

1 Supreme Court, and a petition for a writ of habeas corpus in the California Supreme Court. On
2 June 10, 2009, the California Supreme Court denied review of the Petition on direct appeal, and
3 summarily denied the habeas petition. Petitioner filed the instant action on June 3, 2010.

4 In the petition before this Court, Petitioner raised three claims: (1) ineffective assistance of
5 counsel under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution on the ground
6 that trial counsel failed to present expert evidence that Petitioner was the victim of intimate partner
7 abuse in support of her self-defense argument; (2) ineffective assistance of counsel under the Fifth,
8 Sixth, and Fourteenth Amendments to the U.S. Constitution on the grounds that trial counsel failed
9 to present other available evidence of Petitioner’s intimate partner abuse-related defense and trial
10 counsel failed to object to prejudicial and irrelevant evidence offered by the prosecution; and (3)
11 denial of right to confront witnesses under Fifth, Sixth, and Fourteenth Amendments to the U.S.
12 Constitution on the ground that testimony of a key witnesses (Gregory Chandler, Petitioner’s
13 husband who had allegedly “gone into hiding”) was admitted at her trial without the prosecution
14 acting in good faith to locate that witness.

15 II. DISCUSSION

16 Respondents move to dismiss the petition on the ground that Claims 1 and 3 are
17 unexhausted because Petitioner did not fairly present certain arguments in support of these claims
18 to the state courts.¹

19 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
20 either the fact or length of their confinement are first required to exhaust state judicial remedies,
21 either on direct appeal or through collateral proceedings, by presenting the highest state court
22 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
23 federal court. *See* 28 U.S.C. § 2254(b), (c). The exhaustion-of-state-remedies doctrine reflects a
24 policy of federal-state comity to give the state “the initial ‘opportunity to pass upon and correct
25 alleged violations of its prisoners’ federal rights.’” *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.
26 Ct. 509, 30 L. Ed. 2d 438 (1971) (citations omitted). The exhaustion requirement is satisfied only
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28 ¹ Respondents do not argue that Claim 2 is unexhausted. As explained below, the Court finds that all three of Petitioner’s claims were exhausted.

1 if the federal claim has been “fairly presented” to the state courts. *See id.*; *Peterson v. Lampert*, 319
2 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). A federal district court must dismiss a federal
3 habeas petition containing any claim as to which state remedies have not been exhausted. *See*
4 *Rhines v. Weber*, 544 U.S. 269, 273, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005).

5 **A. Petitioner has exhausted her three federal claims.**

6 The Court’s review of Petitioner’s petition for habeas corpus in the California Supreme
7 Court reveals that Petitioner did, in fact, “fairly present” all three federal constitutional Claims at
8 issue in the instant habeas petition. *See* Respondents’ Mot. to Dismiss, Exh. 2 (“California
9 Supreme Court Petition”) [dkt. #9-2]. In the California Supreme Court Petition, Petitioner fairly
10 presented: Claim 1 (ineffective assistance of counsel based on failure to present expert evidence) at
11 pages 15-31 under a section entitled “Petitioner was deprived of the Effective Assistance of
12 Counsel due to Counsel’s Failure to Present Expert Evidence that She was the Victim of Intimate
13 Partner Abuse and was afraid”; Claim 2 (ineffective assistance of counsel based on failure to
14 present other evidence and failure to object) at pages 32-47 under sections entitled “Petition was
15 deprived of the Effective Assistance of Counsel due to Counsel’s Failure to Present Other
16 Exculpatory Evidence,” “Petitioner was deprived of the Effective Assistance of Counsel due to
17 Counsel’s Failure to make Meritorious Objections to the Admission of Gregory’s Testimony and
18 Statements,” and “Counsel’s Failure to Object to Other Inadmissible and Prejudicial Evidence
19 Constituted Ineffectiveness;” and Claim 3 (denial of right to confront witness for prosecution’s
20 failure to locate key witness) at pages 9-13 under a section entitled “Petitioner’s Right to Confront
21 the Witnesses was Violated by the Prosecution’s Failure to follow a Hot Lead to find Gregory” and
22 at pages 40-47 under a section entitled “Petitioner was deprived of the Effective Assistance of
23 Counsel due to Counsel’s Failure to make Meritorious Objections to the Admission of Gregory’s
24 Testimony and Statements.”²

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26 ² Petitioner’s claims in the instant action were also raised in the California Court of Appeal.
27 *See* Exh. A to Pet’n for Writ of Habeas Corpus, “February 18, 2009 California Court of Appeal
28 Unpublished Decision” [dkt. #2] at pages 19-26 (discussing claim that trial counsel provided
constitutionally ineffective assistance of counsel for failure to present certain expert and non-expert
testimony, and failure to object to other testimony) and at pages 9-16 (discussing claim that
Petitioner was denied right to confront witness [Gregory Chandler] at trial due to unavailability).

1 As the federal claims are clearly identified in the state court brief, Petitioner has properly
2 exhausted all three federal claims at issue in her petition for habeas corpus before this Court. *See*
3 *Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004) (holding that for a petitioner to “fairly present”
4 federal claims to a state court, the federal issues must be clearly identified in the state court brief).³

5 **B. Petitioner has not raised “new claims” or “fundamentally altered” her factual**
6 **allegations in the habeas corpus petition before this Court.**

7 “New factual allegations do not ordinarily render a claim unexhausted.” *See Beaty v.*
8 *Stewart*, 303 F.3d 975, 989 (9th Cir. 2002). A claim is unexhausted only if new factual allegations
9 “fundamentally alter the legal claim already considered by the state courts.” *See Vasquez v.*
10 *Hillery*, 474 U.S. 254, 260 (1986); *see also Beaty*, 303 F.3d at 989-90. It is not necessary that
11 “every piece of evidence” supporting federal claims have been presented to the state court. *See*
12 *Chacon v. Wood*, 36 F.3d 1459, 1469 n.9 (9th Cir. 1994) (emphasis in original); *see also Davis v.*
13 *Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). Rather, new evidence affects the fair presentation
14 requirement only when it “substantially improves the evidentiary basis” for the claims at issue. *See*
15 *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988). New factual allegations that are merely
16 cumulative of those presented to the state court do not transform the claim and thus do not require
17 exhaustion. *See Hillery v. Pulley*, 533 F. Supp. 1189, 1200-02 (E.D. Cal. 1982), *aff’d*, 733 F.2d
18 644 (9th Cir. 1984), *aff’d*, 474 U.S. 254 (1986); *see also Weaver v. Thompson*, 197 F.3d 359, 364
19 (9th Cir. 1999) (even if the “precise factual predicate” for a claim had changed, as long as the claim
20 remained rooted in the same incident it was exhausted). Thus, exhaustion does not require that
21 every piece of evidence supporting the federal claim be presented to the highest state court. *See*
22 *Davis*, 511 F.3d at 1009. Rather, “to exhaust the factual basis of the claim, the petitioner must only
23 provide the state court with the operative facts, that is, all of the facts necessary to give application
24 to the constitutional principle upon which [the petitioner] relies.” *Id.*

25 Here, Respondents suggest that Petitioner raised four “new claims” and presented “new
26 declarations” not considered by the state courts. The four purportedly new claims are: (1) trial

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28 ³ The Court does not address the factual accuracy or legal soundness of Petitioner’s claims. This Order merely finds that Petitioner has exhausted those three claims in state court.

1 counsel’s untimely retention of the domestic violence expert; (2) trial counsel’s failure to explore
2 with the expert how expert testimony could address concerns regarding the potential rebuttal
3 witness; (3) trial counsel’s failure to provide to the expert all relevant evidence regarding intimate
4 partner abuse; and (4) the trial counsel’s decision to put on general domestic violence testimony
5 was unreasonable because it left the jury to infer that the expert did not believe Petitioner was a
6 victim of intimate partner abuse. In addition, Respondents argue that Petitioner presented two new
7 declarations, one by a purported *Strickland* expert regarding her ineffective assistance of counsel
8 claim, and one by Gregory Chandler regarding his whereabouts during Petitioner’s criminal trial.
9 Petitioner contends that her petition includes no new claims, and that Respondents’ arguments,
10 which focus merely on a few lines in a hundred-page brief, are “nitpicking at best.”

11 The Court finds that, although there are slight differences between the petition filed in the
12 California Supreme Court and the petition filed in this Court, none of those differences
13 fundamentally alter the legal claims already considered by the state courts. *See Belmontes v.*
14 *Brown*, 414 F.3d 1094, 1117-18 (9th Cir. 2005), *rev’d on other grounds, Ayers v. Belmontes*, 549
15 U.S. 7 (2006) (new allegations in a federal petition do not render a claim unexhausted unless they
16 fundamentally alter the legal claims already considered by the state courts). The major thrust of
17 Petitioner’s argument before the state courts was that her trial counsel’s performance was
18 constitutionally defective because of trial counsel’s inexperience, lack of familiarity with intimate
19 partner abuse, and failure to present “case-specific expert testimony” that Petitioner was the victim
20 of intimate partner abuse. *See, e.g.*, California Supreme Court Petition at 7 (“trial counsel failed to
21 present compelling and available case-specific testimony that petitioner was a battered spouse”)
22 and at 15 (“counsel did not present the expert’s opinion that [Petitioner] was the victim of intimate
23 partner abuse”). As Petitioner notes, whether trial counsel retained the expert in an untimely
24 manner “was not a separate claim or even a new point.” *See* Response to Mot. to Dismiss at 4 [dkt.
25 #10]. And, in the Court’s view, an allegation as to trial counsel’s tardiness in retaining a domestic
26 violence expert does not fundamentally alter Petitioner’s central argument that trial counsel’s
27 performance was constitutionally defective for failing to present that expert’s opinions. *See*
28 *Vasquez*, 474 U.S. at 260; *see also Davis*, 511 F.3d at 1009.

1 The same principle holds true with respect to the three other purportedly new claims.
2 Petitioner’s allegations that trial counsel: failed to explore how the expert testimony could address
3 trial counsel’s concerns regarding rebuttal the witnesses, failed to provide the expert with all
4 relevant evidence, and failed to put on case-specific expert testimony leaving the jury to infer that
5 the expert did not believe Petitioner was a victim of intimate partner abuse are all encompassed,
6 and thus fairly presented, in the arguments Petitioner raised before the California Supreme Court.
7 For example, Petitioner made the following arguments to the California Supreme Court. First, trial
8 counsel did not present the full results of the expert’s assessment “based on his [trial counsel’s]
9 belief that the admission of the expert’s testimony would ‘open the door’ to an undesirable rebuttal
10 witness” and despite the expert’s warning that he was making a “big mistake.” *See* California
11 Supreme Court Petition at 22, 27. Second, trial counsel did not thoroughly interview Petitioner,
12 failed to fully investigate her case, and did not adequately follow up on information he had
13 regarding Petitioner and Petitioner’s relationship with Gregory Chandler. *Id.* at 32-33, 35. Third,
14 by not presenting the expert’s full testimony, trial counsel “deprived the jury of relevant, helpful
15 and exculpatory evidence that [Petitioner] was a victim of domestic violence and reasonably feared
16 for her life.” *Id.* at 28-31.

17 Finally, although new, the two declarations submitted with the habeas petition do not
18 provide additional factual allegations that fundamentally alter Petitioner’s claims, or the
19 evidentiary basis for Petitioner’s claims. In the first declaration, purported *Strickland* expert, M.
20 Gerald Schwartzbach, merely opines that trial counsel’s performance was constitutionally defective
21 for failure to adequately inform himself about what was then referred to as “Battered Women’s
22 Syndrome” (now intimate partner abuse) and for failure to present case-specific testimony
23 regarding Petitioner. *See* Exh. E attached to Petition [dkt. #2]. Mr. Schwartzbach’s declaration
24 includes no new factual allegations, and is simply cumulative of the allegations presented in state
25 court. *See Hillery*, 533 F. Supp. at 1200-02.

26 Similarly, the second declaration, by Gregory Chandler regarding his whereabouts during
27 Petitioner’s trial, does not fundamentally alter the nature of Petitioner’s legal claim under the
28 Confrontation Clause or substantially improve the evidentiary basis for that claim. *See Aiken*, 841

1 F.2d at 883. Moreover, Petitioner expressly raised her confrontation claim with respect to
2 Gregory’s whereabouts during trial before the state courts. *See* California Supreme Court Petition
3 at 9-10 (“Evidence discovered after trial revealed that, before and during trial, Gregory was living
4 in Sacramento with new girlfriends Margo Swift and Deneen Hayes. Other new evidence reveals
5 that the prosecution investigator was in contact with Margo Swift during [Petitioner’s] trial.”) and
6 at 50-51 (“The evidence shows that, in the months before and during [Petitioner’s] trial, Gregory
7 was living with his new girlfriends Margo Swift and then Deneen Hayes, in Sacramento, and not
8 with [Petitioner’s] family. Neither of these women had any contact with [Petitioner] or her family.
9 *Gregory himself states* that neither [Petitioner] nor anyone in her family knew where he was during
10 the trial and they had not encouraged him to hide out.”) (emphasis added). In other words, the state
11 courts had the same the legal theory (denial of right to confront witnesses) and the same operative
12 facts before it (Gregory’s whereabouts during trial, who knew about his whereabouts, and the
13 prosecution’s efforts to find him) as presented in the pending habeas petition. *See Davis*, 511 F.3d
14 at 1009 (in order to exhaust a federal claim, “the petitioner must only provide the state court with
15 the operative facts, that is all of the facts necessary to give application to the constitutional
16 principle upon which [the petitioner] relies.”).

17 In sum, none of what Respondents characterize as “new claims” or “new evidence”
18 fundamentally alters the nature of the legal claims already considered by the state courts and at
19 issue in the pending habeas petition.

20 III. CONCLUSION

21 For the foregoing reasons, Respondents’ motion to dismiss for failure to exhaust is
22 DENIED. Respondents shall file with the Court and serve on Petitioner, within **sixty days** of the
23 issuance of this Order, an answer conforming in all respects to Rule 5 of the Rules Governing
24 Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted.
25 Respondents shall file with the answer and serve on Petitioner a copy of all portions of the state
26 trial record that have been transcribed previously and that are relevant to a determination of the
27 issues presented by the petition. If Petitioner wishes to respond to the answer, she shall do so by
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filing a traverse with the Court and serving it on respondent within **thirty days** of service of Respondents' answer.

IT IS SO ORDERED.

Dated: March 14, 2011



LUCY H. KOH
United States District Judge