

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 On September 30, 2003, officers pulled over a car driven by Taushia Edwards.
3 (Answer, Ex. A, pgs. 3-4.)¹ Petitioner was a passenger in that car. The officers proceeded
4 to search the car and found a tin with nine packages of methamphetamine, a half-full can of
5 beer, and a hypodermic needle, all beneath the seat where Petitioner had been sitting.
6 (Answer, Ex. A, pg. 5.) Police also searched Petitioner’s person and found a book containing
7 names of known methamphetamine addicts.

8 Petitioner was subsequently arrested and charged with: (1) possession of
9 methamphetamine for sale, a class-2 felony; (2) possession of drug paraphernalia, a class-6
10 felony; and (3) possession of drug paraphernalia to facilitate the sale of drugs, a class-6
11 felony.

12 Petitioner filed two motions in limine. In the first motion, Petitioner sought to
13 preclude the State from referring to his book as a “drug ledger.” In the second, Petitioner
14 sought to preclude the State from introducing evidence that he was seen packaging
15 methamphetamine two weeks prior to the event in question. At the hearing on the motions,
16 Petitioner also sought to exclude evidence that he had previously sold Ms. Edwards
17 methamphetamine and that, on the day of his arrest, he had “fronted” her some
18 methamphetamine. The court denied the motions as to the selling and the fronting of
19 methamphetamine, finding the evidence admissible to show Petitioner’s “intent, preparation,
20 and knowledge,” under Rule 404(b), Ariz. R. Evid. However, the trial court did find the
21 evidence regarding the packaging of methamphetamine two weeks prior to be inadmissible
22 because of its prejudicial effect, remoteness in time, and lack of connection. (Answer, Ex.
23 A, pg. 3.)

24 A jury convicted Petitioner of all three counts. The trial judge then sentenced
25 Petitioner to an aggravated prison term of 6.5 years for Count 1, a 52-day prison term for
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27 ¹ Pursuant to 28 U.S.C. § 2254(e)(1), “a determination of a factual issue made by a State
28 court shall be presumed to be correct.” The facts stated herein are taken from the Arizona Court
of Appeals Memorandum Decision dated November 13, 2006, unless otherwise stated.

1 Count 2, and a 1.5-year prison term, which the court classified as the presumptive term, for
2 Count 3.

3 In November 2006, Petitioner appealed his convictions and sentences to the Arizona
4 Court of Appeals. He raised two arguments.

5 1. The trial court erred by permitting the introduction of evidence of numerous prior acts
6 in violation of Ariz. R. Evid. 404(b), including evidence that:

7 a. Petitioner previously sold methamphetamine to Ms. Edwards;

8 b. Petitioner “fronted” Ms. Edwards a small amount of methamphetamine on the
9 day of his arrest; and

10 c. Petitioner engaged in prior methamphetamine transactions as recorded in
11 Petitioner’s book/“drug ledger.”

12 2. The trial court erred in sentencing Petitioner on Count 3 because the 1.5-year term
13 was not the presumptive term the court intended to impose.

14 (Answer, Ex. B, pgs. 16-24.)

15 The Arizona Court of Appeals affirmed the convictions and sentences for Counts 1
16 and 2, and modified the sentence for Count 3 to conform with the court’s oral pronouncement
17 of the one-year presumptive term of imprisonment. Petitioner did not seek review by the
18 Arizona Supreme Court.²

19 On January 29, 2007, the Petitioner filed his Petition for Writ of Habeas Corpus in
20 federal court. In his Petition, Petitioner presents one claim for relief: Petitioner was denied
21 his Sixth and Fourteenth Amendment rights when the trial court admitted evidence of other
22 crimes, wrongs, or acts. (Petition, pg. 5.)

23 Respondents contend that the Petition should be denied on the grounds of failure to
24 exhaust state court remedies because Petitioner failed to: (1) present the claims to the
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26 ² In his Petition for Writ of Habeas Corpus, Petitioner claims that he filed a Petition for
27 Post-Conviction Relief with the Greenlee County Superior Court, and that his claim was denied.
28 Respondents do not address this in their Answer. This Court has confirmed with the Greenlee
County Superior Court that Petitioner filed a Petition for an Extension of Time, which was
granted, but he did not subsequently file the Petition for Post-Conviction Relief.

1 Arizona Supreme Court and (2) present his claims as federal claims in state court. (Answer,
2 pgs. 5-8.)

3 In his Traverse, Petitioner argues that Arizona prisoners do not have to present their
4 claims to the Arizona Supreme Court in order to exhaust state court remedies. (Traverse,
5 pgs. 1-3.) He also contends that he presented his federal claims in state court because the
6 state court relied on state law that in turn relied on federal law. (Traverse, pgs. 4-5.)

7 DISCUSSION

8 The Magistrate Judge concludes that Petitioner was not required to present his claims
9 to the Arizona Supreme Court; however, Petitioner failed to exhaust his state court remedies
10 because he did not originally present his claims as federal issues. Accordingly, the
11 Magistrate Judge recommends that the Petition be denied.

12 **A. Exhaustion Principles**

13 Ordinarily, before a federal court will consider the merits of a habeas petition, the
14 petitioner must exhaust the remedies available to him in state court. 28 U.S.C.
15 §2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270, 275 (1971). First enunciated in *Ex parte*
16 *Royall*, 117 U.S. 241 (1886), the exhaustion requirement is designed “not to create a
17 procedural hurdle on the path to federal habeas court, but to channel claims into an
18 appropriate forum, where meritorious claims may be vindicated and unfounded litigation
19 obviated before resort to federal court.” *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).
20 The requirement is grounded in principles of comity, and reflects a desire to protect the state
21 courts’ role in the enforcement of federal law. *Castille v. Peoples*, 489 U.S. 346, 349 (1989)
22 (citation omitted). The requirement is also based on a pragmatic consideration that fully
23 exhausted claims will usually be accompanied by a complete factual record once they reach
24 federal court. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

25 A petitioner must exhaust his claims by fairly presenting them in state court, either
26 through a direct appeal or collateral proceedings, before a federal court will consider the
27 merits of habeas corpus claims pursuant to 28 U.S.C. § 2254. *See Rose*, 455 U.S. at 519. A
28 petitioner must have also presented his claim in a procedural context in which its merits will

1 be considered. *See Castille*, 489 U.S. at 351. A habeas petitioner’s claims may be precluded
2 from federal review on exhaustion grounds in either of two ways. First, a claim may be
3 procedurally defaulted in federal court if it was actually raised in state court but found by that
4 court to be defaulted on state procedural grounds. *See Coleman v. Thompson*, 501 U.S. 722,
5 729-30 (1991). Second, the claim may be procedurally defaulted in federal court if the
6 petitioner failed to present the claim in a necessary state court and “the court to which the
7 petitioner would be required to present his claims in order to meet the exhaustion
8 requirement would now find the claims procedurally barred.” *Id.* at 735 n.1. If a petitioner
9 has procedurally defaulted a claim in state court, a federal court will not review the claim
10 unless the petitioner shows “cause and prejudice” for the failure to present the constitutional
11 issue to the state court, or makes a colorable showing of actual innocence. *See Gray v.*
12 *Netherland*, 518 U.S. 152, 162 (1996); *Sawyer v. Whitley*, 505 U.S. 333, 337 (1992); and
13 *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

14 **B. Failure to Present the Claim to the Arizona Supreme Court**

15 Respondents contend that Petitioner has failed to exhaust his state court remedies
16 because he did not raise his claim to the Arizona Supreme Court through the available option
17 of a petition for review. In *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (1999), the Ninth
18 Circuit held that, in cases not carrying a life sentence or the death penalty, “claims of Arizona
19 state prisoners are exhausted for purposes of federal habeas once the Arizona Court of
20 Appeals has ruled on them.” There is no dispute that Petitioner met the exhaustion
21 requirements described in *Swoopes* by appealing the trial court’s adverse ruling to the
22 Arizona Court of Appeals. Respondents, however, suggest that *Swoopes* was incorrectly
23 decided and has been implicitly overruled by more recent case law. In support of their
24 argument, Respondents cite *Baldwin v. Reese*, 541 U.S. 27 (2004).

25 In *Baldwin*, the Supreme Court addressed the question of what constitutes notice of
26 the federal nature of a claim sufficient to satisfy the fair presentment requirement found in
27 28 U.S.C. § 2254(b)(1). In laying the groundwork for its decision, the Supreme Court stated
28 that “[t]o provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly

1 present' his claim in each appropriate state court (including a state supreme court with
2 powers of discretionary review), thereby alerting that court to the federal nature of the
3 claim.” 541 U.S. at 29 (citations omitted). Respondents assert that this statement supports
4 a finding that *Swoopes*, at least insofar as it denies the need for habeas petitioners to seek
5 review in a the highest state court, is no longer valid.

6 This reading of *Baldwin* is too limited. *Swoopes* was decided on remand to the Ninth
7 Circuit for reconsideration in light of the Supreme Court’s decision in *O’Sullivan v. Boerckel*,
8 526 U.S. 838 (1999). In *Swoopes*, the Ninth Circuit, just like the *Baldwin* court, began by
9 reiterating the general rule stated in *O’Sullivan* that, “in order to satisfy the exhaustion
10 requirement for federal habeas relief, state prisoners must file for discretionary review in a
11 state supreme court when that review is part of ordinary appellate review.” *Swoopes*, 196
12 F.3d at 1009. The court recognized, however, that the Supreme Court in *O’Sullivan* had
13 “acknowledged an exception to the exhaustion requirement,” by making it clear the “the
14 creation of a discretionary review system does not, *without more*, make review’ in a state
15 supreme court ‘unavailable.’” *Swoopes*, 196 F.3d at 1009 (quoting *O’Sullivan*, 526 U.S. at
16 839) (emphasis added in *Swoopes*). The Ninth Circuit proceeded to review Arizona’s
17 discretionary review system and found considerations that compelled a finding that, in other
18 than capital cases, appeal to the Arizona Supreme Court was unnecessary. Specifically, the
19 court concluded that two Arizona cases, *State v. Shattuck*, 140 Ariz. 582, 684 P.2d 154
20 (1984), and *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989), made it clear that, “in cases
21 not carrying a life sentence or the death penalty, review need not be sought before the
22 Arizona Supreme Court in order to exhaust state remedies.” *Swoopes*, 196 Ariz. at 1010.
23 Thus, the court concluded, “post-conviction review before the Arizona Supreme Court is a
24 remedy that is ‘unavailable’ within the meaning of *O’Sullivan*.” *Baldwin* does not clearly
25 conclude that this analysis is flawed.

26 Also strongly suggestive of the continued vitality of *Swoopes* is that the Ninth Circuit
27 continues to cite the case for the proposition Respondents suggest was overruled. In *Castillo*
28 *v. McFadden*, 399 F.3d 993 (9th Cir. 2005), the court repeated the principle that “[i]n cases

1 not carrying a life sentence or the death penalty, ‘claims of Arizona state prisoners are
2 exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on
3 them.’” *Id.* at 998 n. 3, quoting *Swoopes*, 196 Ariz. at 1010. At least one other circuit has
4 also cited *Swoopes* for this proposition without questioning its continuing validity. *See*
5 *Lambert v. Blackwell*, 387 F.3d 210 (3rd Cir. 2004).

6 Consequently, the Magistrate Judge concludes that Petitioner exhausted his state court
7 remedies to the extent that he properly presented his claim to the Court of Appeals for
8 review.

9 **C. Failure to Present the Federal Claim in the State Courts**

10 Although Petitioner presented his claim on direct review, he failed to argue that claim
11 based on federal law. In his Petition, Petitioner alleges that his Sixth and Fourteenth
12 Amendment rights were violated when the trial court admitted evidence of other crimes,
13 wrongs, or acts. On direct review, however, Petitioner argued to the Court of Appeals that
14 the evidence was wrongly admitted under Rule 404(b), Ariz. R. Evid. Nevertheless,
15 Petitioner claims that he sufficiently presented his federal claims in state court because the
16 state court based its decision on state law that relies on federal law. (Traverse, pg. 4.)

17 To properly exhaust state remedies, the petitioner must “fairly present” his claims to
18 the state’s highest court in a procedurally appropriate matter. *O’Sullivan*, 526 U.S. at 848.
19 A claim is “fairly presented” if the petitioner has described the operative facts and the federal
20 legal theory on which his claim is based so that the state courts have a fair opportunity to
21 apply controlling legal principles to the facts bearing upon his constitutional claim.
22 *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard*, 404 U.S. at 277-78 (1971). Resolving
23 whether a petitioner has fairly presented his claim to the state court is an intrinsically federal
24 issue to be determined by the federal court. *Wylde v. Hundley*, 69 F.3d 247, 251 (8th Cir.
25 1995); *Harris v. Champion*, 15 F.3d 1538, 1556 (10th Cir. 1994). Commenting on the
26 importance of fair presentation, the U.S. Supreme Court has stated:

27 If state courts are to be given the opportunity to correct alleged
28 violation of prisoners’ federal rights, they must surely be alerted to the
fact that the prisoners are asserting claims under the United States

1 Constitution. If a habeas prisoner wishes to claim that an evidentiary
2 ruling at a state court trial denied him the due process of law guaranteed
3 by the Fourteenth Amendment, he must say so, not only in federal
4 court, but in state court.

5 *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam). Following *Duncan*, the Ninth
6 Circuit has held that a state prisoner has not “fairly presented” (and thus has not exhausted)
7 federal claims in state court unless he specifically indicated to that court that the claims were
8 based on federal law. See, e.g., *Lyons v. Crawford*, 232 F.3d 666, 669-70 (2000), as
9 amended by 247 F.3d 904 (9th Cir. 2001) (general reference to insufficiency of evidence,
10 right to be tried by impartial jury, and ineffective assistance of counsel lacked specificity and
11 explicitness required to present federal claim) and *Shumway v. Payne*, 223 F.3d 982, 987-88
12 (9th Cir. 2000) (broad reference to “due process” insufficient to present federal claim); see
13 also *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (“The mere similarity between
14 a claim of state and federal error is insufficient to establish exhaustion.”).

15 In state court, Petitioner alleged facts which form the bases of his claim, but presented
16 the claim as a violation of state evidentiary law. (Answer, Ex. A, pg. 16). Petitioner failed
17 to make any reference to the U.S. Constitution, a federal statute, or a federal case.
18 Consequently, the state court was not alerted to a federal claim. Because Petitioner’s federal
19 claim was not fairly presented in state court, it remains unexhausted absent a showing of
20 cause and prejudice or a fundamental miscarriage of justice, which Petitioner does not allege.

21 **RECOMMENDATION**

22 Based on the foregoing, the Magistrate Judge recommends that the District Court,
23 after its independent review, enter an order DENYING the Petition for Writ of Habeas
24 Corpus.

25 Pursuant to 28 U.S.C. § 636(b), any party may serve and file written objections within
26 ten days of being served with a copy of the Report and Recommendation. If objections are
27 not timely filed, they may be deemed waived. If objections are filed, the parties should use
28 the following case number: **CIV 07-00052-TUC-FRZ**.

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

DATED this 24th day of March, 2009.


Jennifer C. Guerin
United States Magistrate Judge