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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

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10 COLBERT NICHOLS,

Case No. 3:13-cv-00671-MMD-WGC

11 Petitioner,

ORDER

12 v.

13 ISIDRO BACA, et al.,

14 Respondents.  
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16 Before the Court are the second amended petition for a writ of habeas corpus  
17 pursuant to 28 U.S.C. § 2254 (dkt. no. 14), respondents' motion to dismiss (dkt. no. 21),  
18 and petitioner's opposition (dkt. no. 26). The Court finds that petitioner has not  
19 exhausted his available state-court remedies for ground 3 of the second amended  
20 petition, and the Court grants respondents' motion in part.

21 After a jury trial, petitioner was convicted in state district court of second-degree  
22 murder with the use of a deadly weapon. Exh. 1 (dkt. no. 22). Petitioner appealed, and  
23 the Nevada Supreme Court affirmed. Exh. 9 (dkt. no. 22). The Nevada Supreme Court  
24 denied panel rehearing and *en banc* reconsideration. Exhs. 10, 11 (dkt. no. 22).

25 Petitioner then filed in state district court a post-conviction habeas corpus  
26 petition, and then he filed a supplement. Exhs. 12, 14 (dkt. no. 22). The state district  
27 court denied the petition. Exh. 16 (dkt. no. 22). Petitioner appealed, and the Nevada  
28 Supreme Court affirmed. Exh. 21 (dkt. no. 22).

1 Before a federal court may consider a petition for a writ of habeas corpus, the  
2 petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To  
3 exhaust a ground for relief, a petitioner must fairly present that ground to the state's  
4 highest court, describing the operative facts and legal theory, and give that court the  
5 opportunity to address and resolve the ground. *See Duncan v. Henry*, 513 U.S. 364,  
6 365 (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  
8 state remedies only if he characterized the claims he raised in state proceedings  
9 *specifically* as federal claims. In short, the petitioner must have either referenced  
10 specific provisions of the federal constitution or statutes or cited to federal case law.”  
11 *Lyons v. Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*,  
12 247 F.3d 904 (9th Cir. 2001). “The mere similarity between a claim of state and federal  
13 error is insufficient to establish exhaustion. Moreover, general appeals to broad  
14 constitutional principles, such as due process, equal protection, and the right to a fair  
15 trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th  
16 Cir. 1999) (citations omitted).

17 Petitioner claims in ground 3 that the trial court violated the Sixth and Fourteenth  
18 Amendments when it prohibited defense counsel from eliciting testimony about the  
19 decedent's violent past. Exh. 2 at 17-18 (dkt. no. 22). In the opening brief on direct  
20 appeal, he presented the same facts as an issue of state law. The opening brief has a  
21 reference to “due process,” which is insufficient for presentation of an issue as a matter  
22 of federal law. *See Hiivala*, 195 F.3d at 1106. The reply brief does explicitly mention  
23 due-process protections of the Constitution of the United States. Exh. 4 at 6-8 (dkt. no.  
24 22). However, petitioner cannot raise new claims in a reply brief in state court. *Elvik v.*  
25 *State*, 965 P.2d 281, 284 & n.6 (Nev. 1998). “Submitting a new claim to the state's  
26 highest court in a procedural context in which its merits will not be considered absent  
27 special circumstances does not constitute fair presentation.” *Roettgen v. Copeland*, 33  
28 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

1 Petitioner did file a supplemental brief and a supplemental reply in the direct appeal.  
2 See Exhs. 6, 8 (dkt. no. 22). However, these briefs addressed a decision of the  
3 Supreme Court of the United States that had been announced while the direct appeal  
4 was pending, and they do not discuss further the issue in ground 3. Consequently,  
5 ground 3 is not exhausted.

6 Respondents argue that ground 15 is not exhausted in part, but the Court  
7 already dismissed ground 15.

8 The Court does not agree with respondents that it should dismiss other grounds  
9 for failure to state a claim. Respondents argue that the Court should dismiss grounds  
10 regarding admission of propensity evidence and the Confrontation Clause of the Sixth  
11 Amendment because the Supreme Court of the United States has not clearly  
12 established the law on either of these issues. Respondents' arguments go to both the  
13 merits of these grounds, and whether the Court should defer to the decisions of the  
14 Nevada Supreme Court under 28 U.S.C. § 2254(d). Respondents should raise these  
15 arguments in their answer.

16 Petitioner has filed a motion for enlargement (dkt. no. 25), and he already has  
17 filed his reply (dkt. no. 26). The Court grants this motion.

18 Petitioner has filed a motion for ruling. (Dkt. no. 30.) This order makes the motion  
19 moot.

20 The second amended petition (dkt. no. 14) is mixed, containing both claims  
21 exhausted in state court and claims not exhausted in state court, and it is subject to  
22 dismissal. See *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rushen*, 709 F.2d  
23 1340, 1341 (9th Cir. 1983). Petitioner may voluntarily dismiss the unexhausted ground 3  
24 and proceed with the remaining grounds, he may voluntarily dismiss this action without  
25 prejudice while he returns to state court to exhaust ground 3, or he may move to stay  
26 this action while he returns to state court to exhaust ground 3. If petitioner chooses the  
27 second option, the Court makes no assurances about any possible state-law procedural  
28 bars or the timeliness of a subsequently filed federal habeas corpus petition. If petitioner

1 chooses the last option, he must show that he has “good cause for his failure to  
2 exhaust, his unexhausted claims are potentially meritorious, and there is no indication  
3 that the petitioner engaged in intentionally dilatory litigation tactics.” *Rhines v. Weber*,  
4 544 U.S. 269, 278 (2005). If petitioner chooses the last option, he also will need to  
5 designate an alternative choice in case the Court declines to stay the action. Otherwise,  
6 the Court will dismiss the action.

7 It is therefore ordered that respondents’ motion to dismiss (dkt. no. 21) is granted  
8 in part with respect to ground 3.

9 It is further ordered that petitioner shall have thirty (30) days from the date of  
10 entry of this order to do one of the following: (1) inform this Court in a sworn declaration  
11 that he wishes to dismiss ground 3 of his second amended petition (dkt. no. 14), and  
12 proceed only on the remaining grounds for relief, (2) inform this Court in a sworn  
13 declaration that he wishes to dismiss his second amended petition (dkt. no. 14) and this  
14 action to return to state court to exhaust his state remedies with respect to the claims  
15 set out in ground 3 of his second amended petition (dkt. no. 14), or (3) move to stay this  
16 action while he returns to state court to exhaust his state remedies with respect to the  
17 claims set out in ground 3 of his second amended petition (dkt. no. 14), with a  
18 declaration of an alternative should the Court deny the motion to stay the action.  
19 Failure to comply will result in the dismissal of this action.

20 It is further ordered that if petitioner elects to dismiss ground 3 of his second  
21 amended petition (dkt. no. 14) and proceed on the remaining grounds, respondents  
22 shall file and serve an answer or other response to the remaining grounds within forty-  
23 five (45) days after petitioner serves his declaration dismissing those grounds. If  
24 respondents file and serve an answer, it shall comply with Rule 5 of the Rules  
25 Governing Section 2254 Cases in the United States District Courts.

26 It is further ordered that if respondents file and serve an answer, petitioner shall  
27 have forty-five (45) days from the date on which the answer is served to file and serve a  
28 reply.

1 It is further ordered that petitioner's motion for enlargement (dkt. no. 25) is  
2 granted.

3 It is further ordered that petitioner's motion for ruling (dkt. no. 30) is denied as  
4 moot.

5 DATED THIS 29<sup>th</sup> day of September 2015.

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8 MIRANDA M. DU  
9 UNITED STATES DISTRICT JUDGE  
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