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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 James Elliott Romeo,  
10 Petitioner,

11 v.

12 Charles Ryan, et al.,  
13 Respondents.  
14

No. CV-14-00351-TUC-EJM

**ORDER**

15  
16 Petitioner James Elliott Romeo filed a pro se petition for a Writ of Habeas Corpus  
17 pursuant to 28 U.S.C. § 2254 challenging his convictions for armed robbery, aggravated  
18 robbery, kidnapping, and aggravated assault. (Doc. 1). Petitioner raises four grounds for  
19 relief: (1) ineffective assistance of trial counsel (“IAC”); (2) prosecutorial misconduct;  
20 (3) abuse of discretion by the trial court; and (4) trial counsel’s low standard of  
21 performance.<sup>1</sup> Respondents filed an Answer contending that Petitioner failed to properly  
22 exhaust his claims and that all of the claims are therefore procedurally defaulted and  
23 barred from review by this Court. (Doc. 19).

24 As to Grounds One and Two of the petition, and sub claims (c) through (f) of  
25 Ground Three, the Court finds that Petitioner failed to properly present these claims to

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27 <sup>1</sup> Each of these claims includes a number of sub claims, discussed below in sections I (C).  
28 and III.

1 the Arizona Court of Appeals (“COA”); thus, the claims are procedurally defaulted and  
2 barred from this Court’s review. The Court further finds that Petitioner does not  
3 demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse the  
4 procedural default of his claims. As to sub claims (a) and (b) in Ground Three and sub  
5 claims (a) and (b) in Ground Four, the Court finds that while Petitioner arguably  
6 presented these claims to the Arizona COA, he failed to describe the federal basis for  
7 these claims, and thus they were not fairly presented to the state courts for review. The  
8 Court further finds that Petitioner does not demonstrate cause and prejudice or a  
9 fundamental miscarriage of justice to excuse the procedural default of these claims.  
10 Accordingly, the petition will be denied.

11 **I. FACTUAL AND PROCEDURAL BACKGROUND**

12 **A. Trial, Sentencing, and Appeal**

13 On August 29, 2011, a Cochise County Superior Court jury found Petitioner guilty  
14 of five counts of armed robbery, five counts of aggravated robbery, nine counts of  
15 kidnapping, and twelve counts of aggravated assault. (Doc. 1; Doc. 19 Ex. J at ¶1).  
16 Petitioner was sentenced to a combination of concurrent and consecutive presumptive  
17 prison terms for a total of 104 years. (Doc. 19 Ex. D; Ex. J at ¶1).

18 The Arizona COA summarized the facts of the case as follows:

19 The evidence shows that, in November 2009, Romeo and  
20 several accomplices entered a residence and bound the four  
21 adults in the home with duct tape. Four minors in the home—  
22 two under the age of fifteen—also were taken captive, as was  
23 a fifth adult who had arrived during the incident. Romeo  
24 punched and kicked one of the victims several times, and  
punched another, also using a taser on that victim. At least  
one of Romeo’s accomplices carried a gun throughout the  
incident, threatening several victims. The assailants took  
items from the adult victims.

25 (Doc. 19 Ex. J at ¶3).

26 Following his conviction, Petitioner sought review in the Arizona COA.  
27 Appointed counsel filed a brief stating that he had searched the record and found no  
28 errors or arguable questions of law, and asked the court to review the record for

1 reversible error. (Doc. 19 Ex. H). Appointed counsel further requested that Petitioner be  
2 allowed to file a pro se supplemental brief. Petitioner filed his brief on February 15, 2012  
3 and argued that the trial court improperly denied his motion for a new attorney, that his  
4 speedy trial rights were violated, and that there were two jurors who stated that they were  
5 friends with the victims and that while one juror was dismissed, the other juror remained  
6 on the jury and Petitioner believed the juror's judgment was affected. (Doc. 19 Ex. I). On  
7 May 4, 2012, the COA found no reversible error and affirmed Petitioner's conviction and  
8 sentence. (Doc. 19 Ex. J).

### 9 **B. Petition for Post-Conviction Relief**

10 On February 8, 2012, Petitioner initiated proceedings in Cochise County Superior  
11 Court for post-conviction relief ("PCR"). (Doc. 19 Ex. L). The trial court appointed  
12 counsel to represent Petitioner, and counsel filed the Rule 32 petition on October 15,  
13 2012. (Doc. 19 Exs. M, N). Petitioner raised issues of abuse of discretion by the trial  
14 court, prosecutorial misconduct, and IAC. Petitioner first alleged that the trial court  
15 abused its discretion by 1) failing to hold a hearing on Petitioner's motion for new  
16 counsel and 2) by designating the case "complex" and thereby violating Petitioner's  
17 speedy trial rights. (Doc. 19 Ex. N). Petitioner also alleged prosecutorial misconduct  
18 based on the prosecutor allegedly giving the trial court false information regarding the  
19 standard applicable to Petitioner's motion for new counsel. Finally, Petitioner alleged  
20 IAC based on trial counsel's 1) failure to make sure that Petitioner had a hearing on his  
21 motion for new counsel; 2) failure to effectively argue and make a record for appeal  
22 regarding the motion for new counsel; 3) failure to alert the trial court the prosecutor's  
23 misstatement of law, thus failing to preserve a record of the issue for appeal; 4) failure to  
24 argue against the complex case designation and demand written, supportive findings for  
25 the designation, thereby waiving the issue for appeal; 5) general ineffective investigation;  
26 6) failure to disclose, subpoena, and call as a witness victim-witness Michael Bejarano,  
27 Jr.; and 7) failure to request a hearing or otherwise litigate whether the in-court  
28 identification of Petitioner by the juvenile victims was the result of undue suggestion.

1           The trial court denied PCR on January 17, 2013. (Doc. 19 Ex. O). Petitioner did  
2 not file a petition for review with the Arizona COA. Instead, on August 23, 2013,  
3 Petitioner filed a motion in Cochise County Superior Court requesting that counsel be  
4 appointed to file a petition for review on his behalf. (Doc. 19 Ex. P). On November 18,  
5 2013, Petitioner filed a motion requesting leave to file a delayed petition for review.  
6 (Doc. 19 Ex. Q). In his motion, Petitioner alleged that he had previously filed three  
7 motions requesting appointment of counsel,<sup>2</sup> but that the trial court had never responded,  
8 and that he had recently been advised by the prison paralegal to file a motion for  
9 permission to file a delayed petition for review. On November 20, 2013, the court denied  
10 Petitioner's motion to file a delayed petition for review. (Doc. 19 Ex. R).

### 11           **C. Habeas Petition**

12           Petitioner filed his Petition for Writ of Habeas Corpus (PWHC) in this Court on  
13 January 9, 2014, asserting four grounds for relief. (Doc. 1). In Ground One, Petitioner  
14 contends that trial counsel was ineffective for: (a) failing to file a motion to suppress  
15 testimony or impeach witness Lashawn Smith; (b) failing to filing a motion for a special  
16 jury instruction; (c) failing to file a motion opposing the complex case designation; (d)  
17 failing to file a motion to subpoena victim Michael Bejarano; (e) failing to file a motion  
18 for hardship; and (f) failing to file a motion regarding the denial of Petitioner's speedy  
19 trial rights. In Ground Two, Petitioner alleges that the prosecutor: (a) offered a witness  
20 immunity; (b) threatened to take a witness's children; (c) caused Petitioner's attorney to  
21 prove that Michael Bejarano was a victim; (d) filed for a complex case hearing without  
22 having reasonable cause to do so; (e) called Lashawn Smith to testify when there was an  
23 ongoing custody battle between Ms. Smith and Petitioner; (f) denied Petitioner the right  
24 to confront his accuser at trial; and (g) failed to identify who called 911. In Ground  
25 Three, Petitioner argues the trial court abused its discretion by: (a) denying Petitioner's  
26 request for a speedy trial; (b) denying Petitioner's request to change counsel; (c) failing to  
27 give a jury instruction on the prosecutor's duty to prove every element of the charges

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28           <sup>2</sup> However, the docket only shows one motion filed on August 23, 2013.

1 beyond a reasonable doubt; (d) failing to grant Petitioner’s request for a Rule 20 hearing;  
2 (e) running some of Petitioner’s sentences consecutively; and (f) disproportionately  
3 sentencing Petitioner and not making some of his sentences concurrent. In Ground Four,  
4 Petitioner alleges his trial counsel had a low standard of performance because she: (a)  
5 failed to disqualify a juror who admitted to being a friend of one of the victims; and (b)  
6 failed to disqualify a juror who had limited understanding of English. Petitioner states  
7 that not all of the grounds in his Petition were presented to the Arizona COA because his  
8 trial counsel did not make a record on motion for appeals purposes.

9 Respondents contend that all of Petitioner’s claims are unexhausted and  
10 procedurally defaulted. Respondents specifically state that in the Rule 32 Petition, the  
11 only IAC claim Petitioner presented was counsel’s failure to call one of the victims as a  
12 witness. However, because Petitioner failed to file a petition for review with the COA  
13 after the trial court denied his Rule 32 Petition, this claim is unexhausted and  
14 procedurally defaulted. Respondents also note that Petitioner raised prosecutorial  
15 misconduct claims in his Rule 32 Petition, but that the trial court found the claims  
16 precluded by Rule 32.2(a), and Petitioner failed to file a petition for review with the  
17 COA. Finally, Respondents note that Petitioner did present claims to the COA regarding  
18 the trial court’s failure to grant a change in counsel, the trial court’s abuse of discretion in  
19 denying Petitioner’s speedy trial rights, and trial counsel’s failure to challenge the two  
20 jurors, but allege that Petitioner did not present these claims as specifically federal  
21 claims. Respondents further state that the COA found Petitioner had waived these claims  
22 by failing to comply with Rule 31.13(c), and that the claims are therefore precluded by  
23 the COA’s express finding of procedural default.

## 24 **II. STANDARD OF REVIEW**

25 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) limits the  
26 federal court’s power to grant a petition for a writ of habeas corpus on behalf of a state  
27 prisoner. First, the federal court may only consider petitions alleging that a person is in  
28 state custody “in violation of the Constitution or laws or treaties of the United States.” 28

1 U.S.C. § 2254(a). Sections 2254(b) and (c) provide that the federal courts may not grant  
2 habeas corpus relief, with some exceptions, unless the petitioner exhausted state  
3 remedies. Additionally, if the petition includes a claim that was adjudicated on the merits  
4 in state court proceedings, federal court review is limited by section 2254(d).

5 **A. Exhaustion**

6 A state prisoner must exhaust his state remedies before petitioning for a writ of  
7 habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *O’Sullivan v. Boerckel*, 526  
8 U.S. 838, 842 (1999). To exhaust state remedies, a petitioner must afford the state courts  
9 the opportunity to rule upon the merits of his federal claims by fairly presenting them to  
10 the state’s highest court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S.  
11 27, 29 (2004) (“[t]o provide the State with the necessary opportunity, the prisoner must  
12 fairly present her claim in each appropriate state court . . . thereby alerting the court to the  
13 federal nature of the claim.”). In Arizona, unless a prisoner has been sentenced to death,  
14 the highest court requirement is satisfied if the petitioner has presented his federal claim  
15 to the Arizona COA, either through the direct appeal process or post-conviction  
16 proceedings. *Crowell v. Knowles*, 483 F.Supp.2d 925, 931–33 (D. Ariz. 2007).

17 A claim is fairly presented if the petitioner describes both the operative facts and  
18 the federal legal theory upon which the claim is based. *Kelly v. Small*, 315 F.3d 1063,  
19 1066 (9th Cir. 2003), *overruled on other grounds*, *Robbins v. Carey*, 481 F.3d 1143 (9th  
20 Cir. 2007). The petitioner must have “characterized the claims he raised in state  
21 proceedings *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th  
22 Cir. 2000) (emphasis in original), *opinion amended and superseded*, 247 F.3d 904 (9th  
23 Cir. 2001). “If a petitioner fails to alert the state court to the fact that he is raising a  
24 federal constitutional claim, his federal claim is unexhausted regardless of its similarity to  
25 the issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).  
26 “Moreover, general appeals to broad constitutional principles, such as due process, equal  
27 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hivala v.*  
28 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

1           However, “[a] habeas petitioner who [fails to properly exhaust] his federal claims  
2 in state court meets the technical requirements for exhaustion” if there are no state  
3 remedies still available to the petitioner. *Coleman v. Thompson*, 501 U.S. 722, 732  
4 (1991). “This is often referred to as ‘technical’ exhaustion because although the claim  
5 was not actually exhausted in state court, the petitioner no longer has an available state  
6 remedy.” *Thomas v. Schriro*, 2009 WL 775417, \*4 (D. Ariz. March 23, 2009). “If no  
7 state remedies are currently available, a claim is technically exhausted,” but, as discussed  
8 below, the claim is procedurally defaulted and is only subject to federal habeas review in  
9 a narrow set of circumstances. *Garcia v. Ryan*, 2013 WL 4714370, \*8 (D. Ariz. Aug. 29,  
10 2013).

### 11           **B. Procedural Default**

12           If a petitioner fails to fairly present his claim to the state courts in a procedurally  
13 appropriate manner, the claim is procedurally defaulted and generally barred from federal  
14 habeas review. *Ylst v. Nunnemaker*, 501 U.S. 797, 802–05 (1991). There are two  
15 categories of procedural default. First, a claim may be procedurally defaulted in federal  
16 court if it was actually raised in state court but found by that court to be defaulted on state  
17 procedural grounds. *Coleman*, 501 U.S. at 729–30. Second, the claim may be  
18 procedurally defaulted if the petitioner failed to present the claim in a necessary state  
19 court and “the court to which the petitioner would be required to present his claims in  
20 order to meet the exhaustion requirement would now find the claims procedurally  
21 barred.” *Id.* at 735 n. 1; *O’Sullivan*, 526 U.S. at 848 (when time for filing state court  
22 petition has expired, petitioner’s failure to timely present claims to state court results in a  
23 procedural default of those claims); *Smith v. Baldwin*, 510 F.3d 1127, 1138 (9th Cir.  
24 2007) (failure to exhaust claims in state court resulted in procedural default of claims for  
25 federal habeas purposes when state’s rules for filing petition for post-conviction relief  
26 barred petitioner from returning to state court to exhaust his claims).

27           When a petitioner has procedurally defaulted his claims, federal habeas review  
28 occurs only in limited circumstances. “A prisoner may obtain federal review of a

1 defaulted claim by showing cause for the default and prejudice from a violation of federal  
2 law.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1316 (2012). Cause requires a showing “that  
3 some objective factor external to the defense impeded counsel’s efforts to comply with  
4 the State’s procedural rule . . . [such as] a showing that the factual or legal basis for a  
5 claim was not reasonably available to counsel, . . . or that some interference by officials  
6 made compliance impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal  
7 quotations and citations omitted). Prejudice requires “showing, not merely that the errors  
8 at his trial created a possibility of prejudice, but that they worked to his actual and  
9 substantial disadvantage, infecting his entire trial with error of constitutional  
10 dimensions.” *U.S. v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). The Court  
11 need not examine the existence of prejudice if the petitioner fails to establish cause.  
12 *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n.  
13 10 (9th Cir. 1991). Additionally, a habeas petitioner “may also qualify for relief from his  
14 procedural default if he can show that the procedural default would result in a  
15 ‘fundamental miscarriage of justice.’” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir.  
16 2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). This exception to the  
17 procedural default rule is limited to habeas petitioners who can establish that “a  
18 constitutional violation has probably resulted in the conviction of one who is actually  
19 innocent.” *Schlup*, 513 U.S. at 327; see also *Murray*, 477 U.S. at 496; *Cook*, 538 F.3d at  
20 1028.

### 21 **III. ANALYSIS**

#### 22 **A. Ground One**

23 In Ground One, Petitioner contends that trial counsel was ineffective for: (a)  
24 failing to file a motion to suppress testimony or impeach a witness; (b) failing to filing a  
25 motion for a special jury instruction; (c) failing to file a motion opposing the complex  
26 case designation; (d) failing to file a motion to subpoena a witness; (e) failing to file a  
27 motion for hardship; and (f) failing to file a motion regarding the denial of Petitioner’s  
28 speedy trial rights. Of the claims alleged in Ground One, only claim (d) was previously



1 raised by Petitioner in his Rule 32 petition. None of the sub claims in Ground One were  
2 presented to the Arizona COA. Petitioner did not allege any IAC claims in his direct  
3 appeal to the Arizona COA.<sup>3</sup> While Petitioner did allege several IAC claims in his Rule  
4 32 petition, including a claim that his trial counsel failed to disclose, subpoena, and call a  
5 victim-witness to testify, Petitioner never filed a petition for review with the COA after  
6 the Rule 32 court denied his petition for PCR.

7 Prior to application for a writ of habeas corpus, a person in state custody must  
8 exhaust all of the remedies available in the state courts. 28 U.S.C. § 2254(b)(1)(A). This  
9 “provides a simple and clear instruction to potential litigants: before you bring any claims  
10 to federal court, be sure that you first have taken each one to state court.” *Rose v. Lundy*,  
11 455 U.S. 509, 520 (1982). Section 2254(c) provides that claims “shall not be deemed . . .  
12 exhausted” so long as the applicant “has the right under the law of the State to raise, by  
13 any available procedure the question presented.” 28 U.S.C. § 2254(c). In order to  
14 properly exhaust state remedies before filing a PWHC, a petitioner must afford the state  
15 courts the opportunity to rule upon the merits of his federal claims by fairly presenting  
16 them to the state’s highest court in a procedurally appropriate manner. *Baldwin* 541 U.S.  
17 at 29. In Arizona, the highest court requirement is satisfied if the petitioner has presented  
18 his federal claims to the Arizona COA, either through the direct appeal process or post-  
19 conviction proceedings. *Crowell*, 483 F.Supp.2d at 931–33. Here, Petitioner failed to  
20 properly present any of the claims in Ground One to the COA. While Petitioner did allege  
21 several IAC claims in his Rule 32 petition, Petitioner did not appeal the trial court’s  
22 denial of his Rule 32 petition to the Arizona COA. Thus, Petitioner failed to meet his  
23 burden to fairly present his federal claims to the state’s highest court.

24 In Arizona, claims not previously presented to the state courts on either direct  
25 appeal or collateral review are generally barred from federal review because any attempt

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27 <sup>3</sup> Petitioner was not required to do so because, “[a]s a general rule, ineffective  
28 assistance of counsel claims should be raised in post-conviction relief proceedings  
pursuant to rule 32.” *State v. Atwood*, 171 Ariz. 576, 599 (1992), *opinion modified on*  
*denial of reconsideration* (July 10, 1992).

1 to return to state court to present them would be futile unless the claims fit into a narrow  
2 range of exceptions. *See* Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a) (precluding claims not  
3 raised on direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar),  
4 32.9(c) (petition for review must be filed within thirty days of trial court's decision).  
5 Because these rules have been found to be consistently and regularly followed, and  
6 because they are independent of federal law, either their specific application to a claim by  
7 an Arizona court, or their operation to preclude a return to state court to exhaust a claim,  
8 will procedurally bar subsequent review of the merits of such a claim by a federal habeas  
9 court. *Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Ortiz v. Stewart*, 149 F.3d 923, 931–32  
10 (9th Cir. 1998) (Rule 32 is strictly followed); *State v. Mata*, 916 P.2d 1035, 1050–52  
11 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).  
12 Arizona Rules of Criminal Procedure regarding timeliness<sup>4</sup> and preclusion<sup>5</sup> prevent  
13 Petitioner from now exhausting the claims in Ground One in state court. Accordingly,  
14 these claims are both technically exhausted and procedurally defaulted and thus not  
15 properly before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–33; *Coleman*,  
16 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8.

17 A federal court may not consider the merits of a procedurally defaulted claim  
18 unless the petitioner can demonstrate cause for his noncompliance and actual prejudice,  
19 or establish that a miscarriage of justice would result from the lack of review. *See Schlup*  
20 *v. Delo*, 513 U.S. 298, 321 (1995). Here, Petitioner has failed to show cause for, or  
21 prejudice arising from, his procedural default of the claims, and the Court can glean none  
22 from the record before it. *See Martinez*, 132 S.Ct. at 1316; *Murray*, 477 U.S. at 488.  
23 There was no objective factor external to the defense which impeded Petitioner's efforts  
24 to comply with the State's procedural rule; Petitioner simply failed to raise the claims in

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26 <sup>4</sup> Ariz. R. Crim. P. 32.4(a) states that post-conviction proceedings must begin  
27 within 90 days of either the day of judgment and sentence or the date the mandate issues  
on direct appeal, whichever is later. These deadlines have long since passed in this  
matter.

28 <sup>5</sup> Ariz. R. Crim. P. 32.2(a) states that, absent narrowly tailored exceptions not  
applicable here, successive post-conviction petitions are precluded.

1 his state court proceedings. *See Murray*, 477 U.S. at 488; *see also Engle*, 456 U.S. at 134  
2 n. 43 (the court need not examine the existence of prejudice if the petitioner fails to  
3 establish cause).

4 Accordingly, the Court finds that the claims in Ground One are technically  
5 exhausted and procedurally defaulted, and Petitioner has failed to show cause and  
6 prejudice for the default. Habeas relief on the merits of these claims is therefore  
7 precluded.

### 8 **B. Ground Two**

9 In Ground Two, Petitioner alleges that the prosecutor: (a) offered a witness  
10 immunity; (b) threatened to take a witness's children; (c) caused Petitioner's attorney to  
11 prove that Michael Bejarano was a victim; (d) filed for a complex case hearing without  
12 having reasonable cause to do so; (e) called Lashawn Smith to testify when there was an  
13 ongoing custody battle between Ms. Smith and Petitioner; (f) denied Petitioner the right  
14 to confront his accuser at trial; and (g) failed to identify who called 911. Petitioner did  
15 not raise any of the claims that he now raises in Ground Two in either his direct appeal to  
16 the Arizona COA or in his Rule 32 petition for PCR.

17 When a petitioner fails to fairly present his claims to the state's highest court, but  
18 would now be barred by state procedure from returning to state court, an implied  
19 procedural bar may arise. *See O'Sullivan* 526 U.S. at 848–49. If a mandatory rule of state  
20 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
21 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom., Smith v.*  
22 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
23 state court would now find the exhaustion petition barred, the claim is procedurally  
24 defaulted); *O'Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
25 expired, petitioner's failure to timely present claims to state court results in a procedural  
26 default of those claims). Arizona Rules of Criminal Procedure regarding timeliness and  
27 preclusion prevent Petitioner from now exhausting the claims in Ground Two in state  
28 court. Accordingly, these claims are both technically exhausted and procedurally

1 defaulted and thus not properly before this Court for review. *See Crowell*, 483 F.Supp.2d  
2 at 931–33; *Coleman*, 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8.  
3 Petitioner has failed to show cause for, or prejudice arising from, his procedural default  
4 of the claims, and the Court can glean none from the record before it. *See Martinez*, 132  
5 S.Ct. at 1316; *Murray*, 477 U.S. at 488. Accordingly, the Court finds that all of the claims  
6 in Ground Two are technically exhausted and procedurally defaulted, and Petitioner has  
7 failed to show cause and prejudice for the default. Habeas relief on the merits of these  
8 claims is therefore precluded.

### 9 **C. Ground Three**

10 In Ground Three, Petitioner argues the trial court abused its discretion by: (a)  
11 denying Petitioner’s request for a speedy trial; (b) denying Petitioner’s request to change  
12 counsel; (c) failing to give a jury instruction on the prosecutor’s duty to prove every  
13 element of the charges beyond a reasonable doubt; (d) failing to grant the Petitioner’s  
14 request for a Rule 20 hearing; (e) running some of Petitioner’s sentences consecutively;  
15 and (f) disproportionately sentencing Petitioner and not making some of his sentences  
16 concurrent.

17 Construing Petitioner’s statements liberally, Petitioner arguably raised claims (a)  
18 and (b) in his direct appeal to the Arizona COA. In his appellate brief, Petitioner stated  
19 that the trial judge denied his right to new counsel, and that the speedy trial deadline was  
20 extended twice without Petitioner’s permission. (Doc. 19 Ex. I). Petitioner did not raise  
21 claims (c) through (f) in his direct appeal or in his Rule 32 petition for PCR. However,  
22 while claims (a) and (b) were thus arguably presented to the COA, these claims were not  
23 properly presented for purposes of federal habeas review because Petitioner did not  
24 describe the federal constitutional nature of the claims.

25 To properly exhaust a claim, a petitioner must “give the Arizona courts a ‘fair  
26 opportunity’ to act on his federal [] claim before presenting it to the federal courts.”  
27 *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2004). And, as noted above, in  
28 Arizona the fair presentation requirement is satisfied if the petitioner has presented his

1 federal claims to the Arizona COA, either through the direct appeal process or post-  
2 conviction proceedings. *Crowell*, 483 F.Supp.2d at 931–33. As this Court has explained:

3 Fair presentation requires a petitioner to describe both the  
4 operative facts and the federal legal theory to the state courts.  
5 *Reese*, 541 U.S. at 28, 124 S.Ct. 1347. It is not enough that all  
6 of the facts necessary to support the federal claim were before  
7 the state court or that a “somewhat similar” state law claim  
8 was raised. *Reese*, 541 U.S. at 28, 124 S.Ct. 1347 (stating that  
9 a reference to ineffective assistance of counsel does not alert  
10 the court to federal nature of the claim). Rather, the habeas  
11 petitioner must cite in state court to the specific constitutional  
12 guarantee upon which he bases his claim in federal court.  
13 *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001).  
14 Similarly, general appeals to broad constitutional principles,  
15 such as due process, equal protection, and the right to a fair  
16 trial, are insufficient to establish fair presentation of a federal  
17 constitutional claim. *Lyons v. Crawford*, 232 F.3d 666, 669  
18 (9th Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th  
19 Cir. 2001); *Shumway v. Payne*, 223 F.3d 982, 987 (9th  
20 Cir. 2000) (insufficient for prisoner to have made “a general  
21 appeal to a constitutional guarantee,” such as a naked  
22 reference to “due process,” or to a “constitutional error” or a  
23 “fair trial”). Likewise, a mere reference to the “Constitution  
24 of the United States” does not preserve a federal claim. *Gray*  
25 *v. Netherland*, 518 U.S. 152, 162–63, 116 S.Ct. 2074, 135  
26 L.Ed.2d 457 (1996). Even if the basis of a federal claim is  
27 “self-evident” or if the claim would be decided “on the same  
28 considerations” under state or federal law, the petitioner must  
make the federal nature of the claim “explicit either by citing  
federal law or the decision of the federal courts....” *Lyons*,  
232 F.3d at 668. A state prisoner does not fairly present a  
claim to the state court if the court must read beyond the  
pleadings filed in that court to discover the federal claim.  
*Baldwin*, 541 U.S. at 27, 124 S.Ct. 1347.

20 *Date v. Schriro*, 619 F.Supp.2d 736, 764–65 (D. Ariz. 2008).

21 Here, while Petitioner arguably presented claims (a) and (b) to the Arizona COA,  
22 Petitioner’s appellate brief is completely devoid of any citation to the law or to the  
23 record. Petitioner alleged no legal basis, whether state or federal, for any of his claims,  
24 and thus wholly failed to present the claims as specifically federal claims. Thus,  
25 Petitioner has failed to properly exhaust the claims in Ground Three of his PWHC  
26 because he failed to fairly present a federal legal theory for these claims to the state  
27 courts.

28 When a petitioner fails to fairly present his claims to the state’s highest court, but

1 would now be barred by state procedure from returning to state court, an implied  
2 procedural bar may arise. *See O’Sullivan* 526 U.S. at 848–49. If a mandatory rule of state  
3 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
4 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom., Smith v.*  
5 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
6 state court would now find the exhaustion petition barred, the claim is procedurally  
7 defaulted); *O’Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
8 expired, petitioner’s failure to timely present claims to state court results in a procedural  
9 default of those claims).

10 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent  
11 Petitioner from now exhausting the claims in Ground Three in state court. Accordingly,  
12 these claims are both technically exhausted and procedurally defaulted and thus not  
13 properly before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–33; *Coleman*,  
14 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8. Petitioner has failed to show  
15 cause for, or prejudice arising from, his procedural default of these claims, and the Court  
16 can glean none from the record before it. *See Martinez*, 132 S.Ct. at 1316; *Murray*, 477  
17 U.S. at 488. Accordingly, the Court finds that the claims in Ground Three are technically  
18 exhausted and procedurally defaulted, and that Petitioner has failed to show cause and  
19 prejudice for the default. Habeas relief on the merits of these claims is therefore  
20 precluded.

#### 21 **D. Ground Four**

22 In Ground Four, Petitioner alleges his trial counsel had a low standard of  
23 performance because she: (a) failed to disqualify a juror who admitted to being a friend  
24 of one of the victims; and (b) failed to disqualify a juror who had limited understanding  
25 of English.

26 Construing Petitioner’s statements liberally, Petitioner arguably raised claims (a)  
27 and (b) in his direct appeal to the Arizona COA. While Petitioner did not present the  
28 claims in terms of counsel’s performance, Petitioner stated that “there were two jurors

1 who stated that they were friends with the victims,” and that while one juror was excused,  
2 the other juror remained on the jury and Petitioner believed it affected his judgment.  
3 (Doc. 19 Ex. I). However, even if the factual basis of claims (a) and (b) was sufficiently  
4 clear in Petitioner’s direct appeal, these claims were not properly presented for purposes  
5 of federal habeas review because Petitioner did not describe the federal constitutional  
6 nature of the claims.

7 As explained above, to properly exhaust a claim, a petitioner must “give the  
8 Arizona courts a ‘fair opportunity’ to act on his federal [] claim before presenting it to the  
9 federal courts.” *Castillo*, 399 F.3d at 998. In Arizona, this requirement is satisfied if the  
10 petitioner has presented his federal claims to the Arizona COA, either through the direct  
11 appeal process or post-conviction proceedings. *Crowell*, 483 F.Supp.2d at 931–33. Here,  
12 Petitioner’s appellate brief is completely devoid of any citation to the law or to the  
13 record. Petitioner alleged no legal basis, whether state or federal, for any of his claims,  
14 and thus wholly failed to present the claims as specifically federal claims. Thus,  
15 Petitioner has failed to properly exhaust the claims in Ground Four of his PWHC because  
16 he failed to fairly present a federal legal theory for these claims to the state courts.

17 When a petitioner fails to fairly present his claims to the state’s highest court, but  
18 would now be barred by state procedure from returning to state court, an implied  
19 procedural bar may arise. *See O’Sullivan* 526 U.S. at 848–49. If a mandatory rule of state  
20 procedure would prevent the presentation of the claim, federal review is precluded. *See*  
21 *Smith v. Baldwin*, 510 F.3d 1127, 1139 (9th Cir. 2007), *cert. denied sub nom., Smith v.*  
22 *Mills*, 129 S.Ct. 37 (2008) (when petitioner had not properly exhausted his claim, but  
23 state court would now find the exhaustion petition barred, the claim is procedurally  
24 defaulted); *O’Sullivan*, 526 U.S. at 848 (when time for filing state court petition has  
25 expired, petitioner’s failure to timely present claims to state court results in a procedural  
26 default of those claims).

27 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent  
28 Petitioner from now exhausting the claims in Ground Four in state court. Accordingly,

1 these claims are both technically exhausted and procedurally defaulted and thus not  
2 properly before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–33; *Coleman*,  
3 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at \* 8. Petitioner has failed to show  
4 cause for, or prejudice arising from, his procedural default of these claims, and the Court  
5 can glean none from the record before it. *See Martinez*, 132 S.Ct. at 1316; *Murray*, 477  
6 U.S. at 488. Accordingly, the Court finds that the claims in Ground Four are technically  
7 exhausted and procedurally defaulted, and that Petitioner has failed to show cause and  
8 prejudice for the default. Habeas relief on the merits of these claims is therefore  
9 precluded.

10 **IV. CONCLUSION**

11 For the foregoing reasons,

12 **IT IS HEREBY ORDERED** that Petitioner’s Petition under 28 U.S.C. § 2254 is  
13 denied and that this action is dismissed with prejudice. The Clerk shall enter judgment  
14 accordingly.

15 **IT IS FURTHER ORDERED** that no certificate of appealability shall be issued  
16 and that Petitioner is not entitled to appeal in forma pauperis because dismissal of the  
17 Petition is justified by a plain procedural bar and reasonable jurists would not find the  
18 ruling debatable. Further, to the extent Petitioner’s claims are rejected on the merits,  
19 reasonable jurists would not find the Court’s assessment of the constitutional claims to be  
20 debatable or wrong.

21 Dated this 28th day of October, 2016.

22  
23  
24  
25 

Eric J. Markovich  
United States Magistrate Judge