

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

7

8

9

David Wayne Kiehle,

)

No. CV-11-352-PHX-GMS

10

Plaintiff,

)

**ORDER**

11

vs.

)

12

Charles L. Ryan, et al.,

)

13

Defendants.

)

14

15

16

Pending before this Court is a Petition for Writ of Habeas Corpus filed by Petitioner David Wayne Kiehle. (Doc. 1). Magistrate Judge Burns has issued a Report and Recommendation (“R & R”) in which she recommended that the Court deny the petition with prejudice. (Doc. 19). Petitioner has objected to the R & R and has filed supplemental objections as well. (Docs. 24, 26). Because objections have been filed, the Court will review the petition de novo. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). In addition, Petitioner has filed a “Motion to Cause Respondents to Serve Answer Pleading on Petitioner.” (Doc. 21). For the following reasons, the Court accepts in part and denies in part the R & R, denies the petition, and denies Petitioner’s motion as moot. The Court does grant Petitioner a Certificate of Appealability on one issue, as discussed below.

26

**BACKGROUND**

27

The facts of the investigation are ably put forth in the R & R and are only briefly summarized here. On July 6, 1998, Petitioner called 911 at 4:45 a.m. to report that he had

28

1 found his wife Natalie shot in the head in their bedroom. Paramedics arrived and pronounced  
2 Natalie dead. Petitioner stated that he had been watching movies with his daughter, B., in the  
3 living room when B. had fallen asleep. Petitioner then claimed to have gone into to the  
4 bedroom, had sex with his wife, and returned to the living room to get a glass of water. He  
5 claimed that while he was going to the living room to get the water he heard a gunshot, and  
6 when he returned to the bedroom he found Natalie dead.

7 Over the course of the investigation, the Chandler police found ammunition matching  
8 the type with which the gun had been loaded, and which Petitioner had denied possessing,  
9 in his closet. They reconstructed the shooting three times and concluded that the wound was  
10 not self-inflicted. They learned that Natalie had filed for divorce and that the lawyer who had  
11 served the divorce papers on Petitioner had noted Petitioner's hostility and spoken to Natalie  
12 about whether she was in danger. The autopsy revealed bruising that suggested that Natalie  
13 had not died immediately but had been held down for several minutes after being shot while  
14 she choked on her own blood.

15 On May 2, 2000, Petitioner was found guilty of premeditated first degree murder.  
16 (Doc. 15-1, Ex. B). After he was granted postconviction relief by the Arizona Court of  
17 Appeals, he was given a new trial, where he was found guilty of second degree murder, a  
18 lesser included offense of the original charge, and sentenced to 22 years in prison. (Doc. 18-  
19 2, Ex. EE at 10, ¶ 27; Doc. 15-1, Exs. F, G).

20 On July 10, 2006, Plaintiff filed a direct appeal to the Arizona Court of Appeals,  
21 raising six grounds for relief not relevant to the current petition. (Doc. 17-9, Ex. BB). The  
22 appeal was denied, and Petitioner did not seek review in the Arizona Supreme Court. (Doc.  
23 18-2, Ex. EE). On May 1, 2008, Petitioner, acting through counsel, filed a petition for  
24 postconviction relief pursuant to Arizona Rule of Criminal Procedure 32.1 in Maricopa  
25 County Superior Court. (Doc. 18-4, Ex. MM). There, Petitioner raised two grounds for relief,  
26 namely that 1) Petitioner was denied effective assistance of counsel at the supplemental  
27 briefing stage of his trial, and 2) the sentencing court had violated Arizona law when it issued  
28 a correcting minute entry reducing Petitioner's credited pre-sentence incarceration from

1 2,791 days to 2,376 days. (Doc. 18-4, Ex. MM). The trial court denied the petition on the  
2 merits. (Doc. 18-6, Ex. PP). Both the Arizona Court of Appeals and the Arizona Supreme  
3 Court denied review. (Doc. 18-6, Ex. SS; Doc. 18-7, Ex. UU).

4 Petitioner filed his pro se federal habeas corpus petition on February 23, 2011. (Doc.  
5 7). In it, he alleges the same two grounds for relief that he pursued in his Rule 32  
6 proceedings, namely 1) Petitioner was denied effective assistance of counsel at the  
7 supplemental briefing stage of his trial, and 2) the trial court erred when it amended  
8 Petitioner’s pre-sentence incarceration credit.

## 9 DISCUSSION

### 10 I. Legal Standard

11 The writ of habeas corpus affords relief to persons in custody in violation of the  
12 Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241(c)(3) (2006). Habeas  
13 review is not available “to reexamine state-court determinations on state-law questions.”  
14 *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). The writ may be granted by “the Supreme  
15 Court, any justice thereof, the district courts and any circuit judge within their respective  
16 jurisdictions.” 28 U.S.C. § 2241(a). Review of Petitions for Habeas Corpus is governed by  
17 the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). 28 U.S.C. § 2244  
18 *et seq.* (2006).

#### 19 A. Statute of Limitations under AEDPA

20 Under AEDPA, petitions for habeas corpus are governed by a one-year statute of  
21 limitations. *See Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005) (AEDPA “establishes a  
22 1-year statute of limitations for filing a federal habeas corpus petition”) (citing 28 U.S.C. §  
23 2244(d)(1)). The limitation period begins to run when the state conviction becomes  
24 final—either “upon ‘the conclusion of direct review or the expiration of the time for seeking  
25 such review.’” *White v. Klitzkie*, 281 F.3d 920, 923 (9th Cir. 2002) (quoting 28 U.S.C. §  
26 2244(d)(1)(A)).

#### 27 B. Exhaustion of State Procedures

28 Habeas relief is not available to petitioners who do not properly exhaust their state

1 court procedural remedies prior to filing their federal petitions. 28 U.S.C. § 2254(b)(1). To  
2 satisfy the exhaustion requirement, a petitioner must give state courts the opportunity to pass  
3 upon and correct alleged violations of the prisoner’s federal rights. *Duncan v. Henry*, 513  
4 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)); see *Coleman v.*  
5 *Thompson*, 501 U.S. 722, 731 (1991) (holding that “a state prisoner’s federal habeas petition  
6 should be dismissed if the prisoner has not exhausted available state remedies as to any of  
7 his federal claims”) (citations omitted).

8 To provide the state with the necessary opportunity to review the claim, a petitioner  
9 must fairly present the claim in each appropriate state court. A claim is not fairly presented  
10 unless a petitioner “explicitly indicated” that “the claim was a *federal* one” in the state court  
11 litigation. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *as amended*, 247 F.3d 904  
12 (9th Cir. 2001) (emphasis in original). A petitioner explicitly indicates that a claim is federal  
13 by including “reference to a specific federal constitutional guarantee, as well as a statement  
14 of the facts that entitle the petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162–63  
15 (1996). A petitioner does not fairly present a state court with a federal claim merely by  
16 including “general appeals to broad constitutional principles, such as due process, equal  
17 protection, and the right to a fair trial.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999)  
18 (citing *Gray*, 518 U.S. at 162–63).

### 19 C. Procedural Default

20 Habeas review is also not available for claims that have been procedurally defaulted.  
21 A claim may be procedurally defaulted in one of two ways. First, a claim is procedurally  
22 defaulted when it was raised in state court, but the state court denied relief based upon “an  
23 independent and adequate state procedural rule.” *Coleman v. Thompson*, 501 U.S. 722, 750  
24 (1991). Second, claims that were not exhausted in state court are procedurally defaulted if  
25 the district court determines that a return to state court would be futile because procedural  
26 rules would eliminate “the likelihood that a state court will accord the habeas petitioner a  
27 hearing on the merits of the claim.” *Harris v. Reed*, 489 U.S. 255, 268–70 (1989) (O’Connor,  
28 J., concurring). A federal court may only hear a claim that has been procedurally defaulted

1 if a petitioner “can demonstrate cause for the default and actual prejudice as a result of the  
2 alleged violation of federal law, or demonstrate that failure to consider the claims will result  
3 in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750.

#### 4 **D. Standard of Review**

5 A federal court reviewing a habeas petition can only reverse those decisions of a state  
6 court that were “contrary to, or involved an unreasonable application of” clearly established  
7 federal law. *Williams v. Taylor*, 529 U.S. 362, 391 (2000). Clearly established federal law  
8 consists of “the governing principle or principles set forth by the Supreme Court at the time  
9 the state court renders its decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (citing  
10 *Bell v. Cone*, 535 U.S. 685, 698 (2002)). Habeas is not granted merely when a federal court  
11 disagrees with a state court’s constitutional interpretation: “the most important point is that  
12 an *unreasonable* application of federal law is different than an *incorrect* application of  
13 federal law.” *Williams*, 529 U.S. at 410 (emphasis in original). A state court decision is  
14 contrary to clearly established federal law when it “arrives at a conclusion opposite to that  
15 reached by the Supreme Court on a question of law.” *Taylor v. Lewis*, 460 F.3d 1093, 1097  
16 n.4 (9th Cir. 2006) (citing *Williams*, 529 U.S. at 405–06). A state court involves an  
17 unreasonable application of clearly established federal law when it “correctly identifies a  
18 governing rule but applies it to a new set of facts that is objectively unreasonable.” *McNeal*  
19 *v. Adams*, 623 F.3d 1283, 1288 (9th Cir. 2010). When applying these standards, a habeas  
20 court “should review the last reasoned decision by a state court.” *Robinson v. Ignacio*, 360  
21 F.3d 1044, 1055 (9th Cir. 2004).

#### 22 **II. Discussion**

23 The R & R recommends denying Ground Two because it alleges only errors of state  
24 law, and recommends denying Ground One on the merits. Petitioner has filed a general  
25 objection based upon the allegation that he did not receive a timely copy of Respondent’s  
26 Answer, and has made further objections to Magistrate Judge Burns’s analysis on both  
27 claims. This Court has conducted a *de novo* review, and adopts Magistrate Judge Burns’s R  
28 & R in part and rejects it in part. The following discussion addresses Petitioner’s objections

1 in turn.

2 **A. Failure to Receive the Response**

3 After the R & R was issued, Petitioner filed a “Motion to Strike Magistrate’s Report  
4 and Recommendation” based upon Respondent’s alleged failure to provide Petitioner with  
5 a copy of its Answer. On February 27, Respondent stated that it had mailed the Answer to  
6 Petitioner, but for convenience sake it provided him with another copy, and stated that it had  
7 no objection to allowing Petitioner additional time to file his objections to the R & R. (Doc.  
8 22). Before the Court could rule on Petitioner’s motion, he filed a timely objection, and then  
9 filed a supplement and an errata one week later. (Docs. 24, 25). Because of the apparent  
10 confusion regarding Petitioner’s access to the Answer, this Court has considered thoroughly  
11 all of the material submitted by Petitioner, including material that would otherwise be  
12 untimely. Petitioner has thereby suffered no harm if, in fact, there was a delay in providing  
13 him with the Answer.

14 **B. Ground Two**

15 Magistrate Judge Burns recommended dismissing Claim Two because “federal habeas  
16 corpus relief does not lie for errors of state law.” *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).  
17 In his objections, Petitioner objects by arguing that the claim was made under the Due  
18 Process clause, alleging that he was denied notice and a hearing when the court adjusted the  
19 length of his presentence credit.<sup>1</sup> See *Matthews v. Eldridge*, 424 U.S. 319 (1976). Ground  
20 Two relies on a state law argument, namely that “the State cannot correct an illegally lenient  
21 sentence in absence of an appeal or cross-appeal by the state.” (Doc. 7 at 7). The fact that  
22 Petitioner makes “general appeals to broad constitutional principles” by referring in the  
23 Ground’s title to “the guarantee of Due Process by abuse of discretion” does not transform  
24

---

25 <sup>1</sup> Petitioner continuously refers to the trial court “resentenc[ing] him” or “alter[ing] the  
26 sentence.” (Doc. 24 at 8). In fact, the trial court did not alter the sentence, which remained  
27 at 22 years. The court corrected the number of days that Petitioner received for his  
28 presentence incarceration, because its original calculation had been in error, as Petitioner  
does not deny.

1 it into a federal claim. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). Moreover, this  
2 claim was never framed as a federal one during his state court proceedings: he did not raise  
3 any claim comparable to Ground Two in his direct appeal, and he framed the question as one  
4 of state law in his Rule 32 proceeding. (Doc. 18-6, Ex. MM). Petitioner never “explicitly  
5 indicated” to the state courts that his claim contesting the minute entry “was a *federal* one.”  
6 *Lyons*, 232 F.3d at 669. Moreover, this unexhausted claim is procedurally defaulted;  
7 Petitioner cannot now return to state court and file a Rule 32 petition claiming that his federal  
8 due process rights were violated, because the time to file a Rule 32 petition has long passed.  
9 *See* ARIZ. R. CRIM. P. RULE 32.4; *Harris*, 489 U.S. at 268–70.

10 **C. Ground One**

11 **1. Background**

12 Petitioner further claims that Magistrate Judge Burns misapplied applicable Sixth  
13 Amendment case law in denying Claim One.<sup>2</sup> Petitioner’s trial began on August 8, 2005.  
14 (Doc. 15-5, Ex. K). Closing arguments were held on August 25, 2005. (Doc. 17-5, Ex. U).  
15 On August 30, 2005, at 1:30 p.m., the jurors submitted a note to the judge stating that they  
16 were at an impasse, and requesting access to letters from Petitioner to his daughter B. that  
17 had been referenced during the trial.<sup>3</sup> (Doc. 15-1, Ex. E). The trial judge instructed the jury  
18 to keep deliberating, and to consider only the evidence that had been admitted at trial. (*Id.*).  
19 At 3:20 p.m., the jury sent another letter, which read, “we are at an impasse as to agreement  
20 on a verdict and have exhausted discussion possibilities.” (Doc. 17-7, Ex. W at 3:8–10). The  
21 judge proposed a number of possible options to the attorneys, including declaring a mistrial,  
22

---

23 <sup>2</sup> Respondent argues that Ground One has not been exhausted and is procedurally defaulted  
24 because Petitioner styled it as a Fifth Amendment claim, rather than a Sixth Amendment  
25 claim as he did in his state court proceedings. (Doc. 15 at 19). Since Petitioner is an inmate  
26 proceeding pro se, his pleadings “must be held to less stringent standards than formal  
27 pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). The Court  
interprets Ground One as a Sixth Amendment Claim, which Respondent acknowledges  
Petitioner has exhausted. (Doc. 15 at 19 n.10).

28 <sup>3</sup> The letters had not been admitted into evidence.

1 asking the jury to leave for the day and return in the morning, or summoning the jury and  
2 asking the presiding juror if there are “any issues we can help with.” (Doc. 17-7, Ex. W at  
3 3:20–21). The judge noted that if the jury identified an issue, he would permit parties to  
4 deliver twenty minutes of supplemental argument on that issue alone. Petitioner’s attorney  
5 stated, “No. I don’t have that kind of confidence in myself.” (*Id.* at 5:2–3). Petitioner’s  
6 attorney instead suggested giving a “dynamite instruction,”<sup>4</sup> and the State’s attorney said,  
7 “Let’s go ahead and declare a mistrial.” (*Id.* at 7:12–13). The judge proceeded to call back  
8 the jury and asked them to continue to deliberate, stating that “you may wish to identify for  
9 the court and counsel which issues or questions or law or fact you would like counsel or the  
10 court to assist you with.” (*Id.* at 11:19–21). He continued by stating that “[i]f it is reasonably  
11 probable that you could reach a verdict as a result of this procedure, it would be wise to give  
12 it a try.” (*Id.* at 12:4–6). The court took a recess, and at 5:00 pm, the jury presented the  
13 following note:

14           The impasse is not related to whether or not Natalie committed  
15           suicide. (We are all in agreement based on the evidence that she  
16           did not.) Our differences relate to whether David pulled the  
17           trigger. To assist us in resolving this difference, we’d like to  
18           have the following: any information relative to B.’s interview in  
19           N[orth] C[arolina], all the letters that David wrote to B. that  
20           were given to the Chandler Police Department by the McFarland  
21           family. We do not feel this request is unreasonable given the  
22           fact that both items were mentioned in the discussion in open  
23           court. And number two, [we] would also like clarification  
24           regarding the fingerprint lifted off the murder weapon. Were  
25           they found not to be David Kiehle’s or were they inclusive to  
26           whether they were his?  
27           *Id.* at 13:22–14:11.

28 The trial judge told both attorneys that they would have twenty minutes to address the jury  
the next day. Petitioner’s counsel stated that supplemental argument would be inappropriate  
because the jurors had asked to see inadmissible evidence, and “if the State starts intimating

---

<sup>4</sup> A “dynamite instruction,” called an *Allen* charge in federal court, is a “supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict.” *Black’s Law Dictionary* 87 (9th ed. 2009). See *Allen v. United States*, 164 U.S. 492 (1896).

1 or trying to draw an inference to what is in [the letters] it's objectionable." (Doc. 17-7, Ex.  
2 W at 15:25–16–1). The judge responded that they would reconvene the next day and that  
3 each side would have twenty minutes to address the jury. (*Id.* at 17:3–7).

4 The next day, Petitioner's counsel filed a motion for a mistrial, which the court  
5 denied. (Doc. 15-1, Ex. E). The state's attorney gave supplemental argument in which he  
6 argued, among other things, that an 11-year old child such as B. could not have caused the  
7 bruising on Natalie's body. Petitioner's attorney did not address the jury, but made an oral  
8 motion for a mistrial based upon the State's attorney's supplemental argument. (Doc. 17-7,  
9 Ex. X, at 14:3–10). The jury returned with a verdict that Petitioner was not guilty of first  
10 degree murder but was guilty of second degree murder. (Doc. 17-7, Ex. Y at 3).

11 Before analyzing the R & R and Petitioner's objections to it, it is important to clarify  
12 that Petitioner is not making a claim that the judge's request for supplemental argument  
13 constituted coercion. *See, e.g., U.S. v. Evanston*, 651 F.3d 1080 (9th Cir. 2011) ("Because  
14 the parties were alerted to the factual issues dividing the jury, they could tailor their  
15 arguments accordingly."). Although the coercion argument made up the substance of  
16 Petitioner's initial motion for a mistrial, it was not included in his original direct appeal, was  
17 not mentioned in his Rule 32 proceeding, and has not been mentioned in this habeas  
18 proceeding. Petitioner adopts some of the argument from the motion for a mistrial in his  
19 objection, writing, for example, that "the trial court then . . . allowed the attorneys to make  
20 a new round of closing argument to the jury based on the revealed subjective thought process  
21 of the jury." (Doc. 24 at 9). Nevertheless, the only claim cognizable in his habeas proceeding  
22 is that he was denied his right to be effectively represented by counsel at the supplemental  
23 briefing. (Doc. 7 at 6). To the extent that he presents argument that the judge's actions  
24 constituted coercion, these arguments were never presented to the Arizona Court of Appeals  
25 as a federal claim, and therefore have not been exhausted, and have subsequently been  
26 procedurally defaulted.

## 27 2. Merits

28 Turning to the merits of Petitioner's Sixth Amendment claim, Petitioner claims that

1 he was denied the effective assistance of counsel both in the general test applied under  
2 *Strickland v. Washington*, 466 U.S. 668 (1984), and the narrow exception detailed in *U.S. v.*  
3 *Cronic*, 466 U.S. 648 (1984). Under *Strickland*, relief may be granted only when a petitioner  
4 shows both that “counsel’s performance was deficient” and that “the deficient performance  
5 prejudiced the defense.” *Strickland*, 466 U.S. at 687. Under *Cronic*, a petitioner need not  
6 show that a deficient performance prejudiced the result under three defined circumstances.  
7 *Cronic*, 466 U.S. at 659–60.

8 Parties agree that the trial court’s denial of Petitioner’s Rule 32 petition constitutes  
9 the last reasoned decision on Petitioner’s *Strickland* and *Cronic* claims. (Doc. 18-6, Ex.  
10 PP). The trial court found that Petitioner’s attorney had not performed deficiently because it  
11 was “patently obvious” that waiving the supplemental argument was “part of Defendant’s  
12 trial tactics,” and that having seen the entire trial, “no one could deem the representation  
13 deficient.” (Doc. 18-6, Ex. PP). Further, the trial court concluded that Petitioner had not been  
14 prejudiced, because it was clear from the jury’s note that it had ruled out suicide, and “[t]he  
15 evidence clearly showed that the young girl was not the shooter.” (*Id.*). The trial court found  
16 that *Cronic* did not apply because, although Petitioner’s lawyer did not make supplemental  
17 argument, he “was never absent and was never prevented from assisting Defendant at any  
18 stage of the trial.” (Doc. 18-6, Ex. PP). Magistrate Judge Burns found that this decision was  
19 not an unreasonable application of *Cronic*, because the Supreme Court has never held that  
20 the unique factual circumstance of a supplemental briefing in response to a jury note is a  
21 “critical stage,” and that the trial court’s *Strickland* analysis was reasonable. (Doc. 19 at  
22 14–18).

23 Petitioner’s principal objection is that the deferential standard of review under  
24 AEDPA is not appropriate here because the trial court’s order denying the Rule 32 petition  
25 did not cite to *Strickland* and did not analyze all three circumstances under which *Cronic*  
26 may afford relief. (Doc. 24 at 10). In the Ninth Circuit, the deference ordinarily applied under  
27 AEDPA is relaxed in circumstances where a “state court does not furnish a basis for its  
28 reasoning,” because in those circumstances “federal courts are left simply to speculate about

1 what ‘clearly established law’ the state court might have applied.” *Delgado v. Lewis*, 223  
2 F.3d 976, 982 (9th Cir. 2000) (overruled in part by *Lockyer v. Andrade*, 538 U.S. 63, 74–77  
3 (2003)).

4 **a. *Strickland***

5 Although the trial court did not cite directly to *Strickland*, it analyzed Petitioner’s  
6 ineffective assistance claim under the two well-understood *Strickland* prongs: whether  
7 Petitioner’s attorney’s performance was deficient, and whether Petitioner was prejudiced by  
8 that deficiency. (Doc. 18-6, Ex. PP). The Court does not need to “speculate” about which  
9 federal law the trial court applied, and heightened AEDPA scrutiny is appropriate. *Delgado*,  
10 223 F.3d at 982. Moreover, the trial court’s finding that *Strickland* relief is not available  
11 because Defendant was not prejudiced once it became clear that the jury had ruled out his  
12 theory of the case was correct under any standard of review. This Court has reviewed the trial  
13 transcript and found that there was no evidence presented at trial from which a reasonable  
14 jury could have found that B. shot her mother. (Docs. 15–17). Petitioner cites to *Martin v.*  
15 *Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984) in which the Sixth Circuit held that refusing to  
16 participate in a trial in hopes of winning on appeal was grounds for finding that an attorney’s  
17 performance was deficient, particularly “since the attorney was aware of a strong defense that  
18 he could present without compromising his earlier motions.” *Martin* is not a Supreme Court  
19 case, so disagreeing with it does constitute an unreasonable application of federal law.  
20 Moreover, Petitioner has not alleged that his attorney could have mounted a strong defense  
21 had he engaged in supplemental argument. Finally, even were the attorney’s performance  
22 deficient, Petitioner has made no argument to counter the trial court’s finding that he was not  
23 prejudiced by his attorney’s action. Petitioner is not entitled to relief under *Strickland*.

24 **b. *Cronic***

25 Under *Cronic*, a Petitioner need not show that he was prejudiced under the following  
26 three narrow circumstances: 1) when a defendant is “denied counsel at a critical stage of his  
27 trial,” 2) when “counsel entirely fails to subject the prosecution’s case to meaningful  
28 adversarial testing,” and 3) when circumstances are present such that “although counsel is

1 available to assist the accused during trial, the likelihood that any lawyer, even a fully  
2 competent one, could provide assistance is so small that a presumption of prejudice is  
3 appropriate.” 466 U.S. at 659–60. In its minute entry on Petitioner’s Rule 32 petition, the trial  
4 court judge discussed each of the first two prongs of *Cronic*, noting that Petitioner’s attorney  
5 “was never prevented from assisting Defendant at any stage of the trial” and that he  
6 “subjected the State’s case’s case to vigorous adversarial testing.” (Doc. 18-6, Ex. PP).  
7 Neither of these findings is incorrect even under de novo review, let alone the deferential  
8 standard of AEDPA. *Williams*, 529 U.S. 391.<sup>5</sup> *Cronic*’s first prong does not apply when an  
9 attorney is present and chooses not to speak, and its second prong is not to be parsed among  
10 various stages the trial. *See Bell v. Cone*, 535 U.S. 685, 696–97 (2002) (explaining that  
11 *Cronic*’s first prong applies only to defendants who have “actually or constructively been  
12 denied counsel by government action” and that the second does not apply when a petitioner’s  
13 argument “is not that his counsel failed to oppose the prosecution throughout the sentencing  
14 proceeding as a whole, but that his counsel failed to do so at specific points”); *see also*  
15 *Rogers v. Marshall*, No. 10-55816 VAP-MLG, 2012 WL 1739703, at \*2 (9th Cir. May 17,  
16 2012) (holding that *Cronic* is applicable “when *the trial court denied* his timely request for  
17 representation”) (emphasis added); *Florida v. Nixon*, 543 U.S. 175, 192 (2004) (holding  
18 *Cronic* is not applicable when an attorney presents no case at the guilt phase of trial and  
19

---

20  
21 <sup>5</sup> In the R & R, Magistrate Judge Burns found that *Cronic* did not apply because “[t]he  
22 United States Supreme Court has not extended *Cronic*’s first category (denial of counsel at  
23 a critical stage) to the specific factual circumstances presented here—the decision to forego  
24 supplemental closing argument in response to a jury’s question.” (Doc. 19 at 14). After the  
25 R & R was issued, the Ninth Circuit held that whether any particular stage of a trial is  
26 “critical” for purposes of *Cronic* may be decided on habeas review absent controlling  
27 Supreme Court authority. *See Rogers v. Marshall*, No. 10-55816 VAP-MLG, 2012 WL  
28 1739703, at \*5 (9th Cir. May 17, 2012) (finding that a post-verdict motion for a new trial is  
a “critical stage” even though “the Supreme Court has . . . never squarely addressed whether  
a post-verdict motion for a new trial is one of those stages”). The trial court’s original ruling,  
that Petitioner was not denied the right to counsel because his counsel was present and chose  
not to speak, is consistent with Supreme Court precedent and not contrary to federal law. *See*  
*Bell v. Cone*, 535 U.S. 685, 696–97 (2002).

1 focuses instead on the sentencing phase, because he may be “attempting to impress the jury  
2 with his candor and his unwillingness to engage in a useless charade”).

3         The trial court did not, however, discuss the third prong of *Cronic* in denying  
4 Petitioner’s Rule 32 motion. (Doc. 18-6, Ex. PP). Moreover, Respondent did not address  
5 *Cronic*’s third prong in its Answer, and the R & R does not contain any discussion of  
6 *Cronic*’s third prong. Since there is no basis in the state court record for analyzing  
7 Petitioner’s claim under the third prong of *Cronic*, the Court is “left with no alternative but  
8 to review independently” that claim. *Delgado*, 223 F.3d at 982. Although the Court reviews  
9 the record independently, “we still defer to the state court’s ultimate decision.” *Pirtle v.*  
10 *Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).

11         In *Cronic*, the Court wrote that a defendant need not prove prejudice under  
12 circumstances where, “although counsel is available to assist the accused during trial, the  
13 likelihood that any lawyer, even a fully competent one, could provide effective assistance is  
14 so small that a presumption of prejudice is appropriate without inquiry into the actual  
15 conduct of the trial.” 466 U.S. 659–60. It suggested that such a circumstance had been  
16 present in the well-known trial of the defendants often referred to as the Scottsboro Boys.  
17 *Powell v. Alabama*, 287 U.S. 45 (1932). In that case, an out-of-state lawyer unfamiliar with  
18 a complex criminal case had been assigned on the day of the trial to represent defendants  
19 who were “young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth  
20 under guard of soldiers, charged with an atrocious crime regarded with especial horror in the  
21 community where they were to be tried,” and who were thereby “put in peril of their lives  
22 within a few moments after counsel for the first time charged with any degree of  
23 responsibility began to represent them.” *Cronic*, 466 U.S. at 660. Under such extreme trial  
24 circumstances, “the likelihood that counsel could have performed as an effective adversary  
25 was so remote as to have made the trial inherently unfair.” *Id.* at 660–61. In *Cronic* itself, the  
26 Court found these special circumstances had not been met when the “court appointed a young  
27 lawyer with a real estate practice to represent respondent, but allowed him only 25 days for  
28 pretrial preparation, even though it had taken the Government over four and one-half years

1 to investigate the case and it had reviewed thousands of documents during that  
2 investigation.” *Cronic*, 466 U.S. at 649.

3 The third prong of *Cronic*, therefore, while technically an ineffective assistance of  
4 counsel claim, may be better understood as a claim that the defendant’s trial was so  
5 fundamentally flawed that no effective assistance was possible. *Cronic*, 466 U.S. at 661 (the  
6 third prong applies in “a case in which the surrounding circumstances made it so unlikely that  
7 any lawyer could provide effective assistance that ineffectiveness was properly presumed  
8 without inquiry into actual performance at trial”). Relief under the third prong of *Cronic* is  
9 granted only in extreme circumstances. For example, a defendant who was tried by a jury on  
10 which seven of the twelve jurors had recently sat on a jury that had convicted his co-  
11 conspirators was entitled to relief because the fact that the jurors had heard and ruled on the  
12 other case made “the adversary process itself presumptively unreliable.” *Quintero v. Bell*,  
13 368 F.3d 892, 893 (6th Cir. 2004), *cert. denied*, 544 U.S. 936. When a trial court prevents  
14 an attorney from engaging in the adversarial process, for example by prohibiting him from  
15 cross-examining a witness that has implicated his client, the third prong of *Cronic* may be  
16 implicated, because the error is “of the first magnitude and no amount of showing of want  
17 of prejudice would cure it.” *U.S. v. Bagley*, 473 U.S. 667, 677 (1985) (citing *Cronic*, 466  
18 U.S. at 659).

19 Cases in which there may have been some error do not necessarily give rise to relief  
20 under the third prong of *Cronic*. Relief is not available, for example, when a judge fails to  
21 inquire as to whether petitioner’s trial lawyer is operating under a conflict of interest.  
22 *Mickens v. Taylor*, 535 U.S. 162, 173 (2002) (“The trial court’s awareness of a potential  
23 conflict neither renders it more likely that counsel’s performance was significantly affected  
24 nor in any other way renders the verdict unreliable.”). Demonstrating that an attorney was  
25 mentally ill is not sufficient grounds for imposing *Cronic*’s presumption of prejudice. *Smith*  
26 *v. Ylst*, 826 F.2d 872, 867 (9th Cir. 1987) (“Although there is merit to the argument that a  
27 mentally unstable attorney may make errors of judgment . . . it is reasonable to treat such  
28 cases under the general rule requiring a showing of prejudice.”).

1           Petitioner argues that the circumstances of the supplemental briefing created a  
2 situation in which no lawyer, even a skilled one, could provide him effective assistance of  
3 counsel. (Doc. 24 at 12). As noted above, the Ninth Circuit has recently issued a decision  
4 regarding judicial coercion in circumstances markedly similar to Petitioner’s trial. In *U.S. v.*  
5 *Evanston*, 651 F.3d 1080, 1082 (9th Cir. 2011), the court considered the following question:

6                           In a case of first impression, we examine whether a district court  
7 may, over defense objection and after the administration of an  
8 unsuccessful *Allen* charge, inquire into the reasons for a trial  
9 jury’s deadlock and then permit supplemental argument focused  
10 on those issues, where the issues in dispute are factual rather  
11 than legal. We conclude that allowing such a procedure in a  
12 criminal trial is an abuse of the discretion accorded district  
13 courts in the management of jury deliberations.

14 In *Evanston*, as in Petitioner’s trial, the jury twice wrote that it was deadlocked, and the trial  
15 court inquired as to the status of the jury’s deliberation before requesting supplemental  
16 argument. *Id.* at 1088. Here, however, Petitioner does not challenge the judge’s actions  
17 directly, and were he to, such a challenge would fail. As the court in *Evanston* noted, the  
18 Arizona Rules of Criminal Procedure explicitly allow for instructions such as the one issued  
19 here. *See* ARIZ. R. CRIM. P. 22.4. The Ninth Circuit in *Evanston* went out of its way to note  
20 that “Arizona’s rule—the first to explicitly allow for supplemental closing arguments of this  
21 nature—was adopted as an alternative means of addressing jury questions and impasse.” 651  
22 F.3d at 1089. The Ninth Circuit explicitly approved of the Arizona state rule, even while  
23 stating that federal criminal courts may not adopt the same rule. *Id.* (“[E]ach of these states  
24 has had the benefit of the formal rulemaking process to weigh the benefits and risks of  
25 allowing supplemental argument.”).

26           More importantly, however, Petitioner is not challenging the supplemental briefing  
27 process directly. Instead he argues that by adopting the process—explicitly allowed for by  
28 the Arizona Rules of Criminal Procedure—the trial court transformed the trial into one where  
“the likelihood that counsel could have performed as an effective adversary was so remote  
as to have made the trial inherently unfair.” *Cronic*, 458 at 660–61. The State’s attorney,  
when provided the opportunity to deliver a supplemental briefing, acknowledged that the

1 fingerprints on the gun were not David's, stated that the evidence showed that B. adored her  
2 mother, and suggested that an 11-year-old could not have caused the bruising found on  
3 Natalie's throat and under her skin. (Doc. 17-7, Ex. X at 5-9). The court offered Petitioner's  
4 attorney the same amount of time to rebut the prosecutor's statements. Even though the  
5 supplemental briefing took place after the parties knew some of the jury's decisions, nothing  
6 suggests that the opportunity for a fully competent attorney to provide effective assistance  
7 was "so small that a presumption of prejudice is appropriate without inquiry into the actual  
8 conduct of the trial." *Cronic*, 466 U.S. at 660. Petitioner's attorney could have emphasized  
9 that the fingerprints were not David's, could have sought to implicate B., could have  
10 suggested that an unknown party was in the house, or could have merely expounded on the  
11 standard of reasonable doubt. Indeed, in his Rule 32 action, Petitioner wrote that his attorney  
12 "had to rebut this argument and failed to do so entirely." (Doc. 18-6 at 5). There is no  
13 question that once the jury had rejected Petitioner's theory of the case, his attorney's  
14 situation was difficult. An attorney faced with a difficult argument, however, is in a  
15 materially different situation than the attorney appointed to represent the Scottsboro Boys on  
16 the eve of their trial. Petitioner was not constructively denied counsel to a degree whereby  
17 prejudice can be presumed. Indeed, as the trial court noted, Petitioner's counsel's "conduct  
18 of the trial exceeded the standard of practice for defense attorneys." (Doc. 18-6, Ex. PP).  
19 Claim One, and therefore the entire petition, is denied.

#### 20 **D. Certificate of Appealability**

21 When a petition for habeas corpus is rejected on the merits, a certificate of  
22 appealability will only issue if the petitioner can demonstrate "that reasonable jurists would  
23 find the district court's assessment of the constitutional claims debatable or wrong." *Slack*  
24 *v. McDaniel*, 529 U.S. 473, 484 (2000). There is no debate that Ground Two is a purely state  
25 claim, and that the state court's dismissal of Petitioner's *Strickland* claim under Ground One  
26 was not directly contrary to federal law. As noted above, only the first two prongs of  
27 Petitioner's *Cronic* claim were addressed at the state court level, but there too, no reasonable  
28 jurist could find that the state court's opinion was directly contrary to federal law. Since the

1 third prong of Petitioner’s *Cronic* claim is subject to a lesser degree of review, and in light  
2 of the Ninth Circuit’s recent ruling on supplemental briefing, the Court finds that a  
3 reasonable jurist could find it “debatable” that Petitioner has made “a substantial showing  
4 of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Petitioner is therefore granted  
5 a Certificate of Appealability on one issue: whether, during supplemental briefing, the trial  
6 became one “in which the surrounding circumstances made it so unlikely that any lawyer  
7 could provide effective assistance that ineffectiveness was properly presumed without  
8 inquiry into actual performance at trial.” *Cronic*, 466 U.S. at 661.

### 9 CONCLUSION

10 As Magistrate Judge Burns noted in the R & R, Petitioner’s second claim is a purely  
11 state issue, and his first claim was properly decided by the trial judge in his order denying  
12 Petitioner’s Rule 32 proceeding. Since the trial judge did not address whether the  
13 supplemental briefing process resulted in a constructive denial of counsel under *Cronic*’s  
14 third prong, however, that question is reviewed under a less stringent standard by this Court,  
15 which nevertheless finds that Petitioner was not denied his constitutional right to counsel. He  
16 is granted a Certificate of Appealability only on the limited issue of whether the  
17 supplemental briefing denied him of his right to counsel under the third prong of *Cronic*.

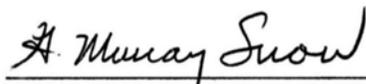
### 18 IT IS THEREFORE ORDERED:

- 19 1. Petitioner’s Amended Petition for the Writ of Habeas Corpus (Doc.7) is  
20 **denied.**
- 21 2. Petitioner’s Motion for Cause Respondents to Serve Answer Pleading on  
22 Petitioner (Doc. 21) is **dismissed as moot.**
- 23 3. The Report and Recommendation (Doc. 19) is **accepted in part and rejected**  
24 **in part.**
- 25 4. Petitioner is issued a Certificate of Appealability for the limited issue of  
26 whether the supplemental briefing denied him his Sixth Amendment rights because it  
27 presented a special circumstance where “the likelihood that any lawyer, even a fully  
28 competent one, could provide assistance is so small that a presumption of prejudice is

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

appropriate.” *Cronic*, 466 U.S. at 659–660.

DATED this 30th day of May, 2012.

  
\_\_\_\_\_  
G. Murray Snow  
United States District Judge