No. 22A285

22-6801

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DESEAN ALEXANDER BRUCE -- PETITIONER

VS.

STATE OF ARIZONA -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

NAME DESEAN ALEXANDER BRUCE

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QUESTIONS PRESENTED

FIRST: Was Petitioner denied due process, a fair trial, a fair appeal, and fair post-conviction proceedings, due to the following circumstances:

1. He was consistently denied effective assistance of trial counsel and appellate counsel.
2. The only direct evidence against him was from eyewitnesses whose testimony was prejudicially affected by police identification procedures which were demonstrably unfair.
3. The suppression hearing regarding the eyewitness testimony was fatally flawed by court rulings which precluded Petitioner from calling the eyewitnesses to testify and precluded Petitioner from presenting evidence of impairment of the witnesses due to substance abuse.
4. The trial proceedings were marred by persistent prosecutorial misconduct.
5. Valid alibi evidence was precluded.
6. The pretrial and trial prosecutors engaged in misconduct of the type which later resulted in the disbarment of the trial prosecutor and homicide reversals of the pretrial prosecutor.
7. The police detectives engaged in deceptive, illegal practices in regard to photo identifications. They frequently misrepresented facts in their testimony.
8. A post-conviction timeliness rule was fatally ambiguous and indefinite in its setting of preclusive time frames and in failing to require a showing of prejudice

SECOND: Should Petitioner's disproportionate and illegal sentence be reduced?

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APPENDIX IS FILED SEPARATELY WITH THIS PETITION

PETITION FOR WRIT OF CERTIORARI

Desean Alexander Bruce, an inmate serving a natural life sentence at the Arizona Department of Corrections, Winslow-Kaibab Unit, representing himself, respectfully petitions this court for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The Arizona Supreme Court denied Petitioner's petition for review of the Arizona Court of Appeals, Division Two, denial of his petition for review, which court upheld the dismissal of his Successive Petition for Post-Conviction relief. None of these opinions were reported. They are attached as Appendices A, B, and C.

JURISDICTION

Petitioner's petition for review was denied by the Supreme Court of Arizona on July 26, 2022. Thereafter he requested and was granted a delay of the time in which to file this petition, until December 23, 2022. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257, having filed this petition within the time limits granted by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner files this petition pursuant to the United States Constitution, Amendment 5, in which he is guaranteed due process in any criminal case such as his.

Petitioner additionally invokes the provisions of the United States Constitution, Amendment 6, guaranteeing him competent counsel and the right to compel witnesses in his behalf.

Finally, Petitioner invokes the Fourteenth Amendment to the United States Constitution, which guarantees that the above grants of rights shall apply in the states of the United States.

TABLE OF AUTHORITIES CITED

STATEMENT OF THE CASE

Petitioner DeSean Bruce, John Jewitt and Jack Anderson were charged with two counts of attempted armed robbery, five counts of armed robbery, and one count of first degree murder. The cases as to each defendant were handled separately through trial, sentencing and appeal.

Petitioner's trial was heard before Judge Michael Alfred, as were pretrial motions. Petitioner was convicted of all counts. He was sentenced on February 26, 2001, to a term of 15 years for the two counts of attempted armed robbery; a term of 21 years for each of the five counts of armed robbery; and to natural life as to the first degree murder, all to run concurrently. Exhibit 1.

Petitioner argued several issues on direct appeal, which was denied. He questioned the fairness of in-court identifications due to suggestive pre-trial identification procedures and proceedings at court hearings, raising several questions. He contended that he had been prevented, at the identification suppression hearing, from questioning the witnesses who had identified him. There was no testimony allowed concerning whether those witnesses had been drinking alcohol or using drugs, nor any other factors pertinent to an eyewitness identification. The trial judge said he had heard all of those witnesses testify at pretrial hearings as to other defendants, and did not need to hear their testimony again, denying the motion to suppress based solely on the testimony of the investigating officer who had handled the identifications, whose testimony was rife with misrepresentations. Petitioner questioned the identification by two witnesses who had identified him from a single photograph. The detective testified that he had told one witness that he must pick one photo from the photo array, suggesting

that the perpetrator was in the lineup. Petitioner contended the six photo lineup shown to the witnesses was unduly prejudicial, since the six photos had only one person with long hair, which is how the witnesses described the perpetrator. The defense contended that the state had not met its burden of proving that there was a fair and unbiased identification procedure, and that he had been unable due to the above circumstances to fully challenge the admissibility of the in-court identifications. He argued that misconduct of the prosecutor violated due process and required a new trial. It was argued that the state made several references to Petitioner's "arrogance." In addition the state specifically told the jury that several defense witnesses were lying, and that the state's witnesses were being truthful. Bruce next argued that the court's instruction regarding premeditated murder was void for vagueness. Finally, it was argued that he should not have been forced to wear leg shackles which at least one juror saw.

As to the identification procedures, the appellate court found that while single photo lineups are generally unduly suggestive, in this circumstance that was not the case. The court faulted the trial court for not allowing the testimony of the eyewitnesses at the suppression hearing, but found that error was harmless beyond a reasonable doubt. Finally, the court agreed that the six photo lineup was unduly suggestive, but found any related error was harmless given the strength of the witness identifications.

Defendant complained that he had been forced to wear leg shackles throughout the trial and that at least one of the jurors had seen him in the shackles. The appellate court found the issue to be waived, noting that there had been no objection to the use of shackles, even when it was brought to the court's attention that a juror had seen defendant in the shackles.

Petitioner contended on post-conviction that appellate counsel had failed to raise an issue regarding the numerous times at trial where the state adduced highly prejudicial gang-related evidence, without an adequate and justifiable basis for doing so. He also contended that trial counsel failed to seek admission of the prior consistent statement of defendant's mother, Candace Bruce, to refute the argument that her testimony was recently fabricated. He also faulted appellate counsel for failing to raise that issue on appeal. The trial court summarily denied the petition for post-conviction relief, stating that all claims were either precluded or would not entitle defendant to relief, without specifying any further rationale for the ruling.

Petitioner filed a petition for review to the Arizona Court of Appeals, raising the same issues raised in the trial court post-conviction pleading, which was denied. Noting that the trial court had summarily dismissed the petition for post-conviction relief without stating a factual or legal basis for its ruling, the Court of Appeals theorized as to what the trial court "could have readily concluded." As to the failure of trial counsel to argue that testimony supporting the alibi testimony of defendant's mother should have been admissible because it demonstrated a lack of recent fabrication, the court found that there was no prejudice in that decision. The court reasoned that there was strong direct testimony of Petitioner's presence at the scene of the crime, and that any bolstering of the alibi evidence seemed highly unlikely to have changed the jury's verdict. The court concluded that even though trial counsel's performance fell below a prevailing professional standard of care, the record did not support a showing of prejudice. As to the claim that trial counsel failed to object to prejudicial and irrelevant gang references, the appellate court found that the references were not so prominent, so numerous, or so gratuitous as to have clearly prejudiced the jury.

The proceedings above were concluded in 2007. In 2020 Petitioner filed a Successive Petition for Post-Conviction Relief, the denial of which brings rise to this action. Because of Arizona's rules of preclusion and waiver, as applicable to post-conviction proceedings, most of the circumstances were precluded from post-conviction review. Accordingly, Petitioner framed the successive petition in terms of Arizona Criminal Rule of Procedure, Rule 32.1.h, which provides that a defendant may be entitled to relief from his conviction if he establishes that under all of the facts and circumstances of a case then existent a reasonable jury would acquit him. However, in the Successive Petition and appellate filings thereafter, Petitioner asked the courts to review the underlying circumstances set forth below, most of which were mishandled by prior counsel or had never been challenged by prior counsel. Neither the trial court nor the appellate courts chose to examine those underlying circumstances, failing to review the case on its merits. Instead those courts held that all such issues were precluded or waived. The Arizona Supreme Court denied review of those prior rulings, prompting the filing of this petition.

REASONS FOR GRANTING THE PETITION

FIRST CLAIM -- DENIAL OF DUE PROCESS

The petition on which this proceeding is based initially was premised as an issue whether current facts would result in a finding of innocence for Petitioner. This was required due to the rules of preclusion which prevented a complete review of the case. To fairly evaluate that claim, the courts would have to evaluate the underlying circumstances of the case, which is what Petitioner requests this court to do, but which the courts below refused to undertake. The totality of the errors below had never been presented to a court for review, a review which would show Petitioner was improperly convicted. No court has undertaken that review. Petitioner urges this court to undertake that review.

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee an accused person due process in the proceedings under which he is tried, a prohibition against vague laws, and substantive due process. In Petitioner's case, he was denied those rights. He was denied the right to competent counsel. The Sixth Amendment guarantees that right, which is further established in Strickland v. Washington, 466 U.S. 668 (1984). Those amendments guarantee the right to call witnesses in his behalf. Crawford v. Washington, 541 U.S. 36, 61 (2004), confirms that right and expands upon it by guaranteeing the of cross-examination, so that testimony be tested through "the crucible of cross-examination." Instead, the hearing precluded him from calling as witnesses the very witnesses whose identifications he sought to preclude. It precluded him from presenting evidence of the clear impairments of those witnesses at the time of the incident. This Court has specifically required than an accused be entitled to

present to the court factors such as impairments of witnesses in eyewitness identification cases, Neil v. Biggers, 409 U.S. 188 (1972). He was prosecuted by zealous prosecutors, one of whom was later disbarred and both of whom had murder cases reversed due to their zealotry. He was faced with continual violations of basic procedural rules and misleading, dishonest testimony by the lead detectives. This Court has reversed cases where the misconduct of prosecutors has directly affected the outcome of a case. Smith v. Cain, 565 U.S. 73 (2011). The guarantees just set forth have all been violated in this case.

Petitioner is now serving a natural life sentence for his conviction in this case, which can only be characterized as a travesty. Significant errors of law were committed, many in the critical area of photo identification, which were glossed over by the appellate court as harmless. These errors were highly prejudicial, because they involved the only direct evidence against Petitioner. There was no physical evidence connecting him to this crime. The trial court did not allow critical testimony at the identification suppression hearing. The appellate court found error, but ruled it harmless. Petitioner's alibi was grossly mishandled by counsel. Repeated references to alleged gang connections were made by the state, when in fact there was no evidence to support those allegations. The police detectives and the prosecutor were guilty of clear and intentional misconduct, again overlooked by the appellate court. Many of these errors were compounded by the clearly ineffective assistance of trial and appellate counsel. Others were the result of clear error by the trial court, which were either glossed over by the appellate courts or not presented on appeal. Neither the trial court nor the appellate court addressed these underlying issues, other than to say they were precluded. The following circumstances support this claim. Each is based on an error by a

prior court which was never corrected, or on ineffective assistance of counsel, or a mixture of both as to each circumstance.

I. 911 CALLS

The police investigation began with several 911 calls made by witnesses to the incident. One of these calls was from Aaron Phillips, an alleged victim of the incident who testified at trial that Petitioner was the shooter who killed the murder victim. The sequence of events leading to his identification of Petitoner is the first clear evidence of witness' recollection changing to the detriment of Mr. Bruce.

Phillips, a purported eyewitness and victim, called the police almost immediately after the incident. Exhibit 2, Phillips 911 call. (The caller states he is Eric Washington. However, the stipulation attached to Exhibit 2 indicates the caller was Phillips.) Phillips asked for an ambulance and police to be sent. He advised he had witnessed the incident. He stated that he had. He was asked if he knew the guy who had shot the deceased. He answered: "Uhm . . . no I don't know him." Id. p 2. He then provided a very generic description of a young black male.

Phillips was interviewed by police later that day by Detectives Fuller and Olivas. Exhibit 3. He stated that the shooter was a man named "JP," who he had met several times through his friend Dena Stein. Id. p 3-4. He refers throughout the statement to JP. He later provides a description of JP. Id., p 20-21.

Two days later Phillips met with Detective Filippelli and looked at a photo lineup. Exhibit 4. He identified a photo as JP, but then after prompting states that person is actually known as Fella (Petitioner's nickname). Id. p 1.

At trial he repeated this testimony and identified Petitioner as the shooter. TR 11/14/2000, p 223 et. al. (All transcript references are to Arizona v. Bruce,

CR-059352). He was even asked about a previous phone conversation he claimed to have had with defendant and indicated he knew him well enough to recognize his voice on the phone. This is the man in the 911 call that did not know the shooter.

II. IDENTIFICATION EVIDENCE

There was no physical evidence connecting Petitioner to this crime. The only evidence connecting his was identification evidence which was tainted from the investigation through to trial. Many aspects of the identifications present clear denials of due process to Petitioner.

A. INVESTIGATION AND MOTION TO SUPPRESS

The defense filed a motion to suppress in-court identifications. A hearing was held at which the only witnesses were Detectives Filippelli and Jimenez. Exhibit 5, transcript of suppression hearing. This hearing was conducted with a complete denial of due process to Petitioner.

Filippelli (report, Exhibit 6) testified he spoke with potential witnesses Dena Stein, Adrienne Dicapua, Aaron Philips, Les Tucker and Queta Hatfield. Filippelli was at the scene of the shooting shortly after it was reported. At that time he showed Stein and Dicapua one photograph of a person he believed to be the perpetrator. TR, 8-21-00, p 6. He did so because they both stated they knew the suspect. Id. 5-6. The showing was in a parking lt, when Phillips, Tucker, and Hatfield were also in the parking lot. Id. p 27. Filippelli did not know how far away from Stein and Decapua the other witnesses were during the showing of the one photo. Id. p 27.

Two days later Filippelli showed a photo lineup to Dicapua, Phillips and Tucker. This was done on a balcony outside the apartment where the shooting

occurred. Id. p. 24. He said each was shown the lineup privately. Id. p 26-27. He could not say that the others could not see what was occurring through the window, nor could he say that there was no discussion among them as the showings were taking place. Id.

Detective Jimenez showed the lineup to Phillips, and agreed he had done something to influence Phillips to cause him to believe that he had to make a selection from the lineup. Id. p 12. Phillips, Hatfield and Tucker all identified the picture of Petitioner.

Filippelli admitted that the only picture in the lineup of a man with long hair was that of the defendant, and that he knew that the witnesses had stated the shooter had long hair. He agreed the other pictures showed men with short hair. Id. p 19-21. Filippelli admitted he had constructed the lineup. Id. p 23-25. Filippelli admitted that he did not know what discussions the witnesses have had among themselves about these matters, nor did he inquire about that. Id. p 28.

At the beginning of the suppression hearing, defense counsel requested leave for the victim/witnesses to be subpoenaed. Id., p 2. The trial court stated: "I have heard from each one of those individuals in the party at least twice." (Referring to the previous trials of co-defendants a year or more prior). Id. p 3. The court said that the defense would do what it could with the testimony of Filippelli. Id. Later, defense counsel reiterated the need to question the eyewitnesses about their opportunity to view "Fella", and question them about the other Neil v. Biggers, 409 U.S. 188 (1972) factors. Id. p 29. That request was denied. The trial court then found that the identification procedures used by the police were not unduly suggestive and denied the motion to suppress. Id. p 35.

The defense was also not permitted to show that the witnesses had been drinking and/or taking drugs during the time that the incident occurred, and what influence that might have had on any in-court identification. Evidence of drinking and drug use by the witnesses was produced at trial. RT 11-15-00 p 85.

Judge Alfred was assigned to the Anderson case on January 7, 1999, for Anderson's second trial, Judge Alley heard the entirety of Anderson's first trial. The reassignment on January 7, 1999, was Alfred's first involvement with any of these cases. There was one pretrial hearing heard by Alfred, on February 16, 1999, at which no testimony was taken. As stated above, Anderson's second trial started February 23, 1999, ending March 5, 1999. At that trial identification witnesses Tucker, DiCapua, Phillips, and Hatfield testified in person. Identification witness Stein testified via videotaped deposition.

There were no evidentiary hearings in Petitioner's case prior to the motion to suppress identifications, which was held August 21, 2000, a full year and a half after the second Anderson trial heard by Alfred. At the August 21 hearing, police interviews of the identification witnesses were admitted into evidence (although it is unlikely the court read those as the court ruled on the issue at the close of the hearing without interruption.

The court's conclusion that it did not want to hear from identification witnesses was clearly inappropriate. First, the court had heard the witnesses testify once before, not twice, and that was a year and a half prior, in Anderson's second trial. One of those witnesses appeared by video. Those witnesses were questioned and cross-examined as to the issues of Mr. Anderson's identification, not Petitioner's. Moreover, the court had before it the police interviews of the witnesses, which again did not address specific issues pertinent to the Dessureault

motion. In sum, Judge Alfred, in his apparent haste to resolve this issue, never heard anyone representing Petitioner question the identification witnesses regarding the pertinent Bigger issues as to Petitioner's identification.

In addition to the serious procedural mistakes which thwarted Petitoner's right to a fair trial, there was no doubt that various of the witnesses who were shown photos of suspects were present when others were viewing the photos. There is no clear evidence that the others could not see or hear what was transpiring with the other witnesses, nor Filippelli dispute that possibility. There is no evidence that the others asked any of the witnesses if they had discussed the procedure with the others.

Contrary to Filippelli's assertion in his report and in his suppression testimony that he showed Stein and DiCapua a single photo of Mr. Bruce the night of the incident, Stein and DiCapua stated in various statements and testified at trial that they were never shown a one photo "array", but rather were shown the "tainted" six photo array at a later time when the others viewed that array. This information was not presented at the suppression hearing or on the appeal. The appeal was presented as if these two witnesses had never stated they had not seen the one photo "lineup", nor was their viewing of the six photo tainted lineup raised as an issue. Thus the court did not consider that testimony, so contradictory to the testimony or the police investigators. This failure of appellate counsel was crucial because the alleged identification of Petitioner by Stein and DeCapua from the one photo shortly after the incident, was used by the appellate court as "baseline" identifications to bolster the tainted identification by the other witnesses and to consider those identifications, even if tainted, to be harmless error. That premise

does not suffice when it is seen that Stein's and DiCapua's identifications were from the same unduly suggestive photo array.

These errors are compounded when it is noted that DiCapua in her initial police interview could not say that she was sure that the person she was identifying as the perpetrator was in fact the person she had met previously. The alleged certainty of her identification of the defendant was the justification for use of a one photo show-up. This was not used at suppression or on appeal. This information, had it been presented, would have threatened the admissibility of the one photo lineup (if that occurred) and further weakened the accuracy of any identification by her of the six photo lineup.

Petitioner challenged the identification processes on appeal. The appellate court agreed that one photo displays are generally considered unduly suggestive. However, the court found that such concerns were not founded in this case (unfettered by not knowing about DiCapua's initial uncertainty of her identification). The court agreed that the six photo lineup shown to all of the witnesses was unduly suggestive, countering the ruling of the trial court. However, the court found the error to be harmless. The appellate court agreed that the trial court should have permitted testimony which inquired as to the reliability of the eyewitnesses. Again the court found the error to be harmless. The appellate court did not specifically address the trial court's unreasonable refusal to allow defendant to call the eyewitnesses to the suppression hearing, even though such was a clear violation of his due process rights.

In 2001 the Tucson Police Department adopted a series of policies and procedures. Among those are specific dictates as to the handling of "Suspect Identification." Ex 7, relevant portions of T.P.D. General Operating Procedures.

B. REFUSAL TO PERMIT EVIDENCE AT SUPPRESSION HEARING REGARDING WITNESSES' ADMITTED IMPAIRMENTS

The defense sought at the identification hearing to introduce evidence regarding the impairment of the eyewitnesses whose testimony was sought to be precluded. As noted above this issue was raised on appeal. It gave the appellate court some pause, but found the issue to be harmless. What was not brought up at either the suppression hearing or on appeal, at least in the form of an offer of proof, was that four eyewitnesses had previously admitted that they were impaired due to drug and/or alcohol consumption. Three of those witnesses admitted having lied under oath about the issue, and were granted immunity as to the lies and drug use. This was not raised at the suppression hearing, or mentioned on appeal.

The first of the four impaired witnesses was Aaron Phillips. He admitted that at the time of the incident he had been drinking beer and taking a narcotic, which he admitted could have affected his memory of what happened that night. RT 7/10/98 p 259-260. The second was Adrienne Dicapua who admitted she used cocaine that night which got her high. She initially lied about this under oath, but subsequently was granted immunity from prosecution in regard to the drug use and perjury. Id., 139-170. The next drug-using eyewitness was Dena Stein. She had been drinking beer and wine, used marijuana, and did 6-10 lines of cocaine. Id., 63-67. She was given immunity for drug use, which she had not previously admitted. Id., 69-72. The last clearly impaired eyewitness was Leslie Tucker. He admitted to having lied under oath about his drug use, and then receiving immunity. He admitted doing drugs that night with the other three impaired witnesses. Id., 30-42, 48.

C. SIGNIFICANT DISCREPANCIES IN EYEWITNESS STATEMENTS, TESTIMONY

The many prejudicial errors set forth above were per se injurious to Petitioner. However, the result of those flawed processes was witness testimony which had serious discrepancies, as to each of the identification witnesses. Exhibit 8 lists the many discrepancies in identification witness testimony starting with their first police statement, through the trials of the two co-defendants, and finally at trial. These discrepancies are important for several reasons, beyond the usual discrepancy between a witness' initial statement and subsequent testimony.

There were three trials, starting with the trials of co-defendants Jewitt and Anderson in 1998 and 1999, and Petitioner's trial in 2000. A pattern will become obvious that witnesses' recollections changed depending on which trial was then at hand. In particular things changed as it came down to Petitioner's trial. Ken Peasley was the prosecutor in Petitioner's trial. As will be seen below, he was later disbarred for presenting false testimony in murder trials. The changes from previous statements to Petitioner's trial present as more than mere coincidence.

Second, these are the same witnesses the trial refused to allow the judge to allow to be called as witnesses at the motion to suppress identifications by photo lineup. They are the same witnesses the judge precluded evidence of their intoxicaton at that hearing. As noted above, the judge stated he had heard the witnesses testify in the prior trials. The problems with that decision are set forth above. That decision becomes even more egregiously wrong when it is seen how the witnesses changed their testimony, seemingly to suit the defendant on trial. The judge could not have foreseen those changes in his recollections of testimony several years earlier.

Finally, the discrepancies show the evolution of the witnesses' statements as to their drug use and its effect on their recollection and perceptive ability. Again, Judge Alfred refused to allow any testimony about the witnesses' drug and alcohol use and condition on the night in question.

III. WITNESSES RECEIVED IMMUNITY; JURY NOT ADVISED

Several witnesses received immunity prior to their testimony in Mr. Bruce's case to protect them from possible perjury charges arising from their testimony in previous trials. Adrienne DiCapua and Leslie Tucker both made admittedly untrue statements regarding their drug use the night of the incident. They were granted immunity from prosecution to secure their testimony against Mr. Bruce. The grant of immunity pertained to their lies and drug use. This was not raised at the suppresson hearing, or mentioned on appeal. The jury did not hear this.

Adrienne Dicapua admitted she used cocaine that night which got her high. She initially lied about this under oath, but subsequently was granted immunity from prosecution in regard to the drug use and perjury. Id., 139-170. Dena Stein had been drinking beer and wine, used marijuana, and did 6-10 lines of cocaine. Id., 63-67. She was given immunity for drug use, which she had not previously admitted. Id., 69-72. Leslie Tucker admitted to having lied under oath about his drug use, and then receiving immunity. He admitted doing drugs that night with the other three impaired witnesses. Id., 30-42, 48.

IV. REPEATED GANG REFERENCES; IRRELEVANT AND PREJUDICIAL ; NEVER FULLY CHALLENGED

In this case there was no charge of participation in a criminal enterprise, committing the offense in furtherance of gang membership, or any other gang-related criminal offense. There was also no uncharged underlying factual premise for the crimes related to gang-activity. Gang activity, gang affiliations, gang associations gang-influenced intentions, and gang motivations were totally irrelevant and immaterial, as well as highly prejudicial, and therefore inadmissible. This case is a case of robbery for pecuniary gain and a resulting murder. There was no legal justification for evidence or comment related in any way to gangs.

Rather than object to the relevance of any gang testimony, defense counsel did not object to the jurors being informed during voir dire that there may be some mention of gangs but that this was not a gang case. RT 11/13/2000, p 49-50. Despite the voir dire admonition that this was not a "gang" case, in opening statement the prosecutor mentioned that victim Leslie Tucker was wearing a red shirt, and that such fact alone angered defendant. RT 11/14/2000, p. 9. There was simply no evidence to support such an allegation of motive on defendant's part. Tucker himself minimized the topic of the red shirt through numerous inconsistent accounts as follows: 1. Fella confronted him about his red shirt in the living room (11/8/97. p.4; 2. Fella was talking to someone and he assumed Fella was talking about him (Jewitt trial, p.11); 3. Fella asked him about the red shirt in the bedroom (Id., p.12); 4. Fella asked him about his red shirt in Dena's bedroom (Anderson trial, 9/29/98, p.16); 5. Fella never specifically told him about his red shirt he just heard talk (9/29/98,); 6. He was in the living room when Fella asked him about his red shirt (Anderson trial, 9/26/99, p.6); 7. Fella confronted him about his red shirt

in the living room (Anderson, 7/9/99, p.9); he cannot remember Fella and hmself coversing (Id., p. 48); and 8. Fella asked him and then his friend 'what's up with the red shirt (11/15/00, p.9). As with so many other instances where the witnesses provided multiple answers to the same question, it must be asked if there is any truth behind those statements at all.

The state's opening statement also gratuitously mentions a gang tattoo worn by one of the co-defendants. Id., p 21. Again, there was never established a connection between the tattoo and these crimes. The prosecutor then sought, unsuccessfully, throughout the trial to establishment a connection between these simple facts and the crimes in question. See, e.g., Id., at p 135; Id., at p 151; Id., at p 228; Exhibit C, at p 9; Exhibit D, p 13; Exhibit A, at p 91. The prosecutor presented this information in opening statement to scare and inflame the jury about an issue that was irrelevant to the facts of the case. Although this issue was raised on appeal, the appellate brief did not mention most of the gang references just cited.

V. ALIBI: HEARSAY NOT ALLOWED TO DEFEAT RECENT FABRICATION ALLEGATION; INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's mother Candace Bruce testified in support of his alibi defense, stating he had been at home with her during the time of the crime. RT, 11-16-10, p 1-107. During cross-examination of Ms. Bruce, the state identified the precise moment when she learned of the fact that her son was suspected of being involved in a robbery/murder -- thus implying a motive to fabricate support for an alibi. Id., p 62. Prior to the testimony of Jake Benjamin, the prosecution objected because the hearsay statement he would offer would appear to support the statement of Ms. Bruce, who had a motive to lie, i.e. an interest in the case. Id., p 7. Mr.

Benjamin's testimony would have been that the statement to him by Ms. Bruce was made prior to her notification of the crime, and thus she would have had no reason to lie. Id., p 14-23. Exhibit 9, statement of Jake Benjamin. At the same time the court precluded Ms. Bruce from testifying about her conversations with Benjamin.

In response to the hearsay objection, defense counsel did not argue that the statement was being offered to rebut any concern of fabrication of the statement. This issue was not raised on appeal. At trial, trial counsel made a legally insufficient argument to support the introduction of this important evidence. In fact the statement by Ms. Bruce was made prior to her having a motive to lie. Defense counsel did not argue that it was a prior consistent statement, admissible to refute a claim of recent fabrication. Without the proper argument, the point was lost and the jury did not hear the important evidence corroborating the alibi. Having not been raised on appeal, when later broached the issue of waiver precluded its fair consideration.

VI. FAILURE TO CALL ADDITIONAL ALIBI AND EXCULPATORY WITNESSES

A second issue with the presentation of an alibi, is that trial counsel called only two of the alibi witnesses disclosed, leaving several not to testify. Not only would additional witnesses have buttressed the testimony of the two witnesses, they were not family members (as were the two alibi witnesses), which left them open to discrediting as being family testimony of the two witnesses, they were not family members (as were the two alibi witnesses), which left them open to discrediting as being family. The witnesses not called are listed below:

Antoinette Anderson (Jack Anderson's mother). Stated that Petitioner did not leave her house with her son Jack (co-defendant). Exhibit 10.

Sandra Heath. Jewitt's girlfriend. Was not called to testify. Stated Jewett did not leave her house with Petitioner. Exhibit 10.

Michelle Brickman and Michelle Kallack. (neighbors at the incident apartment). Provided descriptions of the suspects that did not match Petitioner. Exhibit 10.

Troy Baird. (upstairs apartment from incident). Heard shots and saw two men leaving. Descriptions did not match Petitioner's. Exhibit 10.

All of these witnesses contradict the state's theory of the case, that Petitioner arrived and left with the co-defendants. None were called to testify.

VII. DEFENSE COUNSEL WAS INEFFECTIVE IN REGARD TO DEFENDANT BEING REQUIRED TO WEAR LEG SHACKLES AND A JUROR HAVING SEEN HIM IN THE SHACKLES.

This court has recognized that shackling is an inherently prejudicial practice that should only be permitted where justified by an essential state interest specific to each trial. Holbrook v. Flynn, 475 U.S. 560 (1986). In this case it was undisputed that defendant had worn shackles throughout the trial, but also that there had been no objection. When defendant complained that a juror had observed defendant in Shackles, his objection was denied. RT 11-16-00, p 129, 6-14. The appellate court upheld that ruling noting that there had never been an

objection, and additionally that the juror who had seen the shackles was designated as an alternate and did not participate in deliberations.

There are two key errors by trial counsel presented. First there was no objection to the use of shackles, which at a minimum would have required the state to justify their use pursuant to Holbrook. In addition, neither the juror in question nor any other juror was questioned as to whether the juror who had seen the shackles had discussed this fact with the rest of the juror. The juror was allowed to remain with the jury until alternate jurors were designated. The lack of action in both instances constitute clear ineffective assistance of counsel, and buttress Mr. Bruce's claim that counsel had been repeatedly ineffective throughout the proceedings.

Not only should counsel have moved for the shackles to be removed, which would have made the issue viable on appeal, but they should have also moved for mistrial to preserve that issue for appeal.

VIII. FAILURE TO EXCUSE JUROR WHO WORKED WITH VICTIM

On the second day of trial the court brought to the parties' attention that a juror believed she knew victim Aaron Phillips. The court brought the juror Susan Cook into the courtroom and inquired very briefly of her knowledge of Mr. Phillips, it being established that they casually knew each other for three and one half years from working in the same hospital where he was a phlebotomist. She was simply asked if there was anything about that relationship that would preclude her from being fair and impartial. She stated no. The whole colloquy was less than a page and a half of transcript. TR 11-14-00, p 205-207. Counsel made no record when the court retained the juror on the panel. She was subsequently

denominated an alternate juror before the jury retired to deliberate, again with no comment from counsel. Day 5, a.m.

This matter was poorly handled by the court, and ineffectively so by defense counsel. Phillips was in fact a victim in this first degree murder case, who the juror had worked with for three and one half years. There was substantial question of his credibility, starting with his lies to the 911 operator. The witness should have been asked of any opinion she had of the Mr. Phillips, not just a simple conclusory question if his testimony would affect her deliberations in any way. She should also have been asked if she had told anyone else on the jury. She should have been advised to have no contact with him at work. The foreman of the jury should have been asked if Ms. Cook had made any comment about Phillips. Even though she was excused before deliberations, she was with the jury four days after realizing she knew Phillips. All of the issues left unspoken by the court could have affected the deliberations of the jury. She should have been excused. Counsel should have asked for that.

Defense counsel did not request the juror's immediate removal, request further examination of her or other jurors, or move for mistrial. Neither appellate counsel nor counsel on the first petition for post-conviction relief raised this as an issue.

IX. PROSECUTORIAL MISCONDUCT

ER 3.8 and other ethical rules imposed by the Arizona Supreme Court set forth basic rule of conduct directed at prosecutors. The comment to these rules directs that a prosecutor has "the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is afforded procedural justice and that guilt is decided

upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons." The two prosecutors who handled Petitioner's case did not follow these dictates.

A. KENNETH PEASLEY

Kenneth Peasley was the trial attorney. This allegation must be prefaced with the history of Peasley. Based on conduct several years before the proceedings in this case, and then on a disciplinary ruling by the Arizona Supreme Court in 2004, Mr. Peasley was disbarred. Exhibit 11, Supreme Court of Arizona order of disbarment. The court found that, in several death penalty trials, Peasley had violated his duty as a prosecutor to seek justice. There were trials is 1993 and 1997 in which he was found to knowingly and intentionally presented false testimony to the jury. Two of the three defendants involved had their convictions ultimately vacated as a result of this misconduct. After his disbarment Mr. Peasley worked as a paralegal for Brick Storts, the chief defense counsel in this case, although such employment post-dated Mr. Storts' representation of Petitioner by several years. Mr. Storts also experienced his own suspension from the practice of law and had only returned to practice the year prior. The facts surrounding their disciplinary activity with practicing law was likely known at the time of this trial.

In opening statement, Mr. Peasley walked over to the defense table and pointed his finger right in Mr. Bruce's face. RT 11-14-00, p 6. The prosecutor vouched for the credibility of the state's witnesses by repeatedly saying the defense witnesses had lied (disbarment issue). RT 11-21-00, p 57; 11-21-00, p 56; 11-21-00, p. 57; 11-21-00, p. 59; 11-21-00, p 61; 11-21-00, p. 99; 11-21-00, p 108. This was impermissible vouching for the credibility of the state's witnesses and for his

own opinion on the evidence. Arizona v. Dumaine, 783 P.2d 1184, 1193, 162 Ariz. 392 (1989).

The circumstances of the identification process clearly show a pattern of misstatements by the lead detectives in the case. As noted above, the officers indicated that two witnesses had been shown a one person lineup consisting of only Petitioner's photo. However, their reports differ as to when and where that occurred, and the clear statements of those witnesses contradicted the one-photo story. The alleged single photo identification was covered in their testimony at the Dessureault hearing, and at trial. It was used by the appellate courts as important evidence to confirm the identifications from the tainted lineup. The single photo lineup story truly contaminated this case from start to finish (also a disbarment issue). It is important to note that this behavior occurred while Peasley was under bar review and yet he continued to prosecute cases in this unjust manner, which ultimately left the Supreme Court no alternative but to disbar him as his actions were too dangerous and he would most likely re-offend. Unfortunately for Petitioner, Peasley was not removed in time for him to receive a fair trial.

B. MISSING POLICE REPORTS—DAVID WHITE

Mr. White handled the grand jury presentation of this case, and maintained responsibility for Petitioner's case into 2000, to include the disclosure phase. In light of the missing police reports about to be discussed, it is interesting to note that Mr. White handled the case of State of Arizona v. Carolyn Peak, Pima County cause no. CR-65137. Ms. Peak's case went through trial and resulted in a second degree murder conviction. That conviction was vacated when it was subsequently learned that Mr. White had purposefully withheld from the defense hundreds of pages of case documents. See, Exhibit 12, Peak defense motion based on that

conduct. The conduct was so egregious that the County Attorney agreed to the dismissal without hearing.

The reports of six Tucson Police officers and personnel, some of whom were among the first to respond to this incident, were never disclosed to the defense in this case nor have they been discovered in any subsequent investigations of the case. The officers involved were Sergeant Wes Dison, #24121; Sergeant Dave Keenan, #7925; Officer Oscar Caballero; I.D. tech Lorenz; Officer M. Jennings, # 33031; and Sergeant Mejia. These officers were identified in written reports of other officers as having been present at the scene of the investigation, as set forth in Exhibit 13.

The affidavit of Petitioner, attached as exhibit 14, indicates that neither during the time of the pretrial and trial phases of the case, or in his subsequent reviews of the case, has he seen these reports. No motion for their production was ever made by defense counsel. It can only be concluded that the reports of these officers, all responding to a homicide investigation, were either intentionally or unintentionally withheld from the defense. In either case, it would be another evidence of the shoddy handling of this investigation.

Since the trial in this matter, the County Attorney has begun compiling a list of county peace officers who have had some issue of credibility in one or more criminal cases, entitled Pia County attorney Law Enforcement Activity Disclosure List. The list is available to local defense counsel to develop potential Brady material against police witnesses. The most current list is attached as Exhibit 15. It is interesting to note that now, more than 20 years after this incident, the name of Officer Wes Dison still appears on the list. Dison was one of the officers involved in this case for whom no report was produced.

X. POLICE MISCONDUCT—REPEATED MISSTATEMENTS OF FACT

Detective Filippelli's testimony throughout the proceedings was inconsistent and contained numerous misstatements of fact. His sworn testimony at the three grand jury proceedings provides substantial evidence of this accusation.

The first grand jury was November 19, 1997. Only Jack Anderson was indicted. Ex. 16, grand jury transcript. At that proceeding Filipelli testified as set forth in Exhibit 17. The second grand jury hearing was November 28, 1997. Exhibit 16, with further Filippelli misstatements. The third grand jury was January 22, 1998. Exhibit 16. Filippelli continued to misstate the facts. Exhibit 17.

XI. POLICE MISCONDUCT – RECORDING WITNESS TESTIMONY AND STOPPING THE RECORDING WITHOUT STATED CAUSE. THE WITNESS THEN CHANGES HIS STATEMENT TO THE DETRIMENT OF PETITIONER

Aaron Dennison was present the night of the incident. He was interviewed by officers in the early morning hours that morning. Exhibit 18. For approximately the first half of the interview. Dennison stated that while he was generally in the area of the incident, he had not seen any of the key moments nor witnessed a shooting.

Noted at the middle of page 5 of the interview, the "tape ends." The next notation follows immediately, noting "restart tape." There is no explanation in the tape for the abrupt stop and start of the tape. What is clear, however, is that immediately after the tape is restarted, Dennison's recollection (at least insofar as it

implicates Petitioner) has a remarkable change. He now remembers being present for the shooting, knowing Petitioner from before, and having witnessed him as the shooter. There is no stated reason for this change. It must be surmised that Dennison was threatened or coerced to tell the new story. This conclusion is heightened by the lack of any further explanation offered by the officers. The issue was never raised at any stage by the defense.

XII. "TIMELINESS" DENIAL OF SUCCESIVE PETITON

The trial court asked Petitioner to defend the timeliness of his filing in light of Rule 32.2(b), Arizona Rules of Criminal Procedure. Petitioner set forth facts to demonstrate he was not dilatory in his filing. Nonetheless the trial court and appellate courts took issue with the "delay" in filing. Petitioner fully explained the timing of his filing. This issue should not have been an issue with such an explanation. More importantly, Rule 32.2(b) sets forth no definition of what is an untimely filing. Every other filing requirement in the Arizona Rules of Criminal Procedure specifies a specific due date for such filing. This one does not, and is impermissibly and constitutionally vague in applying such a standard to a filing proclaiming the actual innocence of a wrongly convicted natural life prisoner. Moreover such a vague requirement should at least mandate a finding that the opposing party was in some way prejudiced by the delay. There is no such requirement, nor was any prejudice offered or found, This rule is impermissibly vague.

SECOND CLAIM – PETITIONER MUST BE RESENTENCED

Petitioner received a natural life sentence, ensuring he would never be released from prison. His co-defendants fared much better. He should be resentenced for two reasons. First, his unduly harsh natural life sentence is significantly more harsh that the sentences ultimately rendered to the co-defendants. Presumably that difference was found to be appropriate given the factual circumstances as to each defendant apparently assumed by Judge Alfred. However, those differences were clearly misunderstood, particularly in light of the compelling presentation set forth above. Second, it appears that Judge Alfred misapplied the proper standards for aggravating and mitigating circumstances, rendering Petitioner's sentence illegally imposed.

A. DISPROPORTIONATE SENTENCES

Jack Jewitt's case was originally assigned to Judge Gordon Alley, who heard all pretrial motions, to include a motion challenging identification procedures. His trial started on July 7, 1998, and ended on July 16, 1998. The case had been reassigned to Judge Fields for trial and all subsequent matters. Jewitt was convicted on all counts. He was sentenced on October 27, 1998, to several concurrent 20 year sentences, a ten year sentence consecutive to those sentences, and a sentence of life without parole until 25 years were served, concurrent with the four 20 year concurrent sentences.

Jewitt's appeal was denied. Thereafter he filed a petition for post-conviction relief, citing a number of alleged errors. At the end of that proceeding, which was again held before Judge Fields, the court decided to revisit Jewitt's sentence, having compared it to the sentences which by then had been given to Anderson and

Bruce. RT 7-6-2004, p. 35. Jewett was resentenced on September 7, 2004. The same sentences were rendered at that time as previously ordered, except that the court ordered all sentences to run concurrently, effectively reducing his sentence to twenty-five years.

Jack Anderson had several trials. The first was held before Judge Alley, commencing September 22, 1998. It ended on October 5, 1998, resulting in a mistrial because the jury could not reach a verdict. Anderson's second trial commenced on February 23, 1999, the case having been transferred to Judge Michael Alfred for all further proceedings. The trial ended on March 5, 1999, again resulting in a deadlocked mistrial.

On September 29, 1999, Anderson entered a plea of no contest to one count of armed robbery, probation not available. On November 1, 1999, Judge Alfred sentenced Anderson to 8 years in prison.

Anderson has no doubt been released. Jewitt has served at least the bulk of his sentence. DeSean remains in prison until he dies. Assuming his presence at the incident and some knowing role, the evidence set forth above casts substantial doubt on his role as the main perpetrator. There is in fact clear doubt of his involvement in any fashion. His sentence is egregiously longer than the other defendants. There is federal law that suggests that a defendant's sentence must at least be compared to, and withstand justification for its substantially greater length than that received by co-defendants. U.S. v. Williams, 980 F.2d 1463 (DC Cir. 1992):U.S. v. Nelson, 918 F.2d 1268 (6th Cir 1990). If such a comparison is conducted in this case, DeSean's sentenced must be shortened.

An additional reason to reconsider Petitioner's sentence involves A.R.S. 13-703, as it existed at the time when this case was first considered. That statute set

forth the sentencing parameters for death penalty cases, and was applied in the sentencing of Petitioner.

B. ILLEGALLY IMPOSED SENTENCE

Petitioner was indicted as to his murder charge pursuant to ARS 13-703, insofar as the sentencing procedures are concerned. The murder citation does not include 13-702. All other counts in the indictment list 13-702. At the time of this incident, 13-702 provided the framework for finding aggravating and mitigating circumstances in non-capital cases. 13-703 provided the framework for capital sentencing as to the those factors. ARS 13-702 provides a much more expansive list of potential mitigating factors than does 13-703, and also includes a "catch-all" phrase allowing the court to consider other mitigating factors than those listed if the court found them to be valid. The court in rendering its sentence listed ARS 13-703 in the minute entry, but made no mention of any statute in its verbal recitation. TR 2-26-2001.

The court found no mitigating circumstances, ignoring several mitigating circumstances proposed by defense counsel in oral argument and in a sentencing memorandum. Many of these proposed mitigating circumstances would not be properly countenanced under 13-703, but would be considered under 13-702. State v. Viramontes, 204 Ariz. 360, 64 P.3d 188, 190 (2003), held that the sentencing court can only consider 13-703 for making determinations of aggravating factors in a death penalty case.

Petitioner maintains he must be resentenced considering the mitigating factors of ARS 13-702. It was grossly unfair to have his sentence determined in the same fashion as those being considered for the death penalty.

CONCLUSION

Due to pervasive ineffective assistance of counsel, egregious rulings by the trial court, and the failure of the appellate court's to rectify those errors, Petitioner was afforded a trial lacking in fundamental due process. The issues set forth above have never been addressed by the courts of Arizona, and have never been presented comprehensively s they have in this proceedings.

Trial and appellate counsel for Petitioner were repeatedly ineffective. In failing to challenge the many breaches of due process and fair trial proven above. The prosecutors and lead detectives engaged in misconduct requiring a new trial. These errors are more fully set forth in the supplementary filing Petitioner prepared for the Arizona Supreme Court. Exhibit 19.

Petitioner is entitled to have his natural life sentence reviewed absent the failings and failures described herein.

Executed on the 6 day of December, 2022

DESEAN A. BRUCE

Desean Alexander Bruce