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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Wenceslao Cruz,) No. CIV 12-487-TUC-RCC (LAB)

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Petitioner,) **ORDER**

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vs.)

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Charles L. Ryan; et al.,)

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Respondents.)

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Pending before the court is a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, filed on July 2, 2012, by Wenceslao Cruz, an inmate confined in the Arizona State Prison Complex in Douglas, Arizona. (Doc. 1)

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Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Bowman for report and recommendation.

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The Magistrate Judge recommends the District Court, after its independent review of the record, enter an order denying the petition. The trial court's denial of Cruz's motion to dismiss the charges did not violate due process. Cruz's other claims are procedurally defaulted.

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Summary of the Case

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Cruz was found guilty after a jury trial of fleeing from a law enforcement vehicle. (Doc. 6, p. 2) The trial court sentenced Cruz to a six-year term of imprisonment. (Doc. 6, p. 2)

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1 On direct appeal, Cruz argued the trial court erred when it denied his motion to dismiss
2 the charges. (Doc. 6-1) The Arizona Court of Appeals affirmed his conviction and sentence
3 on August 18, 2011. (Doc. 6-1, p. 10) The Arizona Supreme Court denied review on February
4 15, 2012. (Doc. 6, p. 3) The court of appeals issued its mandate on June 19, 2013.
5 <http://www.appeals2.az.gov/ODSPlus/caseInfolast.cfm?caseID=121890>.

6 On July 2, 2012, Cruz filed the pending petition for Writ of Habeas Corpus pursuant to
7 28 U.S.C. § 2254. (Doc. 1) He claims (1) the trial court erred when it denied his motion to
8 dismiss the charges; (2) his right to a speedy trial was violated; (3) trial counsel was ineffective
9 for failing to introduce the 911 tapes into evidence; and (4) the trial court's statement that the
10 prosecutor should "drop the case and refile" was prosecutorial and judicial misconduct. (Doc.
11 1, 1-1)

12 In their answer, the respondents argue Cruz's claims are procedurally defaulted. (Doc.
13 6) Cruz did not file a reply.

14 15 Discussion

16 The writ of habeas corpus affords relief to persons in custody in violation of the
17 Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). If the petitioner is
18 in custody pursuant to the judgment of a state court, the writ will not be granted unless prior
19 adjudication of the claim –

20 (1) resulted in a decision that was contrary to, or involved an unreasonable
21 application of, clearly established Federal law, as determined by the Supreme
Court of the United States; or

22 (2) resulted in a decision that was based on an unreasonable determination
23 of the facts in light of the evidence presented in the State court proceeding.

24 28 U.S.C. § 2254(d). The petitioner must shoulder an additional burden if the state court
25 considered the issues and made findings of fact.

26 In a proceeding instituted by an application for a writ of habeas corpus by a
27 person in custody pursuant to the judgment of a State court, a determination of
28 a factual issue made by a State court shall be presumed to be correct. The
applicant shall have the burden of rebutting the presumption of correctness by
clear and convincing evidence.

1 28 U.S.C.A. § 2254 (e)(1).

2 A decision is “contrary to” Supreme Court precedent if the “state court confronted a set
3 of facts that are materially indistinguishable from a decision of the Supreme Court and
4 nevertheless arrived at a result different from Supreme Court precedent.” *Vlasak v. Superior*
5 *Court of California ex rel. County of Los Angeles*, 329 F.3d 683, 687 (9th Cir. 2003). A
6 decision is an “unreasonable application” if “the state court identified the correct legal
7 principles, but applied those principles to the facts of [the] case in a way that was not only
8 incorrect or clearly erroneous, but objectively unreasonable.” *Id.* If the state court denied on
9 the merits but did not explain its reasoning, this court must independently review the record to
10 determine whether the state court clearly erred in its application of Supreme Court law. *Pirtle*
11 *v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002), *cert. denied*, 539 U.S. 916 (2003). If the
12 highest state court fails to explain its decision, this court looks to the last reasoned state court
13 decision. *See Brown v. Palmateer*, 379 F.3d 1089, 1092 (9th Cir. 2004).

14 Federal habeas review is limited to those issues that have been fully presented to the state
15 court. This so-called “exhaustion rule” reads in pertinent part as follows:

16 An application for a writ of habeas corpus on behalf of a person in custody
17 pursuant to the judgment of a State court shall not be granted unless it appears
18 that – (A) the applicant has exhausted the remedies available in the courts of the
19 State. . . .

20 28 U.S.C. § 2254(b)(1)(A). This rule permits the states “the opportunity to pass upon and
21 correct alleged violations of its prisoners’ federal rights.” *Duncan v. Henry*, 513 U.S. 364, 365
(1995) (internal punctuation removed).

22 To be properly exhausted, the federal claim must be “fairly presented” to the state courts.
23 *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512 (1971). In other words, the state courts
24 must be apprised of the issue and given the first opportunity to rule on the merits. *Id.* at 275-76.
25 Accordingly, the petitioner must “present the state courts with the same claim he urges upon the
26 federal courts.” *Id.* “The state courts have been given a sufficient opportunity to hear an issue
27 when the petitioner has presented the state court with the issue’s factual and legal basis.”
28 *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999).

1 In addition, the petitioner must explicitly alert the state court that he is raising a federal
2 constitutional claim. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Casey v. Moore*, 386 F.3d
3 896, 910-11 (9th Cir. 2004), *cert. denied*, 545 U.S. 1146 (2005). The petitioner must make the
4 federal basis of the claim explicit either by citing specific provisions of federal law or federal
5 case law, even if the federal basis of a claim is “self-evident,” *Gatlin v. Madding*, 189 F.3d 882,
6 888 (9th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000), or by citing state cases that explicitly
7 analyze the same federal constitutional claim, *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th
8 Cir. 2003) (en banc).

9 If the petitioner is in custody pursuant to a judgment imposed by the State of Arizona,
10 he must present his claims to the state appellate court for review. *Castillo v. McFadden*, 399
11 F.3d 993, 998 (9th Cir. 2005), *cert. denied*, 546 U.S. 818 (2005); *Swoopes v. Sublett*, 196 F.3d
12 1008 (9th Cir. 1999), *cert. denied*, 529 U.S. 1124 (2000). If state remedies have not been
13 exhausted, the petition may not be granted and ordinarily should be dismissed. *See Johnson v.*
14 *Lewis*, 929 F.2d 460, 463 (9th Cir. 1991). In the alternative, the court has the authority to deny
15 on the merits rather than dismiss for failure to exhaust. 28 U.S.C. § 2254(b)(2).

16 A claim is “procedurally defaulted” if the state court declined to address the issue on the
17 merits for procedural reasons. *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002).
18 Procedural default also occurs if the claim was not presented to the state court and it is clear the
19 state would now refuse to address the merits of the claim for procedural reasons. *Id.*

20 Procedural default may be excused if the petitioner can “demonstrate cause for the
21 default and actual prejudice as a result of the alleged violation of federal law, or demonstrate
22 that failure to consider the claims will result in a fundamental miscarriage of justice.” *Boyd v.*
23 *Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998). A fundamental miscarriage of justice results
24 “where a constitutional violation has probably resulted in the conviction of one who is actually
25 innocent.” *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649 (1986).

26
27 Discussion: Claims 2-4
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1 The respondents argue claims 2-4 were not raised in Cruz’s direct appeal and are now
2 procedurally defaulted. The court agrees.

3 Cruz did not present these claims to the Arizona Court of Appeals. (Doc. 6-1) They
4 were not properly exhausted. Moreover, Cruz cannot return to state court and litigate them now.
5 Claims 2 and 4 are precluded because they should have been raised on direct appeal.
6 Ariz.R.Crim.P. 32.2. Claim 3 should have been brought in a Rule 32 post-conviction relief
7 petition, but the time for filing such a petition is now passed. Ariz.R.Crim.P. 32.4(a). These
8 three claims are procedurally defaulted. *See Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir.
9 2002). Cruz did not file a reply arguing his default should be excused or that failure to consider
10 the claims will result in a fundamental miscarriage of justice. *See Boyd v. Thompson*, 147 F.3d
11 1124, 1126 (9th Cir. 1998).

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13 Discussion: Claim 1

14 The respondents argue Claim 1 also was not properly exhausted because Cruz never
15 alerted the court of appeals that he was raising a federal constitutional claim. The court is not
16 entirely convinced.

17 In his brief before the court of appeals, Cruz argued the trial court’s denial of his motion
18 to dismiss violated his “due process” rights. (Doc. 6-1, pp. 12-26) He cited to a case, *State v.*
19 *Huffman*, 222 Ariz. 416, 419-20, 215 P.3d 390, 393-94 (App. 2009), that analyzed when a
20 failure to dismiss violates the Due Process Clause of the Federal Constitution. *Id.* Accordingly,
21 it appears that Cruz did alert the court of appeals that his claim was federal in nature. *See*
22 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). This court need not analyze
23 the issue, however, because the claim may be denied on the merits regardless. *See* 28 U.S.C. §
24 2254(b)(2).

25 During the pretrial discovery process, Cruz moved for a continuance because his
26 investigator had not been able to interview all of the state’s law enforcement witnesses. (Doc.
27 6-1, pp. 8-9) The trial court denied the motion and ordered the state to produce its witnesses
28 two days later. *Id.* The state, however, failed to produce two of its witnesses by the court’s

1 deadline. *Id.* The court ordered the witnesses precluded, but permitted the state to dismiss the
2 charges without prejudice. *Id.* When the state refiled the charges, the defendant filed a motion
3 to dismiss, which was denied. (Doc. 6-1, pp. 3-4)

4 In the pending petition, Cruz claims his due process rights were violated when the trial
5 court denied his motion to dismiss the refiled charges. The court does not agree.

6 As the Arizona Court of Appeals observed, the Due Process Clause is implicated only
7 where the refile of charges after a previous dismissal results in actual prejudice. (Doc. 6-1,
8 pp. 8-9) And here, there was none. *Id.* There was no evidence that “memories had dimmed,
9 evidence was lost, and witnesses were unavailable or could not be found and a fair trial was not
10 possible.” *Id.* Accordingly, the Due Process Clause was not violated by the trial court’s
11 failure to grant the defendant’s motion to dismiss. *See U.S. v. Marion*, 404 U.S. 307, 324, 92
12 S.Ct. 455, 465 (1971) (“Thus, the Government concedes that the Due Process Clause of the
13 Fifth Amendment would require dismissal of the indictment if it were shown at trial that the
14 pre-indictment delay in this case caused substantial prejudice to appellees’ rights to a fair trial
15 and that the delay was an intentional device to gain tactical advantage over the accused.”);
16 *James v. Mauldin*, 2010 WL 366722, 19-21 (D.Ariz. 2010) (Due process was not violated
17 where the state filed aggravated DUI charges shortly after the original misdemeanor DUI
18 charges were dismissed without prejudice.).

19 Cruz further argues that by allowing the state to dismiss the charges and then refile, the
20 trial court allowed it to avoid the previously imposed discovery sanction. This, he maintains,
21 violated the letter and spirit of the state rules of criminal procedure.

22 The Arizona Court of Appeals, however, ruled that the trial court did not abuse its
23 discretion when it allowed the state to dismiss the charges without prejudice. (Doc. 6-1, p. 8)
24 And this court must defer to a state court’s interpretation of its own laws. *Himes v. Thompson*,
25 336 F.3d 848, 852 (9th Cir. 2003). There was no violation of state law here. Moreover, even
26 if there were an error of state procedural law, habeas relief still would not lie.

27 The writ of habeas corpus is not available to redress errors of state procedural law. The
28 only issue before this court is whether the petitioner received a fair trial in accordance with due

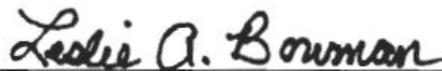
1 process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919 -920 (9th Cir. 1991) (“The issue for us,
2 always, is whether the state proceedings satisfied due process; the presence or absence of a state
3 law violation is largely beside the point.”). For example, the admission of testimony that is
4 arbitrary or prejudicial could, in certain circumstances, violate due process. *Walters v. Maass*,
5 45 F.3d 1355, 1357 (9th Cir. 1995). Cruz, however, does not argue that there was anything
6 wrong with the witnesses’ testimony, only with the pretrial procedure. Absent any evidence that
7 this procedure resulted in a trial so arbitrary and fundamentally unfair as to violate due process,
8 habeas relief is not indicated. The decision of the Arizona Court of Appeals denying relief was
9 not “contrary to” or “an unreasonable application of” federal law. *See* 28 U.S.C. § 2254(d).

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11 RECOMMENDATION

12 The Magistrate Judge recommends that the District Court, after its independent review
13 of the record, enter an order DENYING the Petition for Writ of Habeas Corpus. (Doc. 1)

14 Pursuant to 28 U.S.C. §636 (b), any party may serve and file written objections within
15 14 days of being served with a copy of this report and recommendation. If objections are not
16 timely filed, they may be deemed waived. Reply briefs are not permitted under the Local Rules.

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18 DATED this 12th day of September, 2013.

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22 Leslie A. Bowman
23 United States Magistrate Judge
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