No. 21-

IN THE
Supreme Court of the United States

MURRAY HOOPER,
Petitioner,

v.

DAVID SHINN,
Respondent.

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

PETITION APPENDIX

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[7] Even if Tobar could establish inducement, the evidence was sufficient to show he had a predisposition to entice a minor. Predisposition "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." ***Myers***, 575 F.3d at 805, *quoting* ***Mathews v. United States***, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). "[W]hen a defendant responds immediately and enthusiastically to his first opportunity to commit a crime, without any period of government prodding, his criminal disposition is readily apparent." ***Id***. at 807-08.

Discovering Kitty's age, Tobar quickly asked for nude photos and a meeting to arrange sex. He responded immediately and enthusiastically, without any government prodding. Tobar claims his text, "I yes want woman," expresses a preference for an older woman, but the context refutes this. Tobar was texting other escorts—including a 28-year-old the same evening—but pursued the minor. The district court properly refused to give entrapment instructions.

* * * * * * * *

The judgment is affirmed.

Murray HOOPER, Petitioner-Appellant,

v.

David SHINN,* Warden, Respondent-Appellee.

No. 08-99024

United States Court of Appeals, Ninth Circuit.

Argued and Submitted September 16, 2020 San Francisco, California

Filed January 8, 2021

Background: After affirmance, 145 Ariz. 538, 703 P.2d 482, of state prisoner's murder convictions and death sentence, prisoner petitioned for federal habeas relief. The United States District Court for the District of Arizona, Stephen M. McNamee, J., 2008 WL 4542782, denied relief. Prisoner appealed. The Court of Appeals remanded, The District Court, McNamee Senior District Judge, 2018 WL 2426176, denied relief. Prisoner appealed.

Holdings: The Court of Appeals, Bennett, Circuit Judge, held that:

(1) state court reasonably determined, under Supreme Court precedent in 1985 regarding *Brady* claims, that disclosure of suppressed impeachment evidence would not have affected the outcome;

(2) state court made reasonable factual determination that withheld impeachment evidence was cumulative;

(3) state court reasonably determined that delayed disclosure of police reports and arrest photographs concerning putative alternative perpetrators did not violate *Brady*; and

(4) state court's determination, that error in imposing death sentence was harm-

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), David Shinn is substituted for his predecessor, Dora B. Schriro, as Warden.

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less, even if prior murder convictions were invalid, was not contrary to Supreme Court precedent.

Affirmed.

1. Habeas Corpus ⚿842

The Court of Appeals reviews de novo a district court's denial of a state prisoner's federal habeas petition. 28 U.S.C.A. § 2254(d)(1).

2. Habeas Corpus ⚿452

A state-court decision is "contrary to" clearly established Supreme Court precedent, as basis for granting federal habeas relief to a state prisoner, if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Supreme Court's. 28 U.S.C.A. § 2254(d)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⚿450.1

A state-court decision involves an unreasonable application of clearly established Supreme Court precedent, as basis for granting federal habeas relief to a state prisoner, if it identifies the correct governing legal principle but unreasonably applies that principle to the facts of the prisoner's case. 28 U.S.C.A. § 2254(d)(1).

4. Habeas Corpus ⚿450.1

For a state-court decision to involve an unreasonable application of clearly established Supreme Court precedent, as basis for granting federal habeas relief to a state prisoner, the decision must be more than incorrect or erroneous, and the state court's application must be objectively unreasonable. 28 U.S.C.A. § 2254(d)(1).

5. Habeas Corpus ⚿450.1, 452

Clearly established Supreme Court precedent, for purposes of the Antiterrorism and Effective Death Penalty Act (AEDPA), which allows federal habeas relief to be granted to a state prisoner if the state court's adjudication of the merits of the prisoner's federal claim is contrary to or an unreasonable application of clearly established Supreme Court precedent, includes only the Supreme Court's decisions as of the time of the relevant state-court adjudication on the merits. 28 U.S.C.A. § 2254(d)(1).

6. Habeas Corpus ⚿450.1

When a state court has applied clearly established Supreme Court precedent to reasonably determined facts in the process of adjudicating on the merits a state prisoner's federal claim, a federal habeas court may not disturb the state court's decision unless its error lies beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d)(1).

7. Habeas Corpus ⚿450.1

A state-court factual determination is not unreasonable, as would provide basis for granting federal habeas relief to a state prisoner, merely because the federal habeas court would have reached a different conclusion in the first instance. 28 U.S.C.A. § 2254(d)(2).

8. Habeas Corpus ⚿842

When a district court denies leave to amend a state prisoner's federal habeas petition, based on a determination that the proposed claim would be futile, the Court of Appeals reviews the determination of futility de novo. 28 U.S.C.A. § 2254; Fed. R. Civ. P. 15(a)(2).

9. Habeas Corpus ⚿842

The Court of Appeals reviews de novo a district court's procedural default deter-

minations regarding a state prisoner's federal habeas claims. 28 U.S.C.A. § 2254.

10. Habeas Corpus ⇐450.1, 452

State's apparent concession, that a Supreme Court decision was clearly established law, would be rejected by the federal habeas court, because the parties to the state prisoner's federal habeas proceeding could not waive the standard of federal habeas review under Antiterrorism and Effective Death Penalty Act (AEDPA), which allowed federal habeas relief to be granted to a state prisoner if the state court's adjudication of the merits of the prisoner's federal claim was contrary to or an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C.A. § 2254(d)(1).

11. Constitutional Law ⇐4594(1)

The three elements of a *Brady* due process violation based on the suppression of evidence are: (1) the evidence is favorable to the accused; (2) the prosecution suppressed the evidence; and (3) the evidence is material. U.S. Const. Amend. 14.

12. Habeas Corpus ⇐480

State court's determination, when adjudicating state prisoner's *Brady* due process claim, that prisoner had not shown that disclosure of suppressed impeachment evidence, regarding three additional benefits that state had conferred on witness who entered into plea deal, might have affected the outcome of murder trial, was not contrary to or an reasonable application of clearly established Supreme Court precedent in 1985, as would provide basis for federal habeas relief; testimony of another witness, who had survived in murder-for-hire incident in which two victims died, had been crucial in identifying prisoner as one of the perpetrators, and the defense possessed and used a wealth of impeachment evidence against witness who received plea deal. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1).

13. Habeas Corpus ⇐770

A state court's finding, when adjudicating a state prisoner's *Brady* due process claim, that suppressed evidence is cumulative, is a factual determination, for purposes of availability of federal habeas relief if a state court's factual determination is unreasonable. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(2).

14. Habeas Corpus ⇐480

State court's factual determination, that withheld impeachment evidence was cumulative, was not unreasonable, as would provide basis for federal habeas relief, with respect to state prisoner's *Brady* due process claim challenging State's failure to disclose, in murder prosecution, three additional benefits that state had conferred on witness who entered into plea deal; defense severely impeached witness with evidence portraying him as serial liar with strong incentives to fabricate his testimony, in order to avoid a potential death sentence for his own involvement in the crimes, and to continue to receive favorable treatment from State. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(2).

15. Habeas Corpus ⇐480

State court's determination, that no *Brady* due process violation arose from State's delayed disclosure of police reports and arrest photographs concerning putative alternative perpetrators of the murders, which delay had not prevented the defense from using the reports and photographs at trial, was not contrary to or an unreasonable application of clearly established Supreme Court precedent, as would provide basis for federal habeas relief. U.S. Const. Amend. 14; 28 U.S.C.A. § 2254(d)(1).

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16. Constitutional Law ⚿4594(1)

Suppressed evidence is material, for *Brady* due process purposes, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, and reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S. Const. Amend. 14.

17. Constitutional Law ⚿4594(1)

In determining the materiality of suppressed evidence, as element for *Brady* due process claim, the court must examine the trial record, evaluate the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. U.S. Const. Amend. 14.

18. Constitutional Law ⚿4594(1)

A *Brady* due process violation occurs when the undisclosed favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. U.S. Const. Amend. 14.

19. Constitutional Law ⚿4594(1)

Materiality of the withheld evidence, for purposes of *Brady* due process claim, must be analyzed cumulatively, with the court first examining the force and nature of the withheld evidence item by item, and then considering the cumulative effect of the suppressed evidence, gauging the collective impact by stepping back and considering the strength of the prosecution's case. U.S. Const. Amend. 14.

20. Constitutional Law ⚿4594(10)
Criminal Law ⚿2007

Defendant did not show reasonable probability of different result, as required for materiality element for *Brady* due process claim relating to State's failure to disclose, at an earlier point before trial, police reports and arrest photographs of alleged alternative perpetrators of the murders, and State's failure to disclose until after trial three additional benefits that State conferred on witness who entered into plea deal; State had strong case even without witness's testimony, jury knew about report and photographs, and jury knew that the witness was a self-interested liar. U.S. Const. Amend. 14.

21. Federal Civil Procedure ⚿851

Futility of amendment of a pleading can, by itself, justify the denial of a motion for leave to amend. Fed. R. Civ. P. 15(a)(2).

22. Federal Civil Procedure ⚿851

Amendment to a pleading is futile, justifying denial of leave to amend, if the claim sought to be added is not viable on the merits. Fed. R. Civ. P. 15(a)(2).

23. Sentencing and Punishment ⚿1788(5, 10)

When a death sentence, which is challenged under the Eighth Amendment, is based in part on an invalid aggravating circumstance, an appellate court can uphold the sentence if it either reweighs the aggravating and mitigating circumstances or reviews the sentence for harmless error. U.S. Const. Amend. 8.

24. Habeas Corpus ⚿508

State court's determination that, even assuming that state prisoner's prior murder convictions were invalid, the error was harmless, under Eighth Amendment, as to prisoner's death sentence because there were still two aggravating factors and no mitigating factors, so death sentence would have been required under state law, was not contrary to clearly established Supreme Court precedent, as would provide basis for federal habeas relief. U.S.

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Const. Amend. 8; 28 U.S.C.A. § 2254(d)(1); Ariz. Rev. Stat. Ann. § 13-703(F)(1, 5, 6) (as in effect in 1982).

25. Habeas Corpus ⚿768

In cases under the Antiterrorism and Effective Death Penalty Act (AEDPA), the federal habeas court applies a presumption that state courts know and follow the law, and gives state-court decisions the benefit of the doubt. 28 U.S.C.A. § 2254.

26. Habeas Corpus ⚿481

State prisoners are not entitled to federal habeas relief based on trial error unless they can establish that it resulted in actual prejudice, so that the federal habeas court has grave doubt about whether the trial error of federal law had a substantial and injurious effect or influence in determining the jury's verdict. 28 U.S.C.A. § 2254.

27. Constitutional Law ⚿4744(2)

The mere admission of evidence that might not otherwise have been admitted, at capital sentencing proceedings, does not demand the automatic vacatur of a death sentence, based on a due process violation. U.S. Const. Amend. 14.

28. Habeas Corpus ⚿404

A state prisoner may obtain federal habeas review of a defaulted federal claim by showing cause for the default and prejudice from a violation of federal law. 28 U.S.C.A. § 2254.

29. Habeas Corpus ⚿401

Procedural default of a state prisoner's federal habeas claims may be excused when the prisoner demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. 28 U.S.C.A. § 2254.

30. Habeas Corpus ⚿406

When a State requires a state prisoner to raise an ineffective-assistance-of-trial-counsel claim in a state collateral proceeding, the prisoner may establish cause to excuse the procedural default of a federal habeas claim alleging that the prisoner had received ineffective assistance of counsel during sentencing proceedings by demonstrating that counsel in the initial-review state collateral proceeding was ineffective or there was no counsel in such a proceeding. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

31. Habeas Corpus ⚿409

A state prisoner establishes prejudice, as element for excusing procedural default of a federal habeas claim alleging ineffective assistance of trial counsel, by demonstrating that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. U.S. Const. Amend. 6.

32. Habeas Corpus ⚿409

To find a reasonable probability that state postconviction counsel prejudiced defendant, as element of ineffective assistance of counsel, by failing to raise a claim of ineffective assistance of trial counsel, for purposes of excusing, based on ineffective assistance of state postconviction counsel, a state prisoner's procedural default of a federal habeas claim of ineffective assistance of trial counsel, the federal habeas court must also find a reasonable probability that the claim of ineffective assistance of trial counsel would have succeeded had it been raised. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254.

33. Criminal Law ⚿1960, 1961

In assessing prejudice, as element of ineffective assistance of counsel, with respect to counsel's deficient performance in investigating and presenting mitigation evidence for the penalty phase of a capital murder trial, the court must reweigh the

evidence in aggravation against the totality of available mitigating evidence, and the likelihood of a different result must be substantial, not just conceivable. U.S. Const. Amend. 6.

34. Criminal Law ⚿1960, 1961

Even assuming that counsel performed deficiently, as element of ineffective assistance of counsel, in failing to investigate and present mitigation evidence for penalty phase of capital murder trial, defendant was not prejudiced, where two aggravating factors carried significant weight at sentencing, i.e., offenses were committed as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value, and offenses were committed in especially heinous, cruel, or depraved manner, and mitigation evidence was insubstantial, e.g., defendant's difficult upbringing, his prison behavior, and neuropsychologist's speculative conclusion that defendant had some type of brain impairment. U.S. Const. Amend. 6; Ariz. Rev. Stat. Ann. § 13-703(F)(5, 6) (as in effect in 1982).

35. Habeas Corpus ⚿481

State appellate court's rejection of state prisoner's constitutional challenge to trial court's failure to make individualized determination before imposing non-visible shackles on prisoner, for capital murder trial, was not contrary to or an unreasonable application of clearly established Supreme Court precedent in 1985, as would provide basis for federal habeas relief. 28 U.S.C.A. § 2254(d)(1).

West Codenotes

Prior Version Recognized as Unconstitutional

Ariz. Rev. Stat. Ann. § 13-703(B)

Appeal from the United States District Court for the District of Arizona, Stephen M. McNamee, District Judge, Presiding, D.C. No. 2:98-CV-02164-SMM

Thomas J. Phalen (argued), Phoenix, Arizona; Jon M. Sands, Federal Public Defender; Dale A. Baich, Assistant Federal Public Defender; Office of the Federal Public Defender, Phoenix, Arizona; for Petitioner-Appellant.

Jeffrey L. Sparks (argued), Jon G. Anderson, and John Pressley Todd, Assistant Attorneys General; Kent Cattani, Chief Counsel, Capital Litigation Section/Criminal Appeals Section; Office of the Attorney General, Phoenix, Arizona; for Respondent-Appellee.

Before: JACQUELINE H. NGUYEN, MARK J. BENNETT, and RYAN D. NELSON, Circuit Judges.

OPINION

BENNETT, Circuit Judge:

In this murder-for-hire case, an Arizona jury convicted Murray Hooper on all counts, including two counts of first-degree murder. The trial court sentenced Hooper to death. On New Year's Eve 1980, while Pat Redmond, his wife Marilyn Redmond, and Marilyn's mother Helen Phelps (who was visiting) were home preparing for a festive dinner, Hooper, William Bracy, and Ed McCall forced their way into the home at gunpoint. Hooper and his coconspirators demanded jewelry, money, and guns. They herded their victims into the master bedroom and forced them to lie face down on the bed. Redmond, Marilyn, and Phelps were then bound and gagged. One or all the intruders shot each victim in the head, and one of the intruders slashed Redmond's throat. Redmond and Phelps died, but Marilyn survived.

Hooper appeals the district court's denial of his petition for a writ of habeas corpus. He raises three certified issues: (1) whether the prosecution's nondisclosure and delayed disclosures of evidence violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (2) whether the district court erred in denying him leave to amend his petition to add a claim that his death sentence violates the Eighth and Fourteenth Amendments because his sentence was based, in part, on now-invalid convictions; and (3) whether *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), excuses the procedural default of his claim that his trial counsel rendered ineffective assistance at sentencing. Hooper also raises two uncertified issues: (1) whether he was unconstitutionally shackled at trial; and (2) whether the unconstitutional shackling caused him to involuntarily waive his right to be present at voir dire because it forced him to choose between two constitutional rights.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm the district court's denial of habeas relief.

I. Facts and Procedural History

A. The Conspiracy and Murders

Robert Cruz, head of a Chicago crime organization, hired Hooper, Bracy, and McCall to kill Redmond.[1] Redmond and Ron Lukezic co-owned Graphic Dimensions, a successful Phoenix printing business. In the summer of 1980, Cruz and Arthur Ross (Lukezic's brother-in-law) offered Graphic Dimensions several lucrative printing contracts with Las Vegas hotels, but Redmond rejected the offers. Cruz was unhappy and wanted Redmond killed to get Redmond's interest in the business. His plan was to eventually take over the entire business by having Lukezic killed.

In September 1980, Cruz offered Arnold Merrill $10,000 to kill Redmond, but Merrill refused. In early December 1980, Hooper and Bracy, who lived in Chicago, flew from Chicago to Phoenix, and Cruz and Merrill picked them up at the airport. Over the next several days, Merrill drove Hooper and Bracy to various locations. On one occasion, Merrill took the men to see Cruz, and Merrill saw Cruz give a stack of $100 bills to Bracy, who gave some to Hooper. That same day Merrill drove the men to the Gun Trader, a gun store owned by Merrill's brother, Raymond Kleinfeld. Hooper picked out a large knife, paid for by Cruz, and Kleinfeld gave Bracy a package containing three guns.

At some point, Merrill, Hooper, and Bracy spotted Redmond leaving a bar and followed him as he drove away from the bar. During the chase, Hooper held his gun out of the window to shoot Redmond. Merrill sped up and turned into a parking lot to prevent Hooper from shooting Redmond. After this aborted attempt, Hooper and Bracy moved out of Merrill's home and into the apartment of Valinda Lee Harper and Nina Marie Louie, two women Merrill had introduced to Hooper and Bracy. At some point during their trip, Merrill also introduced Hooper and Bracy to McCall. Hooper and Bracy eventually returned to Chicago.

Hooper and Bracy came back to Phoenix on December 30, 1980. That day, at Cruz's direction, Merrill and George Campagnoni

1. As discussed below, identification was a critical issue in the case. Hooper and Bracy are black, and McCall is white. Hooper was thirty-five when he committed the Redmond crimes. Bracy died of natural causes in 2005, *see* Motion to Dismiss, *Bracy v. Schriro*, No. 95-cv-02339 PHX-SSM (D. Ariz. Sept. 7, 2005), ECF No. 94, and McCall is also deceased.

drove by Redmond's home and Graphic Dimensions to verify the addresses. The next morning, McCall dropped off Hooper and Bracy at Merrill's home, and Merrill gave Bracy a piece of paper with directions to Redmond's home and Graphic Dimensions. Later that morning, McCall came back for Hooper and Bracy, and the three left Merrill's home. Dean Bauer (Cruz's employee) then came to Merrill's home and dropped off two airplane tickets from Phoenix to Chicago for "Sam Johnson" and "Tony Jones."

That same day, Louie arrived at her apartment around noon. McCall, Hooper, and Bracy were already there. Bracy asked Louie "what time it got dark" and said that they had "some business to take care of." All three men were armed with guns. Louie had to work that night, and Harper borrowed McCall's car to drive Louie to work. Before Harper and Louie left the apartment around 5:45 p.m., McCall told Harper that she needed to come back quickly because "they had a very important appointment."

Later that night, Hooper, Bracy, and McCall went to Redmond's home and killed Redmond and Phelps and attempted to kill Marilyn. After the murders, they went to Merrill's home. Around midnight, Campagnoni drove Hooper and Bracy from Merrill's home to the Phoenix airport with the airline tickets for "Sam Johnson" and "Tony Jones."

The day after the murders, McCall went to Harper's and Louie's apartment and told them how the murders had been committed, including describing his role and Hooper's role in committing them. He told them that it was a "contract . . . hit, not [a] robbery" and that Hooper had cut Redmond's throat and shot Marilyn. McCall later detailed the crimes to Merrill and told him that he was expecting $10,000 from Chicago.

B. The Police Investigation

On New Year's Eve 1980, Officer Louis Martinez responded to a call that there were two or possibly three dead bodies at the address of the Redmond home. When Officer Martinez arrived, he questioned Marilyn who was conscious but "had a very detached look on her face." Marilyn told him, "Three black men came in and robbed us." She initially reported to Officer Thomas Varela, who also questioned her at the scene, that the intruders were all black. But Officer Varela asked if she was sure, and Marilyn then told him that two of the intruders were black and one was white. Later that same night at the hospital, Marilyn reported to Officer Jesus Perez that one of the intruders was white and the other two were black. She also reported that one of the black males was wearing a tan leather jacket with dark pants. Around 9 p.m., about two hours after the murders, three black men—Ronald Bradford, Michael Bradford, and Novell Ward (collectively, the "Bradfords and Ward")—were arrested on traffic, weapons, and drug charges. Ronald Bradford was very slender and had a wart on his forehead above his nose. Ward was wearing a brown vinyl or leather jacket with a fleece collar at the time of his arrest.

Around 10:05 p.m., while the Bradfords and Ward were in custody, the Maricopa County Sheriff's Office received an anonymous call that a black man named "Slim" with a wart on his nose was involved in the Redmond murders. The caller said that Slim was currently at the corner of 13th and Washington Streets. The police interviewed, photographed, and fingerprinted the Bradfords and Ward, and the police ultimately ruled them out as suspects in the Redmond crimes.

On January 1, 1981, Harper called the police and implicated Hooper, Bracy, and

McCall in the murders. During her interview, Harper said that she was with Bracy in Phoenix on New Year's Eve.

On January 4, 1981, officers executed a search warrant on McCall's home and vehicle. They found Long's Drugstore receipts inside his vehicle, showing that three pairs of surgical gloves and adhesive tape had been purchased the same day as the murders. They also found two plastic gloves in a garbage bag at McCall's home.

A fingerprint analyst lifted fingerprints from McCall's vehicle and the Redmond home. The analyst was unable to match any to Hooper, Bracy, McCall, or the Bradfords and Ward.

The State's criminalist analyzed the bullets removed from the victims and found at the crime scene and determined that they were .38 caliber bullets, and that all had been fired from the same gun. The bullets could have been fired from a Colt Trooper .357 magnum.

Fifty-three days after the murders, Marilyn flew to Chicago to view lineups of Hooper and Bracy. After viewing the first lineup, which included Bracy, Marilyn reserved judgment. After viewing the second lineup with Hooper, Marilyn positively identified Hooper. Marilyn then asked to see the first lineup again, and she identified Bracy.

C. The Trial

Hooper and Bracy were tried together. Each was charged with conspiracy to commit first-degree murder (Count One), two counts of first-degree murder (Counts Two and Three), one count of attempted first-degree murder (Count Four), three counts of kidnapping (Counts Five to Seven), three counts of armed robbery (Counts Eight to Ten), and one count of first-degree burglary (Count Eleven). Their trial started on October 20, 1982. The jury convicted Hooper and Bracy on all counts on December 24, 1982.

1. Hooper's Defense Theory

Hooper's and Bracy's primary defense theory was that they were in Chicago at the time of the murders. They also argued that the prosecution's investigation was improper, mainly because of the improper conduct of the State's investigator, Daniel Ryan. They further argued that the police had wrongly eliminated the Bradfords and Ward as suspects.

Hooper did not testify, but his counsel laid out Hooper's defense in his opening statement. Hooper and Bracy had come to Arizona in early December 1980, but not to kill Redmond. Cruz and Merrill wanted to take over the South Phoenix drug business, and they brought Hooper and Bracy to Arizona to persuade them to kill the top drug dealers in South Phoenix. Hooper and Bracy refused the job. In an attempt to change their minds, Merrill introduced them to women (Harper and Louie) and took them to the Gun Trader, on Cruz's tab. Cruz also gave them money. But Hooper and Bracy still refused the job and left Arizona.

Cruz, Merrill, Campagnoni, McCall, Harper, and Louie then become "paranoid" that Hooper and Bracy would turn on them by informing the South Phoenix drug dealers about their takeover plans. This motivated the group to frame Hooper and Bracy for the Redmond murders. The group then had McCall pay two unnamed black men to go with him to Redmond's home while McCall committed the murders, and one day later Harper falsely reported to the police that McCall, Hooper, and Bracy had committed the murders.

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2. The State's Evidence

The prosecution presented overwhelming evidence of Hooper's guilt. The most important witness was Marilyn, as she was the only one who saw the intruders in her home. Marilyn identified Hooper, Bracy, and McCall as the murderers. Her in-court identifications were certain, and she did not waiver when the defense suggested she could be mistaken. The jury also learned that Marilyn had picked Hooper and Bracy out of lineups before trial.

Marilyn provided very specific details about her lengthy encounter with the murderers. Marilyn explained that they gave her directions and asked her several questions. She looked at their faces each time they spoke to her. At one point during the encounter, she was positioned "[e]lbow to elbow" with Hooper and she looked at him. She described the clothing that each murderer wore. Bracy was wearing a tan leather jacket, dark slacks, and a dark shirt. Hooper was wearing a darker brown sports or leather coat and dark slacks. McCall was wearing a light tan suit.

Marilyn testified that the men forced their way into the home at gunpoint. Bracy directed her to hold the family dog and close the drapes, and she complied. The intruders demanded jewelry and money and asked if there was a safe or any guns in the home. She gave Bracy the jewelry she was wearing, told them there was a gun in the nightstand, and showed Hooper the guns in the hall closet. Redmond gave them his watch and ring, and one of the intruders grabbed Phelps's wedding ring as she tried to hide it under a pillow. All three victims were eventually told to lie on the bed, and Hooper taped their hands behind their backs. Hooper then gagged all three using socks. Marilyn heard McCall say, "[W]e don't need these two anymore," and then she heard two shots. That was the last thing she remembered before waking up.

The defense tried to discredit Marilyn by pointing out inconsistencies between her testimony and prior statements. For example, Marilyn initially reported to some witnesses that the intruders were all black and that two wore masks. Marilyn testified that she did not recall making the prior statements or that they were wrong or had been misinterpreted. The defense also tried to cast doubt on Marilyn's lineup identifications by, among other things, suggesting that the State's investigator, Ryan, had shown her pictures of Hooper and Bracy before the lineups. Marilyn testified that did not happen.

The defense presented an expert on human perception and memory who testified that people make more mistakes when they try to identify a person of a different race and that violent events are more poorly stored in people's memories. On cross-examination, however, the expert conceded that she could not opine on whether Marilyn experienced any cross-racial identification problems. And the prosecutor elicited testimony showing that Marilyn was skilled at recognizing faces. She testified that she had worked as a sales receptionist for seven years and was like a "visual Rolodex" for the company.

Louie was also an important witness. She testified that she met Hooper and Bracy in early December 1980 in Phoenix. She overheard Bracy say that "he had a big job to do" for $50,000 and "it wasn't going to be very pretty." Bracy told her that he and Hooper would return to Phoenix on New Year's Eve.

On New Year's Eve, Louie saw Hooper, Bracy, and McCall at her apartment. McCall was wearing a suit, Bracy and Hooper were wearing slacks and dark shirts, and one of them had a brown leather jacket. She testified that all three were

armed with guns, and Hooper had a large gun "similar to a .357 magnum or a large-barrel .38." Bracy asked her what time it got dark and said that they had "some business to take care of." McCall let Harper use his car to drive Louie to work that night. McCall told Harper that she needed to come back quickly because "they had a very important appointment."

The next day, McCall came to Louie's apartment and discussed the Redmond crimes. While watching the news, McCall corrected the newscaster by stating that Marilyn was not shot in the face but in the back of the head, like the other two; the victims were not tied up, but were taped; and only Redmond's throat had been slashed. He said that Hooper was the one who had shot Marilyn and cut Redmond's throat. McCall stated that it was a "professional job" and a "contract . . . hit, not [a] robbery," and that they wore gloves.

The State presented evidence corroborating parts of McCall's statements to Louie. It offered the two Long's Drugstore receipts found in McCall's vehicle, showing that three pairs of gloves and tape had been purchased on the day of the murders. A Long's Drugstore employee testified that two men, one black and one white, bought three pairs of gloves and adhesive tape on the day of the murders. Redmond's neighbors reported that a vehicle matching the description of McCall's car had been near the Redmond home around the time of the murders.

Other evidence also corroborated Louie's testimony. An officer testified that Harper had called the police the day after the murders and implicated Hooper, Bracy, and McCall in the Redmond murders. The jury also learned that in a later police interview, Harper said that she was with Bracy in Phoenix on New Year's Eve.[2]

Campagnoni testified that he saw Hooper and Bracy at Merrill's home on New Year's Eve. He saw Merrill give Bracy a piece of paper with directions to the Redmond home and Graphic Dimensions. Campagnoni testified that after Hooper and Bracy left, Bauer came to Merrill's home and dropped off airline tickets with the names "Sam Johnson" and "Tony Jones."

Campagnoni next saw Hooper, Bracy, and McCall later that evening when they returned to Merrill's home. The three had jewelry, some of which looked very similar to a ring and watch owned by Redmond. Campagnoni drove Hooper and Bracy to the airport that night around midnight. Bracy had the airline tickets that Bauer had dropped off earlier, and Bracy told Hooper that he would be "Tony Jones" and Hooper would be "Sam Johnson."

Merrill also testified. He described the origin of and motive for the plan to kill Redmond, including that he had refused Cruz's offer to kill Redmond for $10,000. Merrill provided many details about Hooper's and Bracy's first trip to Arizona in early December 1980. He said that he and Cruz picked up Hooper and Bracy from the Phoenix airport. During early December: he saw Cruz give Bracy a stack of money, which Bracy shared with Hooper; he took the men to the Gun Trader where they picked up three guns and Hooper picked out a knife, which was paid for by Cruz and looked like the same knife found at the crime scene; Merrill, Hooper, and Bracy followed Redmond from a bar called Chester's Lounge, Hooper pointed his gun out the car window to shoot Redmond, but Merrill stopped Hooper from firing by turning into a parking lot; and after the chase, Hooper and Bracy moved from

2. Harper did not testify because she could not be found.

Merrill's home into Harper's and Louie's apartment.

Merrill testified that, on December 30, 1980, Cruz instructed him to tell McCall to pick up Bracy and Hooper from the Phoenix airport and to pick up a package from the Gun Trader. That same day, at Cruz's direction, Merrill and Campagnoni verified the addresses for the Redmond home and Graphic Dimensions. The next morning, McCall dropped off Hooper and Bracy at Merrill's home. McCall came back later that morning and left with Hooper and Bracy. Bauer came to Merrill's home in the afternoon and dropped off two American Airlines tickets from Phoenix to Chicago.

Merrill testified that Hooper, Bracy, and McCall came to his home around 8:30 p.m. on New Year's Eve. They had with them several items that might have come from the Redmond home, including a watch, ring, and gun holster. Several days later, McCall told Merrill that he, Hooper, and Bracy had committed the Redmond crimes. McCall told Merrill that he was expecting a payment of $10,000 from Chicago for the murders.

Merrill was severely impeached. Most significantly, the jury learned that he had received a deal from the State giving him immunity for the Redmond crimes, including the first-degree murders of Redmond and Phelps for which he could have received the death penalty, as well as immunity for unrelated crimes.[3] Thus, the jury knew Merrill had a very strong personal stake in the case and motive to lie. The defense also showed that Merrill had received special treatment from the State and Ryan: Merrill was placed in a more inmate-friendly, out-of-state prison as part of his deal; Ryan did not immediately arrest him in New York even though he was wanted for first-degree murder; Ryan allowed him to travel unrestrained from New York to Arizona despite being a wanted murderer; and Ryan took Merrill out of jail for a conjugal visit.

The defense also cast significant doubt on Merrill's credibility by showing that Ryan had stopped his tape-recorded interview with Merrill more than twenty times. Neither Merrill nor Ryan could provide any plausible explanations for the interruptions, and the defense persuasively argued that Ryan must have paused the tapes to coach Merrill on what to say. The defense gave the jury many other reasons to discredit Merrill's testimony: he had previously lied to the police in this case and had initially helped cover up the crimes; he was part of a group that committed burglaries and robberies, and he had sold stolen property; he had hired someone to commit arson for Cruz; he was a drug dealer and had a long history of abusing prescription medications; and Merrill's friend, Campagnoni, testified that Merrill was a braggart, and even Merrill's own brother, Kleinfeld, testified that he was a "story teller, liar, [and] bragger."

The defense further impeached Merrill by highlighting many inconsistencies between his testimony and his prior statements. For example: Merrill testified that he did not get together with Campagnoni to make up a story, but Merrill had previously stated that he told Campagnoni to deny to the police that any black individuals had been at his home; Merrill testified that the bullets he threw away in a canal could not have been the same type that killed Redmond, but he previously testified that they could have been; and he testified

3. As part of his plea deal, Merrill pleaded guilty to an unrelated burglary and theft and received an eight-year sentence.

that he was not the leader of a criminal group, which contradicted his prior testimony. Parts of Merrill's testimony also contradicted other evidence, giving the jury even more reasons to disbelieve him. For example, Kleinfeld testified that Merrill picked out the knife at the Gun Trader, not Hooper, and Campagnoni testified that Merrill gave Bracy .38 caliber ammunition on New Year's Eve, but Merrill denied giving any bullets to Hooper, Bracy, or McCall.

The State's case included evidence beyond the testimonies of Marilyn, Louie, Campagnoni, and Merrill. Several other witnesses testified about the motive for the killings. Graphic Dimensions employees testified that they had seen Cruz touring Graphic Dimensions around mid-1980. William Michael Tompkins, a pilot whom Cruz had hired on occasion, testified that during the summer of 1980 he overheard Cruz say that he wanted to take over a printing business to launder money and that he was "going to have to get rid of" the uncooperative business partner.

Tompkins also testified that, around December 28, 1980, Cruz had asked him to rent a private plane because the same two black men who had been in Phoenix in early December were coming back to Phoenix and did not want to fly commercial. Cruz, however, called Tompkins the next night and told him to cancel the plane because the men had decided to fly commercial. Bauer testified that on December 31, 1980, at Cruz's direction, he purchased two one-way tickets from Phoenix to Chicago on the red-eye flight that left at 2:00 a.m. Bauer testified that he delivered the tickets to Merrill's home at Cruz's direction. The State's evidence included the two one-way tickets, and an airline representative testified that the tickets had been used. This corroborated that Hooper and Bracy were in Phoenix on New Year's Eve.

Telephone records further supported that Hooper and Bracy were then in Phoenix, not Chicago. The records showed that, on December 31, 1980, two phone calls were made from Merrill's home in Phoenix to Ann Harris's home in Chicago (Harris was the mother of Hooper's then-girlfriend). Other records showed that Bracy made calls from his home in Chicago to Cruz's home in Illinois and the Gun Trader in the days before the murders. No calls were made from Bracy's home to Cruz's Illinois home on the day of the murders, but the calls from Bracy's home to Cruz's Illinois home resumed immediately after. The State argued that these telephone records showed that Bracy and Hooper were in Phoenix on the day of the murders.

The jury learned about evidence from which it could infer that Hooper possessed both the murder weapon and the knife that was used to slash Redmond's throat. The bullets removed from the victims had been fired from the same weapon, which could have been a Colt Trooper .357 magnum. Kleinfeld testified that he sold three guns to Cruz in December 1980, including a .357 Colt Trooper and .22 Ruger, and that McCall had picked up those two guns at the Gun Trader around December 30, 1980, the day before the murders. Louie testified that on the day of the murders, Hooper was with McCall and had a gun similar to a .357 magnum. Kleinfeld also testified that around early December 1980, Merrill, Hooper, and Bracy had come to the Gun Trader and left with a knife that was the same or very similar to the knife found at the crime scene, which had been used to cut Redmond's throat.

3. Evidence Relating to the Bradfords and Ward

During the defense's cross-examination of Detective Ronald Quaife, the jury

learned that three black men, the Bradfords and Ward, had been arrested on the night of the murders for traffic, weapon, and drug charges. Detective Quaife described Ronald Bradford as slender and having a wart above his nose. He stated that Ward had been wearing a brown leather or vinyl jacket at the time of his arrest. He also testified about the anonymous call made to the Sheriff's Office around 10:05 p.m. while the Bradfords and Ward were in custody. Detective Quaife said the caller reported that a black male matching the description of Ronald Bradford had committed the Redmond crimes. He explained that the Bradfords and Ward were ruled out as suspects based on the temporal proximity between the murders and their arrests.

During redirect of Detective Quaife, the prosecutor asked about photos that had been taken of Ronald Bradford. From this questioning, the defense realized that the prosecution had withheld arrest photos of the Bradfords and Ward. They then moved for a mistrial. The court denied the mistrial motion but granted the defense's motion to exclude Detective Quaife's testimony about the photos as improper redirect exceeding the scope of cross-examination. The court then instructed the jury to disregard any reference to the photos.

The next day, the defense learned through Officer Michael Midkiff's testimony that the prosecution may have failed to disclose all the police reports on the Bradfords and Ward. Hooper moved for a mistrial based on this purported failure, and the court conducted a brief hearing. Later that day, the court resumed the hearing on the mistrial motion based on the alleged undisclosed reports. During the hearing, Bracy's counsel informed the court that he would be moving for some of the photos of the Bradfords and Ward to be admitted. Presumably, the photos had been provided to the defense by this time. The photos included color photographs taken from different angles and showed what they were wearing when arrested. The court ultimately denied the mistrial motion. But as a remedy, it ordered that the two detectives who had interviewed the Bradfords and Ward be available to the defense for interviews.[4]

About five days later, while the State was still presenting its case, the prosecution provided the undisclosed reports on the Bradfords and Ward to the defense.[5] The defense was provided the undisclosed photos of and reports on the Bradfords and Ward at least three weeks before Hooper presented his defense.

The State used the photos during Marilyn's direct examination. Though the photos had not yet been admitted, the prosecutor showed Marilyn the photos of the Bradfords and Ward, and she testified that she did not see these men on New Year's Eve.

The photos were later admitted through Hooper's first witness, Detective Quaife. During cross-examination, the prosecutor successfully, and without objection, admitted the photos. On redirect, the court granted Hooper's request that the photos be published to the jury.

Hooper also used the undisclosed reports in questioning Detective Quaife. During Hooper's direct examination, the jury

4. We are unable to discern from the record whether the defense interviewed these two detectives.

5. Before trial, the prosecution had disclosed police reports that mentioned some of the circumstances of the arrests of the Bradfords and Ward as well as the anonymous call. The undisclosed reports revealed more detail about the circumstances of the arrests.

learned that Detective Quaife had been asked by the prosecution during the trial to look for arrest records on the Bradfords and Ward and that Detective Quaife had found them. Detective Quaife testified that, based on these records, he learned that the Bradfords and Ward had been arrested at 9 p.m. at a location about twenty minutes from the Redmond home. The defense drew out other details based on the reports, which called into doubt the reasons the police had discounted the Bradfords and Ward as suspects for the Redmond crimes.

The jury also learned more details about the anonymous call through the prosecutor's cross-examination of Detective Quaife. The caller said that he had seen the newscast of the homicides and that one of the persons involved was at 13th Street and Washington. The caller said that the person involved was a black male named "Slim" and that Slim had a wart on the side of his nose.

4. Defense Evidence

The defense put on evidence showing that the State's investigator, Ryan, used improper investigatory tactics and engaged in other improper conduct. For example, Kleinfeld testified that Ryan had threatened to break his legs if he did not tell him what he wanted to know. Wally Roberts, who worked with Graphic Dimensions, testified that Ryan had given him cash and told him not to cooperate with the defense and to lie to the police. The jury also learned that Ryan had provided false answers to Campagnoni's presentence report writer to help Campagnoni obtain a lighter sentence.

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

5. Closing Arguments and Verdict

The prosecutor's closing argument reviewed all the evidence. The prosecutor discussed the evidence supporting the motive for Redmond's murder, including the various witnesses who knew about the potential Las Vegas business and Tompkins's testimony that Cruz said one of the business partners had to be eliminated. He highlighted Marilyn's testimony about the details of the crimes, her pretrial identifications, and her confident in-court identifications of Hooper and Bracy as the killers. The prosecutor also discussed the testimonies of Merrill, Kleinfeld, Tompkins, Bauer, Campagnoni, Louie, and the Long's Drugstore employee. He reminded the jury about the gloves and receipts found in McCall's home and vehicle, the plane tickets bought by Bauer, and the telephone records.

Hooper's counsel maintained during closing that Hooper was in Chicago at the time of the murders. He argued that the testimonies of Merrill, Campagnoni, Louie, and Marilyn were unreliable. He pointed out that Merrill had to stick to his story, which was a lie, because "[i]f he change[d] it now, he [could] be tried for first degree murder and sent to death row." Hooper's counsel also emphasized the information in the undisclosed reports, arguing that the officers' reasons for discounting the Bradfords and Ward as suspects were not believable and that there was more evidence connecting them to the Redmond crimes than there was against Hooper.

Hooper's counsel did not focus on the photos. The prosecution, however, specifically asked the jury to compare the photos

to Marilyn's descriptions of the intruders. Bracy's counsel did not mention the Bradfords or Ward in his closing statement.

The jury deliberated for three days and found both defendants guilty as charged on all eleven counts, including the two first-degree murder counts.

D. Sentencing

Hooper's prior convictions were relevant for sentencing purposes, and on January 6, 1983, the court held a hearing as to those convictions. Hooper's trial counsel, Grant Woods, was not present, and Allen Gerhardt, another public defender, appeared instead. The State presented evidence that Hooper had been convicted on September 23, 1981, in Illinois, on three counts of first-degree murder, three counts of armed robbery, and three counts of aggravated kidnapping, and the court so found later during Hooper's sentencing.

Before the hearing on aggravating and mitigating circumstances under Arizona's death statute, A.R.S. § 13-703 (1982),[6] the prosecutor notified Hooper's counsel that the State intended to call one Phoenix officer and two Chicago officers to testify at the aggravation and mitigation hearing. The prosecutor stated that the officers would testify about these statements made by Hooper: "They (the people in Phoenix) thought Bracy was high-class, and me a low-class dog. But those people in Phoenix weren't that sharp, they gave me $10,000 for killing Redmond and his family and I would have done it for a couple hundred dollars a person"; "I can't handle myself out of the pen, can't even get a driver's license, most of the time I'm just drunk. I'm better off dead or in the pen because if I got out again I would probably just kill someone again"; and "I like to shoot people, it doesn't bother me a bit."[7]

On February 4, 1983, the court conducted the aggravation and mitigation hearing. Gerhardt also represented Hooper at this hearing. The parties received copies of Hooper's presentence report ("PSR") on the day of the hearing, and before the start of the hearing, the court granted a recess to allow counsel to review the PSR. The PSR showed that Hooper, born in 1945, had a long adult criminal history, starting when he was eighteen. Hooper started out with a disorderly conduct conviction in 1963 and then progressed to robbery and armed robbery convictions. In 1969, he was charged with murder but pleaded guilty to manslaughter. In 1977, he was convicted of attempted murder. As noted, Hooper was convicted in Illinois in 1981 of three counts of first-degree murder, three counts of armed robbery, and three counts of aggravated kidnapping, for crimes committed in November 1980.

The prosecutor asked the court to find the existence of aggravators based on the evidence in the record and Hooper's 1981 Illinois convictions. The prosecutor did not bring up the details of Hooper's other criminal convictions or his admissions, but the court was aware of this information because it was in the PSR and in the supplemental PSR. Hooper's counsel presented no evidence.

Woods and Gerhardt appeared at Hooper's sentencing on February 11, 1983. Woods pleaded for mercy, urging the judge that he should not "order a murder"

6. All citations to A.R.S. § 13-703 refer to the version in effect in 1982.

7. As far as we can tell from the record, the State did not present these admissions at trial because it agreed not to use them after Hooper moved for their suppression. These admissions were disclosed to the trial judge in a supplemental presentence report after the aggravation and mitigation hearing but before sentencing.

APPENDIX A

and that a death sentence was unnecessary because Hooper had already been sentenced to death by an Illinois state court.

The court sentenced Hooper to life imprisonment on Count One, and multiple consecutive sentences of thirty-five years for Counts Four through Eleven. As to Counts Two and Three for the first-degree murders of Redmond and Phelps, the court determined that the State had established five of the seven statutory aggravating factors under Arizona's death statute:

(1) Hooper had a prior conviction for which a life sentence or death was imposable under Arizona law. *See* A.R.S. § 13-703(F)(1). The court found that Hooper's three first-degree murder 1981 convictions in Illinois satisfied this factor.

(2) Hooper had a prior felony conviction involving the use or threat of violence on another person. *See* A.R.S. § 13-703(F)(2). The court found that Hooper's three armed robbery and three aggravated kidnapping 1981 convictions in Illinois satisfied this factor.

(3) Hooper knowingly created a grave risk of death to people other than the victims in the instant offense. *See* A.R.S. § 13-703(F)(3). The court found this factor established by the fact that Marilyn had been placed in a position of grave risk of death given the manner in which the crimes had been committed.

(4) Hooper committed the offense in expectation of receiving something of pecuniary value. *See* A.R.S. § 13-703(F)(5). The court found this factor established by the fact that Hooper and his coconspirators were to receive money, or did receive money, for the contract killing of Redmond.

(5) Hooper committed the offenses in an especially heinous, cruel, or depraved manner. *See* A.R.S. § 13-703(F)(6). The court found this factor established given the manner in which the crimes had been committed. Redmond was "shot twice in the head at close range after having been bound and gagged," and, after the shots were fired, his "throat was cut from ear to ear with a large butcher-type knife." Phelps was "bound, gagged, [laid] across the bed and shot at close range with a high caliber pistol," and she "did not die from the first wound and was shot a second time."

The court noted that Hooper presented no mitigating evidence and determined that Hooper had failed to establish the existence of any of the statutory mitigating factors. The court concluded, "Based upon the findings of those five aggravating circumstances, and the fact that there are no mitigating circumstances sufficiently substantial to call for leniency; as to Counts II and III, it is ordered that [Hooper is] sentenced to die . . . ."[8]

E. Procedural History

1. Direct Appeal

On June 10, 1985, the Arizona Supreme Court affirmed Hooper's convictions and sentence. *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985) (en banc). We discuss

8. At the time of Hooper's sentencing, Arizona law required the trial judge (rather than a jury) to determine the existence of aggravating circumstances. *See* A.R.S. § 13-703(B). The Supreme Court later held that this process is unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). But *Ring* does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

the relevant portions of the decision—those concerning the alleged *Brady* violations and Hooper's death sentence.

The Arizona Supreme Court analyzed five alleged *Brady* violations. *Id.* at 494 (explaining that Hooper's constitutional arguments were addressed in the companion decision in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985) (en banc), decided the same day). Three of those alleged violations are at issue: (1) the delayed disclosure of the photos of the Bradfords and Ward; (2) the delayed disclosure of the police reports on the Bradfords and Ward; and (3) undisclosed benefits that the State and Ryan provided to Merrill and his wife. *Bracy*, 703 P.2d at 471.

As for the photos, the Arizona Supreme Court found that defense counsel objected to their admission, and the trial court excluded them and instructed the jury to disregard them. *Id.* at 472. Given those facts, the Arizona Supreme Court concluded that "either [the] photographs were not exculpatory or defense counsel did not want them in evidence for some other reason" and "defendant did not suffer prejudice from the nondisclosure of this evidence." *Id.*

The Arizona Supreme Court found that the police reports were disclosed "during trial and defendant made use of [them]." *Id.* Given this, the court determined that there was no *Brady* violation as to the police reports. *Id.*

The defense had been informed prior to trial of certain benefits the State and Ryan provided to Merrill. Other such benefits came to light only after trial. *Id.* at 471. These undisclosed benefits were:

> 1) Prior to trial, Dan Ryan, county attorney investigator, made car payments for Arnold Merrill's wife, Cathy Merrill, totaling over $800.00 for which Ryan received only partial reimbursement;
>
> 2) Mrs. Merrill also received approximately $3,000 from the Maricopa County Attorney's Protected Witness Program; [and]
>
> 3) Arnold Merrill made approximately twenty-two long distance phone calls from the county attorney's office, some of which were with Dan Ryan's knowledge, others of which Merrill made while left unattended in Ryan's custody, and none of which he paid for.

Id. For convenience, we refer to these benefits discovered after trial as the "Merrill benefits."

Applying *Brady*, the Arizona Supreme Court determined that the Merrill benefits were favorable to Hooper and had been suppressed. *Id.* at 472. In analyzing *Brady* "materiality," the court determined that the Merrill benefits had been specifically requested by the defense. *Id.* Thus, under *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the evidence fell within the category of undisclosed evidence that had been specifically requested by the defense, and materiality turned on "whether the suppressed evidence might have affected the outcome of the trial." *Bracy*, 703 P.2d at 472 (citing *Agurs*, 427 U.S. 97, 96 S.Ct. 2392).

Applying that standard, the Arizona Supreme Court found that the Merrill benefits were not material for two reasons. First, the evidence was "merely cumulative" of the "wealth of impeaching evidence against Arnold Merrill." *Id.* at 473. "Such evidence included Merrill's plea bargain with the state; his extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police officers; and his private out-of-jail visit with his wife while being incarcerated for first degree murder." *Id.* Given this "wealth of impeaching evidence," the Arizona Supreme Court reasoned that it did "not believe the disclosure of benefits

equaling several thousand dollars would have had any effect upon the outcome of the trial." *Id.*

Second, the court considered the Merrill benefits in light of the other evidence produced at trial and determined that the evidence would not have affected the outcome. *Id.* The court noted that Marilyn gave "strong eyewitness testimony" and that the Merrill benefits, which could have been used to impeach Merrill and Ryan, "had no effect upon [Marilyn's] key testimony." *Id.* Additionally, Merrill's testimony was "not pivotal," as several other witnesses "showed defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond." *Id.*

The Arizona Supreme Court found no *Brady* violation: "[W]e do not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond and the other evidence. Nor would it have had any effect on whatever opinion the jury had of Merrill's credibility." *Id.*

Regarding Hooper's death sentence, the court independently reviewed the record and vacated one aggravating circumstance found by the sentencing court—that Hooper created a grave risk of death to Marilyn under A.R.S. § 13-703(F)(3)—and upheld the remaining four aggravating circumstances. *Hooper*, 703 P.2d at 494–95; *see also Bracy*, 703 P.2d at 481. The Arizona Supreme Court then determined that there were no mitigating circumstances and concluded that Hooper's death sentence was proper. *Hooper*, 703 P.2d at 495.

2. State Habeas Petitions

From 1986 through 2017, Hooper filed five state post-conviction petitions. The Arizona Supreme Court summarily denied the first four petitions and, as of the time Hooper filed his replacement opening brief in our court, the fifth remained pending. We discuss his state petitions relevant to this appeal.

Philip Seplow was appointed to represent Hooper in his first state petition, filed in 1986. Seplow also represented Hooper in his second state petition, filed in 1992. In this second proceeding, Seplow alleged that *he* had been ineffective for failing to raise an ineffective assistance of counsel claim in Hooper's first post-conviction proceeding based on trial counsel's (Woods) failure to present mitigation evidence at sentencing. The post-conviction court denied the second petition and determined that Hooper's ineffective assistance of sentencing counsel claim was procedurally barred. The Arizona Supreme Court summarily denied Hooper's petition for review.

In his fourth petition, filed in 1999, Hooper argued that his death sentence was unconstitutional because it was based in part on his 1981 Illinois convictions, which were likely invalid. On October 19, 2005, the post-conviction court rejected this argument because, at the time, the Illinois convictions remained valid. Alternatively, the post-conviction court found that, even assuming the Illinois convictions were invalid, Arizona law required a death sentence because there were still two valid aggravating circumstances and no mitigating circumstances.

Hooper petitioned the Arizona Supreme Court for review, arguing that a death sentence based on invalid convictions violates the Eighth Amendment. Though Hooper's petition mentioned the Fourteenth Amendment, he did not raise a due process argument based on his Illinois convictions. And when Hooper supplemented his petition by providing the Arizona Supreme Court with a citation to *Brown v.*

Sanders, 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006), he still did not allege a due process violation. On April 20, 2006, the Arizona Supreme Court summarily denied his petition.

3. Federal Habeas Petition

In 1998, Hooper filed the federal habeas petition that led to this appeal. His supplemental petition included a claim that his death sentence violated the Eighth and Fourteenth Amendments because it was based on the likely invalid Illinois convictions. The district court found that this claim was unexhausted, ordered Hooper to withdraw it, and entered a stay pending exhaustion of the claim. After waiting more than five years, the district court vacated the stay but determined that Hooper could move for leave to amend his habeas petition once he exhausted his claim in state court.

In 2006, having purportedly exhausted that claim, Hooper sought leave to amend his petition to add it. The district court denied Hooper's motion to amend, finding that the claim was meritless and thus amendment would be futile. The district court also denied Hooper's claim that his trial counsel had provided ineffective assistance at sentencing by failing to investigate and present mitigation evidence. The district court determined that the claim was procedurally defaulted because Hooper had failed to present it in his first state post-conviction petition.

The district court ultimately denied Hooper's petition in 2008. In its order denying the petition, the district court analyzed thirteen alleged *Brady* violations, including, as relevant here, the delayed disclosures of the photos and police reports and the nondisclosure of the Merrill benefits. In analyzing the Arizona Supreme Court's decision on the *Brady* claims, the district court determined the clearly established law for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was *Brady*, *Agurs*, and *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Applying that clearly established law, the district court found that the Arizona Supreme Court's denial of the *Brady* claims based on the photos was not objectively unreasonable because the photos were not admitted at trial. It also found that the Arizona Supreme Court's decision regarding the police reports was not objectively unreasonable because Hooper used the reports during trial. The district court determined that the Arizona Supreme Court's decision that the Merrill benefits were immaterial was not contrary to or an unreasonable application of Supreme Court precedent. The district court granted a certificate of appealability on the *Brady* claims, and Hooper timely appealed.

In 2012, Hooper moved to stay the appeal and remand the case pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). He also requested a remand for the district court to reconsider its denial of leave to amend. A motions panel of this court granted both requests. In part, the panel believed remand appropriate because, while his case was pending on appeal, the United States District Court for the Northern District of Illinois had granted habeas relief to Hooper and vacated his 1981 Illinois convictions.[9]

9. In 2013, the Seventh Circuit vacated the Illinois district court's denial of Hooper's habeas petition. *Hooper v. Ryan*, 729 F.3d 782, 787 (7th Cir. 2013). The court determined that the Illinois Supreme Court had unreasonably applied *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). 729 F.3d at 787. The court remanded the case to

On remand, the district court again denied relief on the two remanded issues. It denied the ineffective assistance of sentencing counsel claim as procedurally barred, as Hooper failed to demonstrate "cause" under *Martinez* to excuse the procedural default. The court again denied Hooper's request to amend the petition to include the Eighth and Fourteenth Amendment claim because it was meritless and therefore any amendment would be futile. Finally, the district court granted Hooper's request to expand the record with the materials attached to his supplemental briefs submitted on remand, denied his requests for discovery and an evidentiary hearing, and granted a certificate of appealability on both remanded issues.

Hooper filed a timely amended notice of appeal.

II. STANDARD OF REVIEW

[1] We review the district court's denial of a habeas petition de novo. *Reis-Campos v. Biter*, 832 F.3d 968, 973 (9th Cir. 2016). This case is governed by AEDPA. *See Lambert v. Blodgett*, 393 F.3d 943, 965 (9th Cir. 2004). Thus, we may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

[2–4] A state-court decision is contrary to Supreme Court precedent if "the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law" or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). "A decision involves an 'unreasonable application' of clearly established federal law under § 2254(d)(1) if it 'identifies the correct governing legal principle ... but unreasonably applies that principle to the facts of the prisoner's case.'" *Vega v. Ryan*, 757 F.3d 960, 965 (9th Cir. 2014) (per curiam) (alteration in original) (quoting *Williams*, 529 U.S. at 413, 120 S.Ct. 1495). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citation omitted).

[5, 6] "[C]learly established Federal law" under AEDPA includes only the Court's decisions as of the time of the relevant state-court adjudication on the merits. *See Greene v. Fisher*, 565 U.S. 34, 38, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011). "If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised

the district court for an evidentiary hearing and an independent *Batson* determination as to what had occurred at the trial, thirty-two years before. *Id.*

On remand, the prosecution declined an evidentiary hearing, and so the district court granted the writ and vacated the Illinois convictions and life sentences (the Governor of Illinois had commuted all Illinois death sentences, including Hooper's). Final Judgment, *Hooper v. Ryan*, No. 10-CV-01809 (N.D. Ill. Dec. 16, 2013), ECF. No. 81; *see also People ex rel. Madigan v. Snyder*, 208 Ill.2d 457, 281 Ill.Dec. 581, 804 N.E.2d 546, 550, 560 (2004) (denying writ of mandamus challenging then-Governor's grant of blanket clemency to over 160 inmates who had been sentenced to death). Illinois has not retried Hooper.

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in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004). Moreover, "[w]hen a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court's decision unless its error lies 'beyond any possibility for fair-minded disagreement.' " *Shinn v. Kayer*, 592 U.S. ——, 141 S.Ct. 517, 520, 208 L.Ed.2d 353 (2020) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

[7] Under § 2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010).

[8, 9] When a district court denies leave to amend based on a determination that the proposed claim would be futile, we review the determination of futility de novo. *Murray v. Schriro*, 745 F.3d 984, 1015 (9th Cir. 2014). We also review de novo a district court's procedural default determinations. *Runningeagle v. Ryan*, 825 F.3d 970, 978 (9th Cir. 2016).

III. DISCUSSION

We first address the three certified issues: (1) whether nondisclosure of the Merrill benefits and delayed disclosures of the photos and reports violated Hooper's due process rights under *Brady* [10]; (2) whether the district court erred in denying him leave to amend his petition to add a claim that his death sentence violates the Eighth and Fourteenth Amendments because his sentence was based in part on invalid Illinois convictions; and (3) whether *Martinez* excuses the procedural default of his ineffective assistance of sentencing counsel claim. We then address the two uncertified issues: (1) whether Hooper was unconstitutionally shackled at trial; and (2) whether the unconstitutional shackling caused him to involuntarily waive his right to be present at voir dire because it forced him to choose between two constitutional rights. We construe Hooper's briefing on these uncertified issues as a request to expand the certificate of appealability (COA). *See* Ninth Circuit Rule 22-1(e).

A. *Brady* Claims

[10] The last state-court adjudication on the merits of Hooper's *Brady* claims is the Arizona Supreme Court's decision on direct appeal. *See Hooper*, 703 P.2d at 494; *see also Bracy*, 703 P.2d at 471–74. The decision was issued on June 10, 1985, and thus clearly established law includes only the Supreme Court decisions issued by that date. *See Greene*, 565 U.S. at 38, 132 S.Ct. 38. Because *Bagley*, 473 U.S. 667, 105 S.Ct. 3375, was issued on July 2, 1985, it was not clearly established.[11] Thus, the district court erred in relying on *Bagley*.[12]

10. Although Hooper alleged thirteen *Brady* violations in the district court, he discusses only the photos, police reports, and Merrill benefits in his briefs. And he fails to present any argument that any alleged nondisclosures, other than those three, were material under *Brady*. The State argues in its answering brief that Hooper abandoned all of his *Brady* claims other than the three he discusses in his opening brief, and Hooper does not dispute this argument in his reply brief. Accordingly, Hooper has preserved only the *Brady* claims as to the photos, police reports, and Merrill benefits. *See Petrocelli v. Angelone*, 248 F.3d 877, 880 n.1 (9th Cir. 2001) (holding that a petitioner in a capital case abandoned several claims for lack of argument supporting the claims).

11. The State appears to concede that *Bagley* was clearly established. We reject this concession because parties cannot waive § 2254(d)'s

[11] The clearly established law at the time of the Arizona Supreme Court's decision was *Brady*, 373 U.S. 83, 83 S.Ct. 1194 (1963), and *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976). *Brady* established the three elements of a due process violation based on the suppression of evidence: (1) the evidence is favorable to the accused, (2) the prosecution suppressed the evidence, and (3) the evidence is "material." 373 U.S. at 87, 83 S.Ct. 1194. In *Agurs*, the Court differentiated between three nondisclosure situations to which *Brady* applies: (1) where the undisclosed evidence shows "that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," 427 U.S. at 103, 96 S.Ct. 2392, (2) where the defense makes a specific request, and the prosecutor fails to provide responsive evidence, *id.* at 104, 96 S.Ct. 2392, and (3) where the defense makes a general request or no request, and the prosecutor suppresses favorable evidence, *id.* at 106–07, 96 S.Ct. 2392. Hooper's claims fall within situation (2), "specific request" cases.

Agurs established different materiality standards for situations (1) and (3). *Agurs* did not set forth a materiality standard for situation (2), but the Court did explain that "material" means that "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104, 96 S.Ct. 2392.[13] Thus, even though the Supreme Court had not announced a precise materiality standard for "specific request" cases at the time of the Arizona Supreme Court's decision, *Brady* and *Agurs* had established governing legal principles that apply in such cases—a defendant must show that the evidence was suppressed, favorable, and material, meaning the evidence might have affected the outcome of the trial. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392. These legal principles are the applicable clearly established law for AEDPA purposes here. *See Lockyer*, 538 U.S. at 71–72, 123 S.Ct. 1166 (" '[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.").[14]

standard of review. *Amado v. Gonzalez,* 758 F.3d 1119, 1133 n.9 (9th Cir. 2014) (''[The court has] the obligation to apply the correct [AEDPA] standard, for the issue is non-waivable.'').

12. We note that the district court did not have the benefit of *Greene v. Fisher,* 565 U.S. 34, 132 S.Ct. 38, 181 L.Ed.2d 336 (2011), when it identified the applicable clearly established law.

13. The Supreme Court later clarified in *Bagley* that *Agurs* did not establish a materiality standard for ''specific request'' cases. *Bagley,* 473 U.S. at 681, 105 S.Ct. 3375. Rather, the Court explained that its statement in *Agurs* that ''*Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial,'' was merely an explanation of the ''meaning of the term 'materiality.' '' *Id.* at 681 n.12, 105 S.Ct. 3375 (citation omitted).

14. Hooper identifies no Supreme Court precedent in existence at the time of the Arizona Supreme Court's decision that established a more favorable materiality standard for ''specific request'' cases than the materiality principle in *Agurs,* nor are we aware of any. Thus, even if we are somehow incorrect in our determination that there *was* clearly established federal law on this issue in June 1985, our error could inure only to Hooper's benefit; as without such clearly established federal law, the Arizona Supreme Court could not have unreasonably applied it, and Hooper would automatically lose on this issue under AEDPA. *See Brewer,* 378 F.3d at 954 (affirming the denial of a habeas petition under AEDPA for lack of clearly established Supreme Court precedent).

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1. AEDPA Analysis Regarding Merrill Benefits

[12] The Arizona Supreme Court's decision on the *Brady* claim regarding the Merrill benefits was not an unreasonable application of clearly established law under § 2254(d)(1). The court identified the correct governing legal principles in *Brady* and *Agurs*. *See Bracy*, 703 P.2d at 472. The Arizona Supreme Court reviewed the trial evidence and determined that Merrill's testimony was "not pivotal."[15] *Id.* at 473. Rather, it determined that Marilyn's testimony was crucial. *Id.* The Arizona Supreme Court noted that her testimony was "particularly strong," and it found that evidence other than Merrill's testimony "showed defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond." *Id.* The court also determined that the Merrill benefits would not have affected the jury's view of Merrill's credibility because the "defense possessed and used a wealth of impeaching evidence against" him. *Id.* The court ultimately concluded that Hooper failed to meet *Agurs*'s materiality standard, stating that "we do not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond and the other evidence." *Id.*

The Arizona Supreme Court properly found that Marilyn's testimony was key. Marilyn was an eyewitness to the crimes and was certain in her trial identifications of Hooper and Bracy. She had also identified both in pretrial lineups. As the court noted: "This evidence was particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home." *Id.* The court also properly found that Merrill's testimony was "merely corroborative and not pivotal." *Id.* As the court found, the State's case was supported by evidence well beyond Merrill's testimony. In addition to Marilyn's testimony, the testimonies of Louie, Campagnoni, Bauer, and Tompkins, along with the State's other evidence discussed above, all supported Hooper's guilt.

We find reasonable the Arizona Supreme Court's determination that the Merrill benefits would not have affected the jury's view of Merrill's credibility. Merrill was vigorously impeached. The jury knew that Merrill was a known liar, self-interested criminal, and drug dealer and user. The jury also knew that he had lied to the police and had strong motives to lie, including to avoid a potential death sentence.

Given the overwhelming evidence of Hooper's guilt presented at trial, and the improbability that the Merrill benefits would have affected the jury's view of Merrill, the Arizona Supreme Court reasonably concluded that Hooper failed to show that the Merrill benefits "might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392. Thus, the Arizona Supreme Court did not unreasonably apply clearly established law, and we are barred from reviewing Hooper's claim based on the Merrill benefits under § 2254(d)(1).

[13] Alternatively, Hooper argues that we can review his claim on the Merrill benefits under § 2254(d)(2) because the Arizona Supreme Court's finding that the Merrill benefits were cumulative impeach-

15. During his closing, the prosecutor mentioned Merrill's testimony in reviewing all of the evidence, but he did not highlight it. This supports that Merrill's testimony was not crucial. *See Barker v. Fleming*, 423 F.3d 1085, 1100 (9th Cir. 2005) ("A useful measurement of the importance of [a witness] and the materiality of the withheld impeachment evidence is the lack of emphasis the prosecutor placed on his testimony.").

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ment evidence was an unreasonable factual determination.[16] A finding that evidence is cumulative is a factual determination subject to § 2254(d)(2). *See Vega*, 757 F.3d at 974 ("We further conclude that the state court's findings that Father Dan's testimony would have been cumulative and would have had no effect on the verdict is an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.").

[14] The Arizona Supreme Court's determination that the Merrill benefits were cumulative impeachment evidence was not unreasonable. As discussed above, the defense severely impeached Merrill. The evidence portrayed him as a serial liar with strong incentives to fabricate his testimony against Hooper and Bracy to avoid a potential death sentence for his own involvement in the Redmond crimes and to continue to receive favorable treatment from the State. The undisclosed Merrill benefits would have shown that Merrill received monetary benefits from the State and Ryan, making it more likely that he was biased and motivated to lie. But considering the impeachment evidence that was presented, it was already firmly established that Merrill was biased and motivated to lie. Thus, the Arizona Supreme Court's determination was reasonable.

Our conclusion is supported by Ninth Circuit cases in which we determined that undisclosed impeachment evidence was cumulative under similar circumstances. For example, in *Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2013), the prosecution suppressed evidence that the state had intervened with the parole board to secure a witness's parole. *Id.* at 902–03. We held that this impeachment evidence against the witness was cumulative because the witness had been substantially impeached at trial through evidence of his "many past crimes, including his conviction for perjury," and "his extensive history of using false names." *Id.* at 903; *see also id.* at 904; *see also Barker v. Fleming*, 423 F.3d 1085, 1096–97 (9th Cir. 2005) (holding that suppressed convictions were cumulative impeachment evidence in light of other evidence showing that the witness had a "penchant for lying," had been in and out of jail several times, and had made a deal with the state on three other crimes).

In sum, AEDPA bars our review of Hooper's *Brady* claim as to the undisclosed Merrill benefits. But as discussed below, even if we were to review Hooper's *Brady* claim on the Merrill benefits de novo, it would fail because there is no reasonable probability that the trial outcome would have been different had the evidence been disclosed.

2. AEDPA Analysis Regarding Police Reports

[15] Hooper argues that we may review the Arizona Supreme Court's decision on the delayed disclosure of the police reports related to the Bradfords and Ward because the Arizona Supreme Court unreasonably applied clearly established law under § 2254(d)(1). Hooper cites *Brady* and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), as the applicable clearly established law. But those cases did not clearly establish that a delayed disclosure is a *Brady* violation where the defense had the opportunity to use the evidence at trial. Nor has any Supreme Court case so held.

16. Although Hooper failed to raise this argument in the district court, we address it because the State responds to the argument and does not assert waiver. *See United States v. Doe*, 53 F.3d 1081, 1082–83 (9th Cir. 1995) (reviewing the merits of a claim when the government failed to assert waiver).

Because there was no clearly established law governing *Brady* claims based on such delayed disclosures, the Arizona Supreme Court's decision "cannot be contrary to or an unreasonable application of clearly established federal law." *Brewer*, 378 F.3d at 955. AEDPA therefore prevents us from reviewing the Arizona Supreme Court's decision on the police reports.

3. AEDPA Analysis Regarding Photos

Like the police reports, the prosecution disclosed the photos to Hooper during trial, and he used them at trial. Thus, Hooper's argument that the Arizona Supreme Court's decision on the photos was an unreasonable application of clearly established law fails for the same reason his argument on the police reports fails—there was no clearly established law holding that a delayed disclosure is a *Brady* violation where the defense had the opportunity to use the evidence at trial.

Hooper also asserts, however, that we may review the Arizona Supreme Court's decision on the photos because its decision was based on the unreasonable factual determination that no photos had been admitted at trial.[17] In analyzing the suppression of the photos, the Arizona Supreme Court focused on the specific incident during trial when defense counsel objected to Detective Quaife's testimony about the photos on redirect. *See Bracy*, 703 P.2d at 472. This incident occurred before the photos had been admitted.

Because we are unable to determine from the record the specific argument that was made to the Arizona Supreme Court with respect to the photos, it is unclear whether the court's reasoning was based on an unreasonable factual determination. We therefore assume, without deciding, that the Arizona Supreme Court's decision on the photos was based on an unreasonable factual determination. This assumption does not change the outcome on the *Brady* claims because, as discussed below, Hooper's claims fail even on de novo review.

4. De Novo Review of *Brady* Claims

Hooper argues that we may review all of his *Brady* claims de novo, and that he is entitled to relief under de novo review. We disagree because we have concluded above that AEDPA bars our review of the police reports and the Merrill benefits. But as we next discuss, even assuming we could review all of his *Brady* claims de novo, they would fail.

Hooper satisfies two of the three *Brady* elements—the evidence was favorable and (at least partially) suppressed. *See* 373 U.S. at 87, 83 S.Ct. 1194. Thus, his *Brady* claims turn on the prejudicial effect or materiality of the photos, police reports, and Merrill benefits.[18]

[16–18] "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375. We "must examine the trial record, evaluate the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable probability that, had the evidence been disclosed, the

17. Hooper did not raise this argument in the district court. Even so, we consider it because the State fails to assert waiver. *See Doe,* 53 F.3d at 1082–83.

18. "[F]or *Brady* purposes, ['prejudicial' and 'material'] have come to have the same meaning." *Benn v. Lambert,* 283 F.3d 1040, 1053 n.9 (9th Cir. 2002).

result of the proceeding would have been different." *Turner v. United States*, ––– U.S. ––––, 137 S. Ct. 1885, 1893, 198 L.Ed.2d 443 (2017) (quotation marks, alterations, and citations omitted). A *Brady* violation occurs when the undisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

[19] "[M]ateriality of the withheld evidence [must] be analyzed cumulatively . . . ." *Barker*, 423 F.3d at 1094. We first examine the "force and nature of the withheld evidence item by item," and then "we consider the cumulative effect of the suppressed evidence." *Id.* at 1099. "Gauging the collective impact of the withheld evidence requires us to step back and consider the strength of the prosecution's case . . . ." *Id.*

[20] The prosecution provided Hooper with the photos and police reports during its case-in-chief, about three weeks before Hooper presented his defense. Hooper used the evidence to show that the Bradfords and Ward should have been treated as suspects in the Redmond crimes and that the officers unreasonably discounted them as suspects. Hooper claims that earlier disclosure of the photos would have allowed him to (1) show the jury the similarities between the brown jacket worn by Michael Bradford to the one worn by the intruder as described by Marilyn and (2) emphasize the similarities between Hooper and the Bradfords and Ward to show that Marilyn had mistakenly identified Hooper. But Hooper had the opportunity to use the photos for these purposes. Hooper also asserts that earlier disclosure of the photos and reports would have changed his defense theory and opening statement, but he offers no specifics on how his theory or opening statement would have changed.[19]

Thus, Hooper either used the photos and reports or had a meaningful opportunity to do so. And he fails to show how earlier disclosure would have made this evidence more useful to his defense. We discern no prejudice from the delayed disclosure of the photos and reports. *See United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988) (holding no *Brady* violation because "defendants had substantial opportunity to use the documents and to cure any prejudice caused by the delayed disclosure").

Turning to the Merrill benefits, Hooper could have used this evidence to impeach Merrill. But the defense presented overwhelming evidence discrediting Merrill and showing he had personal motives to lie. The jury knew that Merrill was a serial liar, a criminal, and had received significant benefits from the State for his cooperation, including a deal that ensured he would not be sentenced to death for the Redmond murders and an out-of-jail visit so he could have sex with his wife. Given the wealth of impeachment evidence that was presented, the nondisclosure does not undermine confidence in the verdict. At best, it is exceedingly unlikely that additional evidence showing that Merrill and his wife received money and other benefits from Ryan and the State equaling several thousand dollars would have changed the jury's view of Merrill's credibility.

To the extent the Merrill benefits might have suggested that the State's investigation was tainted because Ryan engaged in improper conduct, this theory was present-

19. And, of course, as noted above, Marilyn testified that the men in the photos were *not* the men who invaded her home, murdered her husband and mother, and tried to murder her.

ed to the jury and supported by other, more compelling evidence. The jury knew that Ryan had taken Merrill out of jail to have sex with his wife, had stopped his tape-recorded interview with Merrill more than twenty times for no apparent reason other than to coach Merrill on what he should say, threatened a witness with physical violence, directed a witness to lie to the police and gave that witness money, and lied to a probation officer to secure a reduced sentence for Campagnoni. Thus, the jury had many reasons to question the integrity of the State's investigation based on Ryan's actions, and the Merrill benefits would have simply added another reason to the already compelling evidence.

Having examined the withheld evidence individually, we now consider its cumulative effect, which "requires us to step back and consider the strength of the prosecution's case." *Barker*, 423 F.3d at 1099.

Marilyn was the State's key witness. Her in-court identifications of Hooper and Bracy as the intruders were certain and unwavering. She had years of work experience in recognizing people by their physical features, and during the encounter she had several opportunities to look at the intruders' faces. Her testimony was corroborated by substantial evidence, other than Merrill's testimony, which showed that Hooper and Bracy were in Phoenix on New Year's Eve and involved in the Redmond crimes. This evidence that Hooper and Bracy were both in Phoenix on New Year's Eve, and thus, that they had created fake alibis,[20] provided additional evidence of Hooper's guilt. *See United States v. Dorsey*, 677 F.3d 944, 950 (9th Cir. 2012) ("That Dorsey tried to create a fake alibi was not merely ineffective, but also stands high in the hierarchy of evidence tending to show guilt.").

It is at best unlikely that earlier disclosure of the photos and reports, and disclosure of the Merrill benefits, would have affected the jury's view of the overwhelming evidence supporting Hooper's guilt. The photos and reports were presented to the jury, and Hooper used them to challenge the officers' reasons for discounting the Bradfords and Ward as suspects in the Redmond crimes and to argue that the men should have been treated as suspects. Hooper fails to show how the delayed disclosures had any effect on the evidence supporting his guilt.

The Merrill benefits would have given the jury additional reasons to disbelieve Merrill and to question the State's investigation. But Merrill was not a crucial witness. Hooper's guilt was supported by significant other evidence, and further impeaching Merrill would not have affected Marilyn's key testimony or the testimonies of other important witnesses. The defense presented extensive evidence portraying Ryan as an unscrupulous investigator. Hooper used the evidence to suggest that the State's investigation was tainted, including that Ryan had improperly influenced Marilyn's pretrial identifications of Hooper and Bracy. The jury rejected that theory. It is at best unlikely that additional evidence that Ryan and the State gave benefits *to Merrill and his wife* would have affected the jury's view of Marilyn's crucial testimony or the testimonies of witnesses other than Merrill.

In sum, earlier disclosure of the photos and reports and disclosure of the Merrill benefits would not have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555. The State had a strong case, even without Merrill's testimony. The jury knew about the photos and

20. The jury obviously did not believe the alibis.

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reports, Hooper used them in his defense, and the jury rejected his arguments. The jury knew that Merrill was a self-interested liar, and that Ryan was an unscrupulous investigator. Thus, "[t]he difference between the story ... that the jury knew and that which would have been presented with the withheld evidence is not significant." *Barker*, 423 F.3d at 1101. We are therefore confident in the verdict and conclude that, even assuming AEDPA does not bar our review of Hooper's *Brady* claims, the delay in producing the photos and police reports, and the failure to disclose the Merrill benefits, were not material.

B. Motion for Leave to Amend—Eighth and Fourteenth Amendment Claims

Hooper requested leave to amend his petition to include a claim that his death sentence violates the Eighth and Fourteenth Amendments because the sentence was based on his invalid Illinois convictions. The district court denied his request as futile. The district court reviewed the state post-conviction court's 2005 decision and found that its rejection of Hooper's claim was neither contrary to nor an unreasonable application of clearly established law under AEDPA. The post-conviction court rejected the claim because, even assuming the Illinois convictions were invalid, Hooper failed to show he would have probably received a sentence less than death because there were still two valid aggravating factors and no mitigating factors. The district court determined that the post-conviction court had properly reweighed the aggravating and mitigating factors or conducted a harmless error analysis in accordance with Supreme Court precedent. The district court concluded that any amendment would be futile because Hooper failed to overcome AEDPA deference as to his claim.

[21, 22] "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (applying Rule 15(a) in a habeas case). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin*, 59 F.3d at 845. Amendment is futile if the claim sought to be added is not viable on the merits. *See Murray*, 745 F.3d at 1015.

We agree with the district court that amendment would be futile. We first consider Hooper's claim that his Eighth Amendment rights were violated because his death sentence was based on his invalid Illinois convictions. We then discuss Hooper's Fourteenth Amendment due process claim.[21]

1. Eighth Amendment Claim

[23] Under AEDPA, we review the post-conviction court's decision rejecting Hooper's Eighth Amendment claim. *See id.* at 1006 (looking through the Arizona Supreme Court's decision to the last reasoned state-court decision). In doing so, we apply the clearly established law that, when a death sentence is based in part on an invalid aggravating circumstance, an appellate court can uphold the sentence if it either reweighs the aggravating and mitigating circumstances or reviews the sentence for harmless error. *Clemons v. Mis-*

21. Although the district court failed to specifically address Hooper's Fourteenth Amendment claim, we exercise our discretion and consider the claim because it is a purely legal question that can be decided on the record developed below. *See Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986) ("We have discretion to decide whether to address an issue that the district court did not reach if the question is a purely legal one and the record has been fully developed prior to appeal ....").

sissippi, 494 U.S. 738, 741, 751–54, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

Under Arizona's death penalty statute, the court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-703(E). "[U]nder A.R.S. § 13-703(E), the trial court *must* impose a sentence of death if it finds the existence of one statutory aggravating factor and does not find the existence of any mitigating factor .... A death sentence is thus required regardless of the trial court's belief that a life sentence is appropriate." *State v. Beaty*, 158 Ariz. 232, 762 P.2d 519, 533–34 (1988); *see also State v. Jordan*, 137 Ariz. 504, 672 P.2d 169, 173 (1983) (en banc) ("Where one or more statutory aggravating circumstance is found, and no mitigation exists, the statute requires the death penalty." (quoting *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 13 (1983) (en banc))). This provision of Arizona's death penalty statute has been upheld as constitutional by the Supreme Court. *See Walton v. Arizona*, 497 U.S. 639, 651–52, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) (plurality opinion) (evaluating Arizona's death penalty statute and reaffirming that if a sentencer was not precluded from considering all relevant mitigation, a "statute requiring the imposition of the death penalty if aggravating circumstances were found to exist but no mitigating circumstances were present" is constitutional), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[24] Hooper argues that the state court's decision was contrary to Supreme Court precedent because it automatically affirmed his death sentence. We disagree. The state court first determined that, even if Hooper's Illinois convictions were invalid, two aggravating circumstances remained—he committed the offense in expectation of receiving something of pecuniary value under A.R.S. § 13-703(F)(5) and in an especially heinous, cruel, or depraved manner under A.R.S. § 13-703(F)(6). The court then found that there were no mitigating circumstances. Because there were two aggravators and no mitigators, the court determined that the sentencer would have been required to impose a death sentence under Arizona law, and thus Hooper failed to show that the invalidity of his Illinois convictions would have changed his sentence.

[25] The state court conducted a harmless error analysis in accordance with Supreme Court precedent. *See Clemons*, 494 U.S. at 741, 751–54, 110 S.Ct. 1441. It properly determined that any error in including Hooper's invalid convictions was harmless because Arizona law requires a death sentence if there is at least one aggravating circumstance and no mitigating circumstances. *See Jordan*, 672 P.2d at 173. Thus, Hooper fails to show that the state court's decision was contrary to clearly established law.[22]

Hooper also argues that the post-conviction court's decision was based on an unreasonable factual determination that there were no mitigating circumstances. We reject this argument because the

22. Hooper makes no claim that the state post-conviction court failed to apply the "beyond a reasonable doubt" harmless error standard. *See Clemons*, 494 U.S. at 753, 110 S.Ct. 1441. Even if he had, he would have had to overcome our rule that, "in AEDPA cases, we apply a presumption that state courts know and follow the law and accordingly give state-court decisions the benefit of the doubt." *Poyson v. Ryan*, 879 F.3d 875, 889 (9th Cir. 2018) (quotation marks and citations omitted). More importantly, as discussed below, even if Hooper could overcome AEDPA, his claim would fail because he cannot show actual prejudice.

court's factual determination was reasonable. During the aggravation and mitigation hearing, Hooper presented no evidence. During sentencing, the court noted that "Hooper neither presented any evidence, nor had a statement to make concerning mitigating factors or any other fac[e]t of his presentation in court." The Arizona Supreme Court agreed that Hooper presented no mitigating circumstances. *Hooper*, 703 P.2d at 495 ("The trial court also considered all possible mitigating circumstances and found none to exist. We agree."). And Hooper identifies no mitigating circumstances that the sentencing court or the Arizona Supreme Court found. The state post-conviction court's factual determination was not unreasonable (and indeed was compelled).

Moreover, even if Hooper could show that the state court's decision was contrary to clearly established law because it automatically affirmed his sentence, his claim would be unavailing because he fails to show actual prejudice.

[26] "[Federal] habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Davis v. Ayala*, 576 U.S. 257, 267, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015) (quotation marks omitted) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). "Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 267–68, 135 S.Ct. 2187 (quotation marks omitted) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)); *see also Beardslee v. Brown*, 393 F.3d 1032, 1041–44 (9th Cir. 2004) (applying *Brecht*'s harmless error test to an Eighth Amendment error based on the improper consideration of invalid aggravating factors).

Two valid aggravating circumstances remain after excluding the two that were based on the invalid Illinois convictions.[23] Hooper makes no claim that the invalid convictions in any way tainted the two remaining aggravators, nor could he. Under Arizona law, as long as Hooper had at least one valid aggravator, he was eligible for the death penalty. *See* A.R.S. § 13-703(E). Because the state court found no mitigators, and we must defer to that finding under AEDPA, Arizona law requires the imposition of a death sentence. *See Beaty*, 762 P.2d at 533–34. Thus, Hooper's claim would fail because he suffered no prejudice from the introduction of the invalid convictions.

Because Hooper's Eighth Amendment claim is not viable, the district court properly denied him leave to amend his petition based on futility.

2. Fourteenth Amendment Claim

Hooper primarily argues that, under *Brown v. Sanders*, 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006), the introduction of the invalid Illinois convictions during sentencing violated his due process rights under the Fourteenth Amendment, mandating the reversal of his death sentence. Thus, according to Hooper, the Arizona Supreme Court's summary dismissal of his due process claim was contrary to or an unreasonable application of *Sanders*. Hooper's claim is not viable, but we first address the parties' dispute over whether

23. Under A.R.S. § 13-703(F)(5), that Hooper "committed the offense[s] as consideration for the receipt or in expectation of the receipt of anything of pecuniary value," *Hooper*, 703 P.2d at 494, and under A.R.S. § 13-703(F)(6), that Hooper "committed the offense[s] in an especially heinous, cruel, or depraved manner," *id.* at 495.

Sanders was clearly established for AEDPA purposes.

Sanders was decided after the post-conviction court's 2005 decision but before the Arizona Supreme Court's summary dismissal. Therefore, whether *Sanders* was clearly established depends on whether the Arizona Supreme Court's summary denial was the last state-court adjudication on the merits. *See Greene*, 565 U.S. at 38–40, 132 S.Ct. 38 (holding that clearly established law under AEDPA includes only Supreme Court decisions announced after the last state-court adjudication on the merits).

We need not decide whether *Sanders* was clearly established because, even if it were, Hooper's due process claim is not viable.[24]

Hooper argues that *Sanders* established a categorical rule that irrelevant evidence introduced at sentencing is a due process violation that mandates reversal of a sentence, and therefore, the state court's failure to reverse his sentence was contrary to or an unreasonable application of *Sanders*. We disagree because *Sanders* did not establish any such rule.

Hooper's argument is based on the following statement in *Sanders*: "If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." 546 U.S. at 220–21, 126 S.Ct. 884. First, this statement is not the holding of *Sanders* but was made in response to the dissent's criticism of *Sanders*'s holding. *Id.*

Second, the Supreme Court held in *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), that, in capital sentencing proceedings, the introduction of irrelevant and prejudicial evidence violates the Due Process Clause of the Fourteenth Amendment when admission of the evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.* at 12, 114 S.Ct. 2004. Nothing in *Sanders* suggests that the Court intended to overrule *Romano*'s test with a categorical rule that irrelevant evidence introduced at sentencing is a due process violation that mandates reversal of a sentence.

[27] Finally, the Court confirmed in *Kansas v. Carr*, 577 U.S. 108, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016), that *Romano*'s test continues to apply to alleged due process violations based on improperly admitted evidence at capital-sentencing proceedings: "The test prescribed by *Romano* for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's

24. We will assume for our discussion that Hooper exhausted his due process claim and that it was adjudicated on the merits by the state court. We note, however, that Hooper likely procedurally defaulted his due process claim because he did not raise it in his petition for review to the Arizona Supreme Court. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding relief on the ground that a sentence was imposed in violation of the Constitution when that ground has been "waived at trial or on appeal, or in any previous post-conviction proceeding"); *Murray*, 745 F.3d at 1016 ("[T]he Supreme Court has recognized Arizona Rule of Criminal Procedure 32.2(a)(3) as an independent and adequate state ground that bars federal habeas review of constitutional claims."). Hooper supplemented his petition and provided a citation to *Sanders*, but he did not allege a due process violation under *Sanders*. This was likely insufficient to exhaust his due process claim. *See Powell v. Lambert*, 357 F.3d 871, 874 (9th Cir. 2004) ("A petitioner has exhausted his federal claims when he has fully and fairly presented them to the state courts."). But the State has not asserted procedural default.

imposition of the death penalty a denial of due process.' " *Id.* at 123–24, 136 S.Ct. 633 (quoting *Romano*, 512 U.S. at 12, 114 S.Ct. 2004). In addition, *Carr* appears to reject the categorical rule urged by Hooper: "The mere admission of evidence that might not otherwise have been admitted ... does not demand the automatic vacatur of a death sentence." *Id.* at 124, 136 S.Ct. 633.

Thus, even if *Sanders* was clearly established, it was not the *applicable* clearly established law governing Hooper's due process claim. A state court's failure to apply inapplicable Supreme Court precedent cannot be contrary to or an unreasonable application of clearly established law, and therefore Hooper fails to overcome AEDPA deference as to his due process claim. And Hooper presents no argument that the state court's decision was contrary to or an unreasonable application of *Romano*. For these reasons, it would be futile to allow Hooper to amend his petition to include his due process claim.[25]

C. Ineffective Assistance of Sentencing Counsel Claim

Hooper's federal habeas petition claims that his sentencing counsel, Woods, rendered ineffective assistance by failing to investigate and present any mitigation evidence. Hooper did not raise this claim in his first state post-conviction petition, but he raised it in his second petition. In denying his second petition, the post-conviction court found that the claim was procedurally barred. The district court also found that the claim was procedurally defaulted, and that Hooper failed to show cause to excuse the procedural default.

Hooper argues that the procedural default is excused under *Martinez* because his post-conviction counsel, Seplow, provided ineffective assistance by failing to raise the claim in his first state post-conviction petition. He also argues that the district court abused its discretion in denying his requests for discovery and an evidentiary hearing.

1. *Martinez* Analysis

[28–31] "A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10, 132 S.Ct. 1309.[26] Under *Martinez*, "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding," *id.* at 14, 132 S.Ct. 1309, "a prisoner may establish 'cause' to excuse the procedural default of a claim that the prisoner had received ineffective assistance of counsel ... during sentencing proceedings by demonstrating that counsel in the initial-review collateral proceeding was ineffective or there was no counsel in such a proceeding," *Clabourne v. Ryan*, 745 F.3d 362, 375 (9th Cir. 2014), *overruled on other*

25. We also reject Hooper's reliance on Eighth Amendment law to support his due process claim based on the erroneous admission of evidence. *See Carr,* 577 U.S. at 123, 136 S.Ct. 633 ("Whatever the merits of defendants' procedural objections, we will not shoehorn them into the Eighth Amendment's prohibition of 'cruel and unusual punishments.' ... [I]t is not the role of the Eighth Amendment to establish a special 'federal code of evidence' governing 'the admissibility of evidence at capital sentencing proceedings.' Rather, it is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'render the trial fundamentally unfair.' " (citations and brackets omitted)).

26. Procedural default may also be excused when a prisoner "demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). This exception is not at issue here.

grounds by McKinney v. Ryan, 813 F.3d 798, 819 (9th Cir. 2015) (en banc).[27] A prisoner establishes prejudice by demonstrating "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14, 132 S.Ct. 1309.

The only issue before us is whether Hooper has established "cause" to excuse the procedural default.[28]

[32] To establish "cause," Hooper must show that his post-conviction counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, Hooper must show that post-conviction counsel's performance was deficient and that he was prejudiced by this deficient performance, meaning that "there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Clabourne*, 745 F.3d at 377. "[F]or us to find a reasonable probability that [post-conviction] counsel prejudiced a petitioner by failing to raise a trial-level [ineffective assistance of counsel (IAC)] claim, we must also find a reasonable probability that the trial-level IAC claim would have succeeded had it been raised." *Runningeagle*, 825 F.3d at 982. Stated differently, "[i]f the ineffective assistance of trial counsel claim lacks merit, then the state habeas counsel would not have been deficient for failing to raise it." *Atwood v. Ryan*, 870 F.3d 1033, 1060 (9th Cir. 2017).[29]

[33] Thus, we first consider whether Woods was ineffective under *Strickland*. Even assuming Woods performed deficiently by failing to investigate and present mitigation evidence (a question we need not and do not reach),[30] we find there

27. Because the parties do not dispute that *Martinez* applies to Hooper's ineffective assistance of counsel claim, we assume without deciding that Arizona law at the time of Hooper's appeal required him to raise the claim in an initial-review collateral proceeding. *But see Runningeagle*, 825 F.3d at 981 n.12 (expressing no opinion on whether "Arizona law effectively required petitioners to bring [ineffective assistance of counsel] claims in initial-review collateral proceedings" before 1989).

28. The district found that the motions panel's remand order determined that Hooper had established prejudice. The State does not challenge this finding. We therefore assume, without deciding, that Hooper has satisfied the prejudice prong of the "cause and prejudice" test.

29. Hooper argues that to establish "cause," he need show only that post-conviction counsel rendered deficient performance, citing *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc). *See id.* at 1245–46 (plurality opinion) (stating that to establish "cause," "a prisoner need show only that his PCR [post-conviction relief] counsel performed in a deficient manner" and "need not show actual prejudice resulting from his PCR counsel's deficient performance, over and above his required showing that the trial-counsel IAC claim be 'substantial' under the first *Martinez* requirement"). We reject this argument because we have consistently distinguished *Detrich* and reaffirmed the *Clabourne* framework, which requires a petitioner who was represented by counsel in the initial-review collateral proceeding to establish "cause" by showing *Strickland* prejudice. *See Rodney v. Filson*, 916 F.3d 1254, 1260 & n.2 (9th Cir. 2019) (confirming that a petitioner represented by post-conviction counsel must show *Strickland* prejudice and the *Detrich* standard in the plurality opinion "applies [only] in cases in which the petitioner was *not* represented by counsel in the initial-review collateral proceeding"); *see also Djerf v. Ryan*, 931 F.3d 870, 880 (9th Cir. 2019) (applying *Clabourne* and requiring the petitioner to show *Strickland* prejudice to establish "cause").

30. We do note some of the explanations Woods provided for his performance in 1983, when questioned during a 1992 deposition taken in connection with Bracy's post-conviction proceeding:

APPENDIX A

is no "reasonable probability that, but for [Woods's alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "The likelihood of a different result must be substantial, not just conceivable." *Apelt v. Ryan*, 878 F.3d 800, 832 (9th Cir. 2017) (quoting *Richter*, 562 U.S. at 112, 131 S.Ct. 770).

The mitigation evidence that Hooper now presents, which he has had decades to collect, falls into two general categories—evidence of his life history and evidence related to his mental health. Hooper grew up in Chicago in a segregated, impoverished neighborhood. He lived with his mother, father, and four siblings. Both of his parents were employed. His mother worked in manufacturing for twenty years and then worked at the post office for twenty-two years. His father worked in the stockyards. Hooper's "family never had serious money problems." His parents provided the children with food and clothing, and the family attended church every Sunday.

As a child, Hooper saw people being shot in the streets, witnessed a person being beaten to death with a baseball bat, and saw a man "stomped to death in the street." He also saw prostitutes and "stepped over drug addicts to get to school." Hooper's sister stated that their parents "tried to shield" them from the crime and drug use in their neighborhood.

Growing up, Hooper suffered physical injuries, was beaten up by gangs, and had to fight to survive. At age eleven, he was hit in the head by a ball while playing baseball and knocked unconscious. At age twelve or thirteen, he was knocked unconscious by blows from an ax handle during a fight, and had his arm almost severed off by the ax blade. Hooper was once beaten in the head with a baseball bat.

Hooper presents evidence that he was physically abused by his father. His father whipped him and his siblings "over their clothes and not on their bare skin" when they misbehaved. His father whipped him with extension cords at least two times a week. Hooper's father drew a gun on Hooper and his siblings at least two times, but Hooper's sister stated, "He was not going to shoot us." There was no physical abuse between Hooper's parents, but they argued a lot.

Hooper was never in a gang, but he hung out with older, more violent juveniles. He first got into criminal trouble when he was thirteen or fourteen years old for robbery and vandalism. When his parents learned about his problems, they "repeatedly sat him down and talked to him."

> It was clear to me there were no mitigating factors, and almost every aggravating factor listed in the statute was present.
> ***
> [M]y goal was to try to have him not get the death sentence. And I believe my best chance would be to try to construct an argument directed specifically at that judge that maybe he might buy rather than put on a completely ineffectual and unpersuasive mitigation hearing just for the record, because it wouldn't have done any good. So that's what I did.
> ***
> I had a choice there. I could just try to protect the record, or I could try to talk the judge out of the death penalty. And I didn't think I could do both. I could aggravate the situation with the judge by coming up with —There were no mitigating factors. That's the bottom line. There were none. I could try to make up something or come up with some phony deal that he would not buy, or I could lay it on the line on a different level and see if I could persuade him.

Hooper was sent to various reformatories and juvenile detention centers. He offers news articles supporting that incidents of sexual assault and physical abuse occurred at two of the institutions in which he had been confined. But Hooper does not state if he was physically or sexually abused at those institutions.

Hooper's parents did not use drugs or abuse alcohol. Hooper started drinking alcohol when he was seventeen, and he reported that he consumed heavy amounts of alcohol "for years" and stopped only when he was incarcerated in 1981.

Hooper has been institutionalized for most of his adult life. While incarcerated as a young adult, he obtained his GED and completed one year of college. In his twenties, he spoke to youth about staying away from a life of crime. Hooper has been a model prisoner and has not committed any disciplinary infractions since his extradition to Arizona in 2006. Hooper provides statements from several character witnesses who described him as supportive, caring, and a good person.

Turning to Hooper's evidence related to his mental health, he submits declarations from two mental health professionals. In 2015, psychologist Dr. James Garbarino declared that based on reports from Hooper's siblings, Hooper had been a sensitive child with a vulnerable temperament. His upbringing in an "urban war zone" resulted in his desensitization to violent acts. Hooper experienced chronic trauma from the physical abuse he suffered within his family and community and his exposure to the traumatic environments in juvenile detention facilities. He appeared to be emotionally disconnected from adverse experiences and had difficulty regulating his emotions. Dr. Garbarino noted that a family member stated that from an early age Hooper had a "Jekyll/Hyde pattern," as he had an " 'explosive temper,' and could shift from being 'sweet' to expressing 'rage.' " Dr. Garbarino concluded that Hooper's chronic trauma and "urban war zone" environment contributed to his chronic antisocial and violent behavior. Dr. Garbarino opined that Hooper was not beyond rehabilitation based on positive reports from family, friends, and prison staff.

Dr. Robert Heilbronner, a clinical neuropsychologist, reviewed records and evaluated Hooper in 2011. He found that Hooper demonstrated average IQ, average verbal intellectual abilities, and borderline to low average nonverbal performance abilities. Because he was unable to administer a complete battery of neuropsychological tests, Dr. Heilbronner was unable to explain the cause of the discrepancy between the verbal intellectual abilities and nonverbal performance abilities scores. Nevertheless, he surmised that multiple head traumas and social-educational deprivations as a child were likely contributors. He opined that the discrepancy "more likely than not reflects an abnormal pattern of intellectual functioning" and that "this pattern of impairment was present in 1981."

Later in 2015, Dr. Heilbronner completed his evaluation of Hooper by administering the rest of the neuropsychological tests. He was unable to determine with any degree of neuropsychological certainty the causes of the observed discrepancy. Dr. Heilbronner concluded that, had Hooper been tested closer to the time of trial, it is more likely than not that the results would have shown objective data of brain impairment.[31]

31. In light of Dr. Heilbronner's 2011 and 2015 evaluations, we deny as moot Hooper's 2010 motion requesting a confidential contact visit between Dr. Heilbronner and Hooper to conduct a neuropsychological examination.

As for the aggravation evidence, the State established two statutory aggravating circumstances: Hooper (1) "committed the offense[s] as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value," A.R.S. § 13-703(F)(5), and (2) "committed the offense[s] in an especially heinous, cruel or depraved manner," A.R.S. § 13-703(F)(6).[32]

The murder-for-hire aggravating circumstance carries great weight. *See State v. Harrod*, 218 Ariz. 268, 183 P.3d 519, 535 (2008) (en banc) ("[T]he pecuniary gain aggravating factor, particularly in the case of a contract killing, is especially strong. Accordingly, when a 'hired hit' has taken place, the (F)(5) aggravator has substantial weight." (citation omitted)).

The Arizona Supreme Court found that these facts established the existence of the "especially heinous, cruel or depraved" aggravating circumstance: the victims were herded at gunpoint, "forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks"; "[e]xcept for the first victim, each of them had to endure the 'unimaginable terror' of having their loved ones shot to death within their hearing and then having to wait for their own turn to come"; "Phelps did not die from the first gunshot wound to her head, . . . she did not lose consciousness as a result thereof, and . . . she most certainly suffered pain from that wound"; the murderers inflicted "gratuitous violence" or "needless mutilation" by slashing Redmond's throat after he had been shot twice through the head; and "the murderers killed Mrs. Phelps, an elderly houseguest of the Redmonds with no possible interest in their business affairs." *Bracy*, 703 P.2d at 481–82 (quoting in part *State v. McCall*, 139 Ariz. 147, 677 P.2d 920, 934 (1983) (en banc)); *see also Hooper*, 703 P.2d at 495. The trial court also observed that one of the murderers said " 'we don't need these two anymore[,' which] shows the inhumane and debase[d] motive possessed by [them]." Given these details of the Redmond murders, the "especially heinous, cruel or depraved" aggravating circumstance is also of substantial weight.

In contrast, Hooper's mitigation evidence is weak. The evidence of his difficult upbringing is "by no means clearly mitigating." *Cullen v. Pinholster*, 563 U.S. 170, 201, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). That Hooper engaged in violent crimes such as robbery when he was thirteen, continued to engage in criminal conduct despite having been sent to juvenile detention and his parents' attempts to intervene, and then continued a life of crime throughout his adult life, could have caused a jury to believe that he was beyond rehabilitation. *See id.* ("The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." (citation omitted)). Additionally, that Hooper was *thirty-five years old* when he committed the Redmond murders further decreases the mitigating effect of his childhood circumstances. *See State v. Ellison*, 213 Ariz. 116, 140 P.3d 899, 927 (2006) (en banc) ("[Defendant's] childhood troubles deserve little value as a mitigator for the murders he committed at age thirty-three.").

32. Hooper argued below and appears to argue on appeal that our prejudice analysis should exclude the two aggravating circumstances based on the invalid Illinois convictions. We need not reach this issue because, even assuming that we should exclude the two invalid aggravating circumstances, Hooper fails to show that there is a "reasonable probability that, but for [Woods's alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

Dr. Garbarino's assessment is also not clearly mitigating. Though he surmised that Hooper was not beyond rehabilitation, he concluded that Hooper's upbringing "desensitized him to acting in a violent manner" and caused him to develop a "war zone mentality." This evidence could have weighed against Hooper because it shows his propensity for violence. *See Apelt*, 878 F.3d at 834 ("[P]resenting Apelt's upbringing and activities in Germany to explain how Apelt became a calculating killer arguably could weigh in favor rather than against the death penalty.").

The evidence of his alcohol use carries little or no weight because there is no evidence that Hooper was influenced by alcohol at the time of the Redmond murders. *See Henry v. Ryan*, 720 F.3d 1073, 1090 (9th Cir. 2013) ("[S]tate courts are free to consider the absence of a causal connection when assessing the quality and strength of such evidence."); *cf.* A.R.S. § 13-703(G)(1) (recognizing as a statutory mitigating circumstance: "The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired"). Further, Hooper's heavy alcohol use might have weighed against him. *See Henry*, 720 F.3d at 1090 n.11 (noting that a history of alcoholism might be considered aggravating).

Hooper's evidence of good character and prison behavior is of minimal weight, especially given the strong rebuttal evidence that the prosecutor could have highlighted and introduced. *See Harrod*, 183 P.3d at 534–35 (commenting that mitigating evidence of good character deserves less weight in a case involving a murder planned in advance). Hooper had a long adult criminal history, which started at age eighteen and progressed from disorderly conduct to much more serious crimes of armed robbery and attempted murder. In rebuttal, the prosecutor could have presented the details of these crimes. The prosecutor could have also emphasized Hooper's damaging statements that he would have killed Redmond and his family for "a couple hundred dollars a person," that he was "better off dead or in the pen because if [he] got out again [he] would probably just kill someone again," and that he "like[s] to shoot people, it doesn't bother [him] a bit." The supplemental PSR stated that a Chicago police officer believed Hooper was a "member of a prison gang/terrorist group called the Royal Family for twelve or thirteen years." Presumably, the State could have presented details about this group and Hooper's connection to the group to further rebut his "good character" and prison behavior evidence.

As for Dr. Heilbronner's neuropsychological evaluation, not only could it have opened the door for the prosecution to retain an expert in rebuttal, *see Pinholster*, 563 U.S. at 201, 131 S.Ct. 1388, but also, Dr. Heilbronner's conclusion is speculative. He concluded that Hooper likely had some type of brain impairment at the time of trial but provided no insight into what that impairment could have been, how such an impairment would have affected Hooper, or how it might have been related to the crimes. This type of speculative evidence is insufficient to establish prejudice. *See Atwood*, 870 F.3d at 1064 (noting that speculation that petitioner had a brain dysfunction or disorder was not sufficient to establish prejudice); *Rhoades v. Henry*, 638 F.3d 1027, 1050 (9th Cir. 2011) ("Speculation about potential brain dysfunctions or disorders 'is not sufficient to establish prejudice.' " (citation omitted)).

[34] Considering the two aggravating factors, both of which carry significant weight, alongside Hooper's insubstantial mitigation evidence, there is no "reason-

able probability that, but for [sentencing] counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Because Hooper's trial-level ineffective assistance of counsel claim lacks merit, Hooper's post-conviction counsel, Seplow, was not deficient for failing to raise it, and Hooper cannot show that Seplow was ineffective under *Strickland*. Accordingly, Hooper fails to establish "cause" under *Martinez*, and his claim is procedurally barred.[33]

2. Denial of Discovery and Evidentiary Hearing

In the district court, Hooper requested discovery and an evidentiary hearing to support his argument that the procedural default of his ineffective assistance of counsel claim is excused under *Martinez*. He also asked to expand the record to include all the materials attached to his supplemental briefs addressing the *Martinez* issue. The court granted Hooper's request to expand the record. The expanded record included declarations and interviews of potential mitigation witnesses, including the declarations of his medical experts. After reviewing the record, including the newly added materials, the district court determined that discovery and an evidentiary hearing were unnecessary.

"We review the district court's denial of discovery and an evidentiary hearing for abuse of discretion." *Smith v. Mahoney*, 611 F.3d 978, 997 (9th Cir. 2010).

Hooper claims that discovery and an evidentiary hearing would resolve the factual disputes related to whether Woods performed deficiently. This argument is unavailing given our decision that, even assuming Woods performed deficiently, Hooper cannot show "cause" for the procedural default. He also makes the conclusory assertion that "[e]xpert and lay witnesses could show the full extent of the available mitigation case, and explain its significance" at an evidentiary hearing. Hooper, however, does not identify who those witnesses would be, and he makes no claim that their testimony would differ materially from the mitigation evidence that is already in the record.

Hooper also takes issue with the district court's denial of his request to depose the "major actors," including Woods and Seplow, based on Hooper's failure to "allege specific, relevant facts that might be found in the requested depositions." But Hooper does not explain how that determination was an abuse of discretion. And in his briefing to us he fails to allege any specific material facts that would be obtained from the requested depositions and makes no claim that any deposition testimony would be materially different from the mitigation evidence in the record. Indeed, as pointed out by the district court, the record already contains the deposition of Woods and a declaration by Seplow.

Because Hooper fails to show what additional evidence he could have obtained from discovery or an evidentiary hearing to support that he was prejudiced by

33. Though our prejudice analysis construes Hooper's mitigation evidence in his favor, we note that his mitigation evidence on the level of violence in his childhood neighborhoods and the extent of the physical abuse by his father is not consistent. A family member stated that their neighborhoods were not "overly violent." Family members also stated that the whippings by Hooper's father occurred "[n]ot so often," and that Hooper and his siblings "received no punishments" from their parents. The evidence of his history of alcohol use is also ambiguous. Hooper's friend, who knew Hooper in the mid-1970s, stated that Hooper did not have an alcohol problem. Hooper's PSR also stated that Hooper "reportedly denies the abuse of alcohol and drugs."

Woods's performance, the district court did not abuse its discretion in denying his requests for discovery and an evidentiary hearing. *See Henry*, 720 F.3d at 1087 (affirming the denial of an evidentiary hearing when petitioner failed to "point to any additional evidence that could be properly pursued at an evidentiary hearing to" support his claim); *see also Runningeagle*, 825 F.3d at 990 (holding that the district court did not abuse its discretion in denying an evidentiary hearing when "[t]he expanded record included the declarations of witnesses who would testify at a live hearing, and Runningeagle made no showing that their testimony would differ materially from their declarations").

D. Request to Expand the COA

Hooper seeks to expand the COA to include two uncertified claims: (1) the trial court's decision to shackle him was unconstitutional because it was not based on an individualized determination or justified by an essential state interest, and (2) the unconstitutional shackling caused him to involuntarily waive his right to be present at voir dire because he was forced to choose between two constitutional rights—the right to appear before the jury free of restraints and the right to be present at jury selection.

Under AEDPA, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In determining whether Hooper has met this standard, "[w]e look to the District Court's application of AEDPA to [Hooper's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

The Arizona Supreme Court considered and rejected Hooper's uncertified claims on direct appeal. *Hooper*, 703 P.2d at 487–88. The Arizona Supreme Court found that the trial court did not abuse its discretion in ordering Hooper shackled given that he had been convicted of three murders in Illinois and was under three death sentences for those murders. *Id.* at 487. It also found that the restraints were not visible to the jury. *Id.* Because Hooper had been properly restrained, the court determined that "he was not denied his right to be present when he voluntarily chose to be absent during voir dire." *Id.* at 487–88.

The district court deferred to the Arizona Supreme Court's finding that the jury did not see Hooper's shackles. The district court then determined that the Arizona Supreme Court's ruling on the unconstitutional shackling claim was not contrary to or an unreasonable application of clearly established law. It also rejected, under AEDPA, Hooper's claim that the alleged unconstitutional shackling order caused him to waive his right to be present at voir dire.

[35] When the Arizona Supreme Court adjudicated Hooper's unconstitutional shackling claim, there was no clearly established law on "the specific procedural steps a trial court must take prior to [visible] shackling, about the amount and type of evidence needed to justify restraints, and about what forms of prejudice might warrant a new trial." *Deck v. Missouri*, 544 U.S. 622, 629, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *see Crittenden v. Ayers*, 624 F.3d 943, 970–72 (9th Cir. 2010) (interpreting *Deck* as confirming that there was no clearly established law regarding any required procedures before shackling a defendant). Because there was no clearly established law that required a trial court to make an individualized determination before imposing shackles, no reasonable jurist could disagree with the district court's conclusion that the Arizona Supreme Court's decision was not contrary

to or an unreasonable application of clearly established law. *See Brewer*, 378 F.3d at 955.

The district court properly deferred to the Arizona Supreme Court's determination that the jury did not see the shackles, as that factual conclusion was not unreasonable. There is no indication in the state court record that any juror saw shackles on Hooper. Indeed, Hooper made no allegation in his brief to the Arizona Supreme Court that the shackles were visible, and his briefs here fail to point to any part of the record that shows a juror saw his shackles.[34] Given the lack of any evidence that the jury saw Hooper's shackles, no reasonable jurist could disagree with the district court's decision to defer to the Arizona Supreme Court's factual finding that the shackles were not visible. *See Dixon v. Ryan*, 932 F.3d 789, 810–11 (9th Cir. 2019) (holding that the state court's factual conclusion that restraints were not visible was reasonable because there was no evidence to the contrary).

Hooper's second uncertified claim that he was forced to choose between two constitutional rights depends on a determination that his shackling was unconstitutional. But that claim necessarily fails because we must defer to the Arizona Supreme Court's decision that his shackling was proper. We therefore conclude that no reasonable jurist could debate the district court's rejection of Hooper's second uncertified claim.

We deny Hooper's request to expand the COA.

34. Hooper provides a 1992 affidavit signed by Bracy to support his claims. We cannot consider this affidavit because it was not part of the record on direct appeal. *See Pinholster*, 563 U.S. at 181–82, 131 S.Ct. 1388. Even if we were to consider the affidavit, it does not claim that any juror saw Hooper's shackles. Further, even if the affidavit could be construed as raising the possibility that his shackles may have been visible at times, the mere possibility that a juror saw his shackles would not render the Arizona Supreme Court's factual determination unreasonable.

IV. Conclusion

We affirm the district court's denial of the writ of habeas corpus. Hooper's *Brady* claims are either barred by AEDPA or fail on the merits under de novo review. The district court properly denied Hooper's request for leave to amend his petition to include claims that his death sentence violates the Eighth and Fourteenth Amendments because any amendment would be futile. We also affirm the district court's conclusion that Hooper's ineffective assistance of sentencing counsel claim is procedurally defaulted, and that Hooper fails to show cause under *Martinez* to excuse the default. Finally, we decline to expand the COA.

AFFIRMED.

Bilal HUSSAIN, Petitioner,

v.

Jeffrey A. ROSEN, Acting Attorney General, Respondent.

No. 18-70780

United States Court of Appeals, Ninth Circuit.

Argued and Submitted August 12, 2020 Pasadena, California

Filed January 11, 2021

Background: Noncitizen, who was Pakistani national, sought review of decision of

APPENDIX A

O. K. FILE

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION	
APPEALS	
BONDS: REFUND	
FORFEITURE	
CHANGE OF VENUE	
JURY FEES	
REMANDS	
SENTENCING	

32-L (DIV.) Oct. 20, 1983 (DATE) Hon. Cecil B. Patterson, Jr. (JUDGE OR COMMISSIONER)

VIVIAN KRINGLE, Clerk
M. J. Vega, Deputy

CR 121686

THE STATE OF ARIZONA

County Attorney
By: Joseph Brownlee

Attorney General
By: Michael Jones

vs.

WILLIAM BRACY (B)
MURRAY HOOPER (C)

J. Douglas McVay
H. Allen Gerhardt

Supreme Court of Arizona

The Defendants' Motions for Vacation of Judgment having come on for hearings,

The Court having heard and considered the evidentiary presentations, reviewed and considered the pleadings and law presented and evaluated the arguments of respective counsels,

The Court determines that the issue before it is whether the matters presented in the hearing sessions warrant the vacation of judgments and the granting of new trials for the defendants,

The Defendants alleged for the new trial motions two bases in their pleadings but developed five issues factually as the hearings progressed.

The Court determines that only three of the issues are newly discovered and only these will be addressed in these orders.

The Court Finds that:

1. Daniel F. Ryan assisted Kathy Merrill in making her G.M.A.C. auto payments from approximately September, 1981 to September 30, 1982, by acting as a conduit for said payments to avoid her detection.

Continued . .

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION
APPEALS
BONDS. REFUND
FORFEITURE
CHANGE OF VENUE
JURY FEES
REMANDS
SENTENCING

32-L DIV. Oct. 20, 1983 DATE Hon. Cecil B. Patterson, Jr. JUDGE OR COMMISSIONER VIVIAN KRINGLE, Clerk m. d. Vega Deputy

CR 121686 State vs. Bracy (B)
Hooper (C) (Continued)

2. Daniel Ryan in the course of assisting Mrs. Merrill advanced monies to Mrs. Merrill for her September 1, 1981, payments and her April 23, 1982, payments which in each instance was an amount of $414.00 representing 2 auto payments.

3. At least on the April 23, 1982, payments, Mr. Ryan was reimbursed for his assistance at least in part on June 2, 1982.

4. This assistance was a distinct benefit to the Merrills.

5. Mrs. Merrill was provided approximately $3,000.00 as a result of enrollment in the Maricopa County Attorney's Protected Witness Program.

6. This assistance was a direct benefit to the wife of one of the key state's witnesses, Arnold Merrill, as she was unemployed at the time and her husband was in custody.

7. Arnold Merrill made approximately 22 long distance telephone calls to his wife from the County Attorney's Office between November 11, 1981 and July 15, 1982, while in custody.

8. These telephone calls were not the normal privileges accorded a person who is in custody.

9. At least on some of these phone calls, Daniel Ryan had knowledge of their placement and gave his consent.

10. In other instances, Arnold Merrill although in custody was left unattended by Mr. Ryan or other law enforcement personnel while in the County Attorney's Office and he made calls on his own volition.

FORM CLERK OF THE COURT MAIL DISTRIBUTION CENTER

Received: OCT 24 1983

Continued . .

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION	
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FORFEITURE	
CHANGE OF VENUE	
JURY FEES	
REMANDS	
SENTENCING	

32-L (DIV.) Oct. 20, 1983 (DATE) Hon. Cecil B. Patterson, Jr. (JUDGE OR COMMISSIONER)

VIVIAN KRINGLE, Clerk
m.d. Vega Deputy

CR 121686

State vs. Bracy (B)
Hooper (C)

(Continued)

11. Through lax and sometimes apparently wholely inadequate administrative procedures, the phone calls were never tallied up nor presented to the defense attorneys in discovery.

12. These 22 telephone calls constituted a significant benefit to Mr. Merrill.

The above items should have been provided the defense attorneys pursuant to A.R.C.P. 15.1 and 15.6, as they all were substantial benefits to witness Merrill.

None of them were provided the defendants as required by law and rules of procedure.

The Court determines after a very thorough review of its own notes on the hearings and trial, a review of selected portions of the hearing and trial transcripts, the caselaw presented and reviewed that each of these items would be additional issues raised for impeachment purposes on both Arnold Merrill's and Daniel Ryan's trial testimony.

The Court determines also that they are cumulative of other impeachment matters raised during the trial testimony of both witnesses Merrill and Ryan, by the defendants.

The Court further determines that they are not material as the term is defined in State v. Jeffers, 661 P.2nd 1105, 135 Az. 404 (1983).

None of the issues after evaluation by this Court leads to a conclusion that had they been introduced by the defendants during trial they would have changed the verdicts.

Continued . .

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION	
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SENTENCING	

32-L (DIV.) Oct. 20, 1983 (DATE) Hon. Cecil B. Patterson, Jr. (JUDGE OR COMMISSIONER)

VIVIAN KRINGLE, Clerk
m. d. Vega Deputy

CR 121686

State vs. Bracy (B)
Hooper (C)

(Continued)

There are independent witnesses to place the defendants in the city of Phoenix during the period of time in question, at the scene of the crimes, receiving what appeared very strongly to be a partial payment from a co-conspirator for their criminal responsibilities, receipts for useage of one of the co-conspirator's credit cards in Phoenix during the period in question, a plan for surreptitiously getting the defendants out of Phoenix on or about December 31, 1980, as well as for other testimony which tied the defendants to the offenses herein.

The Court determines also that these independant sources of evidence were sufficient to convict the defendants in these matters.

The Court further determines that a cavalier, almost holier-than though attitude existed on the part of some of the prosecution team as evidenced by the overreaching, "I didn't-think-it-mattered," blase at times, disinterested, it's-none-of-your-business attitudes taken at various points during these entire proceedings.

These attitudes hampered the smooth processing of these matters during all stages and at times caused unnecessary antagonisms between the prosecution and defense teams.

The Court is disturbed that all law enforcement supervisors called in the hearings on these motions for vacation of Judgment showed little or no interest in reviewing and analyzing allegations of violations of Maricopa County Jail policies written or unwritten, well established standard methods for handling persons in custody while in a law enforcement officer's care, custody and control, as well as other questionable conduct.

The Court is further disturbed by the fact that at every discovery and evidentiary gathering effort undertaken

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

OFFICE DISTRIBUTION

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32-L (DIV.) Oct. 20, 1983 (DATE) Hon. Cecil B. Patterson, Jr. (JUDGE OR COMMISSIONER) VIVIAN KRINGLE, Clerk m. d. Vega Deputy

CR 121686

State vs. Bracy (B)
Hooper (C)

(Continued)

by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit.

This Court feels it is without recourse for further review and investigation of some of the conduct by a member of members of the prosecution team who undertook activities which are at their best questionable.

Nonetheless, this Court having determined the issues above presented, based on the case law and facts presented,

IT IS ORDERED denying the Defendants' Motions To Vacate Judgment.

FORM 43-17 APPENDIX B

CLERK OF THE COURT
MAIL DISTRIBUTION CENTER
Received: OCT 24 1983
Returned: OCT 26 1983

145 Ariz. 520

STATE of Arizona, Appellee,

v.

William BRACY, Appellant.

No. 5809.

Supreme Court of Arizona,
En Banc.

June 10, 1985.

Defendant was convicted in the Superior Court, Maricopa County, Cecil B. Patterson, Jr., J., of one count of conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary, and he appealed. The Supreme Court, Gordon, V.C.J., held that: (1) prosecutorial misconduct in nondisclosure of evidence was not prejudicial under circumstances; (2) pretrial identification procedure was not so unduly suggestive as to effect reliability of surviving victim's identification of defendant; (3) requiring defendant to wear leg, ankle, and waist restraints which jury could not see was not an abuse of discretion; (4) right of defendant to cross-examine a witness for prosecution was not unreasonably limited; (5) photographs of murder scene and victims, though inflammatory, were admissible to aid jury in resolving contract murder theory of prosecution; (6) comments of prosecutor in closing argument were not violative of prohibition against self-incrimination; (7) instructions were not fundamentally erroneous for failing to define reasonable doubt; and (8) imposition of death penalty was based on such aggravating factors as the heinous, cruel and depraved manner in which crimes were committed and was justified.

Affirmed.

1. Criminal Law ⇐730(2)

Opening statements of a prosecutor as to pretrial identifications which had not as yet been ruled admissible, though improper, were not prejudicial in light of trial court's subsequent curative instruction to disregard.

2. Criminal Law ⇐1171.1(1)

Actions of prosecutor in voluntarily submitting to an interview with a reporter who desired a story on case and in posing for photos to accompany article, though improper as a transgression of rules relating to trial publicity, were not prejudicial where trial court questioned all jurors after the article surfaced and, after determining that none of them had read it, ordered jurors not to read the issue of the magazine in which the article appeared. 17A A.R.S.Sup.Ct.Rules, Rule 29(a), Code of Prof.Resp., DR1-102(A)(4, 5), DR7-106(B)(6), DR7-107.

3. Criminal Law ⇐1171.1(1)

Act of county investigator in taking alleged accomplice out of jail, in violation of county jail regulations, to privately visit with his wife, though improper, was not prejudicial when an opportunity was afforded defendant to bring act to jury's attention for use in judging alleged accomplice's credibility.

4. Criminal Law ⇐1171.1(1)

A conviction will be reversed for prosecutorial misconduct only where defendant has been denied a fair trial as a result thereof.

5. Criminal Law ⇐1171.1(1)

A defendant is denied a fair trial because of prosecutorial misconduct if there exists a reasonable likelihood that the misconduct could have affected the jury's verdict.

6. Criminal Law ⇐1154

Whether a reasonable likelihood exists that the misconduct of a prosecutor could have affected the jury's verdict is left to the sound discretion of the trial court.

7. Criminal Law ⇐700(2)

The prosecution must disclose to a defendant information that would tend to absolve the defendant of guilt or mitigate his

punishment. 17 A.R.S.Rules Crim.Proc., Rule 15.1.

8. Criminal Law ⇐700(5)

Untimely disclosure of a police report containing "horribly incriminating" statements attributed to defendant was not violative of disclosure requirement as long as report was excluded from trial and witness through whom report was to be presented never testified at trial. 17 A.R.S.Rules Crim.Proc., Rule 15.1.

9. Criminal Law ⇐700(5)

Failure to disclose, until trial, police officer's handwritten notes with regard to victim's description of her three assailants was not violative of disclosure requirement since notes were consistent with victim's trial testimony and, hence, were inculpatory.

10. Criminal Law ⇐700(5)

Suppression, until trial, of photographs of three suspects arrested the evening of the murders was not prejudicial when trial court sustained defense objection to admission of photographs and ordered to disregard any mention of them.

11. Criminal Law ⇐700(5)

Suppression, until trial, of exculpatory information consisting of police reports regarding arrest of three men on night of murders and regarding financial benefits which the prosecution gave to a witness in exchange for her testimony did not amount to a violation of disclosure requirement as long as such information was revealed at trial.

12. Criminal Law ⇐919(1)

Failure to disclose to defendant exculpatory evidence in form of information regarding various benefits which a witness for prosecution received in exchange for his testimony was not such as to require a new trial since, aside from fact that evidence was merely cumulative when compared to great wealth of impeaching evidence against witness showing both bad character and bias, evidence was not crucial because eyewitness testimony in combination with independent evidence of defendant's participation in crime was more than sufficient to uphold conviction.

13. Criminal Law ⇐919(1)

Test for materiality requiring new trial when evidence has been suppressed by prosecution is whether evidence might have affected outcome of trial.

14. Criminal Law ⇐627.6(1, 2), 627.7(2, 3), 1166(10.10)

Relevant written or recorded statements of witnesses, all statements of defendant and any person who was to be tried with him, photographs which prosecutor planned to use at trial, and all material which tended to reduce or negate defendant's guilt or punishment were items which should have been made available to defendant prior to trial under the discovery rules, but failure to make them available was not prejudicial where items were either excluded from trial or, if admitted, were either exculpatory in nature or, if inculpatory, were found to have been previously disclosed to defendant in their substance. 17 A.R.S.Rules Crim.Proc., Rule 15.1.

15. Criminal Law ⇐1158(4)

A decision as to the fairness and reliability of a challenged identification is a matter for the trial court and, absent a showing of clear and manifest error, will not be overturned on appeal.

16. Constitutional Law ⇐266(3)

A defendant has a due process right to a fair identification procedure. U.S.C.A. Const.Amend. 14.

17. Criminal Law ⇐339.5

Reliability is the key to determining the admissibility of identification testimony.

18. Criminal Law ⇐339.6

A pretrial identification, even if unduly suggestive, is nonetheless admissible if shown to be reliable.

19. Criminal Law ⇐339.8(3)

Identification of defendant made by victim at lineup was admissible, even assuming that lineup procedure was unduly

suggestive, where victim was afforded ample opportunity to observe defendant at time of crime, had a high level of attention during her encounter with defendant, and displayed a good level of certainty despite initial discrepancy in description.

20. Criminal Law ⇐637

A decision as to whether a defendant should be shackled is within the sound discretion of the trial court, but if the defendant objects to being shackled during trial, there must be support in the record for the trial court's decision.

21. Criminal Law ⇐637

Factors which a trial court should consider in shackling a defendant include past felony convictions for crimes of violence as well as prior escapes.

22. Criminal Law ⇐637

Requiring defendant to wear leg, ankle, and waist restraints which were not visible to jury was not an abuse of discretion and, when defendant voluntarily chose to be absent during voir dire, was not violative of defendant's right to be present. A.R.S. Const. Art. 2, § 24.

23. Criminal Law ⇐662.7

A defendant has a right to confront and cross-examine witnesses for bias or self-interest through evidence that witness is under indictment and that prosecution is responsible for prosecuting that indictment. U.S.C.A. Const.Amend. 6; A.R.S. Const. Art. 2, § 24.

24. Witnesses ⇐372(2)

Allowing defendant to cross-examine witness for prosecution as to factual basis supporting an indictment against witness, but prohibiting defendant from specifically mentioning contempt charge which was subject of indictment was not an unreasonable limitation upon defendant's right to cross-examine witness for bias or self-interest, where the indictment was not the responsibility of the prosecutor in the case, but of a special, independent prosecutor, and thus would not have indicated that witness' testimony was colored by any hope of lenient treatment, and ample evidence of witness' bias and self-interest was before jury in any event. U.S.C.A. Const. Amend. 6; A.R.S. Const. Art. 2, § 24.

25. Criminal Law ⇐438(7)

Inflammatory photographs may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice attendant to their admission.

26. Criminal Law ⇐438(7)

A trial court may admit inflammatory photographs to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the murder was committed.

27. Criminal Law ⇐438(7)

Purpose for admission of inflammatory photographs must relate to an expressly or impliedly contested issue before they may be admitted.

28. Criminal Law ⇐438(6)

Inflammatory photographs consisting of a closeup of bullet wound in first victim's right cheek and detail of victim's hands bound behind her back, a full view of bedroom with first victim's body upon the bed and second victim's body on the floor, and a closeup of second victim's face and chest were admissible despite their gruesomeness in order to give the jury a full understanding of the murder scene and to establish that the murders were premeditated, intentional, gangland-style contract killings.

29. Criminal Law ⇐721(3)

Prosecutorial arguments to effect that defendant's failure to testify supports an unfavorable inference against him is violative of statutory and constitutional prohibitions against self-incrimination. U.S.C.A. Const.Amend. 5; A.R.S. § 13-117, subd. B.

30. Criminal Law ⇐721(3)

An impermissible comment upon a defendant's invocation of his right not to tes-

tify occurs when the language used is manifestly intended or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

31. Criminal Law ⇐721(6)

A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence except when the comment is phrased to call attention to the defendant's own failure to testify or it appears that the defendant is the only one who could explain or contradict the state's evidence. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

32. Criminal Law ⇐721(6)

Closing argument wherein prosecutor reflected the State's position that defendant failed to produce exculpatory evidence regarding a certain issue was not violative of state and federal prohibitions when it was not phrased to call attention to defendant's own failure to testify or to fact that defendant was the only one who could explain or contradict the state's evidence. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

33. Criminal Law ⇐1038.1(5)

Instruction to effect that it was the duty of the jury to adopt an interpretation of innocence if the evidence was susceptible of two equally reasonable interpretations, one of the defendant's guilt and the other of his innocence, was not fundamentally erroneous as being too confusing where the other instructions sufficiently informed the jury that it could not convict defendant if a reasonable doubt existed. 17 A.R.S.Rules Crim.Proc., Rule 21.3, subd. c.

34. Criminal Law ⇐789(1, 3)

A trial court must always instruct the jury that the prosecution must prove its case beyond a reasonable doubt, but there is no requirement that the trial court define reasonable doubt for the jury, though it may do so if it sees fit.

35. Criminal Law ⇐801

Failure to provide jury with definition of reasonable doubt until 11 hours after deliberation began was not error, since there was no requirement that trial court define reasonable doubt for jury, as long as it charged on burden of prosecution to prove its case beyond a reasonable doubt, and in any event trial court gave jury both an appropriate written and verbal definition.

36. Criminal Law ⇐1172.2

Verbal instruction which, instead of charging jurors that they must find defendant not guilty in event they had a reasonable doubt, chargeed jurors that they "may" find defendant not guilty was not reversibly erroneous, where trial court had previously read same instruction correctly, and jury at all times had a written copy of instruction with proper language.

37. Criminal Law ⇐1206.1(2)

Death penalty statute [A.R.S. §§ 13–703, 13–703, subd. B] is not unconstitutional as administering cruel and unusual punishment, as placing burden upon defendant with respect to mitigation, as vesting prosecutor with discretion to decide in which cases death penalty will be sought, as failing to adequately define terms "heinous, cruel or depraved," as requiring imposition of death penalty when one aggravating circumstance exists and there are no mitigating factors, as failing to allow jury to take part in sentencing determination, or as failing to give trial court guidance as to what mitigating factors are or as to how mitigating factors are to be weighed against aggravating circumstances. U.S.C.A. Const. Amend. 8.

38. Homicide ⇐354

Imposition of death penalty upon conviction of one count of conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first-degree burglary was justifiably based on such aggravating circumstances as fact that defendant was pre-

viously convicted of a felony involving the use or threat of violence on another person, that defendant committed offense as consideration for receipt of a thing of pecuniary value, and that defendant committed offense in an especially heinous, cruel or depraved manner. A.R.S. § 13–703, subd. F, pars. 1–3, 5, 6.

39. Homicide ⇐354

Aggravating circumstance for death penalty, that defendant knowingly created a grave risk of death to another person or persons in addition to victim of offense, cannot be found when individual is an intended victim of crime, not a bystander in zone of danger during defendant's murderous act, and miraculously survives. A.R.S. § 13–703, subd. F, par. 3.

40. Criminal Law ⇐1208.1(5)

Cruelty in context of aggravating circumstance for death penalty includes infliction of physical pain or mental distress upon victim. A.R.S. § 13–703, subd. F, par. 6.

41. Homicide ⇐354

Concepts of "heinous" and "depraved" in context of aggravating circumstances for death penalty involve killer's vile state of mind at time of murder and include infliction of gratuitous violence or needless mutilation of victim as well as senselessness of crime or helplessness of victim. A.R.S. § 13–703, subd. F, par. 6.

42. Criminal Law ⇐1134(2)

A review of the death penalty in a capital case requires the Supreme Court to examine prior cases to determine whether the penalty in the instant case is excessive or disproportionate to the penalty in the prior cases considering both the crime and the perpetrator. A.R.S. § 13–703.

Robert K. Corbin, Atty. Gen., William J. Schafer, III, Chief Counsel, Crim. Div., Gerald R. Grant, Asst. Atty. Gen., Phoenix, for appellee.

J. Douglas McVay, Phoenix, for appellant.

GORDON, Vice Chief Justice:

On December 24, 1982 a jury found defendant, William Bracy,[1] guilty of one count of conspiracy to commit first degree murder, two counts of first degree murder, one count of attempted first degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first degree burglary.

Defendant was subsequently sentenced to death for each count of first degree murder, to life imprisonment for conspiracy to commit first degree murder, and to approximately 140 years for the other crimes. This Court has jurisdiction under Ariz. Const. art. 6, § 5(3) and A.R.S. § 13–4031. We affirm the convictions and sentences.

The facts, viewed in the light most favorable to upholding the verdict, show that Pat Redmond and Ron Lukezic were partners in a successful printing business called Graphic Dimensions. In the summer of 1980, Graphic Dimensions was presented with the possibility of some lucrative printing contracts with certain hotels in Las Vegas. These deals fell through, however, when Pat Redmond and perhaps Ron Lukezic vetoed the idea.

In September of 1980, Robert Cruz asked Arnold Merrill if he would kill Pat Redmond for $10,000. Merrill declined. Cruz wanted Redmond killed in order to get Redmond's interest in Graphic Dimensions. Cruz ultimately planned to have Ron Lukezic killed as well and take complete control of Graphic Dimensions. In early December of 1980, Cruz and Merrill went to the Phoenix Airport and picked up defendant and Murray Hooper who arrived on a flight from Chicago. Cruz and Merrill then took defendant and Hooper to a hotel in Scottsdale, and Cruz gave defendant a key to one of the rooms.

1. In *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1984), Mr. Bracy's last name was spelled "Bracey," and his name appears that way on some Illinois records. In the instant case, however, his name appears as "Bracy" on most records, and we will use this spelling here.

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

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

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

Defendant was tried with Hooper. Marilyn Redmond provided the most damning evidence against defendant, stating that he and Hooper, along with McCall, forcibly entered her home and committed the murders. Arnold Merrill and several other witnesses tied defendant and Hooper to the conspiracy to kill Pat Redmond. Although admitting they were in Phoenix in early December, the defendant and Hooper maintained they had no part in the plot to kill Pat Redmond. Rather, they contended that Arnold Merrill and other local criminals, as part of a robbery ring, framed both defendant and Hooper for the murders which probably resulted from a robbery attempt. Defendant and Hooper also maintained that Mrs. Redmond misidentified them and that they were in Chicago on New Year's Eve of 1980.

Defendant raises a number of issues.

I. PROSECUTORIAL MISCONDUCT

Defendant alleges that prosecutors Joseph L. Brownlee and Michael D. Jones, as well as their chief investigator Dan Ryan,[2] engaged in continuous misconduct denying defendant his right to a fair trial. The alleged instances of misconduct involve prosecutorial nondisclosure of evidence and misconduct exclusive of nondisclosure of evidence.

A. Misconduct Exclusive of Failure to Disclose Evidence

Having reviewed the alleged instances of prosecutorial misconduct, we discuss the following, examining whether misconduct occurred.

[1] First, in opening statement, the prosecutor stated that Nina Marie Louie

2. The trial judge evidently considered Dan Ryan as part of the prosecution team, imputing his misconduct to the prosecution. We agree. Mr. Ryan was employed by the County Attorney and he answered directly to Mr. Brownlee. Mr. Brownlee was responsible for his actions.

made positive pretrial identifications of both defendant and Hooper. The trial judge, however, had not yet decided whether those pretrial identifications were admissible, and he later ruled them inadmissible. Though allowing Louie to make in-court identifications of both defendant and Hooper, the trial court instructed the jurors to disregard the prosecutor's remarks concerning the pretrial identifications. As the trial court had not yet decided whether the pretrial identifications were admissible, the prosecutor's statements were baseless and improper.

Defendant next alleges misconduct in prosecutor Joseph L. Brownlee's appearance in the November 1982 issue of *Phoenix Magazine*.[3] On September 28, 1982 Mr. Brownlee and all other lawyers in this case agreed with the trial judge not to contact the media. Prior to this agreement, Brownlee voluntarily interviewed with a *Phoenix Magazine* reporter who desired a story on Brownlee and the Redmond murders. Brownlee discussed, among other things, where he was and what he was doing New Year's Eve of 1980 when he heard about the murders, how he then spent the entire night and part of the next day investigating the murders, how inspirational Mrs. Redmond had been, his philosophy of prosecuting, and his favorite past case. After the September 28th agreement, Brownlee posed for photos to accompany the article.

[2] Even assuming the parties had not agreed to contact the media, Mr. Brownlee's actions were improper as a transgression of rules relating to trial publicity. *See* Rule 29(a), DR 7-107, Ariz.R.S.Ct. in effect at the time of the trial. In addition, by posing for photos to accompany the article after having agreed not to contact the media, Mr. Brownlee blatantly violated an agreement with the trial court. *See* DR 1-102(A)(4), (5); DR 7-106(B)(6). Mr. Brownlee's behavior was improper.

3. The trial in this matter began in late October of 1982.

[3] Defendant next alleges that county attorney investigator Dan Ryan allowed Arnold Merrill to go free of custody in violation of Maricopa County Jail regulations to visit his wife for sexual relations. The record at least reveals that Dan Ryan took Arnold Merrill out of jail to privately visit his wife. This action was certainly improper.

1) Prejudice resulting from misconduct

[4-6] We now examine the prejudice resulting from the above three instances of misconduct. We will reverse a conviction only where the defendant has been denied a fair trial as a result of prosecutorial misconduct. *State v. Hallman*, 137 Ariz. 31, 668 P.2d 874 (1983); *State v. Moore*, 108 Ariz. 215, 495 P.2d 445 (1972). A defendant is denied a fair trial because of prosecutorial misconduct if there exists a reasonable likelihood that the misconduct could have affected the jury's verdict. *See State v. Tuzon*, 118 Ariz. 205, 575 P.2d 1231 (1978). Whether a reasonable likelihood exists that the misconduct could have affected the jury's verdict is left to the sound discretion of the trial court. *State v. Gonzales*, 105 Ariz. 434, 466 P.2d 388 (1970).[4]

We do not believe a reasonable likelihood exists that the misconduct affected the verdict. No prejudice resulted to defendant from Mr. Brownlee's improper opening statements concerning pretrial identification. The trial court prohibited Nina Marie Louie from testifying regarding the pretrial identifications. Immediately after allowing Louie to identify defendant in court, the trial court instructed the jury to disregard the prosecutor's statement regarding the pretrial identification. The trial court's curative instruction, therefore, nullified any prejudice defendant suffered from the prosecutor's improper statement. *See State v. Means*, 115 Ariz. 502, 566 P.2d 303 (1977) (in light of trial court's curative instruction, trial court did not abuse discre-

4. The trial court denied numerous defense motions for mistrial based upon prosecutorial misconduct.

tion in refusing to order new trial because of prosecutor's improper closing argument).

Though we are disturbed by Mr. Brownlee's misconduct regarding trial publicity, we cannot say any prejudice resulted. After the article surfaced, the trial judge questioned all the jurors, determining that none of them had read it. In addition, the trial court ordered the jurors not to read the issue of the magazine in which the article appeared.

As to Dan Ryan's letting Arnold Merrill out of jail to privately visit his wife, we cannot say it caused prejudice to defendant. The defense brought the information to the jury's attention for the jury to use in judging Merrill's and Ryan's credibility. We find no abuse of discretion.

B. Prosecutorial Nondisclosure of Evidence

Defendant alleges that numerous instances of prosecutorial nondisclosure of evidence warrant a new trial. Such nondisclosure concerns the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Rule 15.1, Ariz.R. Crim.P. 17 A.R.S., the codification of *Brady*.

1) Alleged Instances of Nondisclosure

Defendant alleges the following instances of prosecutorial nondisclosure of evidence: the untimely disclosure of a police report containing "horribly incriminating" statements attributed to defendant; the failure to disclose, until trial, Officer Perez's handwritten notes that were consistent with Mrs. Redmond's testimony regarding the description of the three assailants even though his police report contradicted her testimony; the suppression, until trial, of photographs of three black men arrested New Year's Eve of 1980 who were later released; the suppression, until trial, of police reports regarding the arrests of the three men on the 31st; and the failure to disclose benefits totaling $878.00 the prosecution gave to Nina Marie Louie in exchange for her testimony.

The next instance of prosecution suppression of evidence first came to light after trial. Both defendants moved to vacate judgment based on this evidence, and the trial court held hearings on this motion as a result of which the court found the following items had never been disclosed to defendant:

1) Prior to trial, Dan Ryan, county attorney investigator, made car payments for Arnold Merrill's wife, Cathy Merrill, totaling over $800.00 for which Ryan received only partial reimbursement;

2) Mrs. Merrill also received approximately $3,000 from the Maricopa County Attorney's Protected Witness Program;

3) Arnold Merrill made approximately twenty-two long distance phone calls from the county attorney's office, some of which were with Dan Ryan's knowledge, others of which Merrill made while left unattended in Ryan's custody, and none of which he paid for.

Although finding all of the above items a direct and significant benefit to the Merrills, the trial court refused to vacate judgment because independent reliable evidence tied defendant to the conspiracy and to the murders and because the undisclosed evidence was cumulative.

2) Propriety of New Trial Under Brady

[7] The United States Constitution requires the prosecution to disclose to a defendant information that would tend to absolve the defendant of guilt or mitigate his punishment. *Brady v. Maryland, supra.* This disclosure requirement exists regardless of the good faith or bad faith of the prosecution. *Id; State v. Lukezic*, 143 Ariz. 60, 691 P.2d 1088 (1984).

[8, 9] As to five of the above instances of nondisclosure, we find no *Brady* violations. The police report containing "horribly incriminating information" was excluded from trial, and the witness through which the evidence was to be presented never testified at trial. Failure to disclose inculpatory evidence is not a *Brady* violation. *See United States v. Agurs*, 427 U.S.

97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady v. Maryland, supra.* In addition, as the evidence was never presented at trial, defendant could not have suffered any prejudice. The same rule applies to Officer Perez's notes, which were inculpatory in that they were consistent with Mrs. Redmond's trial testimony. *See, United States v. Agurs, supra; Brady v. Maryland, supra.*

[10] Regarding the photographs of the three suspects arrested the evening of the murders, defense counsel objected to their admission, and the trial court excluded the photographs. Thus, either these photographs were not exculpatory or defense counsel did not want them in evidence for some other reason. As the trial court sustained the defense objection to admission of the photographs and ordered the jury to disregard any mention of them, defendant did not suffer prejudice from the nondisclosure of this evidence.

[11] Regarding the police report concerning the three persons arrested New Year's Eve and the agreement with Nina Marie Louie, though all these items were exculpatory, this information came to light during trial and defendant made use of it. When previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no *Brady* violation. *State v. Jessen,* 130 Ariz. 1, 633 P.2d 410 (1981).

[12] As to the benefits Arnold Merrill received, we find that they were exculpatory in nature and were never disclosed to defendant. Having determined that the prosecution suppressed exculpatory evidence, we must next determine whether a new trial is warranted. The prosecution's failure to disclose exculpatory evidence to a defendant will result in a new trial when the suppressed evidence is material. *United States v. Agurs, supra, Brady v. Maryland, supra.* Absent an abuse of discretion, however, we will not disturb the trial court's denial of a new trial. *State v. Fisher,* 141 Ariz. 227, 686 P.2d 750 (1984).

We employ a sliding scale analysis in determining what level of materiality must be proven to establish that a *Brady* violation requires a new trial. See *United States v. Agurs, supra; Talamante v. Romero,* 620 F.2d 784, (10th Cir.1980), *cert. denied,* 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99; *State v. Lukezic, supra.* In *Agurs,* the United States Supreme Court announced three categories of undisclosed evidence requiring three different levels of materiality: first, in those cases in which the prosecution has knowingly used perjured testimony, the conviction must be set aside if there exists a reasonable likelihood that the false testimony could have affected the jury's verdict; second, where a pretrial request has been made for specific evidence, the judgment must be vacated if the suppressed evidence might have affected the outcome of the trial; and third, where there has been a general request for *Brady* material or no request at all, the test of materiality is whether "the omitted evidence creates a reasonable doubt [as to the defendant's guilt] that did not otherwise exist." *United States v. Agurs,* 427 U.S. at 112, 96 S.Ct. at 2402, 49 L.Ed.2d at 355; *Talamante v. Romero, supra; State v. Lukezic, supra.*

[13] As there were specific defense requests for the undisclosed information concerning Arnold Merrill, the evidence fell under the second *Agurs* category. The defense filed a detailed discovery request demanding discovery of any benefits received by state witnesses in exchange for their testimony. As the undisclosed evidence in the instant case fits under the second *Agurs* category, the test for materiality is whether the suppressed evidence might have affected the outcome of the trial. *United States v. Agurs, supra; Talamante v. Romero, supra; State v. Lukezic, supra; see also,* 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.5 (1984).

After carefully reviewing the record in the instant case, we find the suppressed evidence regarding benefits to Arnold and Cathy Merrill does not reach the level of materiality required by *Agurs.*

We so hold for two reasons. First, we find the undisclosed evidence merely cumulative. *See State v. Maddasion*, 130 Ariz. 306, 636 P.2d 84 (1981). The defense possessed and used a wealth of impeaching evidence against Arnold Merrill. Such evidence included Merrill's plea bargain with the state; his extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police officers; and his private out-of-jail visit with his wife while being incarcerated for first degree murder. Though we find at least two of the undisclosed benefits somewhat unusual and improper, they do not approach the degree of seriousness of the undisclosed benefits in *State v. Lukezic, supra.* Thus, in view of the great wealth of impeaching evidence against Arnold Merrill showing both bad character and bias, we do not believe the disclosure of benefits equaling several thousand dollars would have had any effect upon the outcome of the trial.

Second and more importantly, the strong eyewitness testimony of Mrs. Redmond in combination with independent evidence of defendant's participation in the conspiracy is more than sufficient to uphold the convictions. Mrs. Redmond testified that defendant, Hooper, and McCall entered her home at gunpoint and killed her husband and mother. This evidence was particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home. In addition, evidence apart from that presented through Merrill showed defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond.

Unlike *State v. Lukezic, supra,*[5] therefore, Arnold Merrill's testimony in the instant case was merely corroborative and not pivotal. Furthermore, the undisclosed information impeaching him and Dan Ryan had no effect upon the key testimony of Marilyn Redmond. Finally, unlike *Lukezic,* falsifications of George Campagnoni's probation report were disclosed in the instant case, thus allowing the jury to fully judge his credibility. Campagnoni along with several other witnesses, exclusive of Arnold Merrill, provided important testimony linking defendant to the conspiracy. Thus, we do not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond and the other evidence. Nor would it have had any effect on whatever opinion the jury had of Merrill's credibility. *See also Schmanski v. State*, 466 N.E.2d 14 (Ind.1984). We find no abuse of discretion.

3) Propriety of a New Trial Under the Arizona Discovery Rules

a) Whether a Violation of Arizona Discovery Rules Occurred

[14] Rule 15.1, Ariz.R.Crim.P., 17 A.R.S., requires the prosecution to supply the defense a wide range of discovery material. We believe all of the above discussed non-disclosed evidence should have been made available to defendant. *See* Rule 15.1(a)(1) (relevant written or recorded statements of witnesses); (a)(2) (all statements of defendant and any person who will be tried with him); (a)(4) (photographs which prosecutor will use at trial); (a)(7) (all material which tends to reduce or negate defendant's guilt or punishment).

b) Prejudice under the Arizona Discovery Rules

As with *Brady* violations, not every Rule 15.1 violation will cause a reversal. Imposition of sanctions under Rule 15.7 is within the sound discretion of the trial court. *State v. Stewart*, 139 Ariz. 50, 676 P.2d 1108 (1984). The trial court's choice of a sanction or no sanction will not be reversed on appeal absent a showing of prejudice. *State v. Jessen, supra.*

5. In *State v. Joyce Lukezic, supra,* the defendant was accused of participating in the conspiracy to kill Patrick Redmond. No direct evidence linked defendant to the crime. Rather, numerous witnesses, most importantly Arnold Merrill and George Campagnoni, tied Lukezic to the conspiracy through hearsay evidence.

We find the trial court did not abuse its discretion and that defendant was not prejudiced by the prosecution's violations of Rule 15.1. As to the police report containing incriminating statements attributed to defendant, it was excluded from trial. Regarding the photographs of the three persons arrested New Year's Eve, the trial judge excluded them from evidence and ordered the jury to disregard any mention of them. Concerning Nina Marie Louie's agreement with the prosecution, both defense lawyers made use of this information as it was exculpatory. The same is true for the police reports detailing the arrests of the three persons the evening of the murder.

As to the more inculpatory evidence contained in Officer Perez' notes, the trial court ordered the prosecution to immediately furnish the defense with copies of the notes, thus allowing defendant to cross-examine Officer Perez regarding the conflict between his notes and his police report. Second, though the prosecution had previously failed to supply defendant with the notes, the existence and contents of the notes were revealed in the Cruz-McCall trial, the transcript of which defendant possessed. Thus, the substance of the notes was disclosed to defendant.

Finally, for the same reasons stated in our *Brady* analysis, we do not think the trial court abused its discretion by refusing to vacate judgment under the Arizona Rules of Criminal Procedure because of the undisclosed benefits to Arnold Merrill.

Though we find a new trial is unwarranted in the instant case, we wish to express our dissatisfaction with the conduct of the prosecution. In ruling on defendant's motion to vacate judgment, the trial judge made the following observations:

> "The Court further determines that a cavalier, almost holier-than-thou attitude existed on the part of some of the prosecution team as evidenced by the overreaching, 'I didn't think it mattered' blase at times, disinterested, its-none-of-your-business attitudes taken at various points during these entire proceedings.
>
> "These attitudes hampered the smooth processing of these matters during all stages and at all times caused unnecessary antagonisms between the prosecution and defense teams.
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> * * * * * *
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> "The Court is further disturbed by the fact that at every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit."

With their staggering caseload, the last thing courts need is prosecutorial conduct that causes cases to be extended to accommodate hearings that are not only unnecessary, but are distracting and expensive. We share the trial court's displeasure at the prosecution's disclosure policies in this case.

II. PRETRIAL IDENTIFICATION

[15] Defendant next contends that the trial court erred in finding that the pretrial identification procedure in which Marilyn Redmond identified defendant was not unduly suggestive. The fairness and reliability of a challenged identification are preliminary matters for the trial court, whose findings will not be overturned on appeal absent a showing of clear and manifest error. *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (1980); *State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978).

[16–18] Criminal defendants have a due process right to a fair identification procedure. *State v. Myers*, 117 Ariz. 79, 570 P.2d 1252 (1977); *State v. Nieto*, 118 Ariz. 603, 578 P.2d 1032 (App.1978). Reliability is the key to determining the admissibility of identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920, *cert. denied*, —— U.S. ——, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1983). *State v. Nieto, supra.* Thus, even if a pretrial identification is unduly suggestive, it is nonetheless admissible if the wit-

ness' identification is reliable. *Manson v. Brathwaite, supra. State v. McCall, supra.* Reliability is determined by considering the factors set out in *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[19] Assuming, without deciding, that the lineup procedure was unduly suggestive, we find the identification reliable under the five *Biggers* factors.[6] First, Mrs. Redmond had ample opportunity to observe defendant at the time of the crime. After she first encountered defendant in the well-lighted laundry room, defendant led Mrs. Redmond through her house at gunpoint speaking to her several times. During this time Mrs. Redmond had no difficulty seeing defendant's face or body, and she also got a good look at him in her well-lighted bedroom.

During her encounter with defendant, Mrs. Redmond had a high level of attention. Though she was frightened to a certain degree, Mrs. Redmond stated that she was paying attention to the faces of all three intruders in the house. She was not just a casual observer of defendant, but rather her attention was focused on the suspect. *See State v. Ware,* 113 Ariz. 337, 554 P.2d 1264 (1976).

The accuracy of Mrs. Redmond's description was hotly contested at trial, with the defense arguing that Mrs. Redmond's first descriptions of her assailants indicated that three black men, two of whom were masked, were the murderers. Regarding the reference to three black males, we believe the evidence shows that, at the scene, Mrs. Redmond initially said all three men were black, but that she corrected herself, saying, "no, one was white." The record supports the inference that this discrepancy was caused by difficulties Mrs. Redmond had in communicating immediately following the gunshot wound to her head. Furthermore, though some accounts indicate that Mrs. Redmond initially stated that one or two of the assailants wore masks, other testimony shows that Mrs. Redmond never mentioned masks following the crime. Mrs. Redmond herself never recalled mentioning masks, and her testimony indicated that none of the intruders wore masks. Her other initial descriptions of the two black men were not particularly detailed. Examining the totality of the circumstances regarding this factor, we do not find the discrepancies in the descriptions to be *per se* unreliable. *See State v. McCall, supra.*

Mrs. Redmond displayed a good level of certainty at the lineup. When she first viewed the lineup containing defendant, she did not immediately identify him. Rather, she left the room for a period of time and later returned. She then identified Hooper in a different lineup. She then requested that the first lineup be reassembled, at which time she quickly identified defendant. Mrs. Redmond testified that she had picked out defendant in her mind during the first lineup but that she wanted to verify his height. When she again saw him she said she was positive that defendant was one of the assailants. Thus, despite her initial hesitancy, we find Mrs. Redmond's level of certainty more indicative of reliability than not.

Mrs. Redmond's identification of defendant came fifty-three days after the crime. Whether the length of time between the crime and the pretrial identification is too long depends upon the facts of each case; there is no *per se* rule. *See State v. Strickland,* 113 Ariz. 445, 556 P.2d 320 (1976) (ten days too long where witness saw attacker for very brief moment and at a point in time where she had no discernible interest in remembering what perpetra-

6. We restated those five factors in *State v. McCall, supra:*
(1) the opportunity of the witness to view the criminal at the time of the crime,
(2) the witness' degree of attention,
(3) the accuracy of the witness' prior description of the criminal,
(4) the level of certainty demonstrated by the witness at the confrontation, and
(5) the length of time between the crime and the confrontation.

tor looked like); *State v. McCall, supra* (fourteen days not too long where victim had ample opportunity to observe attacker at time of crime and where victim gave detailed description of attacker). In the instant case, in light of Mrs. Redmond's ample opportunity to observe defendant at the time of the crime, her high level of attention at the time of the crime, and her good level of certainty at the lineup, Mrs. Redmond's identification of defendant fifty-three days after the crime was not unreliable.

Based upon the foregoing factors, we find no clear and manifest error in admitting evidence of Mrs. Redmond's pretrial identification of defendant.

III. SHACKLING OF DEFENDANT

Prior to jury selection, the trial judge ordered that defendant wear leg, ankle, and waist restraints so long as his arms were not confined in front of the jury. Fearing the jury would see the shackles, defendant chose to waive his presence during voir dire. He maintains the trial court's actions denied him his right to be present under Ariz. Const. art. 2, § 24.

[20] Whether a defendant will be shackled is within the sound discretion of the trial court. *State v. Stewart*, 139 Ariz. 50, 676 P.2d 1108 (1984); *State v. Reid*, 114 Ariz. 16, 559 P.2d 136 (1976), *cert. denied*, 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977). Further, when a defendant objects to being shackled during trial, there must be support in the record for the trial court's decision. *State v. Stewart, supra.*

[21] The record revealed that defendant had a long history of violent crime, at least one escape conviction, and was under three death sentences in Illinois arising from a triple first degree murder. Factors a trial court may consider in shackling a defendant include past felony convictions for crimes of violence as well as prior escapes. *State v. Stewart, supra; State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979).

7. He was later acquitted of this charge.

[22] Here, the trial court took extensive precautions to assure that defendant's restraints would not be visible to the jury. *See State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637, *cert. denied*, —— U.S. ——, 104 S.Ct. 180, 78 L.Ed.2d 161 (1983) (appellate court will not find error on ground that defendant shackled unless it is shown jury saw shackles). In view of defendant's background, we do not think the trial court abused its discretion in ordering defendant to wear restraints the jury could not see. Thus, as defendant was properly restrained, he was not denied his right to be present when he voluntarily chose to be absent during voir dire.

IV. LIMITATION OF CROSS-EXAMINATION

Defendant next argues that the trial court committed reversible error by limiting defendant's cross-examination of investigator Dan Ryan.

Mr. Ryan's investigatory techniques concerning the Redmond murders resulted in a contempt of court citation in the *State v. Joyce Lukezic* trial.[7] During the instant case, the defense brought to light many of the allegations of wrongdoing by Mr. Ryan. In reaction, the prosecution called Mr. Ryan as a rebuttal witness, and Mr. Ryan then denied any wrongdoing. Though allowing cross-examination about the factual basis supporting the contempt charge, the court prohibited the defense from mentioning the contempt charge. Defendant submits that the trial court's action denied him his right to confront and cross-examine witnesses guaranteed him by the sixth amendment to the United States Constitution and by art. 2, § 24 of the Arizona Constitution.

[23] Defendants have a sixth amendment right to confront and cross-examine witnesses. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *State v. Dunlap*, 125 Ariz. 104, 608 P.2d 41 (1980). Furthermore, a witness' bias or self-interest may be shown by proving that

the witness is under indictment and that the prosecution is responsible for prosecuting that indictment. See *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); McCormick on Evidence, § 40, at 87 (E. Cleary 3rd Ed.1984). We allow a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal. *State v. Dunlap, supra.*

[24] In the instant case we do not find an unreasonable limitation of the cross-examination right. First, the County Attorney prosecuting the instant case was not involved in prosecuting Mr. Ryan for contempt. Rather, a special, independent prosecutor had responsibility for prosecuting Mr. Ryan. Thus, the pending indictment would not have indicated that Mr. Ryan's testimony was colored by any hope of lenient treatment from the County Attorney. Second, the jury had before it ample evidence showing Mr. Ryan's bias and self-interest. Mr. Ryan was the prosecution's chief investigator answering directly to Mr. Brownlee, and the alleged instances of misconduct were serious. The jury could understand that he had bias and motives for testifying as he did. *See Skinner v. Cardwell*, 564 F.2d 1381, 1389 (9th Cir.1977) (test of reasonable limit on cross-examination is whether jury is otherwise in possession of sufficient information to assess the bias and motives of the witness). *See also United States v. Kelly*, 545 F.2d 619, (8th Cir.1976), *cert. denied*, 430 U.S. 933, 97 S.Ct. 1555, 51 L.Ed.2d 777 (1977); *United States v. Turcotte*, 515 F.2d 145 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1032, 96 S.Ct. 564, 46 L.Ed.2d 406 (1975).

V. INFLAMMATORY PHOTOGRAPHS

Defendant next argues that the trial court committed reversible error in admitting inflammatory photographs because their prejudicial effect outweighed their probative value.

[25] Inflammatory photographs may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice attendant to their admission. *State v. McCall, supra; State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983). The decision to admit such photographs is within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of that discretion. *State v. McCall, supra; State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

[26, 27] In making its decision, the trial court must look to the purpose of the offer. *State v. Routhier*, 137 Ariz. 90, 669 P.2d 68 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 985, 79 L.Ed.2d 221 (1984); *State v. Chapple, supra.* A trial court may admit photographs to prove the *corpus delicti*, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the murder was committed. *State v. Chapple, supra; State v. Thomas*, 110 Ariz. 120, 515 P.2d 865 (1973). The purpose for the photograph's admission, however, must be an expressly or impliedly contested issue. *State v. Chapple, supra.* We find no abuse of discretion in the instant case.

In *State v. McCall, supra*, we considered seven of the same photographs admitted in the instant case. These photographs show Mrs. Phelps' wounds and Mr. Redmond's wounds. Four of the autopsy photographs were inflammatory. We, however, found that their probative value outweighed their prejudicial effect. Concerning two other autopsy photographs, we found them cumulative but not inflammatory and, therefore, not prejudicial. As to the seventh photograph depicting Patrick Redmond's body lying on the bedroom floor of his home, we found it inflammatory. We held, however, that it was relevant and that its probative value outweighed its prejudicial effect. The issues relating to these seven photographs are the same in the instant case as in *McCall.* Thus, for the reasons stated in *McCall*, the trial court in the

instant case did not abuse its discretion in admitting the photographs.

Defendant additionally objected to the admission of seventeen other photographs, only four of which are inflammatory and demand discussion. These are detailed depictions of the victims at the murder scene. The first is a closeup of Mrs. Phelps showing the bullet wound in her right cheek. It is not extremely bloody but is somewhat inflammatory. The next photograph is a detail of Mrs. Phelps' hands bound behind her back. Some blood smears are visible and the photograph is slightly gruesome. The next is a full view of the bedroom with Mrs. Phelps' body upon the bed and Mr. Redmond's on the floor. Though neither body appears in great detail, a large amount of blood appears on the bed. The photograph is inflammatory. The last photograph is a closeup of Mr. Redmond's face and chest. The bullet wound above his ear and his cut throat are clearly visible, a sock is stuffed in his mouth, and a great amount of blood covers his face and saturates his shirt. This photograph is clearly inflammatory.

[28] Though the above four photographs are inflammatory to varying degrees, we hold that the trial court did not abuse its discretion in admitting them. First, these photographs gave the jury a complete view of the murder scene. By seeing closeups of faces, tied hands, and the gagged mouth in combination with photographs showing the location of the bodies, the jury could gain a full understanding of the murder scene, the identity of the victims, and how the murders were committed. These photographs alleviated the need for the jury to speculate as to these matters. *See State v. McCall, supra.*

Second, the photographs supported the state's theory of the case. The state alleged that these were premeditated, intentional, gangland-style contract killings. Though the less gruesome autopsy photographs tended to support this theory, *State v. McCall, supra,* the at-the-scene photographs provided the most convincing evidence of that theory. These photographs showed the binding, gagging, and the systematic method of killing, while the autopsy photographs show only the method of killing.

Finally, though defendant and Hooper offered to stipulate as to the identity of the victims and to the time, mode, manner, and cause of their deaths, such an offer of stipulation does not make the photographs inadmissible. An expressly and impliedly contested issue at trial was whether the murders were premeditated contract killings or whether they were murders committed by local criminals during a robbery attempt. The photographs support the contract murder theory. Further, despite defendant's stipulation, we cannot compel the state "to try its case in a sterile setting." *State v. Chapple,* 135 Ariz. at 289–90, 660 P.2d at 1216. Some of these photographs were gruesome, but the jury may see such photographs if they are relevant and more probative than prejudicial. We find no error.

VI. PROSECUTORIAL COMMENTS IN CLOSING ARGUMENT

Defendant next argues that the prosecutor's final rebuttal argument contained impermissible references to defendant's failure to testify. The prosecutor stated:

> "[MR. BROWNLEE:] Mr. Woods told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect."

[29] The fifth amendment's prohibition against self-incrimination prohibits prosecution arguments that a defendant's failure to testify supports an unfavorable inference against him. *Lakeside v. Oregon,* 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Fuller,* 143 Ariz. 571, 694 P.2d 1185 (1985). Such conduct also violates a state statute, A.R.S. § 13–117(B), which has been

raised to the level of a constitutional guarantee. *State v. Fuller, supra.*

[30, 31] Thus, under both Arizona and Federal law, an impermissible comment upon a defendant's invocation of his right not to testify occurs when "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *United States v. Soulard,* 730 F.2d 1292, 1306 (9th Cir.1984); *State v. Fuller, supra.* The prosecutor, however, may properly comment upon the defendant's failure to present exculpatory evidence except when (1) the comment is phrased to call attention to the defendant's own failure to testify, or (2) it appears that the defendant is the only one who could explain or contradict the state's evidence. *State v. Fuller, supra; United States v. Soulard, supra; State v. Still,* 119 Ariz. 549, 582 P.2d 639 (1978).

[32] We find no violation of defendant's fifth amendment rights. The prosecutor's statement reflected the state's position that defendant failed to produce exculpatory evidence regarding a certain issue. It was not phrased to call attention to defendant's own failure to testify, nor does it appear from the record that defendant was the only one who could explain or contradict the state's evidence.

VII. JURY INSTRUCTIONS

Defendant argues that three alleged errors in the giving of instructions denied him a fair trial.

[33] First, the trial court gave the following instruction without objection from either defense counsel:

> "The state must prove the defendant's guilt beyond a reasonable doubt. If the evidence is susceptible of two equally reasonable interpretations, one of the defendant's guilt and the other of his innocence, it is your duty to adopt the interpretation of innocence."

Defendant now maintains that though he failed to object to the instruction, the giving of the instruction was fundamental error. Rule 21.3(c), Ariz.R.Crim.P.; *State v. Tison,* 129 Ariz. 526, 633 P.2d 335 (1981), *cert. denied,* 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We find no fundamental error. The trial court's other instructions sufficiently informed the jury that it could not convict defendant if a reasonable doubt existed. This instruction could not have confused the jury. If anything, the instruction was advantageous to defendant, *see State v. Harvill,* 106 Ariz. 386, 476 P.2d 841 (1970); *State v. Canedo,* 115 Ariz. 60, 563 P.2d 315 (App.1977), vacated on other grounds, 125 Ariz. 197, 608 P.2d 774 (1980), and he could not have been prejudiced by it.

Next, defendant argues that the trial court committed reversible error by failing to provide the jury a definition of reasonable doubt until eleven hours after deliberations began. Though the court had intended to do so, it failed to give either a written or verbal definition of reasonable doubt. When the court realized its oversight, it reassembled the jury and read all the instructions, adding the reasonable doubt definition both verbally and in written form. The next day, the jury returned its verdicts. We find no error.

[34, 35] First, though the trial court must always instruct the jury that the prosecution must prove its case beyond a reasonable doubt, there is no requirement that a trial court define reasonable doubt for the jury. The court, however, may do so if it sees fit. *State v. Hatton,* 116 Ariz. 142, 568 P.2d 1040 (1977); *State v. Canedo, supra; see also United States v. Miller,* 688 F.2d 652 (9th Cir.1982); *United States v. Witt,* 648 F.2d 608 (9th Cir.1981). Thus, even the total failure to define reasonable doubt could not have resulted in reversal. Second, the trial court eventually defined reasonable doubt for the jury, giving it both an appropriate written and verbal definition.

[36] Finally, defendant claims the trial court committed reversible error during the rereading of the instructions. Regarding

identification evidence, the trial court stated:

> "If after examining the [identification] testimony you have a reasonable doubt as to the accuracy of the identification, you *may* [instead of must] find the defendants not guilty." (emphasis added).

Defense counsel pointed out the court's mistake, but the court declined to reread the instructions a third time stating that the jury had the correct law in written form.

We find no reversible error. The trial court had correctly read the same instructions to the jury the previous day, and the jury at all times had a written copy of the instruction with proper language. Reading the instructions as a whole, we do not believe the jury would have been mislead by the trial court's mistake. *See Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *see also* 75 Am.Jur.2d, *Trial* § 925 (1974).

VIII. DEATH PENALTY ISSUES

A. Constitutionality

[37] Defendant next argues that the Arizona death penalty is unconstitutional because (1) the jury takes no part in the sentencing determination; (2) A.R.S. § 13-703(B) gives the trial court no guidance as to what the mitigating factors are; (3) A.R.S. § 13-703 gives the trial judge no guidance on how to weigh mitigating factors against aggravating circumstances; (4) the death penalty is cruel and unusual; (5) the burden of proof is placed upon defendant with respect to mitigation; (6) the prosecutor has discretion to decide in which cases the death penalty will be sought; (7) Arizona has not adequately defined the terms "heinous, cruel or depraved"; and (8) Arizona law requires imposition of the death penalty when one aggravating circumstance exists and there are no mitigating factors.

We have previously considered and rejected all these arguments and do so again today. *See State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) (jury sentencing); *State v. Mata*, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938, 101 S.Ct. 338, 66 L.Ed.2d 161 (1980) (what is a mitigating factor and how is it weighed); *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 298, 53 L.Ed.2d 1101 (1977) (death penalty not cruel and unusual); *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57, *cert. denied*, —— U.S. ——, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983) (burden on defendant to show mitigating circumstances); *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980), *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) (prosecutorial discretion); *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982) (adequate definition of "heinous, cruel, or depraved"); *State v. Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983) (death penalty not unconstitutional because it requires death sentence if one or more aggravating circumstances outweigh mitigating factors).

B. Propriety of the Death Sentence in This Case

As in all death penalty cases this Court independently reviews the record determining the existence and weight of aggravating circumstances and the propriety of the sentence. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985).

[38] In imposing the death penalty, the trial court found five aggravating circumstances: A.R.S. §§ 13-703(F)(1), -703(F)(2), -703(F)(3), -703(F)(5), and -703(F)(6).

We find the existence of A.R.S. § 13-703(F)(1), that "defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." On September 9, 1981, a judgment of conviction was entered and death penalty imposed against defendant in Cook County, Illinois for three counts of first degree murder.

We also find the existence of A.R.S. § 703(F)(2) that "defendant was previously convicted of a felony in the United States involving the use or threat of violence on

another person." On September 9, 1981 judgment was entered against defendant in Cook County, Illinois on three counts of armed robbery and three counts of aggravated kidnapping. We take judicial notice that all these crimes involve the use or threat of violence against others. *See State v. Nash, supra.*

[39] We do not find the existence of A.R.S. § 13-703(F)(3) that "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." As we held in *State v. McCall, supra,* Marilyn Redmond was an intended victim of the crime, not a bystander in the zone of danger during defendant's murderous act. Her miraculous survival does not alter this fact. A.R.S. § 13-703(F)(3) has no application to this case. *See State v. McCall, supra.*

We find the existence of A.R.S. § 13-703(F)(5) that "defendant committed the offense as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value." Arnold Merrill testified that Robert Cruz gave defendant a stack of $100 bills apparently as prepayment for the murders. Nina Marie Louie testified that Ed McCall told her the murders were contract killings. She also stated that defendant told her in early December that he had a big job to do that was "not very pretty" for which he would receive $50,000. In addition, Louie also testified that, shortly before the murders, all three assailants were armed with guns, and they were talking about coming into large amounts of money and doing an important job. This evidence is sufficient to establish that defendant was a hired murderer. A.R.S. § 13-703(F)(5) indisputably applies to this situation. *State v. McCall, supra; State v. Adamson,* 136 Ariz. 250, 665 P.2d 972, *cert. denied,* —— U.S. ——, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983).

Finally, we agree with the trial court that "defendant committed the offense in an especially heinous, cruel or depraved manner." A.R.S. § 13-703(F)(6).

[40] Cruelty includes the infliction of physical pain or mental distress upon a victim. *State v. McCall, supra; State v. McDaniel,* 136 Ariz. 188, 665 P.2d 70 (1983); *State v. Knapp,* 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). The defendant must intend or reasonably foresee that the victim will suffer because of defendant's acts. *State v. McCall, supra; State v. Adamson, supra.* In analyzing the instant facts we quote from *State v. McCall, supra,* whose identical facts and analysis are applicable here.

> "The Redmonds and Mrs. Phelps were herded about the Redmond home at gunpoint by three men. After giving up their valuables, they were forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks. They knew that their captors were armed. [In addition, one of the attackers said 'we don't need these two anymore' immediately before the shooting started.] It may be inferred that [the victims] were uncertain as to their ultimate fate. *State v. Steelman,* 126 Ariz. 19, 612 P.2d 475 (1980). Except for the first victim, each of them had to endure the 'unimaginable terror' of having their loved ones shot to death within their hearing and then having to wait for their own turn to come. *State v. Gretzler,* 135 Ariz. at 53, 659 P.2d at 12. Such mental distress clearly constitutes cruelty. *State v. Gretzler, supra; State v. Steelman, supra.* In addition, expert medical testimony was given that Mrs. Phelps did not die from the first gunshot wound to her head, that she did not lose consciousness as a result thereof, and that she most certainly suffered pain from that wound. The infliction of such physical pain also clearly constitutes cruelty."

State v. McCall, 139 Ariz. at 161, 677 P.2d at 934.

[41] The finding of A.R.S. § 13-703(F)(6) is also justified by two factors showing defendant's heinousness or depravity. The concepts of "heinousness"

and "depraved" involve the killer's vile state of mind at the time of the murder. *State v. McCall, supra; State v. Gretzler, supra.* Here, the murderers not only shot Pat Redmond twice through the head, but also slashed his throat at the time of his death or shortly thereafter. The infliction of gratuitous violence or the needless mutilation of the victim indicates depravity or heinousness. *State v. McCall, supra,* and cases cited therein. Additionally, the murderers killed Mrs. Phelps, an elderly houseguest of the Redmonds with no possible interest in their business affairs. Her murder in no way furthered the plan of the killers. Heinousness or depravity can be indicated by the senselessness of the crime or the helplessness of the victim. *State v. McCall, supra; State v. Zaragoza,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983); *State v. Ortiz, supra.*[8]

The trial court also considered all possible mitigating circumstances but found none to exist. We agree. At the sentencing hearing, defendant took the stand and testified that he was not in Arizona on December 31, 1980 and that he never killed anyone in Arizona. The jury, of course, had previously found just the opposite to be true, and ample evidence supported the jury's verdict. Defendant's claim of innocence is not a mitigating factor in this case. Reviewing the record, we find no other mitigating circumstances.

In addition, we have reviewed this case in light of *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and find imposition of the death penalty proper. Though defendant had accomplices, the record contains sufficient evidence that defendant killed, attempted to kill, or intended to kill.

C. Proportionality Review

[42] Lastly, this court examines prior cases to "determine whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Nash, supra,* 143 Ariz. at ——, 694 P.2d at 236. Having examined other cases in which the defendant received the death penalty based on one or more of the aggravating circumstances found here, we find imposition of the death penalty not disproportionate. *See State v. Harding,* 141 Ariz. 492, 687 P.2d 1247 (1984); *State v. Fisher,* 141 Ariz. 227, 686 P.2d 750, *cert. denied,* —— U.S. ——, 105 S.Ct. 548, 85 L.Ed.2d 436 (1984), *State v. McCall, supra; State v. Adamson, supra; State v. Woratzeck,* 134 Ariz. 452, 657 P.2d 865 (1982).

We have also examined cases in which the death penalty was reduced to life imprisonment. *See, e.g., State v. Graham,* 135 Ariz. 209, 660 P.2d 460 (1983); *State v. Valencia,* 132 Ariz. 248, 645 P.2d 239 (1982). We believe imposition of the death penalty is justified.

Pursuant to A.R.S. § 13–4035 we have examined the entire record for fundamental error and have found none. The judgment of conviction and the sentences are affirmed.

HOLOHAN, C.J., and HAYS, CAMERON and FELDMAN, JJ., concur.

145 Ariz. 538

STATE of Arizona, Appellee,

v.

Murray HOOPER, Appellant,

No. 5810.

Supreme Court of Arizona,
En Banc.

June 10, 1985.

Defendant was convicted in the Superior Court, Maricopa County, No. Cr–121686,

8. We cannot agree with the trial court that heinousness and depravity were also shown by one of the killer's statements immediately before the killings that "we don't need these two anymore." It was never proven which of the three murderers made this statement, and we cannot impute vileness to all three men because of the statement of one of them.

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Cecil B. Patterson, Jr., J., of one count of conspiracy to commit first-degree murder, two counts of first-degree murder, one count of attempted first-degree murder, three counts of kidnapping, three counts of armed robbery, one count of first-degree burglary, and sentenced to death for each count of first-degree murder, to life imprisonment for a conspiracy to commit first-degree murder, and to approximately 140 years for the other crimes. He appealed. The Supreme Court, Gordon, V.C.J., held that: (1) trial court did not abuse its discretion in ordering defendant to wear restraints that jury could not see; (2) trial court did not err in admitting evidence of witness' pretrial identification of defendant 53 days after crime; (3) judicial ruling that in certain extraordinary cases expert testimony is admissible to generally explain deficiencies of eyewitness testimony would be applied prospectively only; (4) trial court provided defendant with sufficient information with which to make intelligent waiver of his right to jury trial on prior conviction allegations; and (5) State proved both elements needed to show prior convictions.

Affirmed.

1. Criminal Law ⇐637

Whether defendant will be shackled is within sound discretion of trial court.

2. Criminal Law ⇐637

When defendant objects to being shackled during trial, there must be support in record for trial court's decision to shackle defendant.

3. Criminal Law ⇐637

Mere absence of escape convictions does not mean defendant must be free of restraints during trial.

4. Criminal Law ⇐637

Escape convictions are one factor trial court may consider along with prior felony convictions for crimes of violence in determining whether defendant will be restrained during trial.

5. Criminal Law ⇐637

Trial court did not abuse its discretion in ordering defendant to wear restraints that jury could not see where defendant was under three death sentences in foreign jurisdiction arising from triple murder.

6. Criminal Law ⇐636(3)

Defendant was not denied his right to be present during voir dire where defendant was properly restrained with shackles, and defendant chose to waive his presence because of fear that jury would see shackles. A.R.S. Const. Art. 2, § 24.

7. Criminal Law ⇐1158(4)

Fairness and reliability of challenged identification are preliminary matters for trial court whose findings will not be overturned on appeal absent showing of clear and manifest error.

8. Criminal Law ⇐339.8(4)

Lineup in which defendant was identified was not suggestive, where, although some age disparity existed among participants, difference was not so great as to be suggestive, height differences among participants were not extraordinary, and other lineup participants had unique items of clothing, even though defendant was only person in lineup with his shirttail untucked; nothing in lineup singled out defendant.

9. Criminal Law ⇐339.8(3)

Even if lineup procedure was unduly suggestive, it was nonetheless admissible in criminal prosecution if witness' identification was reliable.

10. Criminal Law ⇐339.6

Whether length of time between crime and pretrial identification of defendant is too long depends upon facts of each case; there is no per se rule.

11. Criminal Law ⇐339.8(3)

Pretrial identification was reliable, where witness had ample opportunity to observe defendant at time of crime, her level of attention at time of crime was high, and her level of certainty at lineup was good, even though witness identified defendant 53 days after crime; thus, trial

court did not err in admitting evidence of witness' pretrial identification of defendant.

12. Criminal Law ⇐636(1)

Defendant's right, under Federal and State Constitutions, to be present at every stage of his trial applies only to those proceedings in open court where his presence has reasonably substantial relation to fullness of his opportunity to defend against charge.

13. Criminal Law ⇐636(1)

Defendant, who failed to object to order at trial, had no constitutional right to be present when trial court made order allowing witnesses subject to rule of exclusion in his trial to speak with special prosecutor regarding contempt proceedings.

14. Criminal Law ⇐1036.2

Defendant waived issue of alleged error in admission of witness' 1977 conviction for possession of heroin absent fundamental error, where defendant failed to object to admission of evidence of conviction.

15. Criminal Law ⇐1036.2

No fundamental error occurred in admission of witness' 1977 conviction for possession of heroin, where record indicated that 1977 conviction was felony conviction, admissible to impeach witness' credibility. 17A A.R.S. Rules of Evid., Rule 609.

16. Criminal Law ⇐1036.2

Issue of whether State should have been permitted to attack witness' credibility with witness' use of alias was waived absent fundamental error, where defendant made no objection to such impeachment.

17. Criminal Law ⇐1036.2

No fundamental error occurred by permitting State to impeach defense witness by showing witness had used alias.

18. Courts ⇐100(1)

Constitution allows Supreme Court to apply judicial rulings to criminal cases either prospectively or retroactively.

19. Courts ⇐100(1)

In determining whether judicial ruling should be applied to criminal cases prospectively or retroactively, the Supreme Court should examine purpose of new rule, extent of reliance on old rule, and effect on administration of justice of retroactive application of new standards.

20. Criminal Law ⇐469

In certain extraordinary criminal cases, expert testimony is admissible to generally explain deficiencies of eyewitness testimony.

21. Courts ⇐100(1)

Judicial ruling, that in certain extraordinary criminal cases expert testimony is admissible to generally explain deficiencies of eyewitness testimony, would be applied prospectively only, to any trial beginning on or after January 11, 1983, and to trials which were ongoing on that date if record revealed that applying rule to trial would not have unreasonably disrupted administration of trial.

22. Criminal Law ⇐721(1)

Fifth Amendment's prohibition against self-incrimination prohibits prosecution arguments that defendant's failure to testify supports unfavorable inference against him. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

23. Criminal Law ⇐721(3)

Under both state and federal law, impermissible comment upon defendant's invocation of his right not to testify occurs when language used in prosecution argument is manifestly intended or is of such character that jury would naturally and necessarily take it to be comment on failure to testify. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

24. Criminal Law ⇐721(3)

Language in prosecutor's argument that jury had heard evidence and knew what kind of justice victims had had, that victims have limited right to speak, was not manifestly intended or of such character that jury would naturally and necessarily take it to be comment on defendant's fail-

ure to testify. U.S.C.A. Const.Amend. 5; A.R.S. § 13–117, subd. B.

25. Criminal Law ⇐1156(5)

Trial court's denial of motion for new criminal trial on grounds that it did not believe jurors' actions prejudiced defendant would not be reversed absent abuse of discretion.

26. Criminal Law ⇐872½, 928

Criminal defendants have undisputed right to unanimous verdict by properly constituted jury, unaided by outside influences such as alternate jurors who have been excused by court.

27. Criminal Law ⇐928

If alternate jurors aid jury in its deliberations on guilt of criminal defendant, prejudice necessarily results and new trial is warranted.

28. Criminal Law ⇐928

Trial court did not abuse its discretion in denying defendant's motion for new trial on ground of jury misconduct, where alternate jurors did not discuss merits of case with members of jury and discussions with alternate jurors occurred prior to beginning of actual deliberations, even though alternate jurors discussed with jury how jury foreman was selected and how alternates were chosen; no prejudice resulted to defendant.

29. Criminal Law ⇐1203.19

Trial court properly denied defendant's motion to withdraw waiver of jury trial on issue of prior convictions where waiver was voluntary and trial judge had fully explained rights attendant to jury trial to defendant.

30. Criminal Law ⇐1203.19

Effect of waiver of jury trial on prior conviction allegations was only that trial court and not jury would determine such matters; waiver had no effect on enhancement.

31. Criminal Law ⇐1203.19

Trial court provided defendant with sufficient information with which to make intelligent waiver of his right to jury trial on prior conviction allegations where judge fully explained rights attendant to jury trial to defendant, even though court never explained that finding of prior convictions would enhance punishment.

32. Criminal Law ⇐1203.19

Trial court did not abuse its discretion in not allowing defendant to withdraw his waiver of right to jury trial on prior conviction allegations under Rule of Criminal Procedure 18.1, subd. b(3), which allows trial judge at his discretion to withdraw jury trial waiver before taking evidence, where defendant cited nothing justifying withdrawal of waiver and jury had been dismissed for two weeks when defendant moved to withdraw waiver. 17 A.R.S. Rules Crim.Proc., Rule 18.1, subd. b(3).

33. Criminal Law ⇐1153(1)

Admission of evidence is within discretion of trial court whose rulings will not be disturbed on appeal absent abuse of discretion.

34. Criminal Law ⇐419(1)

Trial court abused its discretion in admitting testimony of prosecutor that he prosecuted defendant in foreign jurisdiction and received jury verdicts of guilt; such testimony was inadmissible hearsay.

35. Criminal Law ⇐1203.12

Trial court erred in admitting photostatic copies of jury forms from Illinois trial in which defendant was found guilty; such forms were inadmissible hearsay and were not authenticated in any manner. 17A A.R.S. Rules of Evid., Rules 801–803.

36. Criminal Law ⇐1202.5

Jury verdict of guilt is not conviction, for purposes of trial on prior convictions; only trial court can enter judgment of conviction.

37. Criminal Law ⇐1203.29

Errors in admitting hearsay evidence of prior convictions were harmless, where other admissible evidence established defendant's prior convictions. 17A A.R.S. Rules of Evid., Rules 801–803.

38. Criminal Law ⇐1203.12

Certifications of prior convictions did not lack trustworthiness because judge signed certification "under seal" yet no seal appeared next to his name, where, pursuant to Rule of Evidence 902, clerk of circuit court certified under seal that signer had official capacity and that signature was genuine. 17A A.R.S. Rules of Evid., Rules 902, 902(2, 4).

39. Criminal Law ⇐662.40

Admitting record of prior convictions did not violate defendant's confrontation rights.

40. Criminal Law ⇐1203.17

State proved both elements needed to show prior convictions, where admissible evidence showed that there was in fact prior conviction and testimony of prosecutor, who testified that he prosecuted defendant in Illinois and received jury verdicts of guilt, established that defendant in present case and person convicted in prior case were same individual.

41. Criminal Law ⇐1203.3

Allegation of State, which cited A.R.S. § 13–604, defining dangerous and repetitive offenders, and which listed three counts of first-degree murder, three counts of armed robbery, and three counts of aggravated kidnapping, all of which are dangerous on their face, gave defendant notice that State was alleging dangerous prior convictions.

42. Criminal Law ⇐1203.25

Resentencing was not warranted on grounds that State's allegations of prior convictions did not allege that prior convictions were dangerous and trial court's finding of prior convictions did not contain finding that such were dangerous, where defendant had sufficient notice of allegation of dangerousness, crimes were obviously dangerous making lack of specific finding harmless, and court found that priors were indeed dangerous when presented with question, even though initially trial court did not specifically find dangerousness of prior convictions. A.R.S. § 13–604.

43. Criminal Law ⇐1208.1(5)

Judgment of conviction against defendant in Illinois for three counts of first-degree murder, for which he received death sentence for each count and could have received same in Arizona, satisfied aggravating circumstance statute A.R.S. § 13–703, subd. F, par. 1, that defendant had been convicted of another offense in the United States for which under state law sentence of life imprisonment or death was imposable.

44. Criminal Law ⇐1208.1(5)

Judgment against defendant in Illinois on three counts of armed robbery and three counts of aggravated kidnapping, which crimes the Supreme Court took judicial notice involved use or threat of violence against others, satisfied aggravating circumstance statute A.R.S. § 13–703, subd. F, par. 2, that defendant was previously convicted of felony in the United States involving use of threat of violence on another person.

45. Homicide ⇐354

Evidence, including testimony man gave defendant's associate stack of $100 bills apparently as prepayment for murders, that associate gave some of such money to defendant, that person told witness murders were contract killings, and that shortly before murders all three assailants were armed with guns and were talking about coming into large amounts of money and doing important job, was sufficient to establish that defendant was hired murderer to whom aggravating circumstance statute A.R.S. § 13–703, subd. F, par. 5, that defendant committed offense as consideration for receipt or in expectation of receipt of anything of pecuniary value, indisputably applied.

46. Criminal Law ⇐1208.1(5)

Defendant's opposition to death penalty and contention that death penalty was immoral was not mitigating circumstance sufficiently substantial to outweigh aggravating circumstances.

APPENDIX D

47. Homicide ⇐354

Imposition of death penalty was proper where defendant killed, attempted to kill or intended to kill, even though defendant had accomplices.

48. Criminal Law ⇐1208.1(4)

Death penalty was not disproportionate, in light of other cases in which defendants had received death penalty.

Robert K. Corbin, Atty. Gen., William J. Schafer, III, Chief Counsel, Crim. Div., Gerald R. Grant, Asst. Atty. Gen., Phoenix, for appellee.

H. Allen Gerhardt, Jr., Mesa, Ross P. Lee, Maricopa County Public Defender, Phoenix, for appellant.

GORDON, Vice Chief Justice:

On December 24, 1982 a jury found defendant, Murray Hooper, guilty of one count of conspiracy to commit first degree murder, two counts of first degree murder, one count of attempted first degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first degree burglary.

Defendant was subsequently sentenced to death for each count of first degree murder, to life imprisonment for conspiracy to commit first degree murder, and to approximately 140 years for the other crimes. This Court has jurisdiction under Ariz. Const. art. 6, § 5 (3) and A.R.S. § 13-4031. We affirm the convictions and sentences.

Defendant was tried jointly with William Bracy. The facts in Hooper's case are identical to those in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), and they need not be repeated here.

Furthermore, with the few exceptions discussed below, Hooper raises the same issues as does Bracy. As we have disposed of these issues in Bracy's case, we need not consider them again except to say that we find no reversible error.

RESTRAINING OF DEFENDANT

Defendant argues that the trial court committed reversible error in requiring him to be restrained during trial. Fearing the jury would see the shackles, defendant chose to waive his presence during jury voir dire. He maintains that the trial court's actions denied him his right to be present under Ariz. Const. art. 2, § 24.

[1, 2] Whether a defendant will be shackled is within the sound discretion of the trial court. *State v. Stewart*, 139 Ariz. 50, 676 P.2d 1108 (1984); *State v. Reid*, 114 Ariz. 16, 559 P.2d 136 (1976). Further when a defendant objects to being shackled during trial, there must be support in the record for the trial court's decision. *State v. Stewart, supra.*

[3, 4] The trial court did not abuse its discretion in ordering defendant shackled. The record revealed that defendant was under three death sentences in Illinois arising from the same triple murder for which defendant Bracy received death sentences in Illinois. Though Hooper, unlike Bracy, had no prior escape convictions, the mere absence of escape convictions does not mean a defendant must be free of restraints during a trial. Escape convictions are one factor a trial court may consider along with prior felony convictions for crimes of violence. *State v. Stewart, supra; State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979).

[5, 6] In the instant case, the trial court took extensive precautions to assure defendant's restraints would not be visible to the jury. *See State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637, *cert. denied*, —— U.S. ——, 104 S.Ct. 180, 78 L.Ed.2d 161 (1983) (appellate court will not find error on ground that defendant shackled unless it is shown jury saw shackles). In view of defendant's background, we do not think the trial court abused its discretion in ordering defendant to wear restraints the jury could not see. Thus, as defendant was properly restrained, he was not denied his right to

be present when he voluntarily chose to be absent during voir dire.

PRETRIAL IDENTIFICATION

[7] Defendant next submits that the trial court committed reversible error in determining that the pre-trial identification of defendant by Marilyn Redmond was not unduly suggestive under *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), *cert. denied*, 397 U.S. 965, 90 S.Ct. 1000, 25 L.Ed.2d 257 (1970). The fairness and reliability of a challenged identification are preliminary matters for the trial court whose findings will not be overturned on appeal absent a showing of clear and manifest error. *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (1980); *State v. McGill*, 119 Ariz. 329, 580 P.2d 1183 (1978). We find no abuse of discretion.

[8] First, the lineup was not suggestive. Nothing in the lineup singles out defendant. Although some age disparity exists among the participants, this difference is not so great as to be suggestive. In addition, while all the participants are not the same height, the height difference is not extraordinary among any of the participants. The difference certainly does not single out defendant. Moreover that defendant was the only person in the lineup with his shirt tail untucked is in no way suggestive. Other lineup participants had unique items of clothing. Thus, this lineup was not suggestive. *See State v. Dessureault, supra.*

[9] Furthermore, even if the lineup procedure was unduly suggestive, it was nonetheless admissible if the witness' identification was reliable. *Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. McCall*, 139 Ariz. 147, 677 P.2d 920, *cert. denied*, — U.S. —, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1983). Reliability is determined by considering the factors set out in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). *See State v. Bracy, supra* (factors listed). Applying these factors, we find the pretrial identification reliable.

First, Mrs. Redmond had ample opportunity to observe defendant at the time of the crime. She first saw defendant in the well-lighted bedroom after Bracy had led her there. Defendant spoke to her, asking if there were any guns in the house, and he grabbed her and led her down a hallway to where the guns were kept. The hallway was also well lighted and defendant's face was no more than a foot away from Mrs. Redmond's face.

Second, Mrs. Redmond had a high level of attention. Though frightened to a certain degree, Mrs. Redmond said she was paying attention to the faces of all three intruders in her house. She was not just a casual observer of defendant, but rather her attention was focused on the suspect. *See State v. Ware*, 113 Ariz. 337, 554 P.2d 1264 (1976).

The accuracy of Mrs. Redmond's description was hotly contested at trial, with the defense arguing that Mrs. Redmond's first description of her assailants indicated that three black men, two of whom were masked, were the murderers. Regarding the reference to three black males, we believe the evidence shows that, at the scene, Mrs. Redmond initially said that all three men were black but that she corrected herself, saying, "no, one was white." The record supports the inference that this discrepancy was caused by difficulties Mrs. Redmond had in communicating immediately following the gunshot wound to her head.

Concerning the masks, it appears by some accounts that Mrs. Redmond initially stated that one or two of the assailants wore masks. Other testimony, however, indicated that Mrs. Redmond never mentioned masks immediately following the crime. Mrs. Redmond herself never recalled mentioning masks, and her testimony indicated that none of the intruders had masks on. Her other initial descriptions of the two black men were not particularly detailed. Examining the totality of the circumstances regarding this factor, we do not find the discrepancies in the description to be *per se* unreliable.

Mrs. Redmond exhibited a high level of certainty at the time of the pre-trial confrontation. After having viewed Bracy's lineup for the first time, Mrs. Redmond re-entered the viewing room and viewed Hooper's lineup. She then left the room, went to another office, and stated that she was positive the person occupying the third spot in the lineup, defendant, was the assailant. Her level of certainty is highly indicative of reliability.

[10, 11] Mrs. Redmond's identification of defendant came fifty-three days after the crime. Whether the length of time between the crime and the pretrial identification is too long depends upon the facts of each case; there is no *per se* rule. *See State v. Strickland*, 113 Ariz. 445, 556 P.2d 320 (1976) (ten days too long where witness saw attacker for very brief moment and at a point in time where she had no discernible interest in remembering what perpetrator looked like); *State v. McCall, supra* (fourteen days not too long where victim had ample opportunity to observe attacker at time of crime and where victim gave detailed description of attacker). In the instant case, in light of Mrs. Redmond's ample opportunity to observe defendant at the time of the crime, her high level of attention at the time of the crime, and her good level of certainty at the lineup, Mrs. Redmond's identification of defendant fifty-three days after the crime was not unreliable.

Based upon the foregoing factors, we find no error in admitting evidence of Mrs. Redmond's pretrial identification of defendant.

ALLEGED DENIAL OF DEFENDANT'S RIGHT TO BE PRESENT

Defendant next argues that he was denied his constitutional right to be present when the trial court entered an ex parte order in regard to the trial.

[12] Though under both the Federal and Arizona constitutions a defendant has a right to be present at every stage of his trial, this right applies only to those proceedings in open court where his presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charge. *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981).

[13] In the instant case, the trial court entered an order allowing witnesses subject to the rule of exclusion in defendant's trial to speak with a special prosecutor regarding contempt proceedings against Mr. Brownlee, Mr. Jones and Mr. Ryan. Defendant failed to object to this order at trial and now fails to cite any authority for his argument that he had a right to be present when the trial court made the order. In this instance, we find defendant had no constitutional right to be present when the trial court made this order.

IMPEACHMENT OF A DEFENSE WITNESS

Defendant argues that reversible error occurred when the prosecution impeached a defense witness with a prior conviction and by showing the witness used an alias.

Prior to calling the witness to the stand, defendant moved to exclude evidence of the witnesses' 1964 manslaughter conviction. The trial judge granted this motion. It was also revealed that the witness had numerous other prior convictions, none of which defendant moved to exclude. On cross-examination the prosecution asked the witness if he had any prior felony convictions, to which he answered yes. Defendant immediately objected, and the trial court instructed the prosecution to frame its question so that the 1964 conviction would not surface. Without objection, the prosecution then elicited from the witness that he had been convicted of possession of heroin in 1977. Defendant also asked the witness several questions about the prior conviction on redirect.

[14, 15] Thus, as defendant failed to object to admission of the 1977 conviction, he has waived the issue on appeal absent fundamental error. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985); *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1980). No fundamental error occurred. The record

indicates that the 1977 conviction was a felony conviction, admissible to impeach a witness' credibility. Rule 609, Ariz.R. Evid., 17A A.R.S..

[16, 17] Defendant next complains that it was reversible error to allow the state to attack the witness' credibility with his use of an alias. Again, defendant made no objection to this impeachment, and the issue is waived absent fundamental error. *State v. Vickers, supra.* There was no fundamental error. The case defendant cites is inapplicable, and nothing indicates it is error to impeach a defense witness by showing his use of an alias.

LIMITATION OF DR. LOFTUS' TESTIMONY

Dr. Elizabeth Loftus, a leading expert on perception, memory retention, and recall, was called to testify regarding the weaknesses of eyewitness testimony. The trial court, however, ruled that Dr. Loftus' testimony would be limited to the area of cross-racial identification. Dr. Loftus then testified before the jury. Defendant, citing *State v. Chapple,* 135 Ariz. 281, 660 P.2d 1208 (1983), maintains that the trial court's limitation upon Dr. Loftus' testimony was reversible error.[1]

We need not decide whether the trial court erred in limiting Dr. Loftus' testimony because we decline to apply *Chapple* retroactively. The trial in the instant case began in late October of 1982, and the verdicts were returned on December 24, 1982. *Chapple* was decided on January 11, 1983.

[18–20] The Constitution allows us to apply judicial rulings either prospectively or retroactively. State ex rel. *Collins v. Superior Court,* 132 Ariz. 180, 644 P.2d 1266 (1982). In making this decision we should examine (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new standards. *Brown v. Louisiana,* 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980); *State ex. rel. Collins, supra.*

[21] The purpose of the rule announced in *Chapple* was narrow. That is, in certain extraordinary cases, expert testimony is admissible to generally explain the deficiencies of eyewitness testimony. Though the *Chapple* rule has some bearing on the truth-finding process, *see State v. Stenrud,* 113 Ariz. 327, 553 P.2d 1201 (1976), additional safeguards present during trial minimize the possibility of a miscarriage of justice.

The extent of reliance on the old rule was great. As we found in *State v. Chapple, supra,* the great majority of cases considering the admissibility of expert testimony regarding eye witness examination had held it inadmissible. Trial courts had undoubtedly relied upon this weighty authority in limiting or excluding expert testimony regarding eyewitness identification.

Finally, we believe retroactive application of the *Chapple* rule would have an undesirable effect upon the administration of justice. In deciding whether to apply a new constitutional rule retroactively we have stated:

> "We are reluctant to apply a constitutional rule of criminal procedure retroactively as '[t]o characterize a past proceeding as unconstitutional and therefore void reflects seriously on the integrity of the law, * * * weakens the confidence of those who trusted in the existence and validity of the rule and undermines the doctrine of the finality of prior determinations.' *State v. Ray,* 114 Ariz. 380, 383, 560 P.2d 1287, 1290 (1977) (quoting in part *State v. Smith,* 112 Ariz. 321, 541 P.2d 918 (1975). See *Linkletter supra.*"

State ex rel. Collins v. Superior Court, 132 Ariz. at 190, 644 P.2d at 1276.

1. In *State v. Chapple, supra,* we held that under the peculiar facts of that case, it was error to entirely foreclose Dr. Loftus' expert testimony on eyewitness identification. That error, in combination with the error in admitting an inflammatory photograph, constituted reversible error.

The same considerations apply to new non-constitutional rules, such as that announced in *Chapple*. It is possible that juries have convicted defendants in trials where testimony similar to that in question was limited or excluded.

"But the law is dynamic. It is a continuum of succeeding redefinitions. Not every refinement in the law should call into question all prior convictions. Justice does not demand judicial reexamination of all criminal trials for each new advancement in judicial thinking. The judiciary could not function if there was never any finality to decisions. It is for this reason that only where there is a denial of a basic right of constitutional magnitude that is correctable will retrospective application be invoked. This is not the case here."

State ex rel. Collins v. Superior Court, 132 Ariz. at 190, 644 P.2d at 1276.

For the above reasons, we will apply the *Chapple* rule prospectively only. Thus as *Chapple* was decided on January 11, 1983, it applies to any trial beginning on or after that date. Further, if a trial was ongoing when *Chapple* was decided and the record reveals that applying *Chapple* to the trial would not have unreasonably disrupted the administration of the trial, we will apply the *Chapple* rule to such a case. Obviously, such a determination depends on the particular facts of each case. This Court recognizes that its holding is not entirely prospective, but we have the discretion to decide the most equitable time to make new rules applicable. *State ex rel. Collins v. Superior Court, supra.*

PROSECUTOR'S COMMENTS IN CLOSING ARGUMENT

Defendant next argues that the prosecutor's final rebuttal argument contained impermissible references to defendant's failure to testify. The prosecutor stated:

"[MR. BROWNLEE:] In conclusion, this case deals with greed, it deals with power, it deals with money, all the things which are superior in and supreme to human life. The state also seeks justice, not by sympathy, but by evidence. You heard the evidence. You know what it is. You know what kind of justice on New Year's Eve Patrick Redmond, Helen Phelps and Marilyn Redmond had. They had no jury. They had a limited right to speak—

"MR. REMPE: Your Honor, would you note my objection as to that?

"THE COURT: Yeah. Mr. Brownlee is reminded also.

"MR. BROWNLEE: I'm referring to—

"THE COURT: Mr. Brownlee, you hear what I said?

"MR. BROWNLEE: Certainly.

"THE COURT: Okay.

"MR. BROWNLEE: Mrs. Redmond told you what happened there. You have heard it called a tragedy. A tragedy is an avalanche, a snowfall, an earthquake. It's not something planned. It was planned. It was intentional. It was brutal.

"You have the evidence, you have a duty. You have a duty to stand up and speak individually for the victims that evening. Mrs. Phelps risked her life when she tried to protect something sacred, her wedding ring, and yet she was forced to give it up just as she was forced to give up her life.

"There is no doubt in this case. You heard about reasonable doubt. Is there a reason to acquit these two gentlemen? There is not. There is no reason. They are guilty beyond a reasonable doubt of each of those offenses. We ask you to find them guilty as charged. Thank you."

[22] The fifth amendment's prohibition against self-incrimination prohibits prosecution arguments that a defendant's failure to testify supports an unfavorable inference against him. *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *State v. Fuller*, 143 Ariz. 571, 694 P.2d 1185 (1985). Such conduct also violates a state statute, A.R.S. § 13–117(B), which has been raised to the level of a constitutional guarantee. *State v. Fuller, supra.*

[23] Thus, under both Arizona and Federal law, an impermissible comment upon a defendant's invocation of his right not to testify occurs when "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *United States v. Soulard*, 730 F.2d 1292, 1306 (9th Cir.1984); *State v. Fuller, supra.*

[24] We find no violation of defendant's fifth amendment rights because we do not think the language was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.

JURY MISCONDUCT

Defendant next alleges that a pre-deliberations meeting of the jurors constituted juror misconduct and warrants a new trial.

[25] On December 21, 1982, the trial court selected four alternates from the sixteen member jury panel. The twelve remaining jurors then selected a foreman. Following their selection, but prior to the beginning of any deliberations, the jurors were dismissed for the evening. After dismissal, two of the final twelve jurors met at a bar with two alternate jurors, where all four discussed how the jury foreman was selected and how the alternates were chosen. No evidence was presented showing the jurors discussed the merits of the case. Though disapproving of the conduct, the trial court did not believe the jurors' actions prejudiced defendant, and the motion for new trial was denied. We will not reverse this decision absent an abuse of discretion. *State v. Vasquez*, 130 Ariz. 103, 634 P.2d 391 (1981).

[26, 27] Defendants have an undisputed right to a unanimous verdict by a properly constituted jury, unaided by outside influences such as alternate jurors who have been excused by the court. *State v. Rocco*, 119 Ariz. 27, 579 P.2d 65 (App.1978). Thus, if alternate jurors aid the jury that is finally picked in its deliberations, prejudice necessarily results and a new trial is warranted. *Id.*

[28] In the instant case, we find no abuse of discretion. First, the alternate jurors did not discuss the merits of the case with the members of the final twelve. Second, these discussions occurred prior to the beginning of actual deliberations. Thus, we do not believe any prejudice resulted to defendant. *See State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982) (finding of prejudice necessary to reverse case for juror misconduct); *see also State v. Rocco, supra* (no prejudice shown where alternate juror prayed with final jury panel in jury room for one minute prior to beginning of deliberations).

PROPOSED WITHDRAWAL OF WAIVER OF JURY TRIAL ON PRIOR CONVICTIONS

Defendant next argues that he unknowingly waived his right to a jury trial on prior convictions and that, therefore, he should be resentenced on counts IV through IX.

The record belies this argument. Immediately after the verdicts were returned in this case, the trial court arraigned defendant and Bracy on the prior conviction allegations. Defendant was present with counsel when the trial court explained the rights attendant to a jury trial on prior convictions to defendant Bracy. Defendant Hooper then stated he was willing to waive a jury trial on the issue of priors. Defendant never objected to this procedure. Two weeks later, defendant moved to withdraw his waiver, stating that he did not understand the consequences of a waiver.

[29–31] The trial court properly denied defendant's motion to withdraw the waiver. First, the waiver was voluntary. Defendant admitted that no force or threats were used against him to extract the waiver. Further, the trial judge fully explained the rights attendant to a jury trial. Though the court never explained that a finding of priors would enhance punishment, such information was irrelevant to defendant's de-

cision. The effect of a waiver of the jury trial was only that the trial court and not the jury would determine the matter; waiver has no effect on enhancement. The trial court provided defendant with sufficient information with which to make an intelligent waiver. *See State v. Butrick*, 113 Ariz. 563, 558 P.2d 908 (1976).

[32] Second, the trial court did not abuse its discretion in not allowing a withdrawal pursuant to Rule 18.1(b)(3), Ariz.R. Crim.P., 17 A.R.S., which allows the trial judge, at his discretion, to withdraw a jury trial waiver before the taking of evidence. Defendant cites nothing justifying withdrawal of the waiver. Indeed, as the jury had been dismissed for two weeks, there was every reason to deny the withdrawal. *See State v. Crumley*, 128 Ariz. 302, 625 P.2d 891 (1981).

PROOF OF PRIOR CONVICTIONS

[33] Defendant next argues that the trial court committed several errors in the admission of evidence during the trial on prior convictions. The admission of evidence is within the discretion of the trial court whose rulings will not be disturbed on appeal absent an abuse of that discretion. *State v. Macumber*, 119 Ariz. 516, 582 P.2d 162 (1978).

[34–36] Defendant argues that the trial court erred in admitting hearsay evidence. Cook County Prosecutor Greg Owen testified that he prosecuted defendant in Illinois and received jury verdicts of guilt. Defendant maintains that testimony regarding the actions of the Illinois jury is inadmissible hearsay. We agree. The Illinois jury verdict was certainly an out of court statement offered to prove what it asserts—that defendant was found guilty and convicted of various crimes. We can further discern no hearsay exceptions applying to such testimony. The trial court abused its discretion in admitting this evidence. *See* Rules 801–803, Ariz.R.Evid., 17A A.R.S. In addition, we find the trial court erred in admitting photostatic copies of the jury forms from the Illinois trial. These forms were inadmissible hearsay and were not authenticated in any manner. Lastly, we question the relevance of evidence in a prior conviction trial that a jury returned guilty verdicts against the defendant in a past case. A jury verdict of guilt is not a conviction; only the trial court can enter a judgment of conviction.

[37–39] Because we find that other admissible evidence establishes defendant's prior convictions, however, we find the errors harmless. *See State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, —— U.S. ——, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983); *State v. Williams*, 133 Ariz. 220, 650 P.2d 1202 (1982). First, we reject defendant's claim that the documents showing his prior convictions were simply "abstracts" of records instead of an actual copy of a record as required by Rule 902(4), Ariz.R.Evidence, 17A A.R.S. We have reviewed the record in question and believe it to qualify as a self authenticating document under Rule 902. We also reject defendant's claim that the certifications lacked trustworthiness because a judge from Cook County signed the certification "under seal" yet no seal appeared next to his name. Rule 902(2) provides that a document can be self-authenticating if a public officer without seal signs the document so long as "a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certified under seal that the signer has the official capacity and that the signature is genuine." In the instant case, the Clerk of the Circuit Court of Cook County, Illinois did exactly what Rule 902(2) describes. Finally, we reject defendant's arguments that admitting the record violated his confrontation rights. *See Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

[40] Thus, the admissible evidence showed that there was in fact a prior conviction. Further, the testimony of Greg Owen established that the defendant in the present case and the one convicted in the prior case are the same individual. The state, therefore, proved both elements

needed to show prior convictions. *State v. Pennye*, 102 Ariz. 207, 427 P.2d 525 (1967).

PROPER ALLEGATION THAT DEFENDANT WAS A DANGEROUS, REPETITIVE OFFENDER

Defendant next argues that the state's allegations of prior convictions did not allege that defendant's prior convictions were dangerous. Further, defendant states that the trial court's finding of prior convictions did not contain a finding that the prior convictions were dangerous. Thus, defendant argues, resentencing is warranted on Counts IV through XI.

[41] This argument is meritless. First, the state's allegation of prior convictions cites A.R.S. § 13–604, defining dangerous and repetitive offenders. Second, the allegations list three counts of first degree murder, three counts of armed robbery, and three counts of aggravated kidnapping, all of which are dangerous on their face. This allegation gave defendant notice that the state was alleging dangerous prior convictions.

[42] Defendant correctly states that, initially, the trial court did not specifically find the dangerousness of the prior convictions. Defendant, however, already had sufficient notice of the allegation of dangerousness. Further, the crimes were obviously dangerous, thus making the lack of a specific finding harmless. Moreover, when presented with the question, the court found that the priors were indeed dangerous. We find no error.

DEATH PENALTY ISSUES

We have disposed of all of the constitutional arguments raised by defendant in *State v. Bracy, supra.* Now, therefore, we independently review the record determining the existence and weight of aggravating circumstances and the propriety of the sentence. *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985).

In imposing the death sentence, the trial court found five aggravating circumstances, A.R.S. § 13–703(F)(1), –703(F)(2), –703(F)(3), –703(F)(5), and –703(F)(6).

[43] We find the existence of A.R.S. § 13–703(F)(1), that "defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." On September 23, 1981 a judgment of conviction was entered against defendant in Cook County, Illinois for three counts of first degree murder. He received the death sentence for each count and could have received the same in Arizona.

[44] We also find the existence of A.R.S. § 13–703(F)(2) that "defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." On September 23, 1981 judgment was entered against defendant in Cook County, Illinois on three counts of armed robbery and three counts of aggravated kidnapping. We take judicial notice that all these crimes involve the use or threat of violence against others. *See State v. Nash, supra.*

For the reasons stated in *State v. Bracy, supra,* we do not find A.R.S. § 13–703(F)(3) to exist.

[45] We find the existence of A.R.S. § 13–703(F)(5), that "defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value". Arnold Merrill testified that Robert Cruz gave William Bracy a stack of $100 bills, apparently as prepayment for the murders. Bracy gave some of this money to Hooper. Nina Marie Louie testified that McCall told her the murders were contract killings. In addition, Nina Marie Louie testified that, shortly before the murders, all three assailants were armed with guns, and they were talking about coming into large amounts of money and doing an important job. Moreover, the evidence established that defendant was part of Cruz' crime organization and that he was Bracy's associate. It can be inferred that he stood to gain monetarily from payments to Bracy. This evidence

is sufficient to establish that defendant was a hired murderer to whom A.R.S. § 13–703(F)(5) indisputably applies. *State v. Bracy, supra; State v. McCall, supra.*

For the reasons stated in *State v. Bracy, supra,* we find the defendant committed the offense in an especially heinous, cruel, or depraved manner, A.R.S. § 13–703(F)(6).

[46] The trial court also considered all possible mitigating circumstances and found none to exist. We agree. At the sentencing hearing, defendant's counsel argued as a mitigating circumstance that the death penalty was immoral. Defendant's opposition to the death penalty, however, is not a mitigating circumstance sufficiently substantial to outweigh the aggravating circumstances. Reviewing the record, we find no other mitigating circumstances.

[47] In addition, we have reviewed this case in light of *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and find imposition of the death penalty proper. Though defendant had accomplices, the record contains sufficient evidence that defendant killed, attempted to kill, or intended to kill.

PROPORTIONALITY REVIEW

[48] Lastly, this court examines prior cases to "determine whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Nash, supra,* 143 Ariz. at ——, 694 P.2d at 236. Having examined other cases in which the defendant received the death penalty based on one or more of the aggravating circumstances found here, we find imposition of the death penalty not disproportionate. *See State v. Harding,* 141 Ariz. 492, 687 P.2d 1247 (1984); *State v. Fisher,* 141 Ariz. 227, 686 P.2d 750, *cert. denied,* — U.S. ——, 105 S.Ct. 548, 85 L.Ed.2d 436 (1984); *State v. McCall, supra; State v. Adamson,* 136 Ariz. 250, 665 P.2d 972 (1983), *cert. denied,* — U.S. ——, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983); *State v. Woratzeck,* 134 Ariz. 452, 657 P.2d 865 (1982).

We have also examined cases in which the death penalty was reduced to life imprisonment. *See e.g., State v. Graham,* 135 Ariz. 209, 660 P.2d 460 (1983); *State v. Valencia,* 132 Ariz. 248, 645 P.2d 239 (1982). We believe imposition of the death penalty is justified.

Pursuant to A.R.S. § 13–4035 we have examined the entire record for fundamental error and have found none. The judgment of conviction and the sentences are affirmed.

HOLOHAN, C.J., and HAYS, CAMERON and FELDMAN, JJ.

APPENDIX D

of the family of the two girls nation by not objecting to the testimony of

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SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, vs. MURRAY HOOPER, Appellant.	Supreme Court No. 5810 Maricopa County No. CR-121686 MANDATE

This Court, having considered this matter, filed its decision on the 10th day of June, 1985, affirming the judgment of conviction and sentence of death. A copy of the opinion of this Court is attached hereto.

The issuance of a warrant of execution in this matter shall abide the timely filing and disposition of a petition for writ of certiorari in the Supreme Court of the United States, or the expiration of the time for filing such a petition.

STATE OF ARIZONA
SUPREME COURT

I, DIANA K. BENTLEY, Acting Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the order made and entered in the above-entitled cause by this Court on the 10th day of June, 1985.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 22nd day of August, 1985.

Diana K. Bentley
DIANA K. BENTLEY, Acting Clerk

cc:
Hon. Robert K. Corbin, Attorney General; Thomas E. Collins, Maricopa County Attorney; Hon. Cecil B. Patterson, Judge; Hon. B. Michael Dann, Presiding Judge; Ross P. Lee, Maricopa County Public Defender; Murray Hooper; Gordon W. Allison, Maricopa County Court Administrator; United States Supreme Court; West Publishing Company; Mead Data Central

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Murray Hooper, Petitioner, vs. Dora B. Schriro et al., Respondents.	No. CV 98-2164-PHX-SMM DEATH PENALTY CASE **MEMORANDUM OF DECISION AND ORDER**

Petitioner Murray Hooper is a state prisoner under sentence of death. Pursuant to the Court's general procedures governing resolution of capital habeas proceedings, the parties have completed briefing of both the procedural status and the merits of Petitioner's habeas claims. Before the Court is Petitioner's Supplemental Petition, which raises thirty-nine claims for habeas relief. (Dkts. 29, 31.)[1] In previous Orders, this Court denied Petitioner's motion for discovery and evidentiary hearing and denied a number of claims finding they were procedurally barred or without merit. (*See* Dkts. 96, 114.) In this Order, the Court resolves Petitioner's remaining claims and concludes that he is not entitled to habeas relief.

FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 1982, a jury convicted Petitioner and William Bracy of two counts

[1] "Dkt." refers to the documents in this Court's file.

of first degree murder, one count of attempted murder, other associated crimes and criminal conspiracy. *See State v. Hooper*, 145 Ariz. 538, 543, 703 P.2d 482, 487 (1985); *State v. Bracy*, 145 Ariz. 520, 524-25, 703 P.2d 464, 469-70 (1985).

Pat Redmond and Ron Lukezic were partners in a successful printing business in Phoenix called Graphic Dimensions.[2] In the summer of 1980, Graphic Dimensions was presented with the possibility of some lucrative printing contracts with certain hotels in Las Vegas, but these deals fell through.

Robert Cruz wanted Redmond killed in order to obtain his interest in the printing business and pursue the Las Vegas contracts. In September 1980, Cruz asked Arnold Merrill if he would be willing to kill Redmond for $10,000. Merrill declined, but arrangements were made with others. In early December 1980, Cruz and Merrill picked up William Bracy and Petitioner who arrived on a flight from Chicago.

Petitioner and Bracy stayed in the Phoenix area for several days, during which Merrill took Bracy and Petitioner to see Cruz, who gave Bracy a stack of $100 bills, some of which Bracy gave to Petitioner. That same day, at Cruz's direction, Merrill took Bracy and Petitioner to a gun store owned by Merrill's brother, Ray Kleinfeld. Petitioner picked out a large knife and Bracy told Kleinfeld to put it on Cruz's account. Kleinfeld gave Bracy a bag which contained three pistols. While Petitioner and Bracy were staying at Merrill's home, Merrill introduced them to Ed McCall.

A few days later, Merrill drove Petitioner and Bracy to a cocktail lounge patronized by Pat Redmond. When Redmond departed, they followed his car. While following Redmond, Merrill noticed Petitioner pointing a gun at Redmond's vehicle, getting ready to fire. Merrill swerved from Redmond's car to prevent the shooting. After the failed shooting, McCall told Merrill that he was "joining up" with Bracy and Petitioner.

During the evening hours of December 31, 1980, Petitioner, Bracy and McCall went

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[2] This factual summary is based on the Court's review of the record and the Arizona Supreme Court's opinion setting forth the facts in the companion case of *State v. Bracy*, 145 Ariz. 520, 524-25, 703 P.2d 464, 469-70 (1985).

APPENDIX F

to the home of Pat Redmond and forced their entrance at gunpoint. Redmond, his wife Marilyn, and his mother-in-law Helen Phelps were present. The three victims were taken into a bedroom where they were robbed of valuables, bound with surgical tape and gagged. Each was shot in the head and Pat Redmond's throat was slashed. Pat Redmond and Helen Phelps died. Marilyn Redmond survived.

Petitioner and Bracy were convicted and sentenced to death for the murders.[3] (ROA 1113, 1116.)[4] On direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and death sentence. *See Hooper*, 145 Ariz. 538, 703 P.2d 482. Petitioner sought certiorari in the United States Supreme Court, which was denied. *Hooper v. Arizona*, 474 U.S. 1073 (1986).

Following direct appeal, Petitioner, *pro se*, filed his first petition for post-conviction relief ("PCR") in the trial court ("PCR court"). (ROA 1494.) Subsequently, counsel was appointed and filed supplements to the PCR petition (Petitioner's *pro se* PCR filing and counsel's supplements are hereafter collectively referred to as "first PCR petition"). (ROA 1529, 1540, 1570, 1581.) After discovery and the filing of affidavits, the PCR court summarily denied Petitioner's first PCR petition. (ROA 1574, 1596.) Petitioner moved for

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[3] Prior to Petitioner's and Bracy's trial, a jury convicted McCall and Cruz in a joint trial for the same crimes. *See State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983); *State v. Cruz*, 137 Ariz. 541, 672 P.2d 470 (1983). Cruz's convictions were reversed on appeal due to improper admission at trial of his alleged ties to organized crime. Although re-tried multiple times, Cruz was eventually acquitted. Another jury convicted Joyce Lukezic of being a co-conspirator in the murder-for-hire plot and she was sentenced to death. The trial judge vacated her conviction and sentence due to violations of *Brady v. Maryland*, 373 U.S. 83 (1963). That decision was upheld on appeal, *State v. Lukezic*, 143 Ariz. 60, 691 P.2d 1088 (1984); although retried, Lukezic was not convicted.

[4] "ROA" refers to twenty-five volumes of records from trial and post-conviction proceedings, which was prepared for Petitioner's petition for review to the Arizona Supreme Court upon denial of his third post-conviction relief petition (Case No. CR-97-0410-PC). "RT" refers to the reporter's transcripts of the joint trial of William Bracy and Petitioner. "ME" refers to the minute entries of the state trial court. A certified copy of the state court record was provided to this Court by the Arizona Supreme Court on November 7, 2005. (Dkt. 87.)

APPENDIX F

rehearing, which was denied. (ROA 1597, 1599.) Petitioner submitted a petition for review to the Arizona Supreme Court, which was denied. (ROA 1600, 1602.) Petitioner sought certiorari in the Supreme Court, which was denied. *Hooper v. Arizona*, 497 U.S. 1031 (1990).

In 1991, Petitioner filed a petition for writ of habeas corpus in this Court, No. CIV 91-1495-PHX-SMM. On November 18, 1992, this Court dismissed the petition without prejudice, to allow Petitioner to return to state court to exhaust additional claims.

Following this Court's dismissal, Petitioner filed a second PCR petition in state court. (ROA 1626-27.) The PCR court conducted a two-day evidentiary hearing on one of the claims in the petition. (*See* No. CIV 95-2339-PHX-SMM, Dkt. 26, 27.) Following the hearing, the PCR court denied relief. (ROA 1720.) Petitioner submitted a petition for review, which was denied. (ROA 1733.) Petitioner sought certiorari in the Supreme Court, which was denied. *Hooper v. Arizona*, 516 U.S. 829 (1995).

Subsequently, Petitioner filed a third PCR petition. (ROA 1741.) The PCR court summarily dismissed this petition. (ROA 1769.) Thereafter, Petitioner sought review, which was denied. (ROA 1771.)

In 1998, Petitioner returned to this Court and filed an initial habeas petition. (Dkt. 1.) Subsequently, he filed a supplemental petition for writ of habeas corpus and a memorandum in support. (Dkts. 29, 31.) In his supplemental petition, Petitioner claimed, in part, that his Arizona sentence violated the Eighth Amendment because his sentencing court relied upon invalid Illinois murder convictions to find the existence of the (F)(1) statutory aggravating circumstance.[5] Petitioner alleged that his Illinois murder convictions were invalid because he was tried and sentenced by a judge later convicted of racketeering – for having taken bribes for outcomes in cases, including murder cases occurring at the same time as

[5] At the time of Petitioner's sentencing, A.R.S. § 13-703(F)(1) provided, as follows: "F. Aggravating circumstances to be considered shall be the following: 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."

Petitioner's Illinois capital trial, *see United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995) (upholding former judge Maloney's convictions). (Dkt. 29 at 9; Dkt. 31 at 59.)

Based upon this newly discovered evidence, the Court concluded that Claim 16, Petitioner's judicial bias claim, was unexhausted. (Dkt. 32.) Petitioner withdrew Claim 16, and this Court stayed this habeas proceeding pending exhaustion of this claim in state court. (*Id.*) However, after waiting more than five years without state court resolution, this Court vacated its stay and ordered the parties to brief the procedural status, merits and requests for evidentiary development as to all claims.[6] (Dkt. 55.) Petitioner filed a motion for discovery and/or evidentiary hearing, which this Court denied. (Dkts. 79, 96.) Subsequently, Petitioner moved to add Claim 16 back into his supplemental petition. (Dkt. 106.) The Court denied amendment, concluding that Claim 16 was without merit and, therefore, amendment was futile. (Dkt. 114.)

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). If a habeas claim includes new factual allegations not presented to the state court, it may be considered unexhausted if the new facts "fundamentally alter" the legal claim presented and considered in state court. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986).

Exhaustion requires that a petitioner clearly alert the state court that he is alleging a

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[6] Further, the Court allowed that, if appropriate, it would grant leave to amend once exhaustion was complete. (Dkt. 55.) Subsequently, the state court denied the merits of Claim 16, concluding that "because [Petitioner] cannot demonstrate that the invalidity of his Illinois convictions would probably have resulted in a sentence less than death, he has not presented a colorable claim for relief." (Dkt. 106, Ex. C.)

specific federal constitutional violation. *See Casey v. Moore*, 386 F.3d 896, 913 (9th Cir. 2004); *see also Gray v. Netherland*, 518 U.S. 152, 163 (1996) (general appeal to due process not sufficient to present substance of federal claim); *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence, right to be tried by impartial jury, and ineffective assistance of counsel lacked specificity and explicitness required); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) ("The mere similarity between a claim of state and federal error is insufficient to establish exhaustion."). A petitioner must make the federal basis of a claim explicit either by citing specific provisions of federal law or case law, *Lyons*, 232 F.3d at 670, or by citing state cases that plainly analyze the federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

In Arizona, there are two primary procedurally appropriate avenues for petitioners to exhaust federal constitutional claims: direct appeal and PCR proceedings. Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions (subsections (d) through (h) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(b), 32.4(a).

A habeas petitioner's claims may be precluded from federal review in two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30. The procedural bar relied on by the state court must be independent of federal law and adequate to warrant preclusion of federal review. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). A state procedural default is not independent if, for example, it depends upon a federal constitutional ruling. *See Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). A state bar is not adequate unless it was firmly established and regularly followed at the time of the purported default. *See Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

Second, a claim may be procedurally defaulted if the petitioner failed to present it in state court and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (stating that the district court must consider whether the claim could be pursued by any presently available state remedy). If no remedies are currently available pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted. *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray*, 518 U.S. at 161-62.

Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. *Reed v. Ross*, 468 U.S. 1, 9 (1984). As a general matter, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust the claim in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would result if the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

AEDPA STANDARD FOR RELIEF

Petitioner filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). The AEDPA established a "substantially higher threshold for habeas relief" with the "acknowledged purpose of 'reducing delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-40 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). The AEDPA's "'highly deferential standard for evaluating state-court rulings' . . . demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997)).

Under the AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the merits" by the state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The phrase "adjudicated on the merits" refers to a decision resolving a party's claim which is based on the substance of the claim rather than on a procedural or other non-substantive ground. *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004). The relevant state court decision is the last reasoned state decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403 F.3d 657, 664 (9th Cir. 2005).

"The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under subsection (d)(1), the Court must first identify the "clearly established Federal law," if any, that governs the sufficiency of the claims on habeas review. "Clearly established" federal law consists of the holdings of the Supreme Court at the time the petitioner's state court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). Habeas relief cannot be granted if the Supreme Court has not "broken sufficient legal ground" on a constitutional principle advanced by a petitioner, even if lower federal courts have decided the issue. *Williams*, 529 U.S. at 381; *see Musladin*, 127 S. Ct. at 654; *Casey v. Moore*, 386 F.3d 896, 907 (9th Cir. 2004). Nevertheless, while only Supreme Court authority is binding, circuit court precedent may be "persuasive" in determining what law is clearly established and whether a state court applied that law unreasonably. *Clark*, 331 F.3d at 1069.

The Supreme Court has provided guidance in applying each prong of § 2254(d)(1). The Court has explained that a state court decision is "contrary to" the Supreme Court's clearly established precedents if the decision applies a rule that contradicts the governing law set forth in those precedents, thereby reaching a conclusion opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set of facts that is materially

indistinguishable from a decision of the Supreme Court but reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). In characterizing the claims subject to analysis under the "contrary to" prong, the Court has observed that "a run-of-the-mill state-court decision applying the correct legal rule to the facts of the prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406; *see Lambert*, 393 F.3d at 974.

Under the "unreasonable application" prong of § 2254(d)(1), a federal habeas court may grant relief where a state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. For a federal court to find a state court's application of Supreme Court precedent "unreasonable" under § 2254(d)(1), the petitioner must show that the state court's decision was not merely incorrect or erroneous, but "objectively unreasonable." *Id.* at 409; *Landrigan*, 127 S. Ct. at 1939; *Visciotti*, 537 U.S. at 25.

Under the standard set forth in § 2254(d)(2), habeas relief is available only if the state court decision was based upon an unreasonable determination of the facts. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (*Miller-El II*). A state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El*, 537 U.S. 322, 340 (2003) (*Miller-El I*); *see Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). In considering a challenge under § 2254(d)(2), state court factual determinations are presumed to be correct, and a petitioner bears the "burden of rebutting this presumption by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Landrigan*, 127 S. Ct. at 1939-40; *Miller-El II*, 545 U.S. at 240. However, it is only the state court's factual findings, not its ultimate decision, that are subject to 2254(e)(1)'s presumption of correctness. *Miller-El I*, 537 U.S. at 341-42 ("The clear and convincing evidence standard is found in § 2254(e)(1), but that

subsection pertains only to state-court determinations of factual issues, rather than decisions.").

As the Ninth Circuit has noted, application of the foregoing standards presents difficulties when the state court decided the merits of a claim without providing its rationale. *See Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000). In those circumstances, a federal court independently reviews the record to assess whether the state court decision was objectively unreasonable under controlling federal law. *Himes*, 336 F.3d at 853; *Pirtle*, 313 F.3d at 1167. Although the record is reviewed independently, a federal court nevertheless defers to the state court's ultimate decision. *Pirtle*, 313 F.3d at 1167 (citing *Delgado*, 223 F.3d at 981-82); *see also Himes*, 336 F.3d at 853. Only when a state court did not decide the merits of a properly raised claim will the claim be reviewed de novo, because in that circumstance "there is no state court decision on [the] issue to which to accord deference." *Pirtle*, 313 F.3d at 1167; *see also Menendez v. Terhune*, 422 F.3d 1012, 1025-26 (9th Cir. 2005); *Nulph v. Cook*, 333 F.3d 1052, 1056-57 (9th Cir. 2003).

DISCUSSION

Claim 1 – Prosecutorial Misconduct

Petitioner argues that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose favorable evidence to him prior to trial; Petitioner appears to be alleging thirteen separate prosecutorial violations. (Dkt. 31 at 12-14; Dkt. 79 at 16-17.) Respondents concede that Claim 1 is exhausted and entitled to merits review. (Dkt. 67 at 17.)

Brady, *Agurs*, 427 U.S. 97 (1976), and *United States v. Bagley*, 473 U.S. 667 (1985), were clearly established federal law before Petitioner's conviction became final.[7] A successful *Brady* claim requires three findings: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the issue

[7] Even though *Bagley* was decided after the Arizona Supreme Court resolved Petitioner's direct appeal, *Bagley* was issued before Petitioner's convictions became final in January 1986.

of guilt or punishment. 373 U.S. at 87. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *see also Harris v. Vasquez*, 949 F.2d 1497, 1528 (9th Cir. 1990). The prosecutor's duty to disclose includes impeachment as well as exculpatory evidence. *Bagley*, 473 U.S. at 676.

Undisclosed Benefits to Witness Arnold Merrill

Petitioner alleges that witness Arnold Merrill received undisclosed benefits for his testimony, specifically that: (1) a prosecution investigator, Dan Ryan, made car payments for Kathy Merrill, Arnold's wife, totaling over $800, for which Ryan received only partial reimbursement; (2) Mrs. Merrill received approximately $3,000 from the Maricopa County Protected Witness Program; and (3) Arnold Merrill made approximately twenty-two long distance phone calls from an office in the county attorney complex, some with Ryan's knowledge, others while unattended in Ryan's custody. The trial court held an extensive evidentiary hearing on these allegations. (*See* ROA 1229, 1231, 1247, 1255, 1258-60; RT 7/21/83, 7/22/83, 9/12/83, 9/13/83, 9/14/83, 9/15/83, 9/20/83.) The court found that these items had not been disclosed prior to trial, but denied Petitioner's motion to vacate judgment on this basis because the evidence was cumulative and other evidence tied Petitioner to the murders. (ROA 1265.) The Arizona Supreme Court concluded that the benefits to Merrill were exculpatory and not disclosed. *See Bracy*, 145 Ariz. at 528, 703 P.2d at 472. However, the court found that the nondisclosed information was not material because it was cumulative – the defense possessed and used at trial significant impeachment material regarding Merrill's bias and bad character – and there was more than sufficient other evidence to support Petitioner's conviction. *Id.* at 528-29, 703 P.2d at 472-73.

This Court now assesses whether the state court's *Brady* determination was contrary to, or an unreasonable application of, clearly established federal law. *See Williams*, 529 U.S. at 406-07. Petitioner has satisfied the first two prongs of a *Brady* analysis, the evidence was suppressed by the prosecution and was exculpatory. First, the state court made a factual

finding that this evidence was not disclosed to Petitioner prior to trial; this Court defers to that finding. *See* 28 U.S.C. § 2254(e)(1). Second, the evidence was favorable to Petitioner as it could have been used as impeachment against the prosecution's witness Arnold Merrill. Thus, the only question is whether the impeachment evidence is material – is there a reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682.[8]

The Ninth Circuit discounts the materiality of undisclosed impeachment evidence that is cumulative to similar impeachment evidence: "additional evidence of the [witness's] penchant for lying would not have affected the jury when his proclivity for lying had already been firmly established." *Barker*, 423 F.3d at 1096; *see also United States v. Croft*, 124 F.3d 1109, 1124 (9th Cir. 1997) (finding cumulative a nondisclosed psychiatric report establishing witness's memory loss because defense had elicited memory loss on cross-examination); *United States v. Marashi*, 913 F.2d 724, 733 (9th Cir. 1990) (stating that nondisclosed evidence that contradicted trial testimony was cumulative because deposition contained same contradiction). In contrast, impeachment evidence that provides a new and different ground for impeachment may be material. *See Horton v. Mayle*, 408 F.3d 570, 580 (9th Cir. 2005) (finding that although witness's testimony was impeached by evidence of drug use, lying to police and assisting in the crime, nondisclosed evidence of promised immunity is a "wholly different kind of impeachment evidence").

The Arizona Supreme Court identified significant impeachment evidence that the defense possessed and used at trial: "Merrill's plea bargain with the state; his extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police

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[8] In *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995), the Supreme Court further elaborated upon materiality regarding impeachment evidence and concluded that nondisclosed impeachment evidence must be evaluated piece by piece and cumulatively in the context of the whole case. *Id.* at 436 n.10. Even though *Kyles* had not been decided at the time of the state court decision, the Arizona Supreme Court evaluated the additional nondisclosures and also evaluated the cumulative effect of all the impeachment evidence. *See Bracy*, 145 Ariz. at 528-29, 703 P.2d at 472-73.

officers; and his private out-of-jail visit with his wife while being incarcerated for first degree murder." *Bracy*, 145 Ariz. at 529, 703 P.2d at 473. The fact that Merrill received additional monetary benefit for his testimony is not substantially different than the impeachment evidence demonstrating bias that was before the jury – that Merrill testified pursuant to a plea bargain and had been given a private visit with his wife. In sum, the defense significantly attacked Merrill's testimony by demonstrating bias and bad character; the additional evidence was not substantially different.

The additional impeachment evidence does not establish a reasonable probability that, had the evidence been disclosed to the defense, the jury would have acquitted Petitioner because this is not a case where the witness supplied the only evidence linking Petitioner to the crime. The Arizona Supreme Court identified the key evidence, apart from Merrill's testimony, that supported Petitioner's conviction:

> [T]he strong eyewitness testimony of Mrs. Redmond in combination with independent evidence of defendant's participation in the conspiracy is more than sufficient to uphold the convictions. Mrs. Redmond testified that [Bracy], Hooper, and McCall entered her home at gunpoint and killed her husband and mother. This evidence was particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home. In addition, evidence apart from that presented through Merrill showed defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond.

Bracy, 145 Ariz. at 529, 703 P.2d at 473. Further, other witnesses, including Nina Marie Louie, Dean Bauer and George Campagnoni corroborated Merrill's testimony. (Louie, RT 11/22/82, 11/23/82, 11/24/82; Bauer, RT 11/16/82; Campagnoni, RT 11/24/82, 11/29/82.)[9]

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[9] Nina Marie Louie testified that the murders were contract killings. (RT 11/23/82 at 40-43.) She also testified that Petitioner expected to receive $50,000 for the job. (*Id*. at 20.) On December 31, 1980, when she was with Petitioner, Bracy and Edward McCall, Bracy informed her that he, Hooper and McCall would soon have plenty of money and that they had some business to take care of that evening. (*Id*. at 32-33.) The next day, after Louie heard and read about the Redmond murders, McCall came over to the apartment. (*Id*. at 38-39.) McCall informed her that the murders were contract murders. (*Id*. at 42-47.)

George Campagnoni corroborated Marilyn Redmond's testimony. He testified that on the evening of December 31, 1980, Petitioner, Bracy and McCall arrived at Merrill's

Thus, the additional undisclosed impeachment evidence does not put the whole case in such a different light as to undermine confidence in the verdict and is not material.[10] *See Bagley*, 473 U.S. at 682.

The decision of the Arizona Supreme Court denying this claim was not contrary to, or an unreasonable application of federal law as determined by the Supreme Court. Petitioner is not entitled to relief regarding this portion of Claim 1.

Late Disclosure of Police Documents

Petitioner alleges that the prosecution untimely disclosed police reports involving incriminating statements attributed to Petitioner; investigative notes by Officer Perez; and a police report and photographs involving three Black men arrested on New Year's Eve 1980. The statements by Petitioner, contained in a police report, were excluded from trial, and the witness, Christina Nowell, through which the evidence was to be presented never testified. (RT 10/13/82 at 16-54; ROA 859.) Petitioner described the statements in the police report as "horribly incriminating"; thus, the Arizona Supreme Court found that they were not exculpatory and their nondisclosure did not violate *Brady*. *Bracy*, 145 Ariz. at 527, 703 P.2d at 471. Further, because the report was disclosed, although late, and not admitted at trial, the supreme court held that Petitioner could not have been prejudiced. *Id.* Because this evidence was not exculpatory, and was disclosed prior to trial, *see Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) (finding no *Brady* violation if information disclosed at a time when of value to the defendant), the Arizona Supreme Court's ruling is not an unreasonable application of

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house around 7:00 p.m. (RT 11/24/82 at 79-86.) He further testified that he saw them with jewelry, a man's and a woman's watch, and wedding bands. (*Id*. at 86-87.)

[10] Petitioner attempts to align himself with Joyce Lukezic, who was granted a new trial based on the prosecution's failure to disclose exculpatory evidence. As discussed by the Arizona Supreme Court, there was no direct evidence of Lukezic's participation in the murder conspiracy, thus, Merrill's testimony was pivotal in her case but only corroborative in Petitioner' trial. *Bracy*, 145 Ariz. at 529, 703 P.2d at 473. Further, impeachment evidence regarding another key witness in Lukezic's trial, George Campagnoni, was withheld from Lukezic but disclosed to Petitioner. Thus, Petitioner's circumstances are significantly distinguishable from Lukezic's.

Brady.

Officer Perez's handwritten notes from his on-the-scene interview of Marilyn Redmond were consistent with her trial testimony describing the three assailants; however, his police report contradicted both his notes and her testimony. The Arizona Supreme Court found no *Brady* violation because the notes corroborated Redmond's testimony and were inculpatory. *Bracy*, 145 Ariz. at 527-28, 703 P.2d at 471-72. Additionally, Petitioner had the notes in time for Officer Perez to be cross-examined on the conflict with his report (RT 11/3/82 at 250-257). *Id.* at 530, 703 P.2d at 474. Because this evidence was not exculpatory, was disclosed in time to be of value to Petitioner, and there is not a reasonable probability that earlier disclosure would have changed the verdict, the supreme court's decision was not an unreasonable application of *Brady*.

During cross-examination of Officer Quaife, the defense elicited testimony that Phoenix police arrested three Black males the night of December 31. (RT 11/9/82 at 275.) On redirect, the prosecution attempted to introduce their photographs to help explain why they were not treated as murder suspects. (*Id.* at 275-81, 295-303.) Because the prosecution had not previously disclosed the photographs, the defense objected to their admission and they were excluded. (*Id.* at 295-303.) The supreme court found no *Brady* violation both because Petitioner did not want the photographs admitted in evidence and because Petitioner suffered no prejudice from the nondisclosure. *Bracy*, 145 Ariz. at 528, 703 P.2d at 472. Similarly, during trial, the parties litigated the late disclosure of police reports regarding the three Black males arrested on December 31. (RT 11/10/82 at 26-53; RT 11/15/82 at 85-86; RT 11/22/82 at 17-31.) The defense used these reports during trial. (RT 12/8/82 at 4-15.) The Arizona Supreme Court found no *Brady* violation because the reports were presented to the jury. *See Bracy*, 145 Ariz. at 528, 703 P.2d at 472. Because the photographs were not admitted at trial, and Petitioner made use of the police reports, there is not a reasonable probability that the outcome would have been different if they had been disclosed earlier. The supreme court's denial of this claim was not objectively unreasonable.

Payments to Witness Louie and Informant Harper

Petitioner alleges that the prosecution paid witness Nina Marie Louie $878 for her testimony, and made payments to informant Valinda Harper. Louie testified at trial to the payment she received from the Maricopa County Witness Protection Program (RT 11/23/82 at 64-73); therefore, the Arizona Supreme Court found no *Brady* violation, *Bracy*, 145 Ariz. at 528, 703 P.2d at 472. Harper was an informant for the prosecution but did not testify at trial because she was unavailable and her location unknown. (RT 12/20/82 at 13-27.) However, the fact that Harper received money through the witness protection program did come out at trial. (*Id.*) Because the payments were disclosed at trial, and Harper did not testify, there is not a reasonable probability that earlier disclosure would have changed the verdict and *Brady* was not violated.

Benefits Provided to Prosecution Witnesses

Petitioner alleges that the prosecution falsified the presentence reports for witnesses George Campagnoni and Arnold Merrill; provided conjugal visits for Merrill and his wife; failed to disclose Merrill's addiction to Valium and the provision of Valium to Merrill while in custody before trial; and took witnesses Michael Gill and George Campagnoni out of jail and supplied them with alcoholic beverages. All of this information was known to Petitioner, and his counsel used it at trial to impeach Merrill, Campagnoni, Investigator Ryan, and Gill. (RT 11/17/82 at 137-38, 142-45; RT 11/18/82 at 58, 98, 168-77; RT 11/29/82 at 23-40; RT 12/16/82 at 18-62; RT 12/20/82 at 36-40, 80, 83-86, 97-102, 150-52). *See Bracy*, 145 Ariz. at 526-27, 529, 703 P.2d at 470-71, 473.

Because all of this evidence was known to Petitioner prior to trial, the prosecution did not suppress it and *Brady* was not violated.

McCall's Confession

Petitioner alleges that the prosecution did not disclose a statement by prison inmate James Leon Carpenter that McCall confessed to the murders and stated that he should have slit Marilyn Redmond's throat. During post-conviction proceedings, the PCR court found that Carpenter's statements were not exculpatory and, therefore, not subject to disclosure under *Brady*. (ROA 1574.)

McCall's regret that Marilyn Redmond lived and that he should have made sure she was dead after he shot her (*see* ROA 1554), was not favorable to Petitioner's alibi defense at trial. Because of Petitioner's associations with McCall during the relevant time period, it would have been unfavorable to introduce McCall's confession of the murders at trial. Louie testified that Petitioner was with McCall on December 31, 1980, and that McCall, Bracy and Petitioner were all armed with guns and indicated to her that they had an important appointment to keep after it got dark. (RT 11/23/82 at 26-36.) Campagnoni testified that Petitioner was with McCall later on that evening when they arrived at Merrill's home around 7:00 p.m. (RT 11/24/82 at 78-90.) Merrill testified that upon arriving, Petitioner said "we got three." (RT 11/17/82 at 112-15.) Thus, any further testimony disclosing McCall's confession of the murders would have been inculpatory, and the PCR court's conclusion that the failure to disclose such evidence was not a violation of *Brady* was not objectively unreasonable. *See Bagley*, 473 U.S. at 676; *Agurs*, 427 U.S. at 109-10.

Grand Jury Testimony

Petitioner contends that Investigator Ryan testified falsely before the Grand Jury. Specifically, Petitioner alleges that Ryan identified Petitioner as a part of the Royal Family street gang in Chicago, and presented other false allegations to the Grand Jury regarding Michael Gill, Joyce Lukezic, Morris Nellum and Dean Bauer. This is not an allegation of nondisclosure, but rather one of other prosecutorial misconduct.

Because the jury ultimately convicted Petitioner of the charged offenses, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *United States v. Mechanik*, 475 U.S. 66, 70 (1986); *see Williams v. Stewart*, 441 F.3d 1030, 1041-42 (9th Cir.), *cert. denied*, 127 S. Ct. 510 (2006) (observing that any constitutional error from prosecutor's alleged misconduct during grand jury proceeding harmless because petitioner ultimately convicted on charged offenses). Petitioner is not entitled to relief on his Grand Jury allegations.

False Statement by Morris Nellum

Petitioner alleges that Investigator Ryan threatened and coerced Morris Nellum into

making a false statement to police that Nellum took Petitioner to the Chicago airport in late December 1980. This is not an allegation of nondisclosure, but rather one of other prosecutorial misconduct.

Morris Nellum was Petitioner's chauffeur in Chicago. *See McCall*, 139 Ariz. at 164-65, 677 P.2d at 937-38. Nellum was prepared to testify at trial regarding admissions made to him by Petitioner regarding the Redmond homicides and Petitioner's payment for those killings. *Id.* Prior to trial, the judge prohibited Nellum from testifying for the prosecution because he failed to cooperate in a defense interview. (RT 9/14/82 at 19-27; *see also* RT 9/9/82 at 3-4.) Nellum told the trial judge that he did not want to testify due to threatening phone calls allegedly from Petitioner. (RT 9/14/82 at 19-22.)

Clearly established federal law provides that the appropriate standard of federal habeas review for a claim of prosecutorial misconduct is "the narrow one of due process, and not the broad exercise of supervisory power." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Therefore, in order to succeed on this claim, Petitioner must prove that the prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*; *see Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (relief on such claims is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

Because Nellum did not testify at trial there was no prosecutorial misconduct that resulted in actual prejudice to the defense. Petitioner is not entitled to relief on this allegation. On the basis of the foregoing, Petitioner is not entitled to relief on any of his prosecutor misconduct allegations.

Claim 3(A) – Ineffective Assistance of Counsel at Trial Regarding Severance

In Claim 3(A), Petitioner contends that his defense counsel, Grant Woods, rendered ineffective assistance at trial by failing to file a motion to sever his trial from co-defendant Bracy, despite having argued orally that severance was necessary. (Dkt. 31 at 24-25.) Specifically, Petitioner asserts that severance was necessary because the incompetence of

Bracy's defense counsel, Stephen Rempe, impacted Petitioner's right to a fair trial. (*Id.*) This claim is exhausted and entitled to merits review. (Dkt. 96 at 10-12.)

Background

In August 1981, a Maricopa County Grand Jury indicted Bracy and Hooper on eleven counts. (ROA 1.) They were arraigned on March 10, 1982. (ROA 98.) Following extensive pretrial proceedings, trial commenced on October 18, 1982. (RT 10/18/82.) After six weeks of trial, on November 30, Petitioner's counsel orally advised the trial court that he intended to file a motion for severance, arguing that Rempe's incompetence was preventing his client from receiving a fair trial. Counsel explained:

> MR. WOODS: I will move the Court, on behalf of Mr. Hooper, . . . pursuant to Rule 13.4 of the Arizona Rules of Criminal Procedure to grant a severance at this time, in that the incompetence of co-counsel, Mr. Rempe, has reached the point, although it has been present throughout the case, it has reached the point where a severance is necessary to promote a fair determination of the guilt or innocence of my client. It has reached the point where in trial Mr. Hooper's due process rights to a fair trial are being severely jeopardized.
>
> I can cite probably fifty incidents in the course of the case of outrageous conduct, and in my opinion incompetent conduct. And, I would like, because of the time problems, I would like to file a written memorandum with the Court, which I can have to the Court on – for argument Monday. But, it is something which I hesitate to do. But we have reached the point of no return, and since we're there, I would move for severance. I can present everything I can think of at the moment, if the Court would consider severing at this moment, or I can put it in the written form and give it to the Court for consideration before the start of the defense on Monday.
>
> THE COURT: I would prefer it to be in a written form, and I would assume that you are focusing your attention on the remaining portion of the trial, should the Court not grant the Rule 20 motions for one or both of the Defendants.
>
> MR. WOODS: That's correct.
>
> THE COURT: I would assume that's where you are really aiming your discussion, as opposed to at this juncture, where we're right now with one and a half witnesses remaining.
>
> MR. WOODS: Well, actually, your honor, I can't be assured – when we reach – Let me put it this way: when we reach the point where counsel for a Defendant is reading a [Police Departmental Report] and reads up to the word, words that Mr. Hooper and Bracy were on parole, when we reach that point where he is reading out himself that my client was on parole, even after the Court has told the State to stay away from that area, when we reach that point, I can't be confident that with even the remaining one and one-half witnesses, Mr. Hooper is not going to be jeopardized because I found it's getting worse.

But, if you are talking about priors, it denigrates our whole defense, if you are talking about reading off my client's on parole. And I am scared to death of Mrs. Redmond coming up, frankly. I – we're also talking about the defense. We have a situation where my co-counsel cannot remember, because, in my opinion, he was intoxicated at the time of the interview that these gentlemen did with Margaret Bracy; he cannot remember what she told them. I wasn't there, I don't know what she told them. But [the prosecution has] noticed her as an alibi or as a rebuttal witness, which scares me to death, having that situation, that you have an interview that co-counsel can't remember, in my opinion, because of intoxication. And [the prosecution says] we're going to use her for rebuttal, and that's the wife of the co-defendant. Now, there is a tape of that, supposedly, and hopefully we'll get to hear that.

. . . .

And now we're at the point, and I'll tell you what exacerbated the whole thing, besides the things that have come out in the last few days, which has just been outrageous, in my opinion. Now we are at the point where we have an agreement among defendants to present a unified defense that, you know, Hooper and Bracy were here and there or whatever, that it's altogether, and now we are at the point where Mr. Rempe informs me that he's, as he did yesterday when I had to object, he's going to start taking shots at Mr. Hooper. Now to do that eight weeks into the case, and after I've given my opening, and after we've done the whole investigation, is outrageous conduct, and, in my opinion, denying Mr. Hooper his right to a fair determination of the guilt and innocence of himself in this matter. And the remedy is a severance at this point. . . .

[PROSECUTOR] MR. JONES: My only point was that ineffective assistance of counsel is not something Mr. Hooper can raise, he doesn't have standing to raise that issue. Even though he may feel affected by alleged –

THE COURT: I don't think that's the issue he's raising, Mike. Ineffective assistance of counsel is not the issue he's raising, because I agree with you, Hooper couldn't raise it for Bracy. What he's raising is the taint, the prejudice, the contamination which flows over to his client by being precluded from doing certain things that he would otherwise be able to do if I had granted a severance when it appeared that [the prosecution] was going to use the statements.[11] And quite frankly, I was the progenitor of the concept of not using those statements so we could keep these guys together. . . . Nonetheless, it was my decision that it would progress efficiently, fairly meeting constitutional requirements if that was not done; and I think I've followed rather strenuously the constitutional requirements. . . .

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[11] The trial court refers to a previous motion for severance filed by Bracy on the basis of Petitioner's statements to police officials which implicated both of them in the crimes. (ROA 345.) Bracy argued for severance to prevent police testimony from being introduced against him without being able to confront Petitioner. (*Id.*) Subsequently, to prevent severance, the prosecution agreed and the trial court ordered that the prosecution not use any inculpatory statements made to police, either by Petitioner or Bracy, in its case-in-chief. (RT 9/2/82 at 4-5; *see also* ROA 329.)

> MR. WOODS: Judge, the Rule says, you can grant a severance at any time, during the trial, if it's necessary to promote a fair determination of the guilt or innocence of a defendant. . . .
>
> THE COURT: That's based on a factual revelation to the Court, which is why I get back to the fact of needing pleadings detailing the need. If, out of those pleadings, I don't feel its sufficient . . . That's where I get back to some kind of a pleading in the file for me to review and to make a determination, make a considered determination, which I've tried to do on everything that's been filed in this matter, and I've read everything that's been filed on this matter, I might add, every single word, to be truthful about it.
>
> MR. WOODS: I'll provide you a memorandum then.

(RT 11/30/82 at 5-11.) Trial counsel did not follow up and file a motion to sever with the trial court.

Petitioner raised this ineffective assistance of counsel (IAC) claim in his first PCR petition. (ROA 1570.) The PCR court indicated an initial intent to hold an evidentiary hearing on the merits of this claim. (ROA 1574, 1577.) However, after the parties obtained and proffered their discovery, the trial court summarily rejected the claim without a hearing, concluding that Petitioner had failed to substantiate his allegation of deficient performance for failure to file a motion to sever. (ROA 1596.)

Discussion

Strickland v. Washington, 466 U.S. 668 (1984), was clearly established federal law at the time Petitioner's conviction became final. Under *Strickland*, to prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that such deficient performance prejudiced his defense. *Id.* at 687. A court need not address both components of the inquiry, or follow any particular order in assessing deficiency and prejudice. *Id.* at 697. To be entitled to relief arising from counsel's failure to move for severance, Petitioner must show both that the motion would have been granted and that he suffered prejudice as a result of the unsevered trial. *See United States v Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985).

When two or more defendants have been joined for trial, an Arizona trial court is required to grant a defendant's motion for severance if it is necessary to promote the fair determination of guilt or innocence of a defendant, or if the court detects the presence or

absence of unusual features of the crime or case that might prejudice a defendant. *See Cruz*, 137 Ariz. at 543, 672 P.2d at 472. The court must balance the possible prejudice to the defendant against interests of judicial economy. *Id.* at 544, 672 P.2d at 473. In challenging a failure to sever, a defendant must demonstrate compelling prejudice against which the trial court was unable to protect. *Id.* In *State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985), "spillover" or "rub off" in a joint trial was discussed as occurring when the jury's unfavorable impression of the defendant against whom the evidence is properly admitted influences the way the jurors view the other defendant. Severance is rarely granted in such cases because defendants usually cannot demonstrate substantial prejudice from the joint trial since, generally, a trial court's cautionary instruction will allow the jury to independently evaluate and categorize the evidence against each defendant. *Id.*

The Court concludes that the trial court would not have granted a formal written motion for severance if counsel had filed one. The record reflects the trial court's efforts to hold a joint trial and avoid the need for severance, as referenced in the above-quoted colloquy. (RT 11/30/82 at 9-10.) When Bracy sought severance, the prosecution stipulated that it would not use in its case-in-chief any inculpatory statements that Bracy or Petitioner made to police. (RT 9/2/82 at 4-5.) The court accepted the stipulation and mooted Bracy's motion for severance. (*Id.*; ROA 345; ROA 704.) The court also denied Bracy's supplemental motion for severance. (*See* ROA 755, 859.) Finally, prior to the November 30 colloquy, the court denied a written motion for severance by Petitioner, which was premised on an allegation that Bracy had confessed the crimes to Christina Nowell; Nowell also stated that she had heard Petitioner make inculpatory statements about the crimes. (*See* ROA 808, 859.) Because the prosecution had failed to follow proper disclosure rules for Nowell's proposed testimony, the court prohibited Nowell from testifying and denied the associated severance motion. (ROA 859; RT 10/13/82 at 16-54.)

Despite the trial court's efforts to maintain a joint trial, Petitioner contends that severance would have been granted if requested in writing because Rempe's incompetence was "spilling over" and substantially prejudicing Petitioner's right to a fair trial. (Dkt. 31 at

24-25.)

In the November 30 colloquy, defense counsel alleged that Rempe, at trial, had almost revealed their probationary status at the time of the crimes, even though the trial court had ruled that this fact was irrelevant. (RT 11/30/82.) However, Petitioner does not allege the specific facts that defense counsel should have presented in a written motion for severance. Petitioner merely alleges that defense counsel should have followed through and filed a written motion for severance. Such a conclusory allegation does not entitle Petitioner to habeas relief. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (stating that conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief).

Further, Petitioner has not demonstrated that he was prejudiced by the joint trial from November 30 forward. The crux of Petitioner's argument is that Rempe's incompetence wrecked Bracy's alibi defense and this, in turn, diminished the believability of Petitioner's alibi. This argument is not supported by the record. Bracy's counsel presented numerous alibi witnesses, including Margaret Bracy, who testified that Bracy was in Chicago at the time of the crime. (RT 12/9/82.) Additionally, counsel presented a tow truck driver that towed Bracy's vehicle from his Chicago home to a repair facility and identified Bracy as the one he dealt with on December 31, 1980; the driver further identified a receipt for services rendered on that date. (*Id.*) During her pretrial interview, Margaret Bracy stated that her husband was home on Christmas eve, rather that New Year's eve; however, at trial, she testified that it was New Year's eve. (RT 12/14/82.)

More importantly, Petitioner fails to show that Rempe's conduct interfered with his own alibi defense. Petitioner presented his alibi defense at trial. (RT 12/8/82, 12/9/82.) Petitioner presented witnesses from Chicago indicating that he was in Chicago on New Year's Eve. (*Id.*) During cross-examination and during the prosecution's rebuttal case, the prosecution sought to impeach Petitioner's witnesses. (RT 12/8/82, RT 12/15/82.) Rempe's conduct did not interfere with Petitioner's ability to put on his own alibi defense. Based on the evidence presented at trial, the jury rejected Petitioner's alibi defense, however, it was

not due to any interference from Rempe.

Petitioner has failed to demonstrate that a request for severance would have been granted or that he was prejudiced by not having his trial severed as of November 30. In sum, Petitioner has not established a violation of *Strickland* based on counsel's alleged failure to formally move for severance during trial. Petitioner is not entitled to relief regarding this claim.

Claims 3(B) & 6 – *Batson* challenge

Petitioner contends that one of his prospective jurors, Freddie Hanshaw, was Black and removed from his case in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). (Dkt. 31 at 25-26.) Petitioner argues that this juror's removal violated his due process rights (Claim 6) and that trial counsel was ineffective because he failed to petition for relief from the unlawful peremptory challenge (Claim 3(B)). (*Id.* at 39.) These claims are exhausted and entitled to merits review. (Dkt. 96 at 11-12 (Claim 3(B); Dkt. 67 at 32 (Claim 6).

Background

The Redmond/Phelps murders were notorious in the community due to the circumstances of the killings, the number of people involved in the criminal conspiracy and the miraculous survival of one of the intended victims, Marilyn Redmond. As a result, there was considerable press coverage, including television, radio and the print media, regarding the homicide investigation and the trials of the various suspects. (*See, e.g.*, RT 10/14/82 at 123-29.) By the time Bracy and Petitioner came to trial in October 1982, other courts had already tried Edward McCall, Robert Cruz and Joyce Lukezic. As a result of the extensive publicity prior to Petitioner's trial, the trial court secured a large number of potential jurors. The first panel consisted of seventy-five potential jurors. (RT 10/18/82 at 5.) The trial court discussed the case, admonished the potential jurors, and required each one to fill out and return a juror questionnaire. (*Id.* at 5-7, 13-20.) The trial court and counsel then reviewed the questionnaires. (*Id.* at 13-20.)

After the court and the parties reviewed the juror questionnaires, thirty-nine of the potential jurors, including Freddie Hanshaw, were struck for cause without objection due to

prior knowledge of the case. (ROA 867; RT 10/20/82 at 24-28.) Jurors were struck for cause because they were unwilling to put aside their sympathy for Mrs. Redmond, due to all that she endured as a result of the crimes. (RT 10/20/82 at 26.) Jurors were also struck due to their unwillingness to be fair and decide the case based on the evidence, rather than their predetermined sense that guilt had already been established. (*Id.* at 26-28.)

Due to the large number of jurors excused for cause, the trial court immediately brought in another panel of forty-five potential jurors. (*Id.* at 21-24.) After this panel had been sworn in and given a jury questionnaire to fill out, counsel for Petitioner addressed the court:

> "MR. WOODS: Bracy, and I am going to move the Court to strike the entire panel because the panel that we have been exposed to so far discriminates against my client on the basis of race in that there have been only two blacks on the panel out of 120, and I ask the Court leave to file Memorandum.
>
> THE COURT: That's denied."

(*Id.* at 28.) Following this colloquy, the trial court and the parties began individual voir dire of the remaining jurors from the first jury panel.[12] (*Id.*)

After the *Batson* decision was announced, Petitioner brought a claim in his first PCR petition arguing that counsel's comments about the lack of minority representation on his jury panels raised a *Batson* challenge. (ROA 1529.) Petitioner also contended that if counsel's comments did not raise a *Batson* challenge, then counsel was ineffective for failing

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[12] Petitioner never presented a claim that Blacks were being systematically excluded from the jury pool in Maricopa County, Arizona. Even if he had, the claim would have had no merit. In *State v. Lee*, 114 Ariz. 101, 559 P.2d 657 (1976), the Arizona Supreme Court reviewed the jury panel selection procedures of Maricopa County. The court determined that Blacks and other minorities were not being systematically excluded. *Id.* Rather, the court upheld the county's selection procedures, finding that "jurors in Arizona are selected at random from voter registration lists pursuant to A.R.S. § 21-301(A) (1976). "The use of voter registration lists as the sole source of the names of potential jurors is not constitutionally invalid, absent a showing of discrimination in the compiling of such voter registration lists." *Id.* at 103, 559 P.2d at 659 (further citation omitted); *see also United States v. Parker*, 428 F.2d 488, 489 (9th Cir. 1970) (same). The *Lee* court further stated that in a trial, "[m]ere observation that a particular group is underrepresented on a particular panel does not support a constitutional challenge." 114 Ariz. at 103, 559 P.2d at 659.

to raise this challenge. (*Id.*; ROA 1546.) Regarding *Batson*, he argued that the prosecution racially discriminated against him by using their peremptory challenges to strike Black jurors. (*Id.*) In support, Petitioner attached the juror questionnaire of Freddie Hanshaw, a prospective Black juror, and asked for an evidentiary hearing. (*Id.* at 9, 11.)

The PCR court ruled, as follows:

> The Defendant's allegation concerning denial of a jury of his peers was not raised at trial and was consequently waived both for appellate purposes and these purposes. Assuming arguendo, however, that the defendant does present a viable issue on the question of arbitrary removal of all blacks from the jury panel by the prosecutors' use of the peremptory challenges, the Defendant's request, non-the-less [sic], should be denied. The Defendant's matter was concluded in the appeals court prior to the decision in Batson v. Kentucky, 476 U.S. 79 (1986).
>
> The U.S. Supreme Court in Allen v. Hardy, 478 U.S. [255], . . . (1986) and in Griffith v. Kentucky, 479 U.S. [314] . . . (1987) has precluded retroactive application of Batson, supra., to matters being considered by the courts, application here would be retroactive and precluded.
>
> * * *
>
> The Court conducted extensive detailed jury voir dire incorporating jury questionnaires as a part of the effort to "sanitize" the jury.
>
> This process resulted in the defendant receiving a jury which was fair and impartial and which was also strongly instructed about its obligations to remain same during the trial.

(ROA 1574.)

Discussion

In *Batson*, the United States Supreme Court held that the Fourteenth Amendment Equal Protection Clause forbids a prosecutor from using peremptory challenges to strike prospective jurors on account of their race. 476 U.S. at 89. In *Allen v. Hardy*, 478 U.S. 255, 257-58 (1986), the Court further resolved that *Batson* does not apply retroactively on collateral review for convictions already final when *Batson* was announced. The *Allen* Court defined final as the date when judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition for certiorari has elapsed. *Id.* at 258 n.1.

Petitioner's judgment of conviction was entered on February 11, 1983 (ROA 1118); the Arizona Supreme Court issued its mandate following the conclusion of direct appeal on August 22, 1985 (Az. Sup. Ct. Dkt. 61, CR-83-0044-AP); and the United States Supreme Court denied his petition for certiorari on January 13, 1986 (*Hooper v. Arizona*, 474 U.S.

1073 (1986)). Therefore, relief pursuant to *Batson* is unavailable because Petitioner's conviction and sentence already were final when the Supreme Court issued that decision in April 1986.

Even if *Baston* were retroactive, Petitioner would not be entitled to relief. *Batson* only applies to jurors removed by a peremptory challenge. 476 U.S. at 96-98. The jury empanelment record conclusively demonstrates that juror Hanshaw was removed for cause based upon answers he provided on the juror questionnaire long before counsel exercised their peremptory challenges (RT 10/20/82 at 24-28; ROA 867, 913). *See Swain v. Alabama*, 380 U.S. 202, 220 (1965) (stating that "challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality"), *rev'd on other grounds, Batson*, 476 U.S. 79.

Because *Batson* had not been decided at the time of Petitioner's trial, trial counsel was not deficient for failing to raise a claim based on that law. Further, Petitioner was not prejudiced because juror Hanshaw was struck for cause; thus, there was no basis to challenge the prosecutor's peremptory challenges. Petitioner has failed to demonstrate that his counsel was constitutionally ineffective. The PCR court's decision denying these claims was not contrary to or an unreasonable application of clearly established Supreme Court precedent. Claims 3(B) and 6 are without merit.

Claim 5 – Untimely Disclosure of Presentence Report

Petitioner alleges that the untimely disclosure of a supplemental presentence report deprived him of a reasonable opportunity to explain, rebut or deny the information contained in the report in violation of his due process rights at sentencing. (Dkt. 31 at 38-39.) Petitioner further contends that he has a liberty interest in the state following its own procedures regarding timely disclosure. (*Id.*)

Petitioner raised this claim in his second PCR petition, incorporating the arguments made by his co-defendant Bracy in a parallel PCR petition. (ROA 1626, 1627 at 33), Respondents contend that the PCR court found Claim 5 procedurally defaulted. (Dkt. 67 at 30-31.) The PCR court found Claim 5 procedurally defaulted as waived pursuant to Ariz.

R. Crim. P. 32.2(a)(3), 32.10. (ROA 1721 at 12-21, 52-53.) In addition, Petitioner did not complete the exhaustion process. Rule 32.9, the rule in effect at the time of Petitioner's second PCR proceeding, required that alleged errors in a PCR ruling had to be raised in a motion for rehearing following denial of post-conviction relief. *See State v. Bortz*, 169 Ariz. 575, 577, 821 P.2d 236, 238 (App. 1991) (holding that former Rule 32.9 prohibits appellate review of any claims not preserved in a motion for rehearing following denial of post-conviction relief). The purpose of the rule was to give the PCR court an opportunity to correct any errors it may have made in ruling on the PCR petition and to provide a clear statement of issues preserved for review. *Id.* at 578, 821 P.2d at 239. Thus, in order to preserve this claim for further appellate review, Petitioner had to present it in his motion for rehearing. *See State v. Gause*, 112 Ariz. 296, 297, 541 P.2d 396, 397 (1975); *see also State v. Pope*, 130 Ariz. 253, 254-55, 635 P.2d 846, 847-48 (1981) (citing cases supporting the rule that petitioners must comply with Rule 32.9); *State v. Carriger*, 143 Ariz. 142, 692 P.2d 991 (1984) (requiring petitioners to strictly comply with the provisions of Rule 32 or be denied relief). The Ninth Circuit has upheld this rule. *See Cook v. Schriro*, 516 F.3d 802, 827-28 (9th Cir. 2008).

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman*, 501 U.S. at 731. To exhaust state remedies, a petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan*, 526 U.S. at 848; *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Anderson*, 459 U.S. at 6; *Picard*, 404 U.S. at 277-78. Despite the Arizona rules in effect at the time of his second PCR, Petitioner did not present Claim 5 in a motion for rehearing. (ROA 1723.) Furthermore, he did not present this claim to the Arizona Supreme Court. (ROA 1733.) Therefore, it was not properly exhausted in state court. *See Cook*, 516 F.3d at 827-28.

If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona

Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 5 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. Claim 5 is procedurally barred.

Claims 8 and 12 – Shackling & Right to be Present at Trial

In Claim 8, Petitioner alleges that the trial court's shackling order denied him his Sixth and Fourteenth Amendment right to be present at all critical stages of his trial, including his right to be present during the empaneling of his jury. (Dkt. 31 at 41-42; Dkt. 78 at 49-50.) In Claim 12, Petitioner alleges that the trial court's shackling order violated his right to a fair trial under the Fourteenth Amendment. (Dkt. 31 at 45-47.) Claims 8 and 12 are exhausted and entitled to merits review based on this Court's earlier ruling. (Dkt. 96 at 13-14.)

Background

Prior to trial, Petitioner moved to remain free from shackling contending that it would be prejudicial for the jury to see him bound in shackles as there was no justification for such an extreme measure. (ROA 813.) The prosecution responded that Petitioner's and Bracy's triple homicide conviction and death sentence in Illinois, as well as their long history of violent conduct, necessitated extreme security measures at trial. (ROA 842.) The Maricopa County Sheriff's Office also forwarded a letter to the court advising that shackling Petitioner and Bracy was necessary for the reasons stated by the prosecution. (ROA 858.) The trial court conducted a hearing, part of which was held in the special trial courtroom so that the parties and Maricopa County officials would have an opportunity to view the special courtroom and advise the court regarding security. (RT 10/14/82 at 86-122; ROA 853.) At the hearing, Maricopa County officials reiterated:

> I feel very deeply responsible to keep these people shackled at all times when they are under the Sheriff's Department and when they are outside of the confines of the Maricopa County Jail. I feel very strongly about that. . . . If I am allowed to secure them the way I think they should, I think they should be shackled which is at the waist and leg irons and cuffs and a minimum of eight

people.

(RT 10/14/82 at 99.) Counsel for Petitioner argued that every juror would be able to see their shackles under the table if the court followed this recommendation. (*Id.* at 119.) Maricopa County officials then proposed, "One suggestion I would make, we could use drapes over the table to restrict vision from anyone in the jury box from seeing underneath the tables there." (*Id.* at 122.)

The trial court ruled:

> Defendant Hooper's Motion to Remain Free from Manacles and Shackles in the jury's presence is granted as follows: The defendants shall only have leg brace restraints and ankle restraints on in the presence of the jury. Waist restraints shall be maintained on the defendants without confining their arms in front of the jury.

(ROA 859.)

Before the first panel of prospective jurors was brought into the courtroom, the court discussed security with the parties. "The Courtroom will be secured before we get started. They're going to put everybody out including the jurors. You'll get a chance to get your clients in, get them settled and we will get the jury back in a sweep." (RT 10/18/82 at 3.) Petitioner was present and introduced to the initial seventy-five member jury panel. (*Id.* at 14.) After Petitioner's introduction, counsel waived Petitioner's presence for all other jury empanelment proceedings except the exercise of peremptory challenges. (*Id.* at 28.) Petitioner specifically stated on the record that he waived his presence before the other jury panels and individual voir dire because he did not want to risk prospective jurors viewing him in shackles. (RT 11/1/82 at 139-41.) After the court and counsel qualified thirty-five potential jurors (RT 10/18/82, 10/20/82, 10/22/82, 10/25/82, 10/28/82, 11/1/82), and the parties were set to exercise peremptory strikes, Petitioner was introduced to the remaining potential jurors (RT 11/1/82 at 120-21). During trial, counsel for Petitioner did not raise any further argument that Petitioner's shackling was visible to the jury. (*See* RT 10/14/82 at 119 (prior to the decision to cover the tables to prevent the jury from viewing the shackles, trial counsel had asked permission, from the jury box, to photograph Petitioner in shackles to preserve the record for appellate purposes).)

On direct appeal, the Arizona Supreme Court held that the trial court justifiably ordered Petitioner's shackling at trial due to his three Illinois death sentences and his prior felony convictions for crimes of violence. *Hooper*, 145 Ariz. at 543-44, 703 P.2d at 487-88. The court pointed out that the trial court had taken precautions so that Petitioner's shackling would not be visible to the jury. *Id.* Regarding waiver, the court held that Petitioner voluntarily chose to be absent during individual voir dire. *Id.*

Shackling Discussion

In Claim 12, Petitioner contends that the trial court's shackling order was unjustified because it was not made on an individualized record and because it interfered with his ability to participate in his defense. (Dkt. 78 at 50.) In both *Illinois v. Allen*, 397 U.S. 337, 344-46 (1970), and *Estelle v. Williams*, 425 U.S. 501, 503-05 (1976), the Supreme Court recognized that shackling may have a significant effect on the jury's presumption of innocence regarding the defendant and should not be utilized except when justified by an essential state interest. The *Allen* Court also found that shackling may interfere with a defendant's ability to communicate with his counsel. 397 U.S. at 344. However, the *Allen* Court upheld a trial court shackling and gagging a contentious defendant who, after repeated warning, continued to intentionally disrupt his trial and, ultimately, had to be removed from the courtroom. *Id.* at 343.

The Arizona Supreme Court made a factual finding that the jury did not see Petitioner's restraints; this Court defers to that finding because Petitioner has not refuted it with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Petitioner has cited no Supreme Court case – and this Court is not aware of any – that stands for the proposition that non-visible shackling violates a defendant's constitutional rights. *Estelle* and *Allen* both indicate that the constitutional concerns arise from the impact upon a jury of learning that a defendant is in pretrial incarceration or physically restrained during trial. *Estelle*, 425 U.S. at 504-05 (explaining that the concern related to compelling a defendant to go to trial in prison attire is that it acts as a "constant reminder" of the accused's status and is "so likely to be a continuing influence throughout trial" that it creates an unacceptable risk that

impermissible factors will influence the verdict); *Allen*, 397 U.S. at 344 (acknowledging that seeing the shackles "might have a significant effect on the jury's feelings about a defendant"). In a later case, the Supreme Court again emphasized that "the law has long forbidden routine use of *visible* shackles during the guilt phase of a trial." *See Deck v. Missouri*, 544 U.S. 622, 626 (2005) (emphasis added)). Because the jury did not see Petitioner's shackling, the Arizona Supreme Court's decision was neither contrary to, nor an unreasonable application of clearly established law. *See Musladin*, 127 S. Ct. at 654.

Further, Petitioner is not entitled to relief because an essential state interest justified the shackling. *See Estelle*, 425 U.S. at 505 (noting that physical restraints can be justified by an essential state interest); *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986) (holding that courtroom security specific to the defendant on trial is an essential state interest that may justify shackling). The trial court's shackling order was justified based upon a pretrial hearing. (RT 10/14/82 at 86-122.) At the hearing, officials from Maricopa County recommended that Petitioner be shackled at trial due to his recent triple homicide conviction, his accompanying death sentences and his record of prior felony convictions for violent conduct. (*Id.*; ROA 853.) Based upon his extensive and dangerous criminal record, the trial court individually determined that Petitioner was a courtroom security risk and that shackling was necessary. (ROA 859.) In light of this record, the trial court's decision to shackle Petitioner was neither contrary to, nor an unreasonable application of clearly established federal law. *See Musladin*, 127 S. Ct. at 654.[13]

Additionally, even if the Court assumes that the trial court's decision to physically restrain Petitioner during trial was unjustified, the Court concludes that any error was harmless. *See Deck*, 544 U.S. at 626 (stating that non-visible shackling is constitutional, even if the decision to physically restrain is not justified); *Williams v. Woodford*, 384 F.3d

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[13] Regarding Petitioner's contention that the trial court's shackling order interfered with his ability to participate in his defense, Petitioner provides no factual basis to support this contention. Conclusory allegations which are not supported by a statement of specific facts are not entitled to relief. *James*, 24 F.3d at 26.

567, 591 (9th Cir. 2004) (even assuming physical restraints were unjustified, any error was harmless because the shackles were not visible to the jury).

For all of the above reasons, Petitioner is not entitled to relief on Claim 12.

Right to be Present Discussion

In Claim 8, Petitioner contends that the trial court's shackling order caused him not to be present for jury empanelment proceedings. (Dkt. 78 at 50.)

A person charged with a felony has a right to be present at every stage of the trial. *Allen*, 397 U.S. at 338. A defendant's right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985). This includes the right to be present at the voir dire and empaneling of the jury. *Diaz v. United States*, 223 U.S. 442, 455 (1912).

Generally, a defendant's constitutional rights may be waived, provided such waiver is voluntary, knowing and intelligent. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). In particular, it is long established that a noncapital defendant can waive his right to be present at trial. *See Diaz*, 223 U.S. at 455. However, the Supreme Court has never determined whether a capital defendant can waive his right to be present at trial; rather, the Court specifically reserved this question in *Drope v. Missouri*, 420 U.S. 162, 182 (1975). Here, the Arizona Supreme Court held that Petitioner voluntarily waived his right to be present, choosing to be absent during individual voir dire. *Hooper*, 145 Ariz. at 543-44, 703 P.2d at 487-88. The *Drope* Court's reservation of the question precludes any argument that the supreme court's decision was contrary to clearly established Supreme Court precedent. *See Musladin*, 127 S. Ct. at 654. Furthermore, the Court concludes that the Arizona Supreme Court's resolution extending waiver into the capital context was not an unreasonable application of federal law in violation of 28 U.S.C. § 2254(d)(1). *See Campbell v. Wood*, 18 F.3d 662, 671-72 (9th Cir. 1994) (en banc) (concluding that a capital defendant can

constitutionally waive his right to be present for trial proceedings);[14] *see also United States v. Mitchell*, 502 F.3d 931, 987 (9th Cir. 2007) (defendant waived his right to be present at sentencing).

Out of the presence of the remaining jurors, the trial court questioned Petitioner personally as to whether he had voluntarily chosen not to be present during individual juror voir dire proceedings. (RT 11/1/82 at 139-42.) In the ensuing colloquy between the trial court and Petitioner, Petitioner indicated that he understood his right to be present but voluntarily chose not to be present for those proceedings to ensure that no juror would see him shackled. (*Id.*) The Arizona Supreme Court's determination that Petitioner voluntarily waived his right to be present during the individual voir dire proceedings was not contrary to or an unreasonable application of federal law. Petitioner is not entitled to relief on Claim 8.

Claim 11 – Fair and Impartial Jury

Without citation to the record, Petitioner alleges that the trial court violated his right to a fair and impartial jury by not allowing him to inquire about prospective jurors' racial bias in light of the interracial nature of the crime – since the victims were White and he is Black. (Dkt. 31 at 44-45.) Respondents concede that this claim is exhausted but contend that Petitioner did not ask the trial court to make such an inquiry. (Dkt. 67 at 40-41.) In response, Petitioner contends only that the trial court had a *sua sponte* duty to inquire of prospective jurors. (Dkt. 78 at 62.)

This claim was raised in Petitioner's first PCR petition and denied:

> The defendant was not entitled to inquiry on the issue of the interracial nature of the murders because he did not raise the issue during trial. He waived the right and the Court was under no obligation to sua sponte raise the issue during the trial proceeding. *Turner v. Murray*, 476 U.S. [28], 106 S. Ct. 1683, 95 L.Ed. 2d 262 (1986).

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[14] Relying on *Bustamonte v. Eyman*, 456 F.2d 269 (9th Cir. 1972), Petitioner argues that his presence at the empaneling of his jury was nonwaivable. As the Court has clarified, only Supreme Court precedent qualifies as clearly established federal law. Moreover, in *Campbell*, the Ninth Circuit explicitly overruled *Bustamonte*. *See Campbell*, 18 F.3d at 672 n.2.

(ROA 1574.)

In *Turner v. Murray*, 476 U.S. 28, 36 (1986), the Court held that a "capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." However, the Court went on to hold that "a defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry." *Id.*

Thus, *Turner* explicitly refutes Petitioner's argument that the trial court had a *sua sponte* responsibility to question the jurors about racial bias issues. Consequently, the state court's decision was not contrary to or an unreasonable application of clearly established federal law. Claim 11 is without merit.

Claim 13 – *Enmund* Claim

Citing *Enmund v. Florida*, 458 U.S. 782 (1982), Petitioner contends that his death sentence violates the Eighth Amendment because the jury did not resolve that he acted with the intent to cause death or with reckless indifference to human life. (Dkt. 31 at 47.) Regardless of exhaustion, this claim is without merit. *See* 28 U.S.C. § 2254(b)(2) (allowing denial of unexhausted claims on the merits); *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (holding that a stay is inappropriate in federal court to allow claims to be raised in state court if they are subject to dismissal under (b)(2) as "plainly meritless").

At sentencing, the trial court considered *Enmund* and found it distinguishable because Enmund was sentenced to death though only an accomplice in a felony murder prosecution, while Petitioner was convicted of conspiracy to commit murder as well as two first degree murder charges. (ROA 1116.) The sentencing court concluded that Petitioner and his co-conspirators were guilty of performing a contract killing for which they were to receive $10,000. (*Id.*)

On direct appeal, the Arizona Supreme Court addressed Claim 13, as follows:

> In addition, we have reviewed this case in light of *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed.2d 1140 (1982) and find imposition of the death penalty proper. Though defendant had accomplices, the record contains sufficient evidence that defendant killed, attempted to kill, or intended to kill.

Hooper, 145 Ariz. at 551, 703 P.2d at 495.

In *Enmund*, the Supreme Court held that a defendant convicted of felony murder is eligible for the death penalty only if he actually killed, attempted to kill, or intended to kill the victim. 458 U.S. at 797. A state court's *Enmund* finding is a factual determination which is presumed correct and which Petitioner "bear[s] the heavy burden of overcoming." *Cabana v. Bullock*, 474 U.S. 376, 388 (1986), *overruled in part on other grounds, Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987); *see Paradis v. Arave*, 20 F.3d 950, 959 (9th Cir. 1994). The trial court and the Arizona Supreme Court found that Petitioner killed, or attempted or intended to kill. Petitioner has not overcome that factual finding, and it is supported by the record.

At the time of Petitioner's direct appeal, no clearly established Supreme Court law required that the *Enmund* finding be made by a jury. *Cf. Enmund*, 458 U.S. at 801 (addressing error in state supreme court finding without mention of jury). Subsequent Supreme Court law established that the finding of culpability required by *Enmund* may be made by the trial court or the appellate court. *Cabana*, 474 U.S. at 387-88. Therefore, Petitioner's argument that the *Enmund* finding must have been made by the jury fails. The Arizona Supreme Court's resolution of this claim is not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief.

Claim 14 – Death Penalty Statutory Challenges

Petitioner contends that Arizona's death penalty statute constitutes cruel and unusual punishment; establishes a presumption in favor of death; provides for judicial fact-finding at sentencing in violation of Petitioner's right to a trial by jury; fails to require the sentencer to find that aggravating circumstances outweigh mitigation beyond a reasonable doubt; unconstitutionally required Petitioner to bear the evidentiary burden for mitigation; fails to provide safeguards for weighing aggravating circumstances against mitigating factors; allows prosecutors unbridled discretion to determine whether to pursue the death penalty; and includes an unconstitutionally vague aggravating circumstance, A.R.S. § 13-703(F)(6). (*See* Dkt. 31 at 47-57.)

Regardless of whether all aspects of this claim are exhausted, they are meritless. *See* 28 U.S.C. § 2254(b)(2); *Rhines*, 544 U.S. at 277. The Arizona Supreme Court's rejection of these claims, *Hooper*, 145 Ariz. at 543, 703 P.2d at 487 (citing its reasoning from *Bracy*, 145 Ariz. at 536, 703 P.2d at 480), was neither contrary to nor an unreasonable application of clearly established federal law.

Clearly established federal law holds that the death penalty does not constitute cruel and unusual punishment. *See Gregg v Georgia*, 428 U.S. 153, 169 (1976); *see also Roper v. Simmons*, 543 U.S. 551, 568-69 (2005) (noting that the death penalty is constitutional when applied to a narrow category of crimes and offenders).

In *Walton v. Arizona*, 497 U.S. 639, 651 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court rejected the argument that "Arizona's allocation of the burdens of proof in a capital sentencing proceeding violates the Constitution." *See also Delo v. Lashley*, 507 U.S. 272, 275-76 (1993) (referring to *Walton* and stating that the Court had "made clear that a State may require the defendant 'to bear the risk of nonpersuasion as to the existence of mitigating circumstances'"). *Walton* also rejected the claim that Arizona's death penalty statute is impermissibly mandatory and creates a presumption in favor of the death penalty because it provides that the death penalty "shall" be imposed if one or more aggravating factors are found and mitigating circumstances are insufficient to call for leniency. 497 U.S. at 651-52 (citing *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Boyde v. California*, 494 U.S. 370 (1990)); *see Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 2524 (2006) (relying on *Walton* to uphold Kansas's death penalty statute, which directs imposition of the death penalty when the state has proved that mitigating factors do not outweigh aggravators).

The Constitution does not require that a capital sentencer be instructed in how to weigh any particular fact in the capital sentencing decision. *See Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994). Nor does the Constitution require that a specific weight be given to any particular mitigating factor. *See Harris v. Alabama*, 513 U.S. 504, 512 (1995). Rather, the state sentencer has broad discretion to determine whether death is appropriate

once a defendant is found eligible for the death penalty. *Tuilaepa*, 512 U.S. at 979-80. Thus, Arizona's death penalty statute need not enunciate specific standards to guide the sentencer's consideration of aggravating and mitigating circumstances. *See id.*; *see also Smith v. Stewart*, 140 F.3d 1263, 1272 (9th Cir. 1998) (summarily rejecting challenges to the "mandatory" quality of Arizona's death penalty statute and its failure to apply the beyond-a-reasonable-doubt standard).

In *Smith*, the Ninth Circuit likewise disposed of the argument that Arizona's death penalty statute is constitutionally infirm because "the prosecutor can decide whether to seek the death penalty." 140 F.3d at 1272; *see Gregg*, 428 U.S. at 199 (pre-sentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional); *Silagy v. Peters*, 905 F.2d 986, 993 (7th Cir.1990) (holding that the decision to seek the death penalty is made by a separate branch of the government and is not a cognizable federal issue).

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Supreme Court found that Arizona's aggravating factors are an element of the offense of capital murder and therefore must be found by a jury. However, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court held that *Ring* does not apply retroactively to cases already final on direct review. Because direct review of Petitioner's case was final prior to *Ring*, he is not entitled to federal habeas relief premised on that ruling.

Finally, the *Walton* Court specifically rejected Petitioner's argument that A.R.S. § 13-703(F)(6), the cruel and heinous aggravating factor, as applied by the Arizona courts is unconstitutionally vague. 497 U.S. at 654 (finding that the Arizona Supreme Court has given substance to the operative terms in the statute and that its construction meets constitutional requirements). Based on the foregoing, Petitioner is not entitled to relief on Claim 14.

Claim 15 – Right to Testify

Petitioner contends that he was deprived of his right to testify at trial because the prosecutor threatened to use allegedly invalid prior convictions as impeachment if Petitioner chose to testify. (Dkt. 31 at 57-59.) Respondents contend, and Petitioner concedes, that

Petitioner did not fairly present Claim 15 in state court. (Dkt. 67 at 52; Dkt. 78 at 29.)

Because Petitioner did not raise Claim 15 in state court, it is unexhausted. *Boerckel*, 526 U.S. at 848 (petitioner must "fairly present" the operative facts and the federal legal theory of his claims to the state's highest court in a procedurally appropriate manner). If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 15 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. Claim 15 is procedurally barred.

Claim 17 – Proof of Prior Convictions

Petitioner contends that his due process rights were violated when the trial court admitted evidence of prior felony convictions from Illinois. (Dkt. 31 at 59-61.) Petitioner further contends that his confrontation rights were violated because he was not allowed to cross-examine the person who prepared the documentation of his prior felony convictions. (*Id.* at 60.)

Exhaustion

Respondents concede that the Sixth Amendment Confrontation Clause aspect of the claim was fairly presented in state court but contend that the due process aspect of this claim is unexhausted. (Dkt. 67 at 54.) Petitioner responds that the Arizona Supreme Court's independent sentencing review exhausted the due process aspect of this claim. (Dkt. 78 at 30.)

The Arizona Supreme Court has stated that it independently reviews each capital case to determine whether the death sentence is appropriate. In *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983), the court stated that the purpose of independent review is to assess the presence or absence of aggravating and mitigating circumstances and the weight to give

to each. *See also State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982). The due process portion of Claim 17 goes far beyond the stated scope of that review, and the Court finds it was not exhausted thereby. *Cf. Moormann v. Schriro*, 426 F.3d 1044, 1057-58 (9th Cir. 2005) (finding that Arizona's independent sentencing review did not exhaust numerous claims including claim alleging admission of prejudicial information). Therefore, the due process aspect of Claim 17 remains unexhausted. If Petitioner were to return to state court now and attempt to exhaust it, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this aspect of Claim 17 is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. The due process aspect of this claim will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. The due process aspect of Claim 17 is procedurally barred.

Merits of Confrontation Clause Allegation

Background

Following his jury conviction for conspiracy to commit first degree murder, first degree murder, attempted first degree murder, kidnapping, armed robbery and burglary, Petitioner was arraigned on charges regarding allegations of prior felony convictions. *See* Ariz. R. Crim. P. 19.1(b) (1982). The burden was on the prosecution to prove the validity of his prior convictions beyond a reasonable doubt. *See State v. Gilbert*, 119 Ariz. 384, 385, 581 P.2d 229, 230 (1978). For purposes of possible sentencing enhancement on his non-capital convictions, Petitioner was charged with having at least two prior felony convictions in Illinois. (RT 12/24/82 at 85-91; ROA 1070.) On January 6, 1983, the court conducted the prior convictions trial regarding nine 1981 Illinois convictions, three for first degree murder, three for armed robbery and three for aggravated kidnapping. (RT 1/6/83 at 32-47; *see* Dkts. 118, 119.) The prosecution submitted, and the court admitted, a certified statement of conviction and sentence from the Cook County Superior Court, Chicago, Illinois, signed by

the Clerk of Court, Morgan Finley. (RT 1/6/83 at 37-41, 46.) The certified statement of conviction and sentence was sealed by Richard Fitzgerald, Chief Judge, Criminal Court, Circuit Court of Cook County, Illinois. (*Id.* at 37-41.) The Arizona Supreme Court held that these documents were self-authenticating and properly admitted; the supreme court denied Petitioner's assertion that admission of the documents violated the Confrontation Clause. *Hooper*, 145 Ariz. at 550, 703 P.2d at 493.

Discussion

Citing *Crawford v. Washington*, 541 U.S. 36 (2004), Petitioner contends that his right of confrontation was violated because he was not allowed to cross-examine the person who prepared the exhibits documenting his prior felony convictions in Illinois. (Dkt. 31 at 59-61; Dkt. 78 at 67.) Because the *Crawford* decision occurred long after Petitioner's conviction became final, Petitioner cannot obtain habeas relief under the AEDPA based on that case.[15] *See Musladin*, 127 S. Ct. at 649. The Supreme Court has rejected Petitioner's argument that *Crawford* is retroactively applicable to this claim. *See Whorton v. Bockting*, 127 S. Ct. 1173 (2007). Because *Crawford* is inapplicable, this Court looks to the law in effect at the time Petitioner's conviction became final. *See Williams*, 529 U.S. at 365.

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." Claims raised pursuant to the Confrontation Clause generally fall into two broad categories: those involving the admission

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[15] Moreover, *Crawford* would not entitle Petitioner to relief. The *Crawford* Court held that the Confrontation Clause prohibits the admission of testimonial evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 68. The Court noted that "most of the hearsay exceptions covered statements that by their nature were not testimonial, for example, business records or statements in furtherance of a conspiracy." *Id.* at 56. Courts that have addressed the issue of public records documenting prior convictions have concluded that they are non-testimonial and therefore beyond the prohibition of *Crawford*. *See United States v. Wieland*, 420 F.3d 1062, 1076-77 (9th Cir. 2005); *State v. Bennett*, 216 Ariz. 15, 162 P.3d 654 (App. 2007)*; State v. King*, 213 Ariz. 632, 146 P.3d 1274 (App. 2006); *see also State v. Benefiel*, 128 P.3d 1251 (Wash. App. 2006); *People v. Taulton*, 29 Cal. Rptr.3d 203 (App. 2005).

of out-of-court statements and those involving restrictions on the scope of cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 18 (1985). The instant claim falls into the first category, which reflects the recognition that the literal right to confront witnesses at the time of trial forms the core of the values furthered by the Confrontation Clause. *Id.*

Ohio v. Roberts, 448 U.S. 56, 66 (1980), established that the veracity of hearsay statements is sufficiently dependable for admission when the evidence falls within a firmly rooted hearsay exception or it contains particular guarantees of trustworthiness such that adversarial testing would be expected to add little to the statements' reliability. *See also Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999). The records admitted to establish the validity of Petitioner's prior felony convictions were public records and their certifying documents. *See Hooper*, 145 Ariz. at 550, 703 P.2d at 493. Those type of documents fall into a firmly rooted hearsay exception and have sufficient indicia of reliability. *See United States v. Wieland*, 420 F.3d 1062, 1077 (9th Cir. 2005). Based on the foregoing, the supreme court's rejection of Petitioner's confrontation claim was not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief.

Claim 18 – Restriction on Cross-Examination

Petitioner argues that the trial court violated his Sixth Amendment right of confrontation when it prohibited him from cross-examining Dan Ryan, the prosecution's chief investigator, about contempt proceedings pending against Ryan. (Dkt. 31 at 61-62.) Respondents concede this claim is exhausted and entitled to merits review. (Dkt. 67 at 56.)

Background

During pretrial proceedings, the prosecution filed a motion in limine to preclude the defense from cross-examining witnesses regarding specific instances of misconduct not amounting to a conviction of a crime. (ROA 596.) The trial court granted the motion. (RT 9/30/82 at 11-12; ROA 804.) Subsequently, Investigator Dan Ryan was cited for contempt by another division of the Maricopa County Superior Court for his conduct in proceedings against alleged co-conspirator Joyce Lukezic, wife of Ron Lukezic. (ROA 784, 785, 1092.)

The prosecution filed a second motion in limine contending that the ongoing contempt proceedings were irrelevant and should not be referred to at trial. (ROA 863.) The court agreed with the prosecution, ruling that reference to the ongoing contempt proceeding was irrelevant. (RT 10/28/82 at 48-49.)

During trial, Petitioner questioned witnesses regarding allegations of misconduct by Investigator Ryan. (*See, e.g.*, RT 11/18/82 at 58, 98; RT 11/29/82 at 23-41; RT 12/16/82 at 16, 35-59; RT 12/17/82 at 36-112.) In response, the prosecution called Ryan as a rebuttal witness. (RT 12/20/82 at 27-168.) On direct examination, Ryan was questioned about the facts and circumstances which formed the basis of the pending contempt citation against him. (*Id.* at 27-72.) Ryan denied engaging in any misconduct. (*Id.*) Prior to cross-examination, Petitioner asked the trial court to reverse its ruling prohibiting the defense from asking Ryan about the pending criminal contempt charges. (*Id.* at 71-72.) Petitioner argued that the prosecution had made the pending contempt charge relevant by asking Ryan about the underlying facts and circumstances of the charges. (*Id.* at 133-37.) The prosecution answered that Ryan was merely responding to allegations that the defense had brought out and that they had not opened the door to the contempt proceeding. (*Id.* at 135-37.) The trial court refused to reconsider its earlier ruling, but reiterated that it would allow counsel to fully explore the factual basis for the contempt proceeding.[16] (*Id.* at 137-38.)

The Arizona Supreme Court denied this claim:

> In the instant case we do not find an unreasonable limitation of the cross-examination right. First, the County Attorney prosecuting the instant case was not involved in prosecuting Mr. Ryan for contempt. Rather, a special, independent prosecutor had responsibility for prosecuting Mr. Ryan. Thus, the pending indictment would not have indicated that Mr. Ryan's testimony was colored by any hope of lenient treatment from the County Attorney. Second, the jury had before it ample evidence showing Mr. Ryan's bias and self-interest. Mr. Ryan was the prosecution's chief investigator answering directly to Mr. Brownlee, and the alleged instances of misconduct were serious. The jury could understand that he had bias and motives for testifying as he did. *See Skinner v. Cardwell*, 564 F.2d 1381, 1389 (9th Cir.1977) (test of reasonable limit on cross-examination is whether jury is otherwise in possession of

[16] Ryan was subsequently acquitted of the contempt charges. *See Bracy*, 145 Ariz. at 532 n.7, 703 P.2d at 476 n.7.

sufficient information to assess the bias and motives of the witness).

Bracy 145 Ariz. at 533, 703 P.2d at 477 (additional citations omitted).

Discussion

There is no dispute that the trial court provided Petitioner a full opportunity to cross-examine Ryan about allegations of misconduct regarding his role in the investigation of the charges presented at trial. The record demonstrates that Petitioner used the opportunity and cross-examined both Ryan and other witnesses about allegations of Ryan's misconduct. However, Petitioner contends that he could not expose Ryan's bias due to the prohibition on cross-examining Ryan about the pending contempt citation. (Dkt. 78 at 68-70.)

The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)). Impeachment of a witness's credibility and exposure of witness bias and possible motive in testifying are two purposes served by the constitutionally protected right of cross-examination. *See id*. at 316. However, a trial court has broad discretion in determining the scope and extent of cross-examination. *See Alford v. United States*, 282 U.S. 687, 694 (1931); *Carriger v. Lewis*, 971 F.2d 329, 332-33 (9th Cir. 1992). A trial court may impose reasonable limits on cross-examination to prevent harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is only marginally relevant. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Such limitations on cross-examination do not deny the constitutionally protected right of confrontation, but constitute legitimate evidentiary rulings entrusted to the discretion of the trial judge. *See id*. (Confrontation Clause guarantees opportunity for effective cross-examination, not cross-examination to whatever extent defendant might wish); *see also Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983).

In both *Davis* and *Van Arsdall*, the trial court's restriction on cross-examination effectively prevented the defense from exploring the potential bias, partiality and reliability

of the witness. *See Davis*, 415 U.S. at 317-18; *Van Arsdall*, 475 U.S. at 679. Here, Petitioner had a full and fair opportunity to cross-examine witnesses about the misconduct allegations that revealed potential bias, the reliability and credibility of Ryan as a witness, and his influence on other witnesses (*see, e.g.*, RT 11/18/82 at 58, 98; RT 11/29/82 at 23-41; RT 12/16/82 at 16, 35-59; RT 12/17/82 at 36-112). *See Bright v. Shimoda*, 819 F.2d 227, 229 (9th Cir.1987) (federal habeas court will rarely find a constitutional violation if the defendant was allowed to cross examine a witness at length and was restricted solely on a collateral matter). In this case, the jury had sufficient information to appraise the bias, motives and reliability of the witness, Ryan; the restriction of cross-examination regarding a collateral matter was not a violation of the Confrontation Clause. The Arizona Supreme Court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief.

Claim 19 – Admissibility of Lineup Identification

Petitioner contends that the trial court's admission of his pretrial lineup identification violated his Fourteenth Amendment due process rights. (Dkt. 31 at 62-64.) Specifically, Petitioner contends that his pretrial lineup was impermissibly suggestive because he was the only suspect with his shirt tail out. (Dkt. 78 at 70.) Petitioner further contends that Marilyn Redmond's identification was unreliable because Redmond earlier provided inconsistent descriptions of her assailants to the police. (*Id.* at 70-72.) Finally, Petitioner alleges that Investigator Ryan influenced Redmond to make a lineup identification. (*Id.*) The Court has determined that this claim is exhausted and entitled to merits review. (Dkt. 96 at 16.)

Clearly Established Law

Evaluating whether an identification has been irreparably tainted by a suggestive procedure requires a two-part analysis. First, the Court must determine whether the challenged procedure was suggestive. *Neil v. Biggers*, 409 U.S. 188, 381 (1972). "An identification procedure is suggestive when it 'emphasize[s] the focus upon a single individual' thereby increasing the likelihood of misidentification." *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998) (quoting *United States v. Bagley*, 772 F.2d

482, 493 (9th Cir. 1985)). Second, if the process was suggestive, the Court must examine the totality of the circumstances to determine whether the witness's identification is nonetheless reliable and, therefore, admissible. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). The factors to be considered in assessing reliability are: (1) the witness's opportunity to view the accused at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the description, (4) the witness's level of certainty, and (5) the length of time between the crime and the confrontation. *Id.* (citing *Biggers*, 409 U.S. at 199-200). The ultimate question is whether, in light of all the circumstances, the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968).

Background

Petitioner and William Bracy were arrested in Chicago on February 20, 1981. On February 22, Marilyn Redmond was flown to Chicago for a lineup identification procedure. (RT 8/26/82 at 21-27.) Chicago Detective O'Callaghan and Investigator Ryan selected individuals to participate in the lineup identifications. (*Id.* at 96-97; RT 9/1/82 at 5-11.) After assisting O'Callaghan, Ryan moved to the viewing room, along with Redmond, Phoenix Detective Martinsen and Prosecutor Brownlee. (RT 8/27/82 at 15.) Redmond viewed three lineups, the first with Bracy, the second with Petitioner and then a final view of the first lineup. (RT 8/26/82 at 23-45.) Redmond positively identified Petitioner as one of the intruders in her home on New Year's Eve 1980. (*Id.* at 143; RT 11/30/82 at 59-63; *see* Dkt. 122.) While awaiting the reassembly of Bracy's lineup, Redmond was moved into a private office. (RT 8/26/82 at 25-28.) At this time, Phoenix police officials had access to Redmond. (*Id.* at 34, 36, 110-11.) However, Redmond stressed numerous times that no police official, from Phoenix or Chicago, pressed her to make an identification, suggested an identification or in any way influenced her to identify Petitioner. (*Id.* at 43-44, 142-43.)

Prior to trial, the state court held a hearing on the admissibility of Redmond's identifications of Petitioner and Bracy. (RT 8/26/82, 8/27/82, 9/1/82.) At the hearing, Redmond testified extensively concerning her recollection of who perpetrated the murders

and her ability to view the assailants at that time, as well as her identification of Petitioner. (RT 8/26/82 at 7-143.) Martinsen, O'Callaghan, Petitioner and Ryan testified at the hearing. (RT 8/27/82, 9/1/82.)

Following the hearing, the trial court determined that the pretrial identification procedure was not unduly suggestive and denied Petitioner's motion to suppress the pretrial identification. (ROA 748.) On direct appeal, the Arizona Supreme Court also found the pretrial identification not suggestive, based upon the following:

> First the lineup was not suggestive. Nothing in the lineup singles out defendant. Although some age disparity exists among the participants, this difference is not so great as to be suggestive. In addition, while all the participants are not the same height, the height difference is not extraordinary among any of the participants. The difference does not single out defendant. Moreover that defendant was the only person in the lineup with his shirt tail untucked is in no way suggestive. Other lineup participants had unique items of clothing. Thus, this lineup was not suggestive. *See State v. Dessureault, supra*.

Hooper, 145 Ariz. at 544, 703 P.2d at 488.

Citing *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409 U.S. 188 (1972), the court held that even if the lineup was suggestive, Redmond's pretrial identification of Petitioner was reliable and, therefore, properly admitted at trial. *Hooper*, 145 Ariz. at 544-45, 703 P.2d at 488-89. Utilizing the five *Biggers* factors for assessing reliability, the Arizona Supreme Court made the following findings:

> First, Mrs. Redmond had ample opportunity to observe defendant at the time of the crime. She first saw defendant in the well-lighted bedroom after Bracy had led her there. Defendant spoke to her, asking if there were any guns in the house, and he grabbed her and led her down the hallway to where the guns were kept. The hallway was also well lighted and defendant's face was no more than a foot away from Mrs. Redmond's face.
>
> Mrs. Redmond had a high level of attention. Though frightened to a certain degree, Mrs. Redmond said she was paying attention to the faces of all three intruders in the house. She was not just a casual observer of defendant, but rather her attention was focused on the suspect. *See State v. Ware*, 113 Ariz. 337, 554 P.2d 1264 (1976).
>
> The accuracy of Mrs. Redmond's description was hotly contested at trial, with the defense arguing that Mrs. Redmond's first description of her assailants indicated that three black men, two of whom were masked, were the murderers. Regarding the reference to three black males, we believe the evidence shows that, at the scene, Mrs. Redmond initially said all three men were black, but that she corrected herself, saying, "no, one was white." The

> record supports the inference that this discrepancy was caused by difficulties Mrs. Redmond had in communicating immediately following the gunshot wound to her head.
>
> Concerning the masks, it appears by some accounts that Mrs. Redmond initially stated that one or two of the assailants wore masks. Other testimony, however, indicated that Mrs. Redmond never mentioned masks immediately following the crime. Mrs. Redmond herself never recalled mentioning masks, and her testimony indicated that none of the intruders had masks on. Her other initial descriptions of the two black men were not particularly detailed. Examining the totality of the circumstances regarding this factor, we do not find the discrepancies in the descriptions to be per se unreliable.
>
> Mrs. Redmond exhibited a high level of certainty at the time of the pre-trial confrontation. After having viewed Bracy's lineup for the first time, Mrs. Redmond re-entered the viewing room and viewed Hooper's lineup. She then left the room, went to another office, and stated that she was positive the person occupying the third spot in the lineup, defendant, was the assailant. Her level of certainty is highly indicative of reliability.
>
> Mrs. Redmond's identification of defendant came fifty-three days after the crime. Whether the length of time between the crime and the pretrial identification is too long depends upon the facts of each case; there is no *per se* rule. *See State v. Strickland*, 113 Ariz. 445, 556 P.2d 320 (1976) (ten days too long where witness saw attacker for very brief moment and at a point in time where she had no discernible interest in remembering what perpetrator looked like); *State v. McCall*, *supra* (fourteen days not too long where victim had ample opportunity to observe attacker at time of crime and where victim gave detailed description of attacker). In the instant case, in light of Mrs. Redmond's ample opportunity to observe defendant at the time of the crime, her high level of attention at the time of the crime, and her good level of certainty at the lineup, Mrs. Redmond's identification of defendant fifty-three days after the crime was not unreliable.

Id.

Discussion

Petitioner's argument as to why the lineup was suggestive is that he was the only person presented with his shirt untucked. (Dkt. 78 at 70-72.) The Arizona Supreme Court made factual findings about the lineup – that there was no significant age disparity nor extraordinary height difference among the participants, and that others in the lineup had unique clothing items. *Hooper*, 145 Ariz. at 544, 703 P.2d at 488. Petitioner has not attempted to overcome these findings with clear and convincing evidence as required by the AEDPA, *see* 28 U.S.C. § 2254(e)(1), and the findings are reasonable based on the state court record, see 28 U.S.C. § 2254(d)(2). There is no requirement that the other persons in the lineup be "nearly identical" to the petitioner. *See United States v. Barron*, 575 F.2d 752, 755

(9th Cir. 1978); *see also Roldan v. Artuz*, 78 F. Supp.2d 260, 271 (S.D.N.Y. 2000) ("police stations are not theatrical casting offices; a reasonable effort to harmonize the lineup is all that is normally required"). Petitioner has failed to establish that the lineup singled him out in a way that made misidentification likely. *See Montgomery*, 150 F.3d at 992. Thus, the state court's conclusion that the pretrial identification was not suggestive was not contrary to or an unreasonable application of federal law.

Even if the lineup was somewhat suggestive, the use of the identification did not violate Petitioner's due process rights unless it was unreliable, based on the totality of the circumstances using the factors set forth in *Biggers*, and gave rise to a very substantial likelihood of irreparable misidentification. 409 U.S. at 197; *Brathwaite*, 432 U.S. at 114. Reliability is the linchpin in determining the admissibility of identification testimony at trial. *Brathwaite*, 432 U.S. at 114. Therefore, the habeas court weighs any corrupting effect of a suggestive identification against the *Biggers* factors to resolve reliability. *Id.*

The Supreme Court has discussed the interplay between state court factfinding utilizing the *Biggers* factors and the ultimate determination regarding the constitutionality of the pretrial identification procedure:

> In deciding this question, the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion are governed by the statutory presumption [of correctness] as our earlier opinion made clear. *Thus, whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact as to which the statutory presumption applies.*

Sumner v. Mata, 455 U.S. 591, 597 (1982) (emphasis added) (referencing *Sumner v. Mata*, 449 U.S. 539 (1981)). The statutory presumption applicable here requires this Court to presume the correctness of the state courts' factual findings unless the petitioner rebuts this presumption with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The relevant findings by the Arizona Supreme Court are that Redmond had a good opportunity to view Petitioner, had a high level of concentration, was certain about her pretrial identification of Petitioner, and that the discrepancies in her descriptions were due to communication

difficulties created by the gunshot wound she had just suffered. *Hooper*, 145 Ariz. at 544-45, 703 P.2d at 488-89.

With respect to the other factors, less than two months passed between the crime and the identification, which does not taint the reliability in light of the strength of the other factors. *See Barron*, 575 F.2d at 755 (finding two months between the crime and identification not inconsistent with reliability when witness has made no intervening identification of another suspect). Only the discrepancies in Redmond's descriptions weigh against reliability, but as found by the supreme court there is a sound basis to overlook those variances. Additional factors also contributed to the reliability of Redmond's pretrial identification of Petitioner. In *United States v. Field*, 625 F.2d 862, 867 (9th Cir. 1980), the court identified the presence and influence of other witnesses at the pretrial identification procedure and the conduct of government agents tending to focus the witness's attention on the defendant as indicia of unreliability. Neither of those have been established by this record. Redmond was the only witness at the Chicago police station, and she stated on the record that no government agent suggested any identification to her. (RT 8/26/82 at 43-44, 142-43.)

After review of the record, the Court finds that the Arizona Supreme Court's fact finding was not unreasonable. After assessing the totality of the circumstances, this Court concludes that Mrs. Redmond's pretrial identification was reliable and the lineup procedures used with her were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Therefore, the state court decision denying this claim was not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief on Claim 19.

Claim 20 – Denial of Counsel for Pre-Indictment Lineup

Petitioner contends that following his arrest he requested but was denied counsel prior to a lineup identification procedure, which violated his rights under the Sixth and Fourteenth Amendments. (Dkt. 31 at 64-68.) Respondents contend that Petitioner did not exhaust this claim in state court. (Dkt. 67 at 60.) Petitioner argues that he raised the claim in a *pro se*

supplemental brief as part of his direct appeal. (Dkt. 78 at 31-32.) The Court agrees that Petitioner fairly presented Claim 20 to the Arizona Supreme Court. (*See* Appellant's *Pro Se* Supplemental Br.; Appellee's Supplemental Answering Br.)

Although Petitioner presented this claim on direct appeal, the Arizona Supreme Court did not discuss the merits of this claim. Because there is no state court disposition, there are no facts or reasoning to defer to under the AEDPA; therefore, this Court reviews *de novo* the merits of this claim. *Smith v. Digmon*, 434 U.S. 332, 332-33 (1978) (claim squarely raised but not addressed by state court is exhausted); *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) (stating that *de novo* review, rather than the AEDPA deferential standard, is applicable to a claim that the state court did not reach on the merits).

As previously outlined in Claim 19, Petitioner and Bracy were arrested in Chicago on February 20, 1981. On February 22, police agencies from Arizona flew Marilyn Redmond to Chicago to view a lineup of the suspects. (RT 8/26/82 at 21-27.) In August 1981, Petitioner was formally indicted in Arizona for the Redmond/Phelps homicides. (ROA 1.)

In *United States v. Wade*, 388 U.S. 218, 237 (1967), the Court established that an accused is entitled to counsel at a post-indictment pretrial lineup because it is a critical stage in a criminal proceeding constituting a trial-like confrontation requiring the assistance of counsel. Subsequently, in *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court refused to extend the Sixth Amendment right to counsel to pre-indictment lineups. The Court concluded that pre-indictment lineups are sufficiently protected by the Fifth and Fourteenth Amendment's Due Process Clause, which forbids admission of a pre-trial lineup identification that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Id.* at 691. The *Kirby* Court reasoned that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversarial proceedings have been initiated against him, whether by way of formal charges, preliminary hearing, indictment, information or arraignment. *Id.* at 688-89; *see also United States v. Gouveia*, 467 U.S. 180, 188 (1984).

Because the lineup at issue was pre-indictment, Petitioner's right to counsel did not attach for this proceeding; Petitioner's constitutional rights were not infringed by lack of

counsel and he is not entitled to habeas relief for Claim 20.

Claim 22 – Improper Impeachment of Defense Witness

Petitioner contends that his defense witness, Michael Wilson, was improperly impeached with a prior felony conviction and because he used an alias. (Dkt. 31 at 69.) Respondents contend, and Petitioner concedes, that Claim 22 was not exhausted as a federal claim in state court. (Dkt. 67 at 63; Dkt 78 at 32.)

If Petitioner were to return to state court now and attempt to litigate this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 22 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. Claim 22 is procedurally barred.

Claim 23 – Comment on Failure to Testify

Petitioner alleges that, during closing argument, the prosecutor indirectly commented on Petitioner's failure to testify in violation of his Fifth and Fourteenth Amendment rights. (Dkt. 31 at 69-70.) Respondents concede that this claim is exhausted and entitled to merits review. (Dkt. 67 at 64.)

Background

The relevant closing argument by the prosecution is as follows:

> [PROSECUTOR] MR. BROWNLEE: In conclusion, this case deals with greed, it deals with power, it deals with money, all the things which are superior in and supreme to human life. The state also seeks justice, not by sympathy, but by evidence. You heard the evidence. You know what it is. You know what kind of justice on New Year's Eve Patrick Redmond, Helen Phelps and Marilyn Redmond had. They had no jury. *They had a limited right to speak*--
>
> MR. REMPE: Your Honor, would you note my objection as to that?
>
> THE COURT: Yeah. Mr. Brownlee is reminded also.
>
> MR. BROWNLEE: I'm referring to --

THE COURT: Mr. Brownlee, you hear what I said?

MR. BROWNLEE: Certainly.

THE COURT: Okay.

MR. BROWNLEE: Mrs. Redmond told you what happened there. You have heard it called a tragedy. A tragedy is an avalanche, a snowfall, an earthquake. It's not something planned. It was planned. It was intentional. It was brutal.

You have the evidence, you have a duty. You have a duty to stand up and speak individually for the victims that evening. Mrs. Phelps risked her life when she tried to protect something sacred, her wedding ring, and yet she was forced to give it up just as she was forced to give up her life.

There is no doubt in this case. You heard about reasonable doubt. Is there a reason to acquit these two gentlemen? There is not. There is no reason. They are guilty beyond a reasonable doubt of each of those offenses. We ask you to find them guilty as charged. Thank you.

(RT 12/21/82 at 175-76.)

The trial court denied Petitioner's motion for a mistrial explaining that the prosecutorial comments were ambiguous and not susceptible of a singular interpretation, meaning that the prosecution was not necessarily pointing a finger at either or both the defendants for not taking the stand. (*See* RT 12/22/82 at 22-23.) On direct appeal, the Arizona Supreme Court found "no violation of defendant's fifth amendment rights because we do not think the language was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." *Hooper*, 145 Ariz. at 548, 703 P.2d at 492.

Discussion

The Fifth Amendment prohibits a prosecutor from commenting to the jury about a defendant's failure to testify at trial. *See Griffin v. California*, 380 U.S. 609, 615 (1965). "[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* The *Griffin* Court held that it was error to instruct a jury that a defendant's decision not to testify carried an adverse inference regarding his silence on matters for which he had personal knowledge. *Id.* at 614. The Ninth Circuit evaluates potential *Griffin* error by asking "whether the

language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify."[17] *See Cook v. Schriro*, 516 F.3d 802, 822 (9th Cir. 2008); *see also Hayes v. United States*, 368 F.2d 814, 816 (9th Cir. 1966) (establishing the Ninth Circuit test for *Griffin* error).

Petitioner's argument is that the prosecutor indirectly commented on his right to remain silent and his right not to testify at trial by comparing his trial to the murder scene. (Dkt. 31 at 69-70.) The Court disagrees. The prosecutor's singular indirect comment about the victims' limited right to speak on the night of the crime was not manifestly intended to call attention to the defendant's failure to testify or to count it against him. *Cf. United States v. Altavilla*, 419 F.2d 815, 816-17 (9th Cir. 1969) (concluding that the prosecutor's comments called attention to the defendant's failure to testify). Further, there is no *Griffin* error because the prosecutor did not suggest to the jury that Petitioner's failure to testify implied guilt. *See Portuondo v. Agard*, 529 U.S. 61, 69 (2000).

Even if the prosecutorial comment was construed as error, it was harmless. *See Cook*, 516 F.3d at 820. Relief is to be granted on a *Griffin* claim only "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987) (quoting *United States v. Kennedy*, 714 F.2d 968, 976 (9th Cir. 1983)); *see Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993). Here, the comment was indirect and not extensive, there was no inference of guilt stressed to the jury and the evidence against Petitioner did not support acquittal; rather, the evidence substantially supported guilt. Thus, the state court's decision denying relief was not contrary

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[17] Under the AEDPA, the Seventh Circuit has concluded that *Griffin* error does not encompass a prosecutor's indirect comment about a defendant's failure to testify. *See Yancey v. Gilmore*, 113 F.3d 104, 106-07 (7th Cir. 1997) (stating that *Griffin* prohibited only "direct" prosecutorial references to the defendant's failure to testify; *Griffin* did not reach the issue of whether a prosecutor may comment on the evidence in such a way that indirectly refers to a defendant's silence). However, applying the AEDPA, the Ninth Circuit utilizes the standard that it adopted in *Hayes*, which includes and evaluates indirect prosecutorial comment. *See Cook v. Schriro*, 516 F.3d 802, 822 (9th Cir. 2008).

to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief on Claim 23.

Claim 24 – Jury Instruction Due Process Violation

Petitioner contends that his due process right to a fair trial was violated because the judge did not define reasonable doubt for the jury prior to deliberations. (Dkt. 31 at 70-71.) Petitioner further contends that when the jury asked for a definition, the judge provided an unconstitutional one. (*Id.*) Respondents contend that Petitioner only raised this claim as a state law issue on direct appeal. (Dkt. 67 at 66-67.) Regardless of whether Claim 24 was exhausted on direct appeal, it is meritless. *See* 28 U.S.C. § 2254(b)(2).

Background

On December 21, 1982, following closing argument, the trial court instructed the jury. The trial court only addressed reasonable doubt as follows: "The state must prove the defendants guilty beyond a reasonable doubt. If the evidence is susceptible of two equally reasonable interpretations, one of the defendant's guilt and the other of his innocence, it is your duty to adopt the interpretation of innocence." (RT 12/21/82 at 180-81.)

On December 23, 1982, the following occurred with all counsel present in the trial court's chambers:

> THE COURT: The Court has received a question from the jury and I will read it: Quote, can you provide us with the court's definition of reasonable doubt? . . . All counsel have had the chance to review the question. The Court has indicated preliminarily that its response should be or will be that they have been provided with all of the instructions on the rules of law applicable in this matter, and among those instructions is a definition of reasonable doubt. Please review those instructions and you will find the Court's definition of reasonable doubt among them.
>
> [PROSECUTOR] MR. JONES: How about "Please review all of those instructions"?
>
> THE COURT: Yeah, please review all of those instructions and you will find the Court's definition of reasonable doubt amongst them.
>
> MR. JONES: I don't have any problem with that.
>
> MR. WOODS: That's fine.
>
> MR. REMPE: I have no problem with that.

(RT 12/23/82 at 41-42; *see also* ROA 1065.)

Because the instructions did not in fact include a definition of reasonable doubt the jury sent another request for a definition. (RT 12/23/82 at 66-67.) The court gave an additional instruction, defining reasonable doubt as follows:

> The state must prove the defendants guilty beyond a reasonable doubt. Reasonable doubt means a doubt based upon reason. It is not an imaginary or possible doubt. It is a doubt for which a reason can be given, arising out of an impartial consideration of the evidence or lack of evidence.

(*Id.* at 52.) The trial court also gave its earlier instruction that touched on reasonable doubt:

> The state must prove the defendants guilty beyond a reasonable doubt. If the evidence is susceptible of two equally reasonable interpretations, one of the defendant's guilt and the other of his innocence, it is your duty to adopt the interpretation of innocence.

(*Id.* at 52-53.)

Subsequently, counsel for Petitioner moved for mistrial:

> The record should reflect that I believe this jury . . . sent out a request, a question asking the court what the court's definition of reasonable doubt was and the court sent back an answer that they should refer to their court's instructions. They almost immediately sent back their response which was in the form of a packet of instructions which we found did not include the reasonable doubt instruction. It is now apparent from the transcript and the record will reflect that this jury was not instructed on reasonable doubt despite the fact it was the intention of the court and the intention of all parties as reflected in our discussion on the instructions.

(*Id.* at 66-67.) Counsel argued that because the jury had been deliberating for eleven hours without a definition of reasonable doubt that such deliberations were prejudicial and he was entitled to a mistrial. (*Id.* at 66-71.) The trial court denied the motion. (*Id.* at 70-71.)

On direct appeal, the Arizona Supreme Court upheld the trial court's disposition:

> Next, defendant argues that the trial court committed reversible error by failing to provide the jury a definition of reasonable doubt until eleven hours after deliberations began. Though the court had intended to do so, it failed to give either a written or verbal definition of reasonable doubt. When the court realized its oversight, it reassembled the jury and read all the instructions, adding the reasonable doubt definition both verbally and in written form. The next day, the jury returned its verdicts. We find no error.
>
> First, though the trial court must always instruct the jury that the prosecution must prove its case beyond a reasonable doubt, there is no requirement that a trial court define reasonable doubt for the jury. The court, however, may do so if it sees fit. *State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977); *State v. Canedo*, supra; *see also United States v. Miller*, 688 F.2d 652

> (9th Cir.1982); *United States v. Witt*, 648 F.2d 608 (9th Cir.1981). Thus, even the total failure to define reasonable doubt could not have resulted in reversal. Second, the trial court eventually defined reasonable doubt for the jury, giving it both an appropriate written and verbal definition.

Bracy, 145 Ariz. at 535, 703 P.2d at 479.

Discussion

"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887)). "[S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury." *Id.* (further citation omitted). Thus, the trial court did not constitutionally err by failing to provide a definition of reasonable doubt prior to deliberations. The Arizona Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law.

The Court further rejects Petitioner's argument that the reasonable doubt instruction given during deliberations was unconstitutional. Petitioner's argument is entirely conclusory as he has not presented any argument regarding the reasonable doubt definition given on December 23; rather, Petitioner focuses only on the December 21 instructions. Petitioner cites *Cage v. Louisana*, 498 U.S. 39 (1990) in support of this claim; however, the 1990 *Cage* decision was not clearly established federal law when Petitioner's conviction became final in January 1986. Even if applicable, *Cage* would not entitle Petitioner to relief. In *Cage*, the Court found unconstitutional a reasonable doubt definition stating that for reasonable doubt to exist, it must be an actual substantial doubt, a "doubt as would give rise to grave uncertainty," and that a finding of guilt required a "moral certainty." 498 U.S. at 40. *Cage* is easily distinguishable; the December 23 instructions did not suggest or indicate, as the *Cage* instructions did, a higher degree of doubt than is required for acquittal under the

reasonable doubt standard.

Based on the foregoing, the Arizona Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law; Petitioner is not entitled to relief on Claim 24.

Claim 25 – Jury Misconduct

Petitioner contends that constitutional error arose from trial jurors and alternate jurors meeting socially and discussing who was selected as foreman, after closing arguments had been given and the court had sworn in the trial jury. (Dkt. 31 at 71-72.) Respondents contend that Petitioner only raised this claim as a state law issue on direct appeal. (Dkt. 67 at 68.) Petitioner argues that the Arizona Supreme Court overlooked any failure to raise the federal constitutional issues because it grounded its decision in federal constitutional principles. (Dkt. 78 at 33-34 (citing *Hooper*, 145 Ariz. at 548, 703 P.2d at 492).) The Court need not resolve the procedural status of Claim 25 because it is meritless. *See* 28 U.S.C. § 2254(b)(2).

Background

On December 21, 1982, counsel presented closing arguments. (RT 12/21/82 at 10-176.) Following the court's reading of the jury instructions, the court announced the four alternate jurors that would be dismissed prior to deliberations. (*Id.* at 195.) The jury returned guilty verdicts on December 24. After his conviction, Petitioner filed a motion for a new trial alleging, in part, juror misconduct. (ROA 1093.) The court held a post-trial hearing at which a trial juror and an alternate juror testified. (RT 2/4/83 at 66-88.) The jurors testified that after closing argument on December 21, four of them, two alternate and two trial jurors, went out for twenty to thirty minutes for a drink to celebrate a birthday of one of the jurors. (*Id.*) When asked, the trial jurors identified who had been selected as foreperson. (*Id.*) Also, there was some discussion about how alternate jurors were selected. (*Id.*) Both the trial juror and the alternate juror emphasized that there was no discussion of the case. (*Id.*)

The trial court determined that, on December 21, the trial jurors selected a foreperson within ten to fifteen minutes and then were dismissed for the night, deliberations to commence

on the morning of the 22nd. (*Id. at* 91-92.) Because no deliberations had taken place at the time of the social outing, the trial court denied the motion alleging juror misconduct. (*Id.*)

On direct appeal, the Arizona Supreme Court held as follows,

> In the instant case, we find no abuse of discretion. First, the alternate jurors did not discuss the merits of the case with the members of the final twelve. Second, these discussions occurred prior to the beginning of actual deliberations. Thus, we do not believe any prejudice resulted to defendant. *See State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982) (finding of prejudice necessary to reverse case for juror misconduct); *see also State v. Rocco, supra* (no prejudice shown where alternate juror prayed with final jury panel in jury room for one minute prior to beginning of deliberations).

Hooper, 145 Ariz. at 548, 703 P.2d at 492.

Discussion

The Sixth Amendment guarantees that the accused shall enjoy the right to trial by an impartial jury and to be confronted with the witnesses against him. *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam). Outside influences upon the jury are analyzed for prejudicial impact. *Id.* at 365. The ultimate inquiry is whether the intrusion affected the jury's deliberations and thereby its verdict. *See United States v. Olano*, 507 U.S. 725, 739 (1993) (concluding that the presence of alternate jurors in the jury room during deliberations was not presumptively prejudicial). The Constitution does not require a new trial every time a juror has been placed in a potentially compromising situation. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982). "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

Here, the trial court concluded that no jury deliberations had taken place when the social gathering occurred between the two trial jurors and two alternate jurors. (RT 2/4/83 at 91-92.) As found by the Arizona Supreme Court, there was no discussion of the merits of the case at the social gathering. These findings are entitled to a presumption of correctness and have not been rebutted. *See* 28 U.S.C. § 2254(e)(1). Based on the record, there was no intrusion into the deliberative process of the jury. Absent intrusion, there was no effect on the jury and no prejudice. Absent prejudice, Petitioner's constitutional rights were not violated.

Parker, 385 U.S. at 365. Based on the foregoing, the Arizona Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law and Petitioner is not entitled to relief on Claim 25.

Claim 26 – Prior Convictions

Petitioner alleges that the trial court erred in refusing to allow him to withdraw his waiver of trial by jury on charges that he had prior felony convictions, that were proffered to enhance his sentences on non-capital convictions. (Dkt. 31 at 72.) Petitioner claims that his lack of knowledge concerning the effect of the waiver rendered that waiver involuntary in violation of due process. (*Id.*) Respondents contend that Petitioner only raised this claim as a state law issue on direct appeal. (Dkt. 67 at 70.) The Court agrees with Petitioner (Dkt. 78 at 34) that he fairly presented Claim 26 (Pet'r Opening Br. at 22); it will be reviewed on the merits.

Background

After two and one-half months of trial, on December 24, 1982, the jury returned guilty verdicts against Petitioner and Bracy for conspiracy to commit first degree murder, first degree murder, attempted first degree murder, kidnapping, armed robbery and burglary. *See Hooper*, 145 Ariz. at 543, 703 P.2d at 487; *Bracy*, 145 Ariz. at 524, 703 P.2d at 468. Following the verdicts, together, Petitioner and Bracy were immediately arraigned on charges that they had prior felony convictions in Illinois. *See* Ariz. R. Crim. P. 18.1(b), 19.1(b) (1982).

> THE COURT: [Have] not guilty pleas been entered for either or both of you on the prior convictions? Do you remember?
>
> MR. REMPE: I honestly don't, Your Honor. If they are not guilty pleas my client verbally told me he would waive his right to a jury for the prior felony conviction decision.
>
> [PROSECUTOR] MR. JONES: Your Honor, Mr. Brownlee doesn't recall them being arraigned on this. We can proceed with an arraignment.
>
> THE COURT: Let me proceed with the arraignment and then set this, recess the trial and reset it down the road, unless we are going to get admissions.
>
> MR. WOODS: No.

> THE COURT: If we are not going to get admissions, not try them without a jury, then I'll reset it on the trial on the priors down the road. Okay, approximately ten days to two weeks okay? So let's take arraignments now at this time.

(RT 12/24/82 at 84-85.) After the trial court arraigned Bracy and entered a not guilty plea on allegations of prior felony convictions in Illinois, the following colloquy occurred regarding waiver of trial by jury:

> MR. JONES: While Mr. Bracy is standing in front of the Court, could we have a waiver from his mouth as to a right to trial by jury on an allegation of prior conviction?
>
> THE COURT: Okay, I'll get it from both of them at the same time. [Mr. Bracy's] counsel has stated on the record, but I will get it from him also.

(*Id.* at 86-87.) Before discussing waiver of trial by jury with both Bracy and Petitioner, the trial court arraigned Petitioner, entered a not guilty plea, and then addressed both defendants:

> THE COURT: Now from each of the defendants, the Court desires at this time to have on the record the fact that they both will waive a trial by jury on allegation of prior convictions and allow the Court to proceed on those matters, sitting as both the factfinder and the legal judge on it. Mr. Bracy?

(*Id.* at 87-88.) Defendant Bracy decided to admit his prior felony convictions. (*Id.*) The trial court then addressed Petitioner:

> THE COURT: Okay, Mr. Woods, I need to set a trial date in your matter.
>
> MR. WOODS: Yes, we do.
>
> THE COURT: Okay, it's ordered setting the matter, State of Arizona versus Murray Hooper for trial on the prior convictions, and Mr. Hooper, you still indicate that you desire to waive the jury in your matter?
>
> DEFENDANT HOOPER: Yes, I decided to waive the jury, but I want the trial on the priors.
>
> THE COURT: Okay, fine, no problem. We will set the trial in that matter for January 6, at 1:30 . . . Is there anything also to come before the Court at this time?

(*Id.* at 89.) At this juncture, Defendant Bracy changed his mind and asked the court if he could withdraw his admission of prior convictions. The trial court allowed Bracy to withdraw his admission and to have a trial on his prior convictions. (*Id.* at 90-91.) The trial court then entered its order that Petitioner and Bracy waived trial by jury on the allegations of prior

felony convictions. (*Id.*; ROA 1070.)

On January 5, 1983, Petitioner moved to withdraw his waiver, asking the court for trial by jury on his prior felony convictions. (ROA 1081.) On January 6, Petitioner testified in support of his motion and was cross-examined about his earlier decision to waive a jury:

> MR. BROWNLEE: Let me make sure I understand what you're telling us. At the time that you waived your right to a trial by jury on December 24th, no one threatened you or forced you into waiving your trial did they?
>
> DEFENDANT HOOPER: No, I was not threatened. . . .
>
> MR. BROWNLEE: And no one made any promises to you or told you you had to waive your right to a trial by jury, did they?
>
> DEFENDANT HOOPER: No, I was advised to waive my rights.
>
> MR. BROWNLEE: Who were you advised by?
>
> DEFENDANT HOOPER: Mr. Woods.
>
> MR. BROWNLEE: Did he explain to you that you did have a right to a trial by jury? . . .
>
> DEFENDANT HOOPER: Sure.
>
> MR. BROWNLEE: And Mr. Hooper, you know what a right to a trial by a jury is, don't you? . . .
>
> DEFENDANT HOOPER: Yes.
>
> MR. BROWNLEE: And you have, based on your prior experiences with a jury trial that just concluded on December 24th, you knew that in a jury trial the jury would be the triers of fact, not the judge, is that correct?
>
> DEFENDANT HOOPER: Yes.

(RT 1/6/83 at 10-11.) Based on the foregoing, the trial court denied the motion, concluding that Petitioner had validly waived his right to trial by jury on prior felony convictions. (*Id.* at 24; ROA 1082.) The court then conducted the trial on Petitioner's and Bracy's prior felony convictions. (RT 1/6/83 at 24-47.) Based on the record presented during trial, the court concluded that the prosecution had proven the validity of Petitioner's prior felony convictions. (ROA 1086.) (*See supra* Claim 17.)

On direct appeal, the Arizona Supreme Court concluded:

> The trial court properly denied defendant's motion to withdraw the waiver. First, the waiver was voluntary. Defendant admitted that no force or

> threats were used against him to extract the waiver. Further, the trial judge fully explained the rights attendant to a jury trial. Though the court never explained that a finding of priors would enhance punishment, such information was irrelevant to defendant's decision. The effect of a waiver of the jury trial was only that the trial court and not the jury would determine the matter; waiver has no effect on enhancement. The trial court provided defendant with sufficient information with which to make an intelligent waiver. *See State v. Butrick*, 113 Ariz. 563, 558 P.2d 908 (1976).

Hooper, 145 Ariz. at 548-49, 703 P.2d at 492-93.

Discussion

Petitioner had a right to trial by jury on allegations of prior felony convictions to determine, not guilt or innocence of the prior crimes, but merely the truth or falsity of the fact of the prior convictions. *See State v. Gilbert*, 119 Ariz. 384, 385, 581 P.2d 229, 230 (1978). The right to trial by jury is a constitutional right protected by the Sixth Amendment. *See Adams v. United States*, 317 U.S. 269, 275 (1942); *see also Johnson v. Zerbst*, 304 U.S. 458 (1938). Constitutional rights, though, are subject to waiver. *Johnson*, 304 U.S. at 464. A waiver is an intentional relinquishment or abandonment of a known right or privilege, a matter which depends upon the particular facts and circumstances surrounding that case. *Id.* The right to trial by jury may be waived when the waiver is knowing, voluntary and intelligent. *Adams*, 317 U.S. at 275.

Petitioner argues that his waiver was not knowing or voluntary because the trial judge did not inform him that proof of his prior convictions would enhance the sentence he received for his non-capital convictions. (Dkt. 31 at 72.) There is both state and federal law to support the proposition that trial courts must make a record that a defendant has been advised of the sentencing range before waiving his right to trial and entering a plea of guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Avila*, 127 Ariz. 21, 25, 617 P.2d 1137, 1141 (1980). The Court disagrees with Petitioner's contention that waiver of trial by jury in this case is tantamount to a guilty plea, invoking the requirements of *Boykin*. *See Butrick*, 113 Ariz. at 566-67, 558 P.2d at 911-12 (noting that a jury waiver is not equivalent to a guilty plea to which additional protections attach). Petitioner's waiver of trial by jury had no impact or effect on whether his non-capital convictions would be subject to enhancement, it only

established that the judge would be the fact-finder. *Id.*

The Arizona Supreme Court found that Petitioner knew and understood that he was choosing to have the trial court, rather than a jury, decide whether the allegations of prior felony convictions had been proven beyond a reasonable doubt. *See Hooper*, 145 Ariz. at 548-49, 703 P.2d at 492-93. The supreme court also found that no force or threats were used against him to extract the waiver. *Id.* The Court concludes that the supreme court did not unreasonably determine the facts in light of the evidence presented in state court. *See* 28 U.S.C. § 2254(d)(2). Based upon these facts, the supreme court concluded that Petitioner constitutionally waived his right to trial by jury on his prior felony convictions. *See Hooper*, 145 Ariz. at 548-49, 703 P.2d at 492-93. While the waiver colloquy between the judge and the Petitioner could have been more extensive, the particular facts of this case support the conclusion that the Petitioner made a knowing and voluntary waiver. All matters were discussed in the presence of his counsel, and it is clear that he had discussed the matter with his attorney. In the end, Petitioner adequately understood his right to have a jury determine if he was the individual in those convictions, and he knowingly and voluntarily waived those rights and agreed to have the matters determined by the judge without a jury. Thus, Petitioner, with the assistance of counsel, knowingly, intelligently and voluntarily waived his right to trial by jury on his prior felony convictions. (RT 12/24/82 at 89; ROA 1070.) Therefore, pursuant to 28 U.S.C. § 2254(d)(1), the Arizona Supreme Court's decision is not contrary to or an unreasonable application of Supreme Court precedent. Petitioner is not entitled to relief on Claim 26.

Claim 27 – Non-Capital Sentencing

Petitioner contends that his sentencing on certain non-capital counts violated the Constitution because the trial court arbitrarily found that he was a dangerous, repetitive offender. (Dkt. 31 at 72-73.) Respondents answer that this claim was raised only as a state law issue in state court. (Dkt. 67 at 72.) The Court agrees.

On direct appeal, Petitioner raised Claim 27 as a state law violation, asking that he be resentenced on certain non-capital counts. (Opening Br. at 24.) Because Petitioner did not

alert the state court that he was alleging a specific federal constitutional violation, the claim was not fairly presented. *See Casey*, 386 F.3d at 913. In turn, the Arizona Supreme Court's resolution of the claim had no basis in federal constitutional law. *See Hooper*, 145 Ariz. at 550, 703 P.2d at 494.

Petitioner contends that, regardless of presentation, this claim was exhausted by the supreme court's independent review of his capital sentence. (Dkt. 78 at 35.) The Arizona Supreme Court's independent sentencing review applies only to death sentences. *See Gretzler*, 135 Ariz. at 54, 659 P.2d at 13 (stating that the purpose of independent review is to assess the presence or absence of aggravating and mitigating circumstances and the weight to give to each); *State v. Brewer*, 170 Ariz. 486, 493-94, 826 P.2d 783, 790-91 (1992) (reviewing the record regarding aggravation and mitigation findings to ensure compliance with Arizona's death penalty statute, and deciding independently whether the death sentence should be imposed); *Blazak*, 131 Ariz. at 604, 643 P.2d at 700. Thus, this claim was not fairly presented, and it was not exhausted by the Arizona Supreme Court's review of the claim or independent sentencing review.

If Petitioner were to return to state court now and attempt to litigate this claim as a federal constitutional issue, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 27 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does attempt to establish. Claim 27 is procedurally barred.

Claim 28 – *Sua Sponte* Severance

Petitioner contends that the trial court should have *sua sponte* severed his trial from that of co-defendant Bracy because (1) the incompetence of Bracy's trial attorney, Stephen Rempe, had a spillover effect upon Petitioner's alibi defense, and (2) due to Bracy's criminal history of escape, the trial court decided to shackle both of them for trial. (Dkt. 31 at 73-74;

Dkt. 78 at 35, 78.) The parties contest exhaustion. (Dkt. 67 at 74; Dkt. 78 at 35.)

In his second PCR petition, Petitioner argued that the spillover effect from Rempe's ineffectiveness was devastating to his alibi defense. (ROA 1626 at 2.) However, Petitioner did not allege that the trial court *sua sponte* should have ordered severance on any grounds. (*Id.* at 2, 18; ROA 1721 at 42-47.) Based upon a review of the state court record, the Court concludes that Petitioner did not fairly present and exhaust a claim that the trial court erred in failing to *sua sponte* sever the trials.[18]

If Petitioner were to return to state court now and attempt to litigate Claim 28, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, it is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 28 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does attempt to establish. Claim 28 is procedurally barred.

Claim 29 – (F)(1) Aggravating Circumstance

Petitioner contends that the state courts did not find the A.R.S. § 13-703(F)(1) aggravating circumstance beyond a reasonable doubt and that the trial court unconstitutionally double-counted his prior murder convictions in support of two aggravating circumstances. (Dkt. 31 at 74-75.) Petitioner asserts that this claim was exhausted by virtue of the supreme court's independent sentencing review. (Dkt. 78 at 10-20.) Regardless of exhaustion, this claim is meritless. *See* 28 U.S.C. § 2254(b)(2).

Petitioner first argues that the trial court did not properly find this aggravating circumstance because it did not specify that it found the existence of the circumstance beyond

[18] Even if these arguments were considered on the merits, Petitioner would not be entitled to relief. The Court has already concluded that Petitioner was not prejudiced by Rempe's conduct during Petitioner's joint trial with Bracy. *See supra* Claim 3. Further, the Court concluded that the trial court was justified in shackling Petitioner at trial. *See supra* Claims 8 and 12.

a reasonable doubt. At the time of Petitioner's sentencing, a judge determined the existence of aggravating circumstances, A.R.S. § 13-703(B) (1983), which had to be established beyond a reasonable doubt, *see State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980). Judges "are presumed to know the law and to apply it in making their decisions." *Walton*, 497 U.S. at 653. Additionally, the Arizona Supreme Court found the (F)(1) aggravating circumstance when it independently reviewed the record and upheld Petitioner's sentence. *Hooper*, 145 Ariz. at 550, 703 P.2d at 494. This Court also presumes that the Arizona Supreme Court properly applied state law and found that the circumstance existed beyond a reasonable doubt. *See Woratzeck v. Stewart*, 97 F.3d 329, 335-36 (9th Cir. 1996); *Clark v. Ricketts*, 958 F.2d 851, 860 n.6 (9th Cir. 1991). This portion of Petitioner's claim is without merit.

Next, Petitioner argues that the supreme court erred in concluding that the (F)(1) aggravating circumstance was properly established because it utilized his prior convictions for murder in Illinois to establish both the (F)(1) and the (F)(2) aggravating circumstances. (Dkt. 31 at 75.) Petitioner's argument is factually erroneous. The Arizona Supreme Court used Petitioner's Illinois convictions for murder to establish the (F)(1) aggravating circumstance; the court used Petitioner's Illinois convictions for armed robbery and aggravated kidnapping to establish the (F)(2) aggravating circumstance. *See Hooper*, 145 Ariz. 538 at 550, 703 P.2d at 494. Thus, Petitioner's double-counting argument is without merit.

Finally, Petitioner argues that his prior murder convictions upon which this aggravating circumstance is based are convictions that may be found invalid by the Illinois courts. Petitioner raised this same argument in Claim 16 and the Court rejected it. (Dkt. 114.) Petitioner is not entitled to relief on Claim 29.

Claim 30 – (F)(2) Aggravating Circumstance

Petitioner contends that the state courts improperly found the existence of the

A.R.S. § 13-703(F)(2) aggravating circumstance.[19] (Dkt. 31 at 75-80; Dkt. 78 at 81-86.) Specifically, Petitioner argues that the state court erred in failing to consider the statutory definitions of Petitioner's prior felonies when deciding the existence of the (F)(2) aggravating circumstance and that there was insufficient evidence of his prior convictions to support the (F)(2) finding. (Dkt. 78 at 82-86.) Rather than resolve the parties' dispute over the procedural status of this claim, the Court finds it judicially expedient to reach and deny the merits of this claim. *See* 28 U.S.C. § 2254(b)(2).

Background

At the time of Petitioner's crime, the (F)(2) aggravating circumstance existed if the "defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." The Arizona courts defined "violence" as the "exertion of any physical force so as to injure or abuse." *See State v. Arnett*, 119 Ariz. 38, 51, 579 P.2d 542, 555 (1978). When assessing the existence of the (F)(2) factor, the sentencer looks only to whether the previous offense by its statutory definition involves violence. *See State v. Gillies*, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983). The court may take judicial notice that certain offenses were, by definition, violent felonies against others. *See State v. Romansky*, 162 Ariz. 217, 227, 782 P.2d 693, 703 (1989); *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985).

At sentencing, the State presented evidence establishing that Petitioner had been convicted of six prior felonies in Illinois, three counts of armed robbery and three counts of aggravated kidnapping. (RT 1/6/83 at 32-47.) To confirm that the convictions involved the use or threat of violence against others, the prosecution provided and the trial court accepted the Illinois statutory citation for the crimes. (RT 2/4/83 at 93-96.) The prosecution and counsel for Petitioner agreed that citation to the Illinois statutes was sufficient to present the substance of these crimes to the judge for consideration as (F)(2) aggravation:

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[19] To the extent this claim is based on Petitioner's argument that the state courts failed to find the aggravating circumstance beyond a reasonable doubt, it is rejected for the reasons discussed as to Claim 29.

> PROSECUTOR: We have the Illinois statutes that spell out and I believe would show to the Court that they do involve the use or threat of use of violence.
>
> DEFENSE COUNSEL: We have no objection to just having the statute submitted.

(RT 2/4/83 at 94.) In the Special Verdict, the trial court found the (F)(2) aggravating circumstance established by Petitioner's three prior felony convictions for armed robbery and three felony convictions for aggravated kidnapping. (ROA 1116.)

In performing its independent review of the record to determine the existence of the aggravating circumstance, the Arizona Supreme Court held as follows:

> We also find the existence of A.R.S. § 13-703(F)(2) that "defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." On September 23, 1981 judgment was entered against defendant in Cook County, Illinois on three counts of armed robbery and three counts of aggravated kidnapping. We take judicial notice that all these crimes involve the use or threat of violence against others. *See State v. Nash, supra*.

Hooper, 145 Ariz. at 550, 703 P.2d at 494.

Discussion

The Supreme Court holds that the appropriate standard of federal habeas review of a state court's application of an aggravating circumstance is the "rational factfinder" standard; i.e., "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Lewis v. Jeffers*, 497 U.S. 764, 781 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Id*.

Petitioner challenges the fact that the state did not present copies of the statutes to the state court, thereby not meeting its burden of proof that the convictions were for crimes of violence. Based upon the record presented to the trial court and the statutory definition of Petitioner's offenses, a reasonable fact finder could have determined that his prior convictions for armed robbery were crimes of violence as required by § 13-703(F)(2). The record establishes that Petitioner was convicted of, and judgment was entered on, three counts of armed robbery. (RT 1/6/83 at 32-47.) By definition, the offense of robbery is committed

"when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." Ill. Comp. Stat. Ch. 38, § 18-1 (1981). By statutory definition, a person commits armed robbery "when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." *Id.*, § 18-2. Because the statutory definitions are not in question, Petitioner's argument that the State failed to meet its burden because it did not submit copies of the Illinois statutes is meritless. In sum, it was not arbitrary for the Arizona courts to conclude that Petitioner's conviction qualified as a "felony in the United States involving the use or threat of violence on another person" supporting the existence of § 13-703(F)(2). Because Petitioner's three prior convictions for armed robbery support the existence of the (F)(2) aggravating circumstance, the Court need not continue to evaluate Petitioner's other felony convictions. *See State v. Ramirez*, 178 Ariz. 116, 130, 871 P.2d 237, 251 (1994) (one of two prior convictions, "standing alone, is sufficient to support the court's finding of an aggravated circumstance under § 13-703(F)(2)").

With respect to Petitioner's assertion that the trial court's admission of the prior convictions was erroneous under state evidentiary law, the Court reiterates that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (federal court's habeas powers do not allow it to grant relief simply because it believes the trial court incorrectly interpreted the rules of evidence). In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution or laws of the United States. *Id*. Therefore, the federal court must only determine whether the alleged error of state law "so infused the proceeding with unfairness as to deny due process of law." *Id*. at 75; *see Jammal v. Van deKamp*, 926 F.2d 918, 920 (9th Cir. 1991) ("The issue is not whether introduction of [the evidence] violated state evidentiary principles, but whether the trial court committed an error which rendered the trial so arbitrary and fundamentally unfair that it violated federal due process") (quoting *Reiger v. Christensen*, 789 F.2d 1425, 1430 (9th Cir. 1986)).

Even if the trial court erred in its admission of the records of Petitioner's prior felony

convictions, the Court finds that the error did not deny Petitioner due process of law or render the proceedings fundamentally unfair. The fact that the trial court reviewed documentary evidence, the authenticity and import of which were not subject to reasonable dispute, did not "violate 'fundamental conceptions of justice.'" *Dowling v. United States*, 493 U.S. 342, 352 (1990) (defining the "category of infractions that violate 'fundamental fairness' very narrowly") (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). The Arizona Supreme Court reasonably determined that the convictions presented were prior felonies involving violence and constituted an aggravating factor pursuant to § 13-703(F)(2). Petitioner is not entitled to habeas relief on Claim 30.

Claim 31 – (F)(5) Aggravating Circumstance

Petitioner contends that A.R.S. § 13-703(F)(5), the pecuniary gain aggravating circumstance, is unconstitutionally vague. (Dkt. 31 at 80-83.) Petitioner further contends that this aggravating circumstance was erroneously found due to unconstitutional double-counting.[20] Specifically, Petitioner claims it was error for the state to use the factual basis of robbery to substantiate the finding of guilt for felony murder and also to substantiate the finding of the (F)(5) aggravating circumstance. (*Id.*) Rather than resolve the parties' dispute over the procedural status of this claim, the Court finds it judicially expedient to reach and deny the merits of this claim. *See* 28 U.S.C. § 2254(b)(2).

The Ninth Circuit has expressly rejected the argument that § 13-703(F)(5) is unconstitutionally vague. *Poland v. Stewart*, 117 F.3d 1094, 1098-1100 (9th Cir. 1997); *Woratzeck*, 97 F.3d at 334-35. As the *Woratzeck* court explained, factor (F)(5) is constitutionally permissible because it "is not automatically applicable to someone convicted of robbery felony-murder"; the factor therefore "serves to narrow the class of death-eligible persons sufficiently." 97 F.3d at 334. Moreover, as the Arizona Supreme Court has noted, the pecuniary gain aggravating circumstance "does not apply in every situation where an

[20] Petitioner also argues that the A.R.S. § 13-703(F)(5) aggravating circumstance was not found beyond a reasonable doubt. The Court has already determined that this allegation is meritless. *See supra* Claim 29.

individual has been killed while at the same time the defendant has made a financial gain. It is limited to those situations where 'the defendant committed the offense . . . *in the expectation* of the receipt of anything of pecuniary value.'" *State v. Hensley*, 142 Ariz. 598, 603, 691 P.2d 689, 695 (1984) (quoting *State v. Harding*, 137 Ariz. 278, 296, 670 P.2d 383, 401 (1983) (Gordon, J., specially concurring)).

In addition, the Arizona Supreme Court and the Ninth Circuit have addressed and rejected the argument that § 13-703(F)(5) impermissibly allows the pecuniary gain factor to be counted both as an element of the underlying robbery offense and an aggravating circumstance at sentencing. The Arizona Supreme Court has explained that the "facts necessary to prove a taking of property are not the same facts necessary to prove the motive for murder. Thus, there is no double-counting of an element of robbery when the State proves pecuniary gain as an aggravating factor." *State v. Greenway*, 170 Ariz. 155, 164, 823 P.2d 22, 31; *see State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984) ("the state must prove additional facts to prove the aggravating circumstance of pecuniary gain once it has proved the robbery"). The Ninth Circuit, citing *Greenway*, has similarly held that the (F)(5) factor does not result in double-counting because not every felony murder that occurs in the course of a robbery is motivated by pecuniary gain; therefore, the motivation of pecuniary gain must be proven as a fact in addition to the elements of the underlying crime. *Woratzeck*, 97 F.3d at 334-35. Petitioner is not entitled to relief on Claim 31.

Claim 32 – (F)(6) Aggravating Circumstance

Petitioner contends that the A.R.S. § 13-703(F)(6) aggravating circumstance is facially vague. (Dkt. 31 at 83-91.) Petitioner also asserts that the state courts applied the (F)(6) aggravating circumstance to the facts of his case in an unconstitutionally arbitrary and capricious manner. (*Id.*) Rather than resolve the parties' dispute over the procedural status of this claim, the Court finds it judicially expedient to reach and deny the merits of this claim. *See* 28 U.S.C. § 2254(b)(2).

First, as addressed in Claim 14, the United States Supreme Court has upheld the (F)(6) aggravating factor against allegations that it is vague and overbroad, rejecting a claim that

Arizona has not construed it in a "constitutionally narrow manner." *See Lewis v. Jeffers*, 497 U.S. 764, 774-77 (1990); *Walton*, 497 U.S. at 649-56.

Second, Petitioner contends there was insufficient evidence to support the trial court's application of the (F)(6) aggravating circumstance to the facts of his case. (Dkt. 31 at 83-91.) A state court's finding of the existence of an aggravating circumstance is a question of state law. *See Jeffers*, 497 U.S. at 780. Therefore, federal habeas review is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Id.* To assess the sufficiency of the evidence in support of the factor, the Court applies the "rational factfinder" standard and asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found" the aggravating factor to exist. *Id.* at 781 (quoting *Jackson*, 443 U.S. at 319). "[A] federal habeas court faced with a record of historical facts which supports conflicting inferences must presume – even if it does not appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

Under Arizona law, the especially cruel, heinous or depraved factor is satisfied by a finding of especial cruelty *or* a finding that the murder is evidenced by especial heinousness or depravity. *See State v. Beaty*, 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988). Cruelty is established when the victim is conscious and suffers physical pain or emotional distress at the time of the offense. *State v. Bible*, 175 Ariz. 549, 604, 858 P.2d 1152, 1207 (1993) (pain or distress may be mental or physical). The terms heinous and depraved focus upon a defendant's state of mind at the time of the murder as reflected by his words or his actions. *Beaty*, 158 Ariz at 242, 762 P.2d at 529. The Arizona Supreme Court evaluates five factors to determine whether a defendant's state of mind was heinous or depraved at the time of the murder: relishing of the murder; infliction of gratuitous violence upon the victim; mutilation of the victim's body; senselessness of the crime; and helplessness of the victim. *Id.* at 242-43, 762 P.2d at 529-30.

In finding that the (F)(6) aggravating circumstance had been established, the Arizona

Supreme Court held:

> In analyzing the instant facts we quote from *State v. McCall, supra,* whose identical facts and analysis are applicable here.
>
> "The Redmonds and Mrs. Phelps were herded about the Redmond home at gunpoint by three men. After giving up their valuables, they were forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks. They knew that their captors were armed. [In addition, one of the attackers said 'we don't need these two anymore' immediately before the shooting started.] It may be inferred that [the victims] were uncertain as to their ultimate fate. *State v. Steelman,* 126 Ariz. 19, 612 P.2d 475 (1980). Except for the first victim, each of them had to endure the 'unimaginable terror' of having their loved ones shot to death within their hearing and then having to wait for their own turn to come. *State v. Gretzler,* 135 Ariz. at 53, 659 P.2d at 12. Such mental distress clearly constitutes cruelty. *State v. Gretzler, supra; State v. Steelman, supra.* In addition, expert medical testimony was given that Mrs. Phelps did not die from the first gunshot wound to her head, that she did not lose consciousness as a result thereof, and that she most certainly suffered pain from that wound. The infliction of such physical pain also clearly constitutes cruelty."
>
> The finding of A.R.S. § 13-703(F)(6) is also justified by two factors showing defendant's heinousness or depravity. The concepts of "heinousness" and "depraved" involve the killer's vile state of mind at the time of the murder. *State v. McCall, supra; State v. Gretzler, supra.* Here, the murderers not only shot Pat Redmond twice through the head, but also slashed his throat at the time of his death or shortly thereafter. The infliction of gratuitous violence or the needless mutilation of the victim indicates depravity or heinousness. *State v. McCall, supra,* and cases cited therein. Additionally, the murderers killed Mrs. Phelps, an elderly houseguest of the Redmonds with no possible interest in their business affairs. Her murder in no way furthered the plan of the killers. Heinousness or depravity can be indicated by the senselessness of the crime or the helplessness of the victim. *State v. McCall, supra; State v. Zaragoza,* 135 Ariz. 63, 659 P.2d 22, *cert. denied,* 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983); *State v. Ortiz, supra.*

Hooper, 145 Ariz. at 551, 703 P.2d at 495 (stating that it incorporated its § 13-703(F)(6) analysis from its opinion in the companion case of *State v. Bracy*, 145 Ariz. at 537, 703 P.2d at 481.)

Based upon the trial record and the facts discussed by the Arizona Supreme Court, the Court easily concludes that there was sufficient evidence to support a finding that the murders were especially cruel and especially heinous or depraved. In light of such evidence, the Arizona Supreme Court's determination that the (F)(6) factor was satisfied was not contrary to or an unreasonable application of clearly established federal law. Petitioner is not entitled to relief.

APPENDIX F

Claim 33 – Mitigation Consideration

Petitioner contends that the trial court failed to find, consider and give effect to statutory and non-statutory mitigation in violation of the Eighth and Fourteenth Amendments. (Dkt. 31 at 91-98.) Respondents contest exhaustion. (Dkt. 67 at 87.) Petitioner responds that this claim was exhausted by virtue of the supreme court's independent sentencing review. (Dkt. 78 at 10-20.) Rather than resolve the procedural issue, the Court finds it judicially expedient under the AEDPA to summarily reach and deny the merits of Claim 33. *See* 28 U.S.C. § 2254(b)(2).

Prior to the presentencing hearing, the trial court specifically indicated that it would consider any and all mitigating circumstances. (ROA 1116.) At his presentencing hearing, Petitioner chose not to present any mitigation evidence. (RT 2/4/83 at 96.) Instead, Petitioner relied on the presentence report and any mitigating information that had been presented at trial. (ROA 1120.) At sentencing, in final argument, counsel argued that the death penalty was immoral and should not be imposed. (RT 2/11/83 at 22-25.) The trial court indicated that it had considered all mitigation presented without limitation. (*Id.* at 15-16.) Ultimately, the trial court determined that the mitigation evidence presented was not sufficiently substantial to call for leniency. (*Id.* at 26, 28-29, 32-34.) The Arizona Supreme Court affirmed this finding:

> The trial court also considered all possible mitigating circumstances and found none to exist. We agree. At the sentencing hearing, defendant's counsel argued as a mitigating circumstance that the death penalty was immoral. Defendant's opposition to the death penalty, however, is not a mitigating circumstance sufficiently substantial to outweigh the aggravating circumstances. Reviewing the record, we find no other mitigating circumstances.

Hooper, 145 Ariz. at 551, 703 P.2d at 495.

In capital sentencing proceedings, the sentencer must not be precluded, by statute, case law or any other legal barrier, from considering, and may not refuse to consider, any constitutionally relevant mitigation evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982). Relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that

the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. The Constitution and the clearly established law require only that the sentencing court hear and consider all constitutionally relevant mitigation evidence, but the court may determine the *weight* to accord such evidence. *See Eddings*, 455 U.S. at 114-15 (emphasis added). On habeas review, the habeas court does not evaluate the substance of each and every piece of evidence submitted as mitigation; rather, it reviews the state court record to ensure that the state court allowed and considered all relevant mitigation. *See Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (holding that when it is evident that all mitigating evidence was considered, trial court is not required to discuss each piece of such evidence).

The record does not support Petitioner's argument that the trial court failed to consider his mitigating evidence. Petitioner chose not to present any mitigation evidence at his presentencing hearing. Further, there is a distinction between "a failure to consider relevant evidence and a conclusion that such evidence was not mitigating"; the latter determination does not implicate a defendant's federal constitutional rights. *Williams v. Stewart*, 441 F.3d 1030, 1057 (9th Cir. 2006). The fact that the court found the evidence "inadequate to justify leniency . . . did not violate the Constitution." *Ortiz*, 149 F.3d at 943; *see Eddings*, 455 at 114-15.

Moreover, the Arizona Supreme Court independently reviewed Petitioner's mitigation evidence and agreed that there were no mitigating circumstances sufficiently substantial to outweigh the aggravation.[21] *Hooper*, 145 Ariz. at 551, 703 P.2d at 495. Even if the trial court had committed constitutional error at sentencing, the Arizona Supreme Court's independent review of the mitigation and aggravation cured any such defect. *See Clemons v. Mississippi*,

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[21] The Arizona Supreme Court's conclusion regarding the lack of substantial mitigation is certainly understandable given the horrific facts surrounding the armed robbery and "execution style" murder of the two victims in this case. *See Woodford v. Visciotti*, 537 U.S. 19, 26 (2002) (per curiam) (noting the overwhelming nature of the aggravation involved in "execution style" murders in the course of a pre-planned armed robbery). Additionally, Petitioner had just committed a triple homicide in Illinois prior to committing these murders, which resulted in the finding of the (F)(2) aggravating circumstance.

494 U.S. 738, 750, 754 (1990) (holding that appellate courts are able to fully consider mitigating evidence and are constitutionally permitted to affirm a death sentence based on independent re-weighing despite any error at sentencing). Petitioner is not entitled to habeas relief on Claim 33.

Claim 34 – Admission of Hearsay

Petitioner contends that the trial court's admission of hearsay testimony from Nina Marie Louie violated his due process rights and his right of confrontation under the Sixth Amendment. (Dkt. 31 at 98.) Respondents contend that this claim is procedurally defaulted because it was not fairly presented in state court. (Dkt. 67 at 89-90.) Petitioner contends that the claim was fairly presented in his first PCR petition. (Dkt. 78 at 36-37.)

Petitioner raised this claim in his first PCR petition. (ROA 1494.) The PCR court found the claim procedurally defaulted as waived pursuant to Ariz. R. Crim. P. 32.2(a)(3) and alternatively ruled on the merits. (ROA 1574.) Petitioner did not preserve this claim in a motion for rehearing, or in his petition for review. (ROA 1597, 1600, 1602.) At the time of Petitioner's first PCR proceeding, Ariz. R. Crim. P. 32.9 required that alleged errors in a PCR ruling be identified in a motion for rehearing following a denial of post-conviction relief in order to be preserved for further appellate review. *See Bortz*, 169 Ariz. at 577, 821 P.2d at 238; *see also Cook*, 516 F.3d at 827-28. *See supra* Claim 5 and accompanying text for a full discussion of this rule. Consequently, Petitioner did not exhaust Claim 34 in state court.

If Petitioner were to return to state court now and attempt to exhaust this claim, it would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because it does not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, this claim is "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claim 34 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. Claim 34 is procedurally barred.

Claim 35 – Choice of Death Penalty Administration

Petitioner contends that the State is forcing him to choose between lethal gas and lethal injection for administration of the death penalty, which violates the Eighth Amendment. (Dkt. 31 at 98.) Petitioner exhausted this claim in his second PCR proceeding. (*See* ROA 1657 at 6; ROA 1723 at 9.) The PCR court dismissed the claim as not colorable and meritless. (ROA 1720.)

The governing Arizona statute provides:

> A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

A.R.S. § 13-704. Pursuant to the statute, Petitioner is not forced to choose; if he makes no choice his death sentence will be inflicted by lethal injection. The Supreme Court has held that if a petitioner chooses lethal gas as his method of execution, he cannot complain that it is unconstitutional, because he has another option. *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999). Further, neither the Ninth Circuit, *see Vickers v. Stewart*, 144 F.3d 613, 617 (9th Cir. 1998); *LaGrand v. Stewart*, 133 F.3d 1253, 1264-65 (9th Cir. 1998); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997), nor the Supreme Court has ever held that execution by lethal injection violates the Eighth Amendment. More directly on point, the Ninth Circuit has rejected Petitioner's argument that being forced to choose your method of execution constitutes an Eighth Amendment violation. *See Campbell v. Blodgett*, 978 F.2d 1502, 1517-18 (9th Cir. 1992). The Ninth Circuit reasoned that allowing the defendant to choose the "less frightening" method appeared to be a humane approach and did not violate the Eighth Amendment. *Id.* Based on the foregoing, Claim 35 is meritless.

Claims 36 and 37 – Death Sentence

In Claim 36, Petitioner contends that his death sentence violates the substantive due process guarantee of the Fourteenth Amendment. (Dkt. 31 at 98-99.) In Claim 37, he contends that his death sentence violates the Equal Protection Clause of the Fourteenth Amendment. (Dkt. 31 at 99-100.) Petitioner concedes that these claims were not exhausted in state court. (Dkt. 78 at 37.)

If Petitioner were to return to state court now and attempt to litigate these claims, they would be found waived and untimely under Rules 32.2(a)(3) and 32.4(a) of the Arizona Rules of Criminal Procedure because they do not fall within an exception to preclusion. *See* Ariz. R. Crim. P. 32.2(b); 32.1(d)-(h). Therefore, these claims are "technically" exhausted but procedurally defaulted because Petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732, 735 n.1. Claims 36 and 37 will not be considered on the merits absent a showing of cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not attempt to establish. Claims 36 and 37 are procedurally barred.

CONCLUSION

The Court concludes that Petitioner is not entitled to habeas relief on any of his claims. The Court further finds that an evidentiary hearing in this matter is neither warranted nor required.[22] Therefore, Petitioner's Supplemental Petition for Writ of Habeas Corpus must be denied and judgment will be entered accordingly.

CERTIFICATE OF APPEALABILITY

In the event Petitioner appeals from this Court's judgment, and in the interests of conserving scarce resources that might be consumed drafting and reviewing an application for a certificate of appealability (COA) to this Court, the Court on its own initiative has evaluated the claims within the petition for suitability for the issuance of a certificate of appealability. *See* 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d at 864-65.

Rule 22(b) of the Federal Rules of Appellate Procedure provides that when an appeal is taken by a petitioner, the district judge who rendered the judgment "shall" either issue a certificate of appealability ("COA") or state the reasons why such a certificate should not issue. Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter,

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[22] The Court previously denied Petitioner's request for evidentiary development as to specific claims (Dkt. 96), but conducted an independent review as to all the claims as required by Rule 8 of the Rules Governing Section 2254 Cases.

agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

The Court finds that reasonable jurists could debate its resolution of the following issue:

> Claim 1. Whether the prosecution's failure to disclose favorable evidence violated Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

Therefore, the Court issues a COA on this issue. For the remaining claims, the Court declines to issue a COA for the reasons set forth in the instant Order and this Court's previous Orders. (Dkt. 96, 114.)

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Supplemental Petition for Writ of Habeas Corpus (Dkts. 29, 31) is **DENIED WITH PREJUDICE.** The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that a Certificate of Appealability is **GRANTED** as to the following issue: Claim 1. Whether the prosecution's failure to disclose favorable evidence violated Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

IT IS FURTHER ORDERED that the Clerk of Court send a courtesy copy of this Order to Rachelle M. Resnick, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, Arizona 85007-3329.

DATED this 9th day of October, 2008.

Stephen M. McNamee
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 15 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MURRAY HOOPER, Petitioner-Appellant, v. DAVID SHINN, Director, Respondent-Appellee.	No. 08-99024 D.C. No. 2:98-CV-02164-SMM District of Arizona, Phoenix ORDER

Before: NGUYEN, BENNETT, and R. NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc. [Dkt. No. 152]. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX G