

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EARL FELTON CRAGO, Jr.,

Petitioner-Appellant,

v.

CHARLES L. RYAN, Warden;
ATTORNEY GENERAL FOR THE STATE
OF ARIZONA,

Respondents-Appellees.

No. 16-16159
17-16469

D.C. No. 4:14-cv-02007-FRZ

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted August 16, 2018**
San Francisco, California

Before: O'SCANNLAIN and BEA, Circuit Judges, and McLAUGHLIN,***
District Judge.

Petitioner Earl Felton Crago, Jr., appeals the district court's judgment

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Mary A. McLaughlin, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

denying his petition for writ of habeas corpus. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review de novo, *see Smith v. Ryan*, 823 F.3d 1270, 1278–79 (9th Cir. 2016), and we affirm.

1. Brady claim. Federal courts may not grant habeas relief unless the state court’s adjudication of a claim rested on an unreasonable determination of the facts in light of the evidence presented, or “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.” 28 U.S.C. § 2254(d). “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Materiality requires a reasonable probability of a different result in the proceeding at issue if the evidence had been disclosed. *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

As an initial matter, Crago does not demonstrate that the prosecution withheld evidence that was favorable to the defense. The one DNA test that was complete before trial was inconclusive, and therefore neither inculpatory nor exculpatory.

Furthermore, the state trial court reasonably weighed the strength of the prosecution’s evidence, other than Crago’s own testimony, against the weakness of

Crago's alibi. The trial evidence included an eyewitness who identified Crago as the shooter, along with testimony that Crago had admitted shooting someone to death. The alibi rested on two items of evidence: an entry permit for a U.S. Army base that Crago obtained on the morning of the shooting, without any indication of when he actually entered and exited the base; and a witness's testimony that Crago left her home on the base that morning early enough to arrive at the murder scene at the time of the shooting. Neither piece of evidence accounts for Crago's whereabouts at the time of the shooting. The trial court also reasonably addressed Crago's claim that another man was the real killer, noting that this theory relied on misrepresentations of witnesses' statements. Crago does not attempt to characterize these findings as unreasonable factual determinations.

Crago contends that the state trial court's decision contradicted or unreasonably applied *Brady* because the decision rejected this claim under an Arizona state rule requiring that new evidence "probably would have changed the verdict," Ariz. R. Crim. P. 32.1(e), in contrast to *Brady*'s more accommodating threshold of "reasonable probability." In fact, the record reveals that the state trial court both invoked and reasonably applied the reasonable-probability standard.

2. Uncertified evidentiary-hearing claim. We construe Crago's briefing of the uncertified claim that the state trial court should have held an evidentiary hearing as a motion to expand the certificate of appealability, and we deny that

motion. Ninth Circuit Rule 22-1(e). First, that argument was never presented to the district court. Second, reasonable jurists would not debate that there was no need for an evidentiary hearing because the state trial court reasonably concluded that Crago's *Brady* claim was meritless even if his allegations about the prosecutor's erroneous statement and withholding of the inconclusive test result were correct. *See Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

AFFIRMED.