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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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David Owens,

)

CIV 13-8228-PCT-JAT (MHB)

10

Petitioner,

)

**REPORT AND RECOMMENDATION**

11

vs.

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Charles L. Ryan, et al.,

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Respondents.

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TO THE HONORABLE JAMES A. TEILBORG, UNITED STATES DISTRICT COURT:

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Petitioner David Owens, who is confined in the Arizona State Prison

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Complex-Eyman, Meadows Unit, in Florence, Arizona, filed a *pro se* Petition for Writ of

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Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondents filed an Answer on

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February 21, 2014 (Doc. 15), and Petitioner filed his Reply on March 19, 2014 (Doc. 18).

20

**BACKGROUND<sup>1</sup>**

21

The pre-sentence report provides the following account of the facts:

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An extensive investigation was directed by Detective Tony Ruppel into area home burglaries occurring between June and November 2001, with similar modus operandi: Cutting or removing screens from windows to gain entrance, master bedroom affected only, mostly jewelry taken, nothing rummaged through, little or no latent finger prints, no shoe impressions in the dirt and block walls concealing entry into houses that looked expensive. A search warrant was obtained on November 5, 2001 for the residence of defendant David Owens (38) ... Evidence was gathered during the search linking the

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<sup>1</sup> Unless otherwise noted, the following facts are derived from the exhibits submitted with Doc. 15 – Respondents’ Answer.

1 defendant to multiple home burglaries in the area. Also found was  
2 pornographic material involving children.

3 Detective Ramona Tepfer headed up the investigation into the pornographic  
4 materials found in the defendant's home. This investigation revealed the  
5 defendant had surreptitiously video-taped multiple victims, mainly juvenile  
6 females, while they were dressing, playing or sleeping. This videotaping  
7 occurred during the same time frame as the burglaries. He had also molested  
8 a female juvenile victim by reaching through a window and touching her in the  
vaginal area while she slept, while he was videotaping at the same time. The  
defendant's modus operandi in these incidents was to gain entrance into rooms  
(mainly bedrooms) by cutting or removing screens to windows, using night  
vision equipment and videotape victims while they were unaware. The  
defendant was also known to cut pieces of carpet and glue them to the bottoms  
of his shoes so as to be quieter during both his burglaries and videotaping.

9 (Exh. V at 2-3.) The pre-sentence report stated Petitioner had committed nine burglaries  
10 occurring approximately between July and November of 2001, and that he had stolen  
11 property ranging in worth from \$3,400 and \$25,000. (Id. at 3-4.) The report also listed seven  
12 instances between June and November of 2001, in which Petitioner illegally entered homes  
13 and unlawfully videotaped six young girls ranging in age from 5 to 14 years old, and one  
14 adult female. (Id. at 4.) The report also indicated that Petitioner had sexually molested one  
15 of the minor victims while videotaping her. (Id.)

16 On November 16, 2001, Petitioner was indicted by grand jury with 33 counts in cause  
17 number CR-2001-1461, including: 11 counts of second-degree burglary, class 3 felonies  
18 (counts 1, 3, 5, 7, 16, 18, 20, 23, 26, 30, 33); six counts of theft, class 3 felonies (counts 2,  
19 4, 6, 8, 9, 12); three counts of first-degree trafficking in stolen property, class 2 felonies  
20 (counts 10, 11, 13); 12 counts of unlawful surreptitious videotaping, class 5 felonies (counts  
21 14, 17, 19, 21, 22, 24, 25, 27, 28, 29, 31, 32); and one count of molestation of a child, a class  
22 2 felony (count 15). (Exh. A.) On January 10, 2002, Petitioner was indicted by a grand jury  
23 and charged with 19 counts of sexual exploitation of a minor, class 2 felonies, in matter  
24 number CR-2002-0051, in connection with child pornography that was found on his  
25 computer. (Exh. B.) The State subsequently filed allegations of prior felony convictions,  
26 which included: four counts of burglary from 1984 in San Bernardino County, California;  
27 seven counts of concealing stolen property also from 1984 in San Bernardino, California;  
28 vehicle theft in 1993 in San Diego, California; and lewd and lascivious acts upon a child

1 under the age of 14 in 1995, in Riverside County, California, which was a dangerous crime  
2 against children. (Exh. D.)

3 During a January 22, 2002 arraignment, Petitioner, who was represented by the  
4 Mohave County Public Defender's Office, pleaded not guilty. (Exhs. C, EEE.) On February  
5 5, 2002, Petitioner filed a motion to suppress a number of items obtained during the search  
6 of his home, including electronic equipment such as videotapes, cameras, notebooks, CDs,  
7 and other computer equipment, claiming that these had been obtained in an unlawful search.  
8 (Exh. I.) The facts surrounding the search of Petitioner's home, as presented in the  
9 suppression hearing, were described by the trial court as follows:

10 On November 2, 2001, Cerbat Justice of the Peace John Taylor issued a search  
11 warrant as requested by the Kingman Police Department. The search warrant  
12 was for 2732 Walapai Avenue in Kingman, regarding burglary, theft and  
13 trafficking in stolen property investigations of David Owens. There is no  
14 dispute that this warrant was valid and issued upon a finding of probable cause  
15 by Judge Taylor.

16 The search team, among others, consisted of Kingman Police Department  
17 Officers Anthony Ruppel and Ramona Tepfer and Department of Public Safety  
18 Officer David Huerta. Upon entry of the residence at 2732 Walapai, in the  
19 course of processing the scene, Officer Ruppel located a photograph of a minor  
20 girl dressed in a towel. Officer Ruppel knew this young girl and questioned  
21 how such a photograph was in the possession of the defendant. Officer Tepfer  
22 found in plain view handwritten notes that, based on her sex and computer  
23 crime training and experience, she believed to be child pornography sites.  
24 Independent of those findings, Officer Huerta generally from a narcotic detail,  
25 found a tape on a VCR and started to play it. Officer Huerta testified that on  
26 search warrants with his detail (M.A.G.N.E.T.) that their search warrants  
27 typically have language that allow officers to play VCR tapes in VCRs. This  
28 procedure was not in the Kingman Police Department search warrant presented  
to Judge Taylor.

21 The testimony presented indicated that when these items were found that the  
22 search was halted and the premises remained secured by on scene law  
23 enforcement. Officer Ruppel took the new information and telephoned the  
24 issuing magistrate to expand the search to include items that may have  
25 evidence of child pornography such as computers, VCRs, DVDs, floppy disc,  
26 mailing lists, photographs and anything to do with pre-teen pornographic  
27 websites. This presentation to Judge Taylor was made under oath  
28 telephonically from the Kingman Police Department. A transcript of this  
affidavit was admitted in evidence as Exhibit 4. Judge Taylor did swear in  
Officer Ruppel and asked him for the State's reasons to expand the search  
warrant. Officer Ruppel first told Judge Taylor about the handwritten note of  
possible pornographic websites of preteens, the VCR incident and lastly about  
the photographs. Judge Taylor asked probative questions which were  
appropriately responded to by Officer Ruppel. Judge Taylor then stated that he

1 gave his permission to conduct the additional search for items specifically set  
2 out.

3 Officer Ruppel returned to the Walapai residence and the search for burglary,  
4 theft, trafficking in stolen property and sex crimes against children was  
5 conducted. The record reflects that the entire search occurred after Officer  
6 Ruppel returned with Judge Taylor's authority to seize items that may contain  
evidence of sex crimes against children. Officer Ruppel was away from the  
scene approximately one-half hour. Officer Ruppel had the Kingman Police  
Department staff transcribe the conversation with Judge Taylor. No one  
contests the authenticity of this transcription.

7 (Exh. Q.)

8 In his motion to suppress, Petitioner argued that the electronic and computer materials  
9 were not within the scope of the warrant, and that the State had failed to obtain a new warrant  
10 as required by the Fourth Amendment, the Arizona Constitution, and Arizona law. (Exh. I.)  
11 The State filed a response on February 15, 2002. (Exh. J.) Petitioner filed a reply on  
12 February 21, 2002. (Exh. K.)

13 On March 5, 2002 the court held an evidentiary hearing on the motion to suppress.  
14 (Exhs. L, CCC.) Although attorney Michael Grondin initially represented Petitioner, on the  
15 first day of the evidentiary hearing, another attorney from the Mohave County Public  
16 Defender's Office, Frank E. Dickey, appeared to represent Petitioner, and did so throughout  
17 the hearing. (Exh. CCC.) At the end of the first day, Petitioner had the following exchange  
18 with the court concerning the substitution:

19 MR. OWENS: It wasn't brought to my attention –

20 THE COURT: You have the right to remain silent. Anything you say could be  
21 used against you.

22 MR. OWENS: I understand that, Your Honor. I –

23 MR. DICKEY: Because Mr. Grondin is not here, Your Honor.

24 MR. OWENS: I don't know, but I am just saying it wasn't brought to my  
25 attention. Mr. Grondin assured me that he'd be my lawyer. He also has other  
information and knowledge concerning this –

26 THE COURT: Well, I don't know where Mr. Grondin is today or what the  
27 activities of the public defender's office attorney, so I am unable to help you  
with that.

28 MR. OWENS: I understand that. I just was making a note here that this was  
not brought to my attention, and Mr. Grondin does have more information me

1 and him exchanged and he remains as my attorney. No disrespect to the public  
2 defender's and Court for giving –

3 THE COURT: There's still many opportunities for whatever Mr. Grondin  
4 knows to be conveyed, and perhaps you can be back at this continuation of this  
5 hearing and I am going to continue this hearing.

6 (Exh. CCC at 21-22.) The hearing continued on March 14, 2002, at the end of which the  
7 court ordered supplemental briefing. (Exh. BBB at 59-60.) On March 22, the State filed a  
8 supplemental brief, citing additional authority concerning telephonic search warrants. (Exh.  
9 M.)

10 On March 25, Petitioner moved to substitute his prior attorney Michael Grondin, who  
11 was no longer with the public defender's office. (Exh. N.) On April 9, 2002, Mr. Grondin  
12 filed a supplemental memorandum on Petitioner's behalf, citing a number of cases  
13 concerning the requirement for a written affidavit or warrant, and arguing that the officers  
14 lacked good faith, and that the inevitable discovery doctrine did not permit officers to  
15 conduct searches without warrants. (Exh. P.)

16 On April 24, 2002, the court denied Petitioner's motion to suppress. (Exh. Q.) The  
17 court held that there did not appear to be an Arizona case directly on point with the issues.  
18 (Id.) The court found that once officers found the handwritten notes by the computer of  
19 purported child pornography sites, they had probable cause to search for child sex crimes  
20 evidence, but needed additional authority to seize those items. (Id.) The officers sought this  
21 authority, but failed to obtain a writing as required by A.R.S. § 13-3911. The court  
22 concluded, however, that to invalidate the search on this basis would be to exalt form over  
23 substance. (Id.) The court found that:

24 [T]here is a distinction that may be drawn between the issuance of an original  
25 warrant and the expansion of an already issued and signed warrant. In those  
26 situations where the privacy interest of an individual has already been  
27 breached because of probable cause, it seems that when officers are lawfully  
28 in a protected area that the discovery of items in plain view that may be  
evidence of other criminal activity there is perhaps a lesser reasonable  
expectation of privacy. Consequently it follows that the appropriate standard  
to determine the validity of a search warrant that is expanded by evidence of  
possible new crimes becomes substantial compliance.

1 (Id.) The court pointed out that “Judge Taylor gave specific and unequivocal authority ... to  
2 search for items relating to sex crimes against children in the possession of David Owens.”

3 (Id.) Citing the case of State v. Morrongiello, 193 Cal. Rpt. 105 (1983), the court held that  
4 given that the original warrant lawfully placed law enforcement in the Petitioner’s residence,  
5 any expansion of the search after obtaining permission from the court should be recognized  
6 as proper procedure. (Id.)

7 On May 8, 2002, after the court denied the motion to suppress, Petitioner and the State  
8 filed a stipulation to sever counts 14-23 in matter CR-2001-1461 and join them with all  
9 counts of the indictment in CR-2002-0051. (Exh. R.)

10 On August 20, 2002, Petitioner entered into a plea agreement, whereby he agreed to  
11 plead guilty to five counts of burglary in the second degree, all class 3 felonies, as charged  
12 in counts 1, 3, 5, 7 and 12; two counts of trafficking in stolen property in the first degree,  
13 class 2 felonies, as charged in counts 10 and 11; and 12 counts of unlawful surreptitious  
14 taping, each class 5 felonies, as charged in counts 14, 17, 19, 21, 22, 24, 25, 27, 28, 29, 31  
15 and 32. (Exh. T.) As part of the plea agreement, the remaining counts were dismissed. (Id.)

16 The agreement provided that Petitioner would receive a sentence of 7 years in prison  
17 for one count of burglary, and 8 years for each of the four remaining burglary counts. (Id.)  
18 Petitioner would also receive 10 years for each count of trafficking in stolen property, 3.5  
19 years for each of 11 counts of surreptitious taping, and 2.5 years for one count of  
20 surreptitious taping. (Id.) Petitioner’s sentence totaled 100 years and the State agreed not  
21 to prosecute him for any other crime he had committed, other than homicide. (Id.)

22 The agreement stated that Petitioner “shall not have any right to appeal from the  
23 judgment or sentence imposed as a result of this stipulated guilty plea.” (Id.) The agreement  
24 also stated that Petitioner “gives up any and all motions, defenses, objections or requests  
25 which he has made or raised, or could assert hereafter, and agrees to the court’s entry of  
26 judgment against him and imposition of a sentence upon him consistent with the stipulation.”

27 (Id.)

28

1 On August 8, 2002, the court held a change-of-plea hearing. (Exhs. U, AAA.) During  
2 the hearing, the court went over the terms of the agreement with Petitioner, including the  
3 various counts to which he was pleading guilty, Petitioner's admission to the prior  
4 convictions, and the fact that he would be sentenced with one historical prior on each count.  
5 (Exh. AAA at 3-5.) The court had the following exchange with Petitioner:

6 THE COURT: And is it your signature on the bottom of the third page of this  
7 plea agreement?

8 THE DEFENDANT: Yes, it is.

9 THE COURT: And did you read the entire agreement before you signed it?

10 THE DEFENDANT: Yes, I did.

11 THE COURT: And has your attorney also explained this agreement to you?

12 THE DEFENDANT: Yes, sir, Your Honor.

13 THE COURT: And you understand that by admitting to historical prior  
14 conviction that you'll not be eligible for probation on any of these matters?

15 THE DEFENDANT: Understandable.

16 THE COURT: Has anybody made any promise to you that's not contained  
17 within this indictment?

18 THE DEFENDANT: No

19 THE COURT: Or, pardon me, plea agreement.

20 THE DEFENDANT: No.

21 THE COURT: Has anybody forced or threatened you in any way to get you to  
22 plead guilty to these offenses?

23 THE DEFENDANT: No, Your Honor. I – I asked for that.

24 THE COURT: And are you entering into this agreement voluntarily and upon  
25 your own free will?

26 THE DEFENDANT: Yes, I am.

27 THE COURT: And you understand that for Class 3 felonies with one ...  
28 historical prior felony conviction, that your range of sentence is between 4½  
years and 23¼ years, with a presumptive term of 9¼ years?

THE DEFENDANT: I understand.

1 THE COURT: That for Class 2 – pardon me, that’s the Class 2 range. For  
2 Class 3 felonies, it’s between 3 ½ years and 16¼ years, with a presumptive  
term of 6 ½ years.

3 THE DEFENDANT: I understand.

4 THE COURT: And that for a Class 5 felony, it’s between one year and 3¾  
5 years, with a presumptive term of 2¼ years.

6 THE DEFENDANT: I understand.

7 THE COURT: And that each sentence may be consecutive to one another?

8 THE DEFENDANT: Yes.

9 (Id. at 5-7.) The court noted that Petitioner and the State agreed that he would receive  
10 sentences totaling 100 years in prison. (Id. at 8.) The court stated, and the parties agreed,  
11 that, pursuant to the agreement, all remaining counts in both cases to which Petitioner was  
12 not pleading guilty would be dismissed. (Id. at 8.)

13 The court discussed the rights Petitioner was giving up, including the right to have a  
14 trial and the right to file an appeal. (Id. at 11.) The court also had the following exchange  
15 with the Petitioner and prosecutor concerning his waiver of the right to appeal the ruling on  
16 the motion to suppress:

17 MR. ZACH: ... [Petitioner] also gives up his right to challenge any pretrial  
18 rulings by this court, including its ruling on his motion to suppress evidence.  
19 He cannot go back and challenge that. That’s something he’s giving up on  
appeal, any other pretrial – that’s something he’s giving up by entering the  
plea agreement. He also cannot challenge any other ruling of the Court up to  
this stage.

20 THE COURT: And you understand that, Mr. Owens, that any pretrial ruling,  
21 any motions that the Court may have considered and entered a ruling, you’ll  
lose any right to appeal upon those?

22 THE DEFENDANT: And I can’t challenge those later? I understand that.

23 THE COURT: You cannot challenge them later, no.

24 THE DEFENDANT: Understandable.

25 THE COURT: That’s by entering into this agreement.

26 THE DEFENDANT: So be it.

27 THE COURT: So you’re willing to do that?

28 MR. GRONDIN: That’s as to literally an appeal, not as to a Rule 32, correct?

1 THE COURT: There still can be Rule 32. That always exists regardless. But  
2 a Rule 32 only reaches whether or not there were any errors in the  
3 proceedings, essentially. That would not reach the merits of any ruling the  
4 court may have made.

5 THE DEFENDANT: Understandable.

6 MR. ZACH: Just be super clear here so there's no argument in the future.  
7 Essentially by entering this plea, he's – Defendant should do so with firm  
8 understanding that he can never challenge the motion to suppress ruling by this  
9 court that was denied. That denial of a motion to suppress will not be brought  
10 up in any appellate court. ... And as long as he fully understands that, I just  
11 want a clean, clean record –

12 ...

13 So long as the defendant understands that he's giving up that right to challenge  
14 the motion to suppress ruling by this court, then the plea can go forward.

15 THE COURT: And that is your understanding, Mr. Owens?

16 THE DEFENDANT: Yes, sir, it is my understanding of that.

17 THE COURT: And do you wish to give up your constitutional rights and any  
18 rights that you may have at any pending appeals?

19 THE DEFENDANT: Yes, I do.

20 (Id. at 11-14.) After the court told him that his only avenue for appeal would be a Rule 32  
21 petition for post-conviction relief, Petitioner stated “I understand that. I’m not going to file  
22 a Rule 32.” (Id. at 15.)

23 Petitioner pleaded guilty to all charges specified in the agreement. (Id. at 17-19;  
24 10-11; 24-28.) The court asked Petitioner whether he had committed each of the burglaries  
25 with which he was charged, and Petitioner admitted that he did. (Id. at 20-11.) The court  
26 also asked Petitioner whether he had engaged in trafficking stolen property as provided in  
27 the indictment, and Petitioner admitted that he did. (Id. 23-28.) Petitioner’s counsel  
28 provided the following factual basis to support his guilty plea to the surreptitious videotaping  
charges, stating:

Pretty much in each case, the defendant went out almost invariably at night,  
dressed in dark clothing, with anything shiny kind of muted, and with night  
vision scopes and videotape recorders approached homes that he had sort of  
scoped out beforehand, and would go up to individual homes and I think  
frequently physically invert the lens into the room and make these videotapes  
of basically children in various states of undress.

1 (Id. at 28-29.) The prosecutor added that the video recordings had been found in Petitioner’s  
2 home and that the children were videotaped in their bedrooms or bathrooms, without consent.  
3 (Id. at 29-30.) Petitioner admitted to each of the instances of surreptitious videotaping. (Id.  
4 at 30-38.) Petitioner also admitted to the prior convictions alleged by the State. (Id. at  
5 38-42.)

6 Petitioner told the court that he had “personally asked for” the sentence in the plea  
7 agreement, and said he “understood what [he] was giving up,” stating that he was “asking  
8 for the rest of [his] life in prison.” (Id. at 13-14.) The State subsequently added, that it was  
9 convinced that this was an intelligent, knowing and voluntary plea, adding that Petitioner’s  
10 counsel had come forward and “said the defendant did want to go to prison for the rest of his  
11 life to make things right with the victims and in his own mind.” (Id. at 44.) The court found  
12 that Petitioner had “knowingly, intelligently, and voluntarily entered into each plea and  
13 admission of prior felony convictions,” that “[t]here are factual bases for each crime,” and  
14 accepted the plea. (Id. at 48-49.)

15 The court sentenced Petitioner on September 12, 2002. (Exhs. Y, ZZ.) During the  
16 hearing, Petitioner’s counsel stated:

17 I know that Mr. Owens would wish it to be known that at the time that he  
18 entered into the plea agreement it wasn’t out of a feeling that the result here  
19 was inevitable, it was the feeling that he ought to own up to and pay the price  
for what he had done because he feels that what he had done was wrong and  
he should pay for it.

20 (Exh. ZZ at 6.) Petitioner then stated that he had been a good man, but that he “got into  
21 meth.” (Id. at 7.) He stated: “When you’re on that drug, it’s very powerful and it’s  
22 incredibly evil and it makes people do evil, crazy stuff that I am so ashamed of.” (Id.)  
23 Petitioner stated that he “deserve[d] life,” adding that “I did some really wicked stuff that I’m  
24 really ashamed of. Please forgive me. I asked [the prosecutor] to give me 100 years ... .” (Id.)

25 The court found that Petitioner’s prior convictions, the charges that were dismissed,  
26 the amount of loss suffered by the victims, and the financial and emotional harm to the  
27 victims were aggravating factors. (Id. at 11-20.) The court found no mitigating factors. The  
28 court imposed the following sentences: an aggravated term of 7 years’ imprisonment for one

1 of the second-degree burglary convictions (count 1); aggravated terms of 8 years'  
2 imprisonment for each of the four additional second-degree burglary convictions (counts 3,  
3 5, 7, 12); aggravated terms of 10 years' imprisonment for each of the two first-degree  
4 trafficking in stolen property convictions (counts 10 and 11); aggravated terms of 3.75 years'  
5 imprisonment for 11 unlawful surreptitious taping convictions (counts 14, 19, 21, 22, 24, 25,  
6 27, 28, 29, 31 and 32); and an aggravated term of 2.75 years' imprisonment for one unlawful  
7 surreptitious taping conviction (count 17). (Exhs. Y, ZZ at 11-20.) All were non-dangerous,  
8 but repetitive offenses pursuant to A.R.S. § 13-604. (Id. at 4.) All sentences were  
9 consecutive and added up to 100 years. (Id. at 22.)

10 On May 5, 2005, Petitioner filed a notice of Rule 32 post-conviction relief. (Exh. Z.)  
11 Petitioner alleged that:

12 A computer and videotapes were not discribed [sic] in the search warrant.  
13 Constitution of the [U]nited States of America Amendment (4) the right of the  
14 people to be secure in their persons, house papers, and effects against  
15 unreasonable searches and seizures shall not be violated, and no warrants shall  
16 issue but upon probable cause, supported oath or affirmation and particularly  
17 describing the place to be searched and the persons or things to be seized.  
18 A.R.S. 13-4037[.]

16 Petitioner also stated: "power of Supreme Court to correct and reduce sentence upon appeal  
17 by defendant. Unreasonable sentence." (Id.) Petitioner also made the following allegation:

18 Ineffective counsel, who should of [sic] filed a special action my appointed  
19 counsel Michael R. Grondin #020828 was on drugs (meth) at the time of my  
20 case and was shortly thereafter convicted of drug use and theft. Also should of  
21 [sic] filed any direct appeals and post-verdict proceedings Rule 24.2(a)(3) and  
22 24.3[.]

21 (Id.)

22 On July 11, 2005, the court noted that Petitioner's PCR notice was untimely. The  
23 court stated that Petitioner had alleged grounds that might allow for a late filing, but found  
24 that Petitioner had "not sufficiently presented the substance of any specific exemption and/or  
25 any reasons for not raising these claims in a timely petition," citing Rule 32.2(b) of the  
26 Arizona Rules of Criminal Procedure. (Exh. AA.) The court thus summarily dismissed the  
27 notice of post-conviction relief. (Id.)  
28

1           Petitioner filed a motion for reconsideration, which the court denied on October 3,  
2 2005, stating that Petitioner did “not make any argument as to why the prior ruling was  
3 incorrect.” (Exhs. BB, CC.) The court also treated the motion for reconsideration as a  
4 successive PCR petition, but found that Petitioner had not complied with Rules 32.1, 32.2  
5 and 32.5 of the Arizona Rules of Criminal Procedure. The court gave Petitioner 30 days to  
6 refile any successive PCR petition. (Exh. CC.)

7           After obtaining a number of extensions from the court (Exhs. DD-HH), Petitioner  
8 filed a PCR petition on February 21, 2006. (Exh. II.) In his petition, he argued that he fell  
9 under the exception in Rule 32.1 because the failure to file in time was without fault on his  
10 part. (Id. at 4.) Petitioner explained that he reasonably believed his lawyer had been  
11 working on his appeal, but had discovered he was not, when he made an inquiry with the  
12 State Bar after not hearing from his lawyer, and learned his lawyer had been suspended from  
13 the practice of law for 3 years. Petitioner attached as an exhibit to the petition a letter from  
14 the Arizona State Bar stating that on October 29, 2004, Michael Grondin was suspended  
15 from the practice of law for 3 years, and would be placed on probation for 2 years upon  
16 reinstatement. (Id.) The letter also stated that Mr. Grondin was ordered to pay \$12,721.90  
17 in restitution to the Yavapai Public Defender’s Office, and the Mohave County Superior  
18 Court. The letter described Mr. Grondin’s misconduct as follows:

19           Mr. Grondin’s misconduct included failing to abide by his client’s decisions  
20 concerning the objectives of representation or to consult with his client as to  
21 the means by which they are to be pursued; failing to act with reasonable  
22 diligence and promptness in representing a client; failing to keep his client  
23 reasonably informed about the status of a matter or promptly comply with  
24 reasonable requests for information; failing, upon termination of  
25 representation, to take steps reasonably practicable to protect his client’s  
26 interests; failing to make reasonable efforts to expedite litigation consistent  
27 with his client’s interests; committing a criminal act that reflects adversely on  
28 his honesty, trustworthiness or fitness as a lawyer, engaging in conduct  
prejudicial to the administration of justice; and being convicted of a  
misdemeanor involving a serious crime.

(Id.) The letter also stated that two aggravating factors were found: multiple offenses and  
illegal conduct including that involving the use of controlled substances. (Id.) The letter also  
noted the following mitigating factors were found: absence of a prior disciplinary record;

1 absence of a dishonest or selfish motive; personal or emotional problems; full and free  
2 disclosure to the disciplinary board or cooperative attitude toward the proceedings;  
3 inexperience in the practice of law; and remorse. (Id.)

4 Petitioner also asserted the following claims:

5 – Sixth Amendment claim of ineffective assistance of counsel: Petitioner claimed that  
6 “a reasonable inference can be made that Mr. Grondin was actually using illegal drugs  
7 and committing serious crimes while he represented Petitioner.” (Id. at 7.) He  
8 claimed that a conflict existed at the time Mr. Grondin was representing Petitioner as  
9 the lawyer had no right by law to represent him and was only able to do so by  
10 concealing his drug use and crimes. Petitioner claimed he was denied his right to  
11 submit a motion to change counsel based on the fact that the attorney was using illegal  
12 drugs and committing serious crimes prior to Petitioner’s entering into the plea  
13 agreement, which violated his right to counsel and his right to competent counsel  
14 under the Sixth Amendment. Petitioner claimed that if the misconduct had come to  
15 light at the time counsel was representing him, the court would have been obligated  
16 to change counsel. Petitioner claimed that the plea must be voided, the conviction and  
17 sentence reversed, and new counsel appointed. (Id. at 8-9.)

18 – Involuntary Plea: Petitioner also claimed that his plea was void because it was  
19 involuntary. (Id. at 9.) Petitioner claimed that prior to entering into the plea, his  
20 lawyer had told him that a motion to suppress all sexual offense evidence, based on  
21 a Fourth Amendment search and seizure violation, had been denied. Petitioner  
22 claimed he had been told that if the motion was granted, the State would offer a plea  
23 of 10-15 years based on the burglary, trafficking, and theft counts. (Id.) Petitioner  
24 claimed that his lawyer lied to him as “no motion to suppress based on a 4th  
25 Amendment violation was submitted.” (Id.) Petitioner claimed this was done “in  
26 order to induce petitioner to enter into the plea agreement concerning both cases.”  
27 Petitioner claimed that, at sentencing, his lawyer admitted that no such motion was  
28 actually submitted and denied. Petitioner claims that had his lawyer told him that the  
motion to suppress was not submitted and denied, he “would not have entered into the  
plea agreement and would have gone forward to trial.” (Id. at 11.)

– Fourth Amendment: Petitioner claimed that “prejudice must be found” because the  
underlying Fourth Amendment violation claim is meritorious and had it been  
submitted, would have required this Court to suppress all the sexual offense evidence  
and dismiss the charges in case # CR 2002-0051. Petitioner claimed that the record  
was clear that the police did not obtain a warrant to search and seize the videotape and  
computer disk evidence the State obtained until after the search and seizure took  
place, so that all the evidence obtained by the State to prove he committed the crimes  
charged under case # CR 2002-0051 was obtained in violation of petitioner’s rights  
against an unconstitutional search and seizure. (Id.)

On March 6, 2006, the court noted that the PCR petition was “presumptively  
untimely.” (Exh. JJ.) The court however, found that “the Defendant has met his burden  
setting forth reasons for [his] untimely filing” and noted that Petitioner “had previously  
requested an attorney.” (Id.) The court appointed Jill Evans from the public defender’s  
office, and attorney Gail Natale was eventually substituted to represent Petitioner. (Id.; Exhs.

1 KK, LL.) After reviewing the record, Ms. Natale informed the court on December 20, 2006,  
2 that she was “unable to find any claims for relief to raise in post-conviction proceedings,”  
3 and that she, therefore, had no supplement to Petitioner’s PCR petition. (Exh. MM.) The  
4 court subsequently issued an order allowing Petitioner to file a successive PCR petition.  
5 (Exh. PP.)

6 Petitioner filed a series of motions asking the court for records and for additional time  
7 to file a successive PCR petition. (Exhs. QQ-XX.) The court granted these motions, but  
8 Petitioner never filed a supplemental petition. (Id.; Exh. YY.) On December 12, 2007, the  
9 court noted that Petitioner had been given time to file any pro per supplemental petition, but  
10 failed to do so. The court determined that:

11 Upon review of the file, the Court has determined that no remaining claim  
12 presents a material issue of fact or law which would entitle the defendant to  
13 relief under this rule, and no further purpose would be served by any further  
14 proceedings.

15 (Exh. YY.) The court thus “dismissed the petition for post-conviction relief in its entirety.”  
16 (Id.) Petitioner did not file a petition for review.

17 On September 13, 2013, Petitioner filed the instant habeas petition in this Court.  
18 (Doc. 1.) Petitioner raises four grounds for relief. In Ground One, Petitioner alleges that his  
19 counsel was ineffective in failing to keep Petitioner informed of his case and giving him  
20 misleading information, which led to Petitioner’s acceptance of a “bad plea deal.” In Ground  
21 Two, Petitioner alleges that his Fourth Amendment right to be free from illegal search and  
22 seizure was violated when officers seized computer disks and tapes from Petitioner’s home  
23 without a search warrant. In Ground Three, Petitioner alleges that his Eighth Amendment  
24 protection from cruel and unusual punishment was violated when his incompetent counsel  
25 entered into a “cruel and unusual plea deal.” In Ground Four, Petitioner alleges that his  
26 post-conviction relief counsel was ineffective.

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1 **DISCUSSION**

2 In their Answer, Respondents contend that Petitioner’s habeas petition is untimely  
3 and, as such, must be denied and dismissed.

4 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a  
5 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.  
6 See 28 U.S.C. § 2244(d)(1). The statute provides:

7 A 1-year period of limitation shall apply to an application for a writ of habeas  
8 corpus by a person in custody pursuant to the judgment of a State court. The  
limitation period shall run from the latest of –

9 (A) the date on which the judgment became final by the conclusion of direct  
10 review or the expiration of the time for seeking such review;

11 (B) the date on which the impediment to filing an application created by State  
12 action in violation of the Constitution or laws of the United States is removed,  
if the applicant was prevented from filing by such State action;

13 (C) the date on which the constitutional right asserted was initially recognized  
14 by the Supreme Court, if the right has been newly recognized by the Supreme  
Court and made retroactively applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or claims presented  
could have been discovered through the exercise of due diligence.

16 An “of-right” petition for post-conviction review under Arizona Rule of Criminal  
17 Procedure 32, which is available to criminal defendants who plead guilty, is a form of “direct  
18 review” within the meaning of 28 U.S.C. § 2244(d)(1)(A). See Summers v. Schriro, 481  
19 F.3d 710, 711 (9<sup>th</sup> Cir. 2007). Therefore, the judgment of conviction becomes final upon the  
20 conclusion of the Rule 32 of-right proceeding, or upon the expiration of the time for seeking  
21 such review. See id.

22 Additionally, “[t]he time during which a properly filed application for State post-  
23 conviction or other collateral review with respect to the pertinent judgment or claim is  
24 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2); see Lott  
25 v. Mueller, 304 F.3d 918, 921 (9<sup>th</sup> Cir. 2002). A post-conviction petition is “clearly pending  
26 after it is filed with a state court, but before that court grants or denies the petition.” Chavis  
27 v. Lemarque, 382 F.3d 921, 925 (9<sup>th</sup> Cir. 2004). A state petition that is not filed, however,  
28 within the state’s required time limit is not “properly filed” and, therefore, the petitioner is

1 not entitled to statutory tolling. See Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). “When  
2 a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for  
3 purposes of § 2244(d)(2).” Id. at 414.

4 In Arizona, post-conviction review is pending once a notice of post-conviction relief  
5 is filed even though the petition is not filed until later. See Isley v. Arizona Department of  
6 Corrections, 383 F.3d 1054, 1056 (9<sup>th</sup> Cir. 2004). An application for post-conviction relief  
7 is also pending during the intervals between a lower court decision and a review by a higher  
8 court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9<sup>th</sup> Cir. 2003) (citing Carey v. Saffold,  
9 536 U.S. 214, 223 (2002)). However, the time between a first and second application for  
10 post-conviction relief is not tolled because no application is “pending” during that period.  
11 See id. Moreover, filing a new petition for post-conviction relief does not reinstate a  
12 limitations period that ended before the new petition was filed. See Ferguson v. Palmateer,  
13 321 F.3d 820, 823 (9<sup>th</sup> Cir. 2003).

14 The statute of limitations under the AEDPA is subject to equitable tolling in  
15 appropriate cases. See Holland v. Florida, 560 U.S. 631, 645-46 (2010). However, for  
16 equitable tolling to apply, a petitioner must show “‘(1) that he has been pursuing his rights  
17 diligently and (2) that some extraordinary circumstances stood in his way’” and prevented  
18 him from filing a timely petition. Id. at 2562 (quoting Pace, 544 U.S. at 418).

19 The Court finds that Petitioner’s Petition for Writ of Habeas Corpus is untimely.  
20 Petitioner was sentenced under the plea agreement on September 12, 2002. (Exhs. Y, ZZ.)  
21 By pleading guilty, Petitioner waived his right to a direct appeal. Petitioner had 90 days to  
22 file an “of-right” petition for post-conviction relief under Rule 32 of the Arizona Rules of  
23 Criminal Procedure. Because Petitioner failed to file such a petition within the prescribed  
24 time, the judgment became final for statute of limitations purposes when the 90-day period  
25 expired, on December 11, 2002, and the limitations period began to run on that date. See 28  
26 U.S.C. § 2244(d)(1)(A); Summers, 481 F.3d at 711. The statute of limitations expired one  
27 year later on December 11, 2003.  
28

1 By the time Petitioner filed his untimely notice of post-conviction relief on May 5,  
2 2005, the AEDPA statute of limitations had already expired. (Exhs. Z, AA.) Filing a petition  
3 for post-conviction relief does not reinitiate a limitations period that ended before the petition  
4 was filed. See Ferguson, 321 F.3d at 823 (“Like the Eleventh Circuit, we hold that section  
5 2244(d) does not permit the re-initiation of the [federal 1-year] limitations period that has  
6 ended before the state petition was filed.”); see also Pace, 544 U.S. at 413-14 (“When a  
7 postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for  
8 purposes of § 2244(d)(2).”).

9 Similarly, Petitioner’s subsequent successive state court pleadings did not toll the  
10 limitations period. These pleadings were also filed after the statute of limitations ended and  
11 could not restart the expired 1-year limitations period. See Ferguson, 321 F.3d at 823. In  
12 sum, Petitioner filed the instant habeas petition almost 10 years after the 1-year limitations  
13 period expired. The Petition is therefore untimely.

14 The Ninth Circuit recognizes that the AEDPA’s limitations period may be equitably  
15 tolled because it is a statute of limitations, not a jurisdictional bar. See Calderon v. United  
16 States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9<sup>th</sup> Cir. 1997), overruled in part on other  
17 grounds by Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530, 540 (9<sup>th</sup> Cir. 1998).  
18 Tolling is appropriate when “‘extraordinary circumstances’ beyond a [petitioner’s] control  
19 make it impossible to file a petition on time.” Id.; see Miranda v. Castro, 292 F.3d 1063,  
20 1066 (9<sup>th</sup> Cir. 2002) (stating that “the threshold necessary to trigger equitable tolling [under  
21 AEDPA] is very high, lest the exceptions swallow the rule”) (citations omitted). “When  
22 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a  
23 timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.  
24 Prunty, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999). A petitioner seeking equitable tolling must  
25 establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
26 extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418. Petitioner must also  
27 establish a “causal connection” between the extraordinary circumstance and his failure to file  
28

1 a timely petition. See Bryant v. Arizona Attorney General, 499 F.3d 1056, 1060 (9<sup>th</sup> Cir.  
2 2007).

3 Petitioner has not proffered any extraordinary circumstance that would justify  
4 equitable tolling or demonstrated that an external impediment hindered the diligent pursuit  
5 of his rights. Petitioner’s *pro se* status, indigence, limited legal resources, ignorance of the  
6 law, or lack of representation during the applicable filing period do not constitute  
7 extraordinary circumstances justifying equitable tolling. See, e.g., Rasberry v. Garcia, 448  
8 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006) (“[A] *pro se* petitioner’s lack of legal sophistication is not,  
9 by itself, an extraordinary circumstance warranting equitable tolling.”). Petitioner has  
10 demonstrated his ability to pursue post-conviction relief by filing a *pro se* Rule 32 petition,  
11 as well as numerous related motions in state court.

12 To the extent that Petitioner could argue that the state court ultimately considered his  
13 “presumptively untimely” successive PCR petition based on his allegation that he believed  
14 his lawyer was working on his appeal, this does not excuse his untimely federal habeas  
15 petition. The state court denied the Rule 32 petition on December 12, 2007, noting that  
16 Petitioner had been given time to file a supplemental petition, but failed to do so. The court  
17 concluded that no remaining claim presents a material issue of fact or law which would  
18 entitle Petitioner to relief, and that no further purpose would be served by any further  
19 proceedings. (Exh. YY.) The court thus “dismissed the petition for post-conviction relief  
20 in its entirety.” (Id.) Petitioner did not file a petition for review.

21 Petitioner did not file his federal habeas petition until September 13, 2013 – over five  
22 years later. Thus, even if Petitioner’s belief that counsel was working on his appeal could  
23 somehow toll the statute of limitations until the court denied his untimely PCR petition, this  
24 would not excuse over five years he waited thereafter to file his federal habeas petition. See  
25 Pace, 544 U.S. at 418.

26 Accordingly, Petitioner is not entitled to equitable tolling and his habeas petition is  
27 untimely.

28

1 **CONCLUSION**

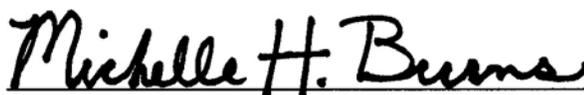
2 Having determined that Petitioner’s habeas petition is untimely, the Court will  
3 recommend that Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1) be denied and  
4 dismissed with prejudice.

5 **IT IS THEREFORE RECOMMENDED** that Petitioner’s Petition for Writ of  
6 Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) be **DENIED** and **DISMISSED WITH**  
7 **PREJUDICE**;

8 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave  
9 to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is  
10 justified by a plain procedural bar and jurists of reason would not find the procedural ruling  
11 debatable.

12 This recommendation is not an order that is immediately appealable to the Ninth  
13 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
14 Appellate Procedure, should not be filed until entry of the district court’s judgment. The  
15 parties shall have fourteen days from the date of service of a copy of this recommendation  
16 within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1);  
17 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen  
18 days within which to file a response to the objections. Failure timely to file objections to the  
19 Magistrate Judge’s Report and Recommendation may result in the acceptance of the Report  
20 and Recommendation by the district court without further review. See United States v.  
21 Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any  
22 factual determinations of the Magistrate Judge will be considered a waiver of a party’s right  
23 to appellate review of the findings of fact in an order or judgment entered pursuant to the  
24 Magistrate Judge’s recommendation. See Rule 72, Federal Rules of Civil Procedure.

25 DATED this 27th day of June, 2014.

26   
27 \_\_\_\_\_  
Michelle H. Burns  
28 United States Magistrate Judge