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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

James Lee Hess,
Petitioner
-vs-
Dora B. Schriro, et al.,
Respondent(s)

CV-06-1639-PHX-PGR (JI)

**REPORT & RECOMMENDATION
On Petition for Writ of Habeas Corpus
Pursuant to 28 U.S.C. § 2254**

I. MATTER UNDER CONSIDERATION

Petitioner, presently incarcerated in the Arizona State Prison Complex at Tucson, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on June 28, 2006 (#1), and a supplemental memorandum on August 23, 2006 (#9). On October 13, 2006, Respondents filed their Answer (#12). Petitioner filed a Reply on October 5, 2007 (#30). Subsequently, Respondents filed a first Supplemental Answer on March 12, 2008 (#34) and a Second Supplemental Answer on September 9, 2008 (#57). Petitioner has filed a first Supplemental Reply on June 3, 2008 (#45) and a Second Supplemental Reply on December 17, 2008 (#69).

The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND

In this proceeding, Petitioner challenges his incarceration resulting from his conviction in Maricopa County Superior Court case number 88-10837, primarily on charges

1 of armed robbery. (Petition #1 at 1.) That conviction is intertwined with Petitioner’s
2 conviction in Maricopa County Superior Court case number 88-11481 on charges of sexual
3 assault.¹ Accordingly, the relevant procedural background for both convictions is addressed.
4 Conversely, it is only the facts of the armed robbery case which are at issue, and so only
5 those facts will be reviewed.

6
7 **A. FACTUAL BACKGROUND**

8 In disposing of Petitioner’s original direct appeal, the Arizona Court of Appeals
9 summarized the facts underlying the armed robbery convictions as follows:

10 Appellant's armed robbery convictions arose out of holdups of
11 two Phoenix retail establishments, both involving lone female
12 employees. A witness to the second robbery provided police with a
13 description of the truck and its license number. Police engaged in a
14 high-speed chase for fifteen minutes before abandoning pursuit.
15 Vehicle registration confirmed that appellant was the truck's owner.

16 The police undertook surveillance at the appellant's address and
17 followed as he and his girlfriend drove to a laundromat in the
18 girlfriend's car. Police officers then arrested appellant inside the
19 laundromat on a California fugitive warrant.

20 At the police station following appellant's arrest, the girlfriend
21 consented to a search of her car. Police seized a backpack which the
22 girlfriend advised them belonged to appellant and a writing tablet lying
23 next to the backpack. Inside the backpack, officers found a bank bag
24 containing \$682. The top page of the writing tablet contained the
25 following:

26 Store truck. [encircled] Get canopy for truck. Get
27 paint job. Hair cut. Truck registration.

28 A detective testified that he later went to the jail to have appellant
fingerprinted and to advise him of additional charges that were being
filed. Appellant initiated a conversation in which he told the detective
that he had hidden the money from the robberies under a bush after the
chase.

(Exhibit D, Mem. Dec. 4/9/92 at 1-2.)

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¹ Case number 88-11481 also included charges of armed robbery. (Exhibit B, Opening Brief at 6.) However, for ease of reference, case number 88-11481 is referred to as the “sexual assault” case, and case number 88-10837 is referred to as the “armed robbery case.”

1 **B. PROCEEDINGS AT TRIAL**

2 On November 29, 1988, in Maricopa County case number 88-10837, Petitioner was
3 indicted on three counts of armed robbery, one count of unlawful flight, and one count of
4 kidnaping. (Exhibit B, Opening Brief at 4.) Petitioner was convicted by a jury on two of the
5 counts of armed robbery and one count of unlawful flight from law enforcement, and prior
6 to sentencing pled no contest to one count of sexual assault. (Exhibit D, Memorandum
7 Decision at 1; Exhibit A, M.E. 8/9/89.)

8 On December 20, 1988, Petitioner was charged in a separate indictment in Maricopa
9 County case number 88-11481, the sexual assault case, with two counts of armed robbery
10 and two counts of sexual assault. Petitioner eventually entered into a plea agreement
11 whereby he pled guilty to one count of sexual assault. (Exhibit B, Opening Brief at 6.)

12 The sentencing in both cases occurred on October 27, 1989. (*Id.*) In case number 88-
13 10837, Petitioner was sentenced to 14 years on one armed robbery count, and a concurrent
14 two and one-half years on the unlawful flight count. He was sentenced to a consecutive 21
15 year term on the other armed robbery. (Exhibit A, Sentence 10/27/89.) In case number 88-
16 11481, Petitioner received an aggravated sentence of 21 years on the sexual assault charge,
17 to run consecutively to his 21 year sentence for armed robbery in case number 88-10837.
18 (Exhibit B, Opening Brief at 7.)

19
20 **C. PROCEEDINGS ON DIRECT APPEAL**

21 Petitioner filed a consolidated appeal in both cases. In the armed robbery case, he
22 challenged the denial of a motion to suppress and admission of statements to police in the
23 armed robbery case, and the denial of a motion for directed verdict. In the sexual assault
24 case, he challenged the voluntariness of Petitioner's plea in the sexual assault case. (Exhibit
25 B, Opening Brief at i; Exhibit C, Supplemental Brief at i.) The Arizona Court of Appeals
26 affirmed the convictions and sentences on April 9, 1992 (Exhibit D).

27 Petitioner filed a Motion for Reconsideration (Reply, #30, Exhibit D), which was
28 summarily denied on November 4, 1992 (*id.*).

1 Petitioner filed a Petition for Review by the Arizona Supreme Court, again attacking
2 both convictions. (Exhibit E, PFR at 2-3.) That petition was summarily denied by an Order
3 (Exhibit F) issued April 21, 1995.

4 Petitioner did not seek certiorari review.

5
6 **D. PROCEEDINGS ON POST-CONVICTION RELIEF**

7 On February 16, 1996, Petitioner filed a Notice of Post-Conviction Relief (Exhibit G),
8 and on September 20, 1996, he filed his *Pro Per* Petition for Post Conviction Relief (Exhibit
9 I). By an Order (Exhibit L) dated July 15, 1997 and filed July 17, 1997, the PCR court
10 summarily dismissed the petition. The denial was based in part on the Court's intervening
11 re-sentencing as a result of Petitioner's successful motion to withdraw his plea in the sexual
12 assault case, #88-11481 (*see* Exhibit L at 1), as discussed hereinafter.

13 Although the caption of the PCR Notice referenced both cases, the caption of the
14 PCR petition referenced only the armed robbery case, #88-10837, and the prayer for relief
15 sought only a "new trial." (Exhibit I at 59.) All further orders, petitions, etc. on this petition
16 referenced only case number 88-10837. As discussed hereinafter, Petitioner simultaneously
17 challenged case number 88-11481 through a successful Motion to Withdraw Plea (Exhibit
18 H), resulting in the vacating of that conviction, and vacating of his sentence in the armed
19 robbery case. (*See* Exhibit J, ME 9/27/96.)

20 Petitioner filed a Petition for Review (Exhibit M), challenging the denial of his PCR
21 petition. That petition was summarily denied by the Arizona Court of Appeals in an Order
22 (Exhibit O) filed September 10, 1998. Petitioner then filed a Petition for Review by the
23 Arizona Supreme Court (Exhibit P), which was summarily denied by an Order (Exhibit R)
24 filed February 19, 1999.

25
26 **E. MOTION TO WITHDRAW PLEA & RESENTENCING**

27 On March 12, 1996 (during the pendency of his first PCR proceeding), Petitioner filed
28 a Motion to Withdraw Plea in the sexual assault case, #88-11481, coupled with a motion for

1 re-sentencing in both cases. (Exhibit H.) Petitioner argued that the plea agreement in the
2 sexual assault case included a promise that his sentence in that case would be concurrent with
3 any sentence imposed in a third case then pending in Pima County. Instead, the Pima County
4 court issued a consecutive sentence. Petitioner further argued that because the sexual assault
5 conviction had been relied upon to enhance his sentences in the armed robbery case, #88-
6 10837, that sentence should be vacated. The trial court granted the motion to withdraw plea,
7 finding that Petitioner's plea was involuntary as a result of Petitioner's reliance on
8 representations concerning the Pima County case sentencing. Consequently, the conviction
9 in the sexual assault case was vacated and the sentence in the intertwined armed robbery
10 case, # 88-10837, was vacated and re-sentencing ordered. (Exhibit J, M.E. 9/27/96.)

11 As a result, Petitioner was re-sentenced on April 4, 1997 in the armed robbery case,
12 #88-10837, to the same terms of imprisonment originally imposed (*i.e* 14 years and 2 1/2
13 years concurrent, and 21 years consecutive), but with the new proviso that all sentences were
14 consecutive to the sentence in the Pima County case.² (Exhibit K, Sentence 4/4/97.)

15 Thereafter, Petitioner proceeded with his first PCR proceeding, discussed herein
16 above, and instituted his second direct appeal, discussed hereinafter.

17 18 **F. SECOND DIRECT APPEAL**

19 Upon being re-sentenced (and during the continuation of his first PCR proceeding),
20 Petitioner filed his second direct appeal challenging his conviction and sentence in the armed
21 robbery case, #88-10837. (*See* Exhibit Q, Opening Brief.) The Arizona Court of Appeals
22 found challenges to Petitioner's *conviction* precluded by failure to raise them in his first
23 appeal. The Court rejected his remaining claims, and affirmed his sentences. (Exhibit T,
24 Mem. Dec. 5/20/99.)

25 Petitioner filed a Petition for Review (Exhibit V), seeking review by the Arizona
26 Supreme Court. That petition was summarily denied by an Order (Exhibit X) issued March

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² In the Pima County case, Petitioner received a sentence totaling 221.25 years.
(Exhibit T, Mem. Dec. 5/20/99 at 2.)

1 3, 2000.

2 In the interim, as discussed herein above, Petitioner's petition for review on his first
3 PCR petition had also been denied. (*See* Exhibit R, Order by Arizona Supreme Court,
4 2/19/99.)

5 Petitioner did not seek certiorari review.

6
7 **G. SECOND PCR PROCEEDING**

8 On May 4, 1999 (during the pendency of his second direct appeal, but following
9 termination of review on his first PCR proceeding), Petitioner filed his second PCR Petition
10 (Exhibit S), asserting ineffective assistance of counsel at trial. Petitioner notes that no PCR
11 Notice had been filed. (Petition #1 at 2.) The PCR court summarily dismissed this petition
12 as "either already addressed or not raised in his previous PCR proceedings." (Exhibit U,
13 M.E. 6/3/99.)

14 Petitioner then filed a Petition for Review (Exhibit W), seeking review by the Arizona
15 Court of Appeals. That Petition was summarily denied. (Exhibit Z, Order 4/19/00.)
16 Petitioner then sought review by the Arizona Supreme Court (Exhibit AA, PFR), which was
17 also summarily denied. (Exhibit BB, Order 12/1/00.)

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19 **H. THIRD PCR PROCEEDING**

20 On March 22, 2000 (after denial of his second PCR petition, but during pendency of
21 review therefrom), Petitioner commenced his third PCR proceeding by filing a Notice of Post
22 Conviction Relief (Exhibit Y). He filed through counsel his Petition (Exhibit CC) on July
23 20, 2001, asserting that a significant change in the law concerning motions to sever, called
24 for the vacating of his conviction. The PCR Court summarily rejected the petition, finding
25 that the relied upon change applied only prospectively. (Exhibit DD, M.E. 12/14/01.)

26 Petitioner sought review by the Arizona Court of Appeals (Exhibit EE, PFR 1/14/03),
27 which was summarily denied (Exhibit FF, Order 8/20/03.)

28 Petitioner then sought review by the Arizona Supreme Court (Exhibit GG, PFR

1 10/6/03), which was summarily denied by an Order (Exhibit HH), filed on February 17,
2 2004.

3 4 **I. FOURTH PCR PROCEEDING**

5 On July 19, 2004 (over five months after the Arizona Supreme Court's ruling (Exhibit
6 HH) in his third PCR proceeding), Petitioner commenced his fourth PCR proceeding by
7 filing a Notice of Post-Conviction Relief (Exhibit II) seeking relief pursuant to *Blakely v.*
8 *Washington*, 542 U.S. 961 (2004) as a significant change in the law. The PCR Court
9 summarily dismissed the proceeding, finding that the petition was untimely, and that no
10 exception for changes in the law applied because *Blakely* and related cases were not
11 retroactively applicable to Petitioner. (Exhibit JJ, M.E. 7/27/04.)

12 Petitioner sought review by the Arizona Court of Appeals, which was summarily
13 denied (Exhibit KK, Order 7/19/05.)

14 Petitioner then sought review by the Arizona Supreme Court, which was summarily
15 denied by an Order (Exhibit LL) filed February 14, 2006.

16 17 **J. PRESENT FEDERAL HABEAS PROCEEDINGS**

18 **Petition** - Petitioner commenced the present proceeding by filing his Petition for Writ
19 of Habeas Corpus (#1) on June 28, 2006. The Petition reflects that it was mailed on June 26,
20 2006. (#1 at 9.) The Petition asserts the following thirteen grounds for relief:

- 21 (1) **Illegal Search & Seizure** - police conducted an unlawful search and seizure
22 of Petitioner's backpack, bank bag, and notebook, which were in the car in
23 which Petitioner was riding at the time of his arrest;
- 24 (2) **Right to Silence** - Petitioner was questioned by the police after he invoked his
25 right to remain silent;
- 26 (3) **Insufficient Evidence of Weapon** - there was insufficient evidence to convict
27 Petitioner of armed robbery because there was insufficient evidence of a
28 weapon;

- 1 (4) **Double Jeopardy** - Petitioner was fined twice for the same offense;
- 2 (5) **IAC re Suppression** - Petitioner received ineffective assistance of counsel
- 3 because counsel failed to move to suppress statements made to the police;
- 4 (6) **IAC re Consent to Search** - Petitioner received ineffective assistance of trial
- 5 and appellate counsel because they failed to raise the issue of an unlawful
- 6 consent search after Petitioner had invoked his right to counsel;
- 7 (7) **IAC re Illegal Search & Seizure** - Petitioner received ineffective assistance
- 8 of trial and appellate counsel because they failed to raise the issue of the
- 9 unlawful search and seizure of Petitioner's backpack, bank bag, and notebook
- 10 from the car;
- 11 (8) **IAC re Seizure of Notepad** - Petitioner received ineffective assistance of trial
- 12 and appellate counsel because they failed to raise the issue of the unlawful
- 13 search and seizure of Petitioner's notepad in violation of the plain view
- 14 doctrine;
- 15 (9) **IAC re Self-Incrimination** - Petitioner received ineffective assistance of trial
- 16 and appellate counsel because they failed to raise the issue of Petitioner's
- 17 privilege against self-incrimination;
- 18 (10) **IAC re Insufficient Evidence of Weapon** - Petitioner received ineffective
- 19 assistance of appellate counsel because counsel did not raise the insufficiency
- 20 of the evidence of a weapon;
- 21 (11) **IAC re Prior Convictions** - Petitioner received ineffective assistance of trial
- 22 counsel because counsel failed to investigate the admissibility of prior
- 23 convictions, and Petitioner did not testify because the attorney said the
- 24 convictions would be used to impeach Petitioner;
- 25 (12) **Improper Joinder** - the trial court improperly joined counts, which led the
- 26 jury to believe that Petitioner had a propensity to commit bad acts; and
- 27 (13) **Right to Jury re Sentencing** - the trial court enhanced the sentence based on
- 28 facts not found by the jury.

1 On August 23, 2006, Petitioner filed a Motion for Leave to File Memorandum of Law
2 in Support of Petition (#9). That motion was granted by an Order (#13), filed October 16,
3 2006, which recognized that the proposed memorandum of law was included in the motion.

4 **Answer** - Respondents filed their Answer (#12) on October 13, 2006, arguing that
5 Petitioner's petition was untimely, and that his claims in Grounds 3, 4, 11, 12, and 13 were
6 unexhausted and procedurally defaulted, and that *Blakely* is not retroactively applicable to
7 Petitioner. Respondents do not otherwise address the merits of the Petition.

8 **Reply** - Petitioner filed his Reply (#30) on October 5, 2007, arguing that his Petition
9 is timely because he had state post-conviction proceedings pending at all times other than the
10 periods February 17, 2004 to July 19, 2004, and February 13, 2006 to June 26, 2006. (#30
11 at 4.) Petitioner argues:

- 12 (1) as to the timeliness issue: that his fourth PCR proceeding was not plainly
13 dismissed as untimely; he began preparing his habeas petition in February,
14 2004, but the inadequate law library precluded him from proceeding apace; he
15 was faithfully trying to exhaust his *Blakely* claim, and it would be unfair to
16 charge the time he spent doing so against him;
- 17 (2) as to the equitable tolling issue, he was relying upon Ninth Circuit law, which
18 at the time, would have continued statutory tolling based on his 4th PCR
19 Petition, since the rejection of that petition as untimely was intertwined with
20 consideration of the merits of his federal claim;
- 21 (3) Arizona Rules of Criminal Procedure 32.2(b) and 32.4(a) are not independent
22 and adequate state grounds for denying his *Blakely* claim;
- 23 (4) as to Ground 3, he fairly presented this claim by asserting an identical state law
24 claim and cited Arizona precedent analyzing and applying federal law; and any
25 procedural default would have been caused by ineffective assistance of
26 appellate counsel; and he is actually innocent of Count I based upon an
27 intervening interpretation of the armed robbery statute;
- 28 (5) as to Ground 4, he raise an identical state law claim on double jeopardy;

- 1 (6) as to Ground 11, this claim of ineffective assistance re the prior convictions
2 cannot be procedurally defaulted because it involved a fundamental right, *i.e.*
3 the right to testify in his own defense, requiring a voluntary and knowing
4 waiver; and
- 5 (7) as to Ground 12 (improper joinder), there was no procedural default because
6 Petitioner asserted the claim under state law (*Ives*) which references and
7 analyzes federal law, and the state courts violated Petitioner's rights to equal
8 protection by failing to apply that state law.

9 **First Supplemental Answer** - On February 22, 2008, the Court noted a variety of
10 issues arising under the original briefs, and provide an opportunity for the parties to
11 supplement their arguments. (Order 2/22/08, #32.)

12 On March 12, 2008, Respondents filed a supplemental Response (#34), arguing: (1)
13 that Petitioner's original sentence of October 27, 1989 controlled the finality issue with
14 regard to any claim arising from Petitioner's convictions, as opposed to claims arising from
15 his re-sentencing; (2) that despite the consideration of the merits of Petitioner's claims in his
16 4th PCR petition, the dismissal of that petition was on timeliness grounds, and thus it
17 provided no statutory tolling, and that any such tolling would not apply to claims attacking
18 Petitioner's conviction; (3) that under the "last reasoned decision" standard, the silent denials
19 of Petitioner's petitions for review renders them as untimely petitions; and (4) Petitioner is
20 not entitled to equitable tolling because: (a) it is not permitted under the AEDPA; (b) any
21 deficiency in law libraries would not be an impediment to filing, and that the deficiencies
22 decried by Petitioner would not have prevented him from timely filing; (c) the changes in law
23 rent by *Pace* were not justification for tolling, in any event the overturning of circuit court
24 precedent is not an "extraordinary circumstance", Petitioner's miscalculation, even though
25 based on Ninth Circuit precedent, is not a basis for equitable tolling, and Petitioner couldn't
26 have relied on the erroneous Ninth Circuit precedent because he didn't have access to a law
27 library; and (d) Petitioner has not shown diligence.

28 **First Supplemental Reply** - On June 3, 2008, Petitioner filed his Supplemental Reply

1 (#45). Petitioner argues: (1) that his resentencing marked the commencement of his
2 limitations period; (2) that his fourth PCR filing was not dismissed as untimely because it
3 raised a claim based on a change in the law; (3) that the appellate courts did not find his
4 fourth PCR petition untimely; and (4) equitable tolling should apply.

5 **Second Supplemental Answer** - On August 20, 2008, the Court advised the parties
6 that a preliminary conclusion had been reached that the petition was not barred by the statute
7 of limitations, and directed that Respondents address the merits of Grounds 1, 2, 5, 6, 7, 8,
8 9, and 10. (Order 8/20/08, #51.)

9 On September 9, 2008, Respondents filed their second Supplement to Answer (#57),
10 arguing that:

11 (1) as to Ground 1, under the limitations adopted in *Stone v. Powell*, 428 U.S.
12 465, 494-495 (1976) Petitioner cannot rely upon the exclusionary rule on
13 habeas, having been provided a full a fair hearing in the state courts;

14 (2) as to Ground 2, the state courts properly found Petitioner’s incriminating
15 statements did not result from any interrogation; Petitioner has not exhausted
16 any claim in Ground 2 that the request for a consent to search was made afer
17 invocation of the right to counsel; and any request for a consent to search is
18 not an interrogation;

19 (3) as to Ground 5, Petitioner has failed to show ineffective assistance because
20 Petitioner’s incriminating statements were not the fruit of the disputed search;
21 even if the fruit, it was too attenuated to require suppression; and Petitioner has
22 failed to show prejudice because the strong evidence from the witness
23 statements would have resulted in a conviction in any event;

24 (4) as to Ground 6, Petitioner has failed to show ineffective assistance because a
25 consent to search is not an interrogation prohibited by the Fifth Amendment;
26 the disputed search yielded no incriminating evidence; and appellate counsel
27 could have reasonably declined to argue the issue under the applicable
28 “fundamental error” review standard;

- 1 (5) as to Ground 7, Petitioner has failed to show ineffective assistance because
2 Petitioner did not have standing to challenge the transportation of the third
3 party's vehicle to the impound lot; it was the search of the backpack in the
4 vehicle which produced incriminating evidence;
- 5 (6) as to Ground 8, Petitioner has failed to show ineffective assistance because the
6 notepad was in plain view in the truck, and plainly incriminating; appellate
7 counsel did argue the plain view issue, albeit unsuccessfully, and Petitioner
8 fails to show the argument was inadequate; and Petitioner has not shown
9 prejudice because the strong evidence from the witnesses would have resulted
10 in conviction without the notepad;
- 11 (7) as to Ground 9, Petitioner has failed to show ineffective assistance because
12 counsel did argue at the voluntariness hearing that Petitioner invoked his right
13 to counsel; Petitioner fails to show that he was prejudiced by appellate
14 counsel's citation of an overturned case, because counsel cited the controlling
15 law and made the correct legal argument; Petitioner fails to show appellate
16 counsel was ineffective for failing to distinguish the *Edwards* case because it
17 was applicable to an assertion of a right to counsel even though it dealt with
18 a right to silence; and Petitioner cannot show prejudice from the failure to
19 suppress given the other evidence of Petitioner's guilt; and
- 20 (8) as to Ground 10, Petitioner cannot show appellate counsel was ineffective for
21 failing to challenge one armed robbery charge on the basis of the absence of
22 a gun, because counsel did argue the point, and there was evidence of use of
23 a toy gun; and Petitioner fails to establish appellate counsel's deficiency
24 concerning the gun, because viewed in a light favorable to the prosecution,
25 there was sufficient evidence on the point.

26 **Second Supplemental Reply** - On December 17, 2008, Petitioner filed his Second
27 Supplemental Reply (#69). Petitioner argues that he was diligent, and thus he is entitled to
28 equitable tolling. As to the merits of his claims, he argues:

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- (1) as to Ground 1, evidence showed the evidence was not in “plain view” and that there was an absence of probable cause to trigger the “plain view” doctrine;
- (2) as to Ground 2, police officers repeatedly initiated contact with him after he invoked his right to counsel, including obtaining consent to search, and thus violated his rights;
- (3) as to Ground 5, the authorities relied on to establish that there was insufficient relationship between the illegal search and his statements are distinguishable; that the truck owner could not validly waive Petitioner’s rights by consenting to the search of the truck; and Petitioner was not permitted to develop a factual basis to establish prejudice, and the return of an on not-guilty verdict suggests a conviction was not assured;
- (4) as to Ground 6, Respondents ignore state precedent forbidding police from obtaining a consent to search after a right to counsel is invoked, and Petitioner is entitled (even in a federal habeas case) to rely on state precedent to show ineffective assistance; the truck photos were evidence obtained as a result of the improperly obtained consent and were highly prejudicial evidence;
- (5) as to Ground 7, the relevant fact is that police knew Petitioner had property in the truck prior to impounding it, and thus improperly seized Petitioner’s property; and evidence suggests that the note pad was moved to plain view and the backpack tampered with;
- (6) as to Ground 8, there was no probable cause to support application of the “plain view” doctrine; the illegal seizure of Petitioner’s property precludes application of the doctrine; the evidence established that the notebook was not in plain view; there was insufficient evidence to establish the incriminating nature of the notepad, and case law indicates a closed notepad is not incriminating and the cases to the contrary cited by Respondents are inapposite; trial counsel failed to adequately develop the record on or pursue

1 these issues; and appellate counsel failed to adequately support his arguments
2 on the issue;

3 (7) as to Ground 9, although counsel argued *Edwards* and *Roberson*, he failed to
4 appreciate or argue the difference between invoking the right to silence and the
5 right to counsel, and thus failed to make the correct legal argument; counsel
6 failed to call other witnesses to establish improper contact by police officers;
7 officer Van Meter was cognizant that his improper contact with Petitioner
8 would likely result in incriminating statements; although appellate counsel
9 raised the issues, he failed to argue facts which supported the assertion of a
10 interrogation and its functional equivalent; and

11 (8) as to Ground 10, appellate counsel failed to assail the absence of evidence on
12 a weapon, and to counter in a reply brief the claims to the contrary; that
13 Respondents improperly select portions of testimony to discredit to support the
14 conviction; that the evidence fails to connect Petitioner to the toy gun, and that
15 reasonable speculation cannot support the conviction.

16 17 **III. APPLICATION OF LAW TO FACTS**

18 **A. STATUTE OF LIMITATIONS**

19 **1. One Year Limitations Period**

20 Respondents assert, *inter alia*, that Petitioner's Petition is untimely. As part of the
21 Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress provided a
22 1-year statute of limitations for all applications for writs of habeas corpus filed pursuant to
23 28 U.S.C. § 2254, challenging convictions and sentences rendered by state courts. 28 U.S.C.
24 § 2244(d). In *Calderon v. U.S. District Court*, 128 F.3d 1283 (9th Cir. 1997), *overruled on*
25 *other grounds*, 163 F.3d 530 (9th Cir. 1998) (real party-in-interest was Rodney Gene
26 Beeler)(hereinafter "Beeler"), the court noted that prior to § 2244(d)'s enactment "state
27 prisoners had almost unfettered discretion in deciding when to file a federal habeas petition"
28 and that "delays of more than a decade did not necessarily bar a prisoner from seeking relief."

1 *Beeler*, 128 F.3d at 1286. The *Beeler* court held that the provisions of § 2244(d)
2 "dramatically changed this landscape" and a petitioner was now "required to file his habeas
3 petition within one year of the date his process of direct review came to an end." *Id.*
4 Petitions filed beyond the one year limitations period are barred and must be dismissed. 28
5 U.S.C. § 2244(d)(1).

6 7 **2. Commencement of Limitations Period**

8 **Pre-existing Judgments** - The *Beeler* court, following other circuits, also held that
9 the period of limitations "did not begin to run against any state prisoner prior to the statute's
10 date of enactment" of April 24, 1996. *Beeler*, 128 F.3d at 1287. Thus, all federal habeas
11 corpus claims concerning state court judgments finalized prior to April 24, 1996, had to be
12 filed by April 23, 1997, or they were barred by the statute of limitations absent a showing
13 that the circumstances surrounding the filing of the petition fell into one of the categories
14 listed in § 2244(d)(1)(B)-(D).

15 **Direct Review** - The one-year statute of limitations on habeas petitions generally
16 begins to run on "the date on which the judgment became final by conclusion of direct review
17 or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

18 Petitioner's original judgment (Exhibit A), issued October 27, 1989, was under direct
19 review until April 21, 1995, when the Arizona Supreme Court denied review (Exhibit F).
20 However, that judgement was not final until expiration of the time for Petitioner to file a
21 petition for a writ of certiorari from the United States Supreme Court. *Bowen v. Roe*, 188
22 F.3d 1157, 1158 (9th Cir.1999). Pursuant to Rule 13, Rules of the Supreme Court of the
23 United States, that time expired "90 days after entry of the order denying discretionary
24 review." Thus, Petitioner's original judgment became final on July 20, 1995. Because this
25 was prior to the effective date of the AEDPA, Petitioner's one year would not have begun
26 running as to the original judgment until the AEDPA's effective date, April 24, 1996.

27 However, that judgement was vacated on September 27, 1996 (Exhibit J), and
28 Petitioner was re-sentenced on April 4, 1997 (Exhibit K). Respondents argued that because

1 re-sentencing did not occur on direct appeal, this re-sentencing is irrelevant. (Answer, #12
2 at 4, n. 1.)

3 In the intervening decision in *Burton v. Stewart*, 549 U.S. 147 (2007), the Court
4 concluded that for purposes of the habeas statute of limitations, “[f]inal judgment in a
5 criminal case means the sentence. The sentence is the judgment.” *Id.* at 156-157 (quoting
6 *Berman v. United States*, 302 U.S. 211, 212 (1937)).

7 Respondents argue that *Burton* does not apply because: (1) it was not a statute of
8 limitations case, but a successive petition case; (2) it involved a resentencing granted as part
9 of the direct review process, while Petitioner’s resentencing was granted on collateral review;
10 and (3) a series of cases clarify that a resentencing does not reset the statute of limitations
11 clock. (Supp. Resp. #34 at 3-4.)

12 It is true that *Burton* was not a statute of limitations case. However, the relevant
13 discussion of finality in *Burton* was specifically directed to the habeas statute of limitations.
14 It was intended to dispose of the defendant’s arguments that he should be permitted to file
15 successive petitions attacking the original conviction and the subsequent resentencing, to
16 avoid the risk that his challenges to the conviction would be time barred by the time he could
17 challenge his resentencing. The Court’s intention that *Burton* impact limitations questions
18 is illustrated by the fact that they vacated and remanded for reconsideration in light of *Burton*
19 the Eleventh Circuit’s dismissal on timeliness grounds in *Ferreira v. Secretary, Dept. of*
20 *Corrections*, 494 F.3d 1286, 1288 (11th Cir. 2007). *See Ferreira v. McDonough*, 549 U.S.
21 1200 (2007).

22 With regard to the cases cited by Respondents to avoid the effect of *Burton*, many of
23 them predate *Burton*, which was decided January 9, 2007.³ Others do not address the effect
24
25

26 ³ These include: *Clay v. United States*, 537 U.S. 522, 525 (2003); *Lozano v. Frank*,
27 424 F.3d 554, 555–56 (7th Cir. 2005); *Caldwell v. Dretke*, 429 F.3d 521, 530 (5th Cir. 2005);
28 *Linscott v. Rose*, 436 F.3d 587 (6th Cir. 2006); and *Hepburn v. Moore*, 215 F.3d 1208 (11th
Cir. 2000). (Supp. Resp., #34 at 5-6.)

1 of a resentencing.⁴

2 The one relevant, post-*Burton* case cited by Respondents, *Bachman v. Bagley*, 487
3 F.3d 979 (6th Cir. 2007), does not make reference to *Burton*, and thus does not distinguish
4 it. Indeed, when *Bachman* returned to the district court with a subsequent petition, the
5 district court noted that “*Burton* stands for the proposition that ‘a habeas petitioner who files
6 his first or only habeas petition after a re-sentencing may properly include all claims from
7 the underlying conviction in that petition, since his criminal case did not end, triggering the
8 statute of limitations clock, until sentencing was completed.’” *Bachman v. Wilson*, 2007 WL
9 4553988 (N.D. Ohio 2007) (citing *Burton*, 127 S.Ct. at 798)).

10 Moreover, *Bachman* was based on the Sixth Circuit’s rejection of Eleventh Circuit
11 precedent, which precedent the Ninth Circuit adopted long ago. In *Bachman*, the court
12 concluded that a sexual predator designation, issued seven years after the conclusion of direct
13 review, did not reset the statute as to any claims relating to the underlying conviction and
14 sentence. The Sixth Circuit relied on pre-*Burton*, Sixth circuit precedent holding that a
15 resentencing resets the habeas clock only as to challenges to the resentencing, not challenges
16 to the conviction or original sentence. 487 F.3d at 982-983 (citing *DiCenzi v. Rose*, 452 F.3d
17 465 (6th Cir.2006). In doing, so, the Sixth Circuit explicitly rejected Eleventh Circuit
18 precedent holding “that resentencing restarts the statute of limitations period for all of the
19 claims in a habeas petition, including those that arise from the original conviction.”

20
21 ⁴ *O’Neal v. Kenny*, 501 F.3d 969 (8th Cir. 2007), decided September 6, 2007, did not
22 address a resentencing. Rather, it involved a “new direct appeal” granted as a result of a state
23 post-conviction relief petition. The Eighth Circuit concluded that “under Nebraska law, a
24 new direct appeal does not constitute direct review for AEDPA purposes.” 501 F.3d at 971.
25 Thus, there was no new sentence at play in *O’Neal*. Moreover, the Supreme Court recently
26 vacated the Eighth Circuit’s decision, 129 S.Ct. 992 (2009) and remanded for reconsideration
27 in light of *Jimenez v. Quarterman*, 555 U.S. ----, 129 S.Ct. 681 (2009) (grant of delayed state
28 direct appeal resets habeas statute of limitations to run from conclusion of delayed appeal).

26 In *Graham v. Borgen*, 483 F.3d 475, 482–83 (7th Cir. 2007), although the defendant
27 moved for a resentencing long after his one year had otherwise expired, the request was
28 denied. Nonetheless, he argued that the proceedings on the motion were a continuation of
direct review, such that their conclusion marked the commencement of the limitations period.
Thus, there was no new sentence at play in *Graham*.

1 *Bachman*, 487 F.3d at 984 (citing *Walker v. Crosby*, 341 F.3d 1240, 1246 (11th Cir.2003)).

2 In contrast, the Ninth Circuit has adopted the rationale of the Eleventh circuit. In *U.S.*
3 *v. LaFromboise*, 427 F.3d 680 (9th Cir. 2005), the court was faced with a motion to vacate
4 under 28 U.S.C. § 2255 filed by a defendant whose original conviction had been vacated on
5 direct appeal, but only as to some of the charges. On remand to the district court, the
6 government dismissed the reversed counts, and so the district court never entered an
7 amended sentence or judgment. The defendant then filed a motion to vacate, which was
8 dismissed as untimely because it had been filed more than a year after the Court of Appeals’
9 decision, which the district court reckoned as the point of finality. The Ninth Circuit
10 reversed, finding because the original sentence had been vacated on direct appeal and no
11 amended judgment entered, the “conviction is not yet final and the one-year limitation period
12 has not begun to run.” 427 F.3d at 683.

13 In so doing, the Ninth Circuit referenced the Eleventh Circuit precedent for measuring
14 finality of the entire conviction from a resentencing, including the *Walker* decision rejected
15 by the Sixth Circuit in *Bachman*. “Our holding here follows the Eleventh Circuit's decision
16 in *Maharaj v. Secretary for the Department of Corrections*, which noted that “[i]n the context
17 of a federal habeas petition, the statute of limitations runs from the date of state resentencing
18 and not the date of the original judgment.” 427 F.3d at 686 (citing *Maharaj*, 304 F.3d 1345,
19 1348 (11th Cir.2002) and *Walker*, 341 F.3d at 1246).

20 Still, Respondents argue that this only applies where the sentence is vacated on direct
21 review, and Petitioner’s sentence was vacated on collateral review via his motion to
22 withdraw his plea. Indeed, *Burton* and *LaFromboise* both involved resentencing upon
23 remand from direct review.⁵ But neither expressly conditioned their holding on that fact.

24 However, the Eleventh Circuit was recently called on to address just such a fact
25

26 ⁵ In *Burton*, the defendant (like Petitioner) had obtained a resentencing in 1996 upon
27 request made to the trial court. However, in *Burton*, there was a second resentencing in
28 1998, following a reversal on direct appeal. 127 S.Ct. at 795. It was this second resentencing
which the Supreme Court treated as the relevant sentencing for determining finality.

1 pattern on remand in *Ferreira v. Secretary, Dept. of Corrections*. There, the Eleventh Circuit
2 applied *Burton* to a 2003 resentencing issued as a result of a post-conviction proceeding. 494
3 F.3d 1286, 1288 (11th Cir. 2007).

4 When Ferreira filed his petition in the district court on June 10, 2003,
5 he was “in custody pursuant to” the 2003 judgment, which was based
6 on the December 10, 1997 conviction and the April 14, 2003
7 [resentencing]. Therefore, the April 14, 2003 judgment that imprisoned
8 Ferreira controls the statute of limitations for this petition because the
9 period begins to run when both the conviction and sentence are final.

10 *Id.* at 1292-1293. *See also Chew v. Hendricks*, 2007 WL 2437830, 4 (D.N.J. 2007) (*Burton*
11 applied to determine finality from a resentencing issued on post-conviction relief); *Latson*
12 *v. McDonough*, 2008 WL 681721, 2 (N.D.Fla.,2008) (same); *U.S. v. Murphy*, 2007 WL
13 3072411, 3 (N.D.Fla.,2007)(citing *Ferreira*) (certificate of appealability on question whether
14 under *Burton* a sentence reduction pursuant to Fed. R. Crim. P. 35 is a resentencing which
15 resets AEDPA clock).

16 Nonetheless, Respondents argue that the source of resentencing is controlling because
17 “finality” occurs when both the conviction and sentence are final, and that such finality is not
18 upset by a subsequent resentencing on collateral review. Respondents ignore, however, the
19 nature of a habeas proceeding. Habeas is not a review of various judgments. Rather, a
20 habeas corpus proceeding is a challenge to the legality of the petitioner’s custody, and that
21 custody must be determined on the basis of the validity of whatever judgment currently holds
22 the petitioner. “*Burton* makes clear that the writ and AEDPA, including its limitations
23 provisions, are specifically focused on the judgment which holds the petitioner in
24 confinement.” *Ferreira*, 494 F.3d at 1293.

25 Thus, as recognized in *Burton*, a petitioner is not held under two separate judgments,
26 one determining his conviction and another setting his sentence. Rather, “[t]he sentence is
27 the judgment.” *Burton*, 548 U.S. at 157. Thus, for example, a habeas petitioner who was re-
28 sentenced upon a grant of collateral relief would not challenge two separate judgments in a
subsequent habeas, one attacking the original judgment as to errors at trial, and the other
attacking the propriety of the new sentence. Rather, he would have, in essence, a single

1 claim: that his current custody was unlawful. Respondents' approach would require two
2 separate habeas petitions, and would result in the very type of piecemeal habeas litigation
3 that *Burton* recognized the AEDPA was designed to avoid.

4 Thus, this Court is bound to apply the rule adopted by the Ninth Circuit and expressed
5 in *Burton*, that finality for limitations purposes is calculated from a resentencing judgment.
6 Therefore, the undersigned concludes that the relevant judgment is Petitioner's April 4, 1997
7 judgment.

8 Review of this judgment continued until conclusion of Petitioner's direct appeal from
9 this judgment, when the Arizona Supreme Court denied review on March 3, 2000 (Exhibit
10 X). Petitioner's conviction became final 90 days later, on June 1, 2000, when his time to
11 petition for certiorari review expired.⁶

12 **New Claims** - While the finality of the conviction is the normal commencement date
13 for the habeas limitations period, the statute does provide an exception for changes in the
14 law. Section 2244(d)(1)(C) provides that the period can run from "the date on which the
15 constitutional right asserted was initially recognized by the Supreme Court, if the right has
16 been newly recognized by the Supreme Court and made retroactively applicable to cases on
17 collateral review." Petitioner's Ground 13 arguably asserts a change in the law based upon
18 the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*,
19 542 U.S. 296 (2004).

20 Here, Petitioner's direct review ended on June 1, 2000. This was before both the June
21 26, 2000 decision in *Apprendi* and before the 2004 decision in *Blakely*. This *could* serve to
22 provide a later commencement date, but only if *Apprendi* and/or *Blakely* has been "made
23 retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). In *Rees*
24 *v. Hill*, 286 F.3d 1103 (9th Cir. 2002), the Ninth Circuit concluded that *Apprendi* was not

25
26 ⁶ Even if the original judgment were the relevant date, Petitioner was continuously
27 challenging that conviction through the pendency of his first PCR proceeding, which
28 entitling him to statutory tolling for the entire time.

1 retroactively applicable on habeas review, under the retroactivity standards established by
2 *Teague v. Lane*, 489 U.S. 288, 308-310 (1989) (decisions establishing new rules of criminal
3 procedure are not to be applied retroactively on habeas review, absent certain circumstances).
4 Similarly, in *Cook v. U.S.*, 386 F.3d 949, 950 (9th Cir. 2004), the Ninth Circuit drew upon its
5 decision in *Rees* to conclude that *Blakely* was not retroactively applicable on habeas.
6 Accordingly, the later decisions in *Apprendi* and *Blakely* do not delay the commencement
7 of Petitioner's one year limitations period.

8 **Normal Expiration of Year** - Based on the foregoing, the undersigned concludes that
9 Petitioner's one year on all his claims began running on the expiration of his time for seeking
10 certiorari review following his second direct appeal, on June 1, 2000. Barring any applicable
11 tolling, Petitioner's limitations period would have commenced running thereafter, and
12 expired one year later on June 1, 2001.

13 14 **2. Statutory Tolling**

15 The AEDPA provides for tolling of the limitations period when a "properly filed
16 application for State post-conviction or other collateral relief with respect to the pertinent
17 judgment or claim is pending." 28 U.S.C. § 2244(d)(2). The statutory tolling applies during
18 the entire time during which the application is pending, including interludes between various
19 stages of appeal on the application. The "AEDPA statute of limitations [is] tolled for 'all of
20 the time during which a state prisoner is attempting, through proper use of state court
21 procedures, to exhaust state court remedies with regard to a particular post-conviction
22 application.'" *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999) (quoting *Barnett v.*
23 *Lemaster*, 167 F.3d 1321, 1323 (10th Cir.1999)). *See also Carey v. Saffold*, 536 U.S. 214,
24 217 (2002).

25 However, once the statute has run, a subsequent post-conviction or collateral relief
26 filing does not reset the running of the one year statute. *Jiminez v. Rice*, 276 F.3d 478, 482
27 (9th Cir. 2001); *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

28 **First PCR Proceeding** - Petitioner's first PCR proceeding was concluded on

1 February 19, 1999 (Exhibit R), prior to the commencement of Petitioner's one year on June
2 2, 2000. Accordingly, it is not relevant for purposes of statutory tolling.

3 **Second PCR Proceeding** - Although Petitioner's second PCR proceeding was
4 commenced on May 4, 1999 (Exhibit S), prior to the commencement of Petitioner's one year,
5 it was not concluded until December 1, 2000 when the Arizona Supreme Court denied
6 review. (Exhibit BB). Thus, Petitioner's limitations period was tolled as a result of this
7 proceeding from the period's commencement on June 1, 2000 until December 1, 2000.

8 **Third PCR Proceeding** - Petitioner's third PCR proceeding commenced on March
9 22, 2000 upon the filing of his Notice of Post-Conviction Relief. *See Isley v. Arizona*
10 *Department of Corrections*, 383 F.3d 1054, 1055-56 (9th Cir. 2004) ("The language and
11 structure of the Arizona postconviction rules demonstrate that the proceedings begin with the
12 filing of the Notice.") This was prior to the conclusion of petitioner's second PCR
13 proceeding. Thus Petitioner's limitations period was further tolled until February 17, 2004,
14 when the Arizona Supreme Court denied review on this petition (Exhibit HH).

15 **Fourth PCR Proceeding** - Petitioner commenced his fourth PCR proceeding on July
16 19, 2004 by filing his Notice of Post-Conviction Relief (Exhibit II) seeking relief pursuant
17 to *Blakely* as a significant change in the law. Respondents argue that this application was
18 dismissed as untimely, and therefore does not toll the running of the statute. In *Pace v.*
19 *DiGuglielmo*, 544 U.S. 408 (2005), the Court held that when a state post-conviction petition
20 is untimely under state law, then it is not "properly filed" within the meaning of § 2244(d)(2)
21 for purposes of statutory tolling. However, Petitioner contends that the state court's ruling
22 was not based on the petition's untimeliness, but it's lack of merit due to non-retroactivity
23 principles. (Reply, #30, Memorandum at 5-6.)

24 The general timeliness requirement in Arizona is that the PCR notice "be filed within
25 ninety days after the entry of judgment and sentence or within thirty days after the issuance
26 of the order and mandate in the direct appeal, whichever is the later." Ariz. R. Crim. P.
27 32.4(a). Petitioner does not argue that his fourth PCR proceeding met this deadline. Rather
28 Petitioner argues that his fourth PCR proceeding was permissible because it asserted a claim

1 under Rule 32.1(g) which authorizes PCR claims based on “a significant change in the law
2 that if determined to apply to defendant's case would probably overturn the defendant's
3 conviction or sentence.” Further, he notes that Arizona’s timeliness rule provides an
4 exception for such claims. The rule provides that “[a]ny notice not timely filed may only
5 raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).”

6 Indeed the PCR court’s order provided:

7 Defendant filed on July 19, 2004 an untimely Notice of Post-
8 Conviction Relief. He now seeks relief pursuant to Rule 32.1(g),
9 Arizona Rules of Criminal Procedure, claiming that *Blakely v.*
10 *Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), is a significant
11 change of law that applies to his case.

12 (Exhibit JJ, M.E. 7/27/04 at 1.) The PCR court proceeded to determine that *Blakely* was not
13 retroactively applicable to final cases. The court concluded:

14 His conviction is therefore final and he is not entitled to relief
15 under Rule 32.1(g).

16 IT IS THEREFORE ORDERED dismissing defendant’s Notice
17 of Post-Conviction Relief.

18 (Exhibit JJ, M.E. 7/27/04 at 2.)

19 At first blush, the PCR court’s pronouncement that the application was “untimely”
20 seems to resolve the matter. However, the reference to Rule 32.1(g) clarifies that the petition
21 was not dismissed as untimely. Rather, the trial court was simply noting the application’s
22 dependence upon the exception for delinquent claims based on changes in the law.

23 Respondents argue that when the PCR court found that Petitioner was not entitled to
24 relief because *Blakely* was not retroactively applicable, the court was then required to find
25 that his petition was untimely. If Rule 32.1(g) described a claim based on “a significant
26 change in the law” that *is* “determined to apply to defendant’s case,” then their argument
27 would have merit. The determination of the retroactivity question would thus be a limitation
28 on claims falling within the scope of Rule 32.1(g). The Rule does not do so. Rather, it
authorizes claims based on “a significant change in the law that *if* determined to apply”
would change the result.

The cases cited by Respondents do not call for a contrary result. Respondents cite

1 *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991), for the proposition that the timeliness
2 exception in Rule 32.4 is conditioned upon the retroactivity analysis. (Supp. Resp. #34 at
3 7-8.) However, *Slemmer* did not address timeliness or Rule 32.4. Rather, *Slemmer* addressed
4 the exception to Arizona’s preclusion bar for claims arising under Rule 32.1(g). Instructive,
5 however, is their discussion of the analysis under Rule 32.1(g):

6 When a new principle of law is articulated, a defendant whose
7 conviction has become final **may seek relief** under Rule 32. That
8 defendant is insulated from the rules of finality and preclusion when,
9 as the rule contemplates, there “has been a significant change in the law
10 applied in the process which led” to conviction or sentence. Whether
11 **relief may be obtained** under Rule 32 then depends on the question of
12 retroactive application of the new principle of law. That question is to
13 be determined by the standards contained in this opinion.

14 *Slemmer*, 170 Ariz. at 184, 823 P.2d at 51 (emphasis added). Thus, *Slemmer* clarifies that
15 retroactivity is not a precondition to a claim fitting within Rule 32.1(g) (or the procedural
16 exceptions for such claims), but a precondition to relief on such a claim. The assertion of the
17 change in the law entitled the petitioner to “seek relief”; the retroactivity merely determined
18 whether the “relief may be obtained.”

19 Similarly, *State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003) was based upon
20 application of Arizona’s preclusion bar, rather than its timeliness bar. The court noted the
21 exception to preclusion for claims under Rule 32.1(g), especially highlighting the proviso
22 that the claim could be based on new “law *if determined to apply to the defendant’s case.*”
23 204 Ariz. at 389, ¶ 5, 64 P.3d at 831 (emphasis in original, quoting Ariz. R. Crim. P. 32.1(g)).
24 The court then stated: “Accordingly, we must first determine whether the [new law] applies
25 retroactively to the petitioners’ sentences.” *Id.* Tellingly, after finding that the new law did
26 not apply retroactively, the *Towery* court did not dismiss the petition as precluded, but
27 affirmed the trial court’s “denial of post-conviction relief.” Thus, as in *Slemmer*, the
28 exception for claims under Rule 32.1(g) applied, notwithstanding the non-retroactivity of the
new law, and the claim was addressed on the merits, including whether the new law applied
retroactively.

 Respondents’ reliance on *Binford v. Rhode*, 116 F.3d 396 (9th Cir. 1997), is also

1 misplaced. *Binford* merely recognized that the Arizona timeliness bar, Rule 32.4, has an
2 exception for claims under Rule 32.1(g). However, *Binford* did not involve the exception
3 for claims under Rule 32.1(g), but a claim under Rule 32.1(f), based upon “the defendant’s
4 failure to appeal from the judgment, sentence, or both within the prescribed time was without
5 fault on the defendant’s part.” 116 F.3d at 399 (quoting Ariz. R. Crim. P. 32.1(f)).

6 Indeed, a review of the PCR court’s ruling shows that the approach of *Slemmer* and
7 *Towery* was followed by the PCR court. Thus, the court characterized the Notice of Post-
8 Conviction Relief as “untimely”, but noted that it sought relief “pursuant to Rule 32.1(g),
9 Arizona Rules of Criminal Procedure.”

10 It is true that the effect of a timeliness ruling is not altered because the court considers
11 the merits of the claim as part of the application of the timeliness rule, nor because it offers
12 an alternative basis for its ruling based on another ground. *Bonner v. Carey*, 425 F.3d 1145,
13 1148-49 (9th Cir. 2005) (citing *Pace*). Here, however, the merits determination of the claim
14 was not merely part of the timeliness determination, nor an alternative to it. Rather, it was
15 a subsequent determination after the finding that the claim was raised under Rule 32.1(g),
16 and thus was not subject to the timeliness rule.

17 Consequently, Petitioner is entitled to statutory tolling for this PCR proceeding.

18 This PCR proceeding commenced on July 19, 2004 when Petitioner filed his Notice
19 of Post-Conviction Relief (Exhibit II).⁷ As of that time, 153 days of Petitioner’s one year had
20 expired since the Arizona Supreme Court’s denial of relief in his third PCR proceeding on
21 February 17, 2004. The proceeding continued until February 14, 2006, when the Arizona
22 Supreme Court denied review. (Exhibit LL.) With 212 days remaining, Petitioner’s one year
23 would have expired on September 14, 2006. Thus, his current federal petition, filed June 28,
24 2006, was timely.

25
26 ⁷ For purposes of calculating tolling under § 2244(d), the federal prisoner “mailbox
27 rule” applies. Under this rule, a prisoner’s state filings are deemed “filed” when they are
28 delivered to prison officials for mailing. *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000).
Because it would not alter the outcome, the undersigned does not attempt to ascertain
whether application of the rule would yield an earlier filing date.

1 **3. Summary re Statute of Limitations**

2 Petitioner’s conviction became final on June 1, 2000, on the expiration of his time for
3 seeking certiorari review on his second direct appeal following his re-sentencing. He had
4 state applications for post-conviction relief pending the entire time from then until the filing
5 of the present federal petition, with the exception of the 153 days between his third and
6 fourth PCR petitions, and the 134 days between his fourth PCR proceeding and the filing of
7 his federal petition. Thus Petitioner had only used 287 days of his one year, and his federal
8 petition was timely.

9
10 **B. PROCEDURAL DEFAULT**

11 Respondents argue in the Answer (#12) that Grounds 3, 4, 11, 12, and 13 are
12 procedurally defaulted. Although Respondents categorize Grounds 11 and 13 as
13 procedurally defaulted, their arguments focus upon actual application of state procedural bar.
14 Accordingly, those claims will be addressed in Section C (Procedural Bar), below.⁸

15
16 **1. Exhaustion Requirement**

17 Generally, a federal court has authority to review a state prisoner’s claims only if
18 available state remedies have been exhausted. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)
19 (*per curiam*). The exhaustion doctrine, first developed in case law, has been codified at 28
20 U.S.C. § 2254(b) and (c). When seeking habeas relief, the burden is on the petitioner to
21 show that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104
22 (9th Cir. 1981)(*per curiam*), *cert. denied*, 455 U.S. 1023 (1982).

23 Ordinarily, “to exhaust one’s state court remedies in Arizona, a petitioner must first
24 raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-
25

26 ⁸ The application of a procedural bar does not render a claim unexhausted, nor
27 procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 729-732 (1991) (discussing
28 the distinct but related nature of the concepts of exhaustion on the one hand, and the
"adequate and independent state procedural grounds" doctrine on the other).

1 conviction relief pursuant to Rule 32.” *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir.
2 1994). Only one of these avenues of relief must be exhausted before bringing a habeas
3 petition in federal court. This is true even where alternative avenues of reviewing
4 constitutional issues are still available in state court. *Brown v. Easter*, 68 F.3d 1209, 1211
5 (9th Cir. 1995); *Turner v. Compoy*, 827 F.2d 526, 528 (9th Cir. 1987), *cert. denied*, 489 U.S.
6 1059 (1989). “In cases not carrying a life sentence or the death penalty, ‘claims of Arizona
7 state prisoners are exhausted for purposes of federal habeas once the Arizona Court of
8 Appeals has ruled on them.’” *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir.
9 2005)(quoting *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir.1999)).

10 **a. Fair Presentment**

11 To result in exhaustion, claims must not only be presented in the proper forum, but
12 must be "fairly presented." That is, the petitioner must provide the state courts with a "fair
13 opportunity" to apply controlling legal principles to the facts bearing upon his constitutional
14 claim. 28 U.S.C. § 2254; *Picard v. Connor*, 404 U.S. 270, 276-277 (1971). A claim has
15 been fairly presented to the state's highest court if the petitioner has described both the
16 operative facts and the federal legal theory on which the claim is based. *Kelly v. Small*, 315
17 F.3d 1063, 1066 (9th Cir. 2003) (overruled on other grounds, *Robbins v. Carey*, 481 F.3d
18 1143, 1149 (9th Cir. 2007)).

19 Because “state and federal courts are jointly responsible for the enforcement of federal
20 constitutional guarantees,” “for purposes of exhaustion, a citation to a state case analyzing
21 a federal constitutional issue serves the same purpose as a citation to a federal case analyzing
22 such an issue.” *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003). However, a
23 “daisy chain-which depends upon a case that was cited by one of the cases that was cited by
24 one of the cases that petitioner cited is too lengthy to meet [the] standards for proper
25 presentation of a federal claim.” *Howell v. Mississippi*, 543 U.S. 440, 443-444 (2005).

26 A state court's actual consideration of a claim satisfies exhaustion. *See Sandstrom v.*
27 *Butterworth*, 738 F.2d 1200, 1206 (11th Cir.1984) (“[t]here is no better evidence of
28 exhaustion than a state court's actual consideration of the relevant constitutional issue”); *see*

1 also *Walton v. Caspari*, 916 F.2d 1352, 1356-57 (8th Cir.1990) (state court's *sua sponte*
2 consideration of an issue satisfies exhaustion).

3 **b. Application to Petitioner's Claims**

4 **Ground 3 (Insufficient Evidence of Gun)** - In Ground 3, Petitioner argues that he
5 was denied due process because there was insufficient evidence to convict Petitioner of
6 armed robbery because there was insufficient evidence of a weapon. Petitioner argues that
7 he presented this claim on direct appeal, (Petition, #1 at 7), but in his Reply, he “concedes
8 that he did not specifically label the insufficiency of the evidence claim as a Fourteenth
9 Amendment Due Process violation.” (#30 at 15.) He argues, however, that he asserted an
10 identical state law claim and cited state precedent relying on federal law, *i.e. State v. Garza*
11 *Rodriguez*, 164 Ariz. 101, 791 P.2d 633 (1990).

12 In his Supplemental Brief on direct appeal, Petitioner simply argued that the trial court
13 erred by failing to issue a directed verdict on Count I in the armed robbery case because “no
14 gun, either actual or simulate, was seen by the victim.” No reference to federal law was
15 made, and the only citation was to *Garza Rodriguez*. (Exhibit C, Suppl Brief at 3.) The
16 Arizona Court of Appeals rejected the argument, relying on *Garza Rodriguez*, on the basis
17 that under state law the victim need not see the weapon, and the evidence showed Petitioner
18 claimed possession and threatened use of a gun, satisfying the requirement of the statute.
19 (Exhibit D, Mem. Dec. at 8.) The same argument was raised in his Petition for Review by
20 the Arizona Supreme Court, which was summarily denied. (Exhibit E, PFR at 20-21; Exhibit
21 F, Order 4/21/95.)

22 Petitioner now makes a claim to a denial of due process. “The Due Process Clause
23 of the Fourteenth Amendment denies States the power to deprive the accused of liberty
24 unless the prosecution proves beyond a reasonable doubt every element of the charged
25 offense.” *Carella v. California*, 491 U.S. 263, 265 (1989).

26 However, *Garza Rodriguez* makes no references to the Due Process Clause nor any
27 other federal law or authority. Rather, it was based solely upon an interpretation of the state
28 armed robbery statute, and held that “that a mere verbal threat to use a deadly weapon,

1 unaccompanied by the actual presence of a deadly weapon, dangerous instrument or
2 simulated deadly weapon, does not satisfy the statutory requirement for a charge of armed
3 robbery.” 164 Ariz. at 112, 792 P.2d at 638. Based upon that determination , they concluded
4 that the “facts are insufficient to support a charge of armed robbery.” *Id.* Thus, this case did
5 not turn upon any federal due process issues, but simply upon the proper interpretation and
6 application of state law.

7 Petitioner argues that the standard for insufficiency of the evidence applied in *Garza-*
8 *Rodriguez* was identical to the federal standard, and thus the reference to that case was
9 sufficient. In support, Petitioner calls for the Court to compare the state standard for
10 insufficient evidence enunciated in *State v. Franklin*, 130 Ariz. 291, 635 P.2d 1213 (1981)
11 with the federal standard under *Jackson v. Virginia*, 443 U.S. 307 (1979), which Petitioner
12 asserts are the same. (Reply #30 at 16-17.) Indeed, if *Garza Rodriguez* turned upon issues
13 of insufficient evidence law, then its citation might be deemed the functional equivalent of
14 expressly presenting a coterminous federal law claim. See *Baldwin v. Reese*, 541 U.S. 27,
15 33 (2004) (declining on procedural grounds to address whether, where an identity between
16 state and federal standards exists, “a petitioner need not indicate a claim's federal nature,
17 because, by raising a state-law claim, he would necessarily ‘fairly present’ the corresponding
18 federal claim”).

19 While the authorities referenced by Petitioner suggest a similarity between the
20 standards, Petitioner fails to show that they are identical, as contemplated in *Baldwin*.
21 Something less than identity is not sufficient. “[R]aising a state claim that is merely similar
22 to a federal claim does not exhaust state remedies.” *Fields v. Waddington*, 401 F.3d 1018,
23 1022 (9th Cir. 2005). “[W]e cannot assume federal claims were impliedly brought by virtue
24 of the fact that they may be ‘essentially the same’ as state law claims. If a petitioner fails to
25 alert the state court to the fact that he is raising a federal constitutional claim, his federal
26 claim is unexhausted regardless of its similarity to the issues raised in state court.” *Casey v.*
27 *Moore*, 386 F.3d 896, 914 (9th Cir. 2004) (citations omitted). Further, Petitioner bears the
28 burden of showing that identity. *Id.* And, the burden of proof of such identity is high. “In

1 the absence of an affirmative statement by the [state supreme court] that it considers a
2 particular state and federal constitutional claim to be identical, rather than analogous ...
3 Petitioner was required to raise his federal claims affirmatively; we will not infer that federal
4 claims have been exhausted.” *Fields v. Waddington*, 401 F.3d 1018, 1024 (9th Cir. 2005).

5 Moreover, *Garza Rodriguez* was not primarily a case about Arizona sufficiency of the
6 evidence law, but was almost exclusively about interpretation of the state armed robbery
7 statute. Neither the Arizona court in *Garza Rodriguez*, nor Petitioner, nor the Arizona Court
8 of Appeals in Petitioner’s case, engaged in any discussion of the insufficient evidence
9 standards.

10 For a federal issue to be presented by the citation of a state decision
11 dealing with both state and federal issues relevant to the claim, the
12 citation must be accompanied by some clear indication that the case
13 involves federal issues. Where, as here, the citation to the state case has
no signal in the text of the brief that the petitioner raises federal claims
or relies on state law cases that resolve federal issues, the federal claim
is not fairly presented.

14 *Casey v. Moore*, 386 F.3d 896, 912 n. 13 (9th Cir. 2004). Thus, Petitioner’s mere reference
15 to *Garza Rodriguez* cannot be deemed to have been a fair alert to the state courts that
16 Petitioner intended to assert a federal due process claim in his direct appeal.

17 Petitioner also argues that he presented this claim in his first PCR proceeding by
18 asserting the failure to raise the due process claim as an instance of ineffective assistance of
19 counsel. (Reply, #30 at 17-18.) It is true that Petitioner made a related claim in his Petition
20 for Review from his first PCR Petition. (Exhibit M, PFR at 14-15.) However, he simply
21 asserted that appellate counsel was inadequate for failing to make a challenge under *Garza*
22 *Rodriguez*, and did not assert that a federal Due Process claim should have been made. (*Id.*)
23 Likewise, his Petition for Review to the Arizona Supreme Court did not assert counsel’s
24 failure to assert a federal due process claim, referencing only a claim under *Garza Rodriguez*.
25 (Exhibit P, PFR at 16-17.)

26 Moreover, merely raising a related claim of ineffective assistance is insufficient.

27 Here, although Rose's Fifth Amendment claim is related to his claim of
28 ineffective assistance, he did not fairly present the Fifth Amendment
claim to the state courts when he merely discussed it as one of several

1 issues which were handled ineffectively by his trial and appellate
2 counsel. While admittedly related, they are distinct claims with separate
3 elements of proof, and each claim should have been separately and
4 specifically presented to the state courts.

5 *Rose v. Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005).

6 Based upon the foregoing, the undersigned concludes that Petitioner’s Ground 3 was
7 never fairly presented to the state courts and is unexhausted.

8 **Ground 4 (Double Jeopardy)** - In Ground 4, Petitioner argues he was fined twice
9 for the same offense in violation of the Double Jeopardy Clause. In his Reply, he argues he
10 presented this claim by raising arguments under Ariz. Rev. Stat. § 13-116, which “imposes
11 the same test for being fined twice for the same offense as does the Double Jeopardy” clause.
12 (Reply, #30 at 19.) In his second direct appeal, Petitioner argued to both the Arizona Court
13 of Appeals and the Arizona Supreme Court that the imposition of dual felony penalty
14 assessment fees was a violation of Ariz. Rev. Stat. § 13-116. (Exhibit Q, Opening Brief at
15 19-20; Exhibit V at 8-9.)

16 Again, Petitioner cited only state authorities in raising his claims, and made no
17 reference to either state or federal double jeopardy constitutional prohibitions, and cited no
18 federal law. The state cases cited by Petitioner, *State v. Sheaves*, 155 Ariz. 538, 747 P.2d
19 1239 (App. 1987) and *State v. Poundstone*, 179 Ariz. 511, 880 P.2d 731 (App. 1994),
20 similarly rely solely upon state statutes, and make no reference to any federal constitutional
21 principles. And, again, Petitioner offers nothing to establish that state standards under that
22 state statute are identical to federal double jeopardy standards. *See Casey*, 386 F.3d at 912-
23 914.

24 Based upon the foregoing, the undersigned concludes that Petitioner’s Ground 4 was
25 never fairly presented to the state courts and is unexhausted.

26 **Ground 12** - In Ground 12, Petitioner argues the trial court improperly joined counts,
27 which led the jury to believe that Petitioner had a propensity to commit bad acts, in violation
28 of his federal due process rights. Petitioner argues in his Reply that he fairly presented this
claim by arguing under *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996) on his second direct

1 appeal. (Reply, #30 at 20-21.)

2 On his second direct appeal, Petitioner argued that the trial court had erred in denying
3 his motion to sever. (Exhibit Q, Opening Brief at 13-18.) In so doing, Petitioner argued that
4 severance was required under Ariz. R. Crim. P. 13 *et seq.*, and cited various state authorities,
5 including *Ives*. Again, Petitioner made no reference to any federal due process right, and
6 cited no federal authority.

7 He cannot rely upon his reference to *Ives*, because that state case was based solely
8 upon state law. It looked only to Arizona Criminal Rules 13.3 and 13.4 and related state
9 precedents to determine whether there was a right to severance. 187 Ariz. at 106-109, 927
10 P.2d at 766-769. The only federal precedents considered by the Arizona court were on the
11 admissibility of prior bad act evidence to determine whether the denial of severance had been
12 prejudicial. *Id.* at 109-111, 927 P.2d at 769-771. Even there, the court noted that the
13 Arizona Rules of Evidence and the Federal Rules were different. *Id.* at 110, 927 P.2d at 770,
14 n. 3.

15 In his Petition, Petitioner argues he presented Ground 4 in his third PCR proceeding.
16 That proceeding was founded upon an assertion that *Ives* constituted a change in the law,
17 entitling Petitioner to relief. (Exhibit EE, PFR.) Again, Petitioner never mentions any
18 federal due process claim, nor cites to any federal authority other than *Yates v. Aiken*, 484
19 U.S. 211 (1988). *Yates* did not involve a due process question, but a question of retroactive
20 application of Supreme Court decisions to cases on collateral review.

21 Accordingly, the undersigned concludes that Petitioner's Ground 12 was never fairly
22 presented to the state courts and is unexhausted.

23 **Summary re Exhaustion** - Based on the foregoing, the undersigned concludes that
24 Grounds 3, 4, and 12 of the Petition are unexhausted.

25
26 **2. Procedural Default**

27 Ordinarily, unexhausted claims are dismissed *without prejudice*. *Johnson v. Lewis*,
28 929 F.2d 460, 463 (9th Cir. 1991). However, where a petitioner has failed to properly

1 exhaust his available administrative or judicial remedies, and those remedies are now no
2 longer available because of some procedural bar, the petitioner has "procedurally defaulted"
3 and is generally barred from seeking habeas relief. Dismissal *with prejudice* of a
4 procedurally barred or procedurally defaulted habeas claim is generally proper absent a
5 "miscarriage of justice" which would excuse the default. *Reed v. Ross*, 468 U.S. 1, 11
6 (1984).

7 Respondents argue that Petitioner may no longer present his unexhausted claims to
8 the state courts. Respondents rely upon Arizona's preclusion bar, set out in Ariz. R. Crim.
9 Proc. 32.2(a) and its timeliness bar set out in Ariz. R. Crim. P. 32.4(a) to establish the
10 procedural defaults. (Answer, #12 at 11-13.) Because of the limited development of Arizona
11 law on the exception to the preclusion bar for claims of "sufficient constitutional magnitude,"
12 *see Stewart v. Smith*, 536 U.S. 856 (2002), and the applicability of clear timeliness bars, the
13 undersigned does not reach Respondents' argument on the applicability of the preclusion bar.

14 **Remedies by Direct Appeal** - Under Ariz.R.Crim.P. 31.3, the time for filing a direct
15 appeal expires twenty days after entry of the judgment and sentence. The Arizona Rules of
16 Criminal Procedure do not provide for a successive direct appeal. *See generally*
17 Ariz.R.Crim.P. 31. Accordingly, direct appeal is no longer available for Petitioner's
18 unexhausted claims.

19 **Remedies by Post-Conviction Relief** - Petitioner can no longer seek review by a
20 subsequent PCR Petition. Ariz.R.Crim.P. 32.4 requires that petitions for post-conviction
21 relief (other than those which are "of-right") be filed "within ninety days after the entry of
22 judgment and sentence or within thirty days after the issuance of the order and mandate in
23 the direct appeal, whichever is the later." *See State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357
24 (App. 1995) (applying 32.4 to successive petition, and noting that first petition of pleading
25 defendant deemed direct appeal for purposes of the rule). That time has long since passed.

26 While Rule 32.4(a) does not bar dilatory claims if they fall within the category of
27 claims specified in Ariz.R.Crim.P. 32.1(d) through (h), Petitioner has not asserted that any
28 of these exceptions are applicable to his equal protection claim. Nor does it appear that

1 such exceptions in Rule 32.1 would apply to this claim. The rule defines the excepted claims
2 as follows:

3 d. The person is being held in custody after the sentence imposed has
expired;

4 e. Newly discovered material facts probably exist and such facts
probably would have changed the verdict or sentence. Newly
5 discovered material facts exist if:

6 (1) The newly discovered material facts were discovered after the trial.

7 (2) The defendant exercised due diligence in securing the newly
discovered material facts.

8 (3) The newly discovered material facts are not merely cumulative or
used solely for impeachment, unless the impeachment evidence
substantially undermines testimony which was of critical significance
9 at trial such that the evidence probably would have changed the verdict
or sentence.

10 f. The defendant's failure to file a notice of post-conviction relief of-
right or notice of appeal within the prescribed time was without fault on
the defendant's part; or

11 g. There has been a significant change in the law that if determined to
apply to defendant's case would probably overturn the defendant's
12 conviction or sentence; or

13 h. The defendant demonstrates by clear and convincing evidence that
the facts underlying the claim would be sufficient to establish that no
reasonable fact-finder would have found defendant guilty of the
14 underlying offense beyond a reasonable doubt, or that the court would
not have imposed the death penalty.

15 Ariz.R.Crim.P. 32.1.

16 Paragraph 32.1 (d) (expired sentence) generally has no application to an Arizona
17 prisoner who is simply attacking the validity of his conviction or sentence. Where a claim
18 is based on "newly discovered evidence" that has previously been presented to the state
19 courts, the evidence is no longer "newly discovered" and paragraph (e) has no application.
20 Paragraph (f) has no application where the petitioner filed a timely notice of appeal or had
21 no right to appeal, and the notice of post-conviction relief of-right applies only to first
22 petitions filed within 90 days following a judgment based on a guilty or *nolo contendere* plea.
23 See Ariz.R.Crim.P. 32.1 (defining when petition of-right). Paragraph (g) has no application
24 because Petitioner has not asserted a change in the law occurring since his last state PCR
25 petition.

26 Finally, paragraph (h), concerning claims of actual innocence, has no application to
27 Petitioner's procedural claims. See *State v. Swoopes*, 216 Ariz. 390, 404, 166 P.3d 945, 959
28

1 (App. 2007) (32.1(h) did not apply where petitioner had “ not established that trial error
2 ...amounts to a claim of actual innocence”). While, Petitioner’s Ground 3 is founded on an
3 assertion of insufficient evidence, a mere insufficiency of evidence at trial is not the same as
4 the affirmative offer of “clear and convincing evidence” of actual innocence required under
5 Rule 32.1(h). *See e.g. Schlup v. Delo*, 513 U.S. 298, 299-300 (1995) (contrasting claims of
6 insufficient evidence and claims of actual innocence).

7 Accordingly, the undersigned must conclude that review through Arizona’s post-
8 conviction relief process is no longer possible for Petitioner’s unexhausted claims.

9 **Summary re Procedural Default** - Petitioner has failed to exhaust his claims in
10 Grounds 3, 4, and 12 of the Petition, and is now procedurally barred from doing so.
11 Accordingly, these claims are procedurally defaulted, and absent a showing of cause and
12 prejudice or actual innocence, must be dismissed with prejudice.

13 14 **C. PROCEDURAL BAR**

15 Respondents argue that Petitioner’s claims in Grounds 11 and 13 have been disposed
16 of by the state courts on independent and adequate state grounds, *i.e.* Arizona’s preclusion
17 bar, and are thus beyond habeas review.

18 Federal habeas review of a federal claim is precluded for procedurally barred claims,
19 *i.e.* those which have actually been presented to the state court, but were disposed of on a
20 procedural ground "that is both 'independent' of the merits of the federal claim and an
21 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Bennett*
22 *v. Mueller*, 322 F.3d 573, 580 (9th Cir. 2003) (citing *Coleman v. Thompson*, 501 U.S. 722,
23 729 (1991)). *But see, Stewart v. Smith*, 536 U.S. 856, 860 (2002) (“assum[ing]”
24 independence standard applies on habeas). To be “independent,” a state law ruling must not
25 depend on an antecedent ruling on the merits of the federal claim. *See Ake v. Oklahoma*, 470
26 U.S. 68, 74-75 (1985)). To be “adequate,” the state law or rule upon which the state court’s
27 ruling rests must be “firmly established” and “regularly applied” at the time of its application.
28 *Harris v. Reed*, 489 U.S. 255 (1989). *See also Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir.

1 1999) ("firmly established and regularly followed at the time it was applied by the state
2 court").

3 In *Bennett v. Mueller*, 322 F.3d 573 (9th Cir.2003), the Ninth Circuit specifically
4 addressed the burden of proving the adequacy of a state procedural bar.

5 Once the state has adequately pled the existence of an independent and
6 adequate state procedural ground as an affirmative defense, the burden
7 to place that defense in issue shifts to the petitioner. The petitioner may
8 satisfy this burden by asserting specific factual allegations that
demonstrate the inadequacy of the state procedure, including citation
to authority demonstrating inconsistent application of the rule. Once
having done so, however, the ultimate burden is the state's.

9 322 F.3d at 584, 585.

10 **Ground 11** - In Ground 11, Petitioner argues he received ineffective assistance of trial
11 counsel because counsel failed to investigate the admissibility of prior convictions, and
12 Petitioner did not testify because the attorney said the convictions would be used to impeach
13 Petitioner. (Petition, #1 at 8-17.) This claim was presented in Petitioner's second PCR
14 proceeding. (Exhibit S, PCR Petition; Exhibit W, PFR.) In dismissing the PCR petition, the
15 trial court concluded that "defendant is precluded from raising the issue now as it was either
16 already addressed or not raised in his previous PCR proceedings."⁹ (Exhibit U, Order
17 6/9/99.) In so doing, the state court made obvious reference to Arizona Rule of Criminal
18 Procedure 32.2(a), which bars as "precluded" PCR claims that either could have been
19 brought in a direct appeal or post-trial motion, were finally decided "on appeal or in any
20 previous collateral proceeding," or were "waived" in a prior appeal or collateral proceeding.

21 In his Reply, Petitioner argues that because the claim involves a fundamental right,
22 absent a personal waiver, it cannot be procedurally barred. (Reply, #30 at 19-20.) Rule 32.2's
23 waiver rule applies to different classes of claims.

24 Some require a defendant's "personal knowledge" "to waive the
25 constitutional right involved." The State must show that the defendant
"knowingly, voluntarily and intelligently" [did] not raise" the ground

26 ⁹ The Arizona Court of Appeals and Arizona Supreme Court both issued summary
27 denials of review. To determine whether a state procedural ruling bars federal review, the
28 habeas court must look to the "last reasoned opinion on the claim." *Ylst v. Nunnemaker*, 501
U.S. 797, 804 (1991).

1 or denial of a right. For all others, the State “may simply show that the
2 defendant did not raise the error at trial, on appeal, or in a previous
collateral proceeding.”

3 *Stewart v. Smith*, 202 Ariz. 446, 449, 46 P.3d 1067, 1070 (2002) (hereinafter *Smith*). *See*
4 *also Cassett v. Stewart*, 406 F.3d 614, 622 (9th Cir. 2005) (citing *Smith*).

5 In essence, Petitioner argues that the state court got it wrong when it decided his claim
6 was precluded. However, this Court is not free to second guess the state courts on issues of
7 state law. *Peltier v. Wright*, 15 F.3d 860, 862 (9th Cir. 1994)

8 Even if this habeas court were free to second guess the state court’s state law
9 determination, Petitioner fails to show that his claim of ineffective assistance is the type of
10 claim which must be personally waived. Petitioner simply argues that his “lost” right to
11 testify in his own behalf is a “fundamental right”, citing *Rock v. Arkansas*, 483 U.S. 44
12 (1987). The Arizona Supreme Court has held that a simple failure to raise such a claim is
13 sufficient to effect a waiver. “As a general rule, when ‘ineffective assistance of counsel
14 claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding,
15 subsequent claims of ineffective assistance will be deemed waived and precluded.’” *State v.*
16 *Bennett*, 213 Ariz. 562, 566, 146 P.3d 63, 67 (2006).

17 It is true that in *Smith*, the Arizona Supreme Court said that “the question of
18 preclusion is determined by the nature of the right allegedly affected by counsel's ineffective
19 performance.” 202 Ariz. at 450, 46 P.3d at 1071. However, that court made clear that this
20 did not apply where a Petitioner had a previous opportunity to raise claims of ineffectiveness.

21 With some petitions, the trial court need not examine the facts. For
22 example, if a petitioner asserts ineffective assistance of counsel at
sentencing, and, in a later petition, asserts ineffective assistance of
23 counsel at trial, preclusion is required without examining facts.

24 *Id.* Petitioner had raised a variety of claims asserting ineffective assistance of trial counsel
25 in his first PCR petition.¹⁰ (Exhibit I, PCR Pet. at 9.) Thus the look-through provided for in

26 ¹⁰ It is true that Petitioner’s 2nd PCR proceeding was his first filed after his
27 resentencing. However, he continued to prosecute his first PCR proceeding after his
28 resentencing. (*See* Exhibit L, M.E. 7/17/97 (denying 1st PCR Petition on merits); and Exhibit
K, Resentence 4/8/97.) Thus his second PCR proceeding was his indeed a second challenge

1 *Smith* would not apply.

2 Moreover, even if *Smith's* look-through analysis applied, Petitioner points to no
3 authority for the proposition that his underlying right to testify is the type of right which must
4 be personally waived by defendant. *Rock v. Arkansas*, cited by Petitioner does not so hold,
5 but simply recognizes the existence of such a right. Indeed, criminal defendants are regularly
6 permitted to forego their right to testify without any formality at all. The undersigned has
7 found no Arizona authority requiring a personal waiver of such a claim, nor of Petitioner's
8 ineffective assistance claim.

9 Petitioner makes no allegation that Rule 32.2(a) is not an independent and adequate
10 state ground.¹¹ Thus, the undersigned must conclude that Petitioner's claim in Ground 11
11 was procedurally barred on independent and adequate state grounds, and is barred from
12 habeas review, absent a showing of cause and prejudice or actual innocence.

13 **Ground 13** - In Ground 13, Petitioner argues that the trial court improperly enhanced
14 the sentence based on facts not found by the jury, thus denying Petitioner his right to trial by
15 jury. Petitioner asserts this claim was exhausted in his 4th PCR proceeding. (Petition, #1 at
16 8-20.) Respondents argue that the 4th PCR proceeding was dismissed as untimely, and that
17 that independent and adequate state ground bars consideration.

18 As discussed above in connection with the statute of limitations, the undersigned has
19 already concluded that the denial of Petitioner's Ground 13 claim was not on the basis that
20 it was untimely, but on the merits, *i.e.* that *Blakely* was not retroactively applicable.
21 Therefore, this claim was not disposed of on independent and adequate state grounds, but
22 upon the merits of the claim, at least insofar as the retroactivity analysis permitted or required
23 the consideration of those merits.

24 _____
25 to the effectiveness of his trial counsel.

26 ¹¹ Petitioner does argue that 32.2(a) is not independent and adequate to bar his *Blakely*
27 claim in Ground 13. (Reply, #30 at 13-14.) However, Petitioner's argument is based on the
28 peculiarity of the analysis applicable to change of law claims under Arizona's procedural
bars. Petitioner does not attempt to extend that argument to his other claims.

1 **Summary** - Based on the foregoing, the undersigned concludes that Petitioner’s
2 Ground 11 was disposed of by the state courts on independent and adequate state grounds,
3 and according that state court judgment comity precludes this habeas court from now
4 considering it, absent a showing of cause and prejudice or actual innocence.

5
6 **D. AVOIDING PROCEDURAL BARS OR DEFAULTS**

7 The undersigned has concluded that Petitioners Grounds 3, 4, and 12 are procedurally
8 defaulted, and his Ground 11 is procedurally barred.

9
10 **1. Cause and Prejudice**

11 If the habeas petitioner has procedurally defaulted on a claim, or it has been
12 procedurally barred on independent and adequate state grounds, he may not obtain federal
13 habeas review of that claim absent a showing of “cause and prejudice” sufficient to excuse
14 the default. *Reed v. Ross*, 468 U.S. 1, 11 (1984).

15 As to Ground 3 (insufficiency of evidence), Petitioner argues that the “cause” for his
16 procedural default is the ineffectiveness of appellate counsel in failing to raise this claim on
17 direct appeal. (Reply, #30 at 18.) Ineffective assistance of counsel may constitute cause for
18 failing to properly exhaust claims in state courts and excuse procedural default.¹² *Ortiz v.*
19 *Stewart*, 149 F.3d 923, 932, (9th Cir. 1998). However, to meet the “cause” requirement, the
20 ineffective assistance of counsel must amount to an independent constitutional violation. *Id.*
21 As discussed hereinafter in connection with Ground 10, the undersigned concludes that
22 Petitioner’s insufficiency of the evidence claim is without merit, and therefore he was not
23 denied effective assistance of counsel.

24
25 ¹² A claim of ineffective assistance of counsel showing “cause” is itself subject to the
26 exhaustion requirements. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Accordingly, “[t]o
27 the extent that petitioner is alleging ineffective assistance of appellate counsel as cause for
28 the default, the exhaustion doctrine requires him to first raise this ineffectiveness claim as
a separate claim in state court.” *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988).
Petitioner now asserts such ineffectiveness in his Ground 10. Respondents make no
argument that this claim was not properly exhausted.

1 Petitioner makes no argument of having cause and prejudice to excuse any other
2 procedural default or procedural bar.

3 Based upon the foregoing, the undersigned finds no “cause” to excuse Petitioner’s
4 procedural default or the effect of the state’s procedural bar.

5
6 **2. Actual Innocence**

7 The standard for “cause and prejudice” is one of discretion intended to be flexible and
8 yielding to exceptional circumstances. *Hughes v. Idaho State Board of Corrections*, 800
9 F.2d 905, 909 (9th Cir. 1986). Accordingly, failure to establish cause may be excused “in
10 an extraordinary case, where a constitutional violation has probably resulted in the conviction
11 of one who is actually innocent.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (emphasis
12 added).

13 Here, Petitioner argues that Ground 3 involves a fundamental miscarriage of justice
14 because there was insufficient evidence at trial to meet the state’s definition of armed
15 robbery. (Reply, #30 at 19.)

16 However, it is not sufficient that the petitioner point to some legal insufficiency.
17 *Bousley v. United States*, 523 U.S. 614, 623(1998) (“‘actual innocence’ means factual
18 innocence , not mere legal insufficiency”). Rather, a petitioner asserting his actual innocence
19 of the underlying crime must show "it is more likely than not that no reasonable juror would
20 have convicted him in the light of the new evidence" presented in his habeas petition. *Schlup*
21 *v. Delo*, 513 U.S. 298, 327 (1995). A showing that a reasonable doubt exists in the light of
22 the new evidence is not sufficient. Rather, the petitioner must show a probability that no
23 reasonable juror would have found the defendant guilty. *Id.* at 329.

24 Petitioner proffers no such showing of actual innocence but simply argues
25 insufficiency of the evidence. That does not suffice to establish a miscarriage of justice.

26
27 **3. Summary re Procedurally Defaulted and Procedurally Barred Claims**

28 Petitioner has failed to establish cause and prejudice or actual innocence.

1 Accordingly, Grounds 3, 4, and 12 are procedurally defaulted, Ground 11 is procedurally
2 barred, and all four such grounds must be dismissed with prejudice.

3
4 **E. GROUND 1: ILLEGAL SEARCH & SEIZURE**

5 For Ground 1 of his Petition, Petitioner argues that police conducted an unlawful
6 search and seizure of Petitioner’s backpack, bank bag, and notebook, which were in the car
7 in which Petitioner was riding at the time of his arrest. Respondents argue that Petitioner
8 cannot rely upon the exclusionary rule on habeas, having been provided a full and fair
9 hearing in the state courts, under *Stone v. Powell*, 428 U.S. 465, 494-495 (1976). Petitioner
10 replies that the claim has merit because evidence showed the evidence was not in “plain
11 view” and that there was an absence of probable cause to trigger the “plain view” doctrine.

12 **Exclusionary Rule Does Not Apply on Habeas** - In *Stone*, the Court “weigh[ed] the
13 utility of the exclusionary rule against the costs of extending it to collateral review of Fourth
14 Amendment claims” and found that “the additional contribution, if any, of the consideration
15 of search-and-seizure claims of state prisoners on collateral review is small in relation to the
16 costs.” 428 U.S. at 489, 494. The Court concluded “that where the State has provided an
17 opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not
18 be granted federal habeas corpus relief on the ground that evidence obtained in an
19 unconstitutional search or seizure was introduced at his trial.” *Id.* at 494.

20 **Full and Fair Hearing Provided** - Petitioner has not alleged any facts to show the
21 absence of a full and fair hearing in the state courts. Rather, he has simply attacked the
22 results of that hearing.

23 Moreover, the record would belie any attempt to do so. Here, Petitioner admits that
24 he was permitted to present this claim in a pre-trial suppression hearing in the trial court.
25 (Petition, #1 at 5-1; Exhibit RR, R.T. 8/1/89 at 33-57.) He again raised the issue on direct
26 appeal, but the claim as to the notepad was rejected under the “plain view doctrine” and the
27 claim as to the backpack etc. was rejected as asserting harmless error. (Exhibit A, Mem.
28 Dec. 4/9/92 at 6-7.) Petitioner points to no limitations on his ability to present his

1 exclusionary rule claim. He simply asserts that the state court got it wrong when it found the
2 notepad to have been in plain view and any error harmless. (2nd Supp. Reply #69 at 2.)

3 The Ninth Circuit holds that “[t]he relevant inquiry is whether petitioner had the
4 opportunity to litigate his claim, not whether he did in fact do so or even whether the claim
5 was correctly decided.” *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). *But see*
6 *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000), *overruled on other grounds by Osband*
7 *v. Woodford*, 290 F.3d 1036, 1043 (9th Cir.2002) (no full and fair hearing where 4th
8 Amendment claim relied on Supreme Court decision issued years after trial).¹³

9 **No Erroneous Decision** - Even if the Ninth Circuit recognized an exception for some
10 erroneous decisions, Petitioner fails to establish that an erroneous decision was made.

11 With regard to his backpack and its contents, Petitioner objects to the application of
12 a harmless error rule, arguing that the error could not have been harmless. (2nd Supp. Reply,
13 #69 at 5.) However, Petitioner does not support that contention. The Arizona Court of
14 Appeals noted the other evidence supporting Petitioner’s conviction, including the victim’s
15 identification of Petitioner’s truck by its description and license, Petitioner’s high-speed car
16 chase away from police, his eventual confession, a fingerprint from Petitioner on a chair at
17 the scene, and Petitioner’s identification in a photo line up by both victims and two officers
18 engaged in the high speed chase. (Exhibit A, Mem. Dec. 4/9/92 at 6.) Petitioner does not
19 show why this evidence was not overwhelming, such that failure to exclude the opposed
20 evidence was not harmless.

21 With regard to the notepad, as discussed in Section J in connection with Petitioner’s
22 related claim of ineffective assistance in Ground 8, the undersigned concludes that Petitioner
23 fails to show that the notepad was not in plain view and thus properly received in evidence.

24 _____
25 ¹³ The Tenth Circuit has held that a defendant has been denied a “full and fair
26 hearing” where an erroneous decision results from a failure to apply the correct constitutional
27 standard. *See e.g. Herrera v. LeMaster*, 225 F.3d 1176 (10th Cir. 2000). The Seventh
28 Circuit has applied the same rationale to an “egregious” error in the handling of a Fourth
Amendment claim. *See Miranda v. Leibach*, 394 F.3d 984 (7th Cir. 2005). Petitioner asserts
neither.

1 **Summary** - Petitioner having failed to show that the state court’s analysis was
2 erroneous (assuming that is relevant), and failing to otherwise establish the denial of a full
3 and fair hearing, the *Stone* doctrine bars consideration of his Ground 1. Accordingly, the
4 claim is without merit and must be denied.

5
6 **F. GROUND 2: RIGHT TO SILENCE**

7 For his Ground 2, Petitioner argues that he was questioned by the police after he
8 invoked his right to remain silent.¹⁴ Respondents argue that the state courts properly
9 concluded that the disputed statements were not the result of interrogation or its functional
10 equivalent. (2nd Supp. Answer, #57 at 16.)

11 **Background** - “[A]n accused ... having expressed his desire to deal with the police
12 only through counsel, is not subject to further interrogation by the authorities until counsel
13 has been made available to him, unless the accused himself initiates further communication,
14 exchanges, or conversations with the police.” *Edwards v. Arizona* , 451 U.S. 477, 484-485
15 (1981). However, not every encounter between police and a defendant are barred once the
16 right to counsel is invoked. “[T]he Miranda safeguards come into play whenever a person
17 in custody is subjected to either express questioning or its functional equivalent.” *Rhode*
18 *Island v. Innis*, 446 U.S. 291, 300-301 (1980). “Miranda refers not only to express
19 questioning, but also to any words or actions on the part of the police (other than those
20 normally attendant to arrest and custody) that the police should know are reasonably likely
21 to elicit an incriminating response from the suspect.” *Id.* at 301. An “incriminating
22 response” refers to “any response-whether inculpatory or exculpatory-that the prosecution
23 may seek to introduce at trial.” *U.S. v. Padilla*, 387 F.3d 1087, 1093 (9th Cir. 2004)
24 (citations omitted, quoting *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

25 _____
26 ¹⁴ As noted by Respondents, the *Stone* doctrine discussed in connection with Ground
27 1 does not bar Petitioner’s claim in Ground 2. (2nd Supp. Answer, #57 at 14, n. 6.) *See*
28 *Withrow v. Williams*, 507 U.S. 680, 687 (1993) (“Stone’s restriction on the exercise of
federal habeas jurisdiction does not extend to a state prisoner’s claim that his conviction rests
on statements obtained in violation of” *Miranda v. Arizona*, 384 U.S. 436 (1966).).

1 The Arizona Court of Appeals rejected Petitioner's claim, finding that there was no
2 interrogation or functional equivalent of interrogation. (Exhibit D, Mem. Dec. 4/9/92 at 7.)¹⁵

3 Whether a defendant was subject to interrogation is a mixed question of fact and law.
4 *U.S. v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994).

5 [A] federal court reviewing a state court conclusion on a mixed issue
6 involving questions both of fact and law must first separate the legal
7 conclusions from the factual determinations that underlie it. Fact-finding underlying the state court's decision is accorded the full
8 deference of §§ 2254(d)(2) and (e)(1), while the state court's conclusion
9 as to the ultimate legal issue-or the application of federal law to the
10 factual findings-is reviewed per § 2254(d)(1) in order to ascertain
11 whether the decision is "contrary to, or involved an unreasonable
12 application of, clearly established" Supreme Court precedent. 28 U.S.C.
13 § 2254(d)(1).

14 *Lambert v. Blodgett*, 393 F.3d 943, 977-978 (9th Cir. 2004).

15 The disputed statement introduced at trial was the following testimony by Detective
16 Van Meter:

17 Q. Did Mr. Hess make any comments to you concerning
18 robberies that had occurred on November 17th, 1988?

19 A. Not explicitly naming any of the establishments, no.

20 Q. Did he make any comments involving robberies.

21 A. Yes.

22 Q. Can you tell me what he told you.

23 A. He asked me a question about some money that was in a red
24 backpack that Detective Rose had recovered. He asked me the question
25 if he could get that money back, and I told him that it was - - it was not
26 my money. I didn't seize it. I had no control over that money. He told
27 me - - he went on further to say that the money that was in that
28 backpack he had earned, and the money that was taken in the robberies
yesterday, he had hid that money. He went on to tell me that he had
had it - - it was not in any kind of bag or covering or anything like that,
that he had hid that money in a bush.

(Exhibit WW, R.T. 8/7/89 at 29-30.) At the suppression hearing, Detective Van Meter had
testified that this conversation occurred in jail, when he had gone to obtain additional
fingerprints from Petitioner and to advise Petitioner that he was filing additional charges

¹⁵ A federal habeas court reviews the "last reasoned decision" by a state court.
Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). Here, the Arizona Supreme Court
issued a summary denial (Exhibit F) of Petitioner's Petition for Review, making the Arizona
Court of Appeals' Memorandum Decision (Exhibit D) the "last reasoned decision."

1 against Petitioner based on the robberies.¹⁶ (Exhibit SS, R.T. 8/2/89 at 8-12.)

2 At that time, Petitioner had already invoked his right to remain silent. (*Id.* at 8.)
3 Petitioner argues that the police effectively wore him down by repeated contacts after he
4 invoked his right to counsel,¹⁷ including questioning him about a California fugitive warrant,
5 consents to search his home and truck, the events of the high-speed pursuit, and the event that
6 led to the disputed statements. Thus, when Petitioner eventually spoke about his having
7 hidden the funds from the robberies, it was as a result of the functional equivalent of
8 interrogation. (2nd Supp. Reply, #69 at 7-8.)

9 The Arizona Court of Appeals summarized the underlying facts as follows:

10 A detective testified that he later went to the jail to have
11 appellant fingerprinted and to advise him of additional charges that
12 were being filed. Appellant initiated a conversation in which he told
the detective that he had hidden the money from the robberies under a
bush after the chase.

13 (Exhibit D, Mem. Dec. at 2.) Petitioner offers nothing to show that these findings were in
14 error.

15 To sustain a challenge based on the state record, a habeas petitioner must show that,
16 in finding the absence of a functional equivalent of interrogation, the state court made an
17 “unreasonable determination of the facts in light of the evidence presented in the State court
18 proceeding.”¹⁸ 28 U.S.C. § 2254(d)(2). To find that burden met, this Court “must be

19
20 ¹⁶ The conversation proceeded with a discussion about the location and amount of the
21 money. (Exhibit SS, R.T. 8/2/89 at 17-18.) These subsequent statements were not introduced
at trial.

22 ¹⁷ Respondents note that Petitioner references his invocation of his right to counsel,
23 advise that they consider this to be part of his right to silence claim, and not a separate right
24 to counsel claim, which they assert would be unexhausted and procedurally defaulted. (2nd
25 Supp. Answer, #57 at 17.) Petitioner does not, in his Second Supplemental Reply, take
26 exception to Respondents characterization of these arguments. Accordingly, the undersigned
adopts Respondents characterization of those arguments, and does not reach the procedural
default issues.

27 ¹⁸ To the extent that Petitioner might now be attempting to introduce new evidence,
28 the standard is even more stringent:

State-court fact-finding may be overturned based on new evidence presented

1 convinced that an appellate panel, applying the normal standards of appellate review, could
2 not reasonably conclude that the finding is supported by the record.” *Taylor v. Maddox*, 366
3 F.3d 992, 1000 (9th Cir. 2004). Here, the undersigned is unconvinced that the burden is met.

4 It is true that the Arizona Court of Appeals does not reference all of the prior contacts
5 now cited by Petitioner. Petitioner argued in his Supplemental Brief (Exhibit C) about the
6 contacts concerning: the consents to search (*id.* at 5-6), the fugitive warrant (*id.* at 7), and the
7 high-speed chase (*id.* at 8). “Failure to consider key aspects of the record is a defect in the
8 fact-finding process.” *Taylor v. Maddox*, 366 F.3d 992, 1008 (9th Cir. 2004). However, the
9 state court need not delineate every factual consideration. “We adhere to the proposition that
10 a state court need not make detailed findings addressing all the evidence before it.”
11 *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003). Nonetheless, the failure to include a
12 discussion of the relevant evidence can show that it was disregarded. *Id.* Thus, the Ninth
13 Circuit has concluded that “[i]n making findings” as part of a reasonable determination of
14 the facts, “a judge must acknowledge significant portions of the record, particularly where
15 they are inconsistent with the judge's findings.” *Taylor*, 366 F.3d at 1007.

16 Here, the omitted facts were not so significant as to cause the undersigned to question
17 the reasonableness of the decision of the Arizona Court of Appeals. Most of the contacts
18 between Petitioner and the officers were simply “those normally attendant to arrest and
19 custody.” *Rhode Island v. Innis*, 446 U.S. at 301. For example, the contact about the
20 fugitive warrant, the consents to search, the fingerprinting, the advice about the new charges,
21 the mental health assistance and even the response to Petitioner about the disposition of the
22 impounded funds would have been such contacts. Even taken together, those contacts do not
23 amount to the “functional equivalent of interrogation.” *Id.*

24 Perhaps Petitioner sees the contacts attendant to arrest and custody narrowly, i.e.

25
26 for the first time in federal court only if such new evidence amounts to clear
27 and convincing proof that the state-court finding is in error. See 28 U.S.C. §
28 2254(e)(1).

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004).

1 applying to little more than booking processes and directions around the jail. The Courts do
2 not. For example, “this circuit has suggested that when an officer informs a defendant of
3 circumstances which contribute to an intelligent exercise of his judgment, this information
4 may be considered normally attendant to arrest and custody.” *United States v. Crisco*, 725
5 F.2d 1228, 1232 (9th Cir.) cert. denied, 466 U.S. 977 (1984). Thus, in *Crisco* the court found
6 that an officer's explanation of the facts underlying the charges was intended to inform the
7 defendant of circumstances and was not a functional equivalent of interrogation. In *U.S. v.*
8 *Moreno-Flores*, an officer’s post-arrest advice about the drugs seized and that the defendant
9 was “in serious trouble” was found to be attendant to his arrest. 33 F.3d 1164, 1170 (9th Cir.
10 1994).

11 Petitioner also complains about the contact concerning the high-speed chase. While
12 this arguably could have been outside the realm of contacts “normally attendant to arrest and
13 custody,” that contact did not of itself result in any statements by Petitioner. Petitioner offers
14 nothing to show that such contact by itself would have prompted Petitioner to provide
15 incriminating responses. Nor does Petitioner show that Detective Van Meter was even aware
16 of this contact such that it should have made him expect an incriminating response from
17 Petitioner during the later fingerprinting session. (Supp. Reply, #69 at 7.) “But, since the
18 police surely cannot be held accountable for the unforeseeable results of their words or
19 actions, the definition of interrogation can extend only to words or actions on the part of
20 police officers that they should have known were reasonably likely to elicit an incriminating
21 response.” *Rhode Island v. Innis*, 446 U.S. at 302.

22 Petitioner complains that all of these contacts should be considered together and
23 makes much of the fact that he was distraught and had complained to Detective Van Meter
24 of his psychological condition. “Whether the officers knew that the suspect was peculiarly
25 susceptible to the officers' appeal, or that he was unusually disoriented or upset is relevant
26 to the inquiry.” *Crisco*, 725 F.2d at 1232. Petitioner does not show, however, that all these
27 circumstances combined amounted to the “compelling pressures of in-custody interrogation
28 identified in *Miranda* as working ‘to undermine the individual's will to resist and to compel

1 him to speak.’ ” *Crisco*, 725 F.2d at 1232 (quoting *Miranda*, 384 U.S. at 494). These were
2 not repeated jabs at Petitioner to wear him down into confessing or to take advantage of his
3 unstable condition. To the contrary, it seems plain to the undersigned that the police were
4 engaged in routine, non-interrogative contacts, and Petitioner simply volunteered his
5 incriminating statements in an effort to save the impounded funds from being labeled as
6 proceeds of the robbery, and thus subject to return to the victims.

7 Accordingly, the undersigned finds that an appellate panel could reasonably conclude
8 that the finding of no interrogation was supported by the record. Therefore, the state court’s
9 determination of the nature of Detective Van Meter’s conduct was not an “unreasonable
10 determination of the facts.”

11 Nor does Petitioner offer anything to show that the state court’s conclusions of law
12 were contrary to or an unreasonable application of Supreme Court law, as required for relief
13 under 28 U.S.C. § 2254 (d)(1). The Arizona Court of Appeals identified the proper standard
14 under *Rhode Island v. Innis*, and evaluated whether the statements were the product of
15 “interrogation or its equivalent.” (Exhibit D, Mem. Dec. 4/9/92 at 7.)

16 Accordingly, the undersigned concludes that Ground Two is without merit and must
17 be denied.

18
19 **G. GROUND 5: INEFFECTIVE ASSISTANCE RE SUPPRESSING STATEMENTS**

20 For his Ground 5, Petitioner argues that he received ineffective assistance of counsel
21 because counsel failed to move to suppress the statements he made to Detective Van Meter
22 about the funds in his backpack, on the basis that they were the fruit of the illegal search of
23 the backpack. Respondents argue that the search of the back pack may have been the “but
24 for” cause of the statements, but the statements were volunteered by Petitioner and therefore
25 were not the “product” or “fruit” of the backpack search, or if the “product” the connection
26 was too attenuated. Therefore, Respondents argue, counsel was not deficient for failing to
27 raise the challenge, and there was no prejudice because any such effort would have failed.
28 Finally, Respondents argue that there was no prejudice because the evidence was so

1 overwhelming that exclusion of the statement would not have resulted in a different outcome
2 to the trial.

3 Petitioner replies that trial counsel's motion to suppress his statements was
4 inadequate, resulting in the waiver of the claim when presented to the Arizona Court of
5 Appeals, and reiterates that "[h]ad police not illegally seized Hess's backpack on the 18th,
6 there would have been no money in their possession for Hess to make statements about and
7 the incriminating statement could not have been legally obtained any other way." (2nd
8 Supplemental Reply, #69 at 10-11.) Petitioner argues that the connection between the
9 backpack and the statements was not too attenuated, and that prejudice has been shown.
10 Finally, Petitioner argues that he was improperly precluded from developing a record on the
11 issue in the state courts.

12 **Standard for Ineffective Assistance Claims** - Generally, claims of ineffective
13 assistance of counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668
14 (1984). In order to prevail on such a claim, petitioner must show: (1) deficient performance
15 - counsel's representation fell below the objective standard for reasonableness; and (2)
16 prejudice - there is a reasonable probability that, but for counsel's unprofessional errors, the
17 result of the proceeding would have been different. *Id.* at 687-88. Although the petitioner
18 must prove both elements, a court may reject his claim upon finding either that counsel's
19 performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

20 The court hearing an ineffective assistance of counsel claim must consider the totality
21 of the evidence with an eye toward the ultimate issue of whether counsel's conduct so
22 undermined the functioning of the adversarial process that the proceeding lacked
23 fundamental fairness. *Id.* at 686; *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990)(observing
24 that counsel cannot be labeled ineffective for failing to raise issues which have no merit);
25 *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir.1985) (failing to raise meritless argument on
26 appeal does not constitute ineffective assistance of counsel).

27 A deficient performance is one in which counsel's errors were so great he or she was
28 not functioning as the counsel guaranteed by the Sixth Amendment. *Iaea v. Sunn*, 800 F.2d

1 861, 864 (9th Cir. 1986). An objective standard applies to proving such ineffectiveness, and
2 requires a petitioner to demonstrate that counsel’s actions were “outside the wide range of
3 professionally competent.” *United States v. Houtcens*, 926 F.2d 824, 828 (9th Cir.
4 1991)(quoting *Strickland*, 466 U.S. at 687-90). The reasonableness of counsel’s actions is
5 judged from counsel’s perspective at the time of the alleged error in light of all the
6 circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

7 **Validity of Underlying Claim** - Petitioner raised this ineffective assistance claim in
8 his first PCR petition. (Exhibit I at 9-13.) In disposing of the claim, the trial court noted the
9 Arizona Court of Appeals’ determination that the search and seizure of the backpack and its
10 contents was unconstitutional. However, the trial court found that “[t]he defendant’s very
11 incriminating statements as to the proceeds of the robberies were not the fruits of the illegal
12 backpack search or obtained in violation of *Miranda* but were volunteered by the defendant.”
13 (Exhibit L, M.E. 7/15/97 at 2.) Petitioner repeated the claim in his petitions for review.
14 (Exhibit M at 6; Exhibit P at 7.) The Arizona Court of Appeals and Arizona Supreme Court
15 summarily denied the claims.¹⁹ (Exhibits O & R.)

16 The Supreme Court has long held that “evidence seized during an unlawful search
17 could not constitute proof against the victim of the search. The exclusionary prohibition
18 extends as well to the indirect as the direct products of such invasions.” *Wong Sun v. U.S.*,
19 371 U.S. 471, 484-485 1963). Thus, evidence may be subject to suppression if it is the
20 “fruit” of an illegal search or seizure. For evidence to be considered the “fruit” of an illegal
21 search, “the illegality [must be] at least the ‘but for’ cause of the discovery of the evidence.”
22 *Segura v. U.S.*, 468 U.S. 796, 815 (1984). However, “[t]he Court has never held that
23 evidence is ‘fruit of the poisonous tree’ simply because ‘it would not have come to light but
24 for the illegal actions of the police.’” *Id.* Thus the “but for” relationship is a necessary but
25 not sufficient condition for evidence to be the “fruit of the poisonous tree.”

26 _____
27 ¹⁹ The trial courts decision on Petitioner’s first PCR proceeding is the “last reasoned
28 decision” and thus the one reviewed here. *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th
Cir. 2004).

1 Rather, the nexus between the illegality and the evidence must be such that the
2 “primary taint of the unlawful invasion” is not purged by intervening circumstances. *Kaupp*
3 *v. Texas*, 538 U.S. 626, 633 (2003). Thus, where a confession would not have occurred “but
4 for” illegal conduct, it may still be admitted if “that confession was ‘an act of free will
5 [sufficient] to purge the primary taint of the unlawful invasion.’ ” *Id.* quoting *Wong Sun*, 371
6 U.S. at 486.

7 Demonstrating such purgation is, of course, a function of circumstantial
8 evidence, with the burden of persuasion on the State. Relevant
9 considerations include observance of *Miranda*, “[t]he temporal
10 proximity of the arrest and the confession, the presence of intervening
11 circumstances, and, particularly, the purpose and flagrancy of the
12 official misconduct.”

13 *Kaupp*, 538 U.S. at 632-633 (citations omitted, quoting *Brown v. Illinois*, 422 U.S. 590, 603-
14 604 (1975)).

15 Here, all the factors point to the purging of the taint. Petitioner had been provided
16 *Miranda* warnings. Moreover, there were significant intervening circumstances between the
17 illegal search and the statements. The illegal search of the backpack was conducted on
18 November 18, 1988, the date of Petitioner’s arrest, by Detective Roland Rose of the Phoenix
19 Police Department. (Exhibit RR, R.T. 8/1/89 at 37-40.) It was Detective Rose who then
20 advised Petitioner that the backpack and bank funds had been seized. (*Id.* at 42.) In contrast,
21 Petitioner’s incriminating statements were made to Detective Van Meter of the Scottsdale
22 Police Department on the following day, November 19, 1988. (Exhibit SS, R.T. 8/2/89 at
23 8-9.) There had been an intervening discussion between Petitioner and Van Meter, on
24 November 18th, concerning the search of Petitioner’s truck and home. (*Id.* at 6-8.) Thus,
25 Petitioner’s statements were not a spontaneous reaction to the illegal search and seizure.
26 Rather, they were born of substantial delay and opportunity for consideration by Petitioner.

27 Petitioner complains that a mere “24-hours between the illegal search and Hess’s
28 statement does not constitute sufficient temporal attenuation to purge the taint.” (2nd Supp.
Reply, #69 at 14.) To support this contention, Petitioner references *U.S. v. Ceccolini*, 435
U.S. 268 (1978). However, *Ceccolini* does not establish some minimum time or bright line

1 rule, but reiterated that “no mathematical weight can be assigned to any of the factors which
2 we have discussed.” *Id.* at 280.

3 Further, although ultimately determined improper, it cannot be said that the search of
4 Petitioner’s backpack was flagrant misconduct. The issue was close enough that the trial
5 judge believed that the search was proper. Petitioner argues that the whole course of police
6 contact was flagrant. (2nd Supp. Reply, #69 at 13-14.) However, it is only the flagrancy of
7 the violation in searching the backpack that is pertinent to deciding whether the results of that
8 search should have been excluded. “A criminal prosecution is more than a game in which the
9 Government may be checkmated and the game lost merely because its officers have not
10 played according to rule.” *Ceccolini*, 435 U.S. at 279 (quoting *McGuire v. United States*, 273
11 U.S. 95, 99 (1927)).

12 Thus, the Arizona trial court properly determined that the incriminating statements
13 “were not the fruits of the illegal backpack search.” As a result, any attempt by trial counsel
14 to pursue a motion to suppress on this basis would have been futile, and cannot form the
15 basis of an ineffective assistance claim.²⁰

16 Therefore, Petitioner’s Ground 5 is without merit and should be denied.

17
18 **H. GROUND 6: INEFFECTIVE ASSISTANCE RE CONSENT TO SEARCH**

19 For Ground 6 of his Petition, Petitioner argues he received ineffective assistance of
20 trial and appellate counsel because they failed to raise the issue of an unlawful consent search
21 after Petitioner had invoked his right to counsel. Respondents argue that Petitioner has failed
22 to show ineffective assistance because a consent to search is not an interrogation prohibited
23 by the Fifth Amendment; the disputed search yielded no incriminating evidence, the only
24 evidence being photos which were available from evidence in plain view; and appellate
25 counsel could have reasonably declined to argue the issue under the applicable “fundamental

26 _____
27 ²⁰ Because the undersigned finds that the omissions complained of would have been
28 futile, the claims of lack of prejudice are not addressed. *See Strickland*, 466 U.S. at 697
(court need not address both defective performance and prejudice to dispose of claim).

1 error” review standard.

2 Petitioner replies that at the time, controlling state law held a request to consent to
3 search to be a violation of the right to counsel, and that law controls whether the request
4 would have been futile. Petitioner argues that the search yielded photos of the truck which
5 were admitted and were incriminating.

6 Petitioner raised this claim in his first PCR petition. (Exhibit I.) The Arizona trial
7 court denied that petition, but did not explicitly address the issue of the consent to search of
8 the evidence from the search of Petitioner’s truck, but simply noted that “[t]he admission of
9 the physical evidence at trial was considered on appeal and, except for he backpack, was
10 affirmed.”²¹ (Exhibit L, M.E. 7/15/97 at 2.)

11 **Viability of Underlying Suppression Claim** - Petitioner argues that counsel could
12 have argued for invalidation of the consent to search based on state law.²² In *State v. King*,
13 the Arizona Court of Appeals held that “after invocation of the right to an attorney, a search
14 cannot be based upon consent obtained after such invocation absent attenuating
15 circumstances.” 140 Ariz. 602, 604, 684 P.2d 174, 176 (Ariz.App.,1984). Respondents
16 counter that the federal courts have consistently held that a consent to search is not an
17 incriminating statement, and therefore a request for such a consent is not an interrogation that
18 triggers a previously invoked right to counsel. (2nd Supp. Ans., #57 at 24.) However, as

19
20 ²¹ Contrary to the trial court’s conclusion, the issue of the consent to search the truck
21 and the resulting evidence was neither raised by Petitioner nor decided in Petitioner’s direct
22 appeal. (See Exhibits B (Open. Br.), C (Supp. Br.), and D (Mem. Dec.)

23 ²² Petitioner also cites *State v. Britain*,, 156 Ariz. 384, 752 P.2d 37 (Ariz.App. 1988).
24 *Britain* involved a statement uttered after the defendant had been repeatedly hit over the head
25 with flashlight. The holding was narrow:

26 We hold that a statement made in response to a police beating is involuntary
27 as a matter of law. When a statement is a response to police brutality, debate
28 will not be allowed as to whether the brutality was intended to elicit a
statement or as to whether defendant's will was truly overborne. When
impermissible police conduct of this sort causes a statement, a finding of
involuntariness is mandated.

Britain, 156 Ariz. at 385, 752 P.2d at 38. Petitioner does not allege any police beating or
brutality.

1 noted by Petitioner, it is not only federal law which sets the bar for the performance of
2 constitutionally effective counsel.²³

3 Based on *King*, the undersigned concludes that a motion to suppress any evidence
4 resulting from the search of the vehicle would have been successful.

5 **Results of Search** - Here, however, there was no evidence introduced at trial which
6 resulted from the search. Detective Van Meter testified that there was “[n]othing of
7 evidentiary items” found in the truck. (Exhibit WW, R.T. 8/27/89 at 38.) And, Petitioner
8 argues only that the photos of the truck should have been excluded.

9 However, the photos of the truck did not result from the improperly obtained consent.
10 The truck was parked on the street. The photographing of the vehicle was not a “search.”
11 Without implicating the law of searches and seizures, “the police may record what they
12 normally may view with the naked eye.” *U.S. v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003)
13 (no violation of reasonable expectation of privacy by video recording of public mailroom in
14 community hospital). “The exterior of a car, of course, is thrust into the public eye, and thus
15 to examine it does not constitute a ‘search.’ ” *New York v. Class*, 475 U.S. 106, 114 (1986).

16 Accordingly, even had counsel successfully challenged the validity of the consent to
17 search, that would not have precluded the admission of the photos of the exterior of the
18 vehicle. There would, therefore, have been no point to challenging the validity of the
19 consent, and failure to raise the claim cannot be deemed to be ineffective assistance.

20 Accordingly, Petitioner’s Ground 6 is without merit and should be denied

21
22 **I. GROUND 7: INEFFECTIVE ASSISTANCE RE SEIZURE**

23 For Ground 7 of his Petition, Petitioner argues that he received ineffective assistance
24 of trial and appellate counsel because they failed to raise the issue of the unlawful seizure of
25 Petitioner’s backpack, bank bag, and notebook with the car.

26 ²³ If Petitioner asserted this claim as a freestanding ground for relief, rather than as
27 a basis for a claim of ineffective assistance, then this Court would be limited to evaluating
28 it under federal law. *See Peltier v. Wright*, 15 F.3d 860, 862 (9th Cir. 1994) (habeas
available only for federal law violations, and state courts final arbiters of state law).

1 Respondents argue that Petitioner has failed to show ineffective assistance because
2 Petitioner did not have standing to challenge the transportation of the third party's vehicle
3 to the impound lot, and it was the search of the backpack in the vehicle which produced
4 incriminating evidence.

5 Petitioner replies that (1) he isn't challenging the seizure of the car, but the seizure of
6 the property inside which the police knew to be his; (2) the evidence infers that the officer
7 who drove the car to the lot removed the notepad from his backpack²⁴; (3) trial counsel failed
8 to develop this theory by calling the relevant officers and appellate counsel failed to argue
9 the issue on direct appeal.

10 Petitioner raised this claim in his first PCR Petition. (Exhibit I at 16.) The trial court
11 did not expressly address the issue, but denied the claim. (Exhibit L, M.E. 71/5/97.)

12 On direct appeal, the backpack and its contents were deemed by the Arizona Court
13 of Appeals to have been wrongly admitted, but harmless. Accordingly, the only remaining
14 evidence introduced at trial as a result of the seizure of Petitioner's property was his notepad.

15 **Legality of "Seizure"** - Petitioner proffers no authority for the proposition that his
16 property was illegally seized.²⁵ He likens its seizure to an attempt by police to seize
17 everything in his home. (2nd Supp. Reply, #59 at 24.) The comparison fails because
18 Petitioner's property was not securely at his residence, but in another's car at a laundromat.
19 The police generally have the authority to impound a vehicle following an arrest of its driver,
20 as part of their "care-taking" functions, whether to avoid safety concerns, to insure the safety
21 of the vehicle, or simply to keep it from being abandoned on another's property. "Case law
22 supports the view that where a driver is arrested and there is no one immediately on hand to
23 take possession, the officials have a legitimate non-investigatory reason for impounding the

24
25 ²⁴ This argument is considered and rejected *infra* in connection with Ground 8
(ineffective assistance re plain view).

26
27 ²⁵ The undersigned presumes without deciding that the transfer of the property in the
28 car was a "seizure" within the meaning of the Fourth Amendment. *See e.g. South Dakota v. Opperman*, 428 U.S. 364, 371, n.6 (1976) (noting the debate whether an impound inventory qualifies as a Fourth Amendment "search").

1 car.”²⁶ *Vega-Encarnacion v. Babilonia*, 344 F.3d 37, 41 (1st Cir. 2003). *See also Hallstrom*
2 *v. City of Garden City*, 991 F.2d 1473 (9th Cir. 1993) (vehicle of arrestee properly impounded
3 from private parking lot to avoid vandalism).

4 By the same token, Petitioner’s property in the vehicle was subject to being taken into
5 protective custody. *See U.S. v. Mitchell*, 458 F.2d 960 (9th Cir. 1972) (care-taking function
6 applied to personal property within impounded vehicle). Doubtless, neither Petitioner nor
7 any other arrestee would have wanted the police to have removed the property and simply
8 deposited it on the street. If they delivered it to Petitioner, they would have been able to
9 impound it as a consequence of his arrest. *See U.S. v. Edwards*, 415 U.S. 800, 804 (1974)
10 (“clothing or other belongings may be seized upon arrival of the accused at the place of
11 detention”).²⁷

12 **Ineffective Assistance** - “Where defense counsel's failure to litigate a Fourth
13 Amendment claim competently is the principal allegation of ineffectiveness, the defendant
14 must also prove that his Fourth Amendment claim is meritorious and that there is a
15 reasonable probability that the verdict would have been different absent the excludable
16 evidence in order to demonstrate actual prejudice.” *Kimmelman v. Morrison*, 477 U.S. 365,
17 375 (1986). Petitioner has failed to show that there was an illegal seizure by the transfer of
18 his personal property to the police parking lot. Accordingly, his claim of ineffective
19 assistance of counsel related thereto is without merit and must be denied.

20 //

21 //

22
23 ²⁶ Here, the evidence shows that the vehicle was driven to the police station with the
24 consent of the owner, Petitioner’s girlfriend. (*See* Pet’s Exhibit O, Police Report 88-151426
25 at 3. (“She agreed to accompany a patrol officer [to the police station and to] let me drive her
26 car to the police station.”))

26 ²⁷ Even if there had been an illegal seizure, the available options of depositing the
27 goods on the street or delivering them to Petitioner would have resulted in the discovery of
28 the notepad evidence. Such inevitable discovery would authorize the admission of otherwise
excludable evidence. *U.S. v. Reilly*, 224 F.3d 986, 994 (9th Cir. 2000).

1 **J. GROUND 8: INEFFECTIVE ASSISTANCE RE PLAIN VIEW**

2 For Ground 8 of his Petition, Petitioner argues that he received ineffective assistance
3 of trial and appellate counsel because they failed to raise the issue of the unlawful search and
4 seizure of Petitioner’s notepad in violation of the plain view doctrine. Petitioner argues that:
5 (1) there was no probable cause to believe the car in which the notepad was found contained
6 evidence; (2) nor was there probable cause to believe that the notepad was evidence of the
7 crime for which Petitioner was arrested; (3) the evidence suggests that the notepad was found
8 inside the backpack and then moved to “plain view”; (4) the officer was required to pickup
9 and read the notepad before its incriminating nature became apparent.

10 Respondents argue that: (1) Petitioner has failed to show ineffective assistance
11 because the notepad was in plain view in the truck, and plainly incriminating; (2) appellate
12 counsel did argue the plain view issue, albeit unsuccessfully, and Petitioner fails to show the
13 argument was inadequate; and (3) Petitioner has not shown prejudice because the strong
14 evidence from the witnesses would have resulted in conviction without the notepad.

15 Petitioner adds in his reply that counsel failed to inquire whether the officer had to
16 leaf through the notepad to find the incriminating page, and case law shows that perusing
17 through documents precludes a finding that they were in plain view.

18 Petitioner raised this claim in his first PCR petition (Exhibit I). The trial court
19 rejected the claim based upon the determination that the “writing notepad was properly
20 seized as in plain view.” (Exhibit L, M.E. 7/15/97 at 2.)

21 **Probable Cause Requirement** - “To fall within the plain view exception, two
22 requirements must be met: the officers must be lawfully searching the area where the
23 evidence is found and the incriminatory nature of the evidence must be immediately
24 apparent.” *Roe v. Sherry*, 91 F.3d 1270, 1272 (9th Cir. 1996).

25 Petitioner also argues that probable cause was required before the police could search
26 the car, citing *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). *Hicks* did not require probable
27 cause as a prerequisite to the police being in a position to view the evidence. Rather, *Hicks*
28 held that before a search could extend beyond what was in “plain view” (e.g. inspecting

1 serial numbers by turning around stereo equipment, to see if they were stolen), “probable
2 cause” was required. Thus, *Hicks* did not add a “probable cause” requirement to the plain
3 view doctrine, but simply recognized that the requirement for probable cause remained
4 outside the doctrine.

5 That is not to say that probable cause is never relevant. In applying the “plain view”
6 doctrine, the Supreme Court noted “[i]t is, of course, an essential predicate to any valid
7 warrantless seizure of incriminating evidence that the officer did not violate the Fourth
8 Amendment in arriving at the place from which the evidence could be plainly viewed.”
9 *Horton v. California*, 496 U.S. 128, 136 (1990). If it is necessary to show probable cause
10 for the officers to be “lawfully searching the area”, then it is functionally a prerequisite.

11 Here, however, the officers were lawfully searching the car because they had
12 obtained the permission of the car’s owner, Petitioner’s girlfriend. The Arizona Court of
13 Appeals properly reasoned: “Since the girlfriend did consent to the search of [her] car, the
14 note pad lying on the car’s floorboard was properly seized according to the ‘plain view’
15 doctrine.” (Exhibit D, Mem. Dec. at 5.) Thus, no “probable cause” requirement applied to
16 the entry to the vehicle. “It is ... well settled that one of the specifically established exceptions
17 to the requirements of both a warrant and probable cause is a search that is conducted
18 pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). *See also Harris*
19 *v. United States*, 390 U.S. 234 (1968) (no illegal search where notecard on floor of care
20 became visible when officer validly opened impounded car to roll up windows and secure
21 the car).

22 Nor does that say that “probable cause” is not pertinent to the analysis whether the
23 “incriminatory nature” is “immediately apparent.” *See e.g. Payton v. New York*, 445 U.S.
24 573, 587 (1980) (plain view doctrine requires “probable cause to associate the property with
25 criminal activity”). The existence of that type of “probable cause” is addressed below in the
26 “immediately apparent” discussion.

27 **Nexus to Arrest Crime** - Petitioner also complains that the incriminating nature of
28 the notepad related to the armed robberies, while he was being arrested on felony flight and

1 a California fugitive warrant. However, there is no requirement that evidence found in plain
2 view relate to the crime originally being investigated, or leading to the arrest. “That lack of
3 relationship always exists with regard to action validated under the ‘plain view’ doctrine;
4 where action is taken for the purpose justifying the entry, invocation of the doctrine is
5 superfluous.” *Hicks* , 480 U.S. at 325.

6 Indeed, there is not even a requirement that officials be investigating any crime at the
7 time the evidence comes into view. Rather, the doctrine extends to evidence discovered
8 when the officer has a “legitimate reason for being present unconnected with a search
9 directed against the accused.” *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). *See*
10 *e.g. Texas v. Brown*, 460 U.S. 730 (1983) (drugs seen in vehicle at routine drivers license
11 checkpoint); *Michigan v. Tyler*, 436 U.S. 499 (1978) (discussing seizure of evidence by
12 firemen responding to fire). *See also Coolidge*, 403 U.S. at 466 (“the ‘plain view’ doctrine
13 has been applied where a police officer is not searching for evidence against the accused, but
14 nonetheless inadvertently comes across an incriminating object”).

15 **Plain View Finding** - Petitioner argues in connection with this claim, as well as in
16 connection with Ground 7, that the officer driving the car to the police parking lot must have
17 removed the notepad from his backpack and placed it on the floorboard to be in plain view.

18 The Arizona Court of Appeals found on direct appeal that the notepad was “lying next
19 to the backpack” and concluded: “Since the girlfriend did consent to the search of the car,
20 the note pad lying on the car’s floorboard was properly seized according to the ‘plain view’
21 doctrine.” (Exhibit D, Mem. Dec. at 2, 5.) A “plain view” determination is a mixed question
22 of fact and law. The underlying factual determinations, e.g. that the notepad was on the
23 floorboard and was visible upon entry to the car, can only be rejected if Petitioner shows that
24 they were an unreasonable determination of the facts based upon the evidence before the
25 state courts, and those findings are entitled to a presumption of correctness and may not be
26 overcome by extrinsic evidence first presented here unless such evidence is clear and
27 convincing. *See Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (discussing limitations
28 under 28 U.S.C. § 2254 (d)(2) (unreasonable determination of facts based on record) and

1 (e)(1) (presumption of correctness against new evidence).

2 Petitioner does not affirmatively assert that the notepad was in the backpack and not
3 on the floorboard. Indeed, in the trial court he disclaimed such knowledge.

4 Q. Where was your notebook?

5 A. I don't know. I don't remember it being on the floorboard.
6 I don't even remember it being there. I thought I had left it at home, so
it was probably wherever they said it was because I don't remember at
all.

7 (Exhibit RR, R.T. 8/1/89 at 52.)

8 Nonetheless, Petitioner now argues that officer Rose testified that the note pad was
9 not in plain view. (2nd Supp. Reply #69 at 5.) At the suppression hearing, Officer Rose
10 testified:

11 Q. Was the backpack visible from outside the car?

12 A. Yes.

13 Q. Was the notepad visible?

14 A. It may have been. I didn't notice it until I opened the
passenger door.

15 (Exhibit RR, R.T. 8/1/89 at 47.) Thus, read in context, Officer Rose did not assert that the
16 note pad was not in plain view, but that it may or may not have been visible from outside the
17 vehicle, but was visible once the door was opened. Without a consent to search, the
18 difference would have been critical. However, consent to search the vehicle was given.
19 Thus, Officer Rose was entitled to open the car and search the vehicle. Having done so, the
20 notepad was then in plain view, and its seizure authorized under the "plain view" doctrine.

21 Petitioner also argues the notepad must have been in the bank bag because officer
22 Morgenthaler denied seeing it when he conducted a security sweep of the vehicle before
23 Petitioner's girlfriend was allowed to remove her purse. To support this argument, Petitioner
24 points to the police reports (Exhibits O and Q) of the officers involved in the arrest, who
25 reported the observation of a "bank bag and money inside a red nap-sack" but did not report
seeing the notepad.²⁸ (Pet's Exhibit O to #69), However, the undersigned does not find it

26 _____

27 ²⁸ Because they do not amount to convincing evidence, the undersigned does not
28 resolve whether these police reports were evidence presented to the state courts, and thus
whether they may properly be considered by this habeas court as extrinsic evidence. *See*

1 persuasive that officers “check[ing] for weapons prior to ANDERSON getting her purse”
2 (*id.*) would fail to make note of the presence of a notepad.

3 Petitioner also argues that evidence of foul play is shown because these arresting
4 officers reported the backpack to be open and the bank bag and money visible, while
5 Detective Rose reported the backpack to be closed when he ultimately searched the vehicle
6 with the owner’s consent. Indeed, Detective Rose reported that the arresting officer reported
7 “a red backpack and a bank bag with a considerable amount of money in it.” (Exhibit RR,
8 R.T. 8/1/89 at 39.) He also testified that it was inside the backpack when he went to search
9 the car:

10 Q. Detective Rose, where was the money when you first went
11 to the car?

12 A. It was inside the bank bag.

13 Q. Was it visible from standing outside the car?

14 A. No, I believe I had to unzip the backpack.

15 * * *

16 THE COURT: And you had to unzip the backpack to get to the
17 bank bag?

18 THE WITNESS: That’s correct, yes.

19 THE COURT: And the pad, though was not in the backpack, it
20 was on the floorboard?

21 THE WITNESS: Yes sir.

22 (Exhibit RR, R.T. 8/1/89 at 46-48.) While that evidence might suggest that there had been
23 some disturbance of the backpack, it does not establish that the notepad must have been in
24 the back pack.²⁹

25 Petitioner’s inferences from this information certainly do not make the Arizona Court
26 of Appeals’ findings unreasonable nor is it clear and convincing evidence that they were
27 wrong. Moreover, even if those deferential presumptions are not applicable in the context
28

29 *Taylor v. Maddox, supra.*

30 ²⁹ Reasonable explanations for the purported divergence on the status of the backpack
31 could include a closure of the backpack by the officer before he left the car in the parking lot
32 to avoid it being observed and stolen, or that the officer performing the protective sweep of
33 the car before the girlfriend retrieved her purse opened the bag to inspect for weapons. *See*
34 *e.g. Harris v. United States*, 390 U.S. 234 (1968) (no illegal search where notepad on floor
35 of car became visible when officer opened impounded car to roll up windows and secure
36 the car).

1 of resolving counsel's effectiveness, the undersigned cannot say that the inferences are even
2 sufficiently convincing that trial counsel's failure to argue them was deficient performance.

3 Nor can the undersigned say that trial counsel's failure to pursue additional testimony
4 was deficient. Petitioner cannot leave this habeas court to speculate that questioning these
5 witnesses would have strengthened those inferences. *Grisby v. Blodgett*, 130 F.3d 365, 373
6 (9th Cir. 1997). "[E]vidence about the testimony of a putative witness must generally be
7 presented in the form of actual testimony by the witness or on affidavit. A defendant cannot
8 simply state that the testimony would have been favorable; self-serving speculation will not
9 sustain an ineffective assistance claim." *U.S. v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991).

10 **Immediately Apparent** - Finally, Petitioner complains that counsel failed to
11 investigate and argue that the incriminating nature of the notepad was not immediately
12 apparent. To fall under the plain view doctrine, "the incriminatory nature of the evidence
13 must be immediately apparent." *Roe v. Sherry*, 91 F.3d 1270, 1272 (9th Cir. 1996).
14 Petitioner complains there was no evidence the incriminating page was on top, and that
15 reading the notepad was required to ascertain the incriminating nature.

16 If the incriminating page had been buried within the notepad, it would not have been
17 within the plain view doctrine. *U.S. v. Whitten*, 706 F.2d 1000, 1013 (9th Cir. 1983) (implied
18 overruling on other grounds recognized by *U.S. v. Rodriguez-Rodriguez*, 441 F.3d 767, 771
19 (9th Cir. 2006)) ("There was nothing facially incriminating about the closed notebook from
20 which the DEA agents could reasonably have concluded that it might contain evidence of
21 crime."). Nor does the doctrine permit officers to "minutely scrutinize" the contents of a
22 "book or similar item" found in plain view within the authorized scope of a search. *U.S. v.*
23 *Issacs*, 708 F.2d 1365 (9th Cir. 1983) (but recognizing the propriety of a "brief perusal" of
24 the books if items validly being searched for might reasonably be located within the book).

25 Here, however, the evidence showed that the note was the top page:

26 Q. BY MS. CHRISTENSEN: Again, Detective Rose, what if
27 anything did you find in that car?

28 A. I found a red nylon, light nylon backpack which contained
numerous items of identification and paperwork to James Hess. I also
found a note pad - - not a note - - a letter writing table, and the top page

1 contained some information concerning a truck.

* * *

2 Q. And this is Exhibit 7. Do you recognize that?

3 A. Yes, I do. This is the note that was on the letter writing pad
4 that was on the floorboard passenger's side of the Nissan Sentra.

5 (Exhibit WW, R.T. 8/7/89 at 49-50.) Similarly, in *Whitten*, the plain view doctrine did extend
6 to a "yellow pad...open to the second or third page when discovered by one of the agents"
7 which revealed plans of a drug distribution operation. 706 F.2d at 1013.

8 Petitioner cites *U.S. v. Padilla*, 986 F.Supp. 163 (S.D.N.Y.,1997) for the proposition
9 that Detective Rose could not lift the notepad and read it. There, the court noted that the
10 "officers, upon glancing at documents noticeably beyond the scope of the consent, [could
11 not] peruse them in search of incriminating evidence." *Id.* at 170. However, *Padilla* did not
12 involve a single document which on its face was incriminating, but a stack of documents
13 encountered during a consensual search for "guns and drugs." *Id.* Thus, the court held only
14 that "[a]ll documents which were not immediately incriminatory on their face should not
15 have been seized," but those with incriminating evidence "in plain view on the face of those
16 documents" were admissible. *Id.* at 170-171. Similarly, there is no Arizona precedent for
17 such an argument. *See State v. Warness*, 26 Ariz.App. 359, 361, 548 P.2d 853, 855 (1976)
18 (rejecting argument that "the evidence was not in plain view because the police officer
19 picked up the bottle before being able to identify the contents positively as marijuana").

20 Indeed, evidence does not lose its character as being "immediately apparent" merely
21 because it must be examined to ascertain its character. Case law teaches that it is not the
22 depth of the "inspection" but the depth of the "search" which is relevant. "If an article is
23 already in plain view, neither its observation nor its seizure would involve any invasion of
24 privacy." *Horton v. California*, 496 U.S. 128, 133-134 (1990). Thus, the plain view doctrine
25 does not permit expansion of a search beyond what is otherwise authorized. "[T]he 'plain
26 view' doctrine may not be used to extend a general exploratory search from one object to
27 another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403
28 U.S. 443, 466-467 (1971). Thus, the officers in this case could not argue that the evidence
discovered in the backpack was in plain view, since they knew the backpack belonged to

1 Hess, and was thus beyond the scope of the consent given by his girlfriend. Likewise, as in
2 *Whitten, Padilla, and Issacs*, they could not have properly rifled through Petitioner’s notepad.

3
4 That did not, however, preclude them from picking up the notepad to search beneath
5 it. *Compare* with *Arizona v. Hicks*, 480 U.S. 321 (1987) (incriminating nature not apparent
6 until stereo equipment moved to inspect serial numbers).

7 Nor did it preclude them from reading the notepad. *See U.S. v. Seljan*, 547 F.3d 993,
8 1006 (9th Cir. 2008) (evidence of pedophilia from letter to young girl was in “plain view” of
9 customs agent searching envelope for evidence of violation of currency reporting
10 requirements, even though agent had to read letter to discern incriminating nature). *See also*
11 *Crouch v. U.S.*, 454 U.S. 952, 955 (1981), White, J., dissenting to denial of certiorari (“a
12 number of Courts of Appeals have held that a plain-view seizure of certain documents is
13 permissible even though their incriminating nature is not apparent absent some reading of
14 their contents”).

15 It is true that in *U.S. v. Garcia*, the Sixth Circuit asserted that “a document, even
16 though in plain view, is [not] within the plain view exception if it must be read in order for
17 its incriminating nature to be determined.” 496 F.3d 495, 510 (6th Cir. 2007). However, that
18 was based upon a search for cocaine which resulted in the discovery in a filing cabinet of a
19 variety of receipts and financial records showing a gap between the defendant’s reported
20 income and expenditures. However, there the investigators admitted to carefully reading
21 each document and that “in order to establish an association between these documents and
22 any criminal activity, they had to undertake ‘further investigation.’ ” *Id.* at 511. No such
23 further investigation was required for Petitioner’s notepad to be incriminating.

24 *Garcia* also related to a city map with a red circle around a known drug area, which
25 was “innocuous without close inspection” including reading the street names, which would
26 have “required far more than an instant”. However, that portion of *Garcia*’s analysis hinges
27 upon Sixth Circuit law that engrafts upon to the “immediately apparent” requirement a
28 temporal limitation that the recognition of the incriminating nature be an “instantaneous

1 sensory perception.”³⁰ See *U.S. v. McLernon*, 746 F.2d 1098, 1125 (6th Cir. 1984). The
2 Ninth Circuit has never adopted such a temporal requirement. See *U.S. v. Chesher*, 678 F.2d
3 1353, 1357, n.2 (9th Cir. 1982) (noting cases approving of reading of documents as being
4 within “immediately apparent” requirement “despite something less than instantaneous
5 recognition”). See also *U.S. v. Ochs*, 595 F.2d 1247, 1257, n.8 (1st Cir. 1979) (rejecting other
6 Circuits’ interpretation of the “immediately apparent” standard to require instantaneous
7 perception and to preclude perusal, noting “it seems best to stick to the exact language of the
8 Supreme Court's plurality opinion rather than to embroider on it even slightly”). Similarly,
9 the Arizona courts have not adopted an “instantaneous” requirement. See e.g. *State v. Millan*,
10 185 Ariz. 398, 402, 916 P.2d 1114, 1118, n. 4 (Ariz.App. 1995) (listing “immediately
11 apparent” as applicable standard. Indeed, the undersigned has found no jurisdiction other
12 than the Sixth Circuit to have utilized a “instantaneous sensory perception” requirement.

13 **Summary** - Petitioner has failed to establish a meritorious claim that the notepad was
14 not subject to the plain view doctrine.³¹ “Where defense counsel's failure to litigate a Fourth
15 Amendment claim competently is the principal allegation of ineffectiveness, the defendant
16 must also prove that his Fourth Amendment claim is meritorious.” *Kimmelman v. Morrison*,

17
18 ³⁰ The Sixth Circuit’s “instantaneous sensory perception” construct was first
19 promulgated in *McLernon*, 746 F.2d at 1124, and the only authority cited was *Texas v.*
20 *Brown*, 460 U.S. 737(1983). However, *Brown* did not adopt such a standard, nor even
21 articulate any contemporaneity standard for application of the “immediately apparent”
22 component of the plain view doctrine. Rather, the Court was concerned with whether the
23 officer possessed sufficient certainty that the tied-off balloon he seized would be filled with
24 narcotics. Thus, it appears that the Sixth Circuit’s rephrasing of the “immediately apparent”
25 standard has simply blossomed by repetition into a more stringent limitation upon the time
26 within which the officer may process the evidence before his eyes and conclude upon its
27 evidentiary value. Arguably this approach would make the propriety of a seizure of
28 documents depend upon the speed with which an individual officer can read or think.

25 ³¹ In his Second Supplemental Reply, Petitioner argues that appellate was ineffective
26 in arguing this claim because he erroneously reported that the notepad included an address
27 where his truck was located, and thus “appears to incriminate Hess further.” Although
28 arising in the course of argument over the plain view doctrine, this is a separate claim of
ineffectiveness from what was raised in Petitioner’s Ground 8 of his Petition. Accordingly,
the undersigned does not address it.

1 477 U.S. 365, 375 (1986). Petitioner cannot do so. Accordingly, this Ground 8 must be
2 denied.

3
4 **K. GROUND 9: INEFFECTIVE ASSISTANCE RE RIGHT TO COUNSEL**

5 For Ground 9 of his Petition, Petitioner argues he received ineffective assistance of
6 trial counsel because he failed to raise the issue of Petitioner’s exercise of his 5th Amendment
7 right to counsel, relying instead solely upon his Fourth Amendment right to silence. He also
8 argues that appellate counsel was ineffective in arguing this issue because he relied upon
9 *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986) which case had been overturned.

10 Respondents argue that Petitioner has failed to show ineffective assistance because:
11 (1) counsel did argue at the voluntariness hearing that Petitioner invoked his right to counsel;
12 (2) Petitioner fails to show that he was prejudiced by appellate counsel’s citation of an
13 overturned case, because counsel cited the controlling law and made the correct legal
14 argument; and (3) Petitioner cannot show prejudice from the failure to suppress given the
15 other evidence of Petitioner’s guilt.

16 Petitioner replies that: (1) trial counsel failed to adequately distinguish his right to
17 counsel claim from his right to silence claim; (2) trial counsel failed to call the necessary
18 witnesses to support this claim; (3) that the evidence shows interrogation and its functional
19 equivalent; and (4) the prejudice question is debatable.

20 Petitioner asserted this claim in his first PCR proceeding. (Exhibit I, PCR Pet. at 30,
21 *et seq.*) The trial court rejected the claim based upon the Court of Appeals determination on
22 direct appeal³² that the statements were not “obtained in violation of *Miranda* but were
23 volunteered by the defendant.” (Exhibit L, M.E. 7/15/98 at 2.)

24 **Trial Counsel Argued the Right to Counsel** - Petitioner argues that trial counsel

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26 ³² As discussed in connection with Ground 2, appellate counsel argued on direct
27 appeal that Petitioner’s statements were a violation of his right to counsel. (Exhibit B,
28 Opening Brief at 12, *et seq.*) The Arizona Court of Appeals affirmed the trial court’s
conclusion that Petitioner’s statements to Detective Van Meter were “not the product of
interrogation or its equivalent.” (Exhibit D, Mem. Dec. at 7.)

1 failed to assert the violation of Petitioner’s right to counsel. However, trial counsel argued
2 to the trial court that Petitioner had invoked “his right to remain silent and have counsel
3 present” and that as a result there was to be no “initiation prior to counsel being appointed.”
4 (Exhibit TT, R.T. 8/3/89 at 26), and characterized as “just highly unbelievable” the assertion
5 that the encounters between Petitioner and Van Meter “is not an interrogation or a
6 circumstance where the police were attempting to elicit responses.” In support of his
7 argument, trial counsel cited not only *Edwards*, but also *Arizona v. Roberson*, 486 U.S. 675
8 (1988), which extended *Edwards* to questioning on a separate investigation. (Exhibit TT,
9 R.T. 8/3/89 at 25-26.) Both of these cases deal with the right to counsel as established in
10 *Miranda*. Accordingly, this portion of Petitioner’s argument is without merit.

11 **Trial Counsel’s Development of Facts** - Petitioner argues that counsel failed to
12 adequately develop the evidence that his encounter with Detective Van Meter was the
13 functional equivalent of interrogation when viewed in light of the other circumstances and
14 contacts with police. However, in support of this argument Petitioner simply reiterates his
15 arguments from Ground 2. For the reasons discussed herein above, the undersigned has
16 rejected Petitioner’s claim that in light of those other circumstances there was the functional
17 equivalent of interrogation.

18 **Reference to Overturned Decision** - In the Opening Brief on direct appeal, filed in
19 April, 1990, appellate counsel cited *State v. Mauro*, 149 Ariz. 24, 716 P.2d 393 (1986) for
20 the proposition that the intent of the police officers determined whether conduct was the
21 functional equivalent of questioning. (Exhibit B, Opening Brief at 15-16.) However, this
22 case had been overturned several years earlier in *Arizona v. Mauro*, where the Supreme Court
23 held that “Officers do not interrogate a suspect simply by hoping that he will incriminate
24 himself.” 481 U.S. 520, 529 (1987).

25 Petitioner fails to show how the citation of *State v. Mauro* prejudiced him. The case
26 was favorable to Petitioner, so if the Arizona Court would have relied on it, it would have
27 been beneficial. Presumably appellate counsel could have inspired the ire of the Arizona
28 court by citing the overturned decision, but Petitioner points to no evidence of such. Rather,

1 the Arizona Court of Appeals resolved the issue on its merits (based on the lack of
2 interrogation), and as discussed in connection with Ground 2, did so properly. Accordingly,
3 this argument has no merit.

4 **Summary** - Trial counsel adequately argued the substance of Petitioner's right to
5 counsel claim, and Petitioner has failed to show that any additional evidentiary support
6 would have changed the finding that there was no violation. Petitioner has failed to show
7 that appellate counsel's dependence upon an overturned case prejudiced him. Accordingly,
8 this Ground 9 is without merit and must be denied.

9
10 **L. GROUND 10: INEFFECTIVE ASSISTANCE RE SUFFICIENCY OF EVIDENCE**

11 For Ground 10 of his Petition, Petitioner argues he received ineffective assistance of
12 appellate counsel because counsel did not properly argue the evidence when asserting the
13 insufficiency of the evidence of a weapon.

14 Respondents answer that: (1) counsel did argue the point; and (2) viewed in a light
15 favorable to the prosecution, there was sufficient evidence on the point.

16 Petitioner replies that the evidence was insufficient to show that he had a weapon in
17 his possession, because the witness who testified to seeing a gun thrown out of a truck
18 window provided a vehicle and driver description that did not match Petitioner. Petitioner
19 complains that Respondents improperly select portions of testimony to discredit to support
20 the conviction.

21 **Decisions of Arizona Courts** - Appellate counsel raised an insufficient evidence
22 claim on direct appeal, arguing that the victim in Count I (Rainbow Beauty Supply) never
23 saw a gun, either actual or simulated. (Exhibit C, Supp. Brief at 3.) The Arizona Court of
24 Appeals rejected the claim, citing *State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d
25 633, 637 (1990) for the proposition that ““the weapon, therefore, need not be displayed by
26 the accused nor seen by the victim.”” The court went on to note that “another witness testified
27 that the appellant threw a toy gun out of his truck window while fleeing the scend of the
28 robbery.” (Exhibit D, Mem. Dec. at 8.)

1 In his first PCR petition, Petitioner asserted that appellate counsel was ineffective for
2 failing to challenge the conclusion that the person the witness saw was Petitioner. (Exhibit
3 I, PCR Pet. at 55 *et seq.*) The trial court did not address the substance of this claim in
4 dismissing the petition. (Exhibit L, M.E. 7/15/97.)

5 **Law Applicable to Weapon** - Under the Arizona armed robbery statute, there are
6 three factors relevant to showing the use of a weapon. First, there must be a weapon
7 actually present during the robbery, although it “need not be displayed by the accused nor
8 seen by the victim.” *State v. Garza Rodriguez*, 164 Ariz. 107, 111, 791 P.2d 633, 637
9 (1990). Second, the weapon may be either real or “simulated.” “[T]he ‘simulation’ is not
10 that a robber feigns or pretends to have a weapon on their person but rather that the person
11 commits the robbery with a pretend deadly weapon.” *Id.* at 112, 791 P.2d at 638. “A person
12 charged with armed robbery, therefore, can no longer overcome the presumption in favor of
13 the State with proof that the article involved in the robbery was unloaded, unworkable, or a
14 fake.” *Id.* at 111, 791 P.2d at 637. Third, the defendant must threaten to use the weapon,
15 real or simulated. *Id.*

16 **Sufficiency of Evidence at Trial** - To sustain a claim of insufficient evidence,
17 Petitioner would have had to show that when “examin[ing] the evidence in the light most
18 favorable to upholding the conviction and resolve all reasonable inferences against a
19 defendant . . . [no] rational trier-of-fact could have found the essential elements of the crime
20 beyond a reasonable doubt.” *State v. Davila*, 189 Ariz. 44, 45, 938 P.2d 93, 94 (App. 1997)
21 (citations omitted).

22 At trial, the victim in Count I, Valerie Purnell, testified that although she never saw
23 a gun, Defendant claimed to have a gun and demanded she give him money from the register
24 drawer. (Exhibit VV, R.T. 8/4/89 at 54, 66, 71.)

25 Thus, the only witness testifying to Petitioner’s possession of a weapon, real or
26 simulated (in this instance a toy gun), was Tony DeLeano. Deleano testified that on
27 November 17, 1988 at 4:00 in the afternoon, he witnessed police chasing a truck in the
28 neighborhood of Union Hills and 19th Avenue. (Exhibit WW, R.T. 8/7/89.) He testified that

1 he saw the driver throw something from the truck window, which landed in the street.
2 DeLeano then retrieved the object, discovered it to be a toy gun, followed a police officer in
3 the area, and delivered it to him. (*Id.* at 11-15.) DeLeano did not identify Petitioner as the
4 driver of the truck, and described the driver as “dark haired, light complexion, had a - - had
5 a mustache, was wearing a dark jacket, medium brown” which he described as “a
6 windbreaker-type jacket.” (*Id.* at 10, 18.) DeLeano described the truck as a foreign import
7 truck, Toyota or Datsun, with a crew-cab and deep brown in color. (*Id.* at 9.)

8 Standing alone, DeLeano’s testimony would at least arguably be insufficient to
9 establish Petitioner’s possession of the toy gun. DeLeano could not identify Petitioner as the
10 driver. Moreover, Petitioner argues that DeLeano’s descriptions ran counter to the testimony
11 of the witnesses from the armed robbery that Petitioner’s truck was blue, and that Petitioner
12 was bare chested, had a dark complexion, and no mustache. (Exhibit WW, R.T. 8/7/89 at 6.)

13 However, the officer to whom DeLeano delivered the toy gun testified that DeLeano
14 had described the truck to him as blue. The officer described DeLeano’s trial testimony as
15 “mistaken.” (Exhibit WW, R.T. 8/7/89 at 24, 27.) Further, the officers involved in the high
16 speed chase at the same date, time and location as the chase described by DeLeano, identified
17 the truck they were chasing as dark blue (Exhibit WW, R.T. 8/7/89 at 21) or blue (*id.* at 52).
18 Moreover, one of the officers testified that he got a clear look at the driver of the truck, and
19 identified Petitioner as the driver. (*Id.* at 69.) Additionally, the license plate of the truck
20 involved in the chase was registered to Petitioner. (*Id.* at 40-41.)

21 Contrary to Petitioner’s suggestions, all the evidence to support an element of an
22 offense need not come from a single witness. When DeLeano’s testimony is considered with
23 this other testimony, there was ample evidence for the jury to link Petitioner to the toy gun.

24 Moreover, the fact that DeLeano’s descriptions varied from the other descriptions
25 does not defeat his connection of Petitioner to the weapon. The testimony of a witness does
26 not have to be accepted or rejected as a whole. Rather, juries are entitled to credit or discredit
27 the portions of a witness’ testimony as they determine them to be credible. *See State v.*
28 *Clemons*, 110 Ariz. 555, 557, 521 P.2d 987, 989 (1974) (“The jury had the right to disbelieve

1 the whole of appellant's testimony or believe in part and disbelieve in part.”). *See also* Model
2 Crim. Jury Instr. 9th Cir. 1.8 (2003) (“You may believe everything a witness says, or part of
3 it, or none of it.”).

4 Thus, when considering the testimony of DeLeano in light of the other witnesses’
5 testimony, a reasonable juror could have found the element of possession of a simulated
6 weapon.

7 **Summary** - Based on the foregoing, the undersigned concludes that the argument
8 proposed by Petitioner would have been futile, and thus it was not defective performance for
9 appellate counsel to have failed to pursue it.

10 11 **M. GROUND 13: RIGHT TO JURY AT SENTENCING**

12 For his Ground 13, Petitioner argues that the trial court improperly enhanced his
13 sentence based on facts not found by the jury, thus denying Petitioner his right to trial by
14 jury. Petitioner asserts this claim was exhausted in his 4th PCR proceeding. (Petition, #1 at
15 8-20.) Respondents have not addressed the merits of this claim.

16 This claim was presented by Petitioner in his Fourth PCR petition (Exhibit II). In that
17 proceeding, he asserted the claim as a change in the law pursuant to *Blakely v. Washington*,
18 542 U.S. 296 (2004). The trial court rejected this claim based on the fact that *Blakely* was
19 not retroactively applicable to Petitioner’s conviction on collateral review. Now, Petitioner
20 asserts that this claim is supported by *In re Winship*, 397 U.S. 358 (1970), which would be
21 applicable to his conviction.³³ (#9 at 21.)

22 **Apprendi/Blakely Not Retroactively Applicable** - If Petitioner’s claim is dependent
23 upon *Blakely*, or its predecessor, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it is without

24
25 ³³ Petitioner based his Fourth PCR Petition upon a change in the law wrought by
26 *Blakely*. His current claim under the 1970 decision in *Winship* would not have been based
27 on such a change, and arguably would have been precluded and/or time barred. The
28 undersigned presumes, without deciding, that Petitioner’s current claim under *Winship* was
fairly presented by presenting his claim under *Blakely*. Although Respondents argue the
claim was procedurally barred, they do not argue that it was not fairly presented and thus
unexhausted and procedurally defaulted.

1 merit because these cases are not retroactively applicable to Petitioner.

2 “Unless they fall within an exception to the general rule, new constitutional rules of
3 criminal procedure will not be applicable to those cases which have become final before the
4 new rules are announced.” *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality). The courts
5 have concluded that both the *Apprendi* and *Blakely* decisions establish new constitutional
6 rules of criminal procedure that do not fit within any of the exceptions to *Teague*. *See U.S.*
7 *v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002) (*Apprendi*); and *Schardt v. Payne*, 414
8 F.3d 1025 (9th Cir.2005). Thus, they may not be retroactively applied.

9 *Apprendi* was decided June 26, 2000, and *Blakely* was decided June 24, 2004. Both
10 were decided after petitioner’s conviction became “final.” In *Beard v. Banks*, the Court
11 repeated the general rule:

12 ***Ordinarily***, ascertaining the date on which a defendant's conviction
13 becomes final poses no difficulties: **State convictions are final** “for
14 purposes of retroactivity analysis **when the availability of direct
15 appeal to the state courts has been exhausted** and the time for filing
16 a petition for a writ of certiorari has elapsed or a timely filed petition
17 has been finally denied.”

18 542 U.S. 406, 411 (2004) (quoting *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)) (emphasis
19 added). Here, Petitioner’s conviction became final on June 1, 2000, upon the expiration of
20 his 90 day period to file a petition for a writ of certiorari following the March 3, 2000
21 conclusion of Petitioner’s direct appeal. (Exhibit X.)

22 **Pre-Apprendi/Blakely Law** - In *Apprendi*, the Supreme Court held that, with the
23 exception of prior convictions, any fact which increases the maximum possible punishment
24 must be determined by the jury and not a judge. In *Blakely*, the Court clarified that the
25 relevant maximum punishment was not the ultimate maximum for a give category of offense,
26 but the maximum that which could be imposed based solely upon the facts found by the jury.
27 In contrast, in *Winship* the Court simply found “that the Due Process Clause protects the
28 accused against conviction except upon proof beyond a reasonable doubt of every fact
necessary to constitute the crime with which he is charged.” 397 U.S. at 364.

Just prior to *Apprendi*, the Supreme Court had noted that it had not resolved yet

1 whether to extend that burden of proof and the related jury right to sentencing factors used
2 to enhance a sentence. In *Jones v. U.S.*, the Court noted: “The point is simply that
3 diminishment of the jury's significance by removing control over facts determining a
4 statutory sentencing range would resonate with the claims of earlier controversies, to raise
5 a genuine Sixth Amendment issue not yet settled.” 526 U.S. 227, 248 (1999). Thus, without
6 the new rules announced in *Apprendi* and *Blakely*, the principles from *Winship* would not
7 have precluded the trial court from enhancing Petitioner’s sentence based upon judicially
8 determined facts.

9 **Summary** - Petitioner is not entitled to retroactive application of *Apprendi* and/or
10 *Blakely*, and without them his Ground 13 is without merit, and must be denied.

11
12 **N. SUMMARY**

13 Grounds 3, 4, and 12 of the Petition are procedurally defaulted, Ground 11 is
14 procedurally barred, and all four such grounds must be dismissed with prejudice. Grounds
15 1, 2, 5, 6, 7, 8, 9, 10, and 13 of the Petition are without merit, and must be denied.

16
17 **IV. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that Grounds 3, 4, 11 and 12 of
19 Petitioner's Petition for Writ of Habeas Corpus, filed June 28, 2006 (#1) be **DISMISSED**
20 **WITH PREJUDICE**.

21 **IT IS FURTHER RECOMMENDED** that the remainder of Petitioner's Petition for
22 Writ of Habeas Corpus, filed June 28, 2006 (#1) be **DENIED**.

23
24 **V. EFFECT OF RECOMMENDATION**

25 This recommendation is not an order that is immediately appealable to the Ninth
26 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*
27 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

28 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall

1 have ten (10) days from the date of service of a copy of this recommendation within which
2 to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing
3 Section 2254 Proceedings. Thereafter, the parties have ten (10) days within which to file a
4 response to the objections. Failure to timely file objections to any factual or legal
5 determinations of the Magistrate Judge will be considered a waiver of a party's right to *de*
6 *novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th
7 Cir. 2003)(*en banc*).

8
9 DATED: May 12, 2009



JAY R. IRWIN
United States Magistrate Judge

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