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

9 Albert Robert Gaxiola,
10 Petitioner,

11 v.

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

No. CV-16-00063-TUC-EJM

ORDER

15 Petitioner Albert Robert Gaxiola filed his pro se petition for a Writ of Habeas
16 Corpus pursuant to 28 U.S.C. § 2254 challenging his convictions for felony murder,
17 aggravated assault, first-degree burglary, attempted first-degree murder, aggravated
18 robbery, and armed robbery. (Doc. 1). Petitioner raises four grounds for relief: (1) the
19 State presented inconsistent theories at the separate trials of two defendants, arguing each
20 one was the sole organizer and planner; (2) the trial court denied Petitioner's request for
21 an interrogatory regarding whether he was in the house or not at the time of the crime and
22 therefore convicted him on a theory not recognized by state or federal law; (3)
23 insufficient evidence to convict for burglary or robbery as predicate felonies for felony
24 murder; and (4) ineffective assistance of appellate counsel ("IAC") for allowing the
25 Arizona Court of Appeals ("COA") to consider the wrong facts and for failing to raise
26 and preserve 404(b) evidentiary issues. Respondents filed an Answer contending that
27 Grounds One, Two, and Three are technically exhausted and procedurally defaulted, and
28 that Ground Four is unexhausted and procedurally barred. (Doc. 11). Respondents further

1 state that Petitioner has failed to show cause and prejudice or a fundamental miscarriage
2 of justice to excuse the default of his claims. Petitioner did not file a reply.

3 The Court finds that all of Petitioner's claims are technically exhausted and
4 procedurally defaulted and thus not properly before this Court for review. The Court
5 further finds that Petitioner does not demonstrate cause and prejudice or a fundamental
6 miscarriage of justice to excuse the procedural default of his claims. Accordingly, the
7 petition will be denied.

8 **I. FACTUAL AND PROCEDURAL BACKGROUND**

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

10 A Pima County Superior Court jury found Petitioner guilty of two counts of felony
11 murder, two counts of aggravated assault, first-degree burglary, first-degree murder,
12 attempted first-degree murder, aggravated robbery, and armed robbery. (Ex. A).
13 Petitioner was sentenced to two consecutive life sentences for the felony murders and
14 consecutive sentences on the remaining counts totaling 54 years. *Id.* The Arizona COA
15 summarized the facts of the case as follows:

16 While Gaxiola waited outside, his accomplices Forde and
17 Bush went to the front door of victim Gina G.'s house,
18 claimed to be Border Patrol agents and threatened to shoot
19 her husband, Raul F., if he moved from the door. They then
20 ordered Raul to let them into the house immediately. He
21 opened the door. Forde and Bush entered and began ordering
22 the family to sit down and be quiet. Raul tried to question
23 Bush and Forde about who they were, but Bush shot him.
24 When Gina stood up to protest, Bush shot her twice, then
25 turned back to Raul and shot him again several times,
26 ultimately killing him. While lying on the floor, Gina heard
27 Gaxiola and another intruder ransacking her house, searching
28 for drugs and money, although they only succeeded in
stealing her jewelry. Meanwhile, Bush questioned Gina's
daughter, B., and shot her twice in the face, ultimately killing
her. At this point the intruders left.

Soon after Gina called 9-1-1 for help, Forde reentered the
house, noticed Gina was still alive, and said "she's alive, you
need to go back in there and finish her off." Gina made her
way to Raul's handgun, and when Bush came back and
opened fire on her, Gina returned fire. Bush was injured and
ran away. Gaxiola then entered the premises and fired at
Gina, but fled after Gina began shooting at him. Gaxiola and
the others did not return.

1 (Ex. E at ¶¶ 2–3).

2 Following his conviction, Petitioner sought relief in the Arizona COA. Appointed
3 counsel filed a brief presenting five issues for review: (1) insufficient evidence to convict
4 for felony murder where the evidence showed Petitioner was an accomplice, but not a
5 principal, to the predicate felonies; (2) the trial court erroneously permitted the State to
6 argue that Petitioner could be convicted based on accomplice liability; (3) count four
7 should be vacated because Arizona does not recognize the crime of attempted felony
8 murder; (4) the consecutive sentences for counts three through eight should be
9 concurrent; and (5) the restitution order should be vacated. (Ex. B). On October 18, 2012
10 the COA affirmed in part and vacated and remanded in part. (Ex. E). Specifically, the
11 court found that accomplice liability applies to felony murder to the extent the defendant
12 is an accomplice to the predicate felony, and therefore the trial court did not err in
13 instructing the jury on accomplice liability. The court vacated Petitioner’s aggravated
14 robbery sentence and remanded for resentencing, and vacated the restitution order and
15 remanded for a new restitution hearing. Petitioner filed a petition for review with the
16 Arizona Supreme Court, which the court denied on May 30, 2013. (Ex. F).

17 On December 12, 2013, Petitioner was resentenced to a concurrent term on the
18 aggravated robbery charge. (Ex. H). Petitioner then filed a second appeal challenging his
19 new sentence and the restitution award. Appointed counsel filed an Anders brief, and
20 Petitioner never filed a pro se petition. (Ex. I). On June 5, 2014 the COA found no
21 reversible error and affirmed the resentencing order and award of restitution. *Id.*
22 Petitioner did not file a petition for review with the Arizona Supreme Court.

23 **B. Petition for Post-Conviction Relief**

24 On May 30, 2013 Petitioner initiated proceedings in Pima County Superior Court
25 for post-conviction relief (“PCR”). (Ex. K). Appointed counsel filed a petition raising
26 five issues: (1) the COA affirmed Petitioner’s convictions based on clearly erroneous
27 facts; (2) appellate counsel was ineffective for failing to argue the issue of the trial court
28 precluding an important witness; (3) ineffective assistance of trial and appellate counsel

1 for failing to raise and preserve Rule 404(b) evidentiary issues; (4) the trial court
2 interfered with Petitioner presenting his theory of the case; and (5) the trial court
3 improperly excluded testimony by Petitioner’s crime scene expert. (Ex. L). The trial court
4 denied PCR on August 22, 2014. (Ex. O).

5 Petitioner filed a petition for review with the Arizona COA and alleged that the
6 trial court erred when (1) it refused to consider Petitioner’s due process, constitutional
7 claim that the COA relied on erroneous facts when it affirmed Petitioner’s convictions,
8 and (2) it failed to consider Petitioner’s ineffective assistance of appellate counsel claim.
9 (Ex. P). On February 10, 2015 the COA issued its decision granting review and denying
10 relief. (Ex. Q). Petitioner did not file a petition for review with the Arizona Supreme
11 Court.

12 **C. Habeas Petition**

13 Petitioner filed his PWHC in this Court on January 20, 2016, asserting four
14 grounds for relief. (Doc. 1). Petitioner requests that the Court vacate his convictions.

15 **II. STANDARD OF REVIEW**

16 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) limits the
17 federal court’s power to grant a petition for a writ of habeas corpus on behalf of a state
18 prisoner. First, the federal court may only consider petitions alleging that a person is in
19 state custody “in violation of the Constitution or laws or treaties of the United States.” 28
20 U.S.C. § 2254(a). Sections 2254(b) and (c) provide that the federal courts may not grant
21 habeas corpus relief, with some exceptions, unless the petitioner exhausted state
22 remedies. Additionally, if the petition includes a claim that was adjudicated on the merits
23 in state court proceedings, federal court review is limited by section 2254(d).

24 **A. Exhaustion**

25 A state prisoner must exhaust his state remedies before petitioning for a writ of
26 habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *O’Sullivan v. Boerckel*, 526
27 U.S. 838, 842 (1999). To exhaust state remedies, a petitioner must afford the state courts
28 the opportunity to rule upon the merits of his federal claims by fairly presenting them to

1 the state’s highest court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S.
2 27, 29 (2004) (“[t]o provide the State with the necessary opportunity, the prisoner must
3 fairly present her claim in each appropriate state court . . . thereby alerting the court to the
4 federal nature of the claim.”). In Arizona, unless a prisoner has been sentenced to death,
5 the highest court requirement is satisfied if the petitioner has presented his federal claim
6 to the Arizona COA, either through the direct appeal process or post-conviction
7 proceedings. *Crowell v. Knowles*, 483 F.Supp.2d 925, 931–33 (D. Ariz. 2007).

8 A claim is fairly presented if the petitioner describes both the operative facts and
9 the federal legal theory upon which the claim is based. *Kelly v. Small*, 315 F.3d 1063,
10 1066 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143
11 (9th Cir. 2007). The petitioner must have “characterized the claims he raised in state
12 proceedings *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th
13 Cir. 2000) (emphasis in original), *opinion amended and superseded*, 247 F.3d 904 (9th
14 Cir. 2001). “If a petitioner fails to alert the state court to the fact that he is raising a
15 federal constitutional claim, his federal claim is unexhausted regardless of its similarity to
16 the issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).
17 “Moreover, general appeals to broad constitutional principles, such as due process, equal
18 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hivala v.*
19 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

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

1 2013).

2 **B. Procedural Default**

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

18 When a petitioner has procedurally defaulted his claims, federal habeas review
19 occurs only in limited circumstances. “A state prisoner may overcome the prohibition on
20 reviewing procedurally defaulted claims if he can show cause to excuse his failure to
21 comply with the state procedural rule and actual prejudice resulting from the alleged
22 constitutional violation.” *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (internal
23 quotations and citation omitted); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (“A
24 prisoner may obtain federal review of a defaulted claim by showing cause for the default
25 and prejudice from a violation of federal law.”). Cause requires a showing “that some
26 objective factor external to the defense impeded counsel’s efforts to comply with the
27 State’s procedural rule . . . [such as] a showing that the factual or legal basis for a claim
28 was not reasonably available to counsel, . . . or that some interference by officials made

1 compliance impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal
2 quotations and citations omitted). Prejudice requires “showing, not merely that the errors
3 at his trial created a possibility of prejudice, but that they worked to his actual and
4 substantial disadvantage, infecting his entire trial with error of constitutional
5 dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).
6 The Court need not examine the existence of prejudice if the petitioner fails to establish
7 cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119,
8 1123 n. 10 (9th Cir. 1991). Additionally, a habeas petitioner “may also qualify for relief
9 from his procedural default if he can show that the procedural default would result in a
10 ‘fundamental miscarriage of justice.’” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir.
11 2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). This exception to the
12 procedural default rule is limited to habeas petitioners who can establish that “a
13 constitutional violation has probably resulted in the conviction of one who is actually
14 innocent.” *Schlup*, 513 U.S. at 327; *see also Murray*, 477 U.S. at 496; *Cook*, 538 F.3d at
15 1028.

16 **III. ANALYSIS**

17 **A. Ground One**

18 In Ground One, Petitioner contends that the State presented inconsistent theories
19 about who planned and organized the home invasion because during Forde’s trial, the
20 State argued that she was the sole organizer and planner, and during Petitioner’s trial, the
21 State also argued that he was the sole organizer and planner. Despite checking the box on
22 his habeas form that this claim was presented to the COA, Petitioner never presented this
23 argument during his direct appeal or PCR proceedings.

24 Claims not previously presented to the state courts on either direct appeal or
25 collateral review are generally barred from federal review because any attempt to return
26 to state court to present them would be futile unless the claims fit into a narrow range of
27 exceptions. *See Ariz. R. Crim. P.* 32.1(d)-(h), 32.2(a) (precluding claims not raised on
28 direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c)

1 (petition for review must be filed within thirty days of trial court's decision). Because
2 these rules have been found to be consistently and regularly followed, and because they
3 are independent of federal law, either their specific application to a claim by an Arizona
4 court, or their operation to preclude a return to state court to exhaust a claim, will
5 procedurally bar subsequent review of the merits of such a claim by a federal habeas
6 court. *Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Ortiz v. Stewart*, 149 F.3d 923, 931–32
7 (9th Cir. 1998) (Rule 32 is strictly followed); *State v. Mata*, 916 P.2d 1035, 1050–52
8 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

9 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent
10 Petitioner from now exhausting his claims in Ground One in state court. Accordingly,
11 this claim is both technically exhausted and procedurally defaulted and thus not properly
12 before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–33; *Coleman*, 501 U.S.
13 at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at * 8.

14 A federal court may not consider the merits of a procedurally defaulted claim
15 unless the petitioner can demonstrate cause for his noncompliance and actual prejudice,
16 or establish that a miscarriage of justice would result from the lack of review. *See Schlup*
17 *v. Delo*, 513 U.S. 298, 321 (1995). Petitioner has failed to show cause for, or prejudice
18 arising from, his procedural default of the claim, and the Court can glean none from the
19 record before it. *See Martinez*, 132 S. Ct. at 1316; *Murray*, 477 U.S. at 488. Accordingly,
20 relief on the merits of this claim is precluded.

21 **B. Ground Two**

22 In Ground Two, Petitioner claims that the trial court denied his request for an
23 interrogatory about whether he was in the house or not, and as a result, the jury was able
24 to convict him on a theory not recognized by state or federal law. As with Ground One,
25 despite checking the box on his habeas form that this issue was presented to the COA,
26 Petitioner never presented the claims in Ground Two in his direct appeal or PCR
27 proceedings.

28 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent

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

10 **C. Ground Three**

11 In Ground Three, Petitioner argues that there was insufficient evidence to convict
12 him of burglary or robbery as the predicate felonies for felony murder, notwithstanding
13 the fact that the murders were not committed in the furtherance of any robbery. The Court
14 finds that Petitioner failed to properly present this claim to the state courts.

15 To properly exhaust a claim, a petitioner must “give the Arizona courts a ‘fair
16 opportunity’ to act on his federal [] claim before presenting it to the federal courts.”
17 *Castillo v. McFadden*, 399 F.3d 993, 998 (9th Cir. 2004). This “provides a simple and
18 clear instruction to potential litigants: before you bring any claims to federal court, be
19 sure that you first have taken each one to state court.” *Rose v. Lundy*, 455 U.S. 509, 520
20 (1982). As this Court has explained, in order to fairly present and properly exhaust his
21 claims, “a petitioner [must] describe both the operative facts and the federal legal theory
22 to the state courts. It is not enough that all of the facts necessary to support the federal
23 claim were before the state court or that a ‘somewhat similar’ state law claim was raised.”
24 *Date v. Schriro*, 619 F.Supp.2d 736, 764–65 (D. Ariz. 2008) (quoting *Reese*, 541 U.S. at
25 28)).

26 Here, on direct appeal, Petitioner argued that there was insufficient evidence to
27 convict him of felony murder because the evidence showed that he was an accomplice,
28 not a principal, to the predicate felonies. Similarly, in his Rule 32 petition, Petitioner

1 argued that because he was not a participant in the predicate felonies, he could not be
2 convicted of felony murder.¹ However, Petitioner did not argue that there was insufficient
3 evidence to convict him of burglary or robbery, the claim he now makes in his habeas
4 petition. It is not enough that Petitioner may have raised a somewhat similar claim in
5 state court; he failed to properly present the specific claim he makes now, and thus failed
6 to give the state courts a fair opportunity to rule on his federal claim.²

7 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent
8 Petitioner from now exhausting Ground Three in state court. Accordingly, the claim is
9 both technically exhausted and procedurally defaulted and thus not properly before this
10 Court for review. *See Crowell*, 483 F.Supp.2d at 931–33; *Coleman*, 501 U.S. at 732, 735
11 n. 1; *Garcia*, 2013 WL 4714370 at * 8. Petitioner has failed to show cause for, or
12 prejudice arising from, his procedural default of these claims, and the Court can glean

13
14 ¹ The Court also notes that Petitioner did not present this as a separate issue in his
15 Rule 32 petition. Rather, Petitioner argued that the COA affirmed his convictions based
16 on clearly erroneous facts, and then as a sub argument, Petitioner alleged that he could
17 not be convicted of felony murder because he was not a participant in the predicate
18 felony. In denying PCR, the trial court noted that this argument appeared “to be nothing
19 more than an effort to re-argue his appellate argument that insufficient evidence
20 supported his conviction.” (Ex. O at 5).

21 In addition, when denying relief on Petitioner’s petition for review after the trial
22 court denied PCR, the COA noted that to the extent Petitioner was arguing that “his
23 convictions violate due process because there was insufficient evidence to support his
24 convictions or because the prosecutor engaged in misconduct, those claims are precluded
25 because they could have been raised on appeal.” (Ex. Q at ¶4 n. 2) (citing *Ariz. R. Crim.*
26 *P. 32.2(a)(3)*). Thus, the state court applied an express procedural bar and this Court is
27 precluded from addressing the merits of this claim on habeas review.

28 ² The Court further notes that in his direct appeal, Petitioner argued sufficiency of
the evidence to convict for felony murder as a state law issue by analyzing Arizona
statutes and case law. While the opening brief included a brief statement that “A verdict
supported by insufficient evidence violates due process” and a citation to the 5th and 14th
amendments of the United States Constitution, (Ex. B at ¶21), the Ninth Circuit has
specifically held that a petitioner’s “conclusory, scattershot citation of federal
constitutional provisions, divorced from any articulated federal legal theory . . .” fails to
satisfy the fair presentation requirement. *Castillo*, 399 F.3d at 1002–03 (“Exhaustion
demands more than drive-by citation, detached from any articulation of an underlying
federal legal theory.”); *see also Date*, 619 F.Supp.2d at 764 (“general appeals to broad
constitutional principles, such as due process, equal protection, and the right to a fair trial,
are insufficient to establish fair presentation of a federal constitutional claim”).

As in his direct appeal, Petitioner also based his arguments in his Rule 32 petition
on Arizona case law and statutes, with a brief statement that “his conviction was obtained
in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States
Constitution.” (Ex. L at 7).

1 none from the record before it. *See Martinez*, 132 S. Ct. at 1316; *Murray*, 477 U.S. at
2 488. Accordingly, the Court finds that Petitioner’s claims in Ground Three are technically
3 exhausted and procedurally defaulted, and that Petitioner has failed to show cause and
4 prejudice for the default. Habeas relief on the merits of this claim is therefore precluded.

5 **D. Ground Four**

6 In Ground Four, Petitioner argues that his appellate counsel was ineffective for
7 allowing the COA to consider the wrong facts and for failing to raise and preserve 404(b)
8 evidentiary issues. The Court finds that Petitioner failed to fairly present his claims in
9 Ground Four to the state courts because he failed to argue the federal constitutional basis
10 for the claims. And, even if Petitioner had properly presented the claims as federal
11 claims, the Court further finds that Petitioner failed to properly exhaust the Rule 404(b)
12 portion of his claim by failing to present it to the Arizona COA, and that Petitioner failed
13 to properly exhaust the wrong facts portion of his claim by failing to present it to the state
14 courts in a procedurally appropriate manner.

15 In Arizona, exhaustion is satisfied if a petitioner presents the federal basis of his
16 claims to the COA through either the direct appeal process or PCR proceedings. “Fair
17 presentation requires a petitioner to describe both the operative facts and the federal legal
18 theory to the state courts. It is not enough that all of the facts necessary to support the
19 federal claim were before the state court or that a ‘somewhat similar’ state law claim was
20 raised.” *Date*, 619 F.Supp.2d at 764 (quoting *Reese*, 541 U.S. at 28 (stating that a
21 reference to ineffective assistance of counsel does not alert the court to federal nature of
22 the claim)). A petitioner’s “conclusory, scattershot citation of federal constitutional
23 provisions, divorced from any articulated federal legal theory . . .” fails to satisfy the fair
24 presentment requirement, and “[e]xhaustion demands more than drive-by citation,
25 detached from any articulation of an underlying federal legal theory.” *Castillo*, 399 F.3d
26 at 1002–03.

27 Here, Petitioner argued in his Rule 32 petition that trial counsel was ineffective for
28 failing to object to the introduction of other bad act evidence under Rule 404(b) and that

1 appellate counsel was ineffective for failing to raise this issue on appeal as fundamental
2 error.³ (Ex. L at 12). Petitioner based his argument on the Arizona Rules of Evidence and
3 state case law. While Petitioner made a reference earlier in the brief to United States
4 Supreme Court law recognizing a defendant’s right to effective assistance of counsel on
5 appeal, *see* Ex. L at 12 (citing *Evitts v. Lucey*, 69 U.S. 387(1985)), Petitioner did not
6 argue the Rule 404(b) issue as a federal, constitutional issue.

7 In his reply brief, Petitioner also argued that appellate counsel was ineffective for
8 allowing the COA to consider the wrong facts and again cited *Evitts*. (Ex. N at 3). The
9 basis of Petitioner’s argument was that the COA relied on the wrong facts in affirming
10 Petitioner’s convictions on direct appeal, the State also relied on those erroneous facts in
11 its response to the Rule 32 petition, and it was appellate counsel’s fault for allowing the
12 COA to rely on the wrong facts. This fails to meet the fair presentation requirement
13 because Petitioner failed to argue a federal constitutional basis for his claim that appellate
14 counsel was ineffective for allowing the COA to consider the wrong facts.

15 In denying PCR, the trial court found that as to the 404(b) claim, Petitioner
16 misstated the record because “this issue—which had been the subject of motions by both
17 parties—was addressed and the court ruled that this evidence was admissible as both an
18 intrinsic part of the crimes charged and also as admissible for appropriate purposes under
19 . . . Rule 404(b).” (Ex. O at 7). The court further found that,

20 Because the evidence . . . was properly admitted following
21 vigorous and competent objection by the Petitioner’s attorney
22 during pretrial, it does not fall below an objectively
23 reasonable standard of attorney representation to make the
24 choice to not raise a futile objective during the trial. It follows
25 that appellate counsel was not ineffective for failing to raise
26 this issue during the Petitioner’s direct appeal.

27 *Id.* at 7–8. The court concluded that, although it addressed each of Petitioner’s IAC
28 claims at face value,

[T]his Court also finds that—although the State failed to

³ This evidence consisted of testimony by Oin Oakstar, who testified on behalf of the State as part of his plea agreement. Oakstar’s testimony concerned his relationship with Petitioner and their history of using and transporting marijuana together.

1 plead preclusion—the evidentiary arguments were raisable on
2 appeal under Rule 31 and are subject to preclusion. Re-
3 wording lost and waived evidentiary issues to paint them as
4 ineffective assistance of trial and appellate counsel does not

5 *Id.* at 10 (internal citation omitted).⁴

6 Exhaustion requires that Petitioner fairly present his claims to the COA. After the
7 trial court denied PCR, Petitioner filed a petition for review with the Arizona COA and
8 presented two issues for review: 1) whether the trial court erred when it refused to
9 consider Petitioner’s due process, constitutional claim that the COA relied on erroneous
10 facts when affirming Petitioner’s convictions on direct appeal; and 2) whether the trial
11 court erred by failing to consider Petitioner’s claim of IAC of appellate counsel. (Ex. P).
12 Petitioner alleged that the trial court “did not deal with the issue of ineffective assistance
13 of appellate counsel” and that appellate counsel “was remiss in failing to properly review
14 the case in order to ensure that [the COA] did not cite to erroneous facts.” (Ex. P at 13).
15 Petitioner referenced *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth
16 Amendment, and the due process and equal protection clauses. Petitioner did not
17 specifically argue that appellate counsel was ineffective for failing to raise a Rule 404(b)
18 issue.

19 In denying relief on the petition for review, the COA noted that although
20 Petitioner claimed that the trial court did not address his claim that appellate counsel was
21 ineffective for failing to ensure that the COA did not rely on erroneous facts, “a trial
22 court is not required to address claims raised for the first time in a reply.” (Ex. Q at ¶5).
23 The COA therefore concluded that the trial court did not err in declining to review the
24 claim. *Id.* The COA also noted that during Petitioner’s direct appeal proceedings,

25 ⁴ The trial court did not directly address Petitioner’s claim (raised only in his reply
26 brief) that appellate counsel was ineffective for allowing the COA to rely on erroneous
27 facts. Rather, the court found that Petitioner’s argument that the COA based its decision
28 on factual errors appeared “to be nothing more than an effort to re-argue his appellate
argument that insufficient evidence supported his conviction.” (Ex. O at 5). The court
concluded that “Petitioner’s line of argument fails when he has to provide his own
interpretation of the facts in order to prevail[,]” and that Petitioner’s argument did not
support a lack of due process. *Id.*

1 appellate counsel filed a motion for reconsideration arguing that the court misconstrued
2 the evidence, which the court denied. As Petitioner did not raise the 404(b) issue in his
3 petition for review, the COA did not address it.

4 In sum, the wrong facts portion of Ground Four was never adjudicated on the
5 merits⁵ because it was only raised in the Rule 32 reply brief and the trial court did not
6 address it, and although raised in the petition for review to the COA, the COA found no
7 error because the trial court is not required to address claims raised for the first time in a
8 reply. The Rule 404(b) portion of Ground Four was not fairly presented to the state's
9 highest court because although raised in the Rule 32 petition, Petitioner abandoned this
10 claim in his petition for review to the COA.

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

21 **IV. CONCLUSION**

22 For the foregoing reasons,

23 **IT IS HEREBY ORDERED** that Petitioner's Petition under 28 U.S.C. § 2254 is
24 denied and that this action is dismissed with prejudice. The Clerk shall enter judgment
25 accordingly.

26 ⁵ The Ninth Circuit has held that “a state has ‘adjudicated’ a petitioner's
27 constitutional claim ‘on the merits’ for purposes of § 2254(d) when it has decided the
28 petitioner's right to post-conviction relief on the basis of the substance of the
constitutional claim advanced, rather than denying the claim on the basis of a procedural
or other rule precluding state court review of the merits.” *Lambert v. Blodgett*, 393 F.3d
943, 969 (9th Cir. 2004).

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

7 Dated this 6th day of June, 2018.

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11 Eric J. Markovich
12 United States Magistrate Judge

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