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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

James A. Sanchez,  
Petitioner,

vs.

Dora Schriro, et al.,  
Respondents.

No. CV 08-0436-PHX-FJM (ECV)

**REPORT AND RECOMMENDATION**

TO THE HONORABLE FREDERICK J. MARTONE, UNITED STATES DISTRICT  
JUDGE:

**BACKGROUND**

Petitioner James A. Sanchez has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. #1. Following a jury trial in Maricopa County Superior Court in 2004, Petitioner was convicted of first degree murder.<sup>1</sup> Doc. #1 at 1. The trial court sentenced Petitioner to natural life in prison. *Id.*; Doc. #11, Exh. A at 3.

On direct appeal, Petitioner’s counsel filed an Anders<sup>2</sup> brief indicating that after searching the entire record, he could find no arguable issues to raise. Doc. #11, Exh. A at

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<sup>1</sup> Petitioner was convicted of the same offense in the first trial of this matter. Doc. #11, Exh. A at 1. That verdict was reversed on appeal and the case was remanded for a retrial. *Id.*

<sup>2</sup> Anders v. California, 386 U.S. 738 (1967).

1 2. The Arizona Court of Appeals granted Petitioner the opportunity to file a supplemental  
2 *pro se* brief, which he did. Doc. #11, Exh. A at 2; Doc. #12. Petitioner raised seven claims  
3 in his direct appeal. Doc. #12 at 4. On August 1, 2006, in a Memorandum Decision, the  
4 Court of Appeals affirmed the conviction and sentence. Doc. #11, Exh. A. Petitioner then  
5 filed a Motion for Reconsideration which the Court of Appeals denied. Doc. #11, Exh. B,  
6 C. Petitioner subsequently filed a Petition for Review in the Arizona Supreme Court. Doc.  
7 #11, Exh. D. The Court denied the Petition on January 17, 2007. Doc. #11, Exh. E.

8 Petitioner twice filed a Notice of Post-Conviction Relief, on January 16 and January  
9 22, 2008. Doc. #11, Exh. F. Both notices raised the exact same issues - that during the jury's  
10 deliberations, the trial court replaced a juror with an alternate when Petitioner was not  
11 present in the courtroom, and that the court failed to answer critical questions in a jury note.  
12 Id. On January 31, 2008, the trial court dismissed Petitioner's notices of post-conviction  
13 relief after finding that they were untimely and failed to satisfy an exception to the timeliness  
14 requirement. Doc. #11, Exh. G. Additionally, the court found that Plaintiff was precluded  
15 from raising these issues because they either were or should have been raised on direct  
16 appeal. Id. Petitioner did not seek review of this decision.

17 On March 5, 2008, Petitioner filed a habeas petition in this court. Doc. #1. He alleges  
18 five grounds for relief: 1) that his constitutional rights were violated when the trial court  
19 allowed the state to call a witness whose statements had previously been discredited; 2) that  
20 the court violated his constitutional rights by allowing the testimony from a witness who  
21 testified at the first trial but died before the retrial, to be read into the record at the retrial; 3)  
22 that the trial court violated his constitutional rights when, during jury deliberations, the court  
23 replaced a juror with an alternate when Petitioner was not present in the courtroom; 4) that  
24 the trial court violated Petitioner's constitutional rights when it refused to admit statements  
25 made by Petitioner's co-defendant to police on the night of the offense; and 5) that the trial  
26 court erred when it denied Petitioner's motion for judgment of acquittal which claimed there  
27 was no evidence to support pre-meditated murder. Id. The court screened the petition and  
28 directed Respondents to file an answer. Doc. #4. Respondents filed an Answer to Petition

1 for Writ of Habeas Corpus on August 18, 2008. Doc. #11. Despite being told of the  
2 opportunity to submit a reply, Petitioner has not filed one. On February 3, 2009, pursuant  
3 to this court's directive, Respondents filed a Supplemental Filing of Exhibit which contains  
4 a copy of Petitioner's opening brief on direct appeal. Doc. #12.

5 The Arizona Court of Appeals summarized the facts of the case as follows:

6 Harold B. was shot and killed in the parking lot of the Hi-Liter bar on  
7 November 22, 1995 by Richard Rivas ("Rivas"). At the time of the shooting,  
8 Sanchez was seen walking with Rivas and pointing or raising his arm in the  
9 direction of Harold B.

10 Harold B. had testified against Sanchez in an aggravated assault case  
11 that had been tried twice because of hung juries. He was murdered before  
12 Sanchez's third trial of that charge.

## 13 **DISCUSSION**

14 Respondents contend in their answer that Petitioner has procedurally defaulted on  
15 grounds one, three and four of his petition. Respondents further argue that grounds two and  
16 five should be denied on the merits. Having failed to file a reply, Petitioner has not  
17 addressed the procedural default defense or Respondents' arguments on the merits.

### 18 **A. Procedural Default**

#### 19 **1. Legal Standards**

20 A state prisoner must exhaust his remedies in state court before petitioning for a writ  
21 of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); Duncan v. Henry, 513 U.S.  
22 364, 365-66 (1995); McQueary v. Blodgett, 924 F.2d 829, 833 (9<sup>th</sup> Cir. 1991). To properly  
23 exhaust state remedies, a petitioner must fairly present his claims to the state's highest court  
24 in a procedurally appropriate manner. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). A  
25 petitioner "must give the state courts one full opportunity to resolve any constitutional issues  
26 by invoking one complete round of the State's established appellate review process." Id. at  
27 845. In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals  
28 by properly pursuing them through the state's direct appeal process or through appropriate  
post-conviction relief. Swoopes v. Sublett, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999); Roettgen  
v. Copeland, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994).

1 A claim has been fairly presented if the petitioner has described both the operative  
2 facts and the federal legal theory on which the claim is based. Bland v. Cal. Dep't of  
3 Corrections, 20 F.3d 1469, 1472-73 (9<sup>th</sup> Cir.1994), overruled on other grounds by Schell v.  
4 Witek, 218 F.3d 1017, 1025 (9<sup>th</sup> Cir. 2000) (en banc); Tamalini v. Stewart, 249 F.3d 895,  
5 898-99 (9<sup>th</sup> Cir. 2001). "Our rule is that a state prisoner has not 'fairly presented' (and thus  
6 exhausted) his federal claims in state court unless he specifically indicated to that court that  
7 those claims were based on federal law." Lyons v. Crawford, 232 F.3d 666, 668 (9<sup>th</sup> Cir.  
8 2000), amended on other grounds, 247 F.3d 904 (9<sup>th</sup> Cir. 2001). "If a petitioner fails to alert  
9 the state court to the fact that he is raising a federal constitutional claim, his federal claim is  
10 unexhausted regardless of its similarity to the issues raised in state court." Johnson v. Zenon,  
11 88 F.3d 828, 830 (9<sup>th</sup> Cir. 1996). Moreover, "[s]tate court rulings on the admissibility of  
12 evidence generally fall outside the scope of federal habeas relief, which is designed only to  
13 remedy violations of federal law." Winzer v. Hall, 494 F.3d 1192, 1198 (9<sup>th</sup> Cir. 2007).

14 If a petition contains claims that were never fairly presented in state court, the federal  
15 court must determine whether state remedies remain available to the petitioner. See Rose v.  
16 Lundy, 455 U.S. 509, 519-20 (1982); Harris v. Reed, 489 U.S. 255, 268-270 (1989)  
17 (O'Connor, J., concurring). If remedies are still available in state court, the federal court may  
18 dismiss the petition without prejudice pending the exhaustion of state remedies. Id.  
19 However, if the court finds that the petitioner would have no state remedy were he to return  
20 to the state court, then his claims are considered procedurally defaulted. Teague v. Lane, 489  
21 U.S. 288, 298-99 (1989); see also Sandgathe v. Maass, 314 F.3d 371, 376 (9<sup>th</sup> Cir. 2002) (a  
22 defendant's claim is procedurally defaulted when it is clear that the state court would hold  
23 the claim procedurally barred). The federal court will not consider these claims unless the  
24 petitioner can demonstrate that a miscarriage of justice would result, or establish cause for  
25 his noncompliance and actual prejudice. See Dretke v. Haley, 124 S.Ct. 1847, 1851-52  
26 (2004); Schlup v. Delo, 513 U.S. 298, 321 (1995); Coleman v. Thompson, 501 U.S. 722,  
27 750-51 (1991); Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

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1           **2.     Ground One**

2           Petitioner’s claim in ground one alleges a violation of the First, Fourth, Fifth, Sixth  
3 and Fourteenth Amendment based on the trial court’s decision to admit the testimony of a  
4 witness who Petitioner claims had been discredited. Although Petitioner raised a related  
5 claim in his direct appeal, he did not raise it as a federal constitutional claim. In his opening  
6 brief on direct appeal, Petitioner argued that the trial court should have precluded the witness  
7 based on the doctrine of judicial estoppel under Arizona law. Doc. #12 at 11-22. At no point  
8 in his lengthy argument on this issue did Petitioner allege a federal constitutional violation.  
9 Id. Nor did Petitioner allege a federal constitutional violation when he raised the same claim  
10 in his petition for review to the Arizona Supreme Court. Doc. #11, Exh. D at 2-4. Petitioner  
11 therefore has failed to exhaust the claim he now raises in ground one.

12           Moreover, Petitioner would no longer have a remedy if he returned to the state court.<sup>3</sup>  
13 As a result, his claim in ground one is procedurally defaulted. Having failed to file a reply,  
14 Petitioner has not alleged cause for the default and actual prejudice, nor has he shown a  
15 miscarriage of justice to overcome the procedural default. The court will therefore  
16 recommend that ground one be denied.

17           **3.     Ground Three**

18           Petitioner’s claim in ground three alleges a violation of the First, Fourth, Sixth and  
19 Fourteenth Amendment based on the trial court’s replacement of a juror with an alternate  
20 when Petitioner was not present in the courtroom. Petitioner alleged in his direct appeal that  
21 the trial court made several errors regarding the replacement of the juror. Doc. #12 at 5-10.  
22 Nothing in his argument suggests he intended to raise a federal claim. Id. Petitioner again  
23 raised the juror replacement issue in his petition for review to the Arizona Supreme Court  
24 but again failed to allege a violation of federal law. Doc. #11, Exh. D at 8-10. Petitioner  
25 raised the issue a third time in his two notices of post-conviction relief but he did not allege

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27           <sup>3</sup> The time has passed to seek post-conviction relief in state court under Rule 32.4(a)  
28 of the Arizona Rules of Criminal Procedure and Petitioner has not shown that any of the  
exceptions to the time limits under Rule 32.1(d), (e), (f), (g) or (h) apply to him.

1 a violation of federal law. Doc. #11, Exh. F. Petitioner therefore has failed to exhaust the  
2 claim he now raises in ground three.

3 Petitioner would no longer have a remedy if he returned to the state court. As a result,  
4 his claim in ground three is procedurally defaulted. Petitioner has presented nothing to show  
5 cause for the default and actual prejudice, nor has he shown a miscarriage of justice to  
6 overcome the procedural default. The court will therefore recommend that ground three be  
7 denied.

#### 8 **4. Ground Four**

9 Petitioner claims in ground four that the trial court violated his Fourth, Fifth, Sixth and  
10 Fourteenth Amendment rights when it refused to admit statements made by Petitioner's co-  
11 defendant to police on the night of the offense. Petitioner raised a similar claim in his direct  
12 appeal but he argued that the court's decision violated a state evidentiary rule. Doc. #12 at  
13 33-37. He cited only Arizona cases to support his claim. Id. Nowhere in his argument did  
14 Petitioner allege a federal constitutional violation. Id. Petitioner again raised the issue of his  
15 co-defendant's statements in his petition for review to the Arizona Supreme Court but he  
16 failed to allege a federal constitutional violation. Doc. #11, Exh. D at 6-7. Petitioner  
17 therefore has failed to exhaust the claim he now raises in ground four.

18 Petitioner would no longer have a remedy if he returned to the state court. Therefore,  
19 his claim in ground four is procedurally defaulted. Petitioner has presented nothing to show  
20 cause for the default and actual prejudice, nor has he shown a miscarriage of justice to  
21 overcome the procedural default. The court will therefore recommend that ground four be  
22 denied.

#### 23 **5. Ground Five**

24 Petitioner claims in ground five that the trial court's decision to deny his motion for  
25 judgment of acquittal based on insufficiency of the evidence violated the First, Fifth, Sixth  
26 and Fourteenth Amendment. Petitioner raised a similar claim in his direct appeal but the  
27 claim was based only on a violation of Rule 20 of the Arizona Rules of Criminal Procedure.  
28 Doc. #12 at 44-46. Nowhere in his argument did Petitioner allege a federal constitutional

1 violation. Id. There is simply nothing to suggest he intended to present this claim as a  
2 violation of federal law.<sup>4</sup> Petitioner did not raise the Rule 20 issue, or a related federal claim,  
3 in his petition for review to the Arizona Supreme Court. Doc. #11, Exh. D. Petitioner  
4 therefore has failed to exhaust the claim he now raises in ground five.

5 As with grounds one, three and four, Petitioner would no longer have a remedy if he  
6 returned to the state court. Therefore, his claim in ground five is procedurally defaulted.  
7 Petitioner has presented nothing to show cause for the default and actual prejudice, nor has  
8 he shown a miscarriage of justice to overcome the procedural default. The court will  
9 therefore recommend that ground five be denied.

## 10 **B. Merits Analysis**

### 11 **1. AEDPA Standard of Review**

12 Under the AEDPA<sup>5</sup>, a federal court "shall not" grant habeas relief with respect to "any  
13 claim that was adjudicated on the merits in State court proceedings" unless the State court  
14 decision was (1) contrary to, or an unreasonable application of, clearly established federal  
15 law as determined by the United States Supreme Court; or (2) based on an unreasonable  
16 determination of the facts in light of the evidence presented in the State court proceeding.  
17 28 U.S.C. § 2254(d); see Williams v. Taylor, 529 U.S. 362, 412-413 (2000) (O'Connor, J.,  
18 concurring and delivering the opinion of the Court as to the AEDPA standard of review).  
19 A state court's decision is "contrary to" clearly established precedent if (1) "the state court  
20 applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2)  
21 "if the state court confronts a set of facts that are materially indistinguishable from a decision  
22 of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent."  
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24 <sup>4</sup> Respondents contend in their answer that "Petitioner properly presented a federal-  
25 law basis for this claim in the state trial and appellate courts." Doc. #11 at 8. They cite the  
26 Arizona Court of Appeals decision to support this statement but the portion cited says  
27 nothing about a federal law claim. The court fails to see a federal basis for this claim in any  
of Petitioner's state court filings and Respondents have pointed to none.

28 <sup>5</sup> Antiterrorism and Effective Death Penalty Act of 1996.

1 Taylor, 529 U.S. at 405-06. "A state court's decision can involve an 'unreasonable  
2 application' of Federal law if it either (1) correctly identifies the governing rule but then  
3 applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails  
4 to extend a clearly established legal principle to a new context in a way that is objectively  
5 unreasonable." Hernandez v. Small, 282 F.3d 1132, 1142 (9<sup>th</sup> Cir. 2002). Thus, the  
6 "unreasonable application" clause requires the state court's application of Supreme Court law  
7 to be more than incorrect or erroneous; it must be objectively unreasonable. Lockyer v.  
8 Andrade, 538 U.S. 63, 75 (2003). "When applying these standards, the federal court should  
9 review the 'last reasoned decision' by a state court ...." Robinson v. Ignacio, 360 F.3d 1044,  
10 1055 (9th Cir. 2004).

## 11 **2. Ground Two**

12 Petitioner's claim in ground two alleges a violation of the First, Fourth, Sixth and  
13 Fourteenth Amendment based on the trial court's decision to allow testimony from a witness  
14 at the first trial to be read into the record at the retrial because the witness died between the  
15 two trials. Petitioner raised a federal constitutional claim in his direct appeal when he argued  
16 that his right to confront the witness was denied and this resulted in a fundamentally unfair  
17 trial in violation of the Due Process Clause. Doc. #12 at 31-32. Petitioner therefore properly  
18 exhausted the claim.

19 The Arizona Court of Appeals on direct appeal denied Petitioner's claim that his right  
20 to confront the witness was violated. Doc. #11, Exh. A at 5-7. The Court analyzed the claim  
21 under Rule 19.3(c)(1) of the Arizona Rules of Criminal Procedure, which governs the  
22 admissibility of statements by a witness under oath in a previous judicial proceeding who is  
23 now unavailable. Id. The Court explained that the testimony of the witness was from  
24 Petitioner's first trial on the same charge, was under oath, and Petitioner had the opportunity  
25 to, and did, cross-examine the witness. Id. The Court found that Petitioner's interest and  
26 motive in both proceedings were the same. Id. The Court therefore found no violation.

27 Although the Arizona Court of Appeals did not directly analyze the claim as a federal  
28 confrontation clause claim, the Court's analysis considered the same factors that would be

1 relevant to such a claim. See Crawford v. Washington, 541 U.S. 36, 53-54 (Sixth  
2 Amendment does not allow admission of testimonial statements of a witness who does not  
3 appear at trial unless the witness was unavailable to testify and the defendant had a prior  
4 opportunity for cross-examination.) Petitioner has presented nothing to show that the Court's  
5 conclusion affirming the trial court's decision to admit the testimony in the retrial was  
6 contrary to, or an unreasonable application of, clearly established U.S. Supreme Court law  
7 or based on an unreasonable determination of the facts. The Arizona Court of Appeals  
8 decision was a straightforward application of the relevant factors to consider when deciding  
9 if an unavailable witness' prior testimony should be admitted. The analysis was consistent  
10 with the confrontation clause analysis set forth in Crawford. Petitioner has failed to satisfy  
11 the standard for habeas relief on this claim and, therefore, the court will recommend that it  
12 be denied.

13 **C. Conclusion**

14 Having determined that grounds one, three, four and five are procedurally defaulted,  
15 and that ground two should be rejected on the merits, the court will recommend that the  
16 petition be denied and dismissed with prejudice.

17 **IT IS THEREFORE RECOMMENDED:**

18 That the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. #1)  
19 be **DENIED** and **DISMISSED WITH PREJUDICE**;

20 This recommendation is not an order that is immediately appealable to the Ninth  
21 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of  
22 Appellate Procedure, should not be filed until entry of the district court's judgment. The  
23 parties shall have ten days from the date of service of a copy of this recommendation within  
24 which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1); Fed. R.  
25 Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have ten days within which to file a  
26 response to the objections. Failure to timely file objections to the Magistrate Judge's Report  
27 and Recommendation may result in the acceptance of the Report and Recommendation by  
28 the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114,

1 1121 (9<sup>th</sup> Cir. 2003). Failure to timely file objections to any factual determinations of the  
2 Magistrate Judge will be considered a waiver of a party's right to appellate review of the  
3 findings of fact in an order of judgement entered pursuant to the Magistrate Judge's  
4 recommendation. See Fed. R. Civ. P. 72.

5 DATED this 24<sup>th</sup> day of February, 2009.

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8 A handwritten signature in black ink, appearing to read "Edward C. Voss", is written over a horizontal line.

9 Edward C. Voss  
10 United States Magistrate Judge

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