

1 the arguments that petitioner has not exhausted all his grounds for relief. Before a federal court
2 may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies
3 available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly
4 present that ground to the state’s highest court, describing the operative facts and legal theory, and
5 give that court the opportunity to address and resolve the ground. See Duncan v. Henry, 513 U.S.
6 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

7 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state
8 remedies only if he characterized the claims he raised in state proceedings specifically as federal
9 claims. In short, the petitioner must have either referenced specific provisions of the federal
10 constitution or statutes or cited to federal case law.” Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir.
11 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law that
12 applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158
13 (9th Cir. 2003) (en banc). “The mere similarity between a claim of state and federal error is
14 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles,
15 such as due process, equal protection, and the right to a fair trial, are insufficient to establish
16 exhaustion.” Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

17 Respondents base their primary argument for failure to exhaust upon the second of three
18 issues that petitioner presented in the appeal from the denial of his state habeas corpus petition. The
19 three issues were:

- 20 I. The District Court erred in denying Wadsworth’s claim that his trial counsel
21 provided ineffective assistance of counsel, when there was no good or sound reason
for counsel’s choice of defense
- 22 II. The District Court erred in dismissing several properly-pled claims in the post-
23 conviction petition for writ of habeas corpus—including the Batson challenge and
24 the ineffective assistance of appellate counsel claim—without an evidentiary hearing,
and by impermissibly adopting the State’s position wholesale
- 25 III. The State presented insufficient evidence of First Degree Murder, and thus the jury
erroneously convicted Wadsworth of the same

26 Ex. 115 at ii (#15) (citations to the Constitution omitted). Respondents argue that petitioner has not
27 exhausted grounds 2, 3, 4, 5, 7, and parts of ground 6 because he did not present them specifically to
28 the Nevada Supreme Court, but only raised the issue that the state district court should have held an

1 evidentiary hearing before dismissing the grounds.¹ The Nevada Supreme Court’s ruling was:

2 Next, appellant argues that the district court erred by summarily dismissing his other claims
3 without holding an evidentiary hearing or making specific findings of fact or conclusions of
4 law as to those claims. Specifically, appellant contends that the district court’s order should
5 be reversed because the district court stated that the claims raised in appellant’s proper
6 person petition were dismissed “on motion of the State, for the reasons stated in the motion
7 to dismiss.” We conclude that, to the extent that the district court erred by failing to set forth
8 specific findings of fact and conclusions of law pursuant to NRS 34.830(1) and NRAP
9 4(b)(5)(B), appellant has failed to demonstrate that he was harmed by such error. Our
10 review of the record reveals that the claims raised by appellant in his proper person petition
11 were belied by the record, were rejected by this court on direct appeal and thus were barred
12 by the doctrine of the law of the case, or failed to demonstrate actual prejudice.

13 Furthermore, other than asserting that the district court failed to hold an evidentiary hearing
14 or make factual findings or conclusions of law in denying these claims, appellant does not
15 present any argument on appeal to demonstrate that the district court erred in declining to
16 hold an evidentiary hearing on these claims. See Maresca v. State, 103 Nev. 669, 673, 748
17 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent
18 argument.”). Thus, we conclude that the district court did not err by denying the claims.

19 Ex. 123, at 3-4 (#16) (emphasis added). The court of appeals has addressed a similar issue in Kibler
20 v. Walters, 220 F.3d 1151 (9th Cir. 2000). In that case, Kibler sought discretionary relief in the
21 Washington Supreme Court. Kibler presented one issue of ineffective assistance of counsel with
22 specificity. As for the other issues of ineffective assistance, Kibler only requested that the lower
23 court should hold an evidentiary hearing on his post-conviction claims, referring to the claims in a
24 lower-court brief. The Washington Supreme Court denied the motion without comment. Id. at
25 1152. The court of appeals noted that Kibler had not stated the underlying claim of ineffective
26 assistance of counsel with clarity, as required both by state-court rule and the exhaustion
27 requirement of 28 U.S.C. § 2254. Id. at 1153. Consequently, Kibler had not exhausted the
28 underlying claim. Id. Likewise, petitioner’s argument in his opening brief on appeal from the
denial of the habeas corpus petition contained only the legal standards for holding an evidentiary
hearing in state court and the conclusion that the district court erred, without any allegations about
the merits of the underlying grounds. If the Nevada Supreme Court had not put the emphasized
portion into its ruling, this court would have no trouble concluding that the issue presented to the
Nevada Supreme Court failed to exhaust the grounds at issue. However, as much as respondents
argue that the emphasized portion was a review of procedural requirements, statements such as
claims being belied by the record or petitioner failing to demonstrate actual prejudice indicate that

¹ Respondents had argued that ground 1(A) is unexhausted, but then they withdrew that argument. Reply at 12 n.7 (#45).

1 the Nevada Supreme Court did review the merits of the claims. Petitioner notes correctly that a
2 claim is exhausted if the Nevada Supreme Court addresses it, even if the claim was not fairly
3 presented to the Nevada Supreme Court. Casey v. Moore, 386 F.3d 896, 916 n.18 (9th Cir. 2004).
4 Consequently, to the extent that petitioner did present raise the claims in the challenged grounds in
5 his proper-person state petition, his request for an evidentiary hearing was not a failure to exhaust
6 those grounds.

7 In the alternative, respondents argue that petitioner did not present some of the challenged
8 grounds either on direct appeal or in his state habeas corpus petition. The court agrees with some,
9 but not all, of respondents' arguments.

10 In ground 2, petitioner alleges that the trial court erred in denying petitioner's attempts to
11 admit into evidence the police statements of Cisco Neal, Michael Griner, and petitioner himself, to
12 impeach the testimony of Detective Fogarty. Regarding Cisco Neal, petitioner argued on direct
13 appeal that he was not able to question Detective Fogarty about Neal, but that was an argument on
14 state law, not federal law. Ex. 63, at 8-9 (#14). The proper-person state habeas corpus petition
15 contains no allegation that the state district court prevented petitioner from further questioning
16 Detective Fogarty about the mention of a possible second shooter in the interview with Neal. See
17 Ex. 81 at 7-7D (#14). Petitioner did allege in the proper-person state petition:

18 Petitioner's defense was, another person with a gun was a[t] the scene of the crime, "who
19 was the chubby dude, possibly named Ace, who had a gun", who[se] bullets most probably
20 would have matched those recovered from victim and crime scene, but the court denied the
21 several opportunities to allow jury to learn about this evidence, and this forced Petitioner to
22 testify regarding the chubby dude with the gun and this left testimony bare and naked
without the prior discussed exculpatory evidence to support it, and the nakedness of the
testimony was further stripped bare when Detective Fogarty told the jury, no evidence
existed to support the Petitioner's allegations as to the chubby dude with a gun that was at
the scene.

23 Ex. 81 at 7C (#14). However, nowhere in the preceding paragraphs did petitioner mention anything
24 about trying to introduce into evidence the transcript of Neal's interview with the police. Regarding
25 Michael Griner, on direct appeal petitioner alleged that Griner's interview with police was
26 transcribed, but petitioner made no argument about Griner's statement. Ex. 63 at 6 (#14). In the
27 proper-person state petition, petitioner alleges that the transcript of Griner's statement was provided
28 to the trial court for the judge's review, but that counsel never marked the transcript as an exhibit or

1 offered the transcript into evidence. Ex. 81 at 7B (#14). This is a claim of ineffective assistance of
2 counsel, which is legally and factually distinct from the claim in the current ground 2 that the
3 district court denied petitioner’s attempt to admit the transcript into evidence. Consequently, the
4 parts of ground 2 regarding the interviews of Neal and Griner are unexhausted.

5 Ground 4 is a claim that petitioner was forced to testify because the trial court did not allow
6 petitioner to impeach Detective Fogarty. Petitioner made a brief argument to that effect in his
7 opening brief on direct appeal. Ex. 63, at 6 (#14). The Nevada Supreme Court then held:

8 Additionally, Wadsworth argues that, but for the district court’s error in limiting Detective
9 Fogerty’s questioning, he would not have had to testify because the second gunman theory
10 would have been presented through Detective Fogerty. However, the decision to testify is a
11 strategic decision. [Footnote 1: Comer v. Schriro, 480 F.3d 960, 987 (9th Cir. 2007) (citing
Rock v. Arkansas, 483 U.S. 44, 53 (1987)).] As such, it was Wadsworth’s prerogative to
testify knowing the strength of the State’s case. By choosing to testify, Wadsworth accepted
both the risks and the rewards that accompanied his testimony.

12 Ex. 75, at 2 (#14). Rock held that a criminal defendant has the right to testify in his or her own
13 defense. 483 U.S. at 49. Rock noted that this right “is also a necessary corollary to the Fifth
14 Amendment’s guarantee against compelled testimony.” Id. at 52. In other words, petitioner had a
15 constitutional right not to testify or to testify; the choice is petitioner’s to make. Even though
16 petitioner did not mention the Constitution in his brief argument, the Nevada Supreme Court
17 recognized the constitutional implications of the argument, and thus effectively exhausted ground 4.
18 Casey, 386 F.3d at 916 n.18.

19 Ground 5 is a claim that the trial court erred when it denied a proposed instruction that told
20 the jury what to do when presented with evidence that is susceptible of two constructions or
21 interpretations. Petitioner presented the same claim on direct appeal. The Nevada Supreme Court
22 held that the district court could deny the instruction as long as the jury received the correct
23 instruction on reasonable doubt. Ex. 75, at 3-4. Respondents argue that this ground should be
24 considered unexhausted because “reasonable doubt” is a generic phrase like “due process” or “fair
25 trial.” See Hiiivala, 195 F.3d at 1106. The court disagrees. It has long been a constitutional
26 requirement that a jury must find a person guilty beyond a reasonable doubt. In re Winship, 397
27 U.S. 358 (1970). The reasonable-doubt instruction in Nevada has been the subject of much
28 litigation, with the court of appeals having found it to be constitutional. See Ramirez v. Hatcher,

1 136 F.3d 1209, 1211-15 (9th Cir. 1998). It is hard to see how use of the phrase “reasonable doubt”
2 in the context of a criminal trial could mean anything other than the federal constitutional standard
3 for finding a defendant guilty. Ground 5 is exhausted.

4 Ground 6(D) is a claim that trial counsel provided ineffective assistance because trial
5 counsel did not locate and present at trial witnesses who were vital for the defense. Petitioner
6 identifies six people. The proper-person state habeas corpus petition has a citation to the general
7 principle that counsel has the duty to investigate the case and to find witnesses for the defense, but,
8 with one exception, petitioner did not provide any names of the witnesses that he provided in
9 ground 6(D). See Ex. 81, at 10-10A (#14). The one exception is a woman named Beatriz Ramirez.
10 Petitioner describes her recollection of the events. Id. at 10A. However, he does not allege
11 anything that counsel should have done regarding her. Petitioner alleges in the federal second
12 amended petition that trial counsel should have investigated and located Ramirez, but the Nevada
13 Supreme Court did not have the benefit of reading the second amended petition. Petitioner has not
14 fairly presented the issue in ground 6(D) to the Nevada Supreme Court, and the ground is
15 unexhausted.

16 Ground 6(G) is a claim that trial counsel provided ineffective assistance because trial
17 counsel did not actually seek admission into evidence of petitioner’s videotaped police interview
18 and the transcript of Cisco Neal’s police interview. See Ex. 75 at 2, 3 (direct-appeal order noting
19 that petitioner did not seek the admission of these two things) (#14). Petitioner argues that he
20 presented this issue in his proper-person petition, Ex. 81 at 8, 8B-8C (#14). However, that is a
21 claim of ineffective assistance of appellate counsel for poor presentation of the issues on direct
22 appeal. The court cannot construe that claim into a claim of ineffective assistance of trial counsel.
23 The attorneys, the court, and the actual claims are all different. Ground 6(G) is unexhausted.

24 Ground 7(B) is a claim of ineffective assistance of appellate counsel because appellate
25 counsel did not challenge the sufficiency of the evidence to establish premeditation and deliberation,
26 both elements of first-degree murder. In the appeal from the denial of the state habeas corpus
27 petition, the Nevada Supreme Court ruled:

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1 Finally, appellant argues that there was insufficient evidence to convict him of first-degree
2 murder with the use of a deadly weapon because there was no evidence of premeditation and
3 deliberation. This claim was not raised in appellant's supplemental petition and was raised
4 in appellant's proper person petition only in the context of ineffective assistance of counsel.
5 Thus, we need not address the insufficient-evidence claim in the first instance. See generally
6 Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (observing that arguments
not presented in district court in first instance need not be considered on appeal), overruled
7 on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004). To the extent that
8 appellant's claim in his proper person petition could be construed as a separate claim of
9 insufficient evidence, such a claim would be procedurally barred because it could have been
10 raised on direct appeal. See NRS 34.810(1)(b)(2).

11 Ex. 123 at 4-5 (#16). The ground of the proper-person petition that the Nevada Supreme Court
12 mentions does start as a claim of ineffective assistance of trial counsel. Ex. 81 at 10 (#14). The
13 argument about the sufficiency of the evidence to establish premeditation and deliberation is at
14 pages 10B-10C of the proper-person petition. Petitioner might have intended to allege a separate
15 claim of insufficient evidence, because in general his proper-person petition often blended separate
16 legal theories together. Regardless of what petitioner did raise in that ground in the proper-person
17 petition, the proper-person petition does not contain a claim of ineffective assistance of appellate
18 counsel for not challenging the sufficiency of all elements, particularly premeditation and
19 deliberation, of first-degree murder. See Ex. 81 (#14). The supplemental petition also does not
20 contain such a claim. See Ex. 96 (#15). In the appeal from the denial of the state habeas corpus
21 petition, petitioner did try to link the issue of sufficiency of the evidence to a claim of ineffective
22 assistance. However, that was a claim of ineffective assistance of trial counsel for choosing the
23 defense theory that there was a second shooter, as opposed to a theory of self-defense or defense of
24 others. See Ex. 115 at 6-15 (#15). Nowhere in that brief did petitioner argue that appellate counsel
25 failed to raise the issue of insufficient evidence to establish premeditation and deliberation. Ground
26 7(B) is unexhausted.

27 **Procedural Default**

28 Respondents also argue that ground 1(B) is procedurally defaulted. Ground 1(B) is the claim
that underlies ground 7(B), that the evidence was insufficient to establish premeditation and
deliberation. As noted above, petitioner might have intended to raise this claim in his proper-person
state habeas corpus petition. He certainly did raise the claim in the appeal from the denial of his
state habeas corpus petition. The Nevada Supreme Court ruled that the claim was barred pursuant

1 to Nev. Rev. Stat. § 34.810 because petitioner could have raised the claim on direct appeal, but did
2 not. Ex. 123 at 4-5 (#16).

3 A federal court will not review a claim for habeas corpus relief if the decision of the state
4 court regarding that claim rested on a state-law ground that is independent of the federal question
5 and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

6 In all cases in which a state prisoner has defaulted his federal claims in state court
7 pursuant to an independent and adequate state procedural rule, federal habeas review
8 of the claims is barred unless the prisoner can demonstrate cause for the default and
actual prejudice as a result of the alleged violation of federal law, or demonstrate that
failure to consider the claims will result in a fundamental miscarriage of justice.

9 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon
10 which the Nevada Supreme Court relied in this case is an adequate and independent state rule.
11 Vang v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat. § 34.810).

12 To demonstrate cause for a procedural default, the petitioner must “show that some objective
13 factor external to the defense impeded” his efforts to comply with the state procedural rule. Carrier,
14 477 U.S. at 488.

15 To show prejudice, “[t]he habeas petitioner must show ‘not merely that the errors at . . . trial
16 created a possibility of prejudice, but that they worked to his actual and substantial disadvantage,
17 infecting his entire trial with error of constitutional dimensions.’” Carrier, 477 U.S. at 494 (quoting
18 United States v. Frady, 456 U.S. 152, 170 (1982)) (emphasis in original).

19 The court disagrees with petitioner that the Nevada Supreme Court decided the issue on the
20 merits in the direct appeal. The direct-appeal argument, in full, was:

21 The jury should not have concluded that WADSWORTH shot the victim because of
22 Criminalist Kevin Lattyak testimony. He testified that he could not state for certain that the
23 bullets recovered at the scene and from the victim came from the .38 caliber Colt revolver
found at the scene. Trial Transcript, Vol. V., pp. 15-16, 21-22 and 24-25. Therefore, the
jury could not have reached its decision based on the testimony at trial.

24 Ex. 63, at 10 (#14-2). The reply brief did not address this claim. See Ex. 68 (#14-7). The Nevada
25 Supreme Court held:

26 Wadsworth next argues that there was insufficient evidence to convict him because the
27 firearms expert could not affirmatively state that the shots fired came from Wadsworth’s
28 revolver. The firearms expert testified that the bullets recovered from the crime scene came
from a Colt .38 caliber revolver. He compared the recovered bullets to the Colt .38 caliber
revolver found at the crime scene. The firearms expert testified that he could not

1 conclusively determine that the Colt .38 recovered from the crime scene was the murder
2 weapon, but he also could not exclude it. Wadsworth later testified that the Colt .38
3 revolver was his and that he had fired the gun in the victim's direction, but that he had fired
4 it into the ground. No other weapon was recovered from the crime scene.

5 It is for the jury to determine the weight and credibility of the evidence. The jury apparently
6 found credible the firearm expert's testimony, as well as Wadsworth's acknowledgement
7 [sic] that he owned the Colt .38 found at the crime scene. Moreover, additional evidence
8 supported Wadsworth's conviction, including eyewitness testimony placing him at the crime
9 scene and shooting a revolver. Therefore, we conclude that the firearm expert's testimony
10 did not render the evidence adduced at trial insufficient to support his conviction.

11 Ex. 75, at 4-5 (#14-14). In the petition, petitioner argues that "[t]he facts, as presented at trial, do
12 not support any reasonable interpretation that Wadsworth had sufficient time nor reason for
13 premeditation and deliberation." Second Amended Petition, at 10 (#26) (emphasis added). On
14 direct appeal, petitioner challenged the sufficiency of the evidence that he fired the fatal shot.
15 Petitioner never made the elements of premeditation and deliberation an issue on direct appeal, and
16 the Nevada Supreme Court's ruling did not address those elements. The Nevada Supreme Court
17 was under no obligation to create an issue sua sponte when petitioner made no mention of it.

18 The court also disagrees with petitioner's argument that the Nevada Supreme Court ruled on
19 the merits of the claim when it considered whether the district court should have held an evidentiary
20 hearing. Immediately after stating that it had reviewed the proper-person petition, the Nevada
21 Supreme Court specifically stated that this claim was procedurally barred by Nev. Rev. Stat.
22 § 34.810. The Nevada Supreme Court's alternative decision on the merits does not affect the
23 adequacy and independence of the state ground for denying the petition. Harris v. Reed, 489 U.S.
24 255, 264 n.10 (1989); Comer, 480 F.3d at 964 n.6.

25 Finally, petitioner argues that appellate counsel provided ineffective assistance because
26 appellate counsel failed to raise the claim on direct appeal, and that such ineffective assistance is
27 cause to excuse the procedural default. However, that claim of ineffective assistance is the
28 unexhausted ground 7(B), which is unable to act as cause. Carrier, 477 U.S. at 488-89. Petitioner
will need to decide what to do with ground 7(B), and then the court can decide how to dispose of
ground 1(B).

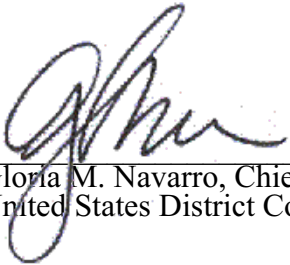
The second amended petition (#26) is mixed, containing both claims exhausted in state court
and claims not exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S.

1 509, 521-22 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983).

2 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (#34) is **GRANTED**
3 in part. Grounds 6(D), 6(G), 7(B), and part of ground 2 are unexhausted.

4 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** from the date of
5 entry of this order to file a motion for dismissal without prejudice of the entire petition, for partial
6 dismissal of grounds 6(D), 6(G), 7(B), and the unexhausted part of ground 2, or for other
7 appropriate relief. Within ten (10) days of filing such motion, petitioner must file a signed
8 declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his
9 counsel in this matter regarding his options, that he has read the motion, and that he has authorized
10 that the relief sought therein be requested. Failure to comply with this order will result in the
11 dismissal of this action.

12 DATED this 30th day of March, 2015.

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16 Gloria M. Navarro, Chief Judge
17 United States District Court
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