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6	UNITED STA	TES DISTRICT COURT
7	DISTRICT OF NEVADA	
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9	JOHN MICHAEL FARNUM	
10	Petitioner,	Case No. 2:13-cv-01304-APG-PAL
11	VS.	ORDER
12	ROBERT LEGRAND, et al.,	
13	Respondents.	
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Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#1), respondents' motion to dismiss (#27), petitioner's opposition (#30), and respondents' reply (#31). The court finds that petitioner has not exhausted some of his claims for relief, and the court grants the motion in part.

19 After a jury trial in state court and a post-verdict motion for acquittal, petitioner was 20convicted of twelve counts of sexual assault with a minor under fourteen years of age, four counts 21 of lewdness with a child under the age of fourteen, and one count of attempted lewdness with a 22 child under the age of fourteen. Ex. 51 (#18). Petitioner appealed. The Nevada Supreme Court 23 determined that petitioner should have been acquitted on two counts of sexual assault and three counts of lewdness; the Nevada Supreme Court rejected petitioner's other contentions. Ex. 72 24 25 (#19). On April 20, 2007, the state district court then entered an amended judgment of conviction. 26 Ex. 76 (#19). Petitioner now is convicted of ten counts of sexual assault with a minor under 27 fourteen years of age, one counts of lewdness with a child under the age of 14, and one count of 28 attempted lewdness with a child under the age of fourteen. Petitioner did not appeal the amended

judgment of conviction, and it became final with the expiration of the time to appeal on May 21,
 2007.

3 On April 14, 2008, 329 days later, petitioner filed in state district court points and 4 authorities in support of a petition for a writ of habeas corpus. Ex. 78 (#19). The actual post-5 conviction habeas corpus petition was filed on April 17, 2008. Ex. 80 (#20). The state district 6 court denied the petition. Ex. 91 (#20). Petitioner appealed. The Nevada Supreme Court remanded 7 for an evidentiary hearing on petitioner's claims that trial counsel provided ineffective assistance 8 because trial counsel failed to investigate the case and failed to present a defense at trial. Ex. 119 9 (#21). The state district court held an evidentiary hearing. Ex. 128 (#22). It denied the petition 10 again. Ex. 130 (#22). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 149 (#22). 11 Remittitur issued on February 11, 2013. Ex. 151 (#22).

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On July 23, 2013, 162 days later, petitioner filed his federal habeas corpus petition pursuant
to 28 U.S.C. § 2254 (#1) in this court. The motion to dismiss followed.

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. <u>See Duncan v. Henry</u>, 513 U.S. 364, 365 (1995) (per curiam); <u>Anderson v. Harless</u>, 459 U.S. 4, 6 (1982).

20 "[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available state 21 remedies only if he characterized the claims he raised in state proceedings specifically as federal 22 claims. In short, the petitioner must have either referenced specific provisions of the federal 23 constitution or statutes or cited to federal case law." Lyons v. Crawford, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), amended, 247 F.3d 904 (9th Cir. 2001). Citation to state case law 24 25 that applies federal constitutional principles will also suffice. Peterson v. Lampert, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). "The mere similarity between a claim of state and federal error is 26 27 insufficient to establish exhaustion. Moreover, general appeals to broad constitutional principles, 28

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1 such as due process, equal protection, and the right to a fair trial, are insufficient to establish 2 exhaustion." Hiivala v. Wood, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). 3 Respondents argue that petitioner has not presented 8 issues of ineffective assistance of counsel to the state courts. The court will refer to these issues as issues 1 through 8. Petitioner 4 5 agrees that he has not presented one issue, a claim of ineffective assistance of appellate counsel, but 6 disputes at least six of the seven other issues. Petitioner writes: The Respondent's argument is, by its very nature, dilatory and attempts to marginalize the arguments of the Petitioner through the labeling of issues. These alleged labels are nothing more than an organizational tool for the Petitioner's thought processes. All in all, the issues 7 8 presented all fall under the same penumbra of ineffective assistance of counsel, by and 9 through the various means that it was committed. 10Opposition, at 2 (#30). Petitioner is incorrect. As respondents note, a claim of ineffective 11 assistance of counsel is not fungible, and it is very dependent upon the facts alleged. See Hemmerle v. Schriro, 495 F.3d 1069, 1075-76 (9th Cir. 2007). "[N]ew factual allegations do not render a 12 claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state 13 courts." Chacon v. Wood, 36 F.3d 1459, 1468 (quoting Vasquez v. Hillery, 474 U.S. 254, 260 14 15 (1986)). The new facts alleged in the federal petition have fundamentally altered many of the issues 16 that respondents challenge. 17 Issue 1 is a claim that appellate counsel provided ineffective assistance by raising a 18 "specious" Eighth Amendment claim on direct appeal. Petitioner concedes that it is not exhausted. 19 Opposition, at 3-4 (#30). 20 Issue 2 is a claim that trial counsel was operating under a conflict of interest because trial 21 counsel previously had represented Bob Farnum, petitioner's father, on charges of sexual offenses. 22 Petitioner disagrees that he has presented a distinct claim of ineffective assistance based upon a 23 conflict of interest, but he waives any such claim. Opposition, at 4-5 (#30). 24 Issue 3 is a claim that trial counsel failed to rehabilitate the sole defense witness, Lynn 25 Raleigh. Both petitioner and respondents point to the same part of the appellate brief in the second 26 state habeas corpus appeal, Ex. 145, at 38-40 (#22). The court is not persuaded by respondents' 27 argument that this was a passing reference. Trial counsel had called Raleigh, who testified to her

28 knowledge of the mother of the victim and her opinion that the mother was not a truthful person.

On cross-examination, Raleigh testified that she was petitioner's sister in law. On redirect
 examination, Raleigh testified that she was present pursuant to a subpoena. In the appellate brief,
 petitioner argued that trial counsel was ineffective in his defense theory of discrediting the mother.
 Part of the argument was that counsel should not have called only one witness, and one who could
 have been discredited with only one question. The facts and the legal theory were before the
 Nevada Supreme Court. Issue 3 is exhausted.

7 Issue 4 is a claim that trial counsel provided ineffective assistance because he gave specious
8 testimony at the state habeas corpus evidentiary hearing about how much time he spent preparing
9 for trial. In his his second state habeas corpus appellate brief, petitioner expressed disbelief that
10 trial counsel actually spent as much time as trial counsel testified that he spent. Ex. 145, at 19-20,
11 40-42 (#22). However, petitioner did not raise the issue as a separate claim of ineffective assistance
12 of counsel, as he appears to be doing in his federal petition. Issue 4 is unexhausted.

13 Issue 5 is a claim that trial counsel failed to file pre-trial motions. Petitioner describes the motions in two separate sections of his petition (#1), at pages 120 and 149. Petitioner described the 14 15 same motions in his second state habeas corpus appellate brief. Ex. 145, at 15, 29 (#22). In its order of affirmance, in the paragraph starting "Third," the Nevada Supreme Court outlined some of 16 17 the things that petitioner argues counsel should have done, including requesting a psychological 18 evaluation on the victims. Ex. 149, at 3-4 (#22). The psychological-evaluation motion is one of the 19 motions mentioned in petitioner's second state habeas corpus appellate brief. Given that the 20Nevada Supreme Court specifically noted the psychological-evaluation motion, and given that the 21 Nevada Supreme Court considered the argument that counsel failed to file the motion as part of 22 petitioner's claim of ineffective assistance of counsel, then the Nevada Supreme Court could not 23 have failed to notice the other motions that petitioner argued trial counsel should have filed. 24 Petitioner fairly presented issue 5 to the Nevada Supreme Court, and it is exhausted.

Issue 6 is a claim that trial counsel provided ineffective assistance because trial counsel
failed to obtain the medical records of the victim's mother. Petitioner argues that he presented this
issue to the Nevada Supreme Court at pages 12-19 of his second state habeas corpus appellate brief.
Respondents note correctly that nowhere in those pages does petitioner allege that counsel failed to

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1 request the mother's medical records. Respondents also note correctly that those pages are the 2 statement of facts of the appellate brief. Even if petitioner did mention something about the 3 mother's medical records in the statement of facts, that passing mention would not be sufficient to have presented the issue to the Nevada Supreme Court. Wood v. Ryan, 693 F.3d 1144, 1121 (9th 4 5 Cir. 2012), cert. denied, 134 S. Ct. 239 (2013). In the body of argument in the second state habeas corpus appellate brief, petitioner did note that his wife told him that the victim's mother took 6 7 mental-health medications, but that allegation would not have placed the Nevada Supreme Court on 8 notice of a claim that trial counsel should have requested the mother's psychological records. Issue 9 6 is unexhausted.

10 Issue 7 is a claim that trial counsel failed to use available impeachment evidence against the 11 prosecution's witnesses. Petitioner presents a long list of statements by witnesses at various locations and proceedings. Petition, at 126-40 (#1). Petitioner presented a similar list in his first 12 13 state habeas corpus appellate brief. Ex. 103, at 38-45 (#21). However, petitioner did not present any such list to the Nevada Supreme Court in his second state habeas corpus appellate brief, after 14 15 remand. Petitioner instead argued that the district court could not have read the state habeas corpus petition, because there were at least 80 inconsistencies listed in that petition. Ex. 145, at 20. 16 17 Nevada does not allow incorporation by reference into appellate briefs. Nev. R. App. P. 28(e)(2). 18 Petitioner did not allege the operative facts within the four corners of his appellate brief, and thus 19 issue 7 is unexhausted. See Baldwin v. Reese, 541 U.S. 27, 32 (2004); Castillo v. McFadden, 399 20F.3d 993, 999-1000 (9th Cir. 2005).

21 Issue 8 is a claim that trial counsel provided ineffective assistance because trial counsel did 22 not challenge the allegation that petitioner abused the victim in the house of Bob Farnum, 23 petitioner's father. Petition at 154-55 (#1). Petitioner names witnesses, describes what each 24 witness's testimony would have been, and argues that counsel did not present this information 25 because he also was representing Bob Farnum on child-pornography charges and thus had a conflict 26 of interest. The first state habeas corpus appellate brief had a similar argument, regarding a failure 27 to investigate. Ex. 103, at 29-31. The Nevada Supreme Court remanded for an evidentiary hearing. 28 On the appeal from the denial of the state petition after the evidentiary hearing, petitioner did not

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present a distinct argument in the brief. See Ex. 145, at 32 ("... including various witness
 statements that could negate the sexual acts alleged to have occurred at Robert Farnum's house, his
 race car trailer and his motor home."). This is nowhere near the particularity that petitioner presents
 in the petition. Petitioner has not presented the operative facts to the Nevada Supreme Court, and
 issue 8 is unexhausted.

6 The petition (#1) is mixed, containing both claims exhausted in state court and claims not 7 exhausted in state court, and it is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22 8 (1982); Szeto v. Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily dismiss 9 the unexhausted issues 1, 2, 4, 6, 7, and 8, and proceed with the remaining grounds, he may 10 voluntarily dismiss this action without prejudice while he returns to state court to exhaust issues 1, 11 2, 4, 6, 7, and 8, or he may move to stay this action while he returns to state court to exhaust issues 1, 2, 4, 6, 7, and 8. If petitioner chooses the second option, the court makes no assurances about the 12 timeliness of a subsequently filed federal habeas corpus petition. If petitioner chooses the last 13 option, he must show that he has "good cause for his failure to exhaust, his unexhausted claims are 14 15 potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." Rhines v. Weber, 544 U.S. 269, 278 (2005). 16

17 IT IS THEREFORE ORDERED that respondents' motion to dismiss (#27) is **GRANTED** in
18 part with respect to issues 1, 2, 4, 6, 7, and 8.

19 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the date of 20entry of this order to do one of the following: (1) inform this court in a sworn declaration that he 21 wishes to dismiss issues 1, 2, 4, 6, 7, and 8 of his petition (#1), and proceed only on the remaining 22 grounds for relief, (2) inform this court in a sworn declaration that he wishes to dismiss his petition 23 (#1) to return to state court to exhaust his state remedies with respect to the claims set out in issues 1, 2, 4, 6, 7, and 8 of his petition (#1), or (3) move to stay this action while he returns to state court 24 25 to exhaust his state remedies with respect to the claims set out in issues 1, 2, 4, 6, 7, and 8 of his 26 petition (#1). Failure to comply will result in the dismissal of this action.

IT IS FURTHER ORDERED that if petitioner elects to dismiss the aforementioned grounds
of his petition (#1) and proceed on the remaining grounds, respondents shall file and serve an

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1	answer or other response to the remaining grounds within forty-five (45) days after petitioner serves	
2	his declaration dismissing those grounds. If respondents file and serve an answer, it shall comply	
3	with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts.	
4	IT IS FURTHER ORDERED that if respondents file and serve an answer, petitioner shall	
5	have forty-five (45) days from the date on which the answer is served to file and serve a reply.	
6	DATED: March 24, 2015.	
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8	ANDREW P. GORDON	
9	United States District Judge	
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