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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

RODOLFO ROMERO,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIV 08-02020 PHX SRB (MEA)
	)	
CHARLES RYAN and	)	REPORT AND RECOMMENDATION
ARIZONA ATTORNEY GENERAL,	)	
	)	
Respondents.	)	
_____	)	

TO THE HONORABLE SUSAN R. BOLTON:

On or about October 22, 2008, Petitioner filed a *pro se* petition seeking a writ of habeas corpus pursuant to 42 U.S.C. § 2254. Respondents filed an answer ("Answer") (Docket No. 12) to the petition on May 12, 2009. The time allowed Petitioner to file a traverse to the answer expired on or about June 12, 2009.

**I Background**

A Maricopa County grand jury indictment returned June 21, 1988, charged Petitioner and a co-defendant, Mr. Conde, with one count of first-degree murder, one count of burglary in the first-degree, five counts of armed robbery, one count of attempted armed robbery, and three counts of aggravated assault. See Answer, Exh. A. The charges arose from a bank robbery

1 occurring on May 27, 1988, in Phoenix, Arizona.<sup>1</sup> A police  
2 officer was shot and killed as he attempted to stop the fleeing  
3 robbers. Id., Exh. C.

4 Petitioner's co-defendant was taken into custody the  
5 day the crimes occurred. Id., Exh. C at 3. Petitioner left the  
6 United States after the crimes occurred. Petitioner's co-  
7 defendant was tried and convicted by a jury of the charges  
8 stated in the indictment in late 1989, and was sentenced to an  
9 aggregate in excess of 200 years imprisonment. Id., Exh. TT at  
10 2.

11 In May of 1996, eight years after the indictment was  
12 issued, the Arizona Attorney General submitted an extradition

13 \_\_\_\_\_  
14 <sup>1</sup> The following is taken from the Arizona Court of Appeals'  
decision in Mr. Conde's appeal:

15 The evidence at trial showed that [Mr. Conde] and  
16 an accomplice entered a bank armed with handguns  
17 which they pointed at customers and bank  
18 personnel. Conde leaped on the top of a counter  
19 and ordered a teller to place money in a plastic  
20 bag. He then ordered a customer to surrender her  
21 car keys so that he and his accomplice could  
22 escape. They obtained their getaway vehicle in  
23 the bank parking lot by taking it from its driver  
at gunpoint. At this juncture, the police  
officer, working off-duty as a bank security  
guard, opened fire on Conde and his accomplice.  
In the exchange of shots the officer was killed.

24 The robbers fled the scene in the stolen car.  
During the next half-hour, they commandeered two  
25 other vehicles at gunpoint. When police located  
26 Conde and ordered him to stop, he fired at them.  
27 He was wounded and was eventually taken into  
custody.

28 Arizona v. Conde, 174 Ariz. 30, 31, 846 P.2d 843, 844 (1992). See  
also Conde v. Flanagan, CIV 02-2034 PHX SRB GEE (D. Ariz).

At a pretrial conference in Petitioner's case the state  
indicated its theory of Petitioner's case was that Mr. Conde actually  
shot the bullet that killed the police officer; the charge of murder  
against Petitioner was predicated on accomplice liability. See  
Response, Exh. G at 46-48.

1 request to the United States Department of Justice, asking for  
2 Petitioner's extradition in the event that law enforcement  
3 authorities could locate Petitioner in Mexico. Id., Exh. CC at  
4 3 & App. A at 1. Approximately four years later, in June of  
5 2000, Petitioner was arrested by Mexican authorities in Mexico.  
6 Id., Exh. C at 3.

7           On February 20, 2001, a Mexican district court approved  
8 the United States' request to extradite Petitioner to Arizona.  
9 Id., Exh. CC at 34. On March 15, 2001, Mexico's Secretary of  
10 Foreign Relations formally granted the extradition request.  
11 Id., Exh. CC at 34. Before Petitioner could be brought to the  
12 United States, however, on October 2, 2001, the Mexico Supreme  
13 Court concluded that the sentence of life imprisonment  
14 constituted cruel and unusual punishment and could not be  
15 imposed on a Mexican national by any court. Id., Exh. CC at 34.  
16 Accordingly, Petitioner subsequently successfully moved a Mexico  
17 federal court to set aside the grant of extradition because one  
18 of the offenses charged by Arizona, i.e., first degree murder,  
19 was punishable by life imprisonment. Id., Exh. CC at 35. The  
20 Mexican federal court's opinion setting aside the approval of  
21 extradition allowed Mexico's Secretary of Foreign Relations to  
22 file a pleading addressing whether Petitioner's extradition was  
23 barred by the possible imposition of a life sentence. Id., Exh.  
24 CC at 35.

25           Accordingly, on October 18, 2001, Mexico's Secretary of  
26 Foreign Relations requested assurances from the United States  
27 that Petitioner "[would] not be subject to imprisonment for life  
28

1 for murder..." if extradited to Arizona. Id., Exh. F, Attach.  
2 Referencing the governing extradition treaty between the United  
3 States and Mexico, the American ambassador responded *inter alia*  
4 that, in the event of Petitioner's conviction, "the State of  
5 Arizona [would not] seek or recommend a penalty of 25 years to  
6 life imprisonment at the sentencing phase of the judicial  
7 proceeding in this case," but that instead the State of Arizona  
8 would recommend imposition of a sentence of "50 to 60 years'  
9 imprisonment." Id., Exh. F, Attach. Regarding the possibility  
10 that the Arizona trial court might impose a life sentence upon  
11 Petitioner's conviction, notwithstanding the above-referenced  
12 recommendation, the United States ambassador informed Mexico  
13 that, should that circumstance arise, "the State of Arizona will  
14 take appropriate action to formally request that the court  
15 reduce such sentence to a term of years." Id., Exh. F, Attach.  
16 The ambassador acknowledged that, nonetheless, "[i]t would then  
17 be for the court to decide whether to accept the executive  
18 authority's determination." Id., Exh. F, Attach.

19 On November 28, 2001, Mexico granted the United States'  
20 request to extradite Petitioner on every requested charge except  
21 the charge of burglary. Id., Exh. CC, App. A at 7.<sup>2</sup> The opinion  
22 approving the extradition noted the agreement complied with the  
23 relevant treaty in that Petitioner was not facing a death  
24 sentence and also noted the exchange of diplomatic notes

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26 <sup>2</sup> Mexico did not extradite on this charge because the  
27 Mexican criminal code lacked an offense equivalent to second degree  
28 burglary. See Answer, Exh. DD at 28 & App. A at 7, 14-15

1 regarding Mexico's insistence that Petitioner be sentenced to a  
2 term of years, rather than an indeterminate sentence, i.e., a  
3 sentence of life imprisonment. Id., Exh. CC, App. A at 13-14.  
4 On March 21, 2002, Mexico extradited Petitioner to Arizona.  
5 Id., Exh. CC at 3.

6 Just prior to trial, Petitioner's counsel moved the  
7 court to reduce the charge of first-degree murder to second-  
8 degree murder, citing the extradition treaty and agreement  
9 between Mexico and the United States. Id., Exh. E & Exh. G.  
10 After the matter was fully pled, the trial court heard argument  
11 on the motion November 18, 2002. Id., Exh. G. The trial court  
12 denied the motion at that time. Id., Exh. G at 15.

13 Petitioner's jury trial on the 1988 charges began on  
14 November 18, 2002. Id., Exh. H. Due to unavailability of  
15 witnesses, the trial court granted the state's motion to  
16 dismiss one count of armed robbery and one count of aggravated  
17 assault. Id., Exh. O at 132-33; Exh. S. Without any objection  
18 from the defense, the jury was instructed as to the lesser-  
19 included offense of second-degree murder. Id., Exh. EE at 4 &  
20 Exh. P at 38. Defense counsel told the jury during closing  
21 argument that Petitioner was "only guilty of Second Degree  
22 Murder." Id., Exh. P at 94.

23 The jury found Petitioner guilty of one count of  
24 first-degree murder, one count of burglary, four counts of armed  
25 robbery, one count of attempted robbery, and three counts of  
26 aggravated assault. Id., Exh. P at 112-17.

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1           During the trial, and after Petitioner was convicted  
2 but prior to sentencing, his defense counsel notified the  
3 Mexican government of Petitioner's trial and conviction on the  
4 charge of first degree murder. Id., Exh. DD at 33; Exh. EE at  
5 5. The Mexican government responded that it was not in favor of  
6 the imposition of a life sentence. Id., Exh. DD at 33;<sup>3</sup> Exh. EE.

7           Petitioner's trial counsel filed a motion for a new  
8 trial asserting Petitioner could not be convicted of murder in  
9 the first degree or burglary because the charges were precluded  
10 by the extradition agreement. Defense counsel also moved to  
11 dismiss both these charges. Id., Exh. CC at 6. At a hearing  
12 on February 7, 2003, the parties stipulated to dismissal of the  
13 conviction for burglary. Id., Exh. CC at 6.

14           In response to Petitioner's post-trial motion to  
15 dismiss, the state offered to reduce the murder charge; however,  
16 Petitioner wanted dismissal of the count on the basis that  
17 jurisdiction was not proper. Id., Exh. CC at 6. On March 19,  
18 2003, the state moved the trial court to reduce Petitioner's  
19 conviction from guilty of first-degree murder to guilty of  
20 second-degree murder, which would allow for a sentence of less

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21  
22           <sup>3</sup> A letter from a Mexican diplomat states:  
23 I reiterate that the government of Mexico is  
24 interested in seeing that the aforementioned  
25 reassurance of no application of life sentence on  
26 the accused, is complied with, this in case he is  
27 found guilty in the legal process being pursued  
28 against him in the United States of America, he  
is handed down a sentence of a determined number  
of years and not a life sentence, without concern  
for how these assurances are complied with by the  
United States government...

Answer, Exh. DD at 33.

1 than life imprisonment. Id., Exh. UU. The motion states it was  
2 "made to satisfy extradition agreement between the governments  
3 of the United States and Mexico. Defendant and defense counsel  
4 are aware of this motion and have no objection thereto." Id.,  
5 Exh. UU. The trial court granted the motion on March 21, 2003.  
6 Id., Exh. BB & Exh. VV.

7 The trial court conducted an aggravation and mitigation  
8 hearing on March 21, 2003, at which hearing Petitioner spoke on  
9 his own behalf. Id., Exh. R & Exh. XX. At that time the court  
10 imposed an aggravated term of 20 years incarceration pursuant to  
11 Petitioner's conviction on the charge of second-degree murder.  
12 Id., Exh. BB. The trial court found as aggravating  
13 circumstances the fact that the victim was a police officer who  
14 acted in his official capacity by trying to prevent the bank  
15 robbery, and the severe emotional harm to the officer's family.  
16 The state court also found as aggravating circumstances the  
17 presence of an accomplice, Petitioner's flight from the scene,  
18 and Petitioner's failure to self-surrender. The trial court  
19 found as other aggravating circumstances the fact that the  
20 murder occurred "in the immediate flight from a robbery to  
21 prevent detection" and Petitioner's decision to arm himself with  
22 assault rifles equipped with "banana-clips" and high-powered  
23 ammunition to ensure that he was "not apprehended at all costs."  
24 Id., Exh. R at 68-69. Stating that "the aggravating factors  
25 far, far outweigh the mitigating factors," the trial court  
26 indicated it would have imposed the same sentence even if it had  
27 disregarded the victim's status as a police officer and the

1 pecuniary motive of the underlying armed robbery. The trial  
2 court also stated the sentence was warranted by the aggravating  
3 factors, which outweighed Petitioner's youthfulness and lack of  
4 a prior criminal record at the time of the crime. Id., Exh. R  
5 at 69.

6 The trial court imposed aggravated prison terms on the  
7 remaining convictions based upon the presence of an accomplice,  
8 flight from the scene, and the fact that the murder committed in  
9 immediate flight to prevent detection. Id., Exh. R at 70-72.  
10 The aggregate length of Petitioner's sentences is 106 years.  
11 Id., Exh. R.

12 Petitioner took a direct appeal of his convictions and  
13 sentences, arguing:

14 The trial court erroneously replaced  
15 Defendant's first-degree murder conviction  
16 with a second-degree murder conviction  
17 because the conviction for that crime is not  
18 expressly allowed by the controlling  
19 extradition agreement between the United  
States and Mexico. And, the Supremacy Clause  
requires that the first-degree murder  
conviction be vacated because it conflicts  
with the controlling extradition agreement.

20 Id., Exh. CC at 32. Petitioner argued the State of Arizona had  
21 violated the extradition agreement between the United States and  
22 Mexico and the "doctrine of specialty" by reducing the charge  
23 after conviction and by imposing consecutive sentences. Id.,  
24 Exh. CC. In his direct appeal Petitioner also argued that the  
25 trial court violated his Sixth Amendment right to a jury trial  
26 by enhancing his sentence using facts that were neither admitted  
27 by Petitioner nor found to be true beyond a reasonable doubt by  
28

1 a jury. Id., Exh. CC at 52.

2           The Arizona Court of Appeals affirmed Petitioner's  
3 convictions and sentences in a decision issued August 16, 2005.  
4 Id., Exh. EE. The Court of Appeals noted that Mexico had agreed  
5 to extradite Petitioner on a charge of first-degree murder.  
6 Id., Exh. EE. The Court of Appeals noted Mexico had agreed to  
7 extradite Petitioner on that charge if the State of Arizona  
8 agreed to oppose the imposition of a life sentence if convicted.  
9 Id., Exh. EE. Additionally, the Arizona Court of Appeals  
10 reiterated the fact that, after Petitioner was convicted, his  
11 counsel notified the Mexican government of Petitioner's  
12 conviction. Id., Exh. EE. The Mexican government responded  
13 that it was not in favor of the imposition of a life sentence.  
14 Id., Exh. EE.

15           The Arizona Court of Appeals held that Petitioner's  
16 extradition, trial, and conviction on the charge of first degree  
17 murder was not in violation of the extradition agreement  
18 because the agreement specifically provided Petitioner could be  
19 extradited to face that charge. Id., Exh. EE. The appellate  
20 court concluded that the means used to bring the sentence  
21 mandated by the extradition agreement into compliance with  
22 Arizona law did not deprive Petitioner of any substantive right.  
23 Id., Exh. EE. Additionally, the Arizona Court of Appeals  
24 concluded that relief based on the application of the doctrine  
25 of specialty would depend on the wishes of Mexico, which country  
26 had indicated only a desire that Petitioner not be sentenced to  
27 life imprisonment if convicted of first-degree murder. Id.,

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1 Exh. EE.

2           The Arizona Court of Appeals also determined that, if  
3 there had been any violation of the specialty doctrine, the  
4 error was invited by Petitioner because there was no  
5 contemporaneous objection to the state's motion for diminution  
6 of the murder count and because prior to trial and in closing  
7 argument Petitioner himself had argued for conviction on the  
8 lesser-included offense of second-degree murder. Id., Exh. EE.

9           Petitioner did not seek review of the Court of Appeals'  
10 decision in his direct appeal by the Arizona Supreme Court.

11           Petitioner initiated an action for state post-  
12 conviction relief pursuant to Rule 32, Arizona Rules of Criminal  
13 Procedure, on October 25, 2005. Id., Exh. HH. This action was  
14 dismissed on Petitioner's motion on November 14, 2005.

15           Petitioner filed another Rule 32 action on December 2,  
16 2005. Id., Exh. KK. Petitioner was appointed counsel, who  
17 informed the state trial court on October 10, 2006, that she  
18 could not find any colorable claims to raise in a Rule 32  
19 petition. Id., Exh. LL. Petitioner filed a pro per petition  
20 for relief, reasserting the claims raised in his direct appeal.  
21 Id., Exh. MM. The state trial court denied relief and the  
22 Arizona Court of Appeals denied review in a decision issued  
23 September 26, 2008. Id., Exh. PP & Exh. QQ.

24           Petitioner asserts he is entitled to relief from his  
25 convictions because the trial court's reduction of the  
26 first-degree murder conviction to second-degree murder was, he  
27 contends, erroneous. Petitioner asserts that "the conviction

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1 for that [second-degree murder] is not expressly allowed by the  
2 controlling extradition agreement between the United States and  
3 Mexico." Accordingly, he argues, "the Supremacy Clause requires  
4 that the first-degree [murder conviction] be vacated because it  
5 conflicts with the extradition agreement". Petitioner also  
6 contends his sentences must be vacated because the trial court  
7 aggravated his sentence based on facts not found by the jury, in  
8 violation of his Sixth Amendment rights.

9 Respondents maintain the petition must be denied and  
10 dismissed. Respondents assert that Petitioner's challenge to  
11 the reduction of his first-degree murder conviction to  
12 second-degree murder is procedurally barred because the Arizona  
13 Court of Appeals found that Petitioner invited any error by  
14 requesting the challenged reduction in charge. Respondents also  
15 contend this claim may be denied because the Arizona Court of  
16 Appeals' ruling on the merits was neither contrary to, nor an  
17 unreasonable application of, United States Supreme Court  
18 precedent. Respondents assert the second claim for relief must  
19 be denied because Arizona Court of Appeals' rejection of  
20 Petitioner's Sixth Amendment challenge was neither contrary to,  
21 nor an unreasonable application of, Supreme Court precedent.

## 22 **II Analysis**

23 **The principles of exhaustion of claims and the presence**  
24 **of an "adequate and independent" state law basis for denial of**  
25 **habeas corpus relief on the merits of the claim**

26 A federal court may not grant habeas relief  
27 to a state prisoner unless the prisoner has  
28 first exhausted his state court remedies. See



1 n.6 (1989). The Ninth Circuit Court of Appeals has held that  
2 "federal courts should not insist upon a petitioner, as a  
3 procedural prerequisite to obtaining federal relief, comply[]  
4 with a rule the state itself does not consistently enforce."  
5 Id., 567 F.3d at 581-82, quoting Siripongs v. Calderon, 35 F.3d  
6 1308, 1318 (9th Cir. 1994). It is Respondents' burden to prove  
7 the rule cited and relied upon by the state court in denying  
8 relief was clear, consistently applied, and well-established at  
9 the time the rule was applied to Petitioner's case. Id.

10 Additionally, for the proffered state procedural bar to  
11 preclude the consideration of a habeas claim "the state court  
12 must actually have relied on the procedural bar as an  
13 *independent basis* for its disposition of the case." Caldwell v.  
14 Mississippi, 472 U.S. 320, 327, 105 S. Ct. 2633, 2638-39 (1985)  
15 (emphasis added). See also Harris v. Reed, 489 U.S. 255,  
16 261-62, 109 S. Ct. 1038, 1042 (1989).

17 "[A] procedural default does not bar  
18 consideration of a federal claim on either  
19 direct or habeas review unless the last state  
20 court rendering a judgment in the case  
21 clearly and expressly states that its  
22 judgment rests on a state procedural bar."  
23 Harris, 489 U.S. at 263, 109 S. Ct. 1038 [].  
... Sanders v. Cotton, 398 F.3d 572, 580 (7th  
Cir. 2005) (where the state appellate court's  
discussion of waiver is intertwined with its  
merits analysis, the state court's decision  
does not rest on an independent and adequate  
state law ground)....

24 Pole v. Randolph, 570 F.3d 922, 937 (7th Cir. 2009) (some  
25 internal citations and quotations omitted). See also Scott, 567  
26 F.3d at 581-82.

1            Respondents argue that the Court should not review the  
2 merits of Petitioner's extradition-based claim regarding the  
3 propriety of his conviction for first-degree murder and the  
4 reduction in his conviction to second-degree murder because the  
5 state court's decision denying his specialty doctrine claim in  
6 Petitioner's direct appeal rested on an adequate and independent  
7 basis for barring federal habeas relief. Respondents contend  
8 the adequate and independent state basis for rejecting  
9 Petitioner's claim is that Petitioner waived the objection by  
10 inviting any error. Respondents cite to cases indicating the  
11 rule was clear, consistently applied, and well-established at  
12 the time of Petitioner's direct appeal. See Answer (Docket No.  
13 12) at 51-52.

14            Some federal courts have concluded that a state's  
15 common law "invited error" rule is an independent and adequate  
16 state law that is sufficient to bar federal habeas review of a  
17 claim for relief. See Leavitt v. Arave, 383 F.3d 809, 832-33  
18 (9th Cir. 2004) (stating "[t]here is no reason that we should  
19 treat the invited error rule differently from other state  
20 procedural bars"); Wilson v. Ozmint, 357 F.3d 461, 467 (4th Cir.  
21 2004); Coleman v. O'Leary, 845 F.2d 696, 699-701 (7th Cir.  
22 1988); Francois v. Wainwright, 741 F.2d 1275, 1282 (11th Cir.  
23 1984); Tillman v. Cook, 25 F. Supp. 2d 1245, 1274-76 (D. Utah  
24 1998).

25            However, it is at least arguable whether the Arizona  
26 Court of Appeals' decision denying this claim in Petitioner's  
27 direct appeal rested on the bar of invited error. The appellate  
28

1 court did begin discussion of the specialty doctrine claim by  
2 noting Petitioner had repeatedly sought the outcome achieved,  
3 i.e., conviction on second degree, rather than first degree,  
4 murder. After then thoroughly discussing the doctrine of  
5 specialty and applicable federal law and the merits of the  
6 claim, the Arizona Court of Appeals summarily stated that, "even  
7 if" Petitioner's conviction on second-degree murder had violated  
8 the specialty doctrine, any error was invited error and,  
9 accordingly, not reversible.

10 Because the claim may be denied on the merits and it is  
11 arguable if the state court decision may be affirmed based on  
12 the "adequate and independent" state bar, it is necessary to  
13 discuss whether the Court of Appeals' denial of the claim on the  
14 merits of the claim was clearly contrary to established federal  
15 law.

16 **Standard of review regarding exhausted claims**

17 The Court may not grant a writ of habeas corpus to a  
18 state prisoner on a claim adjudicated on the merits in state  
19 court proceedings unless the state court reached a decision  
20 contrary to clearly established federal law, or one involving an  
21 unreasonable application of clearly established federal law, or  
22 unless the state court's decision was based on an unreasonable  
23 determination of the facts in light of the evidence presented in  
24 the state proceeding. See 28 U.S.C. § 2254(d) (1994 & Supp.  
25 2008); Carey v. Musladin, 549 U.S. 70, 74-75, 127 S. Ct. 649,  
26 653 (2006); Musladin v. Lamarque, 555 F.3d 834, 838 (9th Cir.  
27 2009).

28



1 and oral argument regarding the diplomatic note, the relevant  
2 treaty, the current status of the interpretation and extension  
3 of the treaty, the circumstance of Petitioner's case, including  
4 the exchange of notes between Mexican and United States  
5 officials regarding Petitioner's extradition agreement, and  
6 Arizona law. See Response, Exh. G.

7           The Arizona Court of Appeals denied the extradition-  
8 based claims on the merits when presented in petitioner's direct  
9 appeal. The Court of Appeals determined:

10           The doctrine of specialty provides that a  
11 state that has obtained extradition of a  
12 person is prohibited from prosecuting that  
13 person "for any offense other than that for  
14 which the surrendering state agreed to  
15 extradite." United States v. Andonian, 29  
16 F.3d 1432, 1434-35 (9th Cir. 1994) (internal  
17 citations omitted).

18           An extradited person may be tried for  
19 offenses other than those for which the  
20 person was surrendered if the extraditing  
21 country consents. The proceedings did not  
22 violate the doctrine of specialty. Romero was  
23 extradited for first-degree murder, all in  
24 compliance with the extradition agreement and  
25 the doctrine of specialty. The subsequent  
26 reduction to the lesser-included offense of  
27 second-degree murder in order to comply with  
28 the sentencing provisions of the agreement  
does not mandate reversal of Romero's  
conviction.

\*\*\*

21           Extradition treaties are construed liberally  
22 to effect their purpose of surrendering  
23 fugitives to be tried for their alleged  
24 offenses. United States v. Wiebe, 733 F.2d  
25 549, 554 (8th Cir. 1984). Under these  
26 circumstances, the reduction of Romero's  
27 conviction to a lesser-included offense  
28 constituted a reclassification contemplated  
by the treaty. Romero does not contest that  
the charge of second-degree murder, as a  
lesser included offense of first-degree  
murder, was based on the same factual  
allegations as those established in the

1 request for extradition based on first-degree  
2 murder, or that the punishment for second  
3 degree murder provided for a sentence of less  
4 than life imprisonment. Therefore, the treaty  
itself permitted a conviction for  
second-degree murder.

5 Answer, Exh. EE at 9-10.

6 In "United States v. Rauscher, 119 U.S. 407, 7 S. Ct.  
7 234 (1886), and Johnson v. Browne, 205 U.S. 309, 27 S. Ct. 539  
8 (1907), the Supreme Court set forth principles for interpreting  
9 extradition treaties and analyzed the effect of limitations on  
10 what offenses may be punished by the extraditing country."  
11 Rodriguez Benitez v. Garcia, 495 F.3d 640, 643 (9th Cir. 2007).  
12 The Arizona Court of Appeals' decision denying Petitioner's  
13 claim was not an objectively unreasonable application of the  
14 holdings in these cases.

15 Rauscher established the doctrine of  
16 specialty, which provides that an extradited  
17 defendant may not be prosecuted for any  
offense other than that for which the  
surrendering country agreed to extradite.[].

18 ...  
19 In Browne, a defendant who was convicted in  
20 the United States of conspiracy to defraud  
the government fled the country and was  
extradited from Canada under a treaty which  
21 did not cover conspiracy. [] Because of the  
treaty's limitations, Canadian authorities  
surrendered the defendant for another offense  
22 but not for the conspiracy charge. [] The  
Supreme Court, looking to the agreed-upon  
23 terms of extradition and to the relevant  
treaty language, refused to uphold a  
24 reinstated conviction on the conspiracy  
charge.

25 Rodriguez Benitez, 495 F.3d at 643-44 (internal citations and  
26 quotations omitted).



1 requires us to leave the decision of the California court  
2 undisturbed." Id. Similarly, the Arizona court's decision  
3 regarding Petitioner's claims based on the specialty doctrine  
4 and the reduction of Petitioner's conviction was not objectively  
5 unreasonable and Petitioner is not entitled to habeas relief on  
6 this claim.

7 **Sixth Amendment sentencing claim**

8 Petitioner asserts his aggravated prison terms violate  
9 his Sixth Amendment rights and the doctrine of Blakely v.  
10 Washington because the trial court, rather than a jury, found  
11 the existence of the six circumstances used to aggravate his  
12 sentence for second-degree murder.

13 In rejecting relief on this claim, the Arizona Court of  
14 Appeals applied the Arizona Supreme Court's decision in Arizona  
15 v. Martinez, 210 Ariz. 578, 115 P.3d 618 (2005), interpreting  
16 Blakely. Answer, Exh. EE at 16-17. The appellate court  
17 concluded that, pursuant to Martinez, Petitioner's  
18 constitutional rights were not violated because Petitioner had  
19 conceded at least one aggravating circumstance, i.e., the  
20 presence of an accomplice. The Court of Appeals reiterated the  
21 holding of Martinez that, once it was established that a single  
22 Blakely-compliant aggravating factor existed, i.e., a jury had  
23 found or the defendant had admitted the existence of an  
24 aggravating factor, the defendant's rights were not violated  
25 because the trial judge found additional aggravating factors.

26 The Arizona courts have interpreted Blakely to allow  
27 for the imposition of an aggravated sentence founded partially

1 on facts not found by a jury if at least one aggravating factor  
2 is compliant with Blakely, i.e., found by a jury or admitted by  
3 the defendant. See Arizona v. Martinez, 210 Ariz. 578, 115 P.3d  
4 618 (2005); Arizona v. Henderson, 210 Ariz. 561, 115 P.3d 601  
5 (2005). The sentencing scheme iterated in Martinez was upheld  
6 upon review by the United States Supreme Court. See Martinez v.  
7 Arizona, 546 U.S. 1044, 126 S. Ct. 762 (2005).

8 Arizona's response to Blakely as explained in Martinez  
9 has been found to be not clearly contrary to federal law. See  
10 Cunningham v. California, 549 U.S. 270, 294 n.17, 127 S. Ct.  
11 856, 871 n.17 (2007) (finding California's sentencing process  
12 unconstitutional and analyzing the Colorado Supreme Court's  
13 response to Blakely in Colorado v. Lopez, 113 P.3d 713, 716  
14 (Colo. 2005); Colorado's Lopez decision is materially similar to  
15 the Arizona Supreme Court's Martinez opinion); Stokes v.  
16 Schriro, 465 F.3d 397, 402-03 (9th Cir. 2006) (holding "the  
17 Arizona state courts' interpretation of these [sentencing]  
18 provisions does not contradict clearly established federal  
19 law"). Accordingly, the Arizona court's decision denying this  
20 claim in Petitioner's direct appeal was not clearly contrary to  
21 federal law and Petitioner is not entitled to relief on this  
22 claim.

### 23 **III Conclusion**

24 The Arizona Court of Appeals' decision denying  
25 Petitioner's claims for relief was not clearly contrary to  
26 federal law with regard to any stated claim for relief.



1 of the Magistrate Judge.

2 DATED this 19<sup>th</sup> day of August, 2009.

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Mark E. Asper  
United States Magistrate Judge