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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Chad Lucas Harrison,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-13-00245-TUC-EJM

**ORDER**

15 Petitioner Chad Lucas Harrison filed a *pro se* petition for a Writ of Habeas Corpus  
16 pursuant to 28 U.S.C. § 2254 challenging his convictions for theft of a means of  
17 transportation, third-degree burglary, criminal damage, simple assault, attempted armed  
18 robbery, attempted aggravated robbery, theft of a credit card, and taking the identity of  
19 another. (Doc. 1). Petitioner raises four grounds for relief: (1) ineffective assistance of  
20 counsel (“IAC”); (2) insufficient indictment; (3) unlawfully imposed sentence/double  
21 jeopardy; and (4) unlawful use of stale priors. Petitioner’s IAC claim includes a number  
22 of sub claims: (a) counsel failed to object to the sufficiency of the indictment; (b) counsel  
23 failed to object to the trial court’s abuse of discretion in imposing an unlawful sentence;  
24 (c) counsel failed to object to the unlawful use of stale priors; (d) counsel failed to  
25 discover that one of Petitioner’s priors was a misdemeanor; (e) counsel failed to notice  
26 that Petitioner was sentenced for a dangerous felony even though the jury found no  
27 dangerous nature; (f) counsel failed to raise the issue that the jury found Petitioner did not  
28 have a weapon but was guilty of armed robbery and aggravated robbery; and (g) counsel

1 failed to interview witnesses.

2 Respondents filed their response contending Grounds Two, Three, and Four are  
3 not cognizable on habeas review because Petitioner fails to specify the nature of the  
4 constitutional violations alleged in these counts. Respondents further note that at the state  
5 level, Petitioner did not describe any federal basis for these claims separate from his IAC  
6 claims, and the state courts only addressed these claims as IAC claims. As to Petitioner’s  
7 IAC claims in Ground One, Respondents contend that sub claims (a), (b), and (c) were  
8 properly presented to the Arizona Court of Appeals (“COA”) and are thus properly  
9 before this Court for review; that sub claims (d) and (g) are unexhausted and procedurally  
10 defaulted because Petitioner failed to present them in his Rule 32 petition for post-  
11 conviction relief (“PCR”); that sub claim (e) is moot because Petitioner has already been  
12 resentenced on count five of the indictment; and that sub claim (f) is unexhausted and  
13 procedurally defaulted because Petitioner only presented this claim in his petition for  
14 review to the Arizona Supreme Court, which does not meet the requirement of fairly  
15 presenting the claim to the state courts.

16 As to the sub claims in Ground One of the petition that are properly exhausted and  
17 not procedurally defaulted, the Court finds that Petitioner has failed to establish a  
18 violation of *Strickland v. Washington*, 466 U.S. 668 (1984), and that the state courts did  
19 not err in their resolution of Petitioner’s *Strickland* claims. As to Grounds Two, Three,  
20 and Four of the petition, the Court finds that Petitioner failed to describe the federal basis  
21 for these claims in his state court proceedings, and thus they were not fairly presented to  
22 the state courts for review. The Court further finds that Petitioner does not demonstrate  
23 cause and prejudice or a fundamental miscarriage of justice to excuse the procedural  
24 default of his claims. Accordingly, the petition will be denied.

25 **I. FACTUAL AND PROCEDURAL BACKGROUND**

26 **A. Trial, Sentencing, and Appeal**

27 On June 27, 2008 a Pima County Superior Court jury found Petitioner guilty of  
28 theft of means of transportation, burglary in the third degree, criminal damage, simple

1 assault, attempted armed robbery, attempted aggravated robbery, theft of a credit card,  
2 and taking the identity of another. (Doc. 15 Ex. B). Petitioner was sentenced to a total of  
3 15 years imprisonment. (Doc. 15 Exs. C and II).

4 The Arizona COA summarized the facts of the case as follows:

5 So viewed, the evidence established that Shawna C. had  
6 stopped at a convenience store at about 9:00 p.m. on January  
7 26, 2008, and left her sedan running in the store's parking lot  
8 while she went inside. She noticed two men at the counter  
9 and saw them leave the store. She also saw one of the men  
10 place his hands on the handlebars of a bicycle outside. When  
11 Shawna walked out to the parking lot moments later, her car  
12 was gone, and she reported the theft to the Tucson Police  
13 Department.

14 The next morning, Harrison was driving Shawna's sedan with  
15 codefendant Zachary Waggoner as his passenger. Waggoner  
16 called out the vehicle's window to Doug Z. and offered him a  
17 ride. Doug accepted the offer and got into the vehicle,  
18 noticing that the back seat was full of what he described as  
19 bicycle parts.

20 Harrison told Doug the vehicle was a "G-ride," and a police  
21 detective testified this term was slang for a stolen vehicle,  
22 with the "G" signifying "grand theft auto." Although Doug  
23 had expected a ride home, Harrison stopped the car in a  
24 railroad underpass. Waggoner, who had been stabbing the  
25 dashboard with a screwdriver during the ride, held it to  
26 Doug's ear and threatened to "shove it through" unless Doug  
27 gave him money. As Doug struggled to get out the passenger-  
28 side door, Waggoner used the screwdriver to stab him in the  
chest and legs. After Doug escaped from the vehicle by  
climbing through the window, Harrison got out as well and  
kicked and punched Doug, telling him, "We are serious."  
Doug had understood this to mean the two men were serious  
about getting his money. Doug whistled for aid and told the  
men he knew someone who lived nearby, and Harrison and  
Waggoner got back into the vehicle and drove away.

A few minutes later, a Pima County Sheriff's deputy noticed  
the same vehicle being driven erratically and then parked  
behind a dumpster at a convenience store. The deputy  
checked the vehicle's license plate, learned the vehicle had  
been stolen, and called for backup. He watched as Harrison  
and Waggoner got out of the vehicle and walked into the  
store.

Once inside, Harrison attempted to make a purchase with a  
bank card in the name of Fidel C. but presented his own  
driver's license as identification, and store employees refused  
the sale. Harrison and Waggoner left the store, walked past  
the dumpster and the vehicle, and went down an alley where  
they were stopped and arrested by police officers. Officers

1 later found Fidel's bank card, work identification card, and  
2 other cards in his name, as well as Harrison's driver's license,  
3 on the lid of the dumpster Harrison had passed. Fidel later  
4 testified he had lost a wallet containing these cards.

5 Shawna was asked to come to the scene and, once there,  
6 identified her vehicle, stating that the bicycle in the back seat  
7 was not hers. She positively identified Waggoner as one of  
8 the men she had seen at the convenience store just before her  
9 car was stolen. She could not positively identify Harrison but  
10 testified his appearance was consistent with that of the man  
11 she had seen with Waggoner the night before. Harrison  
12 stipulated that the damage to Shawna's vehicle exceeded  
13 \$2,000.

14 (Doc. 15 Ex. H at 3–4).

15 Following his conviction, Petitioner sought review in the Arizona COA and  
16 argued that the trial court had erred by denying his Rule 20 motion for a directed verdict.  
17 (Doc. 15 Ex. E). On August 27, 2009, the COA found no reversible error and affirmed  
18 Petitioner's conviction and sentence. (Doc 15 Ex. H).

#### 19 **B. Petition for Post-Conviction Relief**

20 On February 22, 2010, Petitioner initiated proceedings in Pima County Superior  
21 Court for post-conviction relief ("PCR"). (Doc. 15 Ex. J). The trial court appointed  
22 counsel to represent Petitioner, and counsel subsequently filed a notice that he found no  
23 good faith basis in law or fact for relief under Rule 32. (Doc. 15 Exs. K, N). Counsel also  
24 requested that Petitioner be granted leave to file a pro se petition for PCR, and, after  
25 several extensions granted by the court, Petitioner timely filed his Rule 32 petition on  
26 October 19, 2011. (Doc. 15 Ex. U).

27 Petitioner raised the following IAC issues based on trial counsel's failure to  
28 challenge: a) the indictment as duplicitous and insufficient; b) the court's allowance of a  
dangerous nature finding after it dismissed the jury; c) the court's failure to orally  
pronounce the sentence; d) the use of stale priors to enhance Petitioner's sentence; e) the  
dangerousness of counts 5 and 6; and f) the unlawfully imposed sentences that should  
have been imposed pursuant to former A.R.S. § 13–702.02 and not former A.R.S. § 13–  
604. *Id.* Petitioner also raised claims of insufficient indictment, unlawful conviction,

1 unlawfully imposed sentence, and unlawful use of priors. *Id.*

2 The trial court denied PCR on May 30, 2012. (Doc. 15 Ex. X). Petitioner then filed  
3 a motion requesting an addendum to his Rule 32 petition to request dismissal of count  
4 five of the indictment, and a motion requesting modification of his sentence. (Exs. Y, Z).  
5 The court denied both motions, and noted that Petitioner would be resentenced on count  
6 five. (Ex. AA, BB). On July 30, 2012 the court resentenced Petitioner on count five of the  
7 indictment. (Ex. CC).

8 Petitioner filed a petition for review with the Arizona COA on June 28, 2012. (Ex.  
9 DD). Petitioner argued that his trial counsel was ineffective for: a) failing to challenge the  
10 indictment as insufficient because of duplicitousness; b) failing to challenge Petitioner's  
11 sentence as unlawful where the court failed to orally pronounce it; c) failing to challenge  
12 the unlawful use of stale priors; and d) failing to note that dangerous nature was not  
13 proven. Petitioner also argued that the indictment was insufficient, that his sentence was  
14 unlawful because it was not orally pronounced, that his sentence was illegally enhanced  
15 with stale priors, and that the court improperly allowed dangerous nature allegations for  
16 counts 5 and 6 of the indictment after the jury was released. The COA granted review but  
17 denied relief on October 25, 2012. (Ex. EE). Petitioner sought review by the Arizona  
18 Supreme Court, which denied review on March 25, 2013. (Exs. FF, GG).

### 19 **C. Habeas Petition**

20 Petitioner filed his Petition for Writ of Habeas Corpus (PWHC) in this Court on  
21 April 11, 2013, asserting four grounds for relief. (Doc. 1). In Ground One, Petitioner  
22 argues his trial counsel was ineffective for: (a) failing to object to the sufficiency of the  
23 indictment; (b) failing to object to the trial court's abuse of discretion in imposing an  
24 unlawful sentence; (c) failing to object to the unlawful use of stale priors; (d) failing to  
25 discover that one of Petitioner's priors was a misdemeanor; (e) failing to notice that  
26 Petitioner was sentenced for a dangerous felony even though the jury found no dangerous  
27 nature; (f) failing to raise the issue that the jury found Petitioner did not have a weapon  
28 but was guilty of armed robbery and aggravated robbery; and (g) failing to interview

1 witnesses. In Ground Two, Petitioner argues that the indictment was insufficient and  
2 duplicitous because it charged the same conduct twice in counts one through three. In  
3 Ground Three, Petitioner alleges that his sentences were unlawfully imposed because: a)  
4 the trial court did not orally pronounce the sentences; b) the court resentenced petitioner  
5 on count five but never vacated the original sentence; and c) the jury was released before  
6 the dangerous nature findings were read. Finally, in Ground Four, Petitioner argues that  
7 the court unlawfully allowed the use of stale prior convictions at sentencing.

8 Respondents argue that Grounds Two, Three, and Four are unexhausted and  
9 procedurally defaulted because, at the state level, Petitioner did not describe the federal  
10 constitutional nature of these claims, and did not allege any basis for these claims  
11 separate from his IAC claims. Respondents also note that the state court only addressed  
12 these claims as IAC claims. As to Petitioner's IAC claims in Ground One, Respondents  
13 contend that sub claims (d) and (g) are unexhausted and procedurally defaulted because  
14 Petitioner failed to present them in his Rule 32 petition; that sub claim (e) is moot  
15 because Petitioner has already been resentenced on count five of the indictment; and that  
16 sub claim (f) is unexhausted and procedurally defaulted because Petitioner only presented  
17 this claim in his petition for review to the Arizona Supreme Court, which does not meet  
18 the requirement of fairly presenting the claim to the state courts. Respondents concede  
19 that sub claims (a), (b), and (c) of Ground One were fairly presented to the Arizona COA  
20 and are thus properly exhausted.

## 21 **II. STANDARD OF REVIEW**

22 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits the  
23 federal court's power to grant a petition for a writ of habeas corpus on behalf of a state  
24 prisoner. First, the federal court may only consider petitions alleging that a person is in  
25 state custody "in violation of the Constitution or laws or treaties of the United States." 28  
26 U.S.C. § 2254(a). Sections 2254(b) and (c) provide that the federal courts may not grant  
27 habeas corpus relief, with some exceptions, unless the petitioner exhausted state  
28 remedies. Additionally, if the petition includes a claim that was adjudicated on the merits

1 in state court proceedings, federal court review is limited by section 2254(d).

2 **A. Exhaustion**

3 A state prisoner must exhaust his state remedies before petitioning for a writ of  
4 habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *O’Sullivan v. Boerckel*, 526  
5 U.S. 838, 842 (1999). To exhaust state remedies, a petitioner must afford the state courts  
6 the opportunity to rule upon the merits of his federal claims by fairly presenting them to  
7 the state’s highest court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S.  
8 27, 29 (2004) (“[t]o provide the State with the necessary opportunity, the prisoner must  
9 fairly present her claim in each appropriate state court . . . thereby alerting the court to the  
10 federal nature of the claim.”). In Arizona, unless a prisoner has been sentenced to death,  
11 the highest court requirement is satisfied if the petitioner has presented his federal claim  
12 to the Arizona COA, either through the direct appeal process or post-conviction  
13 proceedings. *Crowell v. Knowles*, 483 F.Supp.2d 925, 931–33 (D. Ariz. 2007).

14 A claim is fairly presented if the petitioner describes both the operative facts and  
15 the federal legal theory upon which the claim is based. *Kelly v. Small*, 315 F.3d 1063,  
16 1066 (9th Cir. 2003), *overruled on other grounds*, *Robbins v. Carey*, 481 F.3d 1143 (9th  
17 Cir. 2007). The petitioner must have “characterized the claims he raised in state  
18 proceedings *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th  
19 Cir. 2000) (emphasis in original), *opinion amended and superseded*, 247 F.3d 904 (9th  
20 Cir. 2001). “If a petitioner fails to alert the state court to the fact that he is raising a  
21 federal constitutional claim, his federal claim is unexhausted regardless of its similarity to  
22 the issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).  
23 “Moreover, general appeals to broad constitutional principles, such as due process, equal  
24 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hivala v.*  
25 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

26 However, “[a] habeas petitioner who [fails to properly exhaust] his federal claims  
27 in state court meets the technical requirements for exhaustion” if there are no state  
28 remedies still available to the petitioner. *Coleman v. Thompson*, 501 U.S. 722, 732

1 (1991). “This is often referred to as ‘technical’ exhaustion because although the claim  
2 was not actually exhausted in state court, the petitioner no longer has an available state  
3 remedy.” *Thomas v. Schriro*, 2009 WL 775417, \*4 (D. Ariz. March 23, 2009). “If no  
4 state remedies are currently available, a claim is technically exhausted,” but, as discussed  
5 below, the claim is procedurally defaulted and is only subject to federal habeas review in  
6 a narrow set of circumstances. *Garcia v. Ryan*, 2013 WL 4714370, \*8 (D. Ariz. Aug. 29,  
7 2013).

### 8 **B. Procedural Default**

9 If a petitioner fails to fairly present his claim to the state courts in a procedurally  
10 appropriate manner, the claim is procedurally defaulted and generally barred from federal  
11 habeas review. *Ylst v. Nunnemaker*, 501 U.S. 797, 802–05 (1991). There are two  
12 categories of procedural default. First, a claim may be procedurally defaulted in federal  
13 court if it was actually raised in state court but found by that court to be defaulted on state  
14 procedural grounds. *Coleman*, 501 U.S. at 729–30. Second, the claim may be  
15 procedurally defaulted if the petitioner failed to present the claim in a necessary state  
16 court and “the court to which the petitioner would be required to present his claims in  
17 order to meet the exhaustion requirement would now find the claims procedurally  
18 barred.” *Id.* at 735 n. 1; *O’Sullivan*, 526 U.S. at 848 (when time for filing state court  
19 petition has expired, petitioner’s failure to timely present claims to state court results in a  
20 procedural default of those claims); *Smith v. Baldwin*, 510 F.3d 1127, 1138 (9th Cir.  
21 2007) (failure to exhaust claims in state court resulted in procedural default of claims for  
22 federal habeas purposes when state’s rules for filing petition for post-conviction relief  
23 barred petitioner from returning to state court to exhaust his claims).

24 When a petitioner has procedurally defaulted his claims, federal habeas review  
25 occurs only in limited circumstances. “A prisoner may obtain federal review of a  
26 defaulted claim by showing cause for the default and prejudice from a violation of federal  
27 law.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012). Cause requires a showing “that  
28 some objective factor external to the defense impeded counsel’s efforts to comply with

1 the State’s procedural rule . . . [such as] a showing that the factual or legal basis for a  
2 claim was not reasonably available to counsel, . . . or that some interference by officials  
3 made compliance impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal  
4 quotations and citations omitted). Prejudice requires “showing, not merely that the errors  
5 at his trial created a *possibility* of prejudice, but that they worked to his *actual* and  
6 substantial disadvantage, infecting his entire trial with error of constitutional  
7 dimensions.” *U.S. v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). The Court  
8 need not examine the existence of prejudice if the petitioner fails to establish cause.  
9 *Engle v. Isaac*, 456 U.S. 107, 134 n. 43, (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n.  
10 10 (9th Cir. 1991). Additionally, a habeas petitioner “may also qualify for relief from his  
11 procedural default if he can show that the procedural default would result in a  
12 ‘fundamental miscarriage of justice.’” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir.  
13 2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). This exception to the  
14 procedural default rule is limited to habeas petitioners who can establish that “a  
15 constitutional violation has probably resulted in the conviction of one who is actually  
16 innocent.” *Schlup*, 513 U.S. at 327; see also *Murray*, 477 U.S. at 496; *Cook*, 538 F.3d at  
17 1028.

### 18 C. Adjudication on the Merits and Section 2254(d)

19 The Ninth Circuit has held that “a state has ‘adjudicated’ a petitioner’s  
20 constitutional claim ‘on the merits’ for purposes of § 2254(d) when it has decided the  
21 petitioner’s right to post-conviction relief on the basis of the substance of the  
22 constitutional claim advanced, rather than denying the claim on the basis of a procedural  
23 or other rule precluding state court review of the merits.” *Lambert v. Blodgett*, 393 F.3d  
24 943, 969 (9th Cir. 2004).

25 If a habeas petition includes a claim that was properly exhausted, has not been  
26 procedurally defaulted, and was “adjudicated on the merits in State court proceedings,”  
27 federal court review is limited by § 2254(d). Under § 2254(d)(1), a federal court cannot  
28 grant habeas relief unless the petitioner shows: (1) that the state court’s decision was

1 contrary to federal law as clearly established in the holdings of the United States Supreme  
2 Court at the time of the state court decision, *Greene v. Fisher*, — U.S. —, 132 S.Ct.  
3 38, 43 (2011); (2) that it “involved an unreasonable application of” such law, §  
4 2254(d)(1); or (3) that it “was based on an unreasonable determination of the facts” in  
5 light of the record before the state court. 28 U.S.C. § 2254(d)(2); *Harrington v. Richter*,  
6 562 U.S. 86, 131 S.Ct. 770 (2011). This standard is “difficult to meet.” *Richter*, 131 S.Ct.  
7 at 786. It is also a “highly deferential standard for evaluating state court rulings . . . which  
8 demands that state court decisions be given the benefit of the doubt.” *Woodford v.*  
9 *Visciotti*, 537 U.S. 19, 24 (2002) (internal quotations and citation omitted).

10 To determine whether a state court ruling was “contrary to” or involved an  
11 “unreasonable application” of federal law, courts look exclusively to the holdings of the  
12 Supreme Court that existed at the time of the state court’s decision. *Greene*, 132 S.Ct. at  
13 44. A state court’s decision is contrary to federal law if it applies a rule of law “that  
14 contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of  
15 facts that are materially indistinguishable from a decision of [the Supreme Court] and  
16 nevertheless arrives at a result different from [Supreme Court] precedent.” *Mitchell v.*  
17 *Esparza*, 540 U.S. 12, 14 (2003).

18 A state court decision is an “unreasonable application of” federal law if the court  
19 identifies the correct legal rule, but unreasonably applies that rule to the facts of a  
20 particular case. *Brown v. Payton*, 544 U.S. 133, 141 (2005). “[E]valuating whether a rule  
21 application was unreasonable requires considering the rule’s specificity. The more  
22 general the rule, the more leeway courts have in reaching outcomes in case-by-case  
23 determinations.” *Richter*, 131 S.Ct. at 786 (*quoting Yarborough v. Alvarado*, 541 U.S.  
24 652, 664 (2004)).

#### 25 **D. Ineffective Assistance of Counsel Claims**

26 The Supreme Court established a two-part test for evaluating ineffective assistance  
27 of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that his  
28 trial counsel was ineffective under *Strickland*, Petitioner must show: (1) that his trial

1 counsel's performance was deficient; and (2) that trial counsel's deficient performance  
2 prejudiced petitioner's defense. *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998)  
3 (citing *Strickland*, 466 U.S. at 688, 694).

4 To establish deficient performance, Petitioner must show that "counsel made  
5 errors so serious . . . [that] counsel's representation fell below an objective standard of  
6 reasonableness" under prevailing professional norms." *Strickland*, 466 U.S. at 687-688.  
7 The relevant inquiry is not what defense counsel could have done, but rather whether the  
8 decisions made by defense counsel were reasonable. *Babbit v. Calderon*, 151 F.3d 1170,  
9 1173 (9th Cir. 1998). In considering this factor, counsel is strongly presumed to have  
10 rendered adequate assistance and made all significant decisions in the exercise of  
11 reasonable professional judgment. *Strickland*, 466 U.S. at 690. The Ninth Circuit "h[as]  
12 explained that '[r]eview of counsel's performance is highly deferential and there is a  
13 strong presumption that counsel's conduct fell within the wide range of reasonable  
14 representation.'" *Ortiz*, 149 F.3d at 932 (quoting *Hensley v. Crist*, 67 F.3d 181, 184 (9th  
15 Cir. 1995)). "The reasonableness of counsel's performance is to be evaluated from  
16 counsel's perspective at the time of the alleged error and in light of all the circumstances,  
17 and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365,  
18 381 (1986). Additionally, "[a] fair assessment of attorney performance requires that every  
19 effort be made to eliminate the distorting effects of hindsight, to reconstruct the  
20 circumstances of counsel's challenged conduct, and to evaluate the conduct from  
21 counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Acts or omissions that  
22 "might be considered sound trial strategy" do not constitute ineffective assistance. *Id.*

23 Even where trial counsel's performance is deficient, Petitioner must also establish  
24 prejudice in order to prevail on an ineffective assistance of counsel claim. To establish  
25 prejudice, Petitioner "must show that there is a reasonable probability that, but for  
26 counsel's unprofessional errors, the result of the proceeding would have been different. A  
27 reasonable probability is a probability sufficient to undermine confidence in the  
28 outcome." *Strickland*, 466 U.S. at 694. Under the prejudice factor, "[a]n error by counsel,

1 even if professionally unreasonable, does not warrant setting aside the judgment of a  
2 criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. “The  
3 likelihood of a different result must be substantial, not just conceivable.” *Richter*, 131  
4 S.Ct. at 792. Further, because failure to make the required showing of either deficient  
5 performance or prejudice defeats the claim, the court need not address both factors where  
6 one is lacking. *Strickland*, 466 U.S. at 697–700.

7 Additionally, under the AEDPA, the federal court’s review of the state court’s  
8 decision on an ineffective assistance of counsel claim is subject to another level of  
9 deference. *Bell v. Cone*, 535 U.S. 685, 698–699 (2002). This creates a “doubly  
10 deferential” review standard in which a habeas petitioner must show not only that there  
11 was a violation of *Strickland*, but also that the state court’s resolution of the claim was  
12 more than wrong, it was an objectively unreasonable application of *Strickland*. See  
13 *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam); *Bell*, 535 U.S. at 698-99;  
14 *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002); *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403  
15 (2011) (federal habeas court’s review of state court’s decision on ineffective assistance of  
16 counsel claim is “doubly deferential.”). The issue under section 2254(d) is not whether  
17 counsel’s actions were reasonable, but “whether there is any reasonable argument that  
18 counsel satisfied *Strickland*’s deferential standard.” *Richter*, 131 S.Ct. at 788.

### 19 **III. ANALYSIS**

#### 20 **A. Ground One: Ineffective Assistance of Counsel**

21 In Ground One, Petitioner contends that his trial counsel was ineffective based on  
22 a number of alleged errors. The Court will consider each of these sub claims in turn.

##### 23 a. Duplicitous Indictment

24 Petitioner first argues that trial counsel was ineffective for failing to object to the  
25 sufficiency of the indictment. Petitioner contends that the indictment is duplicitous  
26 because the same conduct is charged twice in a single count. Specifically, Petitioner  
27 objects to the language in counts one through three wherein the indictment states: “On or  
28 about the 26th day of January, 2008 through the 27th day of January, 2008 . . .” (Doc. 15

1 Ex. A). Petitioner interprets the word “through” to mean that counts one through three  
2 charged him with offenses on both January 26 and January 27—in other words, that  
3 Petitioner was charged with two separate offenses on two separate dates in a single count.  
4 Respondents concede that this claim was properly presented to the Arizona COA and is  
5 properly before this Court for review.

6 In denying Petitioner’s Rule 32 petition on sub claim (a), the Arizona Superior  
7 Court inferred that Petitioner was objecting to the use of the phrase “on or about” in  
8 counts one through three of the indictment. (Doc. 15 Ex. X). The court found that “[e]ach  
9 of the counts does not allege more than a single offense,” and noted that the accepted  
10 understanding of the phrase “on or about” did not mean that two separate offenses  
11 occurred for each count; rather, the court cited Black’s Law Dictionary and noted “on or  
12 about” is defined as “Approximately; at or around the time specified.” *Id.* The court  
13 concluded that the indictment was neither duplicitous nor insufficient, and that trial  
14 counsel’s representation was not deficient for failing to object to the sufficiency of the  
15 indictment.

16 In denying relief on Petitioner’s petition for review, the Arizona COA noted that  
17 Petitioner objected to the use of the word “through” in the indictment, not the phrase “on  
18 or about,” as alleging that Petitioner’s “offenses were committed ‘through’ one day and  
19 into the next.” (Doc. 15 Ex. EE). The COA found this complaint was “of no moment”  
20 because, as the trial “court stated in its ruling, ‘Each of the counts [of the indictment]  
21 does not allege more than a single offense.’” *Id.*

22 For purposes of federal habeas review, Petitioner bears the burden of showing that  
23 the post-conviction relief court, in ruling that trial counsel was not ineffective, applied  
24 *Strickland* in an objectively unreasonable manner. In making this determination, “the  
25 question is not whether counsel’s actions were reasonable,” but “whether there is any  
26 reasonable argument that counsel satisfied *Strickland’s* deferential standard.” *Richter*,  
27 131 S.Ct. at 788. Here, the trial court’s finding that Petitioner’s claim that his trial  
28 counsel was ineffective for failing to challenge the indictment as duplicitous and

1 insufficient was without merit is supported by the record before this Court, and was not  
2 an unreasonable application of *Strickland*. While counts one through three of the  
3 indictment refer to offenses occurring “[o]n or about the 26th day of January, 2008  
4 through the 27th day of January, 2008,” these counts do not charge two distinct or  
5 separate offenses in a single count. As reflected in the COA’s summary of the underlying  
6 facts in this case, the charges in counts one through three of the indictment relate to the  
7 theft of Shawna Cadenhead’s vehicle, which was taken on the evening of January 26 and  
8 then recovered the following day. Thus, “a series of acts form[ed] part of one and the  
9 same transaction, and as a whole constitute[d] but one and the same offense.” *State v.*  
10 *Klokic*, 219 Ariz. 241, 245 (Ct. App. 2008) (internal quotations and citations omitted). In  
11 such a situation, “[a] continuing scheme or course of conduct may properly be alleged in  
12 a single count,” *State v. Ramsey*, 211 Ariz. 529, 534 (Ct. App. 2005), and “where  
13 numerous transactions are merely parts of a larger scheme, a single count encompassing  
14 the entire scheme is proper.” *State v. Via*, 146 Ariz. 108, 116 (Ct. App. 1985).

15 Accordingly, Petitioner has not shown that the state court’s determination on this  
16 claim was based on an unreasonable determination of the facts, or that it was contrary to  
17 or an unreasonable application of *Strickland*, and the Court will deny relief on sub claim  
18 (a).

19 b. Unlawfully Imposed Sentence

20 In sub claim (b), Petitioner contends that his trial counsel failed to object to the  
21 trial court’s abuse of discretion in imposing an unlawful sentence. Petitioner specifically  
22 contends that his sentence was unlawfully imposed because the court failed to orally  
23 pronounce the word “imprisonment” when sentencing Petitioner. Respondents concede  
24 that this claim was properly presented to the Arizona COA and is properly before this  
25 Court for review.

26 In his Rule 32 petition, Petitioner noted that at his sentencing hearing, the judge  
27 only pronounced his sentence in terms of number of years, but did not use the word  
28 “imprisonment.” Petitioner argued that A.R.S. § 13–701 and Ariz.R.Crim.P. 26.10(b)(3)

1 require a court to orally pronounce a sentence to imprisonment, and that absent such a  
2 pronouncement, the sentence is illegal. Petitioner further argued that while the minute  
3 entry stated Petitioner was sentenced to a term of imprisonment, when there is a conflict  
4 between an oral pronouncement and a written judgment, the oral pronouncement  
5 controls.

6 In denying Petitioner’s Rule 32 petition on this claim, the Arizona Superior Court  
7 found “no support for the assertion that an oral pronouncement of ‘imprisonment’ be  
8 made.” (Doc. 15 Ex. X). The court further noted that pursuant to *State v. Gannon*, 130  
9 Ariz. 592 (1981), “a Defendant must be sentenced to ‘imprisonment’ as opposed to “the  
10 Department of Corrections,”” and that the sentencing minute entry made clear that  
11 Petitioner was sentenced to a term of imprisonment and committed to the custody of the  
12 DOC. *Id.* The court also noted that while the oral pronouncement of a sentence controls  
13 when there is a discrepancy between the oral sentence and the written judgment, “in this  
14 case there is no conflict . . . The written sentence contains more information but in no  
15 way does it conflict with the oral pronouncement.” *Id.* The court thus concluded that  
16 Petitioner had failed to show that his trial counsel’s representation fell below the  
17 prevailing objective standards in failing to challenge Petitioner’s sentence as unlawful.  
18 The Arizona COA agreed, and adopted the trial court’s analysis. (Doc. 15 Ex. EE).

19 For purposes of federal habeas review, Petitioner bears the burden of showing that  
20 the trial court applied *Strickland* in an objectively unreasonable manner. Petitioner has  
21 not met that burden here. The statutes and cases that Petitioner cited in his Rule 32  
22 petition do not require the trial court to orally pronounce the word “imprisonment” at  
23 sentencing. First, Ariz.R.Crim.P. 26.10(b), “Pronouncement of Sentence,” states that,  
24 among other items, the court must explain to the defendant the terms of the sentence and  
25 specify the commencement date for the term of imprisonment. Nowhere does Rule 26.10  
26 state that the court must orally pronounce the word “imprisonment.” Second, A.R.S. §  
27 13–701 requires that a sentence of imprisonment for a felony shall be a definite term of  
28 years, a requirement that was clearly met when the trial judge specified the number of

1 years that Petitioner was sentenced to on each count of the indictment. *See* Ex. II at 32–  
2 36. In addition, the relevant case law holds that a defendant must be sentenced to a term  
3 of imprisonment, and not to the DOC, a requirement that was also met in this case. *See*  
4 *Gannon*, 130 Ariz. 592; *State v. Gutierrez*, 130 Ariz. 148 (1981). Finally, while Petitioner  
5 contends that oral pronouncement controls when there is a conflict between the oral  
6 pronouncement and the written judgment, as the trial court noted, in this case there was  
7 no conflict. Rather, at sentencing the judge stated the number of years that Petitioner  
8 received for each count of the indictment and specified whether each term was  
9 consecutive or concurrent. *See* Ex. II at 32–36. The sentencing order stated that Petitioner  
10 was “sentenced to a term of imprisonment and is committed to the Arizona [DOC],” and  
11 then listed the number of years Petitioner received for each count. *See* Ex. C. Thus, the  
12 trial court’s finding that Petitioner’s claim that his trial counsel was ineffective for failing  
13 to challenge his sentence as unlawful where the court did not orally pronounce the word  
14 “imprisonment” was without merit is supported by the record before this Court, and was  
15 not an unreasonable application of *Strickland*.

16 In sum, because Petitioner has not shown that the state court’s determination on  
17 this claim was based on an unreasonable determination of the facts, or that it was contrary  
18 to or an unreasonable application of *Strickland*, the Court will deny relief on sub claim  
19 (b).

20 c. Stale Priors

21 In sub claim (c), Petitioner argues that his trial counsel was ineffective for failing  
22 to object to the use of stale priors to enhance Petitioner’s sentence. Petitioner specifically  
23 alleges that the language in former A.R.S. § 13–604(W)(2)(d) is “incredibly vague” and  
24 that subsection (d) is subject to the time limitations of subsections (b) and (c), which  
25 forbid the use of felony convictions older than 10 and 5 years, respectively. Respondents  
26 concede that this claim was properly presented to the Arizona COA and is properly  
27 before this Court for review.

28 In his Rule 32 petition, Petitioner argued that he had only one prior felony that was

1 properly allegeable because his other priors were older than 10 years and thus prohibited  
2 by A.R.S. § 13–604(W)(2)(b). While the trial court allowed the other priors to come in  
3 under A.R.S. § 13–604(W)(2)(d), which defines “[h]istorical prior felony conviction” as  
4 “[a]ny felony conviction that is a third of more prior felony conviction,” Petitioner argued  
5 that subsection (d) is not exempt from the time limits in subsections (b) and (c). Petitioner  
6 thus concluded that his sentences were unlawfully enhanced with 3 or more prior felony  
7 convictions that were too remote for use.

8 In denying Petitioner’s Rule 32 petition on this claim, the Arizona Superior Court  
9 found:

10 There are four statutory ways to address a historical prior  
11 conviction. Each section is a separate means by which a  
12 felony conviction can be recognized as a historical prior  
13 felony conviction. Section d, the section used by the Court to  
enhance Petitioner’s prior felony convictions is not dependent  
on any other section.

14 (Doc. 15 Ex. X) (internal citation omitted). The court therefore concluded that, where  
15 Petitioner had four prior felonies, Petitioner’s third and fourth felony convictions were  
16 properly found to be historical prior felony convictions pursuant to subsection (d) of the  
17 statute. The court thus concluded that Petitioner had failed to show that his trial counsel’s  
18 representation fell below the prevailing objective standards in failing to challenge the trial  
19 court’s finding that Petitioner’s third and fourth prior felonies were historical priors for  
20 sentencing purposes. The Arizona COA agreed, and adopted the trial court’s analysis.  
21 (Doc. 15 Ex. EE).

22 For purposes of federal habeas review, Petitioner bears the burden of showing that  
23 the trial court applied *Strickland* in an objectively unreasonable manner. Petitioner has  
24 not met that burden here. The statute in question, A.R.S. § 13–604(W)(2), defines  
25 “historical prior felony conviction” in four different ways for purposes of sentencing  
26 enhancement. Subsection (a) lists a number of specific felony offenses. Subsection (b)  
27 refers to “[a]ny class 2 or 3 felony, except the offenses listed in subdivision (a) . . . that  
28 was committed within the ten years immediately preceding the date of the present

1 offense.” Subsection (c) refers to “[a]ny class 4, 5, or 6 felony, except the offenses listed  
2 in subdivision (a) . . . that was committed within the five years immediately preceding the  
3 date of the present offense.” Finally, subsection (d) includes “[a]ny felony conviction that  
4 is a third or more prior felony conviction.” Nothing in the statute makes subsection (d)  
5 dependent on or subject to the provisions of any of the other subsections. Indeed, the  
6 plain reading of A.R.S. § 13–604(W)(2) is that there are four different, independent  
7 definitions of “historical prior felony conviction.” *See State v. Garcia*, 189 Ariz. 510, 514  
8 (1997) (“Because subsection (a) already permits use of defined offenses without regard to  
9 passage of time, subsection (d) must refer to those convictions for ‘non-subsection (a)’  
10 offenses that are more than five or ten years old, and thereby too remote in time to fall  
11 within subsection (b) or (c).”). Thus, “once a person has been convicted of three felony  
12 offenses, the third in time can be used to enhance a later sentence, regardless of passage  
13 of time.” *Id.* Accordingly, the trial court’s finding that Petitioner’s claim that his trial  
14 counsel was ineffective for failing to object to the use of stale priors was without merit is  
15 supported by the record before this Court, and was not an unreasonable application of  
16 *Strickland*.

17 In sum, because Petitioner has not shown that the state court’s determination on  
18 this claim was based on an unreasonable determination of the facts, or that it was contrary  
19 to or an unreasonable application of *Strickland*, the Court will deny relief on sub claim  
20 (c).

21 d. Misdemeanor Prior and g. Witness Interviews

22 In sub claim (d), Petitioner argues that his trial counsel failed to discover that one  
23 of the prior felonies the state planned to use at sentencing was actually a misdemeanor.  
24 (Doc. 1 at 6). In sub claim (g), Petitioner alleges that trial counsel did not interview any  
25 witnesses and made no attempts at fact finding. *Id.* Respondents contend that that these  
26 claims are unexhausted and procedurally defaulted because Petitioner failed to present  
27 them in his Rule 32 petition.

28 When a petitioner fails to fairly present his claims to the state’s highest court, but

1 would now be barred by state procedure from returning to state court, an implied  
2 procedural bar may arise. *See O’Sullivan* 526 U.S. at 848–49. If a mandatory rule of state  
3 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
4 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom.*, *Smith v.*  
5 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
6 state court would now find the exhaustion petition barred, the claim is procedurally  
7 defaulted); *O’Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
8 expired, petitioner’s failure to timely present claims to state court results in a procedural  
9 default of those claims).

10 Here, while Petitioner raised a number of IAC claims in his Rule 32 petition and  
11 his petition for review by the Arizona COA, he did not raise the specific claims that he  
12 now alleges in sub claims (d) and (g). *See Date v. Schriro*, 619 F.Supp.2d 736, 788 (D.  
13 Ariz. 2008) (“Ineffective assistance claims different from those presented to the state  
14 courts are precluded from consideration on habeas corpus review. . . Petitioner’s assertion  
15 of a claim of ineffective assistance of counsel based on one set of facts, does not exhaust  
16 other claims of ineffective assistance based on different facts.”); *see also Moormann v.*  
17 *Schriro*, 426 F.3d 1044, 1056–57 (9th Cir. 2005), *cert. denied*, 548 U.S. 927 (2006) (new  
18 allegations of ineffective assistance of counsel not previously raised before the state court  
19 cannot be addressed on habeas review). Arizona Rules of Criminal Procedure regarding  
20 timeliness<sup>1</sup> and preclusion<sup>2</sup> prevent Petitioner from now exhausting sub claims (d) and (g)  
21 in state court. Accordingly, these claims are both technically exhausted and procedurally  
22 defaulted and thus not properly before this Court for review. *See Crowell*, 483 F.Supp.2d  
23 at 931–33; *Coleman*, 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8.  
24 Petitioner has failed to show cause for, or prejudice arising from, his procedural default

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25  
26 <sup>1</sup> Ariz. R. Crim. P. 32.4(a) states that post-conviction proceedings must begin  
27 within 90 days of either the day of judgment and sentence or the date the mandate issues  
on direct appeal, whichever is later. These deadlines have long since passed in this  
matter.

28 <sup>2</sup> Ariz. R. Crim. P. 32.2(a) states that, absent narrowly tailored exceptions not  
applicable here, successive post-conviction petitions are precluded.

1 of the claims, and the Court can glean none from the record before it. *See Martinez*, 132  
2 S.Ct. at 1316; *Murray*, 477 U.S. at 488. There was no objective factor external to the  
3 defense which impeded Petitioner's efforts to comply with the State's procedural rule;  
4 Petitioner simply failed to raise the claims in his state court proceedings. *See Murray*, 477  
5 U.S. at 488; *see also Engle*, 456 U.S. at 134 n. 43 (the court need not examine the  
6 existence of prejudice if the petitioner fails to establish cause).

7 Accordingly, the Court finds that sub claims raised in (d) and (g) are technically  
8 exhausted and procedurally defaulted, and Petitioner has failed to show cause and  
9 prejudice for the default. Habeas relief on the merits of these claims is therefore  
10 precluded.

11 e. Improper Sentencing on Count Five

12 In sub claim (e), Petitioner contends that he was improperly sentenced for a  
13 dangerous felony on count five of the indictment because trial counsel failed to notice  
14 that the jury found no dangerous nature on count five. (Doc. 1 at 6). Respondents contend  
15 that this claim is moot, as Petitioner raised this issue in his Rule 32 petition and was  
16 subsequently resentenced by the trial court on count five as a non-dangerous offense. *See*  
17 Doc. 15 Ex. CC. The Court agrees. Even if trial counsel was ineffective for failing to note  
18 the non-dangerousness finding at sentencing, any argument in sub claim (e) is now  
19 mooted by Petitioner's later resentencing on count five because there is no relief that the  
20 Court can provide. *See Munoz v. Rowland*, 104 F.3d 1096, 1097-98 (9th Cir. 1997)  
21 (petition for habeas deemed moot when it no longer involves a live case or controversy  
22 and the court cannot provide the primary relief sought in the petition).

23 f. Weapon Finding

24 In sub claim (f), Petitioner argues that trial counsel failed to inquire how the jury  
25 could find Petitioner not guilty of having a weapon but guilty of attempted armed robbery  
26 and aggravated robbery. (Doc. 1 at 6). Respondents contend that this claim is  
27 unexhausted and procedurally defaulted because Petitioner only presented this claim in  
28 his petition for review to the Arizona Supreme Court, which does not meet the

1 requirement of fairly presenting the claim to the state courts.

2 When a petitioner fails to fairly present his claims to the state’s highest court, but  
3 would now be barred by state procedure from returning to state court, an implied  
4 procedural bar may arise. *See O’Sullivan* 526 U.S. at 848–49. If a mandatory rule of state  
5 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
6 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom., Smith v.*  
7 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
8 state court would now find the exhaustion petition barred, the claim is procedurally  
9 defaulted); *O’Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
10 expired, petitioner’s failure to timely present claims to state court results in a procedural  
11 default of those claims).

12 Here, Petitioner raised a number of IAC claims in his Rule 32 petition and his  
13 petition for review to the Arizona COA, but he did not raise the specific claim that he  
14 now alleges in sub claim (f). *See Date*, 619 F.Supp.2d at 788; *Moormann*, 426 F.3d at  
15 1056–57. In his petition for review by the Arizona Supreme Court, Petitioner stated that  
16 he was seeking review of the trial court’s and COA’s denial of his IAC claims. Petitioner  
17 twice listed the specific IAC claims that he was seeking review of, *see* Ex. FF at 2, 4, but  
18 did not present the specific claim that trial counsel was ineffective for failing to inquire  
19 how the jury could find Petitioner not guilty of having a weapon but guilty of attempted  
20 armed robbery and aggravated robbery. However, Petitioner did state that, had trial  
21 counsel looked at the correct jury verdict forms,

22 Counsel could of then properly questioned the fact that  
23 because the jury found count 5 not dangerous by not finding  
24 proof the petitioner had a weapon. And having a weapon is a  
25 required element of the offense of armed robbery charged in  
count 5. So this also proves the jury was confused as to the  
requirements needed to convict someone of armed robbery.

26 (Ex. FF at 5). Thus, construing Petitioner’s statements liberally, Petitioner arguably  
27 presented the claim he now alleges in sub claim (f) of the habeas petition to the Arizona  
28 Supreme Court. However, “initially raising a claim before a court of discretionary review

1 does not constitute fair presentation” for purposes of habeas review, *James v. Mauldin*,  
2 2010 WL 366722, \*16 (D. Ariz. Jan. 27, 2010) (citing *Castille v. Peoples*, 489 U.S. 346,  
3 351 (1989) (a claim is unexhausted when it is raised for the first time on discretionary  
4 review and denied without comment)), and “[p]resentation to the Arizona Supreme Court  
5 for the first time is not sufficient to exhaust an Arizona state prisoner’s remedies”  
6 *Hernandez v. Ryan*, 2012 WL 2017776, \*12 (D. Ariz. May 1, 2012); see also *Roettgen v.*  
7 *Copeland*, 33 F.3d 36, 37 (9th Cir. 1994) (“Submitting a new claim to the state’s highest  
8 court in a procedural context in which its merits will not be considered absent special  
9 circumstances does not constitute fair presentation.”); *Casey v. Moore*, 386 F.3d 896 (9th  
10 Cir. 2004) (federal constitutional claim raised for first time to state’s highest court on  
11 discretionary review is not fairly presented).

12 Arizona Rules of Criminal Procedure regarding timeliness<sup>3</sup> and preclusion<sup>4</sup>  
13 prevent Petitioner from now exhausting sub claim (f) in state court. Accordingly, this  
14 claim is both technically exhausted and procedurally defaulted and thus not properly  
15 before this Court for review. See *Crowell*, 483 F.Supp.2d at 931–33; *Coleman*, 501 U.S.  
16 at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8. Petitioner has failed to show cause  
17 for, or prejudice arising from, his procedural default of the claim, and the Court can glean  
18 none from the record before it. See *Martinez*, 132 S.Ct. at 1316; *Murray*, 477 U.S. at 488.  
19 There was no objective factor external to the defense which impeded Petitioner’s efforts  
20 to comply with the State’s procedural rule; Petitioner simply failed to raise sub claim (f)  
21 in his appellate brief to the COA. See *Murray*, 477 U.S. at 488; see also *Engle*, 456 U.S.  
22 at 134 n. 43 (the court need not examine the existence of prejudice if the petitioner fails  
23 to establish cause).

24 Accordingly, the Court finds that sub claim (f) is technically exhausted and

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25  
26 <sup>3</sup> Ariz. R. Crim. P. 32.4(a) states that post-conviction proceedings must begin  
27 within 90 days of either the day of judgment and sentence or the date the mandate issues  
on direct appeal, whichever is later. These deadlines have long since passed in this  
matter.

28 <sup>4</sup> Ariz. R. Crim. P. 32.2(a) states that, absent narrowly tailored exceptions not  
applicable here, successive post-conviction petitions are precluded.

1 procedurally defaulted, and Petitioner has failed to show cause and prejudice for the  
2 default. Habeas relief on the merits of this claim is therefore precluded.

3 **B. Ground Two: Insufficient Indictment; Ground Three: Unlawfully Imposed**  
4 **Sentence/Double Jeopardy; and Ground Four: Unlawful Use of Stale Priors**

5 In Ground Two of his PWHC, Petitioner argues that his criminal indictment was  
6 insufficient and duplicitous because the same conduct was charged twice in a single  
7 count. In Ground Three, Petitioner claims that his sentence was unlawfully imposed  
8 because the trial court did not orally pronounce his sentence of imprisonment, because his  
9 original sentence on count five of the indictment was not vacated when he was  
10 resentenced, and because the jury was released before Petitioner could poll the jury on  
11 their dangerousness findings. In Ground Four, Petitioner argues that stale priors were  
12 unlawfully used to enhance his conviction. Respondents argue that Grounds Two, Three,  
13 and Four are unexhausted and procedurally defaulted because, at the state level,  
14 Petitioner did not describe the federal constitutional nature of these claims, and did not  
15 allege any basis for these claims separate from his IAC claims. Respondents also note  
16 that the state court only addressed these claims as IAC claims.

17 To properly exhaust a claim, a petitioner must “give the Arizona courts a ‘fair  
18 opportunity’ to act on his federal [] claim before presenting it to the federal courts.”  
19 *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2004). As this Court has explained:

20 Fair presentation requires a petitioner to describe both the  
21 operative facts and the federal legal theory to the state courts.  
22 *Reese*, 541 U.S. at 28, 124 S.Ct. 1347. It is not enough that all  
23 of the facts necessary to support the federal claim were before  
24 the state court or that a “somewhat similar” state law claim  
25 was raised. *Reese*, 541 U.S. at 28, 124 S.Ct. 1347 (stating that  
26 a reference to ineffective assistance of counsel does not alert  
27 the court to federal nature of the claim). Rather, the habeas  
28 petitioner must cite in state court to the specific constitutional  
guarantee upon which he bases his claim in federal court.  
*Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001).  
Similarly, general appeals to broad constitutional principles,  
such as due process, equal protection, and the right to a fair  
trial, are insufficient to establish fair presentation of a federal  
constitutional claim. *Lyons v. Crawford*, 232 F.3d 666, 669  
(9th Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th  
Cir. 2001); *Shumway v. Payne*, 223 F.3d 982, 987 (9th  
Cir.2000) (insufficient for prisoner to have made “a general

1 appeal to a constitutional guarantee,” such as a naked  
2 reference to “due process,” or to a “constitutional error” or a  
3 “fair trial”). Likewise, a mere reference to the “Constitution  
4 of the United States” does not preserve a federal claim. *Gray*  
5 *v. Netherland*, 518 U.S. 152, 162–63, 116 S.Ct. 2074, 135  
6 L.Ed.2d 457 (1996). Even if the basis of a federal claim is  
7 “self-evident” or if the claim would be decided “on the same  
8 considerations” under state or federal law, the petitioner must  
9 make the federal nature of the claim “explicit either by citing  
10 federal law or the decision of the federal courts....” *Lyons*,  
11 232 F.3d at 668. A state prisoner does not fairly present a  
12 claim to the state court if the court must read beyond the  
13 pleadings filed in that court to discover the federal claim.  
14 *Baldwin*, 541 U.S. at 27, 124 S.Ct. 1347.

15 *Date v. Schriro*, 619 F.Supp.2d 736, 764–65 (D. Ariz. 2008). The Ninth Circuit has  
16 specifically held that a petitioner’s “conclusory, scattershot citation of federal  
17 constitutional provisions, divorced from any articulated federal legal theory . . .” failed to  
18 satisfy the fair presentment requirement. *Castillo*, 399 F.3d at 1002–03 (“Exhaustion  
19 demands more than drive-by citation, detached from any articulation of an underlying  
20 federal legal theory.”).

21 Here, Petitioner raised the following claims in his Rule 32 petition: 1) IAC; 2)  
22 insufficient indictment based on duplicitousness; 3) unlawful conviction on counts five  
23 and six of the indictment because there was no finding of dangerousness on these counts  
24 before the jury was dismissed; 4) unlawfully imposed sentence based on the court failing  
25 to orally pronounce how the sentences were to be served; and 5) unlawful use of stale  
26 priors. In his petition for review by the Arizona COA, Petitioner presented substantially  
27 the same arguments, except that he abandoned two of the sub claims in his IAC claim.  
28 While Petitioner thus presented the claims that he now alleges in Grounds Two, Three,  
and Four of his PWHC in his state court proceedings, he failed to present the claims as  
specifically federal claims: First, in Ground Two of the PWHC, Petitioner argues that the  
indictment was insufficient based on duplicitousness. In his Rule 32 petition and petition  
for review to the Arizona COA, Petitioner alleged that the duplicitous indictment was “a  
direct violation of federally established law” and “violative of the 5th, 6th, 8th and 14th  
amendments,” but these general appeals to broad constitutional principles are insufficient

1 to establish fair presentation of a federal constitutional claim. (Exs. U at 11–12; CC at 7);  
2 *see Lyons*, 232 F.3d at 66. In Ground Three of his PWHC, Petitioner challenges his  
3 conviction based on the trial court’s alleged failure to orally pronounce his sentence and  
4 because the jury was released before being polled on the dangerous nature findings.  
5 While Petitioner presented both of these issues in his Rule 32 petition and petition for  
6 review to the COA, his arguments focused primarily on state statutory and case law  
7 issues, with only a passing reference to cruel and unusual punishment and the 5th, 6th,  
8 8th and 14th amendments of the US Constitution.<sup>5</sup> Finally, in Ground Four of his PWHC,  
9 Petitioner alleges his sentences were illegally enhanced with stale priors, an issue he also  
10 argued to the state courts. However, Petitioner’s arguments on this point focused on the  
11 statutory interpretation of A.R.S. § 13–604(W)(2)(c)&(d) and various state law cases, not  
12 a federal constitutional guarantee. Thus, Petitioner has failed to properly exhaust the  
13 claims in Grounds Two, Three, and Four of his PWHC because he failed to fairly present  
14 a federal legal theory for these claims to the state courts. Further, as Respondents aptly  
15 note, the state courts did not address Petitioner’s claims for insufficient indictment,  
16 unlawfully imposed conviction, and unlawful use of stale priors as standalone state or  
17 federal law claims; rather, the lower courts only addressed these claims in relation to  
18 Petitioner’s IAC claim. *See Ex. X* at 1 (“All claims submitted for consideration relate to  
19 ineffective assistance of counsel.”); *Ex. EE* (Arizona COA adopted the trial court’s  
20 analysis).

21 When a petitioner fails to fairly present his claims to the state’s highest court, but  
22 would now be barred by state procedure from returning to state court, an implied  
23 procedural bar may arise. *See O’Sullivan* 526 U.S. at 848–49. If a mandatory rule of state

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24  
25 <sup>5</sup> Petitioner also alleges an additional claim in Ground Three, that his original  
26 sentence on count five of the indictment was not vacated when he was resentenced, but  
27 this claim is also unexhausted and procedurally defaulted because Petitioner only raised  
28 this claim for the first time in his petition for review to the Arizona Supreme Court, (*Ex.*  
*FF* at 13), which does not meet the requirements for fair presentation. *See James*, 2010  
WL 366722 at \*16 (“[p]resentation to the Arizona Supreme Court for the first time is not  
sufficient to exhaust an Arizona state prisoner’s remedies”); *Casey*, 386 F.3d 896 (federal  
constitutional claim raised for first time to state’s highest court on discretionary review is  
not fairly presented).

1 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
2 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom.*, *Smith v.*  
3 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
4 state court would now find the exhaustion petition barred, the claim is procedurally  
5 defaulted); *O’Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
6 expired, petitioner’s failure to timely present claims to state court results in a procedural  
7 default of those claims).

8 Arizona Rules of Criminal Procedure regarding timeliness<sup>6</sup> and preclusion<sup>7</sup>  
9 prevent Petitioner from now exhausting Grounds Two, Three, and Four in state court.  
10 Accordingly, these claims are both technically exhausted and procedurally defaulted and  
11 thus not properly before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–33;  
12 *Coleman*, 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8. Petitioner has  
13 failed to show cause for, or prejudice arising from, his procedural default of these claims,  
14 and the Court can glean none from the record before it. *See Martinez*, 132 S.Ct. at 1316;  
15 *Murray*, 477 U.S. at 488. There was no objective factor external to the defense which  
16 impeded Petitioner’s efforts to comply with the State’s procedural rule; Petitioner simply  
17 failed to allege the specific federal constitutional nature of the claims in state court. *See*  
18 *Murray*, 477 U.S. at 488; *see also Engle*, 456 U.S. at 134 n. 43 (the court need not  
19 examine the existence of prejudice if the petitioner fails to establish cause).

20 Accordingly, the Court finds that Grounds Two, Three, and Four are technically  
21 exhausted and procedurally defaulted, and that Petitioner has failed to show cause and  
22 prejudice for the default. Habeas relief on the merits of these claims is therefore  
23 precluded.

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26 <sup>6</sup> Ariz. R. Crim. P. 32.4(a) states that post-conviction proceedings must begin  
27 within 90 days of either the day of judgment and sentence or the date the mandate issues  
on direct appeal, whichever is later. These deadlines have long since passed in this  
matter.

28 <sup>7</sup> Ariz. R. Crim. P. 32.2(a) states that, absent narrowly tailored exceptions not  
applicable here, successive post-conviction petitions are precluded.

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**IV. CONCLUSION**

For the foregoing reasons,

**IT IS HEREBY ORDERED** that Petitioner’s Petition under 28 U.S.C. § 2254 is denied and that this action is dismissed with prejudice. The Clerk shall enter judgment accordingly.

**IT IS FURTHER ORDERED** that no certificate of appealability shall be issued and that Petitioner is not entitled to appeal in forma pauperis because dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable. Further, to the extent Petitioner’s claims are rejected on the merits, reasonable jurists would not find the Court’s assessment of the constitutional claims to be debatable or wrong.

Dated this 3rd day of May, 2016.

  
Eric J. Markovich  
United States Magistrate Judge