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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Martinez Gonzalez,
 Petitioner,
vs.
Martin McDaniel, et al.,
 Respondents.

CV-06-2655-PHX-GMS (JCG)
REPORT & RECOMMENDATION

 Petitioner, Jose Martinez Gonzalez, who is presently confined at the Diamondback Correctional Facility in Watonga, Oklahoma, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Before the Court are the Amended Petition for Writ of Habeas Corpus (“Petition”) (Doc. No. 9), Respondents’ Answer to Petition for Writ of Habeas Corpus (“Answer”) (Doc. No. 23) and Petitioner’s Reply.¹ (Doc. No. 26.) Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Guerin for

¹ To the extent Petitioner’s Reply moves for default judgment against Respondents for failure to timely file their Answer, the motion is without merit. Respondents’ Motion for Extension of Time was granted by the Court and the Answer was accepted by the Court as timely filed. (Doc. No. 22.) In addition, the Court denied Petitioner’s Motion for Default Judgment (Doc. No. 27) by Order dated April 15, 2008. (Doc. No. 29.)

1 Report and Recommendation. The Magistrate Judge recommends that the District Court
2 deny the Petition.

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 On March 28, 2003, the State filed an indictment in Maricopa County Superior Court
5 charging Petitioner and four co-defendants with five counts each of kidnaping, class 5
6 dangerous felonies (Counts 1-5), and one count each of conspiracy to commit kidnaping, a
7 class 2 dangerous felony (Count 6.) (Answer, Ex. M.) The charges arose from an incident
8 in which Petitioner and his co-defendants assisted “coyotes” (alien smugglers) who held
9 illegal aliens captive at gunpoint in a house in Phoenix and refused to release them to family
10 members unless the family members paid \$1500 for each of the aliens’ release. (Answer, Ex.
11 N.)

12 Petitioner was tried jointly with two co-defendants. (*Id.*) On September 15, 2003, a
13 jury convicted Petitioner on the conspiracy to commit kidnaping charge but found Petitioner
14 not guilty as to the kidnaping charges. (Answer, Ex. J.) On November 26, 2003, Petitioner
15 was sentenced to the minimum term of 7 years’ imprisonment. (Answer, Ex. K.)

16 On August 16, 2004, Petitioner filed an appeal in which he raised the following
17 claims: (1) the trial court abused its discretion by refusing to sever the trials of Petitioner and
18 his co-defendants; Petitioner did not receive a fair trial and a new trial is required; (2) the
19 trial court erred by giving a confusing and contradictory instruction regarding the duty of the
20 jury to apply the facts to each co-defendant, resulting in fundamental error; and (3) the trial
21 court erred when it denied defense counsel’s motion for judgment of acquittal because the
22 state did not produce substantial evidence to support its conspiracy charge against Petitioner.
23 (Answer, Ex. L.) On March 8, 2005, the Court of Appeals issued a memorandum decision
24 affirming Petitioner’s conviction and sentence. (Answer, Ex. N.)

25 On April 19, 2005, Petitioner filed a petition for review to the Arizona Supreme Court.
26 (Answer, Ex. O.) On July 19, 2005, the Arizona Supreme Court denied review. (Answer,
27 Ex. P.)
28

1 On August 29, 2005, Petitioner filed a notice of post-conviction relief in Maricopa
2 County Superior Court. (Answer, Ex. Q.) After Petitioner's appointed counsel filed a Notice
3 of Completion of Post-Conviction Review, the trial court afforded Petitioner the opportunity
4 to file a pro se petition. (Answer, Ex. R.) On April 5, 2006, Petitioner filed a "Petition for
5 Post-Conviction Relief" consisting of a pre-printed form on which Petitioner checked four
6 boxes. (Answer, Ex. S.) The trial court struck the pro se petition, ordering Petitioner to file
7 a petition in conformance with Rule 32.5, Ariz. R. Crim. P., no later than June 30, 2006.
8 (Answer, Ex. T.) Petitioner failed to file the petition and the trial court dismissed Petitioner's
9 post-conviction relief proceedings on August 16, 2006.

10 On June 11, 2007, Petitioner filed the pending federal Petition for Writ of Habeas
11 Corpus, arguing three grounds for relief:

12 **Ground 1:** The trial court abused its discretion and violated Petitioner's 6th
13 Amendment and due process rights when it refused to grant Petitioner's motion to sever;

14 **Ground 2:** Petitioner's 14th Amendment and due process rights were violated when
15 the trial court gave confusing and contradictory jury instructions; and

16 **Ground 3:** Petitioner's due process rights were violated when the trial court denied
17 Petitioner's motion for judgment of acquittal based on a lack of substantial evidence to
18 support the conspiracy charge. (Petition, pgs. 6-16.)

19 DISCUSSION

20 The Magistrate Judge recommends that the Petition be denied. Petitioner failed to
21 fairly present his claims as federal claims in state court.²

22
23 ² Respondents briefed Ground 3 on the merits, construing Petitioner's appeal as "arguably
24 fairly presenting this claim to the Arizona Court of Appeals," but at the same time noting that it was
25 "doubtful" that a federal due process claim was, in fact, fairly presented. (Answer, p. 21, nt. 3.) For
26 the reasons stated herein, the Court concludes that Ground 3 was presented only as a state law claim
27 on appeal. However, even if Ground 3 were to be so liberally construed as to be fairly presented,
28 the Court agrees with Respondents' assessment that Ground 3 lacks merit. In considering Ground
3, the Court of Appeals reasonably applied the appropriate federal law. The Court held that
Petitioner's conviction could not be reversed based upon insufficiency of the evidence unless,
resolving all conflicts in the evidence against the defendant, there was a complete absence of

1 **A. Exhaustion**

2 **i. Legal Standard**

3 Ordinarily, before a federal court will consider the merits of a habeas petition, the
4 petitioner must exhaust the remedies available to him in state court. 28 U.S.C.
5 §2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270, 275 (1971). First enunciated in *Ex parte*
6 *Royall*, 117 U.S. 241 (1886), the exhaustion requirement is designed "not to create a
7 procedural hurdle on the path to federal habeas court, but to channel claims into an
8 appropriate forum, where meritorious claims may be vindicated and unfounded litigation
9 obviated before resort to federal court." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).
10 The requirement is grounded in principles of comity, and reflects a desire to protect state
11 courts' role in the enforcement of federal law. *Castille v. Peoples*, 489 U.S. 346, 349 (1989)
12 (citation omitted). The requirement is also based on a pragmatic consideration that fully
13 exhausted claims will usually be accompanied by a complete factual record once they reach
14 federal court. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

15 A petitioner must exhaust his claims by fairly presenting them to the state's highest
16 court, either through a direct appeal or collateral proceedings, before a federal court will
17 consider the merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *See Rose*, 455
18 U.S. at 519. A petitioner must have also presented his claim in a procedural context in which
19 its merits will be considered. *See Castille*, 489 U.S. at 351. A habeas petitioner's claims may
20 be precluded from federal review on exhaustion grounds in either of two ways. First, a claim
21 may be procedurally defaulted in federal court if it was actually raised in state court but

22 _____
23 probative facts to support the conviction. (Answer, Ex. N, pg. 5.) This is the federal standard. *See*
24 *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). The Court of Appeals' application of federal law to
25 the facts before it was reasonable. The Court of Appeals reasonably concluded that Petitioner
26 knowingly participated in a kidnaping conspiracy when he approached undercover police
27 (attempting to bust an alien-smuggling ring under the guise of family members paying money for
28 the release of illegal alien relatives) and asked if they were "there for the people," instructed the
police to move their car for the exchange, observed the exchange and then left the scene with other
co-defendants. (Answer, Ex. N; Ex. F pgs. 69, 71-72, 77, 79, 92-93, 108-110, 129-31; Ex. G, pgs.
5-8.)

1 found by that court to be defaulted on state procedural grounds. *See Coleman v. Thompson*,
2 501 U.S. 722, 729-30 (1991). Second, the claim may be procedurally defaulted in federal
3 court if the petitioner failed to present the claim in a necessary state court and "the court to
4 which the petitioner would be required to present his claims in order to meet the exhaustion
5 requirement would now find the claims procedurally barred." *Id.* at 735 n.1. If a petitioner
6 has procedurally defaulted a claim in state court, a federal court will not review the claim
7 unless the petitioner shows "cause and prejudice" for the failure to present the constitutional
8 issue to the state court, or makes a colorable showing of actual innocence. *See Gray v.*
9 *Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); *Murray*
10 *v. Carrier*, 477 U.S. 478, 485 (1986).

11 **ii. Grounds 1-3 were not fairly presented.**

12 Petitioner presented Grounds 1-3 on direct review. However, Petitioner failed to
13 argue these grounds based on federal law.

14 To properly exhaust state remedies, the petitioner must "fairly present" his claims to
15 the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526
16 U.S. 838, 848 (1999). A claim is "fairly presented" if the petitioner has described the
17 operative facts and the federal legal theory on which his claim is based so that the state courts
18 have a fair opportunity to apply controlling legal principles to the facts bearing upon his
19 constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S.
20 270, 277-78 (1971). Resolving whether a petitioner has fairly presented his claim to the state
21 court is an intrinsically federal issue to be determined by the federal court. *Wyldes v.*
22 *Hundley*, 69 F.3d 247, 251 (8th Cir. 1995); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th
23 Cir. 1994). Commenting on the importance of fair presentation, the United States Supreme
24 Court has stated:

25 If state courts are to be given the opportunity to correct alleged violations of
26 prisoners' federal rights, they must surely be alerted to the fact that the
27 prisoners are asserting claims under the United States Constitution. If a habeas
28 petitioner wishes to claim that an evidentiary ruling at a state court trial denied
him the due process of law guaranteed by the Fourteenth Amendment, he must
say so, not only in federal court, but in state court.

1 *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). Following *Duncan*, the Ninth
2 Circuit has held that a state prisoner has not “fairly presented” (and thus has not exhausted)
3 federal claims in state court unless he specifically indicated to that court that the claims were
4 based on federal law. *See, e.g., Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), *as*
5 *amended by* 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence,
6 right to be tried by impartial jury and ineffective assistance of counsel lacked specificity and
7 explicitness required to present federal claim); *Shumway v. Payne*, 223 F.3d 982, 987-88 (9th
8 Cir. 2000) (broad reference to “due process” insufficient to present federal claim); *see also*
9 *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (“The mere similarity between a claim
10 of state and federal error is insufficient to establish exhaustion.”).

11 In presenting Ground 1 to the Arizona Court of Appeals, Petitioner argued that he was
12 entitled to a severance pursuant to 17 A.R.S. Rules of Crim. Pro., Rule 13.4(a), *State v.*
13 *Grannis*, 900 P.2d 1, 7 (Ariz. 1995) and *State v. Cruz*, 672 P.2d 470 (Ariz. 1983). (Answer,
14 Ex. L, pgs. 7-9.) Petitioner did not specifically indicate to the state court that his claim was
15 based on federal law. The Court of Appeals, in analyzing the merits of Petitioner’s claim,
16 likewise did not include any discussion of federal law. (Answer, Ex. N.) Although
17 Petitioner alleged in the caption of his claim that he “did not receive a fair trial,” a general
18 appeal to a broad constitutional principle is insufficient to establish fair presentation of a
19 federal constitutional claim. *See Fields v. Waddington*, 401 F.3d 1018, 1021 (9th Cir. 2005)
20 (a federal claim is not exhausted by a petitioner's mention, in passing, of a broad
21 constitutional concept, such as due process).

22 In presenting Ground 2 to the Arizona Court of Appeals, Petitioner argued that the
23 trial court’s jury instruction was confusing and amounted to fundamental error pursuant to
24 *State v. Valenzuela*, 984 P.2d 12, 15 (Ariz. 1999). (Answer, Ex. L, pg. 13.) Petitioner did not
25 indicate that he was presenting a federal claim or include reference to the federal Constitution
26 or federal case law. The Arizona Court of Appeals analyzed Petitioner’s claim as a state law
27 claim. (Answer, Ex. N.) As stated above, Petitioner’s passing reference to a “fair trial” was
28 not sufficient to federalize his claim.

1 In presenting Ground 3 to the Arizona Court of Appeals, Petitioner argued that he was
2 entitled to a judgment of acquittal pursuant to 17 A.R.S. Rules of Crim. Pro., Rule 20 and
3 *State v. Edwards*, 665 P.2d 59 (Ariz. 1983). (Answer, Ex. L, pg. 15.) Petitioner did not alert
4 the Court of Appeals that he was presenting a claim arising under federal law, and the Court
5 of Appeals analyzed the merits of Ground 3 as a state law claim. (Answer, Ex. N, pgs. 4-6.)
6 The only reference to federal law related to Ground 3 appears in Petitioner’s introductory
7 sentence: “The government must prove every element of a charged offense beyond a
8 reasonable doubt. U.S. Const. Amends. V, VI, & XIV.” (Answer, Ex. L, pg. 15.) This
9 passing reference to the federal Constitution was insufficient to put the Arizona Court of
10 Appeals on notice of Petitioner’s federal claim. *See Castillo v. McFadden*, 399 F.3d 993,
11 1002 (9th Cir.2005) (holding that exhaustion demands more than a citation to a general
12 constitutional provision, detached from any articulation of the underlying federal legal
13 theory).

14 In state court, Petitioner alleged facts which form the bases of Grounds 1-3 but
15 presented those allegations in support of claims arising under state law. Petitioner failed to
16 make any sufficient reference to the United States Constitution, a federal statute or a federal
17 case. The state court was not alerted to a federal claim. Because Grounds 1-3 were not fairly
18 presented in state court, they remain unexhausted absent a showing of cause and prejudice
19 or a fundamental miscarriage of justice.

20 **iii. Petitioner has not demonstrated cause and prejudice or made a colorable**
21 **showing of actual innocence.**

22 A federal court may only grant review of a procedurally defaulted claim if petitioner
23 makes a showing of cause and prejudice, *Netherland*, 518 U.S. at 162, or a colorable
24 showing of actual innocence amounting to a “fundamental miscarriage of justice.” *Sawyer*
25 *v. Whitley*, 505 U.S. 333, 336 (1992). To establish cause for a procedural default, a petitioner
26 must show an external impediment which rendered Petitioner unable to comply with the
27 procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To show prejudice, the
28 petitioner bears the burden of demonstrating that the error worked to his substantial

1 disadvantage, infecting the entire trial with constitutional error. *Carrier*, 477 U.S. at 488. If
2 petitioner cannot meet one of the requirements, it is unnecessary for federal courts to address
3 the other requirement. *United States v. Frady*, 456 U.S. 152, 168 (1982). Petitioner may also
4 be granted federal review if he can demonstrate a fundamental miscarriage of justice. A
5 fundamental miscarriage of justice results when the petitioner can demonstrate that a
6 constitutional error caused the conviction of one who is actually innocent. *Carrier*, 477 U.S.
7 at 496.

8 Petitioner has not asserted cause and prejudice or actual innocence amounting to a
9 “fundamental miscarriage of justice.” Accordingly, Grounds 1-3 were not properly exhausted
10 and the Court need not consider the merits of those claims.


11 **CONCLUSION**

12 Based on the foregoing, the Magistrate Judge recommends that the District Court enter
13 an order DENYING the Petition for Writ of Habeas Corpus.

14 Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within
15 ten days of being served with a copy of the Report and Recommendation. If objections are
16 not timely filed, they may be deemed waived. If objections are filed, the parties should use
17 the following case number: **CV-06-2655-PHX-GMS**.

18 The Clerk is directed to mail a copy of the Report and Recommendation to Petitioner
19 and counsel for Respondents.

20 DATED this 9th day of October, 2009.

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26 Jennifer C. Guerin
27 United States Magistrate Judge
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