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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Leonard Guzman,**  
Petitioner  
-vs-  
**Dora B. Schriro, et al.,**  
Respondents

CV-07-0295-PHX-SMM (JRI)

**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 Florence, Arizona, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on February 9, 2007 (#1) in case CV-07-0295-PHX-SMM (JRI), and a second Petition on February 9, 2007 (#1) in case CV-07-0296-PHX-SMM (JRI). The two proceedings were consolidated, and Respondents filed their Response on September 7, 2007 (#21), a supplement on July 3, 2003 (#47), a Second Supplement on September 5, 2008 (#51). Petitioner filed a Traverse on October 29, 2007 (#30), an Objection to Supplement on July 16, 2008 (#49), and a Reply to Supplement on September 26, 2008 (#52).

In the meantime, on July 2, 2008, Petitioner filed a Motion for Jury Trial (#45). Respondents filed their Objection on July 3, 2008 (#48). Also, on February 13, 2009, Petitioner filed a Motion for Relief (#57) seeking temporary relief. Respondents filed their Response on February 19, 2009 (#58).

The Petitioner's Petition and Motions are 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.

1 **II. RELEVANT FACTUAL & PROCEDURAL BACKGROUND**

2 **A. FACTUAL BACKGROUND**

3 In disposing of Petitioner’s first petition for post-conviction relief, the trial court  
4 summarized the factual background as follows:

5 On April 15, 1999, the State charged Defendant by Indictment  
6 in cause number CR1999-091712 with three counts of sexual assault  
7 (class 2 felonies); one count of sexual abuse (a class.5 felony); and one  
8 count of kidnapping [sic] (a class 2 felony). The charges arose from an  
9 incident that occurred on December 9, 1998, during which Defendant  
10 restrained his girlfriend's roommate and sexually assaulted her.

11 . . . On August 18, 1999, the State charged Defendant by Indictment  
12 in cause number CR1999-094153, with conspiracy to commit first  
13 degree murder. That charge arose from an incident in which Defendant  
14 attempted to hire a hit man to murder [ ] the victim in the sexual  
15 assault case.

16 (Exhibit X, PCR Order 5/21/03. *See also* Exhibit B, Indictment; and Exhibit EE Indictment.)  
17 (Exhibits to the Answer (#21) are referenced herein as “Exhibit \_\_\_\_.”)

18 **B. PROCEEDINGS AT TRIAL**

19 Petitioner pled not guilty to the charges, and counsel Michael A. Vincent appeared on  
20 his behalf. (Exhibit F, Not. Appear.) Vincent moved to withdraw, and Deputy Public  
21 Defender Scott Silva was appointed. (Exhibit I, M.E. 1/240/00.) Petitioner then moved to  
22 remove counsel, and waived counsel. (Exhibit K, Motions & Waiver.) The motion was  
23 granted and Attorney Silva was appointed to advise Petitioner. (Exhibit L, M.E. 2/11/00).  
24 Attorney Silva then asserted a conflict of interest, and James Leonard of the Legal  
25 Defender’s Office was appointed to serve in an advisory capacity. (Exhibit L, M.E. 2/16/00  
26 and M.E. 2/29/00.) Finally, upon Petitioner’s motion, attorney Leonard was appointed to  
27 represent him. (Exhibit L, M.E. 3/24/00.) The matter was set for trial. (*Id.*)

28 On May 12, 2000, Petitioner entered into plea agreements in each case. In the sexual  
assault case, Petitioner agreed to plead guilty to one count of sexual assault with one prior  
felony conviction in exchange for dismissal of the remaining charges. (Exhibit O.) In the  
conspiracy to commit murder case, he agreed to plead guilty to one count of attempted

1 conspiracy to commit first degree murder. (Exhibit HH.) The parties agreed that the  
2 sentences would be consecutive, but the total term of imprisonment would not exceed 21  
3 years. (Exhibits O and HH, Plea Agreement; Exhibit X, PCR Order 5/21/03.)

4 Petitioner appeared for sentencing on June 15, 2000. The pleas were determined to  
5 be entered knowingly and voluntarily and were accepted. Petitioner was sentenced to the  
6 presumptive terms of 10.5 years on the sexual assault and 9.25 years on the attempted  
7 conspiracy charge. (Exhibit P Sentence; and Exhibit JJ Sentence. *See also* Exhibit X, PCR  
8 Order 5/21/03.) The court pronounced the dismissal of Counts 2, 3, 4, and 5 in the sexual  
9 assault case, number CR1999-091712, as well as allegations of addition prior felony  
10 convictions and unfiled charges arising out of a Tempe Police Department investigation and  
11 a Maricopa County Sheriff's Office investigation. (#47, Exhibit YY, R.T. 6/15/00 at 29.)  
12 However, the Sentence failed to include Count 5 of the sexual assault case as one of the  
13 counts being dismissed. (Exhibit P, Sentence at 3.)

#### 14 15 **C. PROCEEDINGS ON DIRECT APPEAL**

16 Having plead guilty, Petitioner had no right to a direct appeal, and did not file one.  
17 (CV-07-0295 Petition, #1 at 2; CV-07-0296 Petition, #1 at 2.)

#### 18 19 **D. PROCEEDINGS ON FIRST PCR PETITION**

20 **Before Trial Court** - On June 29, 2000, Petitioner filed Notices of Post-Conviction  
21 Relief in both cases. (Exhibits R and KK.) Deputy Public Defender Stephen Collins was  
22 appointed, and ultimately filed a Notice indicating an inability to find issues for review, and  
23 seeking an extension of time for Petitioner to file a pro per petition. (Exhibit S.) After  
24 obtaining several extensions, Petitioner filed his separate pro per Petitions on October 18,  
25 2002. (Exhibits T and MM.)

26 In the sexual assault case, he argued that counsel was ineffective for: (1) failing to  
27 challenge the indictments based upon unspecified errors in the grand jury proceedings; (2)  
28 failing to adequately advise Petitioner of his rights in unspecified ways. (Exhibit T.) In his

1 reply, he added claims that counsel failed to adequately investigate the informant used in the  
2 conspiracy case. (Exhibit W, PCR Reply.)

3 In the conspiracy case, he argued that counsel was ineffective for: (1) failing to file  
4 a motion to suppress; and (2) failing to raise various objections; and (3) failing to adequately  
5 advise petitioner. (Exhibit MM.)

6 On May 21, 2003, the trial court summarily dismissed the petitions for failure to state  
7 any colorable claims. (Exhibit X.)

8 Petitioner filed motions for rehearing in both proceedings. (Exhibits Y and OO.) On  
9 November 10, 2003, the trial court denied the motions. (Exhibit OO, M.E. 11/10/03.)

10 **Before Arizona Court of Appeals** - On July 12, 2004, Petitioner filed a Petition for  
11 Review (Exhibit QQ), seeking review of the joint order denying his PCR petitions. He filed  
12 a Motion to Amend Petition for Post-Conviction Relief, which was denied as an improper  
13 attempt to raise issues not presented to the trial court. (Exhibit SS, Motion and Order  
14 3/4/05.) On June 17, 2005, the Arizona Court of Appeals summarily denied the petition.

15 **Before Arizona Supreme Court** - Petitioner then sought review by the Arizona  
16 Supreme Court. (Exhibit UU), which was summarily denied on February 13, 2006 (Exhibit  
17 VV).

## 18 **E. PROCEEDINGS ON SECOND PCR PETITION**

19 On March 22, 2004 (in the interim between the denial of his first petition, and his  
20 petition for review therefrom), Petitioner filed a second Notice of Post-Conviction Relief in  
21 each case.<sup>1</sup> (Exhibits Z and PP.) On April 14, 2004, the trial court summarily dismissed the  
22 notices as barred under Arizona's preclusion bar, Rule 32.2(a), Arizona Rules of Criminal  
23 Procedure. (Exhibit AA, M.E. 4/14/04.)  
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26 <sup>1</sup> Petitioner's Petitions deny filing a second post-conviction relief proceeding. (#1 at  
27 2-3.) However, his Traverse does not rebut Respondent's assertions that such proceedings  
28 were filed, nor does he offering anything to rebut the records provided by Respondents. *See*  
28 U.S.C. § 2248 (allegations of answer "if not traversed, shall be accepted as true except to  
the extent that the judge finds from the evidence that they are not true").

1 Petitioner did not seek further review of this order.

2  
3 **E. PRESENT FEDERAL HABEAS PROCEEDINGS**

4 **Petition** - Petitioner commenced the instant federal habeas proceedings on February  
5 9, 2007 by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (#1) in  
6 case CV-07-0295-PHX-SMM (JRI), and a second Petition (#1) in case CV-07-0296-PHX-  
7 SMM (JRI).

8 Petitioner's Petition in case number CV-07-0295 challenges his conviction in the  
9 attempted murder case (CR-1999-094153) on the following bases: (1) his guilty plea was not  
10 voluntary; (2) he received ineffective assistance of counsel; (3) the use of an outdated prior  
11 conviction violated his rights against double jeopardy; and (4) the prosecution failed to  
12 disclose favorable evidence in electronic surveillance.

13 His petition in case number CV-07-0296 challenges his conviction in the sexual  
14 assault case (CR-1999-091712) on the following bases: (1) his guilty plea was not voluntary;  
15 (2) the grand jury had been improperly impaneled; (3) he received ineffective assistance of  
16 counsel; (4) the use of an outdated prior conviction violated his rights against double  
17 jeopardy.

18 **Consolidation** - In response to Respondents' motion (#11), this Court consolidated  
19 proceedings on the two habeas petitions pursuant to Federal Rule of Civil Procedure 42(a).  
20 (Order 8/3/07, #17.)

21 **Answer** - On September 7, 2007 Respondents filed their Answer (#21), arguing that  
22 Petitioner's guilty plea waived all claims except his allegations in Ground 1 of each Petition  
23 that his guilty pleas were involuntary. As to Ground 1, Respondents argue that the trial court  
24 reasonably determined that the claim is without merit.

25 **Traverse** - Petitioner filed a Traverse on October 29, 2007 (# 30). Petitioner argues  
26 that his guilty plea does not bar any of his claims, and that he received ineffective assistance  
27 of counsel, which rendered his plea involuntary.

28 Petitioner also filed a demand for a jury trial (#45), to which Respondents have

1 objected (#48) asserting that there is no right to a jury trial in a habeas proceeding, citing 28  
2 U.S.C. § 2243.

3 **First Supplements** - On July 3, 2003, the Court directed (#46) Respondent to  
4 supplement the record with the transcript of the plea proceeding and concerning the dismissal  
5 of Count 5 of the indictment. The same date, Respondents responded (#47), arguing that the  
6 trial court orally dismissed Count 5, and that the oral pronouncement was sufficient and  
7 supersedes any written orders. Petitioner filed an Objection to Supplement on July 16, 2008  
8 (#49), arguing that any plea was involuntary, and that Respondents are inconsistent in their  
9 reliance on the written plea agreements.

10 **Second Supplements** - On August 15, 2008, the Court ordered (#50) the parties to  
11 supplement their briefs to address: the availability of concurrent sentencing had Petitioner  
12 gone to trial; the efficacy of Petitioner's plea as a waiver of a double jeopardy claim; and  
13 whether the failure to disclose surveillance of a confidential information denied Petitioner  
14 exculpatory information and rendered his plea involuntary. Respondents filed a Second  
15 Supplement on September 5, 2008 (#51).<sup>2</sup> Petitioner filed Reply on September 26, 2008  
16 (#52).<sup>3</sup>

17 **Concurrent Sentencing** - As to the availability of concurrent sentencing, Respondents  
18 acknowledge that a concurrent sentence was possible at trial on the pled to offenses, but note  
19 that the court alerted Petitioner to this at his plea proceeding. Moreover, they argue, any trial  
20 would likely have been on all charges, including sexual assault charges which would have  
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22 <sup>2</sup> As discussed hereinafter, Respondents Second Supplemental Response raises  
23 several claims of procedural default. Because the undersigned finds the claims without merit,  
24 the exhaustion and procedural default issues are not reached. *See* 28 U.S.C. § 2254(b)(2)  
25 ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding  
the failure of the applicant to exhaust the remedies available in the courts of the State.").

26 <sup>3</sup> The undersigned notes that Petitioner repeatedly points to his lack of legal research  
27 materials and a computer, and his resulting disadvantage. (*See e.g.* #52 at 1.) However, a  
28 greater disadvantage may be imposed by Petitioner's attempts at flowery language which  
often serve only to obfuscate his arguments. Clear, simple, and precise wording normally  
better serves *pro se* litigants.

1 required consecutive sentencing under Ariz. Rev. Stat. § 13-1406(C) (1998), and that his  
2 exposure at trial was far greater than the agreed to sentence, and given the nature of the  
3 charges consecutive sentences remained a likelihood.

4 Petitioner replies that the relevant inquiry is the voluntariness of his plea, that  
5 Respondents have misquoted the plea colloquy, Petitioner made no agreement with the State,  
6 the statutes referenced by Respondents were not in the indictment or plea agreement and are  
7 therefore not applicable, and it is questionable whether the State could or would have  
8 pursued the dismissed charges especially given the victim's insistence on Petitioner receiving  
9 the maximum sentence possible.

10 Double Jeopardy - As to the double jeopardy issues, Respondents argue that  
11 Petitioner's guilty plea did waive these claims because no double jeopardy issue was  
12 apparent on the face of the record, and that he procedurally defaulted any double jeopardy  
13 claim because he did not fairly present such a claim to the trial court, but raised it for the first  
14 time in his reply in support of his petitions. Moreover, Respondents argue, the use of a prior  
15 conviction to enhance a sentence is not a double jeopardy violation. Finally, Respondents  
16 argue that under Ariz. Rev. Stat. § 13-604(U)(1)(b) (1999) Petitioner's 1985 conviction was  
17 not stale for sentence enhancement purposes because the ten year period or such  
18 enhancement was extended by his 1992 incarceration on other charges, and that because he  
19 had four felony priors, the third or greater felonies counted as historical priors under Ariz.  
20 Rev. Stat. § 13-604(U)(1)(d) (1999).

21 Petitioner replies that he checked the double jeopardy box on the PCR petitions, and  
22 argued it in his motion for rehearing, that use of any prior conviction as a basis of for  
23 enhancement is a violation of double jeopardy, and that he challenges only the use of his  
24 trafficking-in-stolen property conviction and the Respondents' reading of the historical priors  
25 statute is strained.

26 Failure to Disclose - As to the failure to disclose, Respondents argue that any  
27 undisclosed evidence would have related to the affirmative defense of entrapment, and that  
28 disclosure of affirmative defenses is not required under *United States v. Ruiz*, 536 U.S. 622

1 (2002). Respondents further argue that any failure to by counsel to discuss such a defense  
2 would not render the plea involuntary, and that Petitioner made an explicit waiver of such  
3 defenses in his plea agreement. Respondents argue that Petitioner's presentation of an  
4 ineffective assistance of counsel claim did not encompass a claim of non-disclosure, and that  
5 presentation in a motion for rehearing was insufficient, and therefore the claim is  
6 procedurally defaulted. They argue the claim is without merit because Petitioner knew the  
7 essential facts concerning the confidential information, and has failed to present evidence that  
8 disclosure would have been beneficial.

9 Petitioner replies that he is incapable of providing the proof of the value of the  
10 undisclosed tapes precisely because they were undisclosed, and counsel was ineffective for  
11 failing to seek their disclosure.

12 **Motion for Temporary Relief** - On February 13, 2009, Petitioner filed a Motion for  
13 Relief (#57) seeking temporary relief in the form of immediate release to the custody of his  
14 mother, based upon the his inability to mourn with his family the May, 2008 death of his  
15 sister. In addition, Petitioner requests an order directing the Clerk to provide him copies of  
16 the Bail Reform Act of 1984. Respondents filed their Response on February 19, 2009 (#58),  
17 arguing *inter alia*, that Petitioner fails to show exceptional circumstances to justify such  
18 release.

### 19 20 **III. APPLICATION OF LAW TO FACTS**

#### 21 **A. DEMAND FOR JURY TRIAL**

22 Plaintiff has filed a "Motion for Right to Jury Trial" (#45) demanding a jury trial in  
23 this habeas proceeding pursuant to Rule 38, Federal Rules of Civil Procedure. No clear  
24 controlling precedent addresses the authority of a magistrate judge to resolve such a motion.  
25 *But see Lawrence v. Hanson*, 197 F.Supp.2d 533, 536 (W.D.Va. 2002) ("request for a jury  
26 trial is 'not dispositive of a claim or defense of a party'"). Accordingly the request is  
27 addressed herein.

28 Rule 39(a) provides that a demand for a jury trial is ineffective if "the court, on

1 motion or on its own, finds that on some or all of those issues there is no federal right to a  
2 jury trial." As noted by Respondents, the statutes governing habeas corpus actions provide  
3 for the Court to determine all factual issues.

4           The court shall summarily hear and determine the facts, and dispose of  
5 the matter as law and justice require.

6 28 U.S.C. § 2243. In *O'Keith v. Johnston*, 129 F.2d 889, 891 (9th Cir. 1942), the Ninth  
7 Circuit addressed the predecessor to § 2243 and held that its direction "that the hearing so  
8 held be 'in a summary way' does not require or permit trial of facts by a jury." *See also* Fed.  
9 Proc. L.Ed. § 41:109 (2008).

10           There thus being no federal right to a jury trial in these habeas proceedings,  
11 Petitioner's Motion should be denied.

## 12 **B. VOLUNTARINESS OF GUILTY PLEA**

13           In Ground 1 of his Petitions, Petitioner argues that his guilty pleas were not knowingly  
14 and voluntarily made. In support of this claim, Petitioner makes the following assertions:

- 15           1. Trial counsel coerced Petitioner into accepting the plea agreements.
- 16           2. Trial counsel failed to properly advise Petitioner about the potential for a  
17 concurrent sentence at trial.
- 18           3. Trial counsel improperly advised Petitioner that the other charges would be  
19 dismissed.
- 20           4. Trial counsel failed to advise Petitioner about the rights he would be giving up  
21 by pleading guilty.

22           **Law on Voluntariness** - "The longstanding test for determining the validity of a  
23 guilty plea is 'whether the plea represents a voluntary and intelligent choice among the  
24 alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)  
25 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). "Where, as here, a defendant is  
26 represented by counsel during the plea process and enters his plea upon the advice of  
27 counsel, the voluntariness of the plea depends on whether counsel's advice was within the  
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1 range of competence demanded of attorneys in criminal cases. . . . [A] defendant who pleads  
2 guilty upon the advice of counsel ‘may only attack the voluntary and intelligent character of  
3 the guilty plea by showing that the advice he received from counsel was [ineffective].’ ” *Hill*,  
4 474 U.S. at 56-57 (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)) (internal  
5 quotation marks and citation omitted).

6 **Law on Ineffective Assistance** - Generally, claims of ineffective assistance of  
7 counsel are analyzed pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). In order  
8 to prevail on such a claim, petitioner must show: (1) deficient performance - counsel’s  
9 representation fell below the objective standard for reasonableness; and (2) prejudice - there  
10 is a reasonable probability that, but for counsel’s unprofessional errors, the result of the  
11 proceeding would have been different. *Id.* at 687-88, 694. Although the petitioner must  
12 prove both elements, a court may reject his claim upon finding either that counsel’s  
13 performance was reasonable or that the claimed error was not prejudicial. *Id.* at 697.

14 **Deficient Performance** - In determining whether counsel performed deficiently, the  
15 court must focus on whether the attorney’s advice was appropriate under the circumstances  
16 existing at the time of the guilty plea. *See Strickland*, 466 U.S. at 690.

17 **Prejudice** - The defendant must prove he was prejudiced from counsel’s  
18 ineffectiveness by demonstrating a reasonable probability “that but for counsel’s errors, he  
19 would either have gone to trial or received a better plea bargain.” *U.S. v. Howard*, 381 F.3d  
20 873, 882 (9th Cir. 2004). *See also Strickland*, 466 U.S. at 694. The Court must assess the  
21 circumstances surrounding the case to determine if the petitioner’s allegation that he would  
22 have proceeded to trial is plausible. *See United States v. Keller*, 902 F.2d 1391, 1394-95 (9th  
23 Cir. 1990)(petitioner failed to show prejudice because he entered plea as alternative to long  
24 trial, possible conviction on more serious charges and a longer sentence; additional  
25 information about parole eligibility was unlikely to affect his decision). This is an objective  
26 analysis that requires the court to examine what a reasonable person would do “without  
27 regard for the ‘idiosyncrasies of the particular decisionmaker.’ ” *Hill*, 474 U.S. at 60  
28 (quoting *Strickland*, 466 U.S. at 695).

1           **Law on Habeas Standard for Relief** - While the purpose of a federal habeas  
2 proceeding is to search for violations of federal law, not every error justifies relief. “[A]  
3 federal habeas court may not issue the writ simply because that court concludes in its  
4 independent judgment that the state-court decision applied [the law] incorrectly.” *Woodford*  
5 *v. Visciotti*, 537 U. S. 19, 24– 25 (2002) (per curiam). Rather, to justify habeas relief a state  
6 court’s decision must be “contrary to, or an unreasonable application of, clearly established  
7 Federal law, as determined by the Supreme Court of the United States” before relief may be  
8 granted. 28 U.S.C. §2254(d)(1). Similarly, habeas relief may be granted based on an error  
9 in a factual determination only where the state-court decision “was based on an unreasonable  
10 determination of the facts in light of the evidence presented in the State court proceeding.”  
11 28 U.S.C. § 2254(d)(2). Moreover, a state prisoner is not free to attempt to retry the facts of  
12 his case in the federal courts. There is a well established presumption of correctness of state  
13 court findings of fact which limits the use of new evidence not presented to the state courts.  
14 This presumption has been codified at 28 U.S.C. § 2254(e)(1), which states that “a  
15 determination of a factual issue made by a State court shall be presumed to be correct” and  
16 the petitioner has the burden of proof to rebut the presumption by “clear and convincing  
17 evidence.”

18           In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Court rejected a Ninth Circuit mandate  
19 for habeas courts to review habeas claims by conducting a *de novo* review prior to applying  
20 the “contrary to or unreasonable application of” limitations of 28 U.S.C. § 2254(d)(1). In  
21 doing so, however, the Court did not preclude such an approach. “AEDPA does not require  
22 a federal habeas court to adopt any one methodology in deciding the only question that  
23 matters under § 2254(d)(1)--whether a state court decision is contrary to, or involved an  
24 unreasonable application of, clearly established Federal law.” *Lockyer*, 538 U.S. at 71.

25           Because the undersigned finds Petitioner’s claims to be without merit, the application  
26 of these limitations is not addressed.

27           **Coercion** - Petitioner argues that trial counsel coerced Petitioner into accepting the  
28 plea agreements. Petitioner avows that counsel repeatedly "said to petitioner, 'if you do not

1 sign these pleas you will be found guilty by the jury within thirty minutes." (Petition, #1 at  
2 5.) Petitioner relates that counsel told him "if you do not sign these plea agreements, you  
3 will not be getting out of prison and be able to walk your daughter down the aisle and give  
4 her hand away when she gets married." (*Id.*) Respondents argue that the trial court's  
5 rejection of Petitioner's claim of coercion by trial counsel "was not an unreasonable  
6 application of *Strickland*." (Answer, #21 at 15-16.) In ruling on this issue during  
7 Petitioner's first PCR proceedings, the trial court found:

8           The Court does not believe that trial counsel was ineffective because he  
9           told Defendant some harsh truths. Advising a defendant to accept a  
10          reasonable plea agreement in a situation where a defendant is almost  
11          certain to be convicted of the charged offenses if the cases proceed to  
12          trial is effective assistance of counsel, not ineffective assistance.

13 (Exhibit X, M.E. 5/21/03 at 5.)

14           Petitioner fails to show that the trial court was in error. "Mere advice or strong urging  
15 by third parties [such as defense counsel] to plead guilty based on the strength of the state's  
16 case does not constitute undue coercion." *Iaea v. Sunn*, 800 F.2d 861, 867 (9<sup>th</sup> Cir. 1986).

17           In this case, as a result of his plea agreement, Movant obtained the dismissal of many  
18 serious charges with the potential for far more prison time than what Petitioner received. In  
19 the sexual assault case, his plea resulted in the dismissal of two counts of sexual assault (class  
20 2 felonies); one count of sexual abuse (a class.5 felony); and one count of kidnaping (a class  
21 2 felony). In the conspiracy to commit murder case, the charge was reduced to an attempt.  
22 Petitioner offers nothing to suggest that the risk of conviction on these other charges was so  
23 unlikely that counsel's advice would amount to a fabrication rather than competent advice.  
24 Rather, the trial court properly characterized counsel's comments as "harsh truths." However  
25 compelling, they were not coercion.

26           **Advice re Sentencing** - Petitioner argues that trial counsel was ineffective because  
27 he failed to properly advise Petitioner about the potential for a concurrent sentence at trial.  
28 (Petition, #1 at physical p. 15, Part J, p. "2".) Counsel can be performing deficiently if he  
fails to advise a defendant of the negative effect of the agreement for consecutive sentencing.  
*See State v. Young*, 106 Ariz. 589, 590, 480 P.2d 345, 346 (Ariz. 1971) ("Only one

1 experienced in the law of sentencing would be aware that the trial judge has the discretion  
2 to order concurrent sentences for separate crimes”).

3 Respondents correctly argue that Petitioner had no option for concurrent sentencing  
4 *under the terms of the plea agreement.*<sup>4</sup> Indeed, it was on this basis that the trial court  
5 rejected this portion of Petitioner's claim.

6 ...Specifically, Defendant faults his attorney for failing to advise him  
7 that he had the “option” to have both sentences run concurrently. The  
8 Court finds that Defendant has failed to raise a colorable claim of  
9 ineffective assistance of counsel. The reason trial counsel did not advise  
10 Defendant there was a possibility that he could receive concurrent  
11 sentences was because that was not an option under the plea agreement  
12 offered to Defendant by the State. The plea agreement stipulated that  
13 the sentences imposed had to run consecutive to each other. Defendant  
14 did not receive any erroneous advice regarding the range of sentence  
15 from either his attorney or from the Court.

11 (Exhibit X, Order 5/21/03.)

12 This appears to miss the point of Petitioner's claim, *i.e.* that counsel failed to alert  
13 Petitioner that (despite the fact that the plea agreement stipulated to consecutive terms), upon  
14 trial the court could have issued concurrent sentences, thus rendering the plea agreement less  
15 favorable.<sup>5</sup>

16 Even so, Respondents also argue that Petitioner is mistaken about the potential for  
17 concurrent sentences at trial. Respondents argue that there were dismissed charges which  
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21 <sup>4</sup> Petitioner argues that he “did not agree with the State that the sentences will run  
22 consecutive” because he spoke only with counsel. (#52 at 3.) The written plea agreement  
23 signed by Petitioner and the State clearly included such an agreement. (*See* Exhibit O, Plea  
24 Agreement at 1.) A separate oral agreement is not required.

25 <sup>5</sup> In his PCR proceeding in the sexual assault case, the claim was not so plainly stated.  
26 Petitioner merely complained that counsel had failed to advise him that under Ariz. Rev. Stat.  
27 § 13-116 his sentences had to be concurrent. (Exhibit W, Reply at 9.) However, in the  
28 conspiracy to commit murder case, he was plainer about his charge that counsel failed to  
advise him of his "option to have both cases run concurrent." (Exhibit MM, Petition at 11.)  
Obviously, the trial court read this as alleging an "option" at the sentencing on the plea. Read  
in the context of Petitioner's claim that the plea was not knowing and he was "unaware", it  
is clear that the "option" was between the plea agreement and his opportunities at trial. It is  
that "option" which is the crux of a knowing and voluntary determination.

1 mandated a consecutive sentence, and a likelihood of consecutive sentences overall.<sup>6</sup>

2 As to mandatory consecutive sentences, Respondents point to Ariz. Rev. Stat. § 13-  
3 1406(C) (1998),<sup>7</sup> which provided: “The sentence imposed on a person for a sexual assault  
4 shall be consecutive to any other sexual assault sentence imposed on the person at any time.”  
5 Petitioner had been charged with three counts of sexual assault, with at least two historical  
6 felony convictions, which each carried a presumptive sentences of 15.75 years. Those  
7 charges alone could have amounted to a combined sentence of 47.25 years.

8 In addition, under Arizona law, the trial judge generally has discretion whether to  
9 order sentences to be run consecutively or concurrently. *State v. Young*, 106 Ariz. 589, 590,  
10 480 P.2d 345, 346 (Ariz. 1971) (“the trial judge has the discretion to order concurrent  
11 sentences for separate crimes”); *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308  
12 (Ariz. 1983) (“The decision to impose consecutive sentences rests with the discretion of the  
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16 <sup>6</sup> Petitioner argues that there was no likelihood that the state would have gone to trial  
17 on all of the charged offenses. Petitioner’s theory is that the victim wanted maximum  
18 punishment, and therefore the prosecutor would not have agreed to dismiss any charges  
19 unless they were unprepared and unwilling to go to trial on them. Petitioner ignores the  
20 possibility that the sexual assault victim simply preferred to avoid testifying, or that the  
21 prosecution preferred to avoid the risks always inherent in trial, or simply thought the  
22 outcome obtained by the plea agreement was just and in the best interests of the State.

23 <sup>7</sup> Petitioner argues that the sentencing statutes cited by Respondents could not have  
24 been applied to him because the specific subsections were not identified in the Indictment.  
25 Citation of the specific subsections is not necessarily required. *See State v. Kidd*, 116 Ariz.  
26 479, 481, 569 P.2d 1377, 1379 (Ariz.App. 1977) (“when the Legislature spells out a specific  
27 crime in a subsection of a statute which is the only subsection that will apply to the facts of  
28 a case the conviction will be upheld even though the defendant was charged under the  
general section number without particularizing the subsection”); and 41 Am. Jur. 2d  
Indictments and Informations § 110. Moreover, the failure to include such citations could  
have been cured by amendment of the indictment, eliminating the likelihood that the absence  
would have altered Petitioner’s decision to plead guilty. *See State v. Duncan*, 149 Ariz. 357,  
361, 718 P.2d 1010, 1014 (Ariz.App. 1985) (“The general rule is that error in the citation of  
a statute does not invalidate an indictment unless the error misleads the defendant to his  
prejudice.”).

1 trial judge." ).<sup>8</sup> Nonetheless, as noted by Respondents, it seems unlikely that a judge would  
2 not impose a consecutive sentence for the conspiracy to commit first degree murder of the  
3 victim. This would have added at least 25 additional years imprisonment. *See* Ariz. Rev.  
4 Stat. §§ 13-1105(C) (first degree murder is class 1 felony), and 13-1003(D) (1999)  
5 (conspiracy to commit class 1 felony "punishable by a sentence of life imprisonment without  
6 possibility of release on any basis until the service of twenty-five years").

7 Thus, the only way Petitioner would have been assured of being better off without the  
8 plea agreement he made, was if the State would have been willing to make the same plea  
9 agreement, but just without the stipulation as to sentencing. There is no indication that the  
10 State was willing to make such an agreement. Thus, the undersigned finds no real likelihood  
11 that even had trial counsel fully informed Petitioner about all possible outcomes with regard  
12 to concurrent or consecutive sentences, that Petitioner would not have made entered into the  
13 plea agreement.

14 Moreover, Petitioner was advised by the trial court at his plea proceeding that he was  
15 foregoing the potential for concurrent sentences:

16 THE COURT: And do you understand that while the  
17 Court would have the option of running these sentences concurrently,  
18 you have agreed with the State that the sentences will run consecutive,  
19 so one after the other.

20 Is that your agreement?

21 THE DEFENDANT: Yes, Your honor.

22 (Exhibit XX, R.T. 5/15/00 at 6-7.)<sup>9</sup> Despite being advised of the foregone possibility of  
23 concurrent sentencing, and Petitioner's acknowledgment of his understanding, Petitioner  
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25 <sup>8</sup> The general Arizona statute addressing such determination, Ariz. Rev. Stat. § 13-  
26 708, provides no limitations on the judge's discretion, but merely establishes a rule of  
27 construction when the judge is silent upon the concurrent/consecutive determination. *State*  
28 *v. Ward*, 200 Ariz. 387, 389, 26 P.3d 1158, 1160 (Ariz.App. 2001) ("Section 13-708 neither  
creates a presumption for consecutive or concurrent sentences, nor imposes any restrictions  
on a trial court's discretion in choosing between consecutive or concurrent sentences."). *See*  
*also* Ariz. R. Crim. Proc. 26.13 (restating rule of construction in § 13-708).

<sup>9</sup> Petitioner's Second Supplemental Reply takes exception with Respondents'  
paraphrasing of this excerpt. (#51 at 3.) The paraphrase (#51 at 2) is in accord with the  
undersigned's reading of the transcript.

1 proceeded to plead guilty. *See Chau Hon Mow v. United States*, 730 F.2d 1308 (9th  
2 Cir.1984), *cert. denied*, 470 U.S. 1031 (1985) (even if counsel did not properly advise  
3 regarding sentence, defendant could not assert ineffective assistance where the court  
4 informed him before entering plea).

5 Based upon the foregoing, the undersigned finds that any deficiency by counsel in  
6 advising Petitioner in this regard did not prejudice Petitioner.

7 **Advice re Dismissals** - Petitioner argues that counsel was ineffective because trial  
8 counsel advised Petitioner that all other charges would be dismissed with prejudice in  
9 exchange for his guilty pleas under the plea agreements. (Petition, #1 at physical p. 15, Part  
10 J, p. "2".) Although the trial court's Sentence in the sexual assault case failed to include the  
11 dismissal of Count 5 (see Exhibit P, Sentence at 3), the court orally dismissed the count: "At  
12 this time it's ordered in CR 99-91712, dismissing Counts 2, 3, 4 and 5." (Exhibit YY, R.T.  
13 6/15/00 at 29.)

14 In his Supplemental Reply (#49), Petitioner takes exception with Respondent's  
15 reliance on the transcript. However, as pointed out by Respondents, Arizona law makes the  
16 trial court's oral pronouncement binding. "Oral pronouncement in open court controls over  
17 the minute entry." *State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989). "Where  
18 there is a discrepancy between the oral sentence and the written judgment, the oral  
19 pronouncement of sentence controls." *State v. Hanson*, 138 Ariz. 296, 304-305, 674 P.2d  
20 850, 858 - 859 (Ariz.App. 1983).

21 Petitioner fails to show any ineffectiveness of counsel with regard to his  
22 representation about the charges to be dismissed.

23 **Advice re Rights Given Up** - Next, Petitioner argues that his plea was involuntary  
24 because trial counsel failed to advise Petitioner about the rights he would be giving up by  
25 pleading guilty. Petitioner advised the trial court of the exact opposite:

26 THE COURT: Did you discuss with [your attorney] the  
27 Constitutional rights you give up when you enter these "guilty" pleas?  
28 THE DEFENDANT: Yes, Your Honor.

(Exhibit XX, R.T. 5/15/00 at 9.) "These solemn declarations made in open court carry a

1 strong presumption of verity.” *United States v. Rivera-Ramirez*, 715 F.2d 453, 458 (9th  
2 Cir.1983). Petitioner offers nothing besides his bare allegation to overcome that  
3 presumption. That is not sufficient.

4 Moreover, the trial court carefully reviewed his waiver of his rights to: plead not  
5 guilty, counsel, jury trial, presumption of innocence, compulsory cross examination and  
6 confrontation, silence, and direct appeal. (Exhibit XX, R.T. 5/15/00 at 9-11.) Petitioner  
7 explicitly acknowledged each of those rights, and then explicitly consented to giving up those  
8 rights.

9 THE COURT: And do you understand when you enter  
10 “guilty” pleas, you do give up those rights?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Is it your wish to do that at this time?

13 THE DEFENDANT: Yes it is, Your Honor.

14 (Exhibit XX, R.T. 5/15/00 at 11.) Petitioner does not allege that the trial court’s advice was  
15 insufficient. Thus, again, any deficiency in counsel’s advice was cured by the court’s advice.  
16 *Chau Hon Mow, supra.*

17 **No Assertion that Plea Would Have Been Rejected** - As noted above, Petitioner  
18 must prove he was prejudiced from counsel's ineffectiveness by demonstrating a reasonable  
19 probability that but for his attorney's errors, he would not have pleaded guilty and would  
20 have insisted on going to trial or would have gotten a better plea offer. *Hill*, 474 U.S. at  
21 58-59; *Strickland*, 466 U.S. at 694. Petitioner makes no assertion that he would have done  
22 so. He simply complains that the advice of counsel was defective. In light of the benefits  
23 obtained by Petitioner under the plea agreement, and the risks of his conviction at trial, the  
24 undersigned finds no basis for believing that Petitioner would have rejected the plea  
25 agreement.

26 **Conclusion re Voluntariness of Plea** - Based upon the foregoing, the undersigned  
27 concludes that Petitioner’s plea was not upon the basis of advice from counsel who rendered  
28 effective assistance, and thus the Petitioner’s plea was entered knowingly and voluntarily.  
Accordingly, Ground 1 of both Petitions is without merit.

1 **B. EFFECT OF GUILTY PLEA AS WAIVER**

2 Respondents assert that as a result of his guilty plea, Petitioner has waived his right  
3 to assert any claims other than the voluntariness of the plea. (Answer, #21 at 7-8.)

4 Generally, that is the case.

5 When a criminal defendant has solemnly admitted in open court that he  
6 is in fact guilty of the offense with which he is charged, he may not  
7 thereafter raise independent claims relating to the deprivation of  
8 constitutional rights that occurred prior to the entry of the guilty plea.  
9 He may only attack the voluntary and intelligent character of the guilty  
10 plea.

11 *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

12 Moreover, Petitioner’s written Plea Agreement provided:

13 Unless this plea is rejected by the court or withdrawn by either party,  
14 the defendant hereby waives and gives up any and all motions,  
15 defenses, objections or requests which he has made or raised, ro could  
16 assert hereafter, to the court’s entry of judgment against him and  
17 imposition of a sentence upon him consistent with this agreement. Be  
18 entering this agreement the defendant further waives and gives up the  
19 right to appeal.

20 (Exhibit O, Plea Agreement at 2.)

21 Because, as discussed above, Petitioner’s plea was knowingly and voluntarily entered,  
22 he is bound by these waivers.

23 **Ineffective Assistance Claims** -This waiver would apply to Petitioner’s Ground 2 in  
24 CV-07-0295 and Ground 3 in CV-07-0296. In the former, Ground 2 asserts trial counsel’s  
25 ineffectiveness for failing to: (1) pursue pretrial discovery; (2) properly handle the motion  
26 to suppress and related proceedings; and (3) properly advise Petitioner on an entrapment  
27 defense. (CV-07-0295, Petition #1 at physical page 17-19.) In the latter, Ground 3 asserts  
28 trial counsel’s ineffectiveness for failing to: (1) properly handle the motion to suppress and  
related proceedings; and (2) advising Petitioner to “agree to everything when he was  
questioned by the Judge” at the guilty plea proceedings. (CV-07-0296, Petition #1 at  
physical pages 18-20.) All of these claims relate to conduct of counsel prior to entry of the  
guilty plea and Petitioner does not assert that they precluded his plea from being knowing  
and voluntary.

1           Consequently, these claims were waived by Petitioner’s guilty plea. *See U.S. v.*  
2 *Broce*, 488 U.S. 563, 572 (1989) (discussing guilty plea’s waiver of errors by counsel).

3           **Double Jeopardy Errors** - In Ground 3 of CV-07-0295 and Ground 4 in CV-07-  
4 0296, Petitioner argues that the use of an outdated prior conviction against him to enhance  
5 his offense was a violation of the Double Jeopardy Clause. Ordinarily, double jeopardy  
6 claims are excluded from the general waiver inherent in a guilty plea. “Where the State is  
7 precluded by the United States Constitution from haling a defendant into court on a charge,  
8 federal law requires that a conviction on that charge be set aside even if the conviction was  
9 entered pursuant to a counseled plea of guilty.” *Menna v. New York*, 423 U.S. 61, 62 (1975).

10           Respondents argue that Petitioner’s guilty plea did waive these claims because no  
11 double jeopardy issue was apparent on the face of the record. *See e.g. U.S. v. Broce*, 488 U.S.  
12 563, 572 (1989) (distinguishing and enforcing general waiver on simultaneous guilty plea  
13 on multiple charges which were arguably the same offense, because the overlap was not  
14 apparent on the face of the charges). Here, however, the very nature of Petitioner’s claim  
15 (that a sentencing enhancement based on a stale conviction violates double jeopardy), joined  
16 with the underlying facts having been pled in the Indictment as amended by the Allegation  
17 of Historical Priors, precludes application of the *Broce* exception. Petitioner’s claim presents  
18 a question of law which requires only an examination of the criminal charge on its face and  
19 does not depend on an undeveloped factual record. (It is Respondents’ arguments to avoid  
20 the double jeopardy issue which require information outside the charging documents.)

21           On the other hand, Petitioner made an express waiver of his claims and defenses in  
22 his plea agreement. Such an express waiver can bar presentation of a double jeopardy claim.  
23 *See U.S. v. Petty*, 80 F.3d 1384 (9<sup>th</sup> Cir. 1996) (double jeopardy claim barred by agreement  
24 to waive appellate rights). Here, however, Petitioner’s claim is not that he had some defense  
25 to his conviction, but that his sentence was improper as a violation of the double jeopardy  
26 clause. “[A] defendant who waives his right to appeal does not subject himself to being  
27 sentenced entirely at the whim of the district court. For example, a defendant could not be  
28 said to have waived his right to appellate review of a sentence imposed in excess of the

1 maximum penalty provided by statute or based on a constitutionally impermissible factor  
2 such as race.” *U.S. v. Marin*, 961 F.2d 493, 496 (4<sup>th</sup> Cir. 1992). Accepted at face value,  
3 Petitioner’s argument is that his sentence included punishment for a prior crime for which  
4 he had already been convicted and sentenced. Surely a waiver of defenses or appeal rights  
5 could not extend to permitting an imposition of a sentence of that sort.

6 Accordingly, the undersigned concludes that this claim was not waived by virtue of  
7 Petitioner’s guilty plea or his express waiver..

8 **Brady Disclosure** - In Ground 4 in CV-07-0295, Petitioner argues that the  
9 prosecution failed to disclose favorable evidence in electronic surveillance. Petitioner  
10 suggests that the electronic surveillance not provided by the prosecution would have shown  
11 that the confidential informant relied upon for his conspiracy to commit murder charges was  
12 an “agent provocateur” who entrapped him. Such information could establish an affirmative  
13 defense.

14 However, in *U.S. v. Ruiz*, 536 U.S. 622 (2002), the Supreme Court held that the  
15 waivers inherent in a guilty plea extended to claims that the prosecution failed to disclose  
16 favorable impeachment or affirmative defense materials in violation of *Brady v. Maryland*,  
17 373 U.S. 83 (1963).<sup>10</sup> “We do not believe the Constitution here requires provision of this  
18 [affirmative defense] information to the defendant prior to plea bargaining.” 536 U.S. at 633.

19 Accordingly, this claim was waived by Petitioner’s guilty plea.

20 **Grand Jury Panel** - In Ground 2 in case number CV-07-0296, Petitioner argues that  
21 the grand jury had been improperly impaneled in the sexual assault case. Petitioner’s guilty  
22 plea waived this claim. *See Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (holding guilty  
23 plea waived challenge to grand jury, but distinguishing related claim based on ineffective  
24 assistance).

25 **Summary re Waiver** - Based on the foregoing, the undersigned concludes that

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27 <sup>10</sup> *Ruiz* further found that the right to all disclosure could be expressly waived as part  
28 of a plea agreement. 536 U.S. at 633. Here, however, the Plea Agreement’s waiver of rights  
did not extend to *Brady* disclosures.

1 Petitioner’s guilty plea and plea agreement resulted in a waiver of Petitioner's Ground 2 in  
2 CV-07-0295 and Ground 3 in CV-07-0296 (ineffective assistance), Ground 4 in CV-07-0295  
3 (*Brady* disclosures), and Ground 2 in case number CV-07-0296 (Grand Jury panel).  
4 Conversely, the undersigned finds that Ground 3 of CV-07-0295 and Ground 4 in CV-07-  
5 0296 (Double Jeopardy) were not waived by either his guilty plea or plea agreement.

6  
7 **C. DOUBLE JEOPARDY CLAIM**

8 In Ground 3 of CV-07-0295 and Ground 4 in CV-07-0296, Petitioner argues that the  
9 use of an outdated prior conviction against him to enhance his offense was a violation of the  
10 Double Jeopardy Clause. Liberally construed, Petitioner’s theory runs thus: (1) his sentence  
11 was “enhanced” based on a 1985 conviction; (2) under the state statutes, that conviction was  
12 too old to be counted as a sentencing enhancement for the instant conviction; and (3)  
13 therefore the extra years imprisonment must be construed as new punishment for the old  
14 conviction.

15 Respondents properly argue that the use of a prior conviction to enhance a sentence  
16 is not a double jeopardy violation. “An enhanced sentence imposed on a persistent offender  
17 thus ‘is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes’  
18 but as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated  
19 offense because a repetitive one.’” *Monge v. California*, 524 U.S. 721, 728 (1998) (quoting  
20 *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

21 If Petitioner did not assert that the statutes did not authorize the enhancement, *Monge*  
22 would resolve the issue. But, he makes the argument, and it could, if correct, make all the  
23 difference.<sup>11</sup>

24 However, Respondents also argue that Petitioner’s 1985 conviction was in fact not  
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26 <sup>11</sup> The undersigned is not unmindful of (at least) the appearance that Petitioner is  
27 stretching to make a routine sentencing error into a constitutional claim. Because the facts  
28 do not support Petitioner’s claim, the presumption is made that double jeopardy would  
extend to an unauthorized sentencing enhancement based on a prior conviction.

1 stale.<sup>12</sup> Under Ariz. Rev. Stat. § 13-604(U)(1)(b) (1998)<sup>13</sup> a Class 2 or 3 felony prior  
2 conviction counted for enhancement purposes only if it had been committed within ten years  
3 of the offense being sentenced. Here, Petitioner’s sentence was enhanced based on a 1985  
4 conviction for trafficking in stolen property which was committed on May 30, 1984.  
5 (Exhibit G, Allegation of Historical Priors.) His instant offenses were committed on April  
6 15, 1999 and August 18, 1999. (Exhibit X, PCR Order 5/21/03.) Ordinarily, that would have  
7 been 5 years too late for the 1985 conviction to count.

8 However, the statute also provided that “[a]ny time spent incarcerated is excluded in  
9 calculating if the offense was committed within the preceding ten years.” Ariz. Rev. Stat. §  
10 13-604(U)(1)(b) (1998). Petitioner acknowledges that he was in prison on the 1985  
11 conviction until March 16, 1989. (Exhibit OO, Mot. Rehearing at 10.) That would only  
12 extend the utility of the 1985 conviction through March 15, 1999, one month too little to  
13 apply to his sexual assault offense, and over five months too little to apply to his conspiracy  
14 offense. Respondents argue, however, that Petitioner also spent time incarcerated in  
15 connection with his 1992 conviction. “The plain meaning of the phrase ‘any time spent  
16 incarcerated’ indicates that the Legislature intended to exclude all time that a defendant spent  
17 in prison, regardless of whether that incarceration was for the particular prior conviction at  
18 issue or for some other crime.” *State v. Derello*, 199 Ariz. 435, 439, 18 P.3d 1234, 1238  
19 (Ariz.App 2001).

20 Petitioner’s 1992 conviction was issued on April 6, 1992. (Exhibit G, Alleg. Hist.  
21 Priors at 1.) He was incarcerated until November 16, 1993. (#31, Exhibit WW, R.T. 5/5/00  
22 at 8.) Thus, Petitioner spent some 19 months incarcerated on that conviction. That would

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23 <sup>12</sup> Respondents also argue that because Petitioner had four felony priors, the third or  
24 greater felonies, regardless of their age, counted as historical priors under Ariz. Rev. Stat. §  
25 13-604(U)(1)(d) (1999) (“Any felony conviction that is a third or more prior felony  
26 conviction”). While that might have been an effective argument at trial, the court did not  
27 sentence Petitioner on the basis of his third or greater prior, but on the 1985 conviction,  
28 which was his earliest conviction. (*See* Exhibit P, Sentence at 2; and Exhibit G, Alleg. Hist.  
Priors.)

<sup>13</sup> Retained by Az. Sess. Laws 1999, Ch. 261 § 5, but renumbered to subsection (V).

1 extend his 1985 conviction until October, 2000, more than enough to take it within the ten  
2 year limit of § 13-604(U)(1)(b) for application to the instant 1999 offenses.

3 Accordingly, Petitioner's sentence was properly enhanced based upon his 1985  
4 conviction, and no new sentence on that conviction was included in the instant sentence.  
5 Therefore, Petitioner's double jeopardy claim is without merit.

#### 6 7 **D. SUMMARY RE PETITIONS**

8 Based on the foregoing, the undersigned reaches the following conclusions concerning  
9 the grounds for relief asserted in Petitioner's two petitions. As to CV-07-0295 (Attempted  
10 Murder): Ground 1 (Involuntary Plea) is without merit; Ground 2 (Ineffective Assistance)  
11 was waived by his guilty plea and is without merit; Ground 3 (Double Jeopardy) is without  
12 merit; and Ground 4 (*Brady* Disclosures) was waived by his guilty plea and thus is without  
13 merit. As to CV-07-0296 (Sexual Assault): Ground 1 (Involuntary Plea) is without merit;  
14 Ground 2 (Grand Jury) was waived by his guilty plea and thus is without merit; Ground 3  
15 (Ineffective Assistance) was waived by his guilty plea and thus is without merit; and Ground  
16 4 (Double Jeopardy) is without merit.

#### 17 18 **E. MOTION FOR TEMPORARY RELIEF**

19 On February 13, 2009, Petitioner filed a Motion for Relief (#57) seeking temporary  
20 relief. Petitioner seeks to be released pending a ruling in this case, citing his lack of  
21 opportunity to grieve with his family over the May, 2008 death of his sister. Respondents  
22 filed their Response on February 19, 2009 (#58). Petitioner has not replied.

23 Federal Rules of Appellate Procedure Rule 23 governs the release of a prisoner  
24 collaterally attacking a conviction through a habeas petition. *See United States v. Mett*, 41  
25 F.3d 1281, 1282 (9th Cir. 1994) (attacking a federal sentence); and *Marino v. Vasquez*, 812  
26 F.2d 499, 507 (9th Cir. 1987) (attacking a state court sentence). The courts have "reserved  
27 bail for 'extraordinary cases involving special circumstances or a high probability of  
28 success.'" *Mett*, 41 F.3d at 1282.

1 For the reasons discussed herein above, Petitioner cannot show a probability of  
2 success. Moreover, a denial of his petition as recommended herein would render this request  
3 moot.

4 "Special circumstances" have been found to include such things as "a serious  
5 deterioration of health while incarcerated, and unusual delay in the appeal process", *Salerno*  
6 *v. United States*, 878 F.2d 317 (9th Cir. 1987) and situations where "the sentence was so  
7 short that if bail were denied and the habeas petition were eventually granted, the defendant  
8 would already have served the sentence", *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3rd Cir.  
9 1992). The death of a family member is not such a special circumstance. It is wholly  
10 unrelated to Petitioner's habeas proceeding, and the separation from family, even at such  
11 times, is a necessary consequence and part of the punitive nature of imprisonment.

12 Finally, Petitioner, offers nothing to support his request to be provided copies of the  
13 Bail Reform Act.

14 Accordingly, this motion should either be denied as without merit, or denied as moot  
15 if the recommendation to deny the Petition is adopted.

#### 16 17 **IV. RECOMMENDATION**

18 **IT IS THEREFORE RECOMMENDED** that Petitioner's "Motion for Right to Jury  
19 Trial," filed July 2, 2008 (#45) be **DENIED**.

20 **IT IS FURTHER RECOMMENDED** that Petitioner's Petition for Writ of Habeas  
21 Corpus, filed February 9, 2007 (#1) in case CV-07-0295-PHX-SMM (JRI) be **DENIED**.

22 **IT IS FURTHER RECOMMENDED** that Petitioner's Petition for Writ of Habeas  
23 Corpus, filed February 9, 2007 (#1) in case CV-07-0296-PHX-SMM (JRI) be **DENIED**.

24 **IT IS FURTHER RECOMMENDED** that Petitioner's Motion for Temporary  
25 Relief, filed February 13, 2009 (#57) be **DENIED**.

#### 26 27 **V. EFFECT OF RECOMMENDATION**

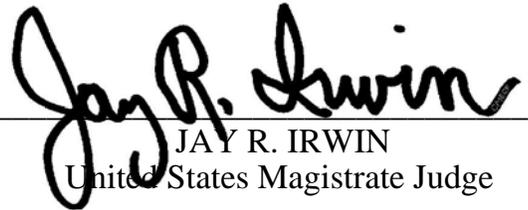
28 This recommendation is not an order that is immediately appealable to the Ninth

1 Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of*  
2 *Appellate Procedure*, should not be filed until entry of the district court's judgment.

3 However, pursuant to *Rule 72(b), Federal Rules of Civil Procedure*, the parties shall  
4 have ten (10) days from the date of service of a copy of this recommendation within which  
5 to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing  
6 Section 2254 Proceedings. Thereafter, the parties have ten (10) days within which to file  
7 a response to the objections. Failure to timely file objections to any factual or legal  
8 determinations of the Magistrate Judge will be considered a waiver of a party's right to *de*  
9 *novo* consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup>  
10 Cir. 2003)(*en banc*).

11  
12 DATED: March 11, 2009

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JAY R. IRWIN  
United States Magistrate Judge