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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lin William James,
Petitioner,

vs.

Rick Mauldin; et. al.,
Respondents.

) No. CV 08-586-PHX-NVW (HCE)

) **REPORT & RECOMMENDATION**

_____)
Pending before the Court is Petitioner’s Petition for Writ of Habeas Corpus (Doc.No. 1) filed pursuant to 28 U.S.C. § 2254. Pursuant to the Rules of Practice of this Court, this matter was referred to the undersigned Magistrate Judge for a Report and Recommendation. For the following reasons, the Magistrate Judge recommends that the District Court dismiss in part and deny the remainder of Petitioner’s Petition for Writ of Habeas Corpus.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner’s Conviction and Summary of the Case

On March 4, 2003, Petitioner was charged by Direct Complaint filed in Maricopa County Superior Court with two counts of Aggravated Driving Or Actual Physical Control While Under The Influence Of Intoxicating Liquor Or Drugs, class 4 felonies which occurred

1 on August 7, 2001.¹ (Answer, Exh. A) (Doc. No. 15). On May 22, 2003, Petitioner was
2 charged by Information with the same offenses. (Answer, Exh. B).

3 On June 13, 2003, the State filed an Allegation of Historical Priors alleging that: (1)
4 on August 27, 1992, Petitioner had been convicted of marijuana possession for sale, a class
5 3 felony, committed on March 13, 1992 (hereinafter “1992 conviction”); and (2) on
6 December 1, 1993, Petitioner had been convicted of aggravated DUI, a class 5 felony,
7 committed on May 17, 1993 (hereinafter “1993 conviction”). (Answer, Exh. C).

8 On November 5, 2003, Petitioner was convicted by a jury of: (1) Aggravated Driving
9 While Under The Influence (Impaired) (Count 1); and (2) Aggravated Driving While Under
10 The Influence (0.10%) (Count 2). (Answer, Exh. D). Following a bench trial at sentencing,
11 the trial court found beyond a reasonable doubt that Petitioner had two historical prior felony
12 convictions within the meaning of A.R.S. §13-604, namely the 1992 and 1993 convictions.
13 (Answer, Exh. E, F at p.29).² The trial court sentenced Petitioner to a mitigated sentence of
14 eight years of imprisonment on Counts 1 and 2 to run concurrently. (Answer, Exh. G; *see*
15 *also* Answer, Exh. F at pp. 38-41).

17 ¹Count One alleged that Petitioner drove or was in actual physical control of a vehicle,
18 while under the influence of intoxicating liquor, any drug, a vapor releasing substance
19 containing a toxic substance or any combination of liquor, drugs or vapor releasing
20 substance, while his driver’s license or privilege to drive was suspended, cancelled, revoked
21 or refused, or while a restriction is placed on his driver’s license or privilege to drive as a
22 result of violating A.R.S. §§28-692, 28-694, 28-1381, 28-1382, 28-1383, or 28-1385 in
23 violation of A.R.S. §§28-1381(A)(1), 28-1383(A)(1), 28-3001, 28-3304, 28-3305, 28-3315,
24 13-701, 13-702, 13-702.01, and 13-801. (Answer, Exh. A) Count Two Alleged that
25 Petitioner drove or was in actual physical control of a vehicle, while there was an alcohol
26 concentration of 0.10 or more in his body within two hours of the time of driving, while his
27 driver’s license or privilege to drive was suspended, cancelled, revoked or refused, or while
28 a restriction is placed on his driver’s license or privilege to drive as a result of violating
A.R.S. §§28-692, 28-694, 28-1381, 28-1382, 28-1383, or 28-1385 in violation of A.R.S.
§§28-1381(A)(2), 28-1383(A)(1), 28-3001, 28-3304, 28-3305, 28-3315, 13-701, 13-702, 13-
702.01 and 13-801. (*Id.*).

²Petitioner requested a jury trial on the State’s allegations of historical prior felony
convictions and the trial court denied that request. (Answer, p. 5 n.3).

1 B. The Direct Appeal

2 On December 29, 2004, Petitioner’s appointed appellate counsel filed an *Anders* brief
3 with the Arizona Court of Appeals. (Answer, p.5 & Exh. H). Therein, counsel stated that
4 after reviewing the record, he “found no arguable question of law that is not frivolous.” (*Id.*
5 at p.9). Counsel also informed the court that Petitioner “has suggested that the evidence
6 presented at his trial was insufficient to prove—beyond a reasonable doubt—that he was either
7 driving or was in actual physical control of a vehicle as was charged in both Count 1 and
8 Count 2 of the information.” (*Id.*). Petitioner also notified counsel of “approximately 25
9 additional issues [Petitioner] suggests be raised in his appellate brief. These additional
10 issues, however, are either unsupported by any facts in the existing appellate record or are
11 more properly the subject matter of a Rule 32—post-conviction relief—proceeding where the
12 record can be supplemented to further develop these issues.” (*Id.*).

13 On February 7, 2005, Petitioner filed a *pro se* “Supplementary Brief” with the Arizona
14 Court of Appeals wherein he raised the following nine issues:

- 15 1. Petitioner “was denied his U.S. Constitutional Right to Due Process when the
16 City of Phoenix dismissed [misdemeanor DUI] charges without the presence
17 of counsel”³;
- 18 2. The State’s act of filing felony charges violated the Ex Post Facto Clause and
19 Petitioner’s “U.S. Constitutional Right to Due Process...”;
- 20 3. Petitioner “was denied his U.S. Constitutional Right to Due Process when the
21 State missed the 10 days for Arraignment and Discovery”;

23
24 ³Petitioner maintained that on August 7, 2001, he had been arrested on misdemeanor
25 charges of DUI; that he appeared in “city court...” on the charges and was appointed counsel;
26 and at his second court appearance, his counsel did not show up and the prosecutor informed
27 Petitioner that the charges had been dismissed. (Answer, Exh. I, p.1). Petitioner further
28 contended that the State subsequently filed the felony charges underlying this instant federal
habeas action. (*Id.* at p.2). According to Petitioner, the felony charges are based on the same
incident that gave rise to the misdemeanor charges that had been dismissed without prejudice
in 2001. (*Id.*).

- 1 4. Petitioner was denied “his U.S. Constitutional Right to Due Process when the
2 State entered 609” with regard to the use of the 1992 prior conviction;
3 5. An error in the jury instructions, which was corrected, violated Petitioner’s
4 right to Due Process under the Fourteenth Amendment of the U.S.
5 Constitution;
6 6. Petitioner “was denied his U.S. Constitutional Right to Due Process when the
7 Court Ruled on 609” with regard to his 1992 prior conviction and yet used the
8 prior conviction for enhancement purposes;
9 7. Petitioner “was denied his U.S. Constitutional Right to Due Process when the
10 Prosecutor and State Witness Kevin Allbrecht, testifie[d] to Factual
11 Inaccuracies” which when considered with the mistaken jury instructions
12 violated Petitioner’s rights under the Fifth, Sixth, and Fourteenth Amendments
13 of the U.S. Constitution and Arizona Constitution;
14 8. Petitioner was denied “his U.S. Constitutional Right to Due Process...”: when
15 the State charged him without an indictment but told the jury that there was an
16 indictment, and because the Fifth Amendment requires an indictment; and
17 9. Petitioner was denied “his U.S. Constitutional Right to Due Process when the
18 State enhanced his sentence with two...” non-eligible historical prior felony
19 convictions. Petitioner also argued that the sentencing enhancement violated
20 *Blakely v. Washington*, 542 U.S. 296 (2004).

21 (Answer, Exh. I).

22 On April 21, 2005, the Arizona Court of Appeals affirmed Petitioner’s convictions
23 and sentences. (Answer, Exh. J).

24 On April 25, 2005, Petitioner’s appointed appellate counsel informed Petitioner that
25 he had reviewed the appellate decision and had concluded that there was no reasonable
26 probability that the Arizona Supreme Court would review Petitioner’s case. (Answer, Exh.
27 K).

28

1 On June 10, 2005, Petitioner filed a Petition for Review to the Arizona Supreme Court
2 with respect to the appellate court's ruling. (Answer, Exh. M). On October 7, 2005, the
3 Arizona Supreme Court summarily denied review. (Answer, Exh. N).

4 C. Post-Conviction Relief Proceedings

5 According to Respondents, during February through May 2004, an attorney was
6 appointed to prepare Petitioner's Petition for Post-Conviction Relief, but on July 13, 2004,
7 the post-conviction relief proceeding was dismissed upon Petitioner's own motion. ⁴
8 (Answer, p.5 n.4).

9 On December 2, 2005, Petitioner filed a Notice of Post-Conviction Relief and a
10 request for appointment of counsel. (Answer, Exh. O). Petitioner's request for appointment
11 of counsel was granted and after appointed counsel reviewed the record, counsel informed
12 Petitioner and the trial court that he found no grounds to raise in post-conviction relief
13 proceedings. (Answer, Exh. P). The trial court granted counsel's request for an extension
14 so that Petitioner could pursue a post-conviction relief petition on his own behalf. (Answer,
15 Exh. P, Q). The trial court also ordered counsel to remain as advisory counsel to Petitioner
16 during the proceeding. (Answer, Exh. Q).

17 On February 16, 2006, Petitioner filed his *pro se* Petition for Post-Conviction Relief
18 (hereinafter "PCR Petition") where he raised the following arguments:

- 19 1. The State's dismissal of the misdemeanor DUI charges and filing of the felony
20 DUI charges after the statute of limitations had expired on the misdemeanor
21 charges violated the Ex Post Facto Clause and the Double Jeopardy Clause of
22 the United States Constitution as well as Rule 8 of the Arizona Rules of
23 Criminal Procedure (hereinafter "PCR claim 1");
- 24 2. The State violated the Ex Post Facto Clause and the Due Process Clause of the
25 United States Constitution "by raising the grade of the misdemeanor DUI..."
26 to aggravated DUI (hereinafter "PCR claim 2");

27
28 ⁴Petitioner's direct appeal was pending during this time.

- 1 3. The State’s delay in filing the felony charges violated Ariz.R.Crim.P. 8
2 governing speedy trials and was unreasonable under *Doggett v. United States*,
3 505 U.S. 647 (1992) (hereinafter “PCR claim 3”);
- 4 4. Ineffective assistance of trial counsel because counsel: (a) failed to alert the
5 court that the statute of limitations had expired; (b) “misled...[Petitioner] to
6 believe that he could get his original plea of 2.5 years back before the court,
7 but at a later date, denied this request”; and (c) “misled...” Petitioner to believe
8 that his 1992 prior conviction would not be used at sentencing in light of the
9 trial court’s ruling that the prior conviction was inadmissible at trial under
10 Ariz.R.Evid. 609 (hereinafter “PCR claim 4”);
- 11 5. The trial court violated Petitioner’s right to due process by considering
12 Petitioner’s prior convictions at sentencing because the charging document did
13 not refer to Petitioner’s prior convictions and the existence of the prior
14 convictions had not been proved to a jury beyond a reasonable doubt.
15 Additionally, the trial court’s determination regarding Petitioner’s prior
16 convictions and use of same for enhancement violated Petitioner’s rights to
17 due process, notice and a jury under the Fifth, Sixth and Fourteenth
18 Amendments of the U.S. Constitution (hereinafter “PCR claim 5”); and
- 19 6. The trial court abused its discretion and violated the Double Jeopardy Clause
20 and Petitioner’s right to due process when it precluded the State from
21 introducing Petitioner’s 1992 conviction under Ariz.R.Evid. 609 but then
22 considered that conviction at sentencing (hereinafter “PCR claim 6”).

23 (Answer, Exh. R. *See also* Answer, Exh. S, T).

24 On March 16, 2006, after the PCR Petition was fully briefed, Petitioner filed an
25 “Attachment” to his PCR Petition wherein he provided additional briefing on his *Blakely*
26 theory. (Answer, Exh. U). On April 4, 2006, the trial court struck Petitioner’s Attachment
27 because it was filed without permission and because Petitioner’s *Blakely* claim was precluded
28

1 in light of the fact that the claim was previously raised in the Court of Appeals. (Answer,
2 Exh. V).

3 On May 9, 2006, the trial court dismissed Petitioner's PCR Petition on the following
4 grounds with regard to

- 5 • PCR claim 1: "Petitioner's claim is that the State filed felony charges after the
6 statute of limitations had run. Petitioner, however, mistakenly argues that the
7 limitations period for misdemeanors applied to his case. Petitioner was
8 charged with Class 4 felonies. These charges fell within the seven-year
9 period."
- 10 • PCR claim 4: "Petitioner's counsel was not ineffective in violation of state law
11 by failing to move to dismiss the charges. The charges were filed well within
12 the statute of limitations."

13 (Answer, Exh. W). The trial court dismissed PCR claims 2, 5, and 6 as precluded by
14 Ariz.R.Crim.P. 32.2(a)(2) because the Arizona Court of Appeals had previously rejected
15 these claim on the merits. (*Id.*). Additionally, the trial court dismissed PCR claim 3 pursuant
16 to Ariz.R.Crim.P. 32.2(a)(3) because Petitioner waived such claim when he did not raise it
17 in his direct appeal. (*Id.*).

18 On June 19, 2006, Petitioner filed a Petition for Review of the trial court's dismissal
19 of his PCR Petition. (Answer, Exh. Y). On June 22, 2007, the Court of Appeals summarily
20 denied review. (Answer, Exh. Z). On July 7, 2007, Petitioner filed a Petition for Review
21 with the Arizona Supreme Court and on October 11, 2007, the Arizona Supreme Court
22 summarily denied review. (Answer, Exh. AA, DD).

23 **II. PETITIONER'S FEDERAL PETITION FOR WRIT OF HABEAS CORPUS**

24 On March 27, 2008, Petitioner filed the instant Petition for Writ of Habeas Corpus
25 (hereinafter "Petition") (Doc. No. 1) together with a Memorandum of Points and Authorities
26 (hereinafter "Petitioner's Memo.") (Doc. No. 3) wherein he raises the following grounds for
27 relief:
28

- 1 1. The State’s filing of the felony DUI charges after expiration of the statute of
2 limitations applicable to misdemeanors violated the Double Jeopardy Clause,
3 Petitioner’s rights to due process and to equal protection under the Fifth and
4 Fourteenth Amendments of the U.S. Constitution (Ground I);
- 5 2. The delay between Petitioner’s arrest and the State’s institution of the felony
6 charges violated Petitioner’s right to a speedy trial under Ariz.R.Crim.P. 8 and
7 the Sixth Amendment of the U.S. Constitution, and denied Petitioner of his due
8 process rights (Ground II);
- 9 3. The State’s prosecution of Petitioner on the felony charges, after
10 Ariz.R.Crim.P. 8.2 was amended to extend the time in which Petitioner could
11 be tried, violated the Ex Post Facto Clause (Ground III);
- 12 4. Violation of Petitioner’s rights under the Sixth Amendment of the U.S.
13 Constitution because Petitioner’s trial counsel rendered ineffective assistance
14 when counsel failed to: (a) investigate and present substantial legal arguments;
15 (b) advise the court that the charges against Petitioner were “insufficient”; (c)
16 subject the State’s case to any meaningful adversarial testing; (d) advise the
17 court of the lapsed expiration of time; and (e) raise Petitioner’s rights under the
18 U.S. Constitution (Ground IV); and
- 19 5. Petitioner’s sentence constituted an “Abuse of discretion...” by the trial court
20 and constituted a violation of Petitioner’s Sixth Amendment rights under
21 *Blakely v. Washington*, 542 U.S. 296 (2004) when the trial court considered
22 Petitioner’s 1992 and 1993 prior convictions to enhance his sentence; use of
23 the prior convictions violated his rights to due process and equal protection;
24 A.R.S. §13-702(C) is unconstitutional on its face; and A.R.S. §13-604 was
25 never named in the charging complaint (Ground V).

26 (Petition; Petitioner’s Memorandum).

27 On August 26, 2008, Respondents filed their Answer (Doc. No. 15). Respondents
28 acknowledge that Petitioner’s Petition for Writ of Habeas Corpus is timely. (Answer, p. 10).

1 Respondents contend that Petitioner's grounds for relief are procedurally barred from federal
2 habeas corpus review and/or fail on the merits.

3 On September 16, 2008, Petitioner filed a Reply (Doc. No. 16).

4 **III. DISCUSSION**

5 **A. Standard of Review**

6 **1. Exhaustion and Procedural Default**

7 Respondents argue that habeas review of the majority of Petitioner's claims is barred
8 because such claims are procedurally defaulted.

9 **a. Exhaustion**

10 A federal court may not grant a petition for writ of habeas corpus unless the petitioner
11 has exhausted the state court remedies available to him 28 U.S.C. § 2254(b); *Baldwin v.*
12 *Reese*, 541 U.S. 27(2004); *Castille v. Peoples*, 489 U.S. 346 (1989). The exhaustion inquiry
13 focuses on the availability of state court remedies at the time the petition for writ of habeas
14 corpus is filed in federal court. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Exhaustion
15 generally requires that a prisoner provide the state courts an opportunity to act on his claims
16 before he presents those claims to a federal court. *Id.* A petitioner has not exhausted a claim
17 for relief so long as the petitioner has a right under state law to raise the claim by available
18 procedure. *See Id.*; 28 U.S.C. § 2254(c).

19 To meet the exhaustion requirement, the petitioner must have "fairly present[ed] his
20 claim in each appropriate state court...thereby alerting that court to the federal nature of the
21 claim." *Baldwin*, 541 U.S. at 29; *see also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995).
22 A petitioner fairly presents a claim to the state court by describing the factual or legal bases
23 for that claim and by alerting the state court "to the fact that the...[petitioner is] asserting
24 claims under the United States Constitution." *Duncan*, 513 U.S. at 365-366. *See also*
25 *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001) (same). Mere similarity between a
26 claim raised in state court and a claim in a federal habeas petition is insufficient. *Duncan*,
27 513 U.S. at 365-366.

28

1 Furthermore, to fairly present a claim, the petitioner "must give the state courts one
2 full opportunity to resolve any constitutional issues by invoking one complete round of the
3 State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Once a federal
4 claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.
5 *See Picard v. Connor*, 404 U.S. 270, 275 (1971). In habeas petitions, other than those
6 concerning life sentences or capital cases, the claims of Arizona state prisoners are exhausted
7 if they have been fairly presented to the Arizona Court of Appeals either on appeal of the
8 conviction or through a collateral proceeding pursuant to Rule 32 of the Arizona Rules of
9 Criminal Procedure.⁵ *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999), *cert. denied*
10 529 U.S. 1124 (2000). Thus, "a petitioner fairly and fully presents a claim to the state court
11 for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the
12 proper forum..., (2) through the proper vehicle..., and (3) by providing the proper factual and
13 legal basis for the claim..." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005)
14 (citations omitted).

15 b. Procedural Default

16 In some instances a claim can be technically exhausted even though the state court did
17 not address the merits. This situation is referred to as "procedural bar" or "procedural
18 default." *See Coleman v. Thompson*, 501 U.S. 722, 732 ("A habeas petitioner who has
19 defaulted his federal claims in state court meets the technical requirements for exhaustion;
20 there are no state remedies any longer 'available' to him."). A claim is procedurally
21 defaulted if the state court declined to address the issue on the merits for procedural reasons
22 such as waiver or preclusion. *Ylst v. Nunnemaker*, 501 U.S. 797, 802-805 (1991); *Franklin*
23 *v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002). A higher court's subsequent summary denial
24 reaffirms the lower court's application of a procedural bar. *Ylst*, 501 U.S. at 803.

25
26 ⁵Respondents argue that *Baldwin* "implicitly overruled" *Swoopes* and its progeny, and
27 thus, to satisfy the exhaustion requirement Petitioner herein must present his claims to the
28 Arizona Supreme Court to satisfy the exhaustion requirement. (Answer, pp. 13-14) That
argument is addressed *infra*, at III.B.1.a.(2.).

1 Additionally, procedural default also occurs if the claim was not presented to the state
2 court and it is clear the state would now refuse to address the merits of the claim for
3 procedural reasons. *Id.* Thus, if a claim has never been presented to the state court, a federal
4 habeas court may determine whether state remedies remain available.⁶ *See Harris v. Reed,*
5 489 U.S. 255, 263 n.9 (1989); *Franklin,* 290 F.3d at 1231. In Arizona, such a determination
6 often involves consideration of Rule 32 *et seq.* of the Arizona Rules of Criminal Procedure
7 governing post-conviction relief proceedings. For example, Ariz.R.Crim.P. 32.1 specifies
8 when a petitioner may seek relief in post-conviction proceedings based on federal
9 constitutional challenges to convictions or sentences. Under Rule 32.2, relief is barred on
10 any claim which could have been raised in a prior Rule 32 petition for post-conviction relief,
11 with the exception of certain claims⁷ which were justifiably omitted from a prior petition.
12 Ariz.R.Crim.P. 32.2. Moreover, a state post-conviction action is futile when it is time-
13 barred. *Beaty,* 303 F.3d at 987; *Moreno v. Gonzalez,* 116 F.3d 409, 410 (9th Cir. 1997)
14 (recognizing untimeliness under Ariz.R.Crim.P. 32.4(a) as a basis for dismissal of Arizona
15 petition for post-conviction relief, distinct from preclusion under Ariz.R.Crim.P. 32.2(a)).

16 Both of these instances of procedural default provide an independent and adequate
17 state-law ground for the conviction and sentence and thus prevents federal habeas corpus

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19 ⁶The Ninth Circuit has suggested that, under Ariz.R.Crim.P. 32.2, there are exceptions
20 to the rule that a district court can decide whether state remedies remain available for claims
21 that require a knowing, voluntary, and intelligent waiver *see Cassett v. Stewart,* 406 F.3d 614
22 (9th Cir. 2005), *cert. denied,* 546 U.S. 1172 (2006). The issue of waiver must be
affirmatively raised by the petitioner. *See Beaty v. Stewart,* 303 F.3d 975, 987 & n.5 (9th Cir.
2002), *cert denied,* 538 U.S. 1053 (2003).

23 ⁷Such claims include: (1) that the petitioner is being held in custody after his sentence
24 has expired; (2) certain circumstances where newly discovered material facts probably exist
25 and such facts probably would have changed the verdict or sentence; (3) the petitioner's
26 failure to file a timely notice of post-conviction relief was without fault on his part; (4) there
27 has been a significant change in the law that would probably overturn petitioner's conviction
28 if applied to his case; and (5) the petitioner demonstrates by clear and convincing evidence
that the facts underlying the claim would be sufficient to establish that no reasonable fact-
finder would have found petitioner guilty beyond a reasonable doubt. Ariz.R.Crim.P. 32.2(b)
(citing Ariz.R.Crim.P. 32.1(d)-(h)).

1 review. Accordingly, the procedural default doctrine prevents state prisoners from obtaining
2 federal review by allowing the time to run on available state remedies and then rushing to
3 federal court seeking review. *Coleman*, 501 U.S. at 731-732 (1991).

4 (1.) Cause and Prejudice

5 A petitioner may be relieved from a procedural default on a showing of cause and
6 prejudice. *Gray v. Netherland*, 518 U.S. 152, 161-162 (1996); *see also Murray v. Carrier*,
7 477 U.S. 478, 485-495 (1986); *Franklin*, 290 F.3d at 1231. Generally, “cause” sufficient “to
8 excuse a default exists if the petitioner ‘can show that some objective factor external to the
9 defense impeded counsel’s efforts to comply with the State’s procedural rule.’” *Cook v.*
10 *Schriro*, 538 F.3d 1000, 1027 (9th Cir. 2008) (*quoting Murray*, 477 U.S. at 488). Examples
11 of cause sufficient to excuse a procedural default include “‘a showing that the factual or legal
12 basis for a claim was not reasonably available to counsel,’ or that ‘some interference by
13 officials’ made compliance impracticable.’” *Id.* (*quoting Murray*, 477 U.S. at 488)).
14 Additionally, in certain circumstances, ineffective assistance of counsel may also constitute
15 sufficient cause to excuse a default. *Id.* (*citing Edwards v. Carpenter*, 529 U.S. 446, 451
16 (2000); *Murray*, 477 U.S. at 488).

17 Prejudice is actual harm resulting from the constitutional violation or error. *Magby*
18 *v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice, a petitioner must
19 demonstrate that the alleged constitutional violation “worked to his actual and substantial
20 disadvantage, infecting his entire trial with error of constitutional dimension.” *United States*
21 *v. Frady*, 456 U.S. 152, 170 (1982). If the petitioner fails to establish cause sufficient to
22 excuse a procedural default, the court “need not consider whether he suffered actual
23 prejudice.” *Cook*, 538 F.3d at 1028 n.13 (*citing Engle v. Isaac*, 456 U.S. 107, 134 n.43
24 (1982)).

25 (2.) Fundamental Miscarriage of Justice

26 A habeas petitioner “may also qualify for relief from his procedural default if he can
27 show that the procedural default would result in a ‘fundamental miscarriage of justice.’”
28 *Cook*, 538 F.3d at 1028 (*citing Schlup v. Delo*, 513 U.S. 298, 321 (1995)). This exception

1 to the procedural default rule is limited to habeas petitioners who can establish that “a
2 constitutional violation has probably resulted in the conviction of one who is actually
3 innocent.” *Schlup*, 513 U.S. at 327. *See also Murray*, 477 U.S. at 496; *Cook*, 538 F.3d at
4 1028. “To be credible, such a claim requires petitioner to support his allegations of
5 constitutional error with new reliable evidence—whether it be exculpatory scientific evidence,
6 trustworthy eye-witness accounts, or critical physical evidence—that was not presented at
7 trial.” *Cook*, 538 F.3d at 1028 (*quoting Schlup*, 513 U.S. at 324).

8 c. Conclusion

9 In summary, failure to exhaust and procedural default/bar are different concepts.
10 *Franklin*, 290 F.3d at 1230-1231. Under both doctrines, the federal court may be required
11 to refuse to hear a habeas claim. *Id.* The difference between the two is that when a petitioner
12 fails to exhaust, he may still be able to return to state court to present his claims there. *Id.*
13 In contrast, “[w]hen a petitioner's claims are procedurally barred and a petitioner cannot show
14 cause and prejudice for the default [or a fundamental miscarriage of justice]...the district
15 court dismisses the petition because the petitioner has no further recourse in state court.” *Id.*
16 at 1231.

17 2. Merits

18 Pursuant to the provisions of the Antiterrorism and Effective Death Penalty Act of
19 1996 (hereinafter “AEDPA”), the Court may grant a writ of habeas corpus only if the state
20 court proceeding:

- 21 (1) resulted in a decision that was contrary to, or involved an
22 unreasonable application of, clearly established Federal
23 law, as determined by the Supreme Court of the United
24 States; or
25 (2) resulted in a decision that was based on an unreasonable
26 determination of the facts in light of the evidence
27 presented in the State court proceeding.

28 28 U.S.C. § 2254(d)(1),(2). Section 2254(d)(1) applies to challenges to purely legal
questions resolved by the state court and section 2254(d)(2) applies to purely factual
questions resolved by the state court. *Lambert v. Blodgett*, 393 F.3d 943, 978 (9th Cir. 2004),

1 *cert. denied* 546 U.S. 963 (2005). Therefore, the question whether a state court erred in
2 applying the law is a different question from whether it erred in determining the facts. *Rice*
3 *v. Collins*, 546 U.S. 333, 342 (2006). In conducting its review, the federal habeas court
4 "look[s] to the last reasoned state-court decision." *Van Lynn v. Farmon*, 347 F.3d 735, 738
5 (9th Cir. 2003).

6 Section 2254(d)(1) consists of two alternative tests, i.e., the "contrary to" test and the
7 "unreasonable application" test. *See Cordova v. Baca*, 346 F.3d 924, 929 (9th Cir. 2003).
8 Under the first test, the state court's "decision is contrary to clearly established federal law
9 if it fails to apply the correct controlling authority, or if it applies the controlling authority
10 to a case involving facts materially indistinguishable from those in a controlling case, but
11 nonetheless reaches a different result." *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003)
12 (*citing Williams v. Taylor*, 529 U.S. 362, 413-414 (2000)). Additionally, a state court's
13 decision is "contrary to" Supreme Court case law if "the state court 'applies a rule that
14 contradicts the governing law set forth in' Supreme Court cases."⁸ *Van Lynn*, 347 F.3d at
15 738 (*quoting Early v. Packer*, 537 U.S. 3, 8 (2002)). "Whether a state court's interpretation
16 of federal law is *contrary* to Supreme Court authority...is a question of federal law as to
17 which [the federal courts]...owe no deference to the state courts." *Cordova*, 346 F.3d at 929
18 (emphasis in original) (distinguishing deference owed under the "contrary to" test of section
19 (d)(1) with that owed under the "unreasonable application" test).

20
21
22 ⁸"[T]he *only* definitive source of clearly established federal law under AEDPA is the
23 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court
24 decision. *Williams*, 529 U.S. at 412...While circuit law may be 'persuasive authority' for
25 purposes of determining whether a state court decision is an unreasonable application of
26 Supreme Court law, *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir.1999), only the
27 Supreme Court's holdings are binding on the state courts and only those holdings need be
28 reasonably applied." *Clark*, 331 F.3d at 1069 (emphasis in original). *See also Holley v.*
Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (*citing Carey v. Musladin*, 549 U.S. 70, 76-
77 (2006) ("Circuit precedent may not serve to create established federal law on an issue the
Supreme Court has not yet addressed").

1 Under the second test, "[a] state court's decision involves an unreasonable application
2 of federal law if the state court identifies the correct governing legal principle...but
3 unreasonably applies that principle to the facts of the prisoner's case." *Van Lynn*, 347 F.3d
4 at 738 (*quoting Clark*, 331 F.3d at 1067). Under the "unreasonable application clause...a
5 federal habeas court may not issue the writ simply because that court concludes in its
6 independent judgment that the relevant state-court decision applied clearly established
7 federal law erroneously or incorrectly....Rather that application must be objectively
8 unreasonable." *Clark*, 331 F.3d at 1068 (*quoting Lockyer v. Andrade*, 538 U.S. 63 (2003))
9 (internal quotation marks and citation omitted). When evaluating whether the state court
10 decision amounts to an unreasonable application of federal law, "[f]ederal courts owe
11 substantial deference to state court interpretations of federal law...." *Cordova*, 346 F.3d at
12 929.

13 Under section 2254(d)(2), which involves purely factual questions resolved by the
14 state court, "the question on review is whether an appellate panel, applying the normal
15 standards of appellate review, could reasonably conclude that the finding is supported by the
16 record." *Lambert*, 393 F.3d at 978; *see also Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.),
17 *cert. denied* 543 U.S. 1038 (2004) ("a federal court may not second-guess a state court's fact-
18 finding process unless, after review of the state-court record, it determines that the state court
19 was not merely wrong, but actually unreasonable.") Section (d)(2) "applies most readily to
20 situations where petitioner challenges the state court's findings based entirely on the state
21 record. Such a challenge may be based on the claim that the finding is unsupported by
22 sufficient evidence,...that the process employed by the state court is defective,...or that no
23 finding was made by the state court at all." *Taylor*, 366 F.3d at 999 (citations omitted).
24 When examining the record under section 2254(d)(2), the federal court "must be particularly
25 deferential to our state court colleagues... [M]ere doubt as to the adequacy of the state court's
26 findings of fact is insufficient; 'we must be satisfied that *any* appellate court to whom the
27 defect [in the state court's fact-finding process] is pointed out would be unreasonable in
28 holding that the state court's fact-finding process was adequate." *Lambert*, 393 F.3d at 972

1 (*quoting Taylor*, 366 F.3d at 1000) (emphasis and bracketed text in original). Once the
2 federal court is satisfied that the state court's fact-finding process was reasonable, or where
3 the petitioner does not challenge such findings, "the state court's findings are dressed in a
4 presumption of correctness, which then helps steel them against any challenge based on
5 extrinsic evidence, i.e., evidence presented for the first time in federal court."⁹ *Taylor*, 366
6 F.3d at 1000. *See also* 28 U.S.C. section 2254(e).

7 Both section 2254(d)(1) and (d)(2) may apply where the petitioner raises issues of mixed
8 questions of law and fact. Such questions "receive similarly mixed review; the state court's
9 ultimate conclusion is reviewed under [section] 2254(d)(1), but its underlying factual
10 findings supporting that conclusion are clothed with all of the deferential protection
11 ordinarily afforded factual findings under [sections] 2254(d)(2) and (e)(1)." *Lambert*, 393
12 F.3d at 978.

13 B. Analysis of Petitioner's Grounds for Relief

14 1. Ground I

15 Petitioner asserts that the filing of the felony charges after the expiration of the statute of
16 limitations applicable to misdemeanor charges violated his federal constitutional rights under
17 the Double Jeopardy Clause as well his rights to due process and to equal protection.¹⁰

18
19 ⁹Under section 2254(e) "a determination of a factual issue made by a State court shall
20 be presumed to be correct." 28 U.S.C. § 2254(e)(1). The "AEDPA spells out what this
21 presumption means: State-court fact-finding may be overturned based on new evidence
22 presented for the first time in federal court only if such new evidence amounts to clear and
23 convincing proof that the state-court finding is in error....Significantly, the presumption of
24 correctness and the clear-and-convincing standard of proof only come into play once the
25 state-court's fact-findings survive any intrinsic challenge; they do not apply to a challenge
26 that is governed by the deference implicit in the 'unreasonable determination' standard of
27 section 2254(d)(2)." *Taylor*, 366 F.3d at 1000.

28 ¹⁰Respondents also read Petitioner's Ground I as raising a vindictive prosecution claim
which Respondents contend is unexhausted and procedurally defaulted. (Answer, pp. 2, 16,
19). Petitioner asserts that he is not raising a vindictive prosecution claim herein nor has he
raised such a claim at the state level. (Reply, p.20). Given Petitioner's express statement that
he is not pursuing such a claim, there is no need to address Respondents' argument on this

1 (Petition, p. 6A; Petitioner’s Memo. pp.1-11).

2 Respondents argue that Petitioner failed to exhaust all claims raised in Ground I of his
3 Petition. Specifically, Respondents contend that: (1) Petitioner failed to fairly present his
4 Double Jeopardy claim; (2) Petitioner’s Due Process claim is unexhausted because it was not
5 presented to the Arizona Supreme Court; and (3) Petitioner’s claim of equal protection
6 violation is unexhausted because this claim was not presented to the state trial court.
7 Alternatively, Respondents contend that Petitioner’s claims of violation of the Double
8 Jeopardy and Due Process Clauses are without merit.

9 a. Exhaustion and Procedural Default

10 (1.) Double Jeopardy

11 Respondents argue that Petitioner did not fairly present his Double Jeopardy claim to the
12 state court because he failed to explain the basis for his claim. (Answer, pp. 17-18).

13 In his PCR Petition, Petitioner included a “Statement of Facts” wherein he alleged that the
14 State had dismissed misdemeanor DUI charges and, after the misdemeanor statute of
15 limitations had passed, the State instituted felony DUI charges against him based upon the
16 same incident that had given rise to the dismissed misdemeanor charges. (Answer, Exh. R).
17 Within his PCR Petition Statement of Facts, Petitioner asserted: “One is placed in double
18 jeopardy when [a] prior factual determination is re-litigated. *State v. Rios*,...” 114 Ariz. 505,
19 562 P.2d 385 (App. 1977). (Answer, Exh. R, p.3 of “*Pro Per* [PCR] Petition”). *Rios* stands
20 for the proposition cited by Petitioner. Petitioner, in his reply brief filed in the PCR
21 proceeding, argued that the State’s institution of felony charges after the expiration of the
22 misdemeanor statute of limitations placed him “in Double-[sic]Jeopardy. One is placed in
23 Double[sic]-Jeopardy when prior factual determination is relitigated. *State v.*
24 *Rios*,....Charging the petitioner twice for the same crime violates the double-[sic]jeopardy
25 clause of the U.S. Constitution.” (Answer, Exh. T, pp. 3-4).

26 According to Respondents, “Petitioner provided additional argument in his...” reply brief
27 _____
28 issue.

1 during the PCR Proceeding and this did not amount to fair presentment. (Answer, p.18)
2 (citing *Laurie v. Wittner*, 228 F.3d 113, 124 (2d Cir. 2000); *State ve. Aleman*, 210 Ariz. 232,
3 236, 109 P.3d 571, 575 (App. 2005) (“Generally, an appellant may not raise issues for the
4 first time in the reply brief.”).

5 When Petitioner filed his PCR Petition, the Arizona Rules of Criminal Procedure required
6 that a petitioner for post-conviction relief “shall include every ground known to him or her
7 for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed
8 upon him or her, and certify that he or she has done so.” Ariz.R.Crim.P. 32.5 (2000)
9 (“Contents of Petition”); *see also* A.R.S. §13-4235 (2001) (same). However, the Court is
10 mindful that “[a] habeas petition from a state prisoner, like Petitioner, who is proceeding *pro*
11 *se* may be viewed more leniently for exhaustion purposes than a petition drafted by counsel.”
12 *Fields v. Waddington*, 401 F.3d 1018, 1021 (9th Cir. 2005) (viewing petitioner’s state petition
13 under “more lenient standard...”). A fair and lenient reading of Petitioner’s PCR briefs
14 supports the conclusion that Petitioner did not raise a *new* double jeopardy claim in his reply
15 brief. In his PCR Petition, Petitioner raised the issue of double jeopardy specifically when
16 discussing his allegation that the state filed the felony charges after dismissing the
17 misdemeanor charges which were based on the same incident and that the felony charges
18 were filed after expiration of the limitations period applicable to misdemeanors. Petitioner’s
19 reply brief, albeit perhaps more artfully worded, makes the same point—the State’s filing of
20 the felony charges, according to Petitioner, required “relitigat[ion]...” of “a prior factual
21 determination...” relating to the misdemeanor charges. (Answer, Exh. T, pp.3-4). Under the
22 instant circumstances, Petitioner fairly presented the state court with the basis of his Double
23 Jeopardy argument raised herein.

24 (2.) Due Process

25 Respondents contend that Petitioner’s Due Process claim is not exhausted because
26 Petitioner failed to seek review by the Arizona Supreme Court of the appellate court’s
27 summary rejection of this claim. According to Respondents, under *Baldwin*, 541 U.S. 27,
28 Petitioner was required to seek review by the Arizona Supreme Court before presenting his

1 claim to this Court. Because Petitioner did not seek such review, Respondents contend that
2 Petitioner has failed to properly exhaust his claim for relief. (Answer, pp. 13-14, 17).

3 In *Baldwin*, the U.S. Supreme Court reviewed a decision from the Ninth Circuit to address
4 the question of what constituted notice of the federal nature of a claim sufficient to satisfy
5 the fair presentment requirement found in 28 U.S.C. § 2254(b)(1). In setting out the
6 groundwork for its decision, the *Baldwin* Court stated that "[t]o provide the State with the
7 necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state
8 court (including a state supreme court with powers of discretionary review), thereby alerting
9 that court to the federal nature of the claim." *Baldwin*, 541 U.S. at 29 (citations omitted).
10 Respondents rely on the *Baldwin* Court's general statements of the law of exhaustion to
11 support their assertion that *Swoopes*, at least insofar as it addresses whether habeas
12 petitioners must seek review in the highest state court, is no longer valid.¹¹ However, an
13 examination of the rationale employed in the *Swoopes* decision readily distinguishes that
14 case from the general statements of law referred to by Respondents.

15 *Swoopes*, which examines the habeas exhaustion requirement specifically with regard to
16 Arizona's discretionary review system, was decided on remand to the Ninth Circuit for
17 consideration in light of the Supreme Court's decision in the *O'Sullivan* case. *Swoopes*, 196
18 F.3d 1008. In *Swoopes*, the Ninth Circuit, like the *Baldwin* Court, began its analysis by
19 reiterating the general rule stated in *O'Sullivan* that, "in order to satisfy the exhaustion
20 requirement for federal habeas relief, state prisoners must file for discretionary review in a
21 state supreme court when that review is part of ordinary appellate review." *Swoopes*, 196
22 F.3d at 1009 (citing *O'Sullivan*, 526 U.S. at 847). The *Swoopes* court recognized, however,
23 that the Supreme Court in *O'Sullivan* had "acknowledged an exception to the exhaustion
24 requirement," by making it clear that "the creation of a discretionary review system does not,
25 without more, make review' in a state supreme court 'unavailable.'" *Swoopes*, 196 F.3d at
26

27 ¹¹Under *Swoopes*, Petitioner herein need only seek review from the Arizona Court of
28 Appeals and not the Arizona Supreme Court. *Swoopes*, 196 F.3d 1008.

1 1009 (*quoting O'Sullivan*, 526 U.S. at 847) (emphasis added in *Swoopes*). The Ninth Circuit
2 proceeded to consider Arizona's discretionary review system and found that Arizona case law
3 made it clear that "in cases not carrying a life sentence or the death penalty, review need not
4 be sought before the Arizona Supreme Court in order to exhaust state remedies." *Swoopes*,
5 196 F.3d. at 1010. Thus, the court concluded, "post-conviction review before the Arizona
6 Supreme Court is a remedy that is 'unavailable' within the meaning of *O'Sullivan*." *Id.*
7 (footnote omitted). There is nothing in *Baldwin* that suggests, implicitly or explicitly, that
8 this analysis is flawed or that the *Swoopes* holding has been overruled.

9 Moreover, the Ninth Circuit continues to cite *Swoopes* for the very proposition
10 Respondents suggest was overruled. *See Castillo v. McFadden*, 399 F.3d 993, 998 n.3 (9th
11 Cir. 2005) ("[i]n cases not carrying a life sentence or the death penalty, 'claims of Arizona
12 state prisoners are exhausted for purposes of federal habeas once the Arizona Court of
13 Appeals has ruled on them.'" (*quoting Swoopes*, 196 F.3d at 1010)). Therefore, Respondents
14 do not prevail with their argument that Petitioner's due process claim raised in Ground I is
15 unexhausted because Petitioner failed to seek review before the Arizona Supreme Court.¹²
16 *See Date v. Schriro*, 619 F.Supp.2d 736 (D.Ariz. Nov. 26, 2008) (examining claims presented
17 to the court of appeals but omitted from the petitioner's petition for review submitted before
18 the Arizona Supreme Court).

19 However, Petitioner's due process claim raised in the instant Petition was not fairly
20 presented in its entirety to the state court. Petitioner argues that the filing of felony charges
21 after the state dismissed the misdemeanor charges and after expiration of the statute of
22 limitations applicable to misdemeanor charges violated his due process rights. On direct
23 appeal, Petitioner did not raise a statute of limitations issue. Instead, the appellate court
24 addressed solely the issue whether the filing of felony charges after the dismissal of the
25

26
27 ¹²These same reasons also foreclose Respondents' argument that Petitioner's ex post
28 facto claim raised in Ground III is not exhausted for failure to present such claim to the
Arizona Supreme Court. (*See Answer*, p.21).

1 misdemeanor charges violated due process. Respondents address this claim on the merits.¹³
2 The Court finds Petitioner that Petitioner exhausted his due process claim only with regard
3 to the imposition of felony charges after dismissal of the misdemeanor charges.

4 Petitioner did not exhaust that portion of his due process claim relating to the filing of the
5 felony charges after expiration of the misdemeanor statute of limitations. In his PCR
6 Petition, Petitioner argued that he “was denied his U.S. Constitutional right to Due
7 Process...by the State changing the original mis. [sic] DUI 28-1381 to AGG. [sic] DUI 28-
8 1383 beyond expired time limits.” (Answer, Exh. O, p.3; *see also* Answer, Exh. R, pp. 2-3
9 of “*Pro Per* [PCR] Petition”). The trial court dismissed the claim because
10 “Petitioner...mistakenly argues that the limitations period for misdemeanors applied to his
11 case. Petitioner was charged with Class 4 felonies. These charges fell within the seven-year
12 period.” (Answer, Exh. W). In his petition for appellate-court review of the trial court’s
13 denial of his PCR Petition, Petitioner claimed:

14 In April, 2003, [sic] state unlawfully filed invalid agg [sic] DUI charges 28-1383
15 beyond statutory time limitation by over 6 months from a closed case for enhancement
16 purposes, and therefor[e] in violation of state law and U.S. Constitution.

17 (Answer, Exh. Y, p.4). Elsewhere, in his petition for review, Petitioner also argued that he
18 was denied his “U.S. Constitutional Rights To Due Process and The Ex Post Facto Clause
19 By The State Raising The Grade of Misdemeanor DUI...to Agg [sic] DUI...” (*Id.*) Neither
20 under this heading, nor elsewhere in his petition for review did Petitioner discuss any due
21 process implication involved in filing the felony charges after expiration of the statute of
22 limitations applicable to misdemeanors. A fair reading of Petitioner’s petition for review
23 leads to the conclusion that Petitioner did not present the Arizona Court of Appeals with a
24 federal constitutional due process issue concerning the filing of the felony charges *after*
25 expiration of the statute of limitations applicable to misdemeanor charges. Petitioner’s
26 failure to raise the claim in his petition for review renders the claim unexhausted.

27 ¹³Respondents addressed the claim on the merits as an alternative to their argument
28 that the claim had not been fairly presented to the state court in light of Petitioner’s failure
to seek review of the appellate court opinion issued on direct review.

1 (a.) Procedural Default

2 Petitioner cannot now return to state court to seek appellate court review of the trial
3 court's denial of this aspect of his due process claim because any such attempt would be
4 time-barred under Arizona's procedural rules. *See Park v. California*, 202 F.3d 1146, 1150-
5 51 (9th Cir. 2000) (federal habeas review is precluded where petitioner has not raised his
6 claim in the state courts and the time for doing so has expired). Specifically, Rule 32.9(c)
7 of the Arizona Rules of Criminal Procedure requires that a petition for review of the trial
8 court's ruling on a post-conviction relief petition must be filed within "thirty days after the
9 final decision of the trial court on the petition for post-conviction relief...." Ariz.R.Crim.P.
10 32.9(c). Petitioner is well-past that deadline and, thus, any attempt to raise the claim before
11 the state court at this point would be futile. *See Miloni v. Schriro*, 2006 WL 1652578
12 (D.Ariz. June 7, 2006) (Ariz.R.Crim.P. 32.9(c) time limit for filing a petition for review in
13 post-conviction relief proceeding is clear, firmly established, and has been consistently
14 applied so as to constitute adequate ground for preclusion under state law); *see also Pickens*
15 *v. Schriro*, 2009 WL 2870219 *12 ("since the time for seeking review by the Arizona Court
16 of Appeals has long expired, *see* Ariz.R.Crim.P. 32.9(c), Petitioner cannot now return to state
17 court and properly satisfy the exhaustion requirement. Accordingly, because any effort to
18 return to the Arizona Court of Appeals to exhaust his claims would be futile, Petitioner's
19 claims...are procedurally defaulted."); *Kanger v. Schriro*, 2008 WL 4830568 *8 (D. Ariz.
20 Nov. 3, 2008) (finding claim procedurally defaulted where petitioner "would...be time-
21 barred from seeking appellate review of the trial court's denial of his PCR" petition). The
22 claim is procedurally defaulted. *See Id.*

23 (b.) Cause and Prejudice

24 Petitioner cites ineffective assistance of trial and appellate counsel as cause to excuse his
25 procedural default. (Reply, pp. 10, 12). He also claims that "for the first 18 months of
26 confinement he did not have access to the prison law-[sic]library and after research made a
27 diligent attempt to raise these issues he did not know about...." (*Id.* at p.12).

28 However, Petitioner was aware of the claim and raised it in his PCR Petition, thus

1 Petitioner’s assertions of lack of access to legal materials is insufficient to establish cause to
2 excuse his failure to present the issue to the appellate court when seeking review during the
3 post-conviction relief proceeding. Likewise, Petitioner’s generic claim of ineffective
4 assistance of counsel is inapplicable to this claim given that Petitioner was not represented
5 by counsel when he filed his petition for review. Because Petitioner failed to establish cause,
6 the Court need not address prejudice. *Cook*, 538 F.3d at 1028 n.13 (citation omitted).

7 (c.) Fundamental Miscarriage of Justice

8 On the instant record, Petitioner has not presented any evidence or argument that would
9 support a finding of a constitutional violation that has probably resulted in the conviction of
10 someone who was actually innocent of the offenses at issue.¹⁴ *See Id.* (petitioner failed to
11 present any evidence that would sustain application of the “fundamental miscarriage of
12 justice exception” to the procedural default rule).

13 (d.) Conclusion

14 In sum, the Court will not address the merits of that portion of Petitioner’s due process
15 claim regarding the filing of felony charges after the expiration of the statute of limitations
16 applicable to misdemeanors.

17 (3.) Equal Protection

18 Respondents acknowledge that Petitioner concluded his *pro se* “Supplementary Brief”
19 filed on direct appeal with a litany of allegations concerning Petitioner’s conviction and
20 sentence:

21 [Petitioner] finds the conviction...and sentence imposed upon him by the State of
22 Arizona to be invalid, illegal, unlawful, wrongful, and unconstitutional. Thus as well
23 as a 6th and 14th Amendment violation of Due Process, violation of the U.S. and State
24 Constitution, and violation of *Equal Protection of the law*. Trial court error, fundamental error, Impermissible Jury Instructions, Intentional Prosecutorial [sic] Missconduct [sic], a 5th Amendment U.S. Constitutional violation. “*Equal Protection of the law.*”

25
26
27 ¹⁴The conclusion that Petitioner has failed to establish that he falls within the
28 “fundamental miscarriage of justice” exception applies to all claims herein that have been procedurally defaulted or procedurally barred.

1 (Answer, Exh. I, pp.11-12)¹⁵ (underlining in original, italics added). Respondents argue that
2 “such drive-by citations do not ‘fairly present’ a constitutional claim.” (Answer, p.18 n.12).
3 The Court agrees with Respondents. “Mere ‘general appeals to broad constitutional
4 principles, such as due process, *equal protection*, and the right to a fair trial,’ do not establish
5 exhaustion.” *Castillo*, 399 F.3d at 999 (quoting *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th
6 Cir. 1999)) (emphasis added). *See also Fields*, 401 F.3d at 1021 (A federal claim is not
7 exhausted “by a petitioner’s mention, in passing, of a broad constitutional concept, such as
8 due process.”). The Ninth Circuit has specifically held that a petitioner’s “conclusory,
9 scattershot citation of federal constitutional provisions, divorced from any articulated federal
10 legal theory...” failed to satisfy the fair presentment requirement.¹⁶ *Castillo*, 399 F.3d at
11 1003 (“Exhaustion demands more than drive-by citation, detached from any articulation of
12 an underlying federal legal theory.”). Here, Petitioner’s passing reference to the Equal
13 Protection Clause made in the conclusion of his appellate brief and “divorced of any
14 articulation of federal legal theory...” failed to satisfy the fair presentment requirement. *Id.*
15 Petitioner did not exhaust his Equal Protection claim.

16 Petitioner’s subsequent reference to the Equal Protection Clause in his 2007 Petition for
17 Review by the Arizona Supreme Court of the trial court’s denial of his PCR Petition, (*see*
18 Answer, p.18 & Exh. AA), does not alter the conclusion that Petitioner has failed to exhaust
19 an equal protection claim. Respondents aptly point out that initially raising a claim before
20 a court of discretionary review does not constitute fair presentation. *See Castille*, 489 U.S.
21 at 351 (no “fair presentation” where the petitioner raised the claim for the first and only time
22 in a procedural context in which its merits will not be considered absent special
23

24 ¹⁵Without any further mention of the Equal Protection Clause, Petitioner also asserted
25 that he did not have to prove his innocence, the jury instructions were “impermissible,” his
26 sentence was enhanced with ineligible prior convictions, and he had proven his innocence
27 beyond a reasonable doubt. (Answer, Exh. I, p.12).

28 ¹⁶Like the instant Petitioner, the petitioner in *Castillo* also set out a litany of alleged
violations in concluding his appellate brief. *See Castillo*, 399 F.3d at 1002.

1 circumstances); *Casey v. Moore*, 386 F.3d 896, 915-19 (9th Cir. 2004) (presentation of federal
2 claim for the first time in a petition for discretionary review to the state supreme court did
3 not constitute “fair presentation”).

4 Petitioner failed to exhaust the equal protection claim raised in Ground I.

5 (a.) Procedural Default

6 Petitioner’s return to state court to raise an Equal Protection claim would be futile because
7 the claim is precluded as waived under Ariz.R.Crim.P. 32.2(a)(3) because it was not
8 presented on direct appeal or in Petitioner’s PCR Petition. Further, presentation of such
9 claim in a second post-conviction relief proceeding would be untimely under Ariz.R.Crim.P.
10 32.4. *See Beaty*, 303 F.3d at 987 (a state post-conviction action is futile when it is time-
11 barred). Nor does the claim qualify for any of the timeliness exceptions. *See Ariz.R.Crim.P.*
12 *32.1(d)-(h)*. Thus, any additional petition would be subject to summary dismissal. *See State*
13 *v. Rosario*, 195 Ariz. 264, 266, 987 P.2d 226, 228 (App. 1999); *State v. Jones*, 182 Ariz. 432,
14 897 P.2d 734 (App. 1995); *Moreno v. Gonzales*, 192 Ariz. 131, 135, 962 P.2d 205, 209
15 (1998) (timeliness is a separate inquiry from preclusion). Under such circumstances,
16 Petitioner’s equal protection claim is procedurally defaulted.¹⁷ *Park*, 202 F.3d at 1150-51
17 (federal habeas review is precluded where petitioner has not raised his claim in the state
18 courts and the time for doing so has expired).

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20
21 ¹⁷Because this claim is procedurally defaulted pursuant to Rule 32.4(a),
22 Ariz.R.Crim.P., this Court need not determine whether the claims are of “sufficient
23 constitutional magnitude” to require a knowing, voluntary, and intelligent waiver such that
24 the claims are precluded pursuant to *Cassett*. Moreover, the procedural timeliness bar of Rule
25 32.4(a), Ariz.R.Crim.P., is clear, consistently applied, and well established. *Powell v.*
26 *Lambert*, 357 F.3d 871 (9th Cir.2004); see e.g., *Rosario*, 195 Ariz. 264, 987 P.2d 226 (where
27 petition did not raise claims pursuant to Rule 32.1(d) through (g), the petition could be
28 summarily dismissed if untimely); *Moreno*, 192 Ariz. 131, 962 P.2d 205 (timeliness
provision of Rule 32.4(a) became effective September 20, 1992); *State v. Jones*, 182 Ariz.
432, 897 P.2d 734 (App.1995) (Rule 32.4(a) was amended “to address potential abuse by
defendants caused by the old rule's unlimited filing periods”); *see also Wagner v. Stewart*,
2008 WL 169639, *9 (D.Ariz. Jan. 16, 2008).

1 of counsel not previously raised before the state court cannot be addressed on habeas
2 review). Petitioner's failure to exhaust his claim of ineffective assistance of counsel with
3 regard to his equal protection argument forecloses his reliance on such a claim to excuse his
4 procedural default. *See Edwards*, 529 U.S. at 451-53.¹⁹

5 Petitioner's alternative argument that he was without access to a library during the first
6 18 months of his confinement²⁰ does not constitute cause for default of his equal protection
7 claim. Petitioner's argument is undermined by the fact that, in his *pro se* brief filed on direct
8 appeal, Petitioner cited and in some instances quoted state and federal case law, state statutes
9 and rules, and provisions of the U.S. Constitution. Claims raised before the state appellate
10 court show that Petitioner was also aware at that time of the factual basis of the claim
11 presented in the instant habeas petition. On the instant record, Petitioner has not shown that
12 his choice to fairly present the state court with some grounds for relief but not others was
13 caused by some objective factor external to his defense.²¹ Because Petitioner has not shown
14 that some objective factor external to his defense prevented him from fairly presenting the
15 state court with his equal protection claim raised in Ground I of the instant Petition, he has
16 failed to satisfy the cause requirement. Because Petitioner failed to establish cause, the Court
17 need not address prejudice. *Cook*, 538 F.3d at 1028 n.13 (citation omitted).

18
19
20
21 ¹⁹Although, the procedural default of an ineffective-assistance-of-counsel claim
22 asserted as cause for the procedural default of another claim may "be excused if the prisoner
23 can satisfy the cause-and-prejudice standard with respect to *that* claim," Petitioner has
24 presented no justification to excuse his failure to raise such claim before the state court.
Edwards, 529 U.S. at 453 (emphasis in original).

25 ²⁰Petitioner was sentenced on January 16, 2004. (Answer, Exh. G). He filed his brief
26 on direct appeal on February 7, 2005. (Answer, Exh. I).

27 ²¹Petitioner cites lack of access to legal research materials as cause to excuse all
28 procedurally defaulted or barred claims in his Petition. This finding applies to reject any
such argument as to all defaulted claims.

1 b. Merits

2 (1.) Double Jeopardy

3 The offense giving rise to Petitioner’s conviction occurred on August 7, 2001 when
4 Petitioner received a citation for misdemeanor DUI in violation of A.R.S. §28-1381.
5 (Petition, p.6A). Petitioner claims that in September 2001, he appeared for his second court
6 appearance and was informed by the prosecutor that the misdemeanor charges had been
7 dismissed without prejudice. (*Id.*; Answer, Exh. I, p.1). On March 4, 2003, Petitioner was
8 charged by Direct Complaint with Aggravated DUI in violation of A.R.S. §28-1383 arising
9 from the August 7, 2001 incident. (Answer, Exh. A). Petitioner argues that the State’s
10 dismissal of the misdemeanor charges and subsequent filing of felony charges based on the
11 same offense and after expiration of the statute of limitations applicable to misdemeanors
12 violated his rights under the Double Jeopardy Clause of the U.S. Constitution. (Petition, p.6;
13 Petitioner’s Memo., pp.2-6).

14 (a.) The State Proceeding

15 Petitioner raised his double jeopardy argument in his PCR Petition. In ruling on the PCR
16 Petition, the trial court summarized Petitioner’s argument on this issue as a claim that “the
17 State unlawfully filed the charges against Petitioner after dismissing the original
18 misdemeanor charge.” (Answer, Exh. W.) In dismissing the claim, the trial court held:
19 “Petitioner’s claim is that the State filed felony charges after the statute of limitations had
20 run. Petitioner, however, mistakenly argues that the limitations period for misdemeanors
21 applied to his case. Petitioner was charged with Class 4 felonies. These charges fell within
22 the seven-year period.” (*Id.*). The state trial court’s decision is the last-reasoned state court
23 opinion this issue.

24 (b.) Analysis

25 The Arizona court did not cite U.S. Supreme Court case law in rejecting Petitioner’s
26 claim. The U.S. Supreme Court has held that the state courts are not required to cite U.S.
27 Supreme Court cases nor are they required to have an “*awareness* of our cases so long as
28 neither the reasoning nor the result of the state-court decision contradicts them.” *Early*, 537

1 U.S. at 8 (emphasis in original).

2 The Double Jeopardy Clause of the Fifth Amendment provides: “[N]or shall any person
3 be subject for the same offence to be twice put in jeopardy of life or limb.” U.S.Const.
4 amend. V. The Double Jeopardy Clause protects criminal defendants against “a second
5 prosecution for the same offense after acquittal,” “a second prosecution for the same offense
6 after conviction,” and “multiple punishments for the same offense.” *North Carolina v.*
7 *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted), *overruled on other grounds by*
8 *Alabama v. Smith*, 490 U.S. 794 (1989). “The protections afforded by the Clause are
9 implicated only when the accused has actually been placed in jeopardy. *Serfass v. United*
10 *States*, 420 U.S. 377...(1975). This state of jeopardy attaches when a jury is empaneled and
11 sworn, or, in a bench trial, when the judge begins to receive evidence.” *United States v.*
12 *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). *See also Serfass*, 420 U.S. at 391-92
13 (jeopardy attaches only when the defendant risks a determination of guilt); *United States v.*
14 *Vaughan*, 715 F.2d 1373 (9th Cir. 1983) (same).

15 To the extent that Petitioner argues that dismissal of the misdemeanor charges without
16 prejudice constituted an acquittal, the U.S. Supreme Court has pointed out that “an ‘acquittal’
17 cannot be divorced from the procedural context in which the action so characterized was
18 taken....The word itself has no talismanic quality for purposes of the Double Jeopardy
19 Clause....In particular, it has no significance in this context unless jeopardy has once attached
20 and an accused has been subjected to the risk of conviction.” *Serfass*, 420 U.S. at 1064-65
21 (citations omitted) (holding that on the facts of that case, dismissal with prejudice did not
22 constitute an “acquittal” under the Double Jeopardy Clause and, thus, did not bar re-
23 prosecution). Under the instant circumstances, Petitioner has not shown that jeopardy had
24 attached and, thus, the prohibition against double jeopardy has not been implicated.

25 This conclusion is not altered by Petitioner’s argument that the felony charges were filed
26 after expiration of the statute of limitations applicable to misdemeanors. Respondents
27 persuasively argue that statutes of limitations and the Double Jeopardy Clause perform two
28 fundamentally different functions. (*See Answer*, pp.37-38). The U.S. Supreme Court has

1 recognized that:

2 The purpose of a statute of limitations is to limit exposure to criminal prosecution to
3 a certain fixed period of time following the occurrence of those acts the legislature has
4 decided to punish by criminal sanctions. Such a limitation is designed to protect
5 individuals from having to defend themselves against charges when the basic facts may
6 have become obscured by the passage of time and to minimize the danger of official
7 punishment because of acts in the far-distant past.

8 *Toussie v. United States*, 397 U.S. 112, 115 (1970). See also *United States v. Rossman*, 940
9 F.2d 535, 536 (9th Cir. 1991) (“the limitations statute...creates a safeguard against unfair
10 convictions arising from delinquent prosecutions but does not entail a right to be free from
11 trial....” (quoting *United States v. Levine*, 658 F.2d 113, 126 (3rd Cir. 1981)); *United States*
12 *v. Davis*, 873 F.2d 900, 909 (6th Cir. 1989) (“The Double Jeopardy Clause protects one
13 against wrongly being tried or ‘placed in jeopardy,’ but statutes of limitations... ‘acknowledge
14 the state’s right to try certain persons, but then set boundaries on the exercise of that power.’”
15 (quoting *Levine*, 658 F.2d at 127); *Levine*, 658 F.2d at 126 (distinguishing between a statute
16 of limitations and constitutional protections such as the Double Jeopardy Clause and noting
17 that while statutes of limitations “establish restrictions on the state’s ability to prosecute, they
18 do not like the constitutional guarantees confer immunity from prosecution.”). In contrast,
19 the Double Jeopardy Clause guarantees against receiving multiple punishments for the same
20 offense or being twice put to trial for the same offense after acquittal or conviction. See
21 *Pearce*, 395 U.S. at 717.

22 Here, regardless of any distinction or similarity concerning statutes of limitations and the
23 guarantees of the Double Jeopardy Clause, the expiration of the statute of limitations
24 applicable to misdemeanors is of no moment with regard to Petitioner’s double jeopardy
25 claim. Petitioner was not charged with misdemeanors after expiration of the statute of
26 limitations applicable to such charges. Nor, as discussed above, has he shown that jeopardy
27 had attached at any time prior to institution of the felony charges. Instead, as the state trial
28 court correctly pointed out, Petitioner was charged with class 4 felonies within the applicable
statute of limitations. See A.R.S. §13-107(B)(1) (the State has seven years to commence
prosecution of a class 4 felony). The Double Jeopardy Clause does not apply in this

1 circumstance.

2 Because no federal constitutional violation occurred, Petitioner's claim lacks merit. The
3 state court's decision is not contrary to, nor an unreasonable application of, federal law as
4 determined by the United States Supreme Court. Nor did the state court's proceeding result
5 in a decision that was based on an unreasonable determination of the evidence presented.

6 (2.) Due Process

7 The offense giving rise to Petitioner's conviction occurred on August 7, 2001. (Answer,
8 Exh. A). Petitioner claims he was originally charged with misdemeanor DUI and that
9 approximately one month after the offense, the charges were dismissed without prejudice.
10 (Petition, p.6A). On March 4, 2003, Petitioner was charged by Direct Complaint with two
11 counts of Aggravated Driving Or Actual Physical Control While Under The Influence Of
12 Intoxicating Liquor Or Drugs, class 4 felonies, arising from the August 7, 2001 incident.
13 (Answer, Exh. A). Petitioner argues that filing of the felony charges after dismissal of the
14 misdemeanor charges violated his right to due process under the Fourteenth Amendment.

15 (a.) The State Proceeding

16 On direct appeal, the Arizona appellate court recognized Petitioner's claim that his due
17 process rights were violated when the state filed felony charges after dismissal of the
18 misdemeanor charges. (Answer, Exh. J, pp.3-4). The court initially rejected Petitioner's
19 claim for lack of citation to the record. (*Id.* at p.3). Because Petitioner relied on exhibits that
20 were not part of the record, the court found that Petitioner had abandoned his argument. (*Id.*
21 at pp. 3-4). The court went on to reject the claim as follows:

22 Assuming the State did dismiss and refile charges against Defendant, no due
23 process...violation occurred. Defendant fails to articulate, and we are unable to
24 discern[] how the dismissal and refileing of the charges violated due process...A
25 dismissal of charges without prejudice does not preclude commencement of another
26 prosecution based upon the same events. *See* Ariz.R.Crim.P. 16.6(a),(d); *Williams v.*
Superior Court In and For Pima County, 21 Ariz. App. 239, 241, 517 P.2d 1286, 1288
(1974).... No due process...violation occurred here.

26 (Answer, Exh. J, p.4). The appellate court's decision is the last-reasoned state court opinion
27 on this issue.

28

1 to challenge his conviction. *Blackledge*, 417 U.S. at 27 (recognizing that the “prosecutor
2 clearly has a considerable stake in discouraging convicted misdemeanants from appealing
3 and thus obtaining a trial de novo...since such an appeal will clearly require increased
4 expenditures of prosecutorial resources..., and may even result in a formerly convicted
5 defendant's going free. And, if the prosecutor has the means readily at hand to discourage
6 such appeals-by ‘upping the ante’ through a felony indictment whenever a convicted
7 misdemeanant [sic] pursues his statutory appellate remedy-the State can insure that only the
8 most hardy defendants will brave the hazards of a de novo trial.”). However, the Court has
9 distinguished cases like *Blackledge*, where the prosecutor institutes more serious charges
10 *post-conviction*, from cases where the prosecutor institutes more serious charges *before trial*.
11 *See Goodwin*, 457 U.S. at 381-82. This is so because before trial,

12 the prosecutor’s assessment of the proper extent of prosecution may not have
13 crystallized. In contrast, once a trial begins—and certainly by the time a conviction has
14 been obtained—it is much more likely that the State has discovered and assessed all of
15 the information against an accused and has made a determination, on the basis of that
information, of the extent to which he should be prosecuted. Thus, a change in the
charging decision made after an initial trial is completed is much more likely to be
improperly motivated than is a pretrial decision.

16 *Goodwin*, 457 U.S. at 381.

17 Here, Petitioner was never convicted of the misdemeanor charges. There was no
18 conviction preceding conviction on the felony charges. Thus, the State did not institute
19 felony charges *after* Petitioner successfully appealed or otherwise challenged a misdemeanor
20 conviction or any other conviction related to the August 2001 offenses. To establish a due
21 process violation under the instant circumstances, Petitioner must objectively show that “the
22 prosecutor’s charging decision was motivated by a desire to punish him for doing something
23 that the law plainly allowed him to do.” *Id.* at 384 (footnote omitted).

24 Respondents herein point out:

25 Although Petitioner repeatedly refers to his offense as a mere ‘traffic complaint,’ he
26 fails to explain how the State’s decision to prosecute him for aggravated DUI under
27 A.R.S. §28-1383, well within the felony statute of limitations, did anything more than
28 properly recognize the severity of Petitioner’s offense. There is no allegation, for
example, that Petitioner did not commit a felony. Nor did Petitioner allege that the
State instituted increased charges following Petitioner’s assertion of a statutory right,
thereby raising the specter of prosecutorial retaliation.

1 (Answer, p.35) (citations omitted).

2 Petitioner counters that in his Memorandum filed with his federal Petition he stated:
3 that after asserting his right to a speedy trial the city court then dismissed...on page 6
4 [of his Memorandum],...the [P]etitioner does question the states [sic] prosecution for
5 basically acting in a vindictive manner because the petitioner was recharged from a
case that had been closed and was subjected to an increase and severity of charges of
which he was convicted and sentenced to 8 years.

6 (Reply, p.20). Review of Petitioner's Memorandum reflects that Petitioner made these
7 assertions when arguing the issue of *double jeopardy* not due process. (Petitioner's Memo.,
8 pp.3-6). Moreover, and more importantly, when raising the due process issue before the state
9 court, Petitioner did not present facts or argument to the state court that the felony charges
10 were filed after he raised a speedy trial claim on the misdemeanor charges or that the State's
11 filing of the felony charges was vindictive for any such reason. The record supports the
12 conclusion that the State's imposition of felony charges did not follow any exercise by
13 Petitioner of a right allowed by law. Consequently, the state court's decision on this issue
14 is not contrary to, nor an unreasonable application of, federal law as determined by the
15 United States Supreme Court. Nor did the state court's proceeding result in a decision that
16 was based on an unreasonable determination of the evidence presented.

17 c. Recommendation: Ground I

18 For the foregoing reasons, the Magistrate Judge recommends that the District Court
19 dismiss as procedurally defaulted: (1) that portion of Petitioner's due process claim regarding
20 the filing of felony charges after the statute of limitations applicable to misdemeanors had
21 expired; and (2) Petitioner's claim that his rights under Equal Protection Clause were
22 violated. The Magistrate Judge also recommends that the District Court deny on the merits
23 Petitioner's claims of violation of the Double Jeopardy Clause and Due Process Clause due
24 to the filing of felony charges after dismissal of the misdemeanor charges.

25 2. Ground II

26 Petitioner asserts that the length of delay between his arrest in 2001 and his trial in 2003,
27 which he calculates to be 800 days, violated Arizona's speedy trial rule, Ariz. R.Crim.P. 8
28 *et seq.*, the Sixth Amendment right to a speedy trial, and the Due Process Clause.

1 Respondents contend that: Petitioner’s claim of a state rule violation is not reviewable in a
2 federal habeas action; his federal due process claim was not exhausted and is procedurally
3 defaulted; and his Sixth Amendment speedy trial claim is procedurally defaulted.

4 a. Cognizability: Claim under Rule 8 of the Arizona Rules of
5 Criminal Procedure

6 Respondents are correct that federal habeas relief is not available for alleged errors of state
7 law. *See Estelle*, 502 U.S. 62. Therefore, Petitioner’s alleged errors in application of
8 Arizona's speedy trial law is not a cognizable claim for federal habeas relief and must be
9 dismissed.

10 b. Exhaustion & Procedural Default: Due Process Claim

11 Respondents argue that it was not until Petitioner filed his Petition for Review of the trial
12 court’s denial of his PCR Petition that he raised a due process claim with regard to the
13 alleged 800-day delay between his 2001 arrest and his trial in 2003. Review of Petitioner’s
14 direct appeal and his PCR Petition reveal that Respondents are correct.

15 In his Petition for Review of the trial court’s denial of his PCR Petition, when arguing that
16 the State violated Ariz.R.Crim.P. 8, Petitioner stated: “Therefore, if delay between arrest and
17 trial is so egregiously long that it violates due process, the DUI prosecution against the
18 defendant will be dismissed.” (Answer, Exh. Y, p.7). Petitioner raised a similar argument
19 in his Petition for Review filed before the Arizona Supreme Court. (Answer, Exh. AA, p.7).
20 However, Petitioner’s invocation of the Due Process Clause with regard to this issue in his
21 petitions for review of the denial of his PCR Petition did not result in fair presentation of that
22 claim to the state court given that he did not present the claim to the state trial court in his
23 PCR Petition—the very denial of which he was seeking review. *See Castille*, 489 U.S. at 351;
24 *Casey*, 386 F.3d at 915-19. Petitioner’s failure to fairly present his due process claim on this
25 issue renders the claim unexhausted. Moreover, this claim is now procedurally defaulted for
26 the same reasons discussed *supra*, at III.B.1.a.(3.)(a.).

27 (1) Cause and Prejudice

28 Petitioner asserts that the failure of both trial counsel and appellate counsel to raise the

1 issue earlier constitutes cause to excuse his procedural default. (*See Reply*, pp.10, 12).
2 Review of Petitioner’s PCR Petition reflects that Petitioner did not raise an ineffective
3 assistance of counsel claim with regard to this issue. Nor did he raise a claim of ineffective
4 assistance of appellate counsel on this issue. Petitioner’s failure to exhaust a claim of
5 ineffective assistance counsel on this issue forecloses his attempt herein to rely on such a
6 claim to excuse his procedural default. *See Edwards*, 529 U.S. at 451-453. Because
7 Petitioner failed to establish cause for his procedural default, the Court need not address
8 prejudice. *Cook*, 538 F.3d at 1028 n.13 (citation omitted).

9 c. Procedural Default: Sixth Amendment Speedy Trial Claim

10 It is undisputed that Petitioner, through his PCR Petition, presented a claim that his Sixth
11 Amendment right to a speedy trial was violated. The state court held that the claim was
12 precluded under Ariz.R.Crim.P. 32.2(a)(3) because Petitioner failed to assert the claim on
13 direct appeal. (Answer, Exh. W, “(He waived this claim on direct appeal. It is precluded by
14 Rule 32.2(a)(3).”). The Arizona Court of Appeals and Arizona Supreme Court summarily
15 denied review.²² “Where a state prisoner’s federal claim is waived or precluded by violation
16 of a state procedural rule [such as Ariz.R.32.2(a)(3)], it is procedurally defaulted unless the
17 prisoner can demonstrate cause and prejudice.” *Cook*, 538 F.3d at 1025-26 (“Preclusion of
18 issues for failure to present them at an earlier proceeding under Arizona Rule of Criminal
19 Procedure 32.2(a)(3) ‘are independent of federal law because they do not depend upon a
20 federal constitutional ruling on the merits.’ *Stewart v. Smith*, 536 U.S. 856, 850 (2002).”
21 (footnote omitted)). The claim is procedurally defaulted.

22 (1.) Cause and Prejudice

23 Petitioner asserts that the failure of both trial counsel and appellate counsel to raise the
24 issue earlier constitutes cause to excuse his procedural default. (*See Reply*, pp.10, 12).

25
26 ²²Under *Ylst*, this Court is directed to presume that the appellate court decisions
27 denying review, without a reasoned opinion, of Petitioner’s claim regarding his right to a
28 speedy trial under the Sixth Amendment did not silently disregard the procedural default
imposed by the trial court. *Ylst*, 501 U.S. at 802.

1 When Petitioner filed his PCR Petition, he was aware of his Sixth Amendment speedy trial
2 claim and that trial and appellate counsel had not pursued such a claim. Petitioner argued
3 in his PCR Petition that trial counsel was ineffective for failing to raise a claim under
4 Ariz.R.Crim.P. 8, Arizona's speedy trial rule with regard to counsel's failure to advise the
5 court that the statute of limitations applicable to misdemeanors had expired, yet he did not
6 present the state court with the argument that counsel was also ineffective for failing to raise
7 a claim under the Sixth Amendment. As discussed *supra*, at III.B.1.a.(3.)(b.), a petitioner's
8 assertion of ineffective assistance of counsel based on one set of facts or theories presented
9 to the state courts does not exhaust other claims of ineffective assistance of counsel based
10 on different facts or theories. *See Anderson*, 459 U.S. at 6; *Moormann*, 426 F.3d at 1056;
11 *Date*, 619 F.Supp.2d at 788. Under the instant circumstances, Petitioner did not fairly
12 apprise the state court that he was raising a claim of ineffective assistance of trial counsel
13 based upon counsel's failure to argue that Petitioner's right to a speedy trial under the Sixth
14 Amendment had been violated. Petitioner's failure to apprise the state court of this argument
15 renders such claim unexhausted. Nor did Petitioner exhaust a claim of ineffective assistance
16 of appellate counsel on this issue.

17 Petitioner's failure to exhaust a claims of ineffective assistance of trial and appellate
18 counsel on this issue forecloses his attempt herein to rely on such claims to excuse his
19 procedural default. *See Edwards*, 529 U.S. at 451-453. Because Petitioner failed to establish
20 cause for his procedural default, the Court need not address prejudice. *Cook*, 538 F.3d at
21 1028 n.13 (citation omitted).

22 d. Recommendation: Ground II

23 The Magistrate Judge recommends that the District Court dismiss: (1) Petitioner's claim
24 regrading violation of Rule 8 of the Arizona Rules of Criminal Procedure as non-cognizable;
25 and (2) Petitioner's claims of due process and Sixth Amendment Speedy Trial right
26 violations as procedurally defaulted.

27 3. Ground III

28 Petitioner asserts that the State violated the Ex Post Facto Clause by filing the felony

1 charges. (Petition, p. 8A). He also argues that the State violated his rights to due process,
2 equal protection and a speedy trial and also violated the Ex Post Facto Clause because the
3 State proceeded under the 2002 version of Rule 8.2(a) of the Arizona Rules of Criminal
4 Procedure.²³ (Petitioner’s Memo., pp. 9-10).

5 Respondents concede that Petitioner, during his direct appeal, exhausted his claim that the
6 State’s institution of felony charges violated the Ex Post Facto Clause.²⁴ However,
7 Respondents contend that all other claims are procedurally defaulted.

8 a. Exhaustion and Procedural Default

9 Review of Petitioner’s direct appeal shows Petitioner did not argue that it was improper
10 on any ground for the State to proceed under the 2002 version of Ariz.R.Crim.P. 8.2. Nor
11 did Petitioner raise such an argument in his PCR Petition. In his reply brief during the PCR
12 proceedings, Petitioner, when discussing Ariz.R.Crim.P. 8, stated:

13 Under the old Hinson Rule, *Hinson v. Coulter*, the State had 150 days from date of
14 arrest to bring DUI cases to trial. Since than [sic] the [S]tate had changed it’s [sic]
15 rules to leave out “date of arrest.” It now states from date of arraignment to trial, 180
16 days....In the petitioner’s case it was 800 plus days from date of arrest to date of trial.
17 *Doggett*, 505 U.S. at ___, 112 S.Ct. at 2690. The court noted that the lower courts have
18 found delay “Presumptively Prejudicial” as it approaches one year. 8-7-01 to 11-4-03.
19 Date of arrest to date of trial. The two year delay prejudiced the petitioner and shows
20 colorable claim to a violation of Rule 8.

(Answer, Exh. T, p.5). Petitioner made no mention of due process, equal protection or the

21 ²³The 2002 version of Ariz.R.Crim.P. 8.2(a) allowed the State more flexibility than
22 its predecessor regarding the time in which to bring the case to trial:

23 Prior to May 31, 2002, Rule 8.2(a) stated[:] “Every person against whom an
24 indictment, information or complaint is filed shall be tried by the court having
25 jurisdiction of the offense within 150 days of the arrest or service of summons
26 [with certain exceptions].” ...[E]ffective December 1, 2002, Rule 8.2(a) stated:
27 “Subject to the provisions of Rule 8.4 [and other listed exceptions], every
28 person against whom an indictment, information or complaint is filed shall be
29 tried by the court having jurisdiction of the offense” within: (I) 150 days from
30 the date of arraignment if the person is held in custody,” and (ii) “180 days
31 from arraignment if the person is released from custody.”

(Answer, p.20 & n.14).

²⁴Respondents alternatively argue that Petitioner failed to fairly present this claim to
the Arizona Supreme Court. As discussed *supra*, at III.B.I.a.(2.), this argument fails.

1 Ex Post Facto Clause with regard to the rule change. It is questionable whether Petitioner's
2 mention of the rule change for the first time in his reply brief resulted in fair presentation of
3 *any* ground for relief related to that issue. The Court, however, need not resolve this question
4 given that Petitioner's mere mention of the rule change, without also apprising the state
5 court of any argument that the State's reliance on the 2002 version of the rule violated
6 Petitioner's rights under the Due Process Clause, the Equal Protection Clause and/or the Ex
7 Post Facto Clause, did not result in fair presentation of these grounds for relief.

8 As discussed *supra*, the fact that Petitioner may have raised such grounds in his petition
9 for review of the trial court's denial of his PCR Petition does not render the claims exhausted.
10 *See Castille*, 489 U.S. at 351; *Casey*, 386 F.3d at 915-19. Consequently, these claims are
11 now procedurally defaulted. *See* discussion, *supra*, at III.B.1.a.(3.)(a.).

12 b. Cause and Prejudice

13 Petitioner asserts that the failure of both trial counsel and appellate counsel to raise the
14 issue earlier constitutes cause to excuse his procedural default. (*See* Reply, pp.10, 12).

15 Although Petitioner argued in his PCR Petition that trial counsel was ineffective for failing
16 to raise a claim under Ariz.R.Crim.P. 8, Arizona's speedy trial rule, Petitioner did not present
17 the state court with the argument that counsel was also ineffective for failing to raise a claim
18 that the State's alleged violation of Arizona Rule 8.2 violated the Ex Post Facto Clause, the
19 Equal Protection Clause, or the Due Process Clause. As discussed *supra*, at III.B.3.a.(3.)(b.),
20 a petitioner's assertion of ineffective assistance of counsel based on one set of facts or
21 theories presented to the state courts does not exhaust other claim of ineffective assistance
22 of counsel based on different facts or theories. *See Anderson*, 459 U.S. at 6; *Moormann*, 426
23 F.3d at 1056; *Date*, 619 F.Supp.2d at 788. Under the instant circumstances, Petitioner did
24 not fairly apprise the state court that he was raising a claim of ineffective assistance of trial
25 counsel based upon counsel's failure to raise the constitutional challenges Petitioner raises
26 herein concerning application of Ariz.R.Crim.P. 8.2. Petitioner's failure to apprise the state
27 court of this argument renders such claim herein unexhausted. Nor did Petitioner exhaust
28 a claim of ineffective assistance of appellate counsel on this issue.

1 Petitioner’s failure to exhaust claims of ineffective assistance of trial and appellate counsel
2 on this issue forecloses his attempt herein to rely on such claims to excuse his procedural
3 default. *See Edwards*, 529 U.S. at 451-453. Because Petitioner failed to establish cause for
4 his procedural default, the Court need not address prejudice. *Cook*, 538 F.3d at 1028 n.13
5 (citation omitted).

6 c. Merits

7 (1.) Ex Post Facto

8 Petitioner claims that the State’s imposition of felony charges after dismissal of the
9 misdemeanor charges violated the Ex Post Facto Clause by placing him “at risk of increased
10 punishment.” (Petition, p.8A).

11 (a.) The State Proceeding

12 Petitioner argued on direct appeal that the institution of the felony charges after dismissal
13 of the misdemeanor charges violated the Ex Post Facto Clause. In rejecting this claim, the
14 Arizona Court of Appeals stated:

15 Defendant fails to articulate, and we are unable to discern, how the dismissal and
16 refile of the charges violated...the Ex Post Facto Clause. A dismissal of charges
17 without prejudice does not preclude commencement of another prosecution based upon
18 the same events. *See Ariz.R.Crim.P. 16.6(a),(d); Williams v. Superior Court In and*
19 *For Pima County*, 21 Ariz. App. 239, 241, 517 P.2d 1286, 1288 (1974). A law violates
the Ex Post Facto Clause when it “changes the punishment, and inflicts a greater
punishment, than the law annexed to the crime, when committed.” *Calder v. Bull*, 3
U.S. 386, 390 (1798). However, Defendant fails to show that he was subject to
increased punishment. No...Ex Post Facto Clause violation occurred.

20 (Answer, Exh. J, p.4). The appellate court’s decision is the last-reasoned state court opinion
21 on this issue.

22 (b.) Analysis

23 The Ex Post Facto Clause prohibits the States from passing any “ex post facto Law.” U.S.
24 Const. Art I, §10, cl.1. The U.S. Supreme Court has “held that the Clause is aimed at laws
25 that ‘retroactively alter the definition of crimes or increase the punishment for criminal
26 acts.’” *California Dep’t. of Corrections v. Morales*, 514 U.S. 499, 504-505 (1995) (*quoting*
27 *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). *See also Collins*, 497 U.S. at 41 (“the
28 constitutional prohibition on ex post facto laws applies only to penal statutes which

1 disadvantage the offender affected by them.”) (*citing Calder v. Bull*, 3 U.S. 386 (1798)). The
2 Supreme Court has summarized the meaning of the Clause as follows:

3 “It is settled, by decisions of this Court so well known that their citation may be
4 dispensed with, that any statute which punishes as a crime an act previously committed,
5 which was innocent when done; which makes more burdensome the punishment for a
6 crime, after its commission, or which deprives one charged with crime of any defense
7 available according to law at the time when the act was committed, is prohibited as *ex*
8 *post facto*.”

9 *Collins*, 497 U.S. at 42 (*quoting Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)). Thus, under
10 the Ex Post Facto Clause, “[l]egislatures may not retroactively alter the definition of crimes
11 or increase the punishment for criminal acts.” *Id.* at 43.

12 The focus of the ex post facto inquiry is “on whether any [legislative]...change alters the
13 definition of criminal conduct or increases the penalty by which a crime is punishable.”
14 *Morales*, 514 U.S. at 506 n.3. Thus, a law violates the Ex Post Facto Clause if it is
15 retroactive in that it applies “to events occurring before its enactment,” *Weaver v. Graham*,
16 450 U.S. 24, 29 (1981); and it is detrimental in that it “produces a sufficient risk of increasing
17 the measure of punishment attached to the covered crimes.” *Morales*, 514 U.S. at 509
18 (footnote omitted). *See also Brown v. Palmateer*, 379 F.3d 1089, 1093 (9th Cir. 2004)
19 (identifying these factors as the “two-part test for assessing Ex Post Facto claims.”). “The
20 inquiry looks to the challenged provision, and not to any special circumstances that may
21 mitigate its effect on the particular individual.” *Weaver*, 450 U.S. at 33.

22 Respondents correctly point out that “Petitioner does not (and cannot) contend that he was
23 prejudiced by a retroactive change in the applicable law.” (Answer, p.32). Although
24 Petitioner may have initially been charged with misdemeanor DUI, Petitioner himself
25 concedes that the misdemeanor charges were dismissed without prejudice. (*Id.* (*citing*
26 *Petition, Ground I*)). The State’s decision to file felony charges under which Petitioner faced
27 a more severe punishment than under misdemeanor charges does not implicate the Ex Post
28 Facto Clause given that the increase in punishment resulted from a charging decision and not
from retroactive application of a statute which “ma[d]e[] more burdensome the punishment
for a crime, after its commission....” *Collins*, 497 U.S. at 42 (*quoting Beazell*, 269 U.S. at

1 169-70)).

2 Nor does Petitioner's reliance on the expiration of the statute of limitations applicable to
3 misdemeanors implicate the Ex Post Facto Clause in this case. The Supreme Court has
4 invoked the Ex Post Facto Clause to strike down a statute that "resurrect[ed]...a time-barred
5 prosecution..." *Stogner v. California*, 539 U.S. 607, 616 (2003) (the Court also noted that
6 its holding did not affect extensions of unexpired statutes of limitations). In contrast to
7 *Stogner*, when Petitioner committed his class 4 felony DUI offenses, the statute of limitations
8 applicable to class 4 felonies permitted the State to prosecute within seven years. *See* A.R.S.
9 §13-107(B)(1). That limitations period had not expired when the State brought the felony
10 charges against Petitioner. Petitioner was not subjected to a newly-enacted statute. On these
11 facts, Petitioner fails to show a violation of the Ex Post Facto Clause.

12 On the instant record, the State's act of filing felony charges against Petitioner after
13 expiration of the statute of limitations applicable to misdemeanors was not a retroactive act
14 of a legislature, did not criminalize conduct that was innocent when done, did not make more
15 burdensome the punishment for a crime *after* it was committed, and did not deprive
16 Petitioner of any defense available according to law at the time the act was committed. *See*
17 *Collins*, 497 U.S. at 42. Consequently, the state court's decision on this issue is not contrary
18 to, nor an unreasonable application of, federal law as determined by the United States
19 Supreme Court. Nor did the state court's proceeding result in a decision that was based on
20 an unreasonable determination of the evidence presented.

21 d. Recommendation: Ground III

22 The Magistrate Judge recommends that the District Court dismiss as procedurally
23 defaulted Petitioner's claims of violation of the Ex Post Facto Clause, Equal Protection
24 Clause and the Due Process Clause with regard to the State's alleged reliance on the 2002
25 version of Ariz.R.Crim.P. 8.2. The Magistrate Judge also recommends that the District
26 Court deny on the merits Petitioner's claim of violation of the Ex Post Facto Clause with
27 regard to the filing of the felony charges after dismissal of the misdemeanor charges.
28

1 4. Ground IV

2 Petitioner asserts a claim of ineffective assistance of trial counsel under the Sixth
3 Amendment on the grounds that trial counsel failed to: (1) advise the trial court that the
4 charges against Petitioner were insufficient as a matter of law; (2) “subject the prosecution’s
5 case to any meaningful adversarial testing...”; (3) “advise the court of the lapsed expiration
6 of time...”; and (4) raise the issue of Petitioner’s right to a speedy trial under the U.S.
7 Constitution. (Petition, p. 9. *See also* Petitioner’s Memo. pp. 11-12).

8 Respondents argue that Petitioner did not exhaust any of these claims and that the claims
9 are now procedurally defaulted.

10 a. Exhaustion & Procedural Default

11 Respondents assert that Petitioner did not fairly present the state court with a federal claim
12 of ineffective assistance of counsel because Petitioner did not specify that the claim was
13 brought pursuant to the U.S. Constitution. Respondents further assert that even if Petitioner
14 fairly apprised the state court of the federal nature of his claim, only one of Petitioner’s
15 claims raised in the instant Petition—that counsel failed to advise the court of the lapsed time
16 limitation— was presented to the state court. “[B]ecause the exhaustion of one ineffectiveness
17 claim does not exhaust other bases for the alleged ineffectiveness...”, Respondents contend
18 that Petitioner’s remaining claims are unexhausted. (Answer, p.24).

19 With regard to the issue of ineffective assistance of counsel, Petitioner stated on the form
20 bearing his Notice of Post-Conviction Relief that he “was denied his U.S. [C]onstitutional
21 right to Due Process by Ineffective Assistance of Counsel.” (Answer, Exh. O, p.3). He
22 attached to that form a handwritten brief wherein he asserted that he “was denied his
23 constitutional right to due process by ineffective assistance of counsel.” (Answer, Exh. O,
24 p.2 of brief) (Petitioner’s use of capitalization omitted)). Under this caption, Petitioner
25 argued that his “Public Defender James Daily (trial attorney) under Rule 8.1(D)^[25][sic] failed
26

27 ²⁵Rule 8.1(d) of the Arizona Rules of Criminal Procedure provides:
28 Duty of Defense Counsel. The defendant’s counsel shall advise the court of

1 to advise the court of the expired time limitation of [§] 28-1381 under A.R.S. [§] 13-
2 107(B)(2), in the defendant's case." (*Id.*).

3 In his PCR Petition, Petitioner asserted that he "was denied his constitutional right to due
4 process by ineffective assistance of counsel." (Answer, Exh. R, p.6 of "*Pro Per* [PCR]
5 Petition") (Petitioner's use of capitalization omitted)). Under this heading, Petitioner argued
6 that trial counsel failed to satisfy his obligation under Ariz.R.Crim.P. 8.1(d) to "advise the
7 court of the expired time limitation of [§] 28-1381...under A.R.S. [§] 13-107(B)(2), in the
8 Defendant's case....Violation of Speedy Trial Rule, Ariz. Criminal Rule 8, cannot extend
9 statute of limitations for criminal prosecutions, §13-107. *Price v. Maxwell* (1984) 140 Ariz.
10 232, 681 P.2d 384."²⁶ (*Id.* at p.7). Petitioner also alleged that trial counsel was ineffective

11
12 the impending expiration of time limits in the defendant's case. Failure to do
13 so may result in sanctions and should be considered by the court in
14 determining whether to dismiss an action with prejudice pursuant to Rule 8.6
15 Ariz.R.Crim.P. 8.1(d) (1998).

16 ²⁶*Price* involved application of A.R.S. §13-107(F) which at the relevant time provided
17 that:

18 If a timely complaint, indictment or information is dismissed for any error,
19 defect, insufficiency or irregularity, a new prosecution may be commenced
20 within six months after the dismissal becomes final even if the period of
limitation has expired at the time of the dismissal or will expire within six
months of such dismissal.

21 *Price*, 140 Ariz. at 233, 681 P.2d at 385 (*citing* A.R.S. §13-107(F)). The statute has since
22 been amended. The issue in *Price* concerned whether A.R.S. §13-107(F) permitted the
23 refiling of misdemeanor charges after the dismissal of the same violations without prejudice
24 on speedy trial grounds pursuant to Ariz.R.Crim.P. 8, and after the statute of limitations had
25 expired. *Id.* The Arizona Supreme Court in *Price* held that A.R.S. §13-107(F) did not toll
26 the statute of limitations in such a case. *Id.* at 234, 681 P.2d at 386. In so holding, the
27 Arizona court analyzed federal statutes providing a similar savings clause. *Id.* at 233, 681
28 P.2d at 385 (*citing* 18 U.S.C. §§3288, 3289). The *Price* court did not discuss or otherwise
cite the right to a speedy trial under the Sixth Amendment of the U.S. Constitution or legal
standards for that or any other federal constitutional violation. Hence, Petitioner's citation
to *Price* did not exhaust any claim of a federal constitutional violation. *Cf. Castillo*, 399 F.3d
at 999 ("we have held that citation to either a federal or state case involving the legal
standard for a federal constitutional violation is sufficient for establishing exhaustion.")

1 because he led Petitioner to believe that Petitioner could “get his original plea of 2.5 years
2 back before the court...” and because he led Petitioner to believe that the 1992 prior
3 conviction would not be used against Petitioner in light of the trial court’s ruling that the
4 prior would not be admissible at trial under Ariz.R.Evid. 609. (*Id.*). Elsewhere in his PCR
5 Petition, under the caption “Argument” with regard to the issue of ineffective assistance of
6 trial counsel, Petitioner again asserted that counsel was ineffective by leading Petitioner to
7 believe that the 1992 prior conviction “would not be alleged...” but the judge nonetheless
8 considered it at sentencing. (*Id.* at p.12). Petitioner also reiterated his argument that pursuant
9 to Ariz.R.Crim.P 8.1, trial counsel “should have advised the court of the *lapsed expiration*
10 *of time limits* in defendants [sic] case under §13-107(B)(2).” (*Id.* at p.13) (emphasis in
11 original).

12 The safeguards provided in the Sixth Amendment, including right to counsel, apply to the
13 states through the Due Process Clause of the Fourteenth Amendment. *See Kansas v. Ventris*,
14 __ U.S. __, 129 S.Ct. 1841, 1844-1845 (2009) (right to counsel under the Sixth Amendment
15 applies to the states through the Fourteenth Amendment); *Danforth v. Minnesota*, 552 U.S.
16 264, __, 128 S.Ct. 1029, 1035 (2008) (“Slowly at first, and then at an accelerating pace in
17 the 1950’s and 1960’s, the Court held that safeguards afforded by the Bill of
18 Rights—including a defendant’s Sixth Amendment right[s]...– are incorporated in the Due
19 Process Clause of the Fourteenth Amendment and are therefore binding upon the States.”).
20 Petitioner’s reference in his Notice of Post-Conviction Relief to the Due Process Clause of
21 the United States Constitution with regard to his claim of ineffective assistance of counsel
22 together with references to the Due Process Clause when setting forth this claim in his PCR
23 Petition fairly apprised the state court that he was raising a federal claim of ineffective
24 assistance of trial counsel.

25 Petitioner was not only required to apprise the state courts that he was making a claim
26 under the U.S. Constitution, but he was also required to provide the the *operative facts* upon
27 _____
28

1 which his claim was based. *See Moormann*, 426 F.3d at 1056; *Castillo*, 399 F.3d at 999;
2 *Kelly v. Small*, 315 F.3d 1063, 1066, 1068 n.2 (9th Cir. 2001), *overruled on other grounds*,
3 *Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007). Review of Petitioner’s claims of ineffective
4 assistance of counsel raised in his Petition for Post-Conviction Relief show that Petitioner
5 did not present to the state courts the operative facts related to Petitioner’s claims brought
6 in the instant federal Petition regarding counsel’s alleged failure to: advise the trial court that
7 the charges against Petitioner were insufficient as a matter of law; “subject the prosecution’s
8 case to any meaningful adversarial testing...”; and raise the issue of Petitioner’s right to a
9 speedy trial under the U.S. Constitution. (Petition, p. 9). Consequently, Petitioner has failed
10 to exhaust these portions of his claim. Moreover, these claims are now procedurally
11 defaulted for the same reasons discussed *supra*, at III.B.1.a.(3)(a.).

12 b. Cause & Prejudice

13 Neither lack of access to research materials nor ineffective assistance of counsel can
14 excuse Petitioner’s failure to exhaust. In addition to the reasons set forth *supra*, at
15 III.B.3.a.(3)(b.), rejecting Petitioner’s claim regarding lack of access to research materials,
16 this Court is also mindful that in Arizona, claims of ineffective assistance of counsel are
17 properly raised in a PCR petition rather than on direct appeal. *See Wagner*, 2008 WL 169639,
18 *9 (*citing State v. Spreitz*, 202 Ariz. 1, 39 P.2d 525 (2002)). Petitioner concedes that he had
19 access to legal research materials by the time he filed his PCR Petition. (Reply, p.12).
20 Further, when Petitioner filed his PCR Petition he was aware of the bases of his unexhausted
21 ineffective assistance of counsel claims. On this record, no objective factor external to the
22 defense impeded Petitioner’s effort to present such claims in his PCR Petition. (*See Id.*).
23 Further, Petitioner’s generic claims of ineffective assistance of trial and appellate counsel
24 raised in his Reply have no bearing on Petitioner’s failure to raise claims of ineffective
25 assistance of trial counsel in his PCR proceeding.²⁷ Moreover, Petitioner has not and cannot
26

27 ²⁷Even if such claims could somehow be asserted, Petitioner’s failure to previously
28 exhaust any such claims before the state court would foreclose Petitioner’s reliance on these

1 claim ineffective assistance of counsel rendered during his PCR proceeding given that “the
2 protections of the Sixth Amendment right to counsel do not extend...to state collateral
3 proceedings....” *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). *See also* 28 U.S.C.
4 §2254(I) (the ineffectiveness of counsel during state post-conviction relief proceedings shall
5 not be a ground for relief in a proceeding filed pursuant to section 2254); *Poland v. Stewart*,
6 169 F.3d 573, 588 (9th Cir. 1999) (stating that because there is no constitutional right to
7 counsel in state collateral review proceedings, there is no constitutional right to effective
8 assistance of counsel during such collateral review proceedings). This is true even where
9 counsel has been appointed to represent a petitioner during state collateral review
10 proceedings. *Poland*, 169 F.3d at 578. Because Petitioner failed to establish cause for his
11 procedural default, the Court need not address prejudice. *Cook*, 538 F.3d at 1028 n.13
12 (citation omitted).

13 c. Merits

14 As discussed above, the only portion of Petitioner’s claim of ineffective assistance of
15 counsel that is subject to review on the merits, is Petitioner’s claim that trial counsel was
16 ineffective by failing to advise the court of the “lapsed expiration of time....” with regard to
17 the expired statute of limitations applicable to misdemeanor cases.

18 (1.) The State Proceeding

19 Petitioner presented the issue in his PCR Petition wherein he argued that trial counsel
20 failed to satisfy his obligation under Ariz.R.Crim.P. 8.1(d) when he to “failed to advise the
21 court of the expired time limitation of [§] 28-1381^[28]...under A.R.S. [§] 13-107(B)(2), in the
22 Defendant’s case.” (Answer, Exh. R, p.7 of “*Pro Per* [PCR] Petition”; *see also Id.* at p.12).
23 A.R.S. §107(B)(2) provides a one year statute of limitations for misdemeanor offenses.
24 A.R.S. §107(B)(2) (2001).

25 In dismissing Petitioner’s PCR Petition, the trial court found that Petitioner mistakenly
26 _____
27 claims to excuse his procedural default. *See Edwards*, 529 U.S. at 451-53.

28 ²⁸A.R.S. §28-1381 governs misdemeanor DUI.

1 argued that the limitations period for misdemeanors applied to his case and for this reason,
2 the court rejected Petitioner’s argument that the State had filed the felony charges after
3 expiration of the statute of limitations. (Answer, Exh. W). The Court went on to state that
4 “Petitioner was charged with Class 4 felonies. These charges fell within the seven-year
5 period” provided in the statute of limitations applicable to the filing of class 4 felony charges.
6 (*Id.*). See also A.R.S. §107(B)(1) (2001). In dismissing Petitioner’s claim of ineffective
7 assistance of counsel on the statute of limitations issue, the trial court held: “Petitioner’s
8 counsel was not ineffective in violation of state law by failing to move to dismiss the charges.
9 The charges were filed well within the statute of limitations.” (Answer, Exh. W).

10 The trial court’s decision is the last-reasoned state court opinion on this issue.

11 (2.) Analysis

12 In *Strickland v. Washington*, 466 U.S. 668,687 (1984), the Supreme Court established a
13 two-part test for evaluating ineffective assistance of counsel claims. To establish that his trial
14 counsel was ineffective under *Strickland*, a petitioner must show: (1) that his trial counsel’s
15 performance was deficient; and (2) that trial counsel’s deficient performance prejudiced
16 petitioner’s defense. *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998)(citing *Strickland*, 466
17 U.S. at 688, 694).

18 To establish deficient performance, Petitioner must show that “counsel made errors so
19 serious...that counsel’s representation fell below an objective standard of reasonableness”
20 under prevailing professional norms. *Strickland*, 466 U.S. at 687-688. The relevant inquiry
21 is not what defense counsel could have done, but rather whether the decisions made by
22 defense counsel were reasonable. *Babbit v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998).
23 In considering this factor, counsel is strongly presumed to have rendered adequate assistance
24 and made all significant decisions in the exercise of reasonable professional judgment.
25 *Strickland*, 466 U.S. at 690. The Ninth Circuit “h[as] explained that ‘[r]eview of counsel’s
26 performance is highly deferential and there is a strong presumption that counsel’s conduct
27 fell within the wide range of reasonable representation.’” *Ortiz*, 149 F.3d at 932 (*quoting*
28 *Hensley v. Crist*, 67 F.3d 181, 184 (9th Cir. 1995)). “The reasonableness of counsel’s

1 performance is to be evaluated from counsel’s perspective at the time of the alleged error and
2 in light of all the circumstances, and the standard of review is highly deferential.”
3 *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Additionally, “[a] fair assessment of
4 attorney performance requires that every effort be made to eliminate the distorting effects of
5 hindsight, to reconstruct the circumstances of counsel’s challenged conduct , and to evaluate
6 the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689.

7 Even where trial counsel’s performance is deficient, Petitioner must also establish
8 prejudice in order to prevail on his ineffective assistance of counsel claim. To establish
9 prejudice, Petitioner “must show that there is a reasonable probability that, but for counsel’s
10 unprofessional errors, the result of the proceeding would have been different. A reasonable
11 probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694;
12 Under the prejudice factor, “[a]n error by counsel, even if professionally unreasonable, does
13 not warrant setting aside the judgment of a criminal proceeding if the error had no effect on
14 the judgment.” *Id.* at 691. Because failure to make the required showing of either deficient
15 performance or prejudice defeats the claim, the court need not address both factors where one
16 is lacking. *Id.* at 697-700.

17 Additionally, under the AEDPA, the federal court’s review of the state court’s decision
18 is subject to another level of deference. *Bell v. Cone*, 535 U.S. 685, 689-699 (2002). In order
19 to merit habeas relief, therefore, Petitioner must make the additional showing that the state
20 court’s ruling that counsel was not ineffective constituted an unreasonable application of
21 *Strickland*. 28 U.S.C. §2254(d)(1); *West v. Schriro*, 2007 WL 4240859, *7 (D.Ariz. Nov
22 29, 2007).

23 The State had seven years from August 7, 2001 to commence class 4 felony charges
24 against Petitioner. See A.R.S. §13-107(B)(1). The Direct Complaint charging Petitioner
25 with class 4 felonies was filed on March 4, 2003. (Answer, Exh. A).

26 Under Rule 8.1 of the Arizona Rules of Criminal Procedure, defense counsel must “advise
27 the court of the impending expiration of time limits in the defendant’s case.” Ariz.R.Crim.P.
28 8.1(d). (2001). It is unclear if Rule 8.1(d) applies to time limitations other than those

1 pertaining to Arizona’s speedy trial rule. Assuming that it does, Petitioner claims that trial
2 counsel failed to comply with this requirement because he did not inform the court that the
3 statute of limitations applicable to misdemeanor cases had expired. Counsel is alleged to
4 have committed this violation of Rule 8.1(d) while he was representing Petitioner on Class
5 4 felony DUI charges that were indisputably filed within the seven-year statute of limitations
6 applicable to class 4 felonies. *See* A.R.S. §13-107(B)(1) (the State has seven years to
7 commence prosecution of a class 4 felony). Thus, as the state court found in dismissing
8 Petitioner’s PCR claim on this issue, counsel had no basis to advise the court about any
9 statute of limitations expiration given that the class 4 felony charges against Petitioner were
10 filed within the applicable limitations period. (*See id.*). Consequently, the state court’s
11 decision on this issue is not contrary to, nor an unreasonable application of, federal law as
12 determined by the United States Supreme Court. Nor did the state court’s proceeding result
13 in a decision that was based on an unreasonable determination of the evidence presented.
14 Petitioner’s claim fails on the merits.

15 d. Recommendation: Ground IV

16 The Magistrate Judge recommends that the District Court dismiss as procedurally
17 defaulted Petitioner’s claims of ineffective assistance of trial counsel regarding Petitioner’s
18 allegations that trial counsel failed to: advise the trial court that the charges against Petitioner
19 were insufficient as a matter of law; “subject the prosecution’s case to any meaningful
20 adversarial testing...”; and raise the issue of Petitioner’s right to a speedy trial under the U.S.
21 Constitution. (Petition, p. 9). The Magistrate Judge also recommends that the District
22 Court deny on the merits Petitioner’s claim of ineffective assistance of counsel with regard
23 to trial counsel’s alleged failure to advise the court of the “lapsed expiration of time...” with
24 regard to the statute of limitations applicable to misdemeanors. (*Id.*).

25 5. Ground V

26 Petitioner challenges his sentence on multiple grounds. Petitioner asserts that his rights
27 under the Sixth Amendment and *Blakely v. Washington*, 542 U.S. 296 (2004) were violated
28 because the trial court “fail[ed] to submit to a jury a sentencing enhancement allegation....”

1 (Petitioner’s Memo., p.15). He also asserts that use of his 1992 and 1993 prior convictions
2 to enhance his sentence violated his rights to due process and equal protection²⁹ and was an
3 abuse of discretion³⁰ because: (1) his 1992 prior conviction was too old to qualify as a
4 historical prior felony conviction under A.R.S. §13-604 and the trial court used the
5 conviction as a sentencing enhancement even though the court had found that the conviction
6 was inadmissible at trial (Petition, p. 10; Petitioner’s Memo., p.14); (2) the trial court used
7 Petitioner’s 1992 prior conviction at sentencing even though the State did not establish the
8 prior conviction through proper evidence; and (3) Petitioner’s 1993 prior conviction was too
9 old to be used to enhance Petitioner’s sentence. (Petition, p. 10; Petitioner’s Memo., p.14).
10 He also claims that the trial court’s use at sentencing of the 1992 prior conviction placed him
11 in double jeopardy (Petitioner’s Memo., pp.13-14). Petitioner further asserts that: (1)
12 “A.R.S. § 13-702(C) is unconstitutional on its face” (Petition, p.10); (2) “A.R.S. § 13-604
13 was never named in the charging complaint” (*Id.*); and (3) “violation of [Sixth]
14 Amendment...” (*Id.*) due to “double or triple counting...” (Petitioner’s Memo., p.15).

15 Respondents concede that Petitioner’s *Blakely* claim was exhausted on direct appeal.
16 (Answer, pp.24-25). However, Respondents contend that all other claims were not exhausted
17 and, thus, are procedurally defaulted.

18 a. Exhaustion & Procedural Default

19 (1.) Whether trial court’s use of Petitioner’s 1992 prior conviction
20 at sentencing violated the guarantees of the Due Process Clause in
21 light of the trial court’s ruling that the prior conviction was

23 ²⁹Although Petitioner did not cite due process and equal protection violations in his
24 form Petition, he does state in his Memorandum submitted with his form Petition that
25 “[u]sing these prior convictions to enhance [P]etitioner’s sentence from 2.5 years to 10 years
violated Due Process and Equal Protection.” (Petitioner’s Memo., p.14).

26 ³⁰The Court agrees with Respondents that Petitioner’s allegation that the trial court
27 abused its discretion at sentencing on the issues cited “is not independently cognizable in
28 habeas because it alleges a violation of state law.” (Answer, p. 26 (*citing Estelle, 502 U.S.*
at 67; Nunes v. Ramirez-Palmer, 485 F.3d 432, 443 (9th Cir. 2007))).

1 inadmissible at trial to impeach Petitioner

2 On direct appeal, Petitioner argued that the trial court's use of his 1992 historical prior
3 conviction at sentencing "[d]enied his U.S. Constitutional right to Due Process..." in light of
4 the court's previous ruling that the prior was inadmissible during trial pursuant to
5 Ariz.R.Evid. 609.³¹ (Answer, Exh. I, p.4. *See also Id.* at p. 3 ("The Appellate [sic] was
6 [d]enied his U.S. Constitutional Right to Due Process when the State [e]ntered 609....Even
7 though the State found appellate's prior conviction of [1992]...to[o]ld the state still used
8 the conviction for enhancement [sic] purposes."); Answer, pp.7-8). In resolving Petitioner's
9 direct appeal, the appellate court acknowledged that Petitioner argued "that his due process
10 rights were violated" on this issue, and went on to examine A.R.S. §13-702(C)(11) (Supp.
11 2004) and state case law. (Answer, Exh. J, p.6).

12 Respondents contend that Petitioner's claim merely raises a state law issue which is not
13 cognizable on federal habeas review. (Answer, p.25 (*citing Estelle*, 502 U.S. at 67 ("We
14 have stated many times that 'federal habeas corpus relief does not lie for errors of state
15 law.'")); *Nunes*, 485 F.3d. at 443 ("[I]n federal court, there is no right to bring a habeas
16 petition on the basis of a violation of state law.")).

17 Respondents are correct that a federal court can grant habeas relief to a petitioner "only
18 on the ground that he or she is in custody in violation of the Constitution or laws or treaties
19 of the United States." 28 U.S.C. §2254(a). Thus, "it is not the province of a federal habeas
20 court to reexamine state-court determinations on state law questions." *Estelle*, 502 U.S. at
21 68. Therefore, the province of a federal habeas court to review "a state court's application
22 of [state sentencing procedures]...is limited, at most, to determining whether the state court's
23 finding was so arbitrary or capricious as to constitute an independent due process or Eighth
24 Amendment violation." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). *See also Richmond v.*
25 *Lewis*, 506 U.S. 40, 50 (1992) ("Of course, the question to be decided by a federal court on
26

27 ³¹The trial court ruled that the prior was inadmissible as impeachment evidence at trial
28 under Ariz.R.Evid. 609 because it was more than ten years old. (*See Answer, Exh. J, p.6*).

1 petition for habeas corpus is not whether the state sentencer committed state-law
2 error....Rather, the federal, constitutional question is whether such reliance is so arbitrary or
3 capricious as to constitute an independent due process or Eighth Amendment
4 violation.”)(internal quotation marks and citations omitted); *Christian v. Rhode*, 41 F.3d 461,
5 469 (9th Cir. 1994) (“Absent a showing of fundamental unfairness, a state court’s
6 misapplication of its own sentencing laws does not justify federal habeas relief.”); *Makal v.*
7 *State of Arizona*, 544 F.2d 1030, 1035 (9th Cir. 1976) (“So long as the type of punishment is
8 not based upon any proscribed federal grounds...the penalties for violations of state statutes
9 are matters of state concern.”); *Altamirano v. Schriro*, 2008 WL 4704209, *2 (D.Ariz. Oct.
10 24, 2008) (“no federal constitutional issue is presented where...the sentence is within the
11 range prescribed by state law”)(citation omitted).

12 Petitioner herein did not merely argue that the state court violated state sentencing law.
13 He argued that the alleged violation of state sentencing law violated his due process rights
14 under the U.S. Constitution. Under the instant circumstances, Petitioner fairly presented, and
15 exhausted, a federal due process claim on direct appeal when he asserted that he was denied
16 his right to due process under the U.S. Constitution when the trial court considered his 1992
17 prior conviction at sentencing even though that prior conviction was ruled inadmissible at
18 trial under Ariz.R.Evid. 609. The Court will consider the claim on the merits.

19 (2.) Whether use of Petitioner’s 1992 prior conviction at
20 sentencing violated the guarantees of the Due Process Clause in
21 light of State’s evidence presented on the issue

22 Petitioner also argues in his instant Petition that his 1992 prior conviction was not properly
23 proved to the court because “the states [sic] own expert witness could not put a definite
24 match to the finger print on the document nor was the proper document proved authentic.”
25 (Petition, p. 10). Petitioner did not raise this argument on direct appeal to challenge the trial
26 court’s use of the 1992 prior conviction at sentencing. Although Petitioner’s PCR Petition
27 challenged on several grounds the trial court’s use of the 1992 conviction at sentencing,
28 Petitioner never argued, as he argues in the instant federal habeas Petition, that the trial

1 court's findings concerning that conviction were erroneous due to issues concerning finger
2 prints or authenticity of the documents used to prove the prior. Accordingly, Petitioner failed
3 to exhaust any such claim. Moreover, this claim is now procedurally defaulted for the same
4 reasons discussed *supra*, at III.B.1.a.(3.)(a.).

5 (b.) Cause & Prejudice

6 The State's allegations of historical prior convictions came on for a bench trial on January
7 16, 2004. (Answer, Exh. F). Petitioner was sentenced at the same proceeding. (*Id.*). Thus,
8 Petitioner was aware in January 2004 of the testimony presented by the State to prove the
9 allegation of his 1992 prior conviction. Petitioner did not raise the issue to the state court in
10 either his direct appeal or his PCR Petition. Petitioner's generic claim of ineffective
11 assistance of trial and appellate counsel as cause to excuse his failure to exhaust the claim
12 is not sufficient given that Petitioner never exhausted a claim of ineffective assistance of
13 either trial or appellate counsel with regard to this issue.³² *See Edwards*, 529 U.S. at 451-53.
14 Because Petitioner failed to establish cause for his procedural default, the Court need not
15 address prejudice. *Cook*, 538 F.3d at 1028 n.13 (citation omitted).

16 (3.) Whether use of Petitioner's 1993 prior conviction at
17 sentencing violated the guarantees of the Due Process Clause in
18 light of the age of that prior

19 Petitioner argued on direct appeal that he "was [d]enied his U.S. Constitutional Right to
20

21 ³²In his PCR Petition, under the heading relating to ineffective assistance of counsel,
22 Petitioner argued that "the court ruled on Defendants [sic]... [1992] prior conviction as being
23 too old (over 10 years), and [trial counsel] James Daily misled the defendant to believe the
24 [1992] prior...conviction would not be used against him." (Answer, Exh. R, p.7 of "*Pro Per*
25 [*PCR*] Petition") When further developing this argument, Petitioner claimed that trial counsel
26 "misled [him] to believe the [1992]...prior conviction would not be alleged as [the trial
27 judge]...*found it to be too old at over 10 years*. The same prior was determined to be under
28 10 years old after finding Defendant guilty. This would place Defendant in double jeopardy
by re-litigating what was already determined." (*Id.* at p. 11) (emphasis in original). On this
record, Petitioner did not present the state court with any factual or legal theory that would
support a claim of ineffective assistance of trial counsel with regard to the State's evidence
used to establish Petitioner's 1992 prior conviction.

1 Due Process when the State enhanced his sentence with two non-allegeable [sic] Historical
2 Prior Convictions.” (Answer, Exh. I, p.7). With regard to his 1993 prior conviction,
3 Petitioner argued that because that conviction involved a class 5 felony and more than five
4 years had passed since the offense giving rise to that conviction, it was too old to qualify as
5 a historical prior felony under the Arizona sentencing statute. (*Id.* at p. 8).

6 Petitioner herein did not merely raise an issue of state sentencing law. He argued that the
7 state’s alleged violation of state sentencing law violated his due process rights under the U.S.
8 Constitution. *See* discussion, *supra*, at III.B.5.a.(1.). Under the instant circumstances,
9 Petitioner fairly presented, and exhausted, a federal due process claim on direct appeal when
10 he asserted that he was denied his right to due process under the U.S. Constitution when the
11 trial court considered his 1993 prior conviction at sentencing. The Court will consider the
12 claim on the merits.

13
14 (4.) Whether use of Petitioner’s 1992 and 1993 prior convictions
15 at sentencing violated the guarantees of the Equal Protection Clause

16 Respondents are correct that Petitioner’s equal protection theory has not been fairly
17 presented to the state courts and, therefore, is not exhausted. On direct appeal, Petitioner did
18 not challenge on equal protection grounds the use of his 1992 or 1993 prior convictions at
19 sentencing. (*Id.*). Additionally, Petitioner did not raise a federal equal protection argument
20 in his PCR Petition with regard to the trial court’s use of Petitioner’s 1992 and 1993 prior
21 convictions at sentencing. (*See* Answer, Exh. O, R, T). Accordingly, Petitioner did not
22 exhaust an equal protection claim on this issue. Moreover, these claims are now procedurally
23 defaulted for the same reasons discussed *supra*, at III.B.1.a.(3.)(a.).

24 (a.) Cause and Prejudice

25 Petitioner’s generic claim of ineffective assistance of trial and appellate counsel as cause
26 to excuse his failure to exhaust the claims is insufficient given that Petitioner never exhausted
27 a claim of ineffective assistance of either trial or appellate counsel on the issue that counsel
28 failed to challenge use of the prior convictions at sentencing based on federal equal

1 protection grounds.³³ See *Edwards*, 529 U.S. at 451-53. Because Petitioner failed to
2 establish cause for his procedural default, the Court need not address prejudice. *Cook*, 538
3 F.3d at 1028 n.13 (citation omitted).

4 (5.) Whether the use of Petitioner's 1992 prior conviction at
5 sentencing placed Petitioner in double jeopardy in light of the trial
6 court's ruling that the prior conviction was inadmissible at trial to
7 impeach Petitioner

8 Petitioner claims his rights under the Double Jeopardy Clause were violated when the state
9 court used his 1992 conviction at sentencing after having previously ruled that the prior was
10 inadmissible as impeachment evidence during trial. (Petitioner's Memo., pp.13-14).

11 Respondents contend that Petitioner raised the claim in his PCR Petition and the state
12 court found the claim to be precluded under Ariz.R.Crim.P. 32.2(a)(2) because Petitioner had
13 raised it on appeal. (Answer, p.26 (*citing* Answer, Exh. W)). Therefore, Respondents argue
14 that the claim is barred under the doctrine of adequate and independent state grounds.
15 (Answer, p.26).

16 In dismissing Petitioner's PCR Petition, the state trial court acknowledged Petitioner's
17 claim that:

18 the trial court abused its discretion and violated the Double Jeopardy Clause by
19 precluding the State from mentioning Petitioner's prior conviction and then later
20 relying on that conviction as a historical prior felony conviction.

21 ³³Petitioner's claim of ineffective assistance of counsel raised in his PCR Petition did
22 not present the state court with facts or argument sufficient to apprise that court that
23 Petitioner was raising a claim of ineffective assistance of counsel with regard to counsel's
24 purported failure to raise an equal protection challenge to the use of Petitioner's 1992 prior
25 conviction as a sentencing enhancement. See *supra*, at n.32, discussing Petitioner's PCR
26 claim of ineffective assistance of counsel concerning his 1992 prior conviction)). In his PCR
27 Petition when arguing ineffective assistance of trial counsel, Petitioner sets out his
28 disagreement with the trial court's use of his 1993 prior conviction to enhance his sentence.
(Answer, Exh. R, pp.11-12 of "*Pro Per* [PCR] Petition"). However, Petitioner's argument
made no mention that counsel was ineffective for failure to challenge on federal equal
protection grounds the state court's sentencing enhancement based upon Petitioner's 1993
conviction.

1 (Answer, Exh. W). The trial court dismissed the claim finding that

2 Petitioner raised this claim on direct appeal. The court of appeals rejected this claim
3 on the merits. It is precluded by Rule 32.2(a)(2).

4 (*Id.*). Under Ariz.R.Crim.P. 32.2(a)(2), a claim shall be precluded in post-conviction relief
5 proceedings if that claim had been finally adjudicated on the merits on appeal or in any
6 previous collateral relief proceeding. Ariz.R.Crim.P. 32.2(a)(2). Respondents maintain that
7 the state trial court's ruling constitutes an adequate and independent state ground barring
8 federal habeas review. However, the Ninth Circuit has recognized that

9 A claim that has been found to be "precluded" under subsection (a)(2) appears to be a
10 classic exhausted claim and may therefore be subject to consideration in federal habeas.
11 *See Ceja v. Stewart*, 97 F.3d 1246, 1252-53 (9th Cir.1996) (recognizing the distinction
12 between waiver and preclusion, and holding that "[p]reclusion does not provide a basis
13 for federal courts to apply a procedural bar").

14 *Poland*, 169 F.3d at 578 (also noting that *in contrast* to a claim precluded under
15 Ariz.R.Crim.P. 32.2(a)(2), "a claim that has been 'waived' under subsection (a)(3) is
16 procedurally defaulted and therefore barred from federal court consideration, absent a
17 showing of cause and prejudice or fundamental miscarriage of justice."). Thus, generally,
18 when the state appellate court resolves a claim on the merits on direct appeal, the claim is
19 exhausted. The state trial court's rejection of an issue raised in a petition for post-conviction
20 relief for the reason that the issue was previously addressed on direct appeal, then, does not
21 necessarily mean, as Respondents claim here, that the issue is barred from habeas review on
22 independent and adequate state grounds. *See id.*

23 The state trial court in dismissing Petitioner's PCR Petition on the double jeopardy claim
24 found that the claim had previously been addressed on the merits by the appellate court on
25 direct appeal. However, the record reflects that the Arizona Court of Appeals, when ruling
26 on Petitioner's direct appeal, addressed state law and federal due process claims on this issue
27 but did not address the merits of a federal double jeopardy claim with regard to the 1992
28 prior conviction. Moreover, review of Petitioner's brief submitted on direct appeal reflects
that Petitioner did not raise such an issue. Thus, contrary to the trial court's assertion, the
Court of Appeals did not address Petitioner's double jeopardy claim on the merits.

1 The record also reflects that Petitioner did not invoke a *federal* double jeopardy claim
2 regarding the 1992 prior conviction in his PCR Petition given that he did not specify the
3 particular provision of the federal Constitution, nor did he cite federal or state cases
4 involving the legal standard for a claim under the Double Jeopardy Clause of the Fifth
5 Amendment of the U.S. Constitution. See *Insyxiengmay*, 403 F.3d at 668; *Castillo*, 399 F.3d
6 at 999. To the extent that Petitioner cited state case law, *State v. Rios*, 114 Ariz. 505, 562
7 P.2d 385 (App. 1977), to support his double jeopardy claim, that case did not refer to the
8 Fifth Amendment Double Jeopardy Clause, the U.S. Constitution, or to the legal standard for
9 a violation of this provision. On the instant record, Petitioner never fairly apprised the state
10 court that he was raising a federal double jeopardy claim with regard to the state court's use
11 of his 1992 prior conviction to enhance his sentence.

12 Nevertheless, out of an abundance of caution and because Petitioner's double jeopardy
13 claim is without merit, the Court will address the claim on the merits regardless whether it
14 has been exhausted. See 28 U.S.C. § 2245(b)(2).

15 (6.) Whether A.R.S. §13-702(C) is unconstitutional on its face

16 Petitioner raised this claim in his petition for review of the appellate court's denial of his
17 direct appeal. Petitioner did not raise the claim on direct appeal or in his PCR Petition.
18 Under the instant circumstances, Respondents are correct that Petitioner has failed to fairly
19 present this claim to the state court and, thus, the claim is not exhausted. See *Castille*,
20 489 U.S. at 351; *Casey*, 386 F.3d at 915-19.

21 (a.) Cause and Prejudice

22 Petitioner's claims of lack of access to research materials and ineffective assistance of
23 counsel do not constitute cause. In addition to the reasons set forth *supra*, at III.B.3.a.(3)(b.),
24 regarding alleged lack of research materials, the fact that Petitioner raised the issue in his
25 petition for Arizona Supreme Court review of his direct appeal shows that, despite his
26 claimed lack of access to research materials prior to the filing of his PCR Petition, he was
27 aware of the claim earlier. Nor can he blame ineffective assistance of trial or appellate
28 counsel given that he did not exhaust a claim of ineffective assistance of trial or appellate

1 counsel on this issue. *See Edwards*, 529 U.S. at 451-53. Because Petitioner failed to
2 establish cause for his procedural default, the Court need not address prejudice. *Cook*, 538
3 F.3d at 1028 n.13 (citation omitted). Moreover, even if the Court were to consider prejudice,
4 Petitioner would be unable to satisfy the standard given that the trial court did not impose an
5 aggravated sentence under A.R.S. § 13-702(C). (*See Answer*, Exh. F, pp. 40-41). Instead,
6 the court imposed a mitigated sentence pursuant to A.R.S. §13-604(C). (*Id.*; *see also*
7 *Answer*, p.4).

8 (7.) Whether “A.R.S. §13-604...” was required to be “named in the
9 charging complaint” (Petition, p.10)

10 Petitioner argues that “allegations pursuant to A.R.S. §13-604 which increase prescribed
11 punishment must be made in the charging document, presented to a jury, proven beyond a
12 reasonable doubt, and decided by a jury verdict.”³⁴ (Petitioner’s Memo., pp. 14-15).

13 Respondents acknowledge that Petitioner argued in his PCR Petition that the State violated
14 state and federal due process by not listing his prior convictions in the charging document
15 itself. (*Answer*, p.27). Nonetheless, they argue that the claim is precluded under the doctrine
16 of adequate and independent state grounds because the state trial court dismissed Petitioner’s
17 PCR claim. The state trial court dismissed Petitioner’s PCR claim as follows: “Petitioner
18 raised a *Blakely* claim on direct appeal. The court of appeals rejected this claim on the
19 merits. It is precluded by Rule 32.2(a)(2).” (*Answer*, Exh. W).

20 As discussed *supra*, at III.B.5.a.(5.), “[a] claim that has been found to be “precluded”
21 under ...[32.2](a)(2) appears to be a classic exhausted claim and may therefore be subject to
22 consideration in federal habeas.” *Poland*, 169 F.3d at 578. Therefore, contrary to
23 Respondents’ assertion, the trial court’s finding of preclusion under Ariz.R.Crim.P.
24 32.2(a)(2) does not bar consideration of Petitioner’s claim. *See discussion, supra*, at
25 III.B.5.a.(5.).

26
27 ³⁴To the extent that Petitioner argues the sentencing enhancement applied to him
28 violated *Blakely* based on lack of a jury finding, that issue is discussed *infra*, at
III.B.5.b.(1.).(*Id.*).

1 On direct appeal, Petitioner argued that his sentence violated *Blakely* because a jury did
2 not find the aggravating factors beyond a reasonable doubt. (Answer, Exh. I, pp. 9-11).
3 Petitioner did not specifically argue that his federal due process rights were violated because
4 the prior convictions were not alleged in the charging document. Nonetheless, given the state
5 court’s finding during post-conviction relief proceedings that the claim had been resolved on
6 the merits during direct appeal, and given that the claim lacks merit, this Court will consider
7 the claim on the merits. *See* 28 U.S.C. 2254(b)(2).

8 (8.) Whether Petitioner’s sentences violated the Sixth Amendment
9 due to double or triple counting

10 Petitioner alleges that enhancing his sentence “beyond the presumptive term of 2.5 years
11 would count as double or triple counting...” apparently under A.R.S. §13-702(C) which
12 specifies aggravating factors a court must consider at sentencing. (Petitioner’s Memo., p.15).

13 Respondents are correct that Petitioner did not raise the issue of double or triple counting
14 in his direct appeal or in his PCR Petition. To any extent that Petitioner may have addressed
15 the issue in his petition for review filed before the Arizona Supreme Court, that does not
16 constitute fair presentation. *See Castille*, 489 U.S. at 351; *Casey*, 386 F.3d at 915-19.

17 (a.) Cause and Prejudice

18 Petitioner’s failure to present the state court with a claim of ineffective assistance of trial
19 or appellate counsel on this issue forecloses his reliance on allegations of ineffective
20 assistance of counsel to excuse his procedural default. *See Edwards*, 529 U.S. at 451-53.
21 Because Petitioner failed to establish cause for his procedural default, the Court need not
22 address prejudice. *Cook*, 538 F.3d at 1028 n.13 (citation omitted). Moreover, even were the
23 Court to consider prejudice, Petitioner would be unable to satisfy the standard given that the
24 state court properly considered Petitioner’s prior convictions and imposed mitigated
25 sentences. *See* discussion *infra*, at III.B.5.b.

26 b. Merits

27 (1.) Blakely Claim

28 Petitioner claims that his rights under the Sixth Amendment and *Blakely v. Washington*,

1 542 U.S. 296 (2004), were violated because the trial court did not submit Petitioner’s prior
2 convictions to the jury for proof beyond a reasonable doubt.

3 (a.) The State Proceeding

4 The Arizona Appellate Court rejected Petitioner’s *Blakely* claim on direct appeal because
5 Petitioner had been sentenced to mitigated, rather than to aggravated, sentences. (Answer,
6 Exh. J, p. 3, n.1). The appellate court’s decision is the last-reasoned state court opinion on
7 this issue.

8 (b.) Analysis

9 The Sixth Amendment to the United States Constitution guarantees a criminal defendant
10 the right to a jury. This right continues through the sentencing process, *i.e.*, a defendant has
11 the right to demand that a jury find the existence of any specific fact that the law makes
12 essential to his punishment. *Blakely*, 542 U.S. at 301.³⁵

13 Other than the fact of a prior conviction, any fact that increases the penalty for a crime
14 beyond the prescribed statutory maximum must be submitted to a jury, and proved
beyond a reasonable doubt.

15 *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)(emphasis added). The Supreme Court
16 explained in *Blakely* that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum
17 sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or*
18 *admitted by the defendant.*” *Blakely*, 542 U.S. at 303 (citations omitted) (emphasis in
19 original).

20 The Arizona Supreme Court, in applying *Blakely* and *Apprendi* to Arizona’s sentencing
21 scheme, has held that the statutory maximum for purposes of *Apprendi* and *Blakely* analysis
22 is the presumptive sentence established for a defendant’s crime. *State v. Brown*, 209 Ariz.
23 200, 99 P.3d 15, 18 (2004); *see also State v. Brown*, 212 Ariz. 225, 129 P.3d 947, 949

25 ³⁵Although Petitioner was sentenced before the Supreme Court decided *Blakely*,
26 *Blakely* applies retroactively herein because Petitioner’s criminal case was not yet final when
27 the *Blakely* decision was issued. *See Schardt v. Payne*, 414 F.3d 1025, 1033 (9th Cir. 2005)
28 (citing *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *State of Arizona v. Febles*, 115 P.3d
629, 635 (Ariz. App. 2005).

1 (2006). However, nothing in the history of the right to a jury trial:

2 suggests that it is impermissible for judges to exercise discretion-taking into
3 consideration various factors relating both to offense and offender-in imposing a
4 judgment *within the range* prescribed by statute. We have often noted that judges in
this country have long exercised discretion of this nature in imposing sentence *within*
statutory limits in the individual case.

5 *Apprendi*, 530 U.S. at 481 (emphasis in original)(*citing Williams v. New York*, 337 U.S. 241,
6 246 (1949)). In the exercise of this time-honored discretion, a judge may consider
7 “sentencing factors”, e.g., circumstances “which may be either aggravating or mitigating in
8 character, that supports a specific sentence *within the range* authorized by the jury’s finding
9 that the defendant is guilty of a particular offense.” *State v. Martinez*, 210 Ariz. 578, 15 P.3d
10 618, 621 (2005) (emphasis in original) (*citing Apprendi*, 530 U.S. at 494 n. 19); *see also*
11 *United States v. Booker*, 543 U.S. 220 (2005) (jury must determine facts that raise a
12 sentencing ceiling). “Thus, upon the finding of an aggravating factor the ‘statutory
13 maximum’ then becomes not the presumptive term, but the maximum aggravated sentence
14 allowed by the relevant sentencing statute.” *Kemp v. McWilliams*, 2007 WL 128782, *3 (D.
15 Ariz. Jan. 12, 2007).

16 In sum, the aggravating factor of a prior conviction is *Blakely*-exempt from the Sixth
17 Amendment’s jury trial requirement. *Blakely*, 542 U.S. at 301 (““Other than the fact of a
18 prior conviction,....””)(*quoting Apprendi*, 530 U.S. at 490); *United States v. Thomas*, 447
19 F.3d 1191, 2000 (9th Cir. 2006). Other aggravating factors can be *Blakely*-compliant, i.e.,
20 found by a jury or admitted by a defendant. Once a single aggravating factor has been
21 properly established as either *Blakely*-exempt or *Blakely*-compliant, the trial court may find
22 and consider additional aggravating factors in its determination of the appropriate sentence
23 to be imposed within the given statutory sentencing range. *Martinez*, 210 Ariz at 585, 115
24 P.3d at 625 (emphasis added); *see also Apprendi*, 530 U.S. at 481.

25 Following a bench trial on the State’s allegations concerning Petitioner’s prior
26 convictions, the trial court found beyond a reasonable doubt that Petitioner had two prior
27 historical felony convictions. (Answer, Exh. F, pp.29, 39). Based upon this finding,
28 Petitioner was sentenced pursuant to Arizona’s sentencing statute applicable to defendants

1 who stand convicted of a class 4 felony and who also have two or more historical prior felony
2 convictions. *See* A.R.S. §13-604(C) (2001 & supp. 2004); (Answer, p.4). In Petitioner’s
3 case, Petitioner was not subjected to an aggravated sentence within the applicable sentencing
4 range. As the Arizona appellate court pointed out, Petitioner actually received a mitigated
5 sentence, *i.e.*, below the presumptive term, within the applicable range. Moreover, the trial
6 court’s reliance on Petitioner’s 1992 and 1993 prior convictions to apply such range did not
7 constitute a *Blakely* violation given that prior convictions are *Blakely*-exempt and, thus, do
8 not require submission to a jury. *See Blakely*, 542 U.S. at 301 (“Other than the fact of a prior
9 conviction,....”)(*quoting Apprendi*, 530 U.S. at 490); *Thomas*, 447 F.3d at 2000.
10 Consequently, the state court’s decision upholding the sentence is not contrary to, nor an
11 unreasonable application of, federal law as determined by the United States Supreme Court.
12 Nor did the state court’s proceeding result in a decision that was based on an unreasonable
13 determination of the evidence presented.

14 (2.) Whether use of the 1992 prior conviction at sentencing
15 violated Petitioner’s right to due process

16 The state trial court ruled that Petitioner’s 1992 prior conviction was inadmissible as
17 impeachment evidence at trial under Ariz.R.Evid. 609 because that conviction was more than
18 ten years old. (*See* Petition, Exh. 7A; Answer, Exh. J, p.6). However, at sentencing, the trial
19 court relied on the 1992 prior conviction to enhance Petitioner’s sentence. Petitioner asserts
20 that use of the prior conviction at sentencing violated his right to due process.

21 (a.) The State Proceeding

22 The trial court ruled pursuant to Ariz.R.Evid. 609 that Petitioner’s 1992 prior conviction
23 was inadmissible for impeachment purposes.

24 On January 16, 2004, after a bench trial on the State’s allegations of Petitioner’s 1992 and
25 1993 historical prior convictions, the court found beyond a reasonable doubt that Petitioner
26 had previously been convicted: (1) on December 1, 1993 of Aggravated Driving While under
27 the Influence of Intoxicating Liquor, a class 5 felony, committed on May 17, 1993 in
28 Maricopa County; and (2) on August 27, 1992 of Possession of Marijuana for Sale, at Least

1 One Pound but Less Than Eight Pounds, a class 3 felony, committed on March 13, 1992, in
2 Maricopa County. (Answer, Exh. E, F at p.29; *see also* Answer, Exh. C). The trial court
3 further found that the convictions qualified as historical prior convictions under A.R.S. §13-
4 604, and could be used for sentencing enhancement. (Answer, Exh. F, p.29). The trial court
5 sentenced Petitioner to the statutory scheme applicable to a defendant who stood convicted
6 of two prior historical felonies. However, the court found that the age of the 1992 prior
7 conviction was a mitigating factor and sentenced Petitioner to a mitigated term. (*Id.* at pp.
8 40-41).

9 Petitioner argued on direct appeal that his due process rights were violated when the trial
10 court considered his 1992 prior conviction at sentencing after having previously ruled that
11 the conviction was inadmissible as impeachment evidence at trial. The Arizona Court of
12 Appeals rejected Petitioner’s claim as follows in pertinent part:

13 Rule 609 generally forbids as impeachment evidence a conviction more than ten years
14 old. The sentencing statute, A.R.S. §13-702(C)(11) (Supp. 2004), *requires* the court
15 to consider as an aggravating factor whether the defendant “was previously convicted
16 of a felony within the ten years immediately preceding the date of the offense.” A.R.S.
17 §13-702(C)(11). The court *may*, however, consider older felony convictions in its
discretion. *See State v. Romero*, 173 Ariz. 242, 243, 841 P.2d 1050, 1051 (App. 1992)
 (“[W]e do not understand the statute to mean that the judge cannot consider any felony
 that is more than ten years old....”). Therefore, the court correctly considered the prior
 felony convictions.

18 (Answer, Exh. J, p.6). The appellate court’s decision is the last-reasoned state court opinion
19 on this issue.

20 (b.) Analysis

21 The question on federal habeas review is not whether the state sentencing court
22 “committed state-law error; rather a federal habeas petitioner must show that an alleged state
23 sentencing error was ‘so arbitrary or capricious as to constitute an independent due
24 process...violation.’” *Horton v. Finn*, 2008 WL 4645995, *4 (C.D. Cal. Oct. 20, 2008)
25 (*quoting Richmond*, 506 U.S. at 50; *citing Christian*, 41 F.3d at 469)).

26 Petitioner’s prior conviction at issue occurred on August 27, 1992. (Answer, Exh. F,
27 p.29). The offenses leading to the convictions at issue in the instant habeas Petition occurred
28 on August 7, 2001. (Answer, Exh. A, B). Petitioner’s jury trial commenced in November

1 2003. (Answer, Exh. D).

2 As the Arizona appellate court correctly noted, Rule 609 of the Arizona Rules of Evidence
3 generally prohibits as impeachment evidence the use of a conviction more than ten years old.
4 Ariz.R.Evid. 609. From a transcript page submitted by Petitioner, it appears that when the
5 trial court was ruling on the 609 issue, there was some discussion whether the ten-year period
6 under Rule 609 was calculated from the date of the offense for which Petitioner was being
7 tried or the date of trial. (Petition, Exh. 7A). There is no dispute that the trial court
8 ultimately held that Petitioner's 1992 conviction was inadmissible under Rule 609. (Answer,
9 Exh. J, p.6; Petition, p. 10). The instant record is also clear that the offense giving rise to the
10 1992 prior conviction occurred on March 13, 1992 which was *within ten years* of the date
11 of the August 7, 2001 offenses at issue in the instant habeas Petition. The instant record is
12 also clear that the offense giving rise to the 1992 prior conviction occurred *more than ten*
13 *years* before Petitioner's November 2003 trial on the offenses at issue in the instant habeas
14 Petition.

15 At sentencing, the court found that Petitioner's 1992 prior conviction
16 qualified as a historical prior under A.R.S. §13-604(V)(2)(b) because it is a Class 3
17 felony, which was committed *within the preceding 10 years* of when this case that
18 we're here on today was committed.

19 So the Court finds beyond a reasonable doubt that there are two historical
20 priors that can be used for sentencing enhancement.

21 (Answer, Exh. F, p.29) (emphasis in added). When Petitioner was sentenced, section 13-604
22 defined a "historical prior felony conviction" as including:

23 Any class 2 or 3 felony, except the offenses listed in subdivision (a) of this
24 paragraph³⁶, that was committed *within the ten years immediately preceding the date*
25 *of the present offense*. Any time spent on absconder status while on probation or
26 incarcerated is excluded in calculating if the offense was committed within the
27 preceding ten years. If a court determines a person was not on absconder status while
28 on probation that time is not excluded.

29 A.R.S. §13-604(V)(2)(b) (2001 & Supp. 2004) (emphasis added). Additionally, Arizona
30 sentencing statutes required the court to consider whether "[t]he defendant was previously

31 ³⁶Petitioner's 1992 conviction did not fall within subdivision (a).

1 convicted of a felony within the ten years immediately preceding the date of the offense.”
2 A.R.S. §13-702(C)(11) (2001 & Supp. 2004). Further, under Arizona law, the court could
3 also consider, as an aggravating factor, any felony that is more than ten years old. *Romero*,
4 173 Ariz. at 243, 841 P.2d at 1051. Accordingly, the trial court’s ruling under Ariz.R.Evid.
5 609 had no bearing on the issue whether the 1992 prior conviction could be considered at
6 sentencing under Arizona’s sentencing scheme. Moreover, although Petitioner was sentenced
7 under the scheme applicable to defendants “with two historical prior felonies,”³⁷ the court
8 considered the age of the 1992 prior conviction as a “mitigating circumstance under the
9 catch-all of the statute.” (Answer, Exh. F at pp.39-40). In doing so, the court stated:

10 And I do recognize that that possession for sale of marijuana case was just within a few
11 months of expiring as a historical prior because it was committed in March of ‘92. This
12 offense was committed in August of 2001 and so historicals only go for 10 years, at
13 least for that class offense. So you were close to expiring on that.

14 So I think I can find that as a mitigating factor. I tend to agree with Ms.
15 Simpson that – and your family members that it seems harsh to impose a 10-year or
16 greater sentence for [sic] under the circumstances of this case. As I said, no victim, no
17 accident, no damage, all occurred within the drive-through of Dunkin Donuts’ parking
18 lot at 19th Avenue and Northern Avenue.

19 So the Court does find that there is at least one mitigating circumstance and
20 that is the age of the prior. Also, the nature of the events leading up to this offense, I
21 think is also a mitigating factor. Accordingly—and I think those are substantially
22 sufficient to impose a mitigated term in this case.

23 Accordingly, it is the judgment and sentence of the Court that defendant be
24 imprisoned for the mitigated term of eight years.

25 (Answer, Exh. F, pp. 40-41).

26 No fundamental unfairness and/or arbitrary or capricious disregard of Petitioner’s right
27 to liberty is apparent from the record herein. The 1992 prior conviction, regardless whether
28 it was deemed admissible at trial under Arizona evidentiary rules, fell within the statutory
definition of a historical prior felony conviction under Arizona sentencing statutes. Further,

³⁷At sentencing, the court recognized that in light of Petitioner’s two historical prior
felony convictions, Petitioner faced a minimum term of 8 years, a presumptive term of 10
years, and a maximum of 15 years. (Answer, Exh. F, p. 39); *see also* A.R.S. §13-604(C)
(2001 & supp. 2004) (setting out this sentencing range for defendants convicted of a class
4 felony who also have two historical prior felony convictions). The court further advised
Petitioner that the applicable sentencing statute also provided for a super-mitigated term of
7 years and a super-aggravated term of 15 years. (*Id.*).

1 at sentencing, the trial court considered the age of that prior conviction as a mitigating factor
2 to impose a sentence below the presumptive term. The state court's decision upholding the
3 sentence is not contrary to, nor an unreasonable application of, federal law as determined by
4 the United States Supreme Court. Nor did the state court's proceeding result in a decision
5 that was based on an unreasonable determination of the evidence presented.

6 (3.) Whether use of Petitioner's 1993 prior conviction at
7 sentencing violated the guarantees of the Due Process Clause in
8 light of the age of that prior

9 Petitioner argues that because his 1993 prior conviction involved a class 5 felony and was
10 more than five years old, it did not qualify as a historical prior felony under the A.R.S. §13-
11 604. (Petition, p.10; Petitioner's Memo., p.14). Therefore, according to Petitioner, the trial
12 court's reliance on his 1993 prior conviction at sentencing violated his rights under the Due
13 Process Clause.

14 (a.) The State Proceeding

15 Following a bench trial on the matter of Petitioner's alleged prior convictions, the trial
16 court found that Petitioner's 1992 and 1993 convictions qualified as historical prior
17 convictions under A.R.S. §13-604 and could be used in determining Petitioner's sentence.
18 (Answer, Exh. F, p.29). Specifically, with regard to Petitioner's 1993 prior conviction, the
19 trial court held:

20 Based on the evidence presented, the Court finds beyond a reasonable doubt that the
21 defendant...was convicted on December 1, 1993...of aggravated driving while under the
22 influence of intoxicating liquor, a Class 5 felony, committed on May 17, 1993, in
23 violation of Arizona law. That qualified as a historical prior under ARS Section 13-
604(V)(2)(b) because it involved aggravated driving while under the influence of
intoxicating liquor or drugs.

24 *(Id.)*.

25 Petitioner argued on direct appeal that his due process rights were violated because both
26 the 1992 and 1993 prior convictions were too old to qualify as historical prior felony
27 convictions. With regard to his 1993 prior conviction, Petitioner presented on direct appeal
28 essentially the same argument that he presents here. The appellate court, did not specifically

1 discuss Petitioner's 1993 prior conviction on this issue. The appellate court, after
2 acknowledging that Petitioner raised a due process claim with regard to the use of his 1992
3 prior conviction at sentencing, held that the trial "court correctly considered the prior felony
4 convictions." (Answer, Exh. J, p.6). The appellate court's decision is the last-reasoned state
5 court opinion on this issue.

6 (b.) Analysis

7 As set forth *supra*, at III.B.5.b.(2)(b.), Petitioner must show that an alleged state
8 sentencing error was so arbitrary or capricious as to constitute an independent due process
9 violation. *Richmond*, 506 U.S. at 50; *Christian*, 41 F.3d at 469; *Horton*, 2008 WL 4645995
10 at *4.

11 The offense giving rise to Petitioner's 1993 prior conviction was aggravated driving while
12 under the influence of intoxicating liquor, a class 5 felony. (Answer, Exh. F, p.29).

13 Arizona defines "[h]istorical prior felony conviction" to include:

14 (a) Any prior felony conviction for which the offense of conviction:

15 (v) Involved *aggravated driving under the influence of intoxicating liquor* or
16 drugs, driving while under the influence of intoxicating liquor or drugs with
17 a suspended, canceled, revoked or refused driver license or driving under the
influence of intoxicating liquor or drugs with two or more driving under the
influence of intoxicating liquor or drug convictions within a period of sixty
months; or

18 ***

19 (b) Any class 2 or 3 felony, except the offenses listed in subdivision (a) of this
paragraph, that was committed within the ten years immediately preceding the date of
20 the present offense. Any time spent on absconder status while on probation or
incarcerated is excluded in calculating if the offense was committed within the
preceding ten years. If a court determines a person was not on absconder status while
21 on probation that time is not excluded.

22 (c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this
paragraph, that was committed within the five years immediately preceding the date of
23 the present offense. Any time spent on absconder status while on probation or
incarcerated is excluded in calculating if the offense was committed within the
preceding five years. If a court determines a person was not on absconder status while
24 on probation that time is not excluded.

25 A.R.S. §13-604(V)(2)(a),(b),(c) (2001 & Supp. 2004) (emphasis added).

26 Petitioner argues that his 1993 prior felony conviction fell under section 13-604(V)(2)(c)
27 because it involved a class 5 felony. He further argues that under section 13-604(V)(2)(c),
28 his 1993 conviction was too old to qualify as an historical prior felony conviction because

1 it was more than 5 years old.

2 Petitioner overlooks that section 13-604(V)(2)(a)(v) brings his 1993 prior conviction for
3 aggravated DUI within the definition of a historical prior felony conviction and section 13-
4 604(V)(2)(c) specifically states that it does not apply to “[a]ny class 4,5 or 6 felony...listed
5 in subdivision (a).” See A.R.S. §13-604(V)(2)(c) (“Any class 4, 5 or 6 felony, *except the*
6 *offenses listed in subdivision (a) of this paragraph....*”) (emphasis added).

7 This Court notes that the trial court misspoke when it stated that the 1993 conviction
8 qualified as a historical prior felony conviction under section 13-604(b)(2)(v). However, any
9 mis-citation is without moment give that the court explained that the 1993 conviction
10 qualified as a historical prior felony conviction “because it involved aggravated driving while
11 under the influence of intoxicating liquor or drugs” which is consistent with A.R.S. §13-
12 604(b)(2)(a)(v). (Answer, Exh. F, p.29).

13 Given that Petitioner’s 1993 conviction, like his 1992 prior conviction, qualified as a
14 historical prior felony conviction, the trial court’s use of the convictions to enhance
15 Petitioner’s sentence was neither fundamentally unfair nor an arbitrary or capricious
16 disregard of Petitioner’s right to liberty. The state court’s decision upholding the sentences
17 is not contrary to, nor an unreasonable application of, federal law as determined by the
18 United States Supreme Court. Nor did the state court’s proceeding result in a decision that
19 was based on an unreasonable determination of the evidence presented.

20 (4.) Whether the use of Petitioner’s 1992 prior conviction at
21 sentencing placed Petitioner in double jeopardy in light of the trial
22 court’s ruling that the prior conviction was inadmissible at trial to
23 impeach Petitioner

24 Petitioner argues that the trial court’s ruling during trial that his 1992 prior conviction was
25 too old to be admissible as impeachment evidence under Ariz.R.Evid. 609 precluded the
26 court from later relying on the same prior conviction at sentencing. According to Petitioner
27 “relitigating...” the issue at sentencing “placed...[P]etitioner in [d]ouble jeopardy.”
28 (Petitioner’s Memo., p.14).

1 Although the Arizona court did not specifically discuss Petitioner’s double jeopardy
2 argument with regard to his 1992 prior conviction, the court did correctly conclude that use
3 of the prior to enhance Petitioner’s sentence did not violate due process principles. *See*
4 *supra*, at III.B.5.b.(2.)(b.).

5 When "there is no state court decision on [the] issue to which to accord deference," the
6 claim must be reviewed *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002); *see*
7 *also Brazzel v. Washington*, 491 F.3d 976, 983 (9th Cir. 2007) (“If the state court has not
8 addressed a constitutional issue at all, then our review is *de novo*.”).

9 As discussed *supra*, at III.B.5.b.(2.)(b.), the trial court’s evidentiary ruling during trial
10 regarding Petitioner’s 1992 prior conviction had no bearing on application of state sentencing
11 laws during Petitioner’s sentencing proceeding. The Arizona sentencing scheme clearly
12 allowed for enhancement in Petitioner’s case.

13 The U.S. Supreme Court has held that the Double Jeopardy Clause “protects against
14 successive prosecutions for the same offense after acquittal or conviction and against
15 multiple criminal punishments for the same offense.” *Monge v. California*, 524 U.S. 721,
16 728 (1998) (citations omitted). The Supreme Court has also generally found “double
17 jeopardy protections inapplicable to sentencing proceedings...because the determinations at
18 issue do not place a defendant in jeopardy for an ‘offense’....Nor have sentence
19 enhancements been construed as additional punishment for the previous offense....” *Id.*
20 (citations omitted). Thus,

21 [a]n enhanced sentence imposed on a persistent offender...“is not to be viewed as either
22 a new jeopardy or additional penalty for the earlier crimes” but as “a stiffened penalty
23 for the latest crime, which is considered to be an aggravated offense because a
24 repetitive one.”

25 *Monge*, 524 U.S. at 728 (*quoting Gryger v. Burke*, 334 U.S. 728, 732 (1948)). Therefore,
26 double jeopardy protections are inapplicable to Petitioner’s challenged sentencing
27 enhancement. *See id.*; *see also Guzman v. Ryan*, 2009 WL 1066239, *17 (D.Ariz. April 21,
28 2009). Petitioner’s double jeopardy claim fails on the merits. To the extent that the State
appellate court’s decision affirming Petitioner’s convictions and sentences can be construed

1 as a ruling on this issue, such decision is not contrary to, nor an unreasonable application of,
2 federal law as determined by the United States Supreme Court. Nor did the state court's
3 proceeding result in a decision that was based on an unreasonable determination of the
4 evidence presented.

5 (5.) Whether "A.R.S. §13-604..." was required to be "named in the
6 charging complaint" (Petition, p.10)

7 Petitioner argues that "allegations pursuant to A.R.S. §13-604 which increase prescribed
8 punishment must be made in the charging document, presented to a jury, proven beyond a
9 reasonable doubt, and decided by a jury verdict." (Petitioner's Memo., pp. 14-15).

10 (a.) The State Proceeding

11 Petitioner argued on direct appeal that his sentences violated *Blakely*. The appellate court
12 held that *Blakely* did not apply to Petitioner's sentences because he was sentenced to
13 mitigated, rather than aggravated, sentences. (Answer, Exh. J, p.3 n.1).

14 In his PCR Petition, Petitioner argued that State failed to allege his prior convictions in
15 the charging document. The state court dismissed this claim because: "Petitioner raised a
16 *Blakely* claim on direct appeal. The court of appeals rejected this claim on the merits. It is
17 precluded by Rule 32.2(a)(2)." (Answer, Exh. W).

18 Thus, the appellate court's decision is the last-reasoned state court opinion on this issue.

19 (b.) Analysis

20 As discussed *supra*, at III.B.5.b.(1.)b.), Petitioner's *Blakely* claim fails on the merits.
21 Thus, to any extent the claim can be construed as a *Blakely* claim, it fails on the merits as
22 well.

23 Furthermore, the Sixth Amendment guarantees a criminal defendant "the right...to be
24 informed of the nature and cause of the accusation...." U.S. Const. amend, VI. *See also Cole*
25 *v. State of Arkansas*, 333 U.S. 196, 201 (1948) (*citing DeJong v. State of Oregon*, 299 U.S.
26 353, 362 (1937)); *In re Oliver*, 333 U.S. 257, 273 (1948); *Jackson v. Virginia*, 443 U.S. 307,
27 314 (1979); *Gault v. Lewis*, 489 F.3d 993, 1002-1003 (9th Cir. 2007), *cert denied*, ___ U.S. ___,
28 128 S.Ct. 1477 (2008). (recognizing same). To determine whether a defendant has received

1 constitutionally adequate notice, the reviewing court looks first to the charging document.
2 *See Gautt*, 489 F.3d at 1003 (*citing Cole*, 333 U.S. at 198). However, the federal constitution
3 does not require that the charging document include prior convictions that the State intends
4 to use solely for sentencing purposes. *See Almendarez-Torres v. United States*, 523 U.S. 224,
5 229 (1998) (“An indictment must set forth each element of the crime that it charges... [b]ut
6 it need not set forth factors relevant only to the sentencing of an offender found guilty of the
7 charged crime.”); *United States v. Pacheco-Zepeda*, 234 F.3d 411, 413-414 (9th Cir. 2000)
8 (Under *Almendarez-Torres*, the trial court “was entitled to consider any prior aggravated
9 felony convictions in sentencing [the defendant]...even though such conduct had not been
10 charged in the indictment, presented to a jury, and proved beyond a reasonable doubt.”);
11 *Murphy v. Giurbino*, 2006 WL 2521561, *3-*4 (N.D. Cal. Aug. 30, 2006) (denying habeas
12 relief on claim that prior conviction used for sentencing enhancement was not alleged in the
13 charging document). Although the U.S. Supreme Court has “expressed reservations about
14 *Almendarez-Torres*...” the Court nevertheless “choose not to overrule *Almendarez-Torres*,
15 and unmistakably carved out an exception for ‘prior convictions’ that specifically preserved
16 the holding of *Almendarez-Torres*.” *Pacheco-Zepeda*, 234 F.3d at 414 (*citing Apprendi v.*
17 *New Jersey*, 530 U.S. 466 (2000)). *See also Apprendi*, 530 U.S. at 490 (“[o]ther than the fact
18 of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed
19 statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

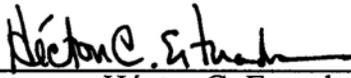
20 Because Petitioner herein had no federal constitutional right to notice of the prior
21 convictions to be used for sentencing purposes, or the statutory enhancements that would
22 flow from his prior convictions, the omission of the prior convictions from the charging
23 document did not violate Petitioner’s rights under the U.S. Constitution. The state court’s
24 decision upholding Petitioner’s sentences is not contrary to, nor an unreasonable application
25 of, federal law as determined by the United States Supreme Court. Nor did the state court’s
26 proceeding result in a decision that was based on an unreasonable determination of the
27 evidence presented.

28

1 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.) (*en banc*), *cert. denied*, 540 U.S.
2 900 (2003).

3 DATED this 30th day of December, 2009.

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Héctor C. Estrada
United States Magistrate Judge