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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ralph Thomas Jessup,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-14-2097-TUC-LCK

ORDER

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15 Petitioner Ralph Jessup has filed a Petition for Writ of Habeas Corpus pursuant to
16 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), Respondents' Answer (Doc.
17 18), and Petitioner's Reply and Supplement (Docs. 19, 24). The parties have consented to
18 Magistrate Judge jurisdiction.¹ (Doc. 16.)

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Jessup was convicted in the Pima County Superior Court on one count of theft of
21 means of transportation, four counts of kidnapping, four counts of aggravated assault
22 with a deadly weapon, one count of aggravated robbery, and two counts of armed
23 robbery. (Doc. 18, Ex. B.) Jessup was sentenced to concurrent prison terms, the longest
24 of which is twenty-one years. (*Id.*, Ex. C.)

25 The Arizona Court of Appeals summarized the facts in support of Jessup's
26 convictions:

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¹ This case was reassigned to the current judge on May 10, 2016. (Doc. 26.)

1 In late 2008, D.H. and M.D. were in their home when several people,
2 including Jessup, kicked open the back door and ordered the couple to the
3 ground. Jessup and his accomplices subsequently tied up D.H. and M.D.
4 and covered their heads with jackets and blankets. The invaders then
demanded drugs and anything of value and ransacked the home. Jessup and
his companions eventually left in a van that belonged to D.H. and M.D.

5 D.H. freed himself and called police, who found the van parked in
6 Jessup's back yard. During a search of Jessup's home and garage, officers
found numerous items that had been taken from D.H. and M.D., as well as
7 tools used during the home invasion.

8 (*Id.*, Ex. A at 2 (footnote omitted).)

9 Jessup appealed and the Arizona Court of Appeals affirmed his convictions and
10 sentences. (*Id.*, Exs. A, E.) Jessup filed a Notice of Post-conviction Relief (PCR). (*Id.*,
11 Ex. I.) Appointed counsel filed a notice that she could not identify any claims to raise in a
12 PCR petition. (*Id.*, Ex. K.) Jessup submitted a pro se PCR Petition, which the court
13 denied. (*Id.*, Exs. M, Q.) The court of appeals granted Jessup's petition for review but
14 denied relief. (*Id.*, Exs. T, U.) Jessup submitted a second Notice of PCR and appointed
15 counsel averred that he could not identify any claims for relief. (*Id.*, Exs. Z, AA, BB.)
16 Jessup again submitted a pro se petition, which the court denied. (*Id.*, Exs. DD, FF, II.)
17 The court of appeals granted Jessup's petition for review but denied relief. (*Id.*, Exs. PP,
18 QQ.)

19 **DISCUSSION**

20 Jessup raises three claims. Respondents contend most of the claims are not
21 cognizable, in whole or in part. They contend the remainder of the claims are
22 procedurally defaulted. The Court first will examine whether each claim is reviewable in
23 this Court and whether it was properly exhausted.

24 **EXHAUSTION**

25 **Principles of Exhaustion and Procedural Default**

26 A writ of habeas corpus may not be granted unless it appears that a petitioner has
27 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
28

1 *Thompson*, 501 U.S. 722, 731 (1991). To properly exhaust, a petitioner must “fairly
2 present” the operative facts and the federal legal theory of his claims to the state’s highest
3 court in a procedurally appropriate manner. *O’Sullivan v. Boerckel*, 526 U.S. 838, 848
4 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-
5 78 (1971).

6 In Arizona, there are two primary procedurally appropriate avenues for petitioners
7 to exhaust federal constitutional claims: direct appeal and PCR proceedings. A habeas
8 petitioner’s claims may be precluded from federal review in two ways. First, a claim may
9 be procedurally defaulted in federal court if it was actually raised in state court but found
10 by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30.
11 Second, a claim may be procedurally defaulted if the petitioner failed to present it in state
12 court and “the court to which the petitioner would be required to present his claims in
13 order to meet the exhaustion requirement would now find the claims procedurally
14 barred.” *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th
15 Cir. 1998) (stating that the district court must consider whether the claim could be
16 pursued by any presently available state remedy). If no remedies are currently available
17 pursuant to Rule 32, the claim is “technically” exhausted but procedurally defaulted.
18 *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray v. Netherland*, 518 U.S. 152, 161-62
19 (1996).

20 Because the doctrine of procedural default is based on comity, not jurisdiction,
21 federal courts retain the power to consider the merits of procedurally defaulted claims.
22 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a
23 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the
24 failure to properly exhaust the claim in state court and prejudice from the alleged
25 constitutional violation, or shows that a fundamental miscarriage of justice would result if
26 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

1 **Analysis**

2 Claim 1

3 Jessup asserts three subclaims of ineffective assistance of counsel (IAC). Jessup
4 alleges trial counsel (a) failed to challenge the search warrant, which he alleges was
5 defective because the affidavit was insufficient to support the warrant. Specifically, he
6 argues (i) the warrant and supporting affidavit did not include the garage, and (ii) the
7 telephonic affidavit in support of the warrant did not include the sheds or four of the
8 vehicles listed on the warrant (white pickup, Toyota pickup, black Corvette, and red
9 Chevrolet Beretta).² Jessup also alleges PCR counsel was ineffective for failing to
10 (b) discover and challenge the invalid search warrant, and (c) challenge the indictment as
11 defective.

12 *Claim 1(a)(i)*

13 In the first PCR proceeding, Jessup alleged trial counsel was ineffective for not
14 challenging an illegal search; specifically, that the police searched a garage not listed on
15 the warrant. (Doc. 18, Ex. M at 5-6.) The state courts ruled on the merits of this claim.
16 (*Id.*, Ex. Q at 3; Ex. U at 3-4.) Therefore, the Court will evaluate this portion of Claim
17 1(a) on the merits.

18 *Claim 1(a)(ii)*

19 In the second PCR proceeding and supplement thereto, Jessup argued that trial
20 counsel failed to realize that four vehicles and the sheds were not properly included in the
21 search warrant, and failed to obtain a copy of the affidavit in support of the search
22 warrant and to file a motion to suppress. (*Id.*, Ex. DD at 11, 15-16; Ex. FF.) The PCR
23 court found this claim precluded because it was raised or could have been raised in his
24 first PCR proceeding. (*Id.*, Ex. II at 2.) The court of appeals concluded this claim was
25 untimely pursuant to Arizona Rule of Criminal Procedure 32.4(a). (Doc. 18, Ex. QQ at
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27 ² Claim 1 of the Petition does not include these detailed allegations. However, they
28 are alleged in Claim 2 and Jessup argued them in his reply and supplement. (Docs. 19,
24.)

1 4.) Because the last state court to rule on the claim found it barred based on an adequate
2 and independent state rule, it is procedurally defaulted in this Court.

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4 Jessup did not explicitly argue that he could establish cause to overcome this
5 procedural default. However, in state court he argued that his PCR counsel was
6 ineffective for failing to raise this claim. The Court need not evaluate cause because this
7 claim fails on the merits. Jessup has not established that he was prejudiced by trial
8 counsel’s failure to raise this claim – that the telephonic affidavit did not include four of
9 the vehicles or the sheds.

10 IAC claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). To
11 prevail under *Strickland*, a petitioner must show that counsel’s representation fell below
12 an objective standard of reasonableness and that the deficiency prejudiced the defense. *Id.*
13 at 687-88.

14 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
15 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
16 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
17 the time.” *Id.* at 689. Thus, to satisfy *Strickland*’s first prong, deficient performance, a
18 defendant must overcome “the presumption that, under the circumstances, the challenged
19 action might be considered sound trial strategy.” *Id.* “A failure to raise untenable issues
20 on appeal does not fall below the *Strickland* standard.” *Turner v. Calderon*, 281 F.3d 851,
21 872 (9th Cir. 2002).

22 Because an IAC claim must satisfy both prongs of *Strickland*, the reviewing court
23 “need not determine whether counsel’s performance was deficient before examining the
24 prejudice suffered by the defendant as a result of the alleged deficiencies.” *Id.* at 697 (“if
25 it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient
26 prejudice . . . that course should be followed”). A petitioner must affirmatively prove
27 prejudice. *Id.* at 693. To demonstrate prejudice, he “must show that there is a reasonable
28 probability that, but for counsel’s unprofessional errors, the result of the proceeding

1 would have been different. A reasonable probability is a probability sufficient to
2 undermine confidence in the outcome.” *Id.* at 694.

3 The Court does not have the recording of the telephonic affidavit or a transcript of
4 the recording. However, it accepts Petitioner’s representation, which was endorsed by the
5 PCR court, that neither the sheds nor the four specific vehicles were included in the
6 telephonic affidavit. (Doc. 18, Ex. MM at 4.) Regardless, Jessup has not alleged much
7 less established that evidence presented at trial should have been suppressed because it
8 was found in the sheds or additional vehicles. Jessup attached to the Petition three pages
9 from the trial transcript in which a law enforcement officer testified to finding
10 incriminating evidence in the garage (Doc. 1, Ex. B at 15-17.) However, he presented no
11 evidence regarding the search of the cars or sheds. Therefore, Jessup has not
12 demonstrated a reasonable probability that the outcome of the trial would have been
13 different if counsel had challenged the search of these locations. Because he has not
14 established prejudice arising from counsel’s failure to challenge the warrant on this basis,
15 the claim is without merit.

16 *Claims 1(b) and 1(c)*

17 Claims 1(b) and 1(c) are not cognizable in this Court because assertions that
18 counsel was ineffective as to a collateral proceeding are precluded from review under the
19 governing statute. 28 U.S.C. § 2254(i).

20 Claim 2

21 Jessup alleges the affidavit in support of the search warrant was defective and the
22 search was invalid in violation of the Fourth Amendment.

23 This claim was raised for the first time in the second PCR Petition and supplement
24 thereto.³ (Doc. 18, Exs. DD, FF.) The PCR court ruled that the search warrant was

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26 ³ Jessup asserts that he raised this claim in the first PCR petition. (Doc. 1 at 7.)
27 Although he raised a claim that counsel was ineffective for failing to file a motion to
28 suppress based on a defective search warrant, he did not allege a separate violation of his
Fourth Amendment right to be free of an unlawful search and seizure. (*See* Doc. 18, Exs.
M, N.)

1 supported by probable cause. (*Id.*, Ex. II at 5; Ex. MM at 4.) The court of appeals
2 concluded this claim was untimely pursuant to Arizona Rule of Criminal Procedure
3 32.4(a). (Doc. 18, Ex. QQ at 4.) Because the last state court to rule on the claim found it
4 barred based on an adequate and independent state rule, it is procedurally defaulted in
5 this Court.

6 Even if not defaulted, this Fourth Amendment claim is not subject to review by the
7 Court. In *Stone v. Powell*, 428 U.S. 465, 494 (1976), the Supreme Court held that “where
8 the State has provided an opportunity for full and fair litigation of a Fourth Amendment
9 claim, a state prisoner may not be granted federal habeas relief on the ground that
10 evidence obtained in an unconstitutional search and seizure was introduced at trial.”
11 Pursuant to *Stone*, a prerequisite for consideration of Jessup’s Fourth Amendment claim
12 is the denial of the chance to fully and fairly litigate the claim in state court.

13 Here, Jessup does not argue the State prevented him from fully litigating this
14 claim. Rather, he alleges counsel failed to raise the issue at trial, on appeal, or in a PCR
15 proceeding.⁴ “The relevant inquiry is whether petitioner had the opportunity to litigate his
16 claim, not whether he in fact did so.” *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th
17 Cir. 1996). If a petitioner did not pursue suppression in state court, *Stone* still bars the
18 claim if the state court provides for the filing of such motions. *See Gordon v. Duran*, 895
19 F.2d 610, 613 (9th Cir. 1990) (finding irrelevant whether petitioner litigated suppression
20 in state court because California penal code allowed him to do so). Arizona allows for the
21 filing of pretrial suppression motions and the denial of a motion may be appealed. Ariz.
22 R. Crim. P. 16.1, 16.2; A.R.S. § 13-4031; *see State v. Nissley*, 362 P.3d 493, 451, 238
23 Ariz. 446, 498 (Ct. App. 2015). The Ninth Circuit has recognized that a defendant may
24 fully litigate a suppression claim in the system provided by Arizona. *See Moormann v.*
25 *Schriro*, 426 F.3d 1044, 1053 (9th Cir. 2005) (noting that petitioner filed a pre-trial
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27 ⁴ *Stone* does not bar the related Sixth Amendment claim that counsel was
28 ineffective in relation to the Fourth Amendment issue (as alleged in Claim 1). *See*
Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

1 motion to suppress, after an evidentiary hearing the court made factual findings and
2 limited the admissible evidence and that decision was reviewed on appeal).

3 Because Jessup had the opportunity to fully litigate the Fourth Amendment claim,
4 although he did not do so, the claim is barred by *Stone*.

5 Claim 3

6 Jessup alleges the indictment was defective on the charge of theft of means of
7 transportation because the vehicle did not belong to the person alleged by the State,
8 which violated his Fifth and Sixth Amendment rights.

9 Jessup arguably raised this claim in the second PCR proceeding. (Doc. 18, Ex. DD
10 at 4-11.) The PCR court found the indictment was not deficient. (*Id.*, Ex. II at 4; Ex. MM
11 at 2.) The court of appeals concluded this claim was untimely pursuant to Arizona Rule
12 of Criminal Procedure 32.4(a). (Doc. 18, Ex. QQ at 4.) Because the last state court to rule
13 on the claim found it barred based on an adequate and independent state rule, it is
14 procedurally defaulted in this Court.

15 Jessup does not directly allege cause and prejudice to overcome the default of this
16 claim. But, he alleges all counsel were ineffective, including his assertion in Claim 1(c)
17 that PCR counsel failed to challenge the defective indictment. Claim 3, however, should
18 have been raised, if at all, on direct appeal.⁵ Before ineffectiveness of appellate counsel
19 may be used to establish cause for a procedural default, it must have been presented to
20 the state court as an independent claim. *Murray*, 477 U.S. at 489. Jessup did not properly
21 exhaust in a PCR petition a claim that appellate counsel was ineffective for failing to
22 fairly present Claim 3. (Doc. 18, Exs. M, N, DD, FF.) Ineffectiveness claims regarding
23 counsel are now foreclosed in state court by Arizona Rule of Criminal Procedure
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26 ⁵ Additionally, IAC of PCR counsel generally cannot constitute cause because a
27 petitioner does not have a constitutional right to PCR counsel. *See Coleman*, 501 U.S. at
28 757. The Supreme Court has carved out a limited exception to that rule, holding that IAC
of PCR counsel can operate as cause for IAC claims if the first time they can be raised is
in a collateral proceeding. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). However,
Martinez is not applicable to Claim 3 because it does not allege IAC.

1 32.2(a)(3) and 32.4(a). Because the Arizona state courts have not had a fair opportunity
2 to rule on ineffectiveness of appellate counsel claims alleged as cause, and Jessup may
3 not exhaust this claim now, it is technically exhausted but procedurally defaulted. *See*
4 *Gray*, 518 U.S. at 161-62; *Coleman*, 501 U.S. at 735 n.1. Therefore, IAC on appeal
5 cannot operate as cause (to excuse the default of Claim 3) unless Jessup establishes cause
6 and prejudice to excuse the default of the appellate IAC claim. *See Edwards v.*
7 *Carpenter*, 529 U.S. 446, 453 (2000) (ineffective counsel as cause can itself be
8 procedurally defaulted). Jessup has made no argument that there is cause to excuse the
9 default of a claim that his appellate counsel was ineffective for failing to fairly present
10 this claim. Therefore, IAC on appeal cannot operate as cause to excuse the default of
11 Claim 3.

12 Jessup also alleges as cause his lack of legal knowledge and resources. The Ninth
13 Circuit has determined cause was not established by an inmate who asserted he was
14 illiterate and that the inmate helping him had been released. *See Hughes v. Idaho State*
15 *Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (finding that illiteracy cannot be relied
16 upon to bypass state courts in favor of federal court). Here, Jessup is not illiterate and he
17 has been able to adequately articulate his claims in both state court and this Court.
18 Therefore, his limited knowledge and access to legal research has not prevented him from
19 presenting his claims. *See Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991) (relying
20 on the petitioner's state court filings which reflected sufficient legal knowledge).

21 Jessup has not alleged that a fundamental miscarriage of justice will occur if this
22 claim is not reviewed on the merits. To demonstrate a fundamental miscarriage of justice
23 based on factual innocence, a petitioner must show that a constitutional violation has
24 probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513
25 U.S. 298, 327 (1995)). To establish the requisite probability, the petitioner must
26 demonstrate with new reliable evidence that it is more likely than not that no reasonable
27 juror would have found petitioner guilty beyond a reasonable doubt. *Id.* at 324, 327.
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1 Although Jessup argues there was insufficient evidence for him to be convicted of theft of
2 means of transportation, nowhere in his filings has Jessup identified new evidence in
3 support of that theory.

4 Claim 3 is procedurally defaulted.

5 **MERITS**

6 **Legal Standards for Relief Under the AEDPA**

7 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) created a
8 “highly deferential standard for evaluating state-court rulings’ . . . demand[ing] that state-
9 court decisions be given the benefit of the doubt.” *Woodford v. Visciotti*, 537 U.S. 19, 24
10 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). Under the
11 AEDPA, a petitioner is not entitled to habeas relief on any claim “adjudicated on the
12 merits” by the state court unless that adjudication:

- 13 (1) resulted in a decision that was contrary to, or involved an
14 unreasonable application of, clearly established Federal law, as determined
15 by the Supreme Court of the United States; or
16 (2) resulted in a decision that was based on an unreasonable
17 determination of the facts in light of the evidence presented in the State
18 court proceeding.

18 28 U.S.C. § 2254(d). The last relevant state court decision is the last reasoned state
19 decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005)
20 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403
21 F.3d 657, 664 (9th Cir. 2005).

22 “The threshold test under AEDPA is whether [the petitioner] seeks to apply a rule
23 of law that was clearly established at the time his state-court conviction became final.”
24 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under
25 subsection (d)(1), the Court must first identify the “clearly established Federal law,” if
26 any, that governs the sufficiency of the claims on habeas review. “Clearly established”
27 federal law consists of the holdings of the Supreme Court at the time the petitioner’s state
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1 court conviction became final. *Williams*, 529 U.S. at 365; *see Carey v. Musladin*, 549
2 U.S. 70, 74 (2006).

3 The Supreme Court has provided guidance in applying each prong of
4 § 2254(d)(1). The Court has explained that a state court decision is “contrary to” the
5 Supreme Court’s clearly established precedents if the decision applies a rule that
6 contradicts the governing law set forth in those precedents, thereby reaching a conclusion
7 opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set
8 of facts that is materially indistinguishable from a decision of the Supreme Court but
9 reaches a different result. *Williams*, 529 U.S. at 405-06; *see Early v. Packer*, 537 U.S. 3,
10 8 (2002) (per curiam). Under the “unreasonable application” prong of § 2254(d)(1), a
11 federal habeas court may grant relief where a state court “identifies the correct governing
12 legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the
13 particular . . . case” or “unreasonably extends a legal principle from [Supreme Court]
14 precedent to a new context where it should not apply or unreasonably refuses to extend
15 the principle to a new context where it should apply.” *Williams*, 529 U.S. at 407. For a
16 federal court to find a state court’s application of Supreme Court precedent
17 “unreasonable,” the petitioner must show that the state court’s decision was not merely
18 incorrect or erroneous, but “objectively unreasonable.” *Id.* at 409; *Schriro v. Landrigan*,
19 550 U.S. 465, 473 (2007); *Visciotti*, 537 U.S. at 25. “A state court’s determination that a
20 claim lacks merit precludes federal habeas relief so long as “‘fairminded jurists could
21 disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S.
22 Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

23 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the
24 state court decision was based on an unreasonable determination of the facts. *Miller-El v.*
25 *Dretke*, 545 U.S. 231, 240 (2005) (Miller-El II). In considering a challenge under
26 § 2254(d)(2), state court factual determinations are presumed to be correct, and a
27 petitioner bears the “burden of rebutting this presumption by clear and convincing
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1 evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 550 U.S. at 473-74; *Miller-El II*, 545 U.S.
2 at 240.

3 **Claim 1(a)(i)**

4 Jessup alleges trial counsel failed to move to suppress on the basis that the
5 detached garage that was searched was not listed on the face of the warrant. As discussed
6 above, the clearly established Supreme Court law governing IAC claims is set forth in
7 *Strickland*.

8 On October 24, 2008, a Pima County Sheriff’s Officer executed a search warrant
9 at Jessup’s residence. The warrant directed the search of “5974 S. Rex Stravenue to
10 include storage sheds in backyard,” several vehicles, and three persons including Jessup.
11 (Doc. 18, Ex. M, Attach.) In denying this claim, the PCR court noted:

12 the terms “storage shed” and “garage” are often interchangeable, especially
13 in the context of such structures in the backyards of properties. Second,
14 even if “garage” was somehow not included in the class of “storage sheds,”
15 nothing about the description of the property in the search warrant could
16 have confused officers. An officer executing the search warrant would have
known immediately that the warrant was referring to what Jessup refers to
as the ‘garage.’ As such, the search warrant was sufficiently particular, and
any motion by defense counsel would have failed.

17 (*Id.*, Ex. Q at 3.) The appellate court affirmed the PCR court’s ruling. (*Id.*, Ex. U at 3-4.)

18 A search warrant “is valid if the description is sufficiently definite to enable the
19 executing officer to reasonably ascertain and identify the place to be searched and the
20 objects to be seized.” *United States v. Williams*, 687 F.2d 290, 293 (9th Cir. 1982) (citing
21 *Steele v. United States*, 267 U.S. 498, 503-04 (1925)). Here, because the warrant
22 identified the address of the property and explicitly identified “sheds” in the backyard, it
23 was sufficiently particular. Further, the Ninth Circuit has determined in prior cases that
24 use of the term “premises” in a warrant, as was used here, may be sufficient to include
25 and authorize a search of the buildings thereon. *See United States v. Williams*, 687 F.2d
26 290, 293 (9th Cir. 1982). “[T]he Fourth Amendment is not violated by a search of the
27 grounds or outbuildings within a residence’s curtilage where a warrant authorizes a
28 search of the residence.” *United States v. Cannon*, 264 F.3d 875, 880 (9th Cir. 2001).

1 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
2 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
3 certificate of appealability.

4 Dated this 31st day of August, 2016.

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8 Honorable Lynnette C. Kimmins
9 United States Magistrate Judge
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