

1 dismissed Reberger's appeal on May 26, 1995, and remittitur issued on June 14, 1995.
2 (Exhs. 169, 170.)

3 Reberger filed a state postconviction habeas petition on January 30, 1996. (Exh.
4 173.) The state district court appointed several attorneys for Reberger—who eventually
5 moved to dismiss all of them and proceed *pro se*—conducted an evidentiary hearing, and
6 ultimately denied the petition. (Exhs. 225, 227, 231, 233, 234, 236, 238, 240.) The Nevada
7 Supreme Court affirmed the denial of the petition on December 12, 2012, and remittitur
8 issued on January 7, 2013. (Exhs. 249, 250.)

9 Reberger dispatched his federal petition for mailing about February 14, 2013 (ECF
10 No. 9). Respondents now move to dismiss certain claims in the second-amended petition
11 on the grounds that the claims are unexhausted, procedurally barred and/or
12 noncognizable in federal habeas corpus (ECF No. 66).

13 **III. DISCUSSION**

14 **A. Exhaustion**

15 State prisoners seeking federal habeas relief must comply with the exhaustion rule
16 codified in § 2254(b)(1):

17 An application for a writ of habeas corpus on behalf of a person in custody
18 pursuant to the judgment of a State court shall not be granted unless it
appears that –

19 (A) The applicant has exhausted the remedies available in the court so the
20 State; or

21 (B) (i) there is an absence of available State corrective process; or
22 (ii) circumstances exist that render such process ineffective to protect the
rights of the applicant.

23 28 U.S.C. § 2254(b)(1). The purpose of the exhaustion rule is to give the state courts a
24 full and fair opportunity to resolve federal constitutional claims before those claims are
25 presented to the federal court, and to “protect the state courts’ role in the enforcement of
26 federal law.” *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *O’Sullivan v. Boerckel*, 526 U.S.
27 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
28 unexhausted until the petitioner has given the highest available state court the opportunity

1 to consider the claim through direct appeal or state collateral review proceedings. See
2 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374,
3 376 (9th Cir. 1981).

4 A habeas petitioner must “present the state courts with the same claim he urges
5 upon the federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
6 constitutional implications of a claim, not just issues of state law, must have been raised
7 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.
8 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must
9 be “alerted to the fact that the prisoner [is] asserting claims under the United States
10 Constitution” and given the opportunity to correct alleged violations of the prisoner’s
11 federal rights. *Duncan*, 513 U.S. at 365; see *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th
12 Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear
13 instruction to potential litigants: before you bring any claims to federal court, be sure that
14 you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir.
15 2001) (quoting *Rose*, 455 U.S. at 520). “[G]eneral appeals to broad constitutional
16 principles, such as due process, equal protection, and the right to a fair trial, are
17 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106 (citations omitted).
18 However, citation to state caselaw that applies federal constitutional principles will suffice.
19 *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

20 A claim is not exhausted unless the petitioner has presented to the state court the
21 same operative facts and legal theory upon which his federal habeas claim is based.
22 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
23 exhaustion requirement is not met when the petitioner presents to the federal court facts
24 or evidence which place the claim in a significantly different posture than it was in the
25 state courts, or where different facts are presented at the federal level to support the same
26 theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
27 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982).

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1 **i. Grounds 4, 6B, and 8**

2 Respondents argue that federal grounds 4, 6B, and 8 are unexhausted because
3 Reberger raised the claims as state-law claims only on direct appeal (ECF No. 66 at 19,
4 21). In ground 4, he argues that his Fifth, Sixth, and Fourteenth Amendment due process
5 and fair trial rights were violated when the trial court permitted a patently unreliable
6 jailhouse informant to testify. (ECF No. 65 at 71.) He essentially raised this claim on
7 direct appeal; however, respondents are correct that he raised it as a state-law issue only,
8 citing *D'Agostino v. Nevada*, 823 P.3d 283 (1991). (Exh. 164 at 31.)

9 Reberger claims in ground 6B that his Fifth, Sixth, and Fourteenth Amendment due
10 process and fair trial rights were violated when Harvey was allowed to testify without
11 independent corroboration of her testimony. (ECF No. 65 at 78-81.). He raised this claim
12 on direct appeal as a state-law claim. (Exh. 164 at 44-46.)

13 In ground 8, Reberger argues that his Fifth and Fourteenth Amendment due
14 process rights were violated when the trial court refused to charge two proposed
15 instructions on the theory of the defense. (ECF No. 65 at 82-83.). He raised this claim on
16 direct appeal as a state-law issue only, citing *D'Agostino*, 823 P.3d 283. (Exh. 164 at 46-
17 47.)

18 Reberger also raised the above claims as federal constitutional claims in his
19 appeal of the denial of his first state postconviction petition. (Exh. 246 at 40-42, 52-54,
20 57-59.) The Nevada Supreme Court stated that these claims were barred by the doctrine
21 of the law of the case because it had already held on direct appeal that the claims lacked
22 merit. (Exh. 249 at 8, n.4.) Having reviewed the order, this Court concludes that the
23 Nevada Supreme Court implicitly considered the federal claims in the appeal of the denial
24 of the state postconviction petition. Accordingly, federal grounds 4, 6B and 8 are
25 exhausted.

26 **ii. Ground 5**

27 Ground 5 alleges that several instances of prosecutorial misconduct violated
28 Reberger's Fifth, Sixth, and Fourteenth Amendment due process and fair trial rights.

1 Respondents argue that grounds 5B, 5C, and 5D are unexhausted. (ECF No. 66 at 19-
2 20.) In ground 5B, Reberger contends that the prosecutor’s misconduct in deliberately
3 placing prejudicial information before the jury violated his Fifth, Sixth, and Fourteenth
4 Amendment due process and fair trial rights. (ECF No. 65 at 73-74.) The prosecutor left
5 autopsy photos face up on his table so that they were visible to the jury before they were
6 admitted into evidence, despite the fact that the court agreed that that would be
7 inappropriate. The prosecutor also elicited allegedly highly prejudicial testimony from a
8 police officer that Reberger was the driver, not the passenger, during a traffic stop. (*Id.*)
9 In ground 5C, Reberger asserts that the prosecutor improperly argued that it is not a
10 defense to argue that the State did not prove its case beyond a reasonable doubt. (*Id.* at
11 74.) In ground 5D, Reberger argues that the prosecution deliberately withheld the original
12 letters that Reberger wrote to Amber Harvey from prison, and then “miraculously”
13 produced them at the beginning of the first trial. (*Id.* at 74-76.) During the second trial, the
14 prosecution obtained logs from the prison that reflected how many letters Reberger
15 mailed; these were never provided to the defense. (*Id.*)

16 On direct appeal, Reberger argued in what is now federal grounds 5B, 5C, and 5D
17 that prosecutorial misconduct violated his fair trial rights, citing *Garner v. State*, 374 P.2d
18 525 (Nev. 1962), a case involving egregious prosecutorial misconduct. (Exh. 164 at 32-
19 39.) *Garner* extensively discusses the right of all defendants to a fair trial and quotes
20 *Berger v. United States*, 295 U.S. 78, 88 (1935) at length. This Court determines that in
21 his direct appeal Reberger fairly apprised the Nevada Supreme Court of the federal
22 constitutional claims in federal grounds 5B, C, and D. They are, therefore, exhausted.

23 **iii. Ground 6A**

24 Reberger asserts that his Fifth, Sixth, and Fourteenth Amendment due process
25 and fair trial rights were violated when the trial court allowed co-defendant Amber Harvey
26 to testify because she was not competent to testify. (ECF No. 65 at 76-78.). Harvey
27 testified that she was under the influence of heroin, “crank,” marijuana, and alcohol at the
28 time the crime was committed. At trial she stated that she was under the influence of

1 Thorazine, a powerful anti-psychotic drug. Harvey had mental illness, emotional and
2 psychological issues, and cognitive defects. Reberger presented this claim on direct
3 appeal and invoked *Riley v. State*, 567 P.2d 475 (Nev. 1977). (Exh. 164 at 49-51.) *Riley*
4 clearly relies on federal constitutional provisions; accordingly, ground 6A is exhausted.

5 **iv. Ground 9**

6 Reberger alleges several claims that his trial counsel rendered ineffective
7 assistance in violation of his Sixth and Fourteenth Amendment rights. Respondents argue
8 that grounds 9A, through D are unexhausted. (ECF No. 66 at 21-22.) In ground 9A,
9 Reberger argues that trial counsel failed to call the jailhouse informant's girlfriend who
10 would have testified that the informant provided false information. (ECF No. 65 at 84-85.)
11 In ground 9B, Reberger contends that his defense counsel failed to investigate and call
12 alibi witnesses who could have placed Reberger elsewhere at the time of the incident.
13 (*Id.* at 85-86.) As ground 9C Reberger asserts that counsel was ineffective for waiving his
14 speedy-trial rights because this was a situation in which the prosecution was able to build
15 a stronger case long after the 60 days had expired. (*Id.* at 86-87.) In ground 9D, Reberger
16 argues that defense counsel was ineffective for calling the State's handwriting expert,
17 which led to the admission of incriminating evidence against Reberger. (*Id.* at 87-88.)

18 The Nevada Supreme Court considered all of these claims on the merits and
19 denied them. Grounds 9A through D are exhausted.

20 **B. Procedural Default**

21 28 U.S.C. § 2254(d) provides that this Court may grant habeas relief if the relevant
22 state court decision was either: (1) contrary to clearly established federal law, as
23 determined by the Supreme Court; or (2) involved an unreasonable application of clearly
24 established federal law as determined by the Supreme Court.

25 "Procedural default" refers to the situation where a petitioner in fact presented a
26 claim to the state courts but the state courts disposed of the claim on procedural grounds,
27 instead of on the merits. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). A federal
28 court will not review a claim for habeas corpus relief if the decision of the state court

1 regarding that claim rested on a state law ground that is independent of the federal
2 question and adequate to support the judgment. *Id.*

3 The *Coleman* Court explained the effect of a procedural default:

4 In all cases in which a state prisoner has defaulted his federal claims
5 in state court pursuant to an independent and adequate state procedural
6 rule, federal habeas review of the claims is barred unless the prisoner can
7 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.

8 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The
9 procedural default doctrine ensures that the state's interest in correcting its own mistakes
10 is respected in all federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046
11 (9th Cir. 2003).

12 To demonstrate cause for a procedural default, the petitioner must be able to
13 "show that some objective factor external to the defense impeded" his efforts to comply
14 with the state procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to
15 exist, the external impediment must have prevented the petitioner from raising the claim.
16 See *McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

17 To demonstrate a fundamental miscarriage of justice, a petitioner must show the
18 constitutional error complained of probably resulted in the conviction of an actually
19 innocent person. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998). "[A]ctual
20 innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United*
21 *States*, 523 U.S. 614, 623 (1998). This is a narrow exception, and it is reserved for
22 extraordinary cases only. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Bare allegations
23 unsupplemented by evidence do not tend to establish actual innocence sufficient to
24 overcome a procedural default. *Thomas v. Goldsmith*, 979 F.2d 746, 750 (9th Cir. 1992).

25 **i. Ground 1**

26 Reberger sets forth a claim pursuant to *Napue v. Illinois*, 360 U.S. 264, 269 (1959)
27 and *Brady v. Maryland*, 373 U.S. 83 (1963). He argues that his Fifth, Sixth and Fourteenth
28 Amendment due process and fair trial rights were violated when the State suppressed

1 exculpatory and material evidence that his co-defendant Amber Harvey had a deal to
2 receive a reduced sentence in exchange for her testimony against Reberger. (ECF No.
3 65 at 21-64.) Reberger presented this claim to the Nevada Supreme Court in his appeal
4 of the denial of his second state postconviction petition. (Exh. 375 at 34-64.)

5 Respondents point out that the Nevada Supreme Court held that this claim was
6 procedurally defaulted pursuant to NRS § 34.726(1), NRS § 34.810(1)(b) and NRS §
7 34.810(3). (Exh. 380 at 3-5.) The Ninth Circuit Court of Appeals has held that, at least in
8 non-capital cases, application of these procedural bars form an independent and
9 adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); see
10 also *Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999). However, here, in
11 analyzing whether cause and prejudice existed to excuse the default, the state supreme
12 court agreed with the state district court that Reberger demonstrated, under *Brady*, that
13 the State withheld favorable evidence. (Exh. 380 at 3.) The Nevada Supreme Court also
14 agreed with the state district court that the evidence was not material, thus concluding
15 that Reberger could not show prejudice. Accordingly, the state supreme court's federal
16 *Brady* analysis controlled the outcome of its state procedural default analysis. A state
17 procedural rule constitutes an "independent" bar if it is not interwoven with federal law or
18 dependent upon a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

19 The Ninth Circuit Court of Appeals reasoned in *Cooper v. Neven*:

20 In this case, the Nevada Supreme Court explicitly relied on its federal
21 *Brady* analysis as controlling the outcome of its state procedural default
22 analysis. It stated, "The second and third *Brady* components parallel the
23 good cause and prejudice necessary to overcome the procedural bars;
24 therefore, proving that the State withheld evidence generally establishes
25 cause, and proving that the withheld evidence was material establishes
26 prejudice." Unlike other cases, where discussion of the merits of a claim
27 occurs simply to determine whether the claim could have been raised
28 earlier, here the claim is itself the justification for the default. As the Nevada
Supreme Court explained, in the context of *Brady* claims, the merits of the
claim dovetail exactly with the cause-and-prejudice analysis. Thus, its
decision did not rest on an independent and adequate state ground and
does not bar federal habeas review.

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1 *Cooper*, 641 F.3d 322, 332-333 (9th Cir. 2011). As in *Cooper*, the state supreme court's
2 decision on Reberger's federal ground 1 did not rest on an independent and adequate
3 state ground. Ground 1, therefore, is not procedurally barred from federal habeas review.

4 **ii. Ground 5A**

5 Reberger argues that the prosecutor's misconduct in failing to disclose exculpatory
6 evidence, namely, notes from another case in which the State described co-defendant
7 Harvey as a "patently unreliable" witness. (ECF No. 65 at 72-73.) While respondents
8 argue that this claim is procedurally defaulted; in fact, Reberger raised this claim on direct
9 appeal. (Exhs. 164, 169.) It is not procedurally barred from federal review.

10 **iii. Grounds 9E through 9H**

11 Reberger claims several instances of ineffective assistance of trial counsel: 9E —
12 counsel failed to sufficiently challenge at trial the authorship of the letters that were seized
13 when Reberger was in pretrial detention (ECF No. 65 at 88-90); ground 9F — counsel
14 failed to challenge Detective Richard Perkins' testimony at the suppression hearing
15 regarding probable cause for Reberger's arrest (*id.* at 90-92); ground 9G — counsel failed
16 to challenge the search warrant (*id.* at 92); and ground 9H — counsel failed to object to
17 jury instruction no. 16, which allowed the jury to draw an adverse inference from
18 Reberger's silence at trial (*id.* at 92-93). This Court concludes that Reberger presented
19 these claims to the Nevada Supreme Court in the appeal of the denial of his first state
20 postconviction petition. (Exh. 246 at 64-79, 83-84.) Accordingly, they are not procedurally
21 barred from federal review.

22 **iv. Ground 9I**

23 Reberger contends that counsel was ineffective for failing to confront Harvey with
24 her prior statements. (ECF No. 65 at 93-94.) Reberger first raised this claim to the
25 Nevada Supreme Court in the appeal of the denial of his second state postconviction
26 petition. (Exh. 375 at 42.) The Nevada Supreme Court held that this claim was
27 procedurally defaulted pursuant to NRS § 34.726(1), NRS § 34.810(1)(b) and NRS §

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1 34.810(3) because it was untimely, raised in a successive petition and was an abuse of
2 the writ. (Exh. 380 at 1, 4-7.)

3 Reberger now argues that pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), he can
4 demonstrate cause and prejudice to excuse the default (ECF No. 80 at 32-33). In
5 *Martinez*, the Court explained:

6 when a State requires a prisoner to raise an ineffective-assistance-
7 of-trial-counsel claim in a collateral proceeding, a prisoner may establish
8 cause for a default of an ineffective-assistance claim in two circumstances.
9 The first is where the state courts did not appoint counsel in the initial-review
10 collateral proceeding for a claim of ineffective assistance at trial. The
11 second is where appointed counsel in the initial-review collateral
12 proceeding, where the claim should have been raised, was ineffective under
13 the standards of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052,
14 80 L.Ed.2d 674 (1984). To overcome the default, a prisoner must also
15 demonstrate that the underlying ineffective-assistance-of-trial-counsel
16 claim is a substantial one, which is to say that the prisoner must
17 demonstrate that the claim has some merit.

18 *Martinez*, 566 U.S. at 14.

19 In January 1996, the state district court granted Reberger's motion for appointment
20 of state postconviction counsel. (See Exhs. 175, 177.) In July 1996, Reberger filed a *pro*
21 *se* motion to proceed with the postconviction litigation *pro se*. (Exh. 186.) On August 14,
22 1996, the state district court held a hearing and agreed that appointed counsel could
23 function as stand-by counsel. (Exh. 189.) Next, on October 25, 1996, appointed counsel
24 filed a motion to withdraw, explaining that Reberger had become hostile and offensive to
25 the point that the attorney-client relationship was "grossly diminished." (Exh. 190.)
26 Beginning about December 1996, the state district court appointed at least two other
27 attorneys to represent Reberger, both of whom Reberger ultimately moved to dismiss.
28 (Exhs. 195, 203, 205, 210, 213, 214.)

In short, Reberger's situation falls outside of *Martinez*. He was appointed
counsel—several times, in fact—but elected to proceed *pro se*. Accordingly, he cannot
now argue that the lack of state postconviction counsel provides cause under *Martinez*.
Ground 9I, therefore, is dismissed as procedurally barred.

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1 **v. Ground 10**

2 Reberger argues that his appellate counsel was ineffective: ground 10A — for
3 failing to raise several claims on appeal as federal constitutional claims (ECF No. 65 at
4 94-95); ground 10B — for failing to raise several prosecutorial misconduct arguments: (1)
5 Harvey had never seen the letters that were seized in Oregon, yet the prosecutor showed
6 her the letters in preparation for her testimony; (2) the prosecutor deliberately elicited
7 testimony that Reberger was in custody prior to trial; and (3) at trial the prosecutor showed
8 a witness a photo from a lineup that was an illegal and inadmissible lineup because it was
9 conducted after Reberger’s right to counsel had attached and without Reberger’s attorney
10 present (*id.* at 95-96); and ground 10C — for failing to challenge jury instruction no. 16
11 (*id.* at 96-97).

12 Respondents argue that these claims are procedurally barred. (ECF No. 93 at 20-
13 21.). Reberger contends that these claims were properly raised on direct appeal and in
14 the first state postconviction, and therefore, they are exhausted and not procedurally
15 defaulted. (ECF No. 80 at 31.) Despite petitioner’s attempt to try to combine his claims on
16 direct appeal with his claims in his first state postconviction petition, Reberger did not
17 present any of the claims in ground 10 to the Nevada Supreme Court before presenting
18 them in the appeal of the denial of the second state postconviction petition. (*See Exhs.*
19 164; 169; 246, 249; Exh. 335 at 42-44; Exh. 375 57-58.)

20 In its order affirming the denial of the second state postconviction petition, the
21 Nevada Supreme Court held that these claims were procedurally defaulted pursuant to
22 NRS § 34.726(1), NRS § 34.810(1)(b) and NRS § 34.810(3) because they were untimely,
23 raised in a successive petition and constituted an abuse of the writ. (Exh. 380 at 5-7.)
24 Reberger does not argue that he can meet his burden of demonstrating cause and
25 prejudice to excuse the default, likely because such argument would be unavailing under
26 the United States Supreme Court’s recent decision in *Davila v. Davis*. 137 S.Ct. 2058,
27 2065 (June 26, 2017) (declining to expand the “narrow” *Martinez* exception to claims of
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1 ineffective assistance of appellate counsel). Therefore, grounds 10A, 10B and 10C are
2 procedurally barred from federal review.

3 **C. Fourth Amendment Claims and *Stone v. Powell***

4 Independent, substantive Fourth Amendment claims are generally barred from
5 federal habeas review. In *Stone v. Powell*, the United States Supreme Court held that
6 allegations of violations of a petitioner's Fourth Amendment rights are not cognizable in
7 federal habeas corpus actions provided that the petitioner has a "full and fair" opportunity
8 to litigate these claims in state court. *Stone*, 428 U.S. 465, 481 (1976); *Ortiz-Sandoval v.*
9 *Gomez*, 81 F.3d 891, 899 (9th Cir. 1996). To be eligible for habeas relief on Fourth
10 Amendment claims, a petitioner must demonstrate that the state court has not afforded
11 him a full and fair hearing on those claims. *Stone*, 428 U.S. at 494 n.37.

12 **i. Grounds 2 and 3**

13 In ground 2, Reberger claims that the search and seizure of property in his vehicle
14 and the seizure of letters he allegedly wrote violated his Fourth, Fifth, Sixth and
15 Fourteenth Amendment rights. (ECF No. 65 at 64-69.). Police arrested Reberger prior to
16 obtaining an arrest warrant. Reberger claims that when he was in custody, but before he
17 was served with the arrest warrant, police seized incriminating letters that he allegedly
18 wrote. In ground 3, Reberger asserts that his First, Fourth, Fifth, Sixth and Fourteenth
19 Amendment rights were violated when the trial court failed to suppress letters he allegedly
20 wrote that were seized while he was in pre-trial detention. (*Id.* at 69-70.)

21 These claims are barred from federal habeas review under *Stone*. While Reberger
22 invokes several constitutional provisions, these claims all sound in the Fourth
23 Amendment. A petitioner must merely be afforded the *opportunity* to litigate Fourth
24 Amendment claims in state court. See *Gordon v. Duran*, 895 F.2d 610, 613-614 (9th Cir.
25 1990). Here, Reberger filed a counseled pretrial motion to suppress the evidence. (Exh.
26 68.) The state district court conducted an evidentiary hearing on the motion; the court
27 ultimately suppressed Reberger's confession as well as any evidence directly derivative
28 of the confession. (Exhs. 81, 93.) Reberger raised his Fourth Amendment arguments on

1 direct appeal. (Exh. 164.) In affirming the conviction, the Nevada Supreme Court
2 concluded that probable cause, combined with exigent circumstances, existed to arrest
3 Reberger. (Exh. 169.) Accordingly, grounds 2 and 3 are dismissed as noncognizable in
4 federal habeas.

5 **IV. CONCLUSION**

6 Finally, the Court notes that in many instances in the briefs on the motion to
7 dismiss, the parties failed to include citations or pinpoint citations to the state-court record
8 or relevant federal briefs. The parties must include such citations in the answer and reply.


9 It is therefore ordered that respondents' motion to dismiss (ECF No. 66) is granted
10 in part and denied in part as follows: (1) Grounds 9I, 10A, 10B, and 10C are dismissed
11 as procedurally barred; and (2) Grounds 2 and 3 are dismissed as noncognizable on
12 federal habeas review.

13 It is further ordered that respondents will have sixty (60) days from the date this
14 order is entered within which to file an answer to the remaining claims in the second-
15 amended petition.

16 It is further ordered that petitioner will have forty-five (45) days following service of
17 respondents' answer in which to file a reply.

18 It is further ordered that respondents motion for leave to file excess pages (ECF
19 No. 92) is granted.

20 DATED THIS 23rd day of March 2018.

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24 _____
25 MIRANDA M. DU
26 UNITED STATES DISTRICT JUDGE
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