remained in
14 the living room to keep the husband and friend from interfering. *Id.*

15 Approximately five minutes after the wife was taken away, the guest decided to escape
16 and summon help. [doc. 150, Exhibit C, p. 158] He fought his way outside, broke free from
17 two of the intruders, and ran for help. *Id.*, pp. 158-160. He noticed a vehicle parked just
18 adjacent to the house. *Id.*, p. 167. The vehicle was gone two or three minutes later when he
19 returned to the house. *Id.*, p. 168.

20 When the husband heard the sounds of the struggle, he got off the floor and ran to the
21 front door intending to lock the intruders out and again confronted Swoopes, who was standing
22 in the doorway. *Id.*, p. 119. When Swoopes left, the husband locked the door and went to
23 check on his wife. *Id.*, pp. 121-122. After determining that she was safe, he ran outside and saw
24 the robbers drive away in a mid to late ‘60s light colored Plymouth Valiant. *Id.*, pp. 123-124

25 After the robbery, the three victims were unable to clearly describe the gunman and
26 failed to identify Swoopes in a photographic lineup. *Arizona v. Swoopes*, 216 Ariz. 390, 393,
27 166 P.3d 945, 948 (App. 2007). None of the victims reported the gunman as having any facial
28 blemishes or scars. *Id.* It is undisputed that Swoopes has a scar above his right eye.

1 Sixteen months after the robbery, the husband and his friend learned that a similar home
2 invasion occurred in their neighborhood on that same night and a suspect in that crime was
3 currently on trial. *Id.*; [doc. # 154, p. 3] The two men went to the courthouse and recognized
4 Swoopes as the man who robbed them. *Swoopes*, 216 Ariz. at 393, 166 P.3d at 948. The police
5 then arranged a live lineup for the wife, who identified Swoopes explaining she was looking for
6 a man with a facial scar. *Id.*

7 At trial, the three victims identified Swoopes as the gunman. *Id.* On cross examination,
8 the wife admitted that after the robbery she did not tell police the gunman had a scar. [doc. #
9 150, Exhibit C, p. 228-230] She was not specifically asked if she ever told police the gunman
10 had a *blemish*.

11 During his closing argument, Swoopes' counsel reminded the jury that the wife admitted
12 that she told detectives the gunman had no scars. [doc. # 150, Exhibit D, p. 119] He argued,
13 this was strong evidence that her later identification of Swoopes was erroneous.

14 The prosecutor tried to address this inconsistency in his rebuttal closing. He conceded
15 that the wife did not tell detectives the gunman had a scar, but argued her identification was
16 nevertheless accurate because her memory was refreshed when she saw Swoopes in the physical
17 lineup.

18 During deliberations, the jury sent a written question to the trial judge asking to see "any
19 statement made by [the wife] of a blemish before the physical lineup." *Swoopes*, 216 Ariz. 390,
20 393, 166 P.3d 945, 948. The court responded that "the statement is not admissible" and further
21 instructed the jurors to "rely on their collective memories." *Id.* It is undisputed that the wife
22 did not make a statement about a blemish to the police immediately after the robbery.

23 After the trial and sentencing, Swoopes filed a direct appeal arguing (1) "the court erred
24 in imposing consecutive sentences," (2) "the court erred in convicting him of sexual assault as
25 an accomplice, and (3) "the victims' in-court identification of him was tainted." *Arizona v.*
26 *Swoopes*, 155 Ariz. 432, 434, 747 P.2d 593, 596 (App. 1987); [doc. # 150, p. 2, n. 1] During
27 the briefing process, the appeal was inadvertently transferred to the Arizona Supreme Court
28 before being returned to the court of appeals. [doc. # 11, p. 3, n. 3] During this period,

1 Swoopes filed a supplemental brief arguing (4) the prosecutor engaged in misconduct, (5) the
2 court erred in instructing the jury on the issue of identification evidence, (6) the state improperly
3 excluded counsel from the trial lineup, and (7) the aggravated robbery conviction violated
4 double jeopardy. [doc. # 11, p. 3, n. 3]; [doc. # 150, p. 2, n. 1] The court of appeals refused to
5 entertain the additional claims. *Id.*; [doc. # 7, p. 5, n.1] On July 21, 1987, the court of appeals
6 affirmed Swoopes' convictions and sentences in *Arizona v. Swoopes*, 155 Ariz.432, 747 P.2d
7 593 (App 1987) (*Swoopes I*). The Arizona Supreme Court denied review on January 13, 1988.
8 [doc. # 150, p. 2]

9 In his first post-conviction relief petition, filed on February 1, 1989, Swoopes argued (1)
10 trial counsel was ineffective for failing to investigate the alleged getaway car, (2) the trial court
11 erred in its instruction to the jury about identification evidence, (3) he was denied counsel at all
12 critical stages, (4) the prosecutor engaged in misconduct at trial and suppressed evidence, (5)
13 the sentence was unconstitutional, and (6) he was denied due process and equal protection. [doc
14 # 142, p. 4] The trial court denied the petition on July 17, 1990. [doc. # 142, p. 4] The court
15 of appeals denied Swoopes' petition for review on February 21, 1991. [doc. # 150, p. 3]

16 On February 21, 1991, Swoopes filed a special action in the court of appeals raising the
17 same issues presented in his first post-conviction relief petition and arguing the trial court erred
18 procedurally and substantively in denying his petition. [doc. # 142, p. 5.] The court of appeals
19 denied the special action on April 18, 1991, and the Arizona Supreme Court denied a petition
20 for review on September 27, 1991. *Id.*

21 On July 26, 1993, Swoopes filed in this court his original Petition for Writ of Habeas
22 Corpus pursuant to Title 28, United States Code, Section 2254. (Petition.) He claimed (1) the
23 victims' in-court identification of him was tainted, (2) his due process and equal protection
24 rights were violated by misconduct before the grand jury, (3) the trial court committed error at
25 trial and in regard to a stipulation, (4) the prosecutor engaged in misconduct in part by
26 withholding exculpatory evidence, (5) trial and appellate counsel were ineffective, and (6) his
27 sentences violated the Double Jeopardy Clause. [doc. # 1, pp. 5-7]; [doc. # 150, pp. 3-4, n. 3]
28 This court denied claim (1) on the merits and found the remaining claims procedurally

1 defaulted. [doc. # 150, pp. 4-5]. The Ninth Circuit affirmed in *Swoopes v. Sublett*, 163 F.3d
2 607 (9th Cir. 1998) (*Swoopes II*).

3 The Supreme Court vacated *Swoopes II* and remanded in light of the recently decided
4 *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999). *Swoopes v. Sublett*, 527 U.S.
5 1001, 119 S.Ct. 2335 (1999). On remand, the Ninth Circuit held that an ordinary habeas
6 petitioner in Arizona exhausts his claims by presenting them to the court of appeals. *Swoopes*
7 *v. Sublett*, 196 F.3d 1008 (9th Cir. 1999) (*Swoopes III*), *cert. Denied*, 529 U.S. 1124 (2000). The
8 Ninth Circuit remanded the case for this court to "determine which claims were properly
9 exhausted, and not procedurally barred, and issue a decision on the merits of those claims."
10 [doc. # 150, p. 5]

11 After a new round of briefing, Swoopes filed a motion to stay the petition and pursue
12 discovery, which was granted by this court. [doc. # 150, pp. 5-6] By this point, Swoopes'
13 counsel had discovered in the file the trial court's response to the jury's mid-deliberation
14 question.

15 Swoopes returned to state court and filed a second post-conviction relief petition¹ on
16 March 27, 2003. [doc. # 142, p. 5] He argued (1) the trial court erred procedurally and
17 substantively in its response to the jury question, (2) trial and appellate counsel were ineffective
18 in their response to the jury question issue, and (3)(a) the state violated *Brady* by failing to
19 disclose evidence that another suspect was connected to the getaway car and (3)(b) the state
20 failed to preserve or destroyed evidence favorable to his defense. *Id.*, pp. 6-7. The trial court
21 granted relief on the ineffective assistance claim and ordered a new trial. [doc. # 137, Exhibit
22 B]; *Arizona v. Swoopes*, 216 Ariz. 390, 393, 166 P.3d 945, 948 (App. 2007) (*Swoopes IV*). On
23 September 19, 2007, the court of appeals reversed the trial court concluding that Swoopes'
24 claims were precluded, not eligible for any of the preclusion exceptions, and not of sufficient
25

26 ¹ Swoopes refers to his special action petition as his second post-conviction relief petition and
27 refers to his second petition pursuant to Ariz.R.Crim.P. 32 as his third post-conviction relief petition.
28 The court refers to his second Rule 32 petition as his second post-conviction relief petition in keeping
with the terminology used by the state appellate court.

1 constitutional magnitude that they could not be waived implicitly. *Swoopes IV*. The Arizona
2 Supreme Court denied review on June 3, 2008. [doc. # 150, p. 7]

3 On September 22, 2009, Swoopes filed in this court his amended Petition for Writ of
4 Habeas Corpus, which combines certain claims from his original habeas petition with claims
5 newly raised in his second post-conviction relief petition. He claims (I) his due process rights
6 were violated “by the trial court’s use of unduly suggestive and unreliable identification at
7 trial,” (II) “the trial judge erred procedurally and substantively in his response to a mid-
8 deliberation jury question,”² (III) his right to due process and equal protection was violated by
9 prosecutorial misconduct; and (IV) trial counsel and appellate counsel were ineffective. [doc.
10 # 142] The court addresses Swoopes’ claims seriatim.

11 Ground One: Suggestive Identification Testimony

12 Swoopes argues his due process rights were violated when evidence was presented at
13 trial of an “unduly suggestive and unreliable identification at trial.” [doc. # 142, p. 8] The
14 parties agree that this claim should be addressed on the merits.

15 This claim was raised in the original petition, which was filed before the AEDPA’s
16 effective date, so the AEDPA standard of review does not apply. *Mayfield v. Woodford*, 270
17 F.3d 915, 922 (9th Cir. 2001). Pure questions of law and mixed questions of law and fact are
18 reviewed de novo. *Id.* The court will “presume that the state court’s findings of historical fact
19 are correct and defer to those findings in the absence of convincing evidence to the contrary or
20 a demonstrated lack of fair support in the record.” *Id.* (internal punctuation removed).

21 Evidence presented at trial of an out-of-court identification may violate due process if
22 the identification procedure created “a very substantial likelihood of irreparable
23 misidentification.” *Neil v. Biggers*, 409 U.S. 188, 198 (1972). “Suggestive confrontations are
24 disapproved because they increase the likelihood of misidentification, and unnecessarily
25 suggestive ones are condemned for the further reason that the increased chance of
26 misidentification is gratuitous.” *Id.*

27 ² Swoopes withdraws his claim that the trial court erred by admitting evidence in breach of a
28 stipulation by the parties. [doc. # 154, p. 4, n.3]

1 If the court finds a pre-trial identification procedure was unnecessarily suggestive, the
2 court proceeds to determine whether the ultimate identification was nevertheless sufficiently
3 reliable. *Id.*, at 198-99. If so, then its admission at trial did not violate due process. *Id.* “[T]he
4 central question, [is] whether under the ‘totality of the circumstances’ the identification was
5 reliable even though the confrontation procedure was suggestive.” *Id.* at 199. “[T]he factors
6 to be considered in evaluating the likelihood of misidentification include the opportunity of the
7 witness to view the criminal at the time of the crime, the witness’ degree of attention, the
8 accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated
9 by the witness at the confrontation, and the length of time between the crime and the
10 confrontation.” *Id.* at 199-200.

11 Assuming without deciding that the initial pre-trial identification was unnecessarily
12 suggestive, the court concludes that under the totality of the circumstance the identification was
13 sufficiently reliable.

14 The three witnesses had an “ample opportunity” to observe Swoopes during the robbery.
15 *Arizona v. Swoopes*, 155 Ariz. 432, 435 (App. 1988); *see also Coley v. Gonzales*, 55 F.3d 1385,
16 1387 (9th Cir. 1995) (“[T]he state court’s factual determinations are presumed correct.”). The
17 witnesses were not mere bystanders but were direct victims. Obviously, their degree of
18 attention was heightened by that fact. On the other hand, the court recognizes that the stress of
19 the robbery is a factor that could have impaired the witness’s ability to accurately remember
20 details about the gunman’s face. *See, e.g., Raheem v. Kelly*, 257 F.3d 122, 138 (2nd Cir. 2001)
21 (“[I]t is human nature for a person toward whom a gun is being pointed to focus his attention
22 more on the gun than on the face of the person pointing it.”), *cert. Denied*, 534 U.S. 1118
23 (2002).

24 The accuracy of the witnesses’ prior description of the suspect was at least fair. While
25 none of the witnesses reported³ that the suspect had a scar above his right eye, their descriptions

26
27 ³ Immediately after the robbery, the wife was specifically asked if she noticed a scar and she
28 replied in the negative. [doc. # 150, Exhibit D, p. 118-19] The husband did not mention a scar but
apparently was never specifically asked about it. *Id.*

1 were not as vague as Swoopes argues. The husband described the suspect as "negro," with a
2 "flare[d]" nose, "slender" with a "good build"- "weighed about 165." [doc. # 1, Exhibit A] He
3 had "a mustache and maybe long sideburns." *Id.* He wore a dark coat, tan or gray pants, and
4 "like a baseball cap" that was purple or black. *Id.* The wife described the suspect as "black,"
5 "about 5'8" or 5'9", slim figure." *Id.* He wore a black cap, brown jacket, brown pants, sneakers,
6 and bellbottoms. *Id.* The friend described the suspect as "a black male, approximately 5'11",
7 lighter colored curly hair, with "a mustache and a thin beard around his chinline," "about 155,
8 160 pounds," "real nervous" with "[n]o discernible accent." *Id.* He wore "dark pants" and "a
9 maroon or purple coat or shirt." *Id.* The witnesses' descriptions vary somewhat, but they agree
10 in the main. The degree of detail supplied by the witnesses is some evidence that they had a
11 good look at the suspect. The degree of similarity between the witnesses' descriptions is some
12 evidence that their descriptions were accurate.

13 After viewing Swoopes in court, the two men were "absolutely certain" that Swoopes
14 was the gunman. *Arizona v. Swoopes*, 155 Ariz. 432, 433, 747 P.2d 593, 594 (App. 1988). The
15 wife later identified Swoopes at a live lineup "without being told of the positive identification
16 by her companions." *Arizona v. Swoopes*, 155 Ariz. 432, 434-35, 747 P.2d 593, 595-96 (App.
17 1988). The witnesses' degree of certainty is further evidence that the identification was reliable.

18 The courthouse identification, however, was made approximately 16 months after the
19 crime. This is a considerable length of time and does not support reliability. By itself, however,
20 this lapse of time is not dispositive. *See, e.g., U.S. v. Williams*, 596 F.2d 44, 49 (2nd Cir. 1979)
21 ("[A]lthough the time lapse of two years and eight months between the crime and the in-court
22 confrontation is a somewhat negative factor, it is outweighed by the other four *Manson* criteria
23"), *cert. Denied*, 442 U.S. 946 (1979). Based on the totality of the circumstances, the court
24 concludes the identification testimony was not so unreliable that its admission violated due
25 process.

26 Swoopes argues the witnesses' failure to report a scar on the face of the gunman proves
27 their later identification of him was not sufficiently reliable. The court does not agree. It is
28 undisputed that Swoopes has a scar above his right eye. But while this scar is plainly visible

1 under ordinary conditions, it is not so prominent⁴ that it could not have been missed during the
2 tense and chaotic atmosphere of an armed robbery.

3 Swoopes notes that the witnesses were shown a photographic lineup shortly after the
4 robbery, and although they were shown his picture, were unable to make an identification. He
5 argues their later identification of him was likely a recollection of seeing his photograph rather
6 than an identification of the true gunman. The court agrees that the sequence of events is some
7 evidence that the witnesses' identification was unreliable. However, the court does not agree
8 that this outweighs the other factors pointing to reliability. *See U.S. v. Davenport*, 753 F.2d
9 1460, 1463 (9th Cir. 1985) ("The fact that Davenport was the only individual common to the
10 photo spread and the lineup cannot, without further indicia of suggestiveness, render the lineup
11 conducive to irreparable misidentification."); *U.S. v. Johnson*, 820 F.2d 1065, 1073 (9th Cir.
12 1987) (similar); *but see, e.g., Foster v. California*, 394 U.S. 440, 442-43, 89 S.Ct. 1127, 1128-
13 29 (1969) (Lineup procedure was unfair where the witness finally made a definitive
14 identification after viewing a lineup, where the defendant was the tallest of the three men and
15 the only one wearing a leather jacket, followed by a "one-to-one confrontation" with the
16 defendant, followed by a *second* lineup, where "[the defendant] was the only person in this
17 lineup who had also participated in the first lineup.").

18 Ground Two: Mid-Deliberation Jury Question

19 In claim (II), Swoopes argues "the trial judge erred procedurally and substantively in his
20 response to a mid-deliberation jury question" [doc. # 142, p. 9]

21 First, Swoopes claims that when the jury sent out its question during deliberations, the
22 judge improperly communicated with the jury *ex parte* without consulting Swoopes' attorney.
23 [doc. # 142, p. 9]; [doc. # 1, memorandum, pp. 22-24] The respondents concede this claim is
24 timely, but they argue it is procedurally defaulted. [doc. # 150, pp. 9, 21-22]

25
26 ⁴ Swoopes has a horizontal scar above his right eye, parallel to and below his right eyebrow.
27 *See* [doc. # 52, p. 2.] It is almost as long as his eyebrow but not as thick. *Id.* It is a darker brown color
28 than the surrounding skin but not as dark as his eyebrow, which is almost black. *Id.* It is approximately
the same color as the crease of skin immediately above his eyelid but wider than that crease. *Id.*

1 When Swoopes raised this claim in his second post-conviction proceeding, the state
2 appellate court found the claim precluded pursuant to Ariz.R.Crim.P. 32.2. *Arizona v. Swoopes*,
3 216 Ariz. 390, 166 P.3d 945 (App 2008). A procedural bar imposed by the state below
4 precludes federal review only if it is adequate to support the judgment and independent of
5 federal law. *Thomas v. Goldsmith*, 979 F.2d 746, 749 (9th Cir. 1992). A procedural bar is
6 adequate if it was “firmly established and regularly followed” at the time of the default. *Fields*
7 *v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997), *cert. Denied*, 523 U.S. 1132 (1998). Here, the
8 default occurred when Swoopes failed to raise this claim in his direct appeal or first post-
9 conviction relief petition. *Id.*, at 760-61. Because procedural default is an affirmative defense,
10 the respondents have the burden to show the state’s procedural bar is adequate and independent
11 of federal law. *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005).

12 In this case, the state court’s procedural bar was not firmly established and regularly
13 followed at the time of the default. The state court found Swoopes’ claim precluded after
14 applying the *current* version of Rule 32.2. *See Arizona v. Swoopes*, 216 Ariz. 390, 397, 166
15 P.3d 945, 952 (App. 2007) (*Swoopes IV*). This version, which dates from 1992, did not apply
16 at the time of Swoopes’ default because that default occurred before 1992, when the previous
17 version of the rule was in existence. *Id.* Accordingly, the court concludes the procedural bar
18 applied by the court of appeals (the new rule) was not firmly established and regularly followed
19 at the time of the default (when the previous version of the rule applied). *See Scott v. Schriro*,
20 567 F.3d 573, 580-82 (9th Cir. 2009), *cert. Denied*, 130 S.Ct. 1014 (2009); *Clayton v. Gibson*,
21 199 F.3d 1162, 1171 (10th Cir. 1999) (“[T]he 1995 amendments do not constitute an ‘adequate’
22 state law ground for procedural default purposes if they did not exist at the time of the
23 default.”), *cert. Denied*, 531 U.S. 838 (2000).

24 Addressing the claim on the merits, the court concludes Swoopes is not entitled to relief.
25 Swoopes cannot show as a matter of fact that the judge engaged in ex parte communications.

26 Swoopes raised this claim in his second post-conviction relief petition. He submitted an
27 affidavit from his trial counsel who stated that he had no recollection of the jury’s note or the
28 judge’s response but asserted if he had seen the response, he would have objected because it

1 was misleading. *Arizona v. Swoopes*, 216 Ariz. 390, 395, 166 P.3d 945, 950 (App. 2007). The
2 state court concluded that Swoopes' evidence amounted to no more than a mere speculation that
3 the judge engaged in ex parte communications. *Id.* Because it was customary for the judge to
4 contact counsel off the record in such circumstances, the state court found that the judge
5 probably did just that and simply failed to make a subsequent record. *Id.* The court will
6 "presume that the state court's findings of historical fact are correct and defer to those findings
7 in the absence of convincing evidence to the contrary or a demonstrated lack of fair support in
8 the record." *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

9 Swoopes cannot show as a matter of fact that the judge engaged in ex parte
10 communications. Accordingly, this claim should be denied.

11 Swoopes further argues the trial court should have "brought the jury into open court in
12 his and his attorney's presence and presented it with the crucial and true evidence about [the
13 wife's] unreliable identification (in part by "holding the '*Dessureault*' hearing in the presence
14 of the jury) that was needed to answer the jury's concern about the reliability of the
15 identification." [doc. # 142, p. 9] In support of this claim, Swoopes cites *Rushen v. Spain*, 464
16 U.S. 114 (1983) and *State v. Werring*, 523 P.2d 499 (1974). [doc. # 119, p. 7]

17 The gravamen of Swoopes' claim is not immediately apparent. *Rushen* and *Werring* hold
18 that the due process clause may be implicated if the trial court responds to a jury's mid-
19 deliberation question without allowing counsel to participate. Neither holds that the court is
20 obliged to supply the jury with additional evidence whenever the jury requests it. In
21 *Dessureault*, the Arizona Supreme Court discussed certain procedures the trial court should
22 employ if there is an issue as to the admissibility of a witness's identification. *Arizona v.*
23 *Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), *cert. Denied*, 397 U.S. 965 (1970). Among
24 other things, the court held that "if at the trial the proposed in-court identification is challenged,
25 the trial judge must immediately hold a hearing in the *absence* of the jury to determine from
26 clear and convincing evidence whether it contained unduly suggestive circumstances." *Id.*, p.
27 384, 955 (emphasis added). *Dessureault* does not support Swoopes' claim either. *See also*
28 *Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (Due process does not always require the trial

1 judge to conduct a hearing outside the presence of the jury when identification evidence is at
2 issue.).

3 Swoopes cannot show that the trial court's failure to hold an evidentiary hearing in
4 response to the jury's mid-deliberation question violated his Constitutional rights. The claim
5 should be denied.

6 Swoopes further argues the court substantively erred when it returned to the jury an
7 answer that was misleading.

8 The respondents argue this claim is untimely because it was not included in the original
9 petition, and the amended petition was filed after the applicable one-year limitation period. *See*
10 28 U.S.C. § 2244(d)(1). This issue was decided by the Ninth Circuit only after briefing on the
11 petition was concluded. Where the original habeas petition was filed before the AEDPA
12 effective date, the AEDPA's one-year limitation period does not apply to the case at all, even
13 to an amended petition filed after the effective date. *Smith v. Mahoney*, __ F.3d __, 2010 WL
14 744271 * 12 .

15 As the court stated above, the state court's finding of preclusion does not bar federal
16 review. Nevertheless, the court finds the claim fails on the merits.

17 A habeas petitioner complaining of trial error is entitled to relief only if he can show the
18 error "had a substantial and injurious effect or influence in determining the jury's verdict." *See*
19 *Brecht v. Abrahamson*, 507 U.S. 619, 63, 113 S.Ct. 1710, 1722 (1993). Swoopes cannot show
20 the trial court's response had such an effect or influence.

21 When the jury asked in mid-deliberation if the wife made any statement about a blemish
22 before the physical lineup, the trial court responded that "the statement is inadmissible."
23 *Swoopes*, 216 Ariz. 390, 393, 166 P.3d 945, 948 (App. 2007). Thus, the jury was told two
24 things: (1) the wife made a statement, and (2) that statement was not admissible.

25 The jury, however, was instructed to find the facts based only on the evidence presented
26 at trial. [doc. # 150, Exhibit D, p. 141] Evidence, the jury was told, consists of the testimony
27 of the witnesses and exhibits. *Id.* An inadmissible statement is not evidence. Accordingly, the
28 wife's "statement" about a blemish was not evidence and would not have been considered by

1 the jury in their determination of the facts. Because a jury is presumed to follow its instructions,
2 the court must conclude the trial judge's response to the jury's mid-deliberation question did
3 not have a "substantial and injurious effect or influence in determining the jury's verdict." *See*
4 *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722 (1993); *see also Weeks v.*
5 *Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 733 (2000) ("A jury is presumed to follow its
6 instructions." "Similarly, a jury is presumed to understand a judge's answer to its question.").

7 Moreover, even if the trial judge's response caused the wife's identification testimony
8 to be improperly bolstered, relief is not available in light of the remaining evidence against
9 Swoopes. The husband testified that he was sober and clear-headed the night of the robbery,
10 and he had no difficulty seeing the gunman's face. [doc. # 150, Exhibit C, pp. 108, 95, 97]
11 While he conceded he did not pick Swoopes out of the photo lineup, he said he had no problem
12 recognizing Swoopes in the flesh. *Id.*, p. 132. He testified there was no question in his mind
13 that Swoopes was the gunman. *Id.*, pp. 133, 142.

14 The friend testified that while he may have had a couple of beers, he was not in any way
15 under the influence the night of the robbery. *Id.*, pp. 145, 146. The lighting was adequate, and
16 he had no trouble seeing the gunman's face. *Id.*, pp. 149, 150, 161. He failed to pick Swoopes
17 out of a photo lineup, but he had no trouble recognizing Swoopes in the courthouse. [doc. #
18 150, pp. 164, 165; Exhibit D, p. 50] He had no doubt that Swoopes was the gunman. [doc. #
19 150, Exhibit C, pp. 186, 87]

20 The state also presented evidence connecting Swoopes to the vehicle used the night of
21 the robbery. At some point, Swoopes was arrested for a traffic violation. [doc. # 150, Exhibit
22 D, pp. 62-63] He was driving his aunt's black over blue 4-door 1967 Chrysler, license number:
23 TBT 387. *Id.* He said he lived with his aunt at 2115 North Avenida El Capitan. *Id.* Detective
24 Skuta testified that he went to this address and saw outside the residence the '67 Chrysler and
25 a Plymouth Valiant. [doc. # 150, Exhibit D, pp. 27-28] The Chrysler's licence plate was on the
26 Valiant. *Id.* The husband and friend testified that the 4-door Valiant looked like the vehicle
27 used by the robbers. [doc. # 150, Exhibit C, pp. 166-68, 188-89]

1 Even without the wife's testimony, there was compelling evidence that Swoopes was the
2 gunman. The trial judge's response to the jury's mid-deliberation question did not have a
3 "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v.*
4 *Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722 (1993).

5 Swoopes further argues the effect of the erroneous response was magnified by the
6 prosecutor's statements during his rebuttal closing. The court finds that the prosecutor's closing
7 argument was somewhat misleading but not as prejudicial as Swoopes argues.

8 During his closing argument, Swoopes' counsel reminded the jury that the wife told
9 detectives the gunman had no scars. [doc. # 150, Exhibit D, p. 119] He argued, this was strong
10 evidence that her later identification of Swoopes was erroneous.

11 The prosecutor tried to address this inconsistency in his rebuttal closing. He conceded
12 the wife told detectives the gunman had no scars, but argued her identification was nevertheless
13 accurate because her memory was refreshed when she saw Swoopes in the physical lineup. His
14 rebuttal closing reads in pertinent part as follows:

15 And then it's very nice, the lady's in the hospital, she has been there for
16 a couple hours, she's been through hell and some officer is trying to get some
17 statements, did he look this way, did he have a scar, no, no, about five foot seven
18 or eight, same weight, same color, same size, she said on that witness stand, how
many of you listened to her? You all did, You all did. The word blemish kept
coming up. She saw a blemish on his face. The guy is asking about a scar and
she's probably doped up at that time, as indicated. And you are going to walsh
[sic] him out of the Courtroom.

19 You know, when you see a person face to face, your memory gets
refreshed. When you see that person, it hits you that that's the person. That's it.

20 . . .

21 Then when a defense attorney gets you on the witness stand, and put
22 yourselves in the shoes of these victims, here, naturally, any tiny discrepance,
blemish versus scar, any thing will be picked on and hammered out. My God in
heaven she did not get her Polaroid out and photograph it. Her mind did though.
Her mind did.

23 And sure, 1:00 o'clock in the morning, when she's sedated and exhausted
24 and in shock, she may not have mentioned the scar. Her memory was refreshed
when she saw him. . . .

25 And they did not commit perjury in this Courtroom. You should resent
being told that.

26 Now they told the police that very night about this scar. That very day
27 about that scar. Let me ask you this question. Because this is the whole thing
28 when you come right down to it. It isn't the rhetoric, and it isn't the did you see
a mole on someone's chin, did you see a scratch here, do you see a pox mark on
the forehead, did you see that, it's the totalitariness [sic] of the person how he looks,
when you see him, his size; . . .

1 As she said on the witness stand, and she told Detective Skuta, it wasn't
2 just a blemish, it wasn't just a scar, it was all these things when I saw him with
3 a gun and I had a chance to see him, that's the man. . . .

4 [doc. 150, Exhibit D, pp. 133- 36]

5 According to Swoopes, the prosecutor falsely stated that the wife told detectives
6 immediately after the robbery that the gunman had a blemish. The court does not agree. The
7 prosecutor did make certain statements about a blemish. He said: "The word blemish kept
8 coming up." "She saw a blemish on his face." *Id.* He never stated, however, that she told the
9 police the gunman had a blemish.

10 The meaning of these blemish statements is open to debate. Before the statements, the
11 prosecutor discussed the wife's testimony at trial. Accordingly, the blemish statements may
12 refer to the wife's admission at trial that she recognized Swoopes in the lineup in part by his
13 scar.

14 Immediately after making the blemish statements, however, the prosecutor discussed the
15 wife's interview at the hospital after the robbery. He stated: "The guy is asking about a scar and
16 she's probably doped up at that time, as indicated." *Id.* Accordingly, the prosecutor may have
17 been suggesting the wife saw a blemish but did not mention it because she was medicated at the
18 time. Regardless of which of these interpretations is correct, however, the court concludes the
19 prosecutor never improperly told the jury that the wife told police the gunman had a blemish
20 immediately after the robbery.

21 More problematic, however, are the prosecutor's following statements: "Now they told
22 the police that very night about this scar." "That very day about that scar." [doc. # 150, Exhibit
23 D, p. 136] These statements are also something of a mystery. Immediately after the robbery,
24 the witnesses did not tell police the gunman had a scar. The prosecutor conceded in his closing
25 that the wife did not mention the scar and explained in detail why her identification was
26 nevertheless reliable. Accordingly, it is unlikely that the prosecutor would deliberately
27 misrepresent the trial evidence, and simultaneously undermine his own closing argument by
28 asserting the exact opposite. The respondents suggest the prosecutor was referring to a later
 time when the witnesses recognized Swoopes and told the detectives about their respective

1 identifications. [doc. # 150, pp. 29-30, n. 8] This is a plausible theory considering that the
2 prosecutor's statements immediately following deal with the process of identification.

3 But regardless of what these statements mean, the court concludes they did not convince
4 the jury that the wife told detectives about the scar immediately after the robbery. If they had
5 believed that, then they would have had no reason to send out their mid-deliberation jury
6 question asking if the wife made any statements about a blemish. Their question makes sense
7 only if they believed the wife made no statements about a *scar* but might have made one about
8 a *blemish* instead.

9 The rebuttal closing was not a model of clarity, but the prosecutor did not falsely tell the
10 jury that the wife described the gunman as having a blemish or a scar immediately after the
11 robbery. It is possible that the jury inferred from his argument that the wife's concession that
12 she did not mention a scar to the police did not foreclose the possibility that she mentioned a
13 blemish instead. This would explain the jury's mid-deliberation question

14 The court concludes that the trial court's response to the mid-deliberation jury question,
15 in light of all the trial proceedings, did not have a "substantial and injurious effect or influence
16 in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct.
17 1710, 1722 (1993).

18 Swoopes argues this court should defer to the determination of the state court that the
19 trial court's error was not harmless. The court however must apply the pre-AEDPA standard
20 of review, which requires us to review mixed questions of law and fact *de novo*. The
21 determination of whether a trial error was harmless or not is a mixed question of law and fact
22 reviewed *de novo*. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir. 1988), *cert. Denied*, 488
23 U.S. 901 (1988). Accordingly, this court may not defer to the state court's resolution of this
24 issue.

25 Ground Three: Prosecutorial Misconduct

26 In his third claim, Swoopes argues the prosecutor "withheld and failed to preserve or to
27 destroy substantially exculpatory evidence from the defense." [doc. # 142, p. 10] Specifically,
28 Swoopes claims the prosecution failed to disclose that police suspected another man,

1 Wigglesworth, of committing the home invasion. [doc. # 150, Exhibit A, 7-9] This claim was
2 raised in Swoopes' second post-conviction relief petition. It is neither time-barred nor
3 procedurally defaulted. The court concludes the claim should be denied on the merits.

4 "[T]he suppression by the prosecution of evidence favorable to an accused upon request
5 violates due process where the evidence is material either to guilt or to punishment, irrespective
6 of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct.
7 1194, 1196 - 1197 (1963). "The evidence is material [and reversal is required] only if there is
8 a reasonable probability that, had the evidence been disclosed to the defense, the result of the
9 proceeding would have been different." *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375,
10 3383 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence
11 in the outcome." *Id.*

12 Swoopes maintains the state failed to disclose a wealth of *Brady* material that would have
13 altered the verdict had it been presented at trial. [doc. # 137, Exhibit A, pp. 9-10] Specifically,
14 the state failed to disclose that the Plymouth Valiant, identified by the husband and friend as the
15 getaway vehicle, was actually owned, not by Swoopes or his aunt, but by a Harold McGrew.
16 *Id.* This McGrew did not know Swoopes and never lent him his car. *Id.* Moreover, McGrew
17 sold the car to a Russell Clark who had been arrested for burglary at one time. *Id.* Clark in turn
18 was associated with a John Wigglesworth, who later pleaded guilty to a home invasion robbery.
19 *Id.* Wigglesworth drove a Ford Thunderbird and used the modus operandi of switching licence
20 plates to avoid arrest. [doc. # 154, p. 49] Swoopes argues this Thunderbird could have been the
21 getaway vehicle because it more closely matched the victim's original description than did the
22 Valiant. *Id.* It is not clear how all this evidence would have benefitted Swoopes.

23 At trial, Swoopes' counsel argued the husband and the friend were mistaken when they
24 identified the Valiant as the getaway car. [doc. # 150, Exhibit D, pp. 75, 126] Now, Swoopes
25 believes counsel should have conceded that the Valiant was the getaway car but should have
26 argued the car was associated with other possible suspects – Clark and Wigglesworth. This new
27 line of evidence, however, does not exonerate Swoopes. Swoopes conducted his robbery with
28 two accomplices. They have never been identified. One of them could have been Clark or

1 Wigglesworth. The fact that this new evidence implicates Clark or Wigglesworth, does not
2 mean the evidence also exonerates Swoopes. They may have committed the robbery together.
3 Moreover, if the Valiant was indeed the getaway car, the fact that the Valiant was parked in
4 front of Swoopes' house and displayed the licence plate from Swoopes' aunt's car would have
5 been additional circumstantial evidence of his guilt.

6 In the alternative, Swoopes suggests his attorney should have introduced evidence that
7 Wigglesworth's Ford Thunderbird was the getaway vehicle. Again, it is difficult to see how this
8 alternate theory would have helped to exonerate Swoopes. If the Thunderbird was the getaway
9 vehicle, then Wigglesworth was likely involved in the robbery. Wigglesworth, however,
10 associated with Clark, another robbery suspect. Clark, in turn, owned the vehicle that was
11 observed sitting in front of Swoopes' house sporting the licence plate from Swoopes' aunt's
12 car.⁵ The evidence tends to prove that Swoopes knew both Clark and Wigglesworth and had
13 access to the Ford Thunderbird.

14 The court does not find "a reasonable probability that, had the evidence been disclosed
15 to the defense, the result of the proceeding would have been different." *See U.S. v. Bagley*, 473
16 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985); *but see U.S. v. Jernigan*, 492 F.3d 1050 (9th Cir.
17 2007) (Where bank robbery was committed by a lone, Hispanic woman, *Brady* was violated
18 when the government failed to disclose the existence of second female, Hispanic suspect.).

19 Swoopes further claims his due process rights were violated when the state failed to
20 preserve or destroyed evidence. Specifically he maintains the state failed to preserve a record
21 of all of the proceedings below concerning his identification issue; destroyed or failed to
22 preserve the testimony of witnesses at the *Dessureault* suppression hearing of February 3, 1986
23 and February 24, 1986; destroyed trial exhibits such as mug shots, photos of the physical lineup
24 and getaway car; and destroyed physical evidence such as the rape kit, a pillowcase and blouse.
25 [doc. # 142, p. 7]

26
27 ⁵ The car's previous owner, Harold McGrew, told police he did not know Swoopes and never
28 parked his car at the aunt's house. [doc. # 154, p. 48] Because the car was observed parked in front
of the aunt's house, it may be assumed that it was parked there by the new owner, Russell Clark.

1 This evidence was destroyed some time after Swoopes' direct appeal and initial post-
2 conviction relief petition. [doc. # 137, Exhibit B, ruling 3/16/06, p. 2] Nevertheless, Swoopes
3 argues the absence of this material hampers the "litigation of his post-conviction challenges to
4 his conviction." [doc. # 137, Exhibit A, memorandum in support of petition, p. 16]

5 This claim was raised in Swoopes' second post-conviction relief petition. It is neither
6 time-barred nor procedurally barred from federal review. The court concludes the claim should
7 be denied on the merits.

8 In order for the state's failure to preserve evidence to violate due process the "evidence
9 must both possess an exculpatory value that was apparent before the evidence was destroyed,
10 and be of such a nature that the defendant would be unable to obtain comparable evidence by
11 other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct.
12 2528, 2534 (1984). Moreover, if the state did not destroy the evidence in bad faith, there is no
13 due process violation. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333, 337 (1988).

14 The Supreme Court has never clearly held that the due process clause is implicated if the
15 state destroys potentially exculpatory material *after* trial. See *Cress v. Palmer*, 484 F.3d 844,
16 853 (6th Cir. 2007); *Ferguson v. Roper*, 400 F.3d 635, 638 (8th Cir. 2005), *cert. Denied*, 546 U.S.
17 1098 (2006). The court need not decide, however, whether or not *Trombetta*, and *Youngblood*
18 apply to Swoopes' claim because he is not entitled to relief regardless. *But see Pennsylvania*
19 *v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 1994 (1987) (The Constitution does not obligate
20 the states to provide post-conviction relief, and if they do, the Due Process Clause does not
21 guarantee the petitioner the same rights that would apply before trial). Swoopes has made no
22 showing that the state destroyed this evidence in bad faith. See [doc. # 137, Exhibit B, ruling
23 3/16/06, p. 2] Accordingly, he has not shown his due process rights were violated.

24 Swoopes further argues the prosecutor engaged in misconduct by the introduction of
25 "racially charged evidence and comments." [doc. # 142, p. 10] The state concedes this claim
26 is timely and was properly exhausted. [doc. # 150, pp. 9, 17, 36]

27 Because guilty verdicts must be based on "solid evidence, not upon appeals to emotion,"
28 a prosecutor's attempt to improperly inflame the passions of the jury by appealing to racial or

1 ethnic stereotypes may violate the defendant's Constitutional right to due process. *Kelly v.*
2 *Stone*, 514 F.2d 18, 19 (9th Cir. 1975); *Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000),
3 *cert. Denied*, 531 U.S. 1037 (2000). A habeas petitioner complaining of trial error is entitled
4 to relief, however, only if he can show the error "had a substantial and injurious effect or
5 influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 637
6 (1993); *Bains*, 204 F.3d at 977-78.

7 At trial, the prosecutor elicited testimony from the wife about the circumstances of the
8 sexual assault. At some point during the crime, one of the robbers pulled the wife off the living
9 room floor, where the victims were being held, and into the bedroom. [doc. # 150, Exhibit C,
10 p. 208] The gunman restrained the husband telling him: "Don't be a hero or you will die and
11 everybody in the house will die." *Id.*, p. 113. The wife testified that the robber forced her to
12 perform fellatio and told her to act "like I like it." *Id.*, p. 210. He then asked for her name and
13 phone number explaining it was "[b]ecause he would like to have a good white woman." *Id.*
14 She testified she was afraid that the other men would also abuse her. *Id.*, p. 211.

15 During his closing argument, the prosecutor described the sexual assault calling it a
16 "[d]isgusting, reviling, revolting thing that happened to this lady." [doc. # 150, Exhibit D, p.
17 92] He argued that Swoopes was guilty of the sexual assault because he was an accomplice.
18 *Id.*, p. 96-97. He explained as follows:

19 If you aided, if you made it possible you are equally guilty. Keep cool, man.
20 Don't be a hero, man. We are just taking your wife into the other room for a little
fun.

21 [doc. # 150, Exhibit D, p. 97] Later, the prosecutor described the sexual assault saying:

22 What did he tell her to do? Act like you enjoy it. Get an Oscar for that one. Act
23 like you enjoy it. And then what happens? Give me your phone number and she's
scared to death, she gives it, the phone number is right there on the phone
24 anyway. She doesn't want to get hurt any worse. Anymore. I would like a nice
white lady to fuck. Sure, Okay.

25 [doc. # 150, Exhibit D, p. 103]

26 Toward the end of his argument, the prosecutor asserted that "this lady and this man and
27 their friend . . . have been through hell because of this defendant." *Id.*, p. 138. He urged the
28

1 jury to “put an end to her nightmare” and “[s]how her that the truth still exists” and “that justice
2 exists.” *Id.*, p. 139.

3 Swoopes argues that none of this testimony was relevant and it was introduced into the
4 trial for the sole purpose of inflaming the racial prejudices of the jury. [doc. # 154, p. 72] The
5 court does not agree.

6 Testimony establishing the sexual assault and Swoopes’ actions facilitating the assault
7 were necessary to prove the elements of the offence. The state asserted Swoopes was guilty of
8 sexual assault as an accomplice. The state therefore was required to prove Swoopes “knowingly
9 and with criminal intent participat[ed], associat[ed], or concur[ed] with another in the
10 commission of [the rape]. *Arizona v. Swoopes*, 155 Ariz. 432, 434, 747 P.2d 593, 595 (App.
11 1987). It was therefore relevant that the rape occurred, that Swoopes knew of his accomplice’s
12 intentions, and facilitated the rape by keeping the husband from interfering.

13 Certainly, argument that the assailant wanted the wife’s phone number because he
14 wanted a “nice white lady to fuck” raised the specter of certain racial prejudices that could have
15 been used to improperly influence the jury. [doc. # 150, Exhibit D., p. 103] Here, however, it
16 cannot be said that the prosecutor dwelt improperly on the racial overtones of the assault. First,
17 the prosecutor’s presentation stuck fairly faithfully to the actual words of the robbers. He did
18 embellish them to some extent, but primarily he stuck to the actual testimony. It would be
19 ironic to find that a prosecutor committed misconduct by repeating in court the very words used
20 by the perpetrators during the underlying crime. *See, e.g., Fields v. Woodford*, 309 F.3d 1095,
21 1109 (9th Cir. 2002) (“Finally, given the eyewitness testimony about what Fields did to Cobb,
22 there is no reasonable probability that the prosecutor’s emotional appeal affected the verdict.”),
23 amended by *Fields v. Woodford*, 315 F.3d 1062 (9th Cir. 2002)..

24 Second, the court notes that the most potentially inflammatory statements were
25 attributed, not to Swoopes, but to the robber who committed the sexual assault. Even if the
26 jurors’ passions were improperly inflamed, their anger would have been directed primarily
27 toward the accomplice, not Swoopes. Swoopes, in fact, stopped the assault from escalating by
28 telling his accomplice that it was time to leave.

Moreover, the prosecutor discussed the sexual assault primarily in racially neutral terms. The prosecutor's discussion was by no means mild. He used words and phrases obviously calculated to emphasize the degradation of the underlying crime. He called the assault, for example, a "[d]isgusting, reviling, revolting thing." His language, however, did not reference the race of the parties. He did not use the type of racially loaded terms and argument that courts have previously found to violate the Constitution. *See, e.g., Bains v. Cambra*, 204 F.3d 964, 975 (9th Cir. 2000) ("Here, the prosecutor relied upon clearly and concededly objectionable arguments for the stated purpose of showing that all Sikh persons (and thus Bains by extension) are irresistibly predisposed to violence when a family member has been dishonored . . ."); *Kelly v. Stone*, 514 F.2d 18 (9th Cir. 1975) ("Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know . . ."); *Miller v. State of N.C.*, 583 F.2d 701, 704 (1978) ("[The prosecutor] repeatedly referred to the defendants as "these black men" and ultimately argued that a defense based on consent was inherently untenable because no white woman would ever consent to having sexual relations with a black.").

Finally, the trial court offered instructions to the jury that should have lessened whatever prejudicial influence the prosecutor's arguments might have had. The jury was specifically instructed that it was to find the facts from the evidence presented in court. [doc. # 150, Exhibit D, p. 140] It was instructed not to be influenced by sympathy or prejudice. *Id.*, p. 140. Moreover, it was instructed that the arguments made by the lawyers are not evidence, but should be considered only if they help the jury members understand the law and the evidence. *Id.*, p. 142; *see also Id.*, pp. 94, 131 (where the prosecutor repeated these instructions to the jury).

Assuming the prosecutor's comments were improper, Swoopes cannot show they "had a substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see, e.g., Moore v. Morton*, 255 F.3d 95, 114, n. 16 (3rd Cir. 2001) (collecting cases); *but see, e.g., Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975).

Ground Four: Ineffective Assistance of Trial Counsel and Appellate Counsel

1 Swoopes argues his trial counsel and appellate counsel were ineffective in their handling
2 of the mid-deliberation jury question. This issue was raised in Swoopes' second post-conviction
3 petition in 2003. It is neither time-barred nor procedurally barred from federal review. The
4 court concludes the claim should be denied on the merits.

5 "The Sixth Amendment guarantees criminal defendants the right to effective assistance
6 of counsel." *Luna v. Cambra*, 306 F.3d 954, 961(9th Cir. 2002), reissued as amended, 311 F.3d
7 928 (9th Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)). Habeas relief,
8 however, is available only if "counsel's performance was deficient" and the "deficient
9 performance prejudiced the defense." *Id.* To show prejudice, the petitioner "must demonstrate
10 a reasonable probability that, but for counsel's unprofessional errors, the result of the
11 proceeding would have been different." *Id.* "A reasonable probability is a probability sufficient
12 to undermine confidence in the outcome." *Id.* Because Swoopes challenges his conviction, he
13 must show "there is a reasonable probability that, absent the errors, the fact finder would have
14 had a reasonable doubt respecting guilt." *Id.*

15 "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v.*
16 *Washington*, 466 U.S. 668, 689 (1984). "A fair assessment of attorney performance requires
17 that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the
18 circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's
19 perspective at the time." *Id.* "Because of the difficulties inherent in making the evaluation, a
20 court must indulge a strong presumption that counsel's conduct falls within the wide range of
21 reasonable professional assistance; that is, the defendant must overcome the presumption that,
22 under the circumstances, the challenged action might be considered sound trial strategy." *Id.*
23 (internal citation omitted).

24 First, Swoopes cannot show trial counsel's deficient performance caused the trial court
25 to give the misleading instruction. The trial court concluded that the trial judge probably
26 consulted counsel and then failed to properly record the incident as was the customary practice.
27 [doc. # 137, Exhibit B, p. 3] This finding, however, does not necessarily mean that trial counsel
28 approved the misleading instruction. As Swoopes himself notes, it is possible the trial court told

1 counsel of the question, assured them that he would instruct the jury to rely on the evidence
2 already presented during the trial, and then constructed the misleading instruction himself and
3 so advised the jury. [doc. # 154, p. 41, n. 21] If this is what happened, and Swoopes has no
4 evidence to the contrary, then trial counsel's performance was not deficient.

5 Moreover, trial counsel's allegedly deficient performance did not cause Swoopes
6 prejudice. As the court already explained, the instruction should not have influenced the jury's
7 deliberation because the jury was already instructed to base its findings on the evidence
8 presented and it was specifically instructed that the "blemish statement" was not evidence.
9 Moreover, the identification evidence from the husband and the friend was more than sufficient
10 to establish Swoopes' guilt.

11 Assuming without deciding that appellate counsel's failure to discover the judge's
12 response in the court file was deficient performance, Swoopes cannot show prejudice. *See*
13 *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (The petitioner must show "that there is
14 a reasonable probability that, but for counsel's unprofessional errors, [he] would have prevailed
15 on appeal."). The misleading instruction should not have influenced the jury's deliberation and
16 identification evidence from the husband and the friend was more than sufficient to establish
17 Swoopes' guilt.

18 Swoopes also claims his trial counsel was ineffective for failing to investigate the Valiant
19 and failing to call investigator Gene Reedy regarding the wife's lineup identification. These
20 claims were included in his original habeas petition. [doc. #1, Memorandum, pp. 32, 34]

21 Assuming without deciding that these claims were exhausted, Swoopes cannot show trial
22 counsel was ineffective.

23 Assuming without deciding that trial counsel's performance was deficient in failing to
24 investigate the Valiant, Swoopes cannot show he suffered prejudice. As the court previously
25 discussed, Swoopes now has evidence that the Plymouth Valiant, identified by the husband and
26 friend as the getaway vehicle, was actually owned, not by Swoopes or his aunt, but by a Harold
27 McGrew. [doc. # 137, Exhibit A, pp. 9-10] He also has evidence that another man, John
28 Wigglesworth, could have been the gunman in part because Wigglesworth drove a Ford

1 Thunderbird, which Swoopes argues could have been the getaway vehicle. *Id.*, [doc. # 154, p.
2 49]

3 As discussed previously, the court does not find a “reasonable probability” that had this
4 evidence been introduced at trial, “the fact finder would have had a reasonable doubt respecting
5 guilt.” *See Luna v. Cambra*, 306 F.3d 954, 961(9th Cir. 2002), reissued as amended, 311 F.3d
6 928 (9th Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)); *see also Benn v.*
7 *Lambert*, 283 F.3d 1040, 1053 (9th Cir. 2002) (Ineffective assistance of counsel claim employs
8 the same analysis as a *Brady* claim.), *cert. Denied*, 537 U.S. 942 (2002). Swoopes cannot show
9 his trial counsel’s alleged failure to investigate the Valiant caused him prejudice. Accordingly,
10 trial counsel was not ineffective.

11 Swoopes further argues trial counsel was ineffective for failing to call Gene Reedy to
12 testify. He argues Reedy’s testimony would have been relevant on the issue of suggestive
13 identification procedures. [doc. # 52, p. 51] Reedy was an investigator who observed the
14 conduct of the live lineup. [doc. # 150, Exhibit D, pp., 32, 33, 42] Swoopes argues Reedy
15 would have testified that during the lineup the wife explained that she “was looking for
16 something in particular” and when the detective asked: “What?”, she responded: “A scar.” [doc.
17 # 52, p. 36] The court concludes this testimony would have been cumulative.

18 On cross-examination, trial counsel established that, at the lineup, the wife did not make
19 an identification right away. *Id.*, pp. 235-37. She observed Swoopes for some five minutes and
20 then asked to have a closer look at the suspects. *Id.* She announced her identification after she
21 had that closer look. *Id.* Immediately after the lineup, the wife made a statement to Detective
22 Skuta memorializing her identification and the factors that lead to her identification. *Id.*, p. 240.
23 Among other things, she said she wanted the suspects to approach the window and turn
24 sideways because she wanted to see if any of them had a scar on the side of his face. *Id.*, p. 240.
25 She saw such a scar on Swoopes’ face near his right eye. *Id.*, p. 243. She said this scar helped
26 her make her identification, but she also based her identification on his height, weight, and
27 color. *Id.*, pp. 239, 243, 245.

1 Reedy could have testified that the wife told Detective Skuta that she wanted to have a
2 closer look at the suspects because she was looking for a scar. This fact, however, was
3 established by counsel during his cross-examination of the wife. Reedy's testimony would have
4 been cumulative. Failing to offer testimony that would have been cumulative is not prejudicial.
5 *See Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998), *cert. Denied*, 525 U.S. 1159
6 (1999). Accordingly, Swoopes cannot show trial counsel was ineffective.

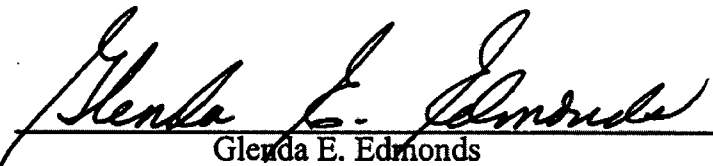
7
8 RECOMMENDATION

9 The Magistrate Judge recommends that the District Court, after its independent review
10 of the record, enter an order DENYING the Petition for Writ of Habeas Corpus. [doc. #1]

11 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
12 10 days of being served with a copy of this report and recommendation. If objections are not
13 timely filed, the party's right to de novo review may be waived. *See U. S. v. Reyna-Tapia*, 328
14 F.3d 1114, 1121 (9th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 900 (2003).

15 The Clerk is directed to send a copy of this report and recommendation to the petitioner
16 and the respondents.

17
18 DATED this 22nd day of March, 2010.

19
20
21 
22 _____
23 Glenda E. Edmonds
24 United States Magistrate Judge
25
26
27
28