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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Christopher Whipple,
10 Petitioner,

11 v.

12 Charles Ryan, et al.,
13 Respondents.
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No. CV-16-00652-TUC-EJM

ORDER

15 Petitioner Christopher Whipple filed a pro se petition for a Writ of Habeas Corpus
16 pursuant to 28 U.S.C. § 2254 challenging his convictions for possession of a dangerous
17 drug for sale, transportation of a dangerous drug for sale, possession of a deadly weapon
18 during the commission of a felony drug offense, possession of a deadly weapon by a
19 prohibited possessor, and possession of drug paraphernalia. (Doc. 1). Petitioner raises
20 four grounds for relief: 1) ineffective assistance of counsel; 2) due process violations for
21 the state's failure to disclose evidence; 3) unreasonable search and seizure; and 4)
22 prosecutorial misconduct. Respondents filed an Answer contending that all of Petitioner's
23 claims are procedurally defaulted without excuse and that Petitioner has failed to show
24 cause and prejudice for the procedural default or that a fundamental miscarriage of justice
25 has occurred. (Doc. 9). Respondents further allege that all of Petitioner's claims are
26 waived by his guilty plea, and that Ground Three is not cognizable on habeas review.

27 The Court finds that Petitioner's claims are procedurally defaulted and barred
28 from this Court's review. The Court further finds that Petitioner does not demonstrate

1 cause and prejudice or a fundamental miscarriage of justice to excuse the procedural
2 default of his claims. Accordingly, the Petition will be denied.

3 **I. FACTUAL AND PROCEDURAL BACKGROUND**

4 **A. Plea and Sentencing**

5 On March 17, 2015 Petitioner pled guilty to possession of a dangerous drug for
6 sale, transportation of a dangerous drug for sale, possession of a deadly weapon during
7 the commission of a felony drug offense, possession of a deadly weapon by a prohibited
8 possessor, and possession of drug paraphernalia in Pima County Superior Court. (Doc. 10
9 Ex. A).¹ Petitioner was sentenced to concurrent prison terms, the longest being 14 years.
10 (Ex. B).

11 **B. Post-Conviction Relief Proceedings²**

12 On July 16, 2015, Petitioner initiated proceedings in Pima County Superior Court for
13 Rule 32 post-conviction relief (“PCR”). (Ex. E). Appointed counsel filed a notice stating
14 that she was unable to find any colorable claims for relief to raise in a Rule 32 petition
15 and requested additional time for Petitioner to file a pro se petition. (Ex. G). Petitioner
16 was given until January 19, 2016 to file his petition. (Ex. H). Petitioner failed to file
17 within the allowed time and the court dismissed his PCR proceedings on January 28,
18 2016. *Id.*

19 On July 13, 2016 Petitioner filed a notice and motion to clarify sentence. (Ex. I).
20 Petitioner alleged that pursuant to A.R.S. § 13-3407 and §13-603, he should be receiving
21 earned release credits, but that he was not. *Id.* The trial court interpreted Petitioner’s
22 motion as a Rule 32 petition. (Ex. J). However, the court found that the motion was not
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24 ¹ All exhibits refer to Document 10

25 ² Because Petitioner pled guilty, he could not file a direct appeal and could only
26 challenge his conviction and sentence through a Rule 32 petition. *See* A.R.S. § 13-
27 4033(B) (“In noncapital cases a defendant may not appeal from a judgment or sentence
28 that is entered pursuant to a plea agreement or an admission to a probation violation.”);
Ariz. R. Crim. P. 32.1 (“Any person who pled guilty or no contest, admitted a probation
violation, or whose probation was automatically violated based upon a plea of guilty or
no contest shall have the right to file a post-conviction relief proceeding, and this
proceeding shall be known as a Rule 32 of-right proceeding.”).

1 timely and did not raise a claim pursuant to Rule 32.1(D), (E), (F), (G), or (H) and was
2 therefore time barred. *Id.* The court further found that Petitioner was sentenced correctly
3 pursuant to the provisions of A.R.S. § 13-3407(F) and A.R.S. § 41-1604.07(A) and was
4 specifically excluded from release credit eligibility. *Id.* The court dismissed Petitioner’s
5 motion. *Id.*

6 **C. Habeas Petition**

7 Petitioner filed his PWHC in this Court on September 30, 2016, asserting four
8 grounds for relief. (Doc. 1). Petitioner requests that the Court hold an evidentiary hearing
9 and vacate his sentence.

10 **II. STANDARD OF REVIEW**

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

19 **A. Exhaustion**

20 A state prisoner must exhaust his state remedies before petitioning for a writ of
21 habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *O’Sullivan v. Boerckel*, 526
22 U.S. 838, 842 (1999). To exhaust state remedies, a petitioner must afford the state courts
23 the opportunity to rule upon the merits of his federal claims by fairly presenting them to
24 the state’s highest court in a procedurally appropriate manner. *Baldwin v. Reese*, 541 U.S.
25 27, 29 (2004) (“[t]o provide the State with the necessary opportunity, the prisoner must
26 fairly present her claim in each appropriate state court . . . thereby alerting the court to the
27 federal nature of the claim.”). In Arizona, unless a prisoner has been sentenced to death,
28 the highest court requirement is satisfied if the petitioner has presented his federal claim

1 to the Arizona COA, either through the direct appeal process or post-conviction
2 proceedings. *Crowell v. Knowles*, 483 F.Supp.2d 925, 931–33 (D. Ariz. 2007).

3 A claim is fairly presented if the petitioner describes both the operative facts and
4 the federal legal theory upon which the claim is based. *Kelly v. Small*, 315 F.3d 1063,
5 1066 (9th Cir. 2003), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143
6 (9th Cir. 2007). The petitioner must have “characterized the claims he raised in state
7 proceedings *specifically* as federal claims.” *Lyons v. Crawford*, 232 F.3d 666, 670 (9th
8 Cir. 2000) (emphasis in original), *opinion amended and superseded*, 247 F.3d 904 (9th
9 Cir. 2001). “If a petitioner fails to alert the state court to the fact that he is raising a
10 federal constitutional claim, his federal claim is unexhausted regardless of its similarity to
11 the issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).
12 “Moreover, general appeals to broad constitutional principles, such as due process, equal
13 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hivala v.*
14 *Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999).

15 However, “[a] habeas petitioner who [fails to properly exhaust] his federal claims
16 in state court meets the technical requirements for exhaustion” if there are no state
17 remedies still available to the petitioner. *Coleman v. Thompson*, 501 U.S. 722, 732
18 (1991). “This is often referred to as ‘technical’ exhaustion because although the claim
19 was not actually exhausted in state court, the petitioner no longer has an available state
20 remedy.” *Thomas v. Schriro*, 2009 WL 775417, *4 (D. Ariz. March 23, 2009). “If no
21 state remedies are currently available, a claim is technically exhausted,” but, as discussed
22 below, the claim is procedurally defaulted and is only subject to federal habeas review in
23 a narrow set of circumstances. *Garcia v. Ryan*, 2013 WL 4714370, *8 (D. Ariz. Aug. 29,
24 2013).

25 **B. Procedural Default**

26 If a petitioner fails to fairly present his claim to the state courts in a procedurally
27 appropriate manner, the claim is procedurally defaulted and generally barred from federal
28 habeas review. *Ylst v. Nunnemaker*, 501 U.S. 797, 802–05 (1991). There are two

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

13 When a petitioner has procedurally defaulted his claims, federal habeas review
14 occurs only in limited circumstances. “A state prisoner may overcome the prohibition on
15 reviewing procedurally defaulted claims if he can show cause to excuse his failure to
16 comply with the state procedural rule and actual prejudice resulting from the alleged
17 constitutional violation.” *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (internal
18 quotations and citation omitted); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (“A
19 prisoner may obtain federal review of a defaulted claim by showing cause for the default
20 and prejudice from a violation of federal law.”). Cause requires a showing “that some
21 objective factor external to the defense impeded counsel’s efforts to comply with the
22 State’s procedural rule . . . [such as] a showing that the factual or legal basis for a claim
23 was not reasonably available to counsel, . . . or that some interference by officials made
24 compliance impracticable.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal
25 quotations and citations omitted). Prejudice requires “showing, not merely that the errors
26 at his trial created a possibility of prejudice, but that they worked to his actual and
27 substantial disadvantage, infecting his entire trial with error of constitutional
28 dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

1 The Court need not examine the existence of prejudice if the petitioner fails to establish
2 cause. *Engle v. Isaac*, 456 U.S. 107, 134 n. 43 (1982); *Thomas v. Lewis*, 945 F.2d 1119,
3 1123 n. 10 (9th Cir. 1991). Additionally, a habeas petitioner “may also qualify for relief
4 from his procedural default if he can show that the procedural default would result in a
5 ‘fundamental miscarriage of justice.’” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir.
6 2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)). This exception to the
7 procedural default rule is limited to habeas petitioners who can establish that “a
8 constitutional violation has probably resulted in the conviction of one who is actually
9 innocent.” *Schlup*, 513 U.S. at 327; *see also Murray*, 477 U.S. at 496; *Cook*, 538 F.3d at
10 1028.

11 **III. ANALYSIS**

12 Petitioner alleges four grounds for relief. However, none of Petitioner’s claims
13 were presented to the state courts in a procedurally appropriate manner. Petitioner failed
14 to timely file a pro se Rule 32 petition and his PCR proceedings were dismissed.
15 Although Petitioner later filed a motion to modify sentence that the trial court construed
16 as a PCR petition, the court found that the motion was untimely and failed to raise a
17 claim pursuant to Rule 32.1(D), (E), (F), (G), or (H), and dismissed the motion. Petitioner
18 did not file a petition for review with the Arizona Court of Appeals, but even if he had,
19 the sentencing claim Petitioner raised in his motion to the trial court is not related to the
20 claims Petitioner now raises on habeas. Thus, because Petitioner’s habeas claims were
21 never presented to the state courts, the Court finds that these claims are unexhausted.³

22 Claims not previously presented to the state courts on either direct appeal or
23 collateral review are generally barred from federal review because any attempt to return
24 to state court to present them would be futile unless the claims fit into a narrow range of
25 exceptions. *See Ariz. R. Crim. P. 32.1(d)-(h), 32.2(a)* (precluding claims not raised on

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27 ³ Petitioner’s claim that courts may dispense with the exhaustion requirement
28 because of delay on the part of the state or because it would manifest injustice to the
petitioner, and that the state has disregarded his constitutional rights since the beginning
of this case, is unavailing and does not excuse Petitioner from complying with the
procedural rules.

1 direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c)
2 (petition for review must be filed within thirty days of trial court's decision). Because
3 these rules have been found to be consistently and regularly followed, and because they
4 are independent of federal law, either their specific application to a claim by an Arizona
5 court, or their operation to preclude a return to state court to exhaust a claim, will
6 procedurally bar subsequent review of the merits of such a claim by a federal habeas
7 court. *Stewart v. Smith*, 536 U.S. 856, 860 (2002); *Ortiz v. Stewart*, 149 F.3d 923, 931–32
8 (9th Cir. 1998) (Rule 32 is strictly followed); *State v. Mata*, 916 P.2d 1035, 1050–52
9 (Ariz. 1996) (waiver and preclusion rules strictly applied in post-conviction proceedings).

10 Arizona Rules of Criminal Procedure regarding timeliness and preclusion prevent
11 Petitioner from now exhausting his claims in Grounds One, Two, Three, and Four in state
12 court. Accordingly, the claims are both technically exhausted and procedurally defaulted
13 and thus not properly before this Court for review. *See Crowell*, 483 F.Supp.2d at 931–
14 33; *Coleman*, 501 U.S. at 732, 735 n. 1; *Garcia*, 2013 WL 4714370 at * 8.

15 A federal court may not consider the merits of a procedurally defaulted claim
16 unless the petitioner can demonstrate cause for his noncompliance and actual prejudice,
17 or establish that a miscarriage of justice would result from the lack of review. *See Schlup*
18 *v. Delo*, 513 U.S. 298, 321 (1995). Petitioner has failed to show cause for, or prejudice
19 arising from, his procedural default of the claim, and the Court can glean none from the
20 record before it. *See Martinez*, 132 S. Ct. at 1316; *Murray*, 477 U.S. at 488. While
21 Petitioner attempts to argue that he can satisfy the cause requirement by showing his trial
22 counsel was ineffective, this blanket overstatement does not explain nor excuse Petitioner
23 from failing to properly present his claims to the state courts. (Doc. 11 at 1–2).
24 Petitioner's conclusory statement that a failure to review his habeas claims will result in a
25 fundamental miscarriage of justice is similarly unavailing. *Id.* at 1.

26 Accordingly, relief on the merits of Petitioner's habeas claims is precluded.

27 **IV. CONCLUSION**

28 For the foregoing reasons,

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

IT IS FURTHER ORDERED that no certificate of appealability shall be issued and that Petitioner is not entitled to appeal in forma pauperis because dismissal of the Petition is justified by a plain procedural bar and reasonable jurists would not find the ruling debatable.

Dated this 27th day of March, 2019.


Eric J. Markovich
United States Magistrate Judge