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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

16        This action was reversed and remanded by the Ninth Circuit Court  
17        of Appeals for what appeared to be an incorrect application of the  
18        relevant law at the time. *Swoopes v. Ryan, Memorandum*, No. 11-16918  
19        (August 13, 2014). Petitioner filed his original federal petition in  
20        1993, before the enactment of the AEDPA. The pre-AEDPA standard is  
21        deference to factual findings underlying a determination by the state  
22        court. *Mayfield v. Calderon*, 229 F.3d 895, 901 (9<sup>th</sup> Cir. 2000); 28  
23        U.S.C. §2254(d)(1966). Petitioner urges this Court to review the  
24        legal issues without deference to the state court (de novo), but give  
25        deference to the state court factual findings on the merits and grant

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1 the habeas petition.<sup>1</sup>  
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3 **BACKGROUND**  
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5 Petitioner was convicted after a jury trial of first-degree  
6 burglary, sexual assault, aggravated robbery, three counts of armed  
7 robbery, and three counts of kidnapping. The trial court imposed a  
8 combined sentence totaling 42 years. At trial, the state presented  
9 evidence that Petitioner and two accomplices committed an armed home  
10 invasion. Petitioner was the only one of the three whose face was  
11 uncovered. The main issue at trial was identification. Petitioners'  
12 accomplices have never been identified.

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

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

27 <sup>1</sup> Both parties agreed to primarily rely on and refer to the briefs  
28 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' 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' 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,  
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1991.

1                   On July 26, 1993, Petitioner filed in this court his original  
2 Petition for Writ of Habeas Corpus pursuant to Title 28, United States  
3 Code, Section 2254(Petition). He claimed (1) the victims' in-court  
4 identification of him was tainted, (2) his due process and equal  
5 protection rights were violated by misconduct before the grand jury,  
6 (3) the trial court committed error at trial and in regard to a  
7 stipulation, (4) the prosecutor engaged in misconduct in part by  
8 withholding exculpatory evidence, (5) trial and appellate counsel were  
9 ineffective, and (6) his sentences violated the Double Jeopardy  
10 Clause. This court denied claim (1) on the merits and found the  
11 remaining claims procedurally defaulted. The Ninth Circuit affirmed in  
12 *Swoopes v. Sublett*, 163 F.3d 607 (9th Cir. 1998) (*Swoopes II*). The  
13 Supreme Court vacated *Swoopes II* and remanded in light of the recently  
14 decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). *Swoopes v.*  
15 *Sublett*, 527 U.S. 1001 (1999). On remand, the Ninth Circuit held that  
16 an ordinary habeas petitioner in Arizona exhausts his claims by  
17 presenting them to the court of appeals. *Swoopes v. Sublett*, 196 F.3d  
18 1008 (9th Cir. 1999) (*Swoopes III*), cert. denied, 529 U.S. 1124  
19 (2000). The Ninth Circuit remanded the case for this court to  
20 "determine which claims were properly exhausted, and not procedurally  
21 barred, and issue a decision on the merits of those claims." (Doc. 150  
22 at 5.)

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

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.<sup>2</sup> 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

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' 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.

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.)<sup>3</sup> 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).

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20 Respondents argue and this Court agrees that Petitioner shows  
21 neither. He does not argue there is "convincing evidence" the  
22 proceedings were *ex parte*, nor can he; his trial attorney admitted he  
23 had "no recollection of whether there was a hearing in court to  
24 discuss the jury's mid-deliberation note or not." The state court's  
25 findings regarding regular practices were appropriate and are entitled  
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28 <sup>3</sup> The Ninth Circuit's Excerpts of Record (E.R.) were filed as  
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.  
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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).

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*.

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

B. Alleged Exculpatory Evidence Under *Brady*

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

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

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'  
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 Petitioner first points to the fact that police initially  
25 suspected that a man named John Wigglesworth might have been involved  
26 in the crime. (Doc. 182 at 10.) There is no evidence, however, tying  
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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 (9<sup>th</sup> 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.<sup>4</sup> Indeed, even  
24 re-readings of Petitioner's *Brady* argument fails to uncover any  
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26 <sup>4</sup> 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.

1 discernible exculpatory value in it. (See E.R. A at 17 ("[I]t is not  
2 clear how the allegedly withheld evidence would have benefitted  
3 [Petitioner's] defense.") Its only conceivable purpose and effect,  
4 instead, would have been to confuse and distract the jurors from  
5 considering Petitioner's guilt by speculating on the guilt of others.  
6 Such evidence is not admissible in Arizona. See Ariz. R. Evid. 401  
7 (defining relevant evidence); 402 (irrelevant evidence inadmissible at  
8 trial); 403 (even relevant evidence may be excluded if its probative  
9 value is substantially outweighed by the danger of confusing or  
10 misleading the jury). See also *State v. Machado*, 226 Ariz. 281, 246  
11 P.3d 632 (2011) (third-party culpability is admissible only if it  
12 tends to create a reasonable doubt as to the defendant's guilt and its  
13 probative value is not substantially outweighed by the danger of  
14 confusing, distracting, or misleading the jurors). *Brady* does not  
15 require the disclosure of such evidence. See *United States v. Kohring*,  
16 637 F.3d 895 (2010) (*Brady* materiality applies only to evidence that  
17 is, or can lead to other evidence that is, admissible or capable of  
18 being used for impeachment purposes).

19  
20 Upon further review, this claim also fails.

21 **C. Alleged Unreliable Eyewitness Identification**

22 Petitioner argues that the Ninth Circuit's mandate requires this  
23 Court to reconsider its ruling on this claim under the correct pre-  
24 AEDPA legal standards. Specifically, the issue whether "the challenged  
25 identifications [of Petitioner as the gunman] were sufficiently  
26 reliable" must be reviewed *de novo*, not with AEDPA deference of  
27 whether the "state court's determination...was not contrary to, or an  
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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  
novo* standard of review of the claim, this Court should rule that  
17                  Petitioner' constitutional rights were violated and that he is  
18                  entitled to issuance of a writ of habeas corpus.

19                  Respondents argue that Petitioner's suggestive-identification  
20                  claim is doubly flawed. Petitioner cannot show that any of the  
21                  eyewitness identifications in this case resulted from improper,  
22                  police-arranged procedures. Moreover, as discussed in the R&R (Doc.  
23                  157 at 6-9), the identifications were reliable. If the court finds a  
24                  pre-trial identification procedure was unnecessarily suggestive, the  
25                  court proceeds to determine whether the ultimate identification was  
26                  unnecessary. (Doc. 169 at 18-20.)  
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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.

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.)

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

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

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

## CONCLUSION

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

Under these standards, the Petition will be denied.

Accordingly,

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

Dated this 23rd day of February, 2016.

David C. Bury  
United States District Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Samuel Swoopes, ) CV-93-471-TUC-DCB  
Petitioner, )  
v. )  
Charles L. Ryan, et al., ) ORDER  
Respondents. )  
 )  
 )

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

## **STANDARDS OF REVIEW**

When objection is made to the findings and recommendation of a magistrate judge, the district court must conduct a de novo review. *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  
face was uncovered. [doc. # 154, p. 3] The main issue at trial was  
3 identification. Swoopes' accomplices have never been identified.

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

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

12 When the husband heard the sounds of the struggle, he got off the floor  
13 and ran to the front door intending to lock the intruders out and again  
confronted Swoopes, who was standing in the doorway. *Id.*, p. 119. When  
14 Swoopes left, the husband locked the door and went to check on his wife.  
*Id.*, pp. 121-122. After determining that she was safe, he ran outside and  
15 saw the robbers drive away in a mid to late '60s light colored Plymouth  
Valiant. *Id.*, pp. 123-124 After the robbery, the three victims were  
16 unable to clearly describe the gunman and failed to identify Swoopes in  
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  
17 any facial blemishes or scars. *Id.* It is undisputed that Swoopes has a  
scar above his right eye.

18 Sixteen months after the robbery, the husband and his friend learned  
19 that a similar home invasion occurred in their neighborhood on that same  
night and a suspect in that crime was currently on trial. *Id.*; [doc. #  
20 154, p. 3] The two men went to the courthouse and recognized Swoopes as  
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  
explaining she was looking for a man with a facial scar. *Id.*

22 At trial, the three victims identified Swoopes as the gunman. *Id.* On  
23 cross examination, the wife admitted that after the robbery she did not  
tell police the gunman had a scar. [doc. # 150, Exhibit C, p. 228-230]  
24 She was not specifically asked if she ever told police the gunman had a  
blemish. During his closing argument, Swoopes' counsel reminded the jury  
25 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  
26 her later identification of Swoopes was erroneous.

27

28

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

6       During deliberations, the jury sent a written question to the trial  
7 judge asking to see "any statement made by [the wife] of a blemish before  
8 the physical lineup." *Swoopes*, 216 Ariz. 390, 393, 166 P.3d 945, 948. The  
9 court responded that "the statement is not admissible" and further  
10 instructed the jurors to "rely on their collective memories." *Id.* It is  
11 undisputed that the wife did not make a statement about a blemish to the  
12 police immediately after the robbery.  
13

14      After the trial and sentencing, Swoopes filed a direct appeal arguing  
15 (1) "the court erred in imposing consecutive sentences," (2) "the court  
16 erred in convicting him of sexual assault as an accomplice, and (3) "the  
17 victims' in-court identification of him was tainted." *Arizona v. Swoopes*,  
18 155 Ariz. 432, 434, 747 P.2d 593, 596 (App. 1987); [doc. # 150, p. 2, n.  
19 1]. During the briefing process, the appeal was inadvertently transferred  
20 to the Arizona Supreme Court before being returned to the court of  
21 appeals. [doc. # 11, p. 3, n. 3] During this period, Swoopes filed a  
22 supplemental brief arguing (4) the prosecutor engaged in misconduct, (5)  
23 the court erred in instructing the jury on the issue of identification  
24 evidence, (6) the state improperly excluded counsel from the trial  
25 lineup, and (7) the aggravated robbery conviction violated double  
26 jeopardy. [doc. # 11, p. 3, n. 3]; [doc. # 150, p. 2, n. 1] The court of  
27 appeals refused to entertain the additional claims. *Id.*; [doc. # 7, p.  
28 5, n.1] On July 21, 1987, the court of appeals affirmed Swoopes'  
29 convictions and sentences in *Arizona v. Swoopes*, 155 Ariz.432, 747 P.2d  
30 593 (App 1987) (*Swoopes I*). The Arizona Supreme Court denied review on  
31 January 13, 1988. [doc. # 150, p. 2]

32      In his first post-conviction relief petition, filed on February 1,  
33 1989, Swoopes argued (1) trial counsel was ineffective for failing to  
34 investigate the alleged getaway car, (2) the trial court erred in its  
35 instruction to the jury about identification evidence, (3) he was denied  
36 counsel at all critical stages, (4) the prosecutor engaged in misconduct  
37 at trial and suppressed evidence, (5) the sentence was unconstitutional,  
38 and (6) he was denied due process and equal protection. [doc # 142, p.  
39 4] The trial court denied the petition on July 17, 1990. [doc. # 142, p.  
40 4] The court of appeals denied Swoopes' petition for review on February  
41 21, 1991. [doc. # 150, p. 3] On February 21, 1991, Swoopes filed a  
42 special action in the court of appeals raising the same issues presented  
43 in his first post-conviction relief petition and arguing the trial court  
44 erred procedurally and substantively in denying his petition. [doc. #  
45 142, p. 5.] The court of appeals denied the special action on April 18,  
46 1991, and the Arizona Supreme Court denied a petition for review on  
47 September 27, 1991. *Id.*  
48

49      On July 26, 1993, Swoopes filed in this court his original Petition for  
50 Writ of Habeas Corpus pursuant to Title 28, United States Code, Section  
51 2254. (Petition.) He claimed (1) the victims' in-court identification of  
52 him was tainted, (2) his due process and equal protection rights were  
53

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  
evidence, (5) trial and appellate counsel were ineffective, and (6) his  
sentences violated the Double Jeopardy Clause. [doc. # 1, pp. 5-7]; [doc.  
# 150, pp. 3-4, n. 3]

4  
5 This court denied claim (1) on the merits and found the remaining  
claims procedurally defaulted. [doc. # 150, pp. 4-5]. 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, 119 S.Ct. 1728  
(1999). *Swoopes v. Sublett*, 527 U.S. 1001, 119 S.Ct. 2335 (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, p. 5]

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

14 *Swoopes* returned to state court and filed a second post-conviction  
relief petition on March 27, 2003. [doc. # 142, p. 5] He argued (1) the  
trial court erred procedurally and substantively in its response to the  
jury question, (2) trial and appellate counsel were ineffective in their  
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].

27

28

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)  
(*Swoopes IV*). This version, which dates from 1992, did not apply at the  
19 time of Swoopes' default because that default occurred before 1992, when  
20 the previous version of the rule was in existence. *Id.* Accordingly, the  
21 court concludes the procedural bar applied by the court of appeals (the  
22 new rule) was not firmly established and regularly followed at the time  
23 of the default (when the previous version of the rule applied). See *Scott*  
24 v. *Schrirro*, 567 F.3d 573, 580-82 (9th Cir. 2009), cert. denied, 130 S.Ct.  
25 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).

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

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

41 Swoopes cannot show as a matter of fact that the judge engaged in *ex*  
42 *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  
v. Werring*, 523 P.2d 499 (1974). [doc. # 119, p. 7]

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

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

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

30 The respondents argue this claim is untimely because it was not included  
31 in the original petition, and the amended petition was filed after the  
32 applicable one-year limitation period. See 28 U.S.C. § 2244(d)(1). This  
33 issue was decided by the Ninth Circuit only after briefing on the  
34 petition was concluded. Where the original habeas petition was filed  
35 before the AEDPA effective date, the AEDPA's one-year limitation period  
36 does not apply to the case at all, even to an amended petition filed  
37 after the effective date. *Smith v. Mahoney*, \_\_ F.3d \_\_, 2010 WL 744271  
38 \* 12 .

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

42 A habeas petitioner complaining of trial error is entitled to relief  
43 only if he can show the error "had a substantial and injurious effect or  
44 influence in determining the jury's verdict." See *Brecht v. Abrahamson*,  
45 507 U.S. 619, 63, 113 S.Ct. 1710, 1722 (1993). Swoopes cannot show the  
46 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  
3 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  
exhibits. *Id.* An inadmissible statement is not evidence. Accordingly, the  
6 wife's "statement" about a blemish was not evidence and would not have  
been considered by the jury in their determination of the facts. Because  
7 a jury is presumed to follow its instructions, the court must conclude  
8 the trial judge's response to the jury's mid-deliberation question did  
not have a "substantial and injurious effect or influence in determining  
the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113  
9 S.Ct. 1710, 1722 (1993); see also *Weeks v. Angelone*, 528 U.S. 225, 234,  
120 S.Ct. 727, 733 (2000) ("A jury is presumed to follow its  
10 instructions." "Similarly, a jury is presumed to understand a judge's  
answer to its question.").

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

16 The friend testified that while he may have had a couple of beers, he  
17 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  
18 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  
19 courthouse. [doc. # 150, pp. 164, 165; Exhibit D, p. 50] He had no doubt  
20 that Swoopes was the gunman. [doc. # 150, Exhibit C, pp. 186,87]

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

27 Even without the wife's testimony, there was compelling evidence that  
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  
misleading but not as prejudicial as Swoopes argues.

6 During his closing argument, Swoopes' counsel reminded the jury that  
7 the wife 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.

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

11 And then it's very nice, the lady's in the hospital, she has  
12 been there for a couple hours, she's been through hell and  
13 some officer is trying to get some statements, did he look  
14 this way, did he have a scar, no, no, about five foot seven  
15 or eight, same weight, same color, same size, she said on  
16 that witness stand, how many of you listened to her? You all  
17 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. 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.

18 . . . Then when a defense attorney gets you on the witness  
19 stand, and put yourselves in the shoes of these victims,  
here, naturally, any tiny discrepancy, 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. And sure, 1:00 o'clock in the morning,  
when she's sedated and exhausted and in shock, she may not  
have mentioned the scar. Her memory was refreshed when she  
saw him. . . . And they did not commit perjury in this  
Courtroom. You should resent being told that.

20  
21  
22  
23 Now they told the police that very night about this scar.  
24 That very day about that scar. Let me ask you this question.  
25 Because this is the whole thing 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; . . . As she said on the witness stand, and

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

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

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

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

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

More problematic, however, are the prosecutor's following statements: "Now they told the police that very night about this scar." "That very day about that scar." [doc. # 150, Exhibit D, p. 136] These statements 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 *Brech 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     defe to the state court's resolution of this issue.

20      (R&R at 9 - 16.)

**RULING**

21      The Objections added nothing new to this claim that have not  
22     already been addressed completely and accurately by the R&R and through-  
23     out these proceedings. The Court finds no error in the Magistrate  
24     Judge's analysis of the law. Both the trial court and the Arizona Court  
25     of Appeals found that Petitioner failed to show an *ex parte* communication  
26     occurred. *State v. Swoopes*, 216 Ariz. 390, 394-395 (Ariz. App. 2007).  
27     The Objection is based on unsupported speculation. Viewing the totality  
28     of the evidence against Petitioner, Petitioner cannot show that the trial  
29     court's response "had a substantial and injurious effect or influence in  
30     determining the jury's verdict." *Brech v. Abrahamson*, 507 U.S. 619  
31     (1993); see also *Rushen v. Spain*, 464 U.S. 114, 117 (1983(subject to  
32     harmless error analysis); *United States v. Madrid*, 842 F.2d 1090, 1093-94  
33     (9<sup>th</sup> Cir. 1988)(no actual prejudice). The Court finds no unreasonable  
34     error.

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  
Exculpatory Evidence Under Brady.**

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

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

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

15 Swoopes maintains the state failed to disclose a wealth of *Brady*  
16 material that would have altered the verdict had it been presented at  
trial. [doc. # 137, Exhibit A, pp. 9-10] Specifically, the state failed  
17 to disclose that the Plymouth Valiant, identified by the husband and  
friend as the getaway vehicle, was actually owned, not by Swoopes or his  
18 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  
19 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  
20 home invasion robbery. *Id.* Wigglesworth drove a Ford Thunderbird and used  
the modus operandi of switching licence plates to avoid arrest. [doc. #  
21 154, p. 49] Swoopes argues this Thunderbird could have been the getaway  
vehicle because it more closely matched the victim's original description  
22 than did the 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  
24 mistaken when they identified the Valiant as the getaway car. [doc. #  
150, Exhibit D, pp. 75, 126] Now, Swoopes believes counsel should have  
25 conceded that the Valiant was the getaway car but should have argued the  
car was associated with other possible suspects - Clark and Wigglesworth.  
26 This new line of evidence, however, does not exonerate Swoopes. Swoopes  
conducted his robbery with two accomplices. They have never been  
27 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  
1 p. 7] shots, photos of the physical lineup and getaway car; and destroyed  
2 physical evidence such as the rape kit, a pillowcase and blouse. [doc. #  
3 142, p. 7]

4 This evidence was destroyed some time after Swoopes' direct appeal and  
5 initial postconviction relief petition. [doc. # 137, Exhibit B, ruling  
6 3/16/06, p. 2] Nevertheless, Swoopes argues the absence of this material  
7 hampers the "litigation of his post-conviction challenges to his  
8 conviction." [doc. # 137, Exhibit A, memorandum in support of petition,  
9 p. 16] This claim was raised in Swoopes' second post-conviction relief  
10 petition. It is neither time-barred nor procedurally barred from federal  
11 review. The court concludes the claim should be denied on the merits.  
12

13 In order for the state's failure to preserve evidence to violate due  
14 process the "evidence must both possess an exculpatory value that was  
15 apparent before the evidence was destroyed, and be of such a nature that  
16 the defendant would be unable to obtain comparable evidence by other  
17 reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489  
18 (1984). Moreover, if the state did not destroy the evidence in bad faith,  
19 there is no due process violation. *Arizona v. Youngblood*, 488 U.S. 51,  
20 58 (1988).  
21

22

23

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

(R&R at 16 - 18.)

## RULING

The Objection is repetitive of ongoing arguments and claims that have been addressed by the R&R. The Court finds no error in the analysis or application of the law. A constitutional violation arising from prosecutorial misconduct does not warrant habeas relief if the error is harmless. See *Sandoval v. Calderon*, 241 F.3d 765, 778 (9th Cir. 2000). When a state court has found a constitutional error to be harmless beyond a reasonable doubt, a federal court may not grant habeas relief unless the state court's determination is objectively unreasonable. See *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003) (per curiam); *Cooper v. Brown*, 510 F.3d 870, 921 (9th Cir. 2007). Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or 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  
23                   at trial." [doc. # 142, p. 8] The parties agree that this claim should  
24                   be addressed on the merits.

25                   This claim was raised in the original petition, which was filed before  
26                   the AEDPA's effective date, so the AEDPA standard of review does not  
27                   apply. *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001). Pure  
28                   questions of law and mixed questions of law and fact are reviewed de  
                         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

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

16 The three witnesses had an "ample opportunity" to observe Swoopes  
17 during the robbery. *Arizona v. Swoopes*, 155 Ariz. 432, 435 (App. 1988);  
18 see also *Coley v. Gonzales*, 55 F.3d 1385, 1387 (9th Cir. 1995) ("[T]he  
19 state court's factual determinations are presumed correct."). The  
20 witnesses were not mere bystanders but were direct victims. Obviously,  
21 their degree of attention was heightened by that fact. On the other hand,  
22 the court recognizes that the stress of the robbery is a factor that  
23 could have impaired the witness's ability to accurately remember details  
24 about the gunman's face. See, e.g., *Raheem v. Kelly*, 257 F.3d 122, 138  
25 (2nd Cir. 2001) ("[I]t is human nature for a person toward whom a gun is  
26 being pointed to focus his attention more on the gun than on the face of  
27 the person pointing it."), cert. denied, 534 U.S. 1118 (2002).

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

6 After viewing Swoopes in court, the two men were "absolutely certain"  
7 that Swoopes was the gunman. *Arizona v. Swoopes*, 155 Ariz. 432, 433 (App.  
8 1988). The wife later identified Swoopes at a live lineup "without being  
told of the positive identification by her companions." *Arizona v.  
Swoopes*, 155 Ariz. 432, 434-35 (App. 1988). The witnesses' degree of  
certainty is further evidence that the identification was reliable.  
9

10 The courthouse identification, however, was made approximately 16  
months after the crime. This is a considerable length of time and does  
11 not support reliability. By itself, however, this lapse of time is not  
dispositive. *See, e.g., U.S. v. Williams*, 596 F.2d 44, 49 (2nd Cir.  
12 1979) ("[A]lthough the time lapse of two years and eight months between  
the crime and the in-court confrontation is a somewhat negative factor,  
it is outweighed by the other four *Manson* criteria . . . ."), cert.  
13 denied, 442 U.S. 946 (1979). Based on the totality of the circumstances,  
the court concludes the identification testimony was not so unreliable  
14 that its admission violated due process.  
15

16 Swoopes argues the witnesses' failure to report a scar on the face of  
the gunman proves their later identification of him was not sufficiently  
17 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  
18 could not have been missed during the tense and chaotic atmosphere of an  
armed robbery.  
19

20 Swoopes notes that the witnesses were shown a photographic lineup  
shortly after the robbery, and although they were shown his picture, were  
21 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  
23 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  
25 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  
26 (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  
27 made a definitive identification after viewing a lineup, where the  
28

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:

27

28

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  
 29 was an accomplice. *Id.*, p. 96-97. He explained as follows: If you aided,  
 30 if you made it possible you are equally guilty. Keep cool, man. Don't be  
 31 a hero, man. We are just taking your wife into the other room for a  
 32 little fun. [doc. # 150, Exhibit D, p. 97] Later, the prosecutor  
 33 described the sexual assault saying: What did he tell her to do? Act like  
 34 you enjoy it. Get an Oscar for that one. Act like you enjoy it. And then  
 35 what happens? Give me your phone number and she's scared to death, she  
 36 gives it, the phone number is right there on the phone anyway. She  
 37 doesn't want to get hurt any worse. Anymore. I would like a nice white  
 38 lady to fuck. Sure, Okay. [doc. # 150, Exhibit D, p. 103] Toward the end  
 39 of his argument, the prosecutor asserted that "this lady and this man and  
 40 their friend . . . have been through hell because of this defendant."  
 41 *Id.*, p. 138. He urged the jury to "put an end to her nightmare" and  
 42 "[s]how her that the truth still exists" and "that justice exists." *Id.*,  
 43 p. 139. Swoopes argues that none of this testimony was relevant and it  
 44 was introduced into the trial for the sole purpose of inflaming the  
 45 racial prejudices of the jury. [doc. # 154, p. 72] The court does not  
 46 agree.

47 Testimony establishing the sexual assault and Swoopes' actions  
 48 facilitating the assault were necessary to prove the elements of the  
 49 offence. The state asserted Swoopes was guilty of sexual assault as an  
 50 accomplice. The state therefore was required to prove Swoopes "knowingly  
 51 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.  
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).

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

6 (R&R at 19 - 22.)

7 **Ruling**

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

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

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

24 Swoopes argues his trial counsel and appellate counsel were ineffective  
25 in their handling of the mid-deliberation jury question. This issue was  
26 raised in Swoopes' second post-conviction petition in 2003. It is neither  
27 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  
 13 that trial counsel approved the misleading instruction. As Swoopes  
 14 himself notes, it is possible the trial court told counsel of the  
 15 question, assured them that he would instruct the jury to rely on the  
 16 evidence already presented during the trial, and then constructed the  
 17 misleading instruction himself and so advised the jury. [doc. # 154, p.  
 18 41, n. 21] If this is what happened, and Swoopes has no evidence to the  
 19 contrary, then trial counsel's performance was not deficient. Moreover,  
 20 trial counsel's allegedly deficient performance did not cause Swoopes  
 21 prejudice. As the court already explained, the instruction should not  
 22 have influenced the jury's deliberation because the jury was already  
 23 instructed to base its findings on the evidence presented and it was  
 24 specifically instructed that the "blemish statement" was not evidence.

25        Moreover, the identification evidence from the husband and the friend  
 26 was more than sufficient to establish Swoopes' guilt. Assuming without  
 27 deciding that appellate counsel's failure to discover the judge's  
 28 response in the court file was deficient performance, Swoopes cannot show  
 13 prejudice. See *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (The  
 14 petitioner must show "that there is a reasonable probability that, but  
 15 for counsel's unprofessional errors, [he] would have prevailed on  
 16 appeal."). The misleading instruction should not have influenced the  
 17 jury's deliberation and identification evidence from the husband and the  
 18 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. 1998), cert. Denied, 525 U.S. 1159 (1999). Accordingly, Swoopes cannot  
2 show trial counsel was ineffective.

3 (R&R at 22 - 26.)

4 **RULING**

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

16 **CONCLUSION**

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

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

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 21<sup>st</sup> day of July, 2011.

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11 David C. Bury  
12 United States District Judge  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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

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27

28

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

<sup>1</sup> defaulted. [doc. # 150, pp. 4-5]. The Ninth Circuit affirmed in *Swoopes v. Sublett*, 163 F.3d 607 (9<sup>th</sup> 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 (9<sup>th</sup> 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 petition<sup>1</sup> 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

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,”<sup>2</sup> (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 (9<sup>th</sup> 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  
28 <sup>2</sup> Swoopes withdraws his claim that the trial court erred by admitting evidence in breach of a  
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 (9<sup>th</sup> 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 (2<sup>nd</sup> 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 reported<sup>3</sup> that the suspect had a scar above his right eye, their descriptions

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27      <sup>3</sup> 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.*

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

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

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

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

1 under ordinary conditions, it is not so prominent<sup>4</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 <sup>4</sup> 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.*

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

In this case, the state court’s procedural bar was not firmly established and regularly followed at the time of the default. The state court found Swoopes’ claim precluded after applying the *current* version of Rule 32.2. *See Arizona v. Swoopes*, 216 Ariz. 390, 397, 166 P.3d 945, 952 (App. 2007) (*Swoopes IV*). This version, which dates from 1992, did not apply at the time of Swoopes’ default because that default occurred before 1992, when the previous version of the rule was in existence. *Id.* Accordingly, the court concludes the procedural bar applied by the court of appeals (the new rule) was not firmly established and regularly followed at the time of the default (when the previous version of the rule applied). *See Scott v. Schriro*, 567 F.3d 573, 580-82 (9<sup>th</sup> Cir. 2009), *cert. Denied*, 130 S.Ct. 1014 (2009); *Clayton v. Gibson*, 199 F.3d 1162, 1171 (10<sup>th</sup> 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).

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

Swoopes raised this claim in his second post-conviction relief petition. He submitted an affidavit from his trial counsel who stated that he had no recollection of the jury’s note or the 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 (9<sup>th</sup> 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 *Brech 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]

28

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  
 20 refreshed. When you see that person, it hits you that that's the person. That's it.  
 21 . . .

22 Then when a defense attorney gets you on the witness stand, and put  
 yourselves in the shoes of these victims, here, naturally, any tiny discrepancy,  
 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  
 about that scar. Let me ask you this question. Because this is the whole thing  
 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  
2 a gun and I had a chance to see him, that's the man. . . .

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

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

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

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

20                   More problematic, however, are the prosecutor's following statements: "Now they told  
21 the police that very night about this scar." "That very day about that scar." [doc. # 150, Exhibit  
22 D, p. 136] These statements are also something of a mystery. Immediately after the robbery,  
23 the witnesses did not tell police the gunman had a scar. The prosecutor conceded in his closing  
24 that the wife did not mention the scar and explained in detail why her identification was  
25 nevertheless reliable. Accordingly, it is unlikely that the prosecutor would deliberately  
26 misrepresent the trial evidence, and simultaneously undermine his own closing argument by  
27 asserting the exact opposite. The respondents suggest the prosecutor was referring to a later  
28 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 (9<sup>th</sup> 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.<sup>5</sup> 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 (9<sup>th</sup> 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]

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26  
27 <sup>5</sup> 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 (6<sup>th</sup> Cir. 2007); *Ferguson v. Roper*, 400 F.3d 635, 638 (8<sup>th</sup> 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 (9<sup>th</sup> Cir. 1975); *Bains v. Cambra*, 204 F.3d 964, 974-75 (9<sup>th</sup> 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  
24 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.

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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.

1 Moreover, the prosecutor discussed the sexual assault primarily in racially neutral terms.  
2 The prosecutor's discussion was by no means mild. He used words and phrases obviously  
3 calculated to emphasize the degradation of the underlying crime. He called the assault, for  
4 example, a "[d]isgusting, reviling, revolting thing." His language, however, did not reference  
5 the race of the parties. He did not use the type of racially loaded terms and argument that courts  
6 have previously found to violate the Constitution. *See, e.g., Bains v. Cambra*, 204 F.3d 964,  
7 975 (9<sup>th</sup> Cir. 2000) ("Here, the prosecutor relied upon clearly and concededly objectionable  
8 arguments for the stated purpose of showing that all Sikh persons (and thus Bains by extension)  
9 are irresistibly predisposed to violence when a family member has been dishonored . . . .");  
10 *Kelly v. Stone*, 514 F.2d 18 (9<sup>th</sup> Cir. 1975) ("Because maybe the next time it won't be a little  
11 black girl from the other side of the tracks; maybe it will be somebody that you know . . . .");  
12 *Miller v. State of N.C.*; 583 F.2d 701, 704 (1978) ("[The prosecutor] repeatedly referred to the  
13 defendants as "these black men" and ultimately argued that a defense based on consent was  
14 inherently untenable because no white woman would ever consent to having sexual relations  
15 with a black.").

16 Finally, the trial court offered instructions to the jury that should have lessened whatever  
17 prejudicial influence the prosecutor's arguments might have had. The jury was specifically  
18 instructed that it was to find the facts from the evidence presented in court. [doc. # 150, Exhibit  
19 D, p. 140] It was instructed not to be influenced by sympathy or prejudice. *Id.*, p. 140.  
20 Moreover, it was instructed that the arguments made by the lawyers are not evidence, but should  
21 be considered only if they help the jury members understand the law and the evidence. *Id.*, p.  
22 142; *see also Id.*, pp. 94, 131 (where the prosecutor repeated these instructions to the jury).

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

27 Ground Four: Ineffective Assistance of Trial Counsel and Appellate Counsel  
28

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 (9<sup>th</sup> Cir. 2002), reissued as amended, 311 F.3d  
7 928 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2002), reissued as amended, 311 F.3d  
6 928 (9<sup>th</sup> Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)); *see also Benn v.*  
7 *Lambert*, 283 F.3d 1040, 1053 (9<sup>th</sup> 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.

28

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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.

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18           DATED this 22<sup>nd</sup> day of March, 2010.

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Glenda E. Edmonds  
United States Magistrate Judge