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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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LUIS CARDENAS-ORNELAS,  
  
v.  
RENEE BAKER, *et al.*,  
  
Respondents.

Case No. 3:17-cv-00461-MMD-CLB  
  
ORDER

**I. SUMMARY**

Petitioner Luis Cardenas-Ornelas, an incarcerated person who is represented by counsel, has brought this habeas corpus proceeding under 28 U.S.C. § 2254. Currently before the Court is Respondents’ Motion to Dismiss (“Motion”) (ECF No. 39). Cardenas-Ornelas has responded (ECF No. 48), and Respondents have replied (ECF No. 48). For the reasons discussed below, the Court will grant Respondents’ Motion.

**II. BACKGROUND<sup>1</sup>**

Cardenas-Ornelas challenges a conviction and sentence imposed by the Second Judicial District Court for Washoe County (“State Court”) for second degree murder with the use of a deadly weapon. (ECF No. 41-18.) In September 2010, the State Court entered a judgment of conviction sentencing Cardenas-Ornelas to a maximum term of life with the possibility of parole after a minimum of 10 years, plus a separate consecutive term of 96-240 months for the deadly weapon enhancement. (*Id.*) Cardenas-Ornelas appealed.

In his direct appeal, Cardenas-Ornelas raised two issues relevant to Respondents’ motion: (1) whether the State Court erred in imposing a greater sentence for Cardenas-

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<sup>1</sup>This procedural history is derived from the exhibits located at ECF Nos. 40-45 of the Court’s docket.

1 Ornelas's weapon enhancement than that imposed on his similarly situated brother; and  
2 (2) whether Cardenas-Ornelas's weapon's enhancement was an illegal sentence. (ECF  
3 No. 22 at 3 (citing ECF No. 41-36 at 1 (Opening Brief).) The Nevada Supreme Court  
4 affirmed Cardenas-Ornelas's convictions on November 18, 2011. (ECF No. 42-2.)

5 On July 27, 2012, Cardenas-Ornelas filed a state petition for writ of habeas corpus  
6 ("State Petition") seeking post-conviction relief. (ECF No. 42-24.) The State Petition was  
7 denied, and Cardenas-Ornelas appealed. The Nevada Supreme Court affirmed the denial  
8 of relief (ECF No. 44-12), and the remittitur issued on May 9, 2017 (ECF No. 44-14).

9 Cardenas-Ornelas filed the federal petition initiating this case on August 2, 2017.  
10 (See ECF No. 1.) The Court subsequently appointed counsel to represent him and  
11 allowed leave to amend. (ECF No. 10.) The Second Amended Petition (ECF No. 22)  
12 ("Petition")—the operative pleading in this case—alleges four grounds for relief in total.  
13 Respondents' Motion challenges two of those four grounds, arguing cognizability and  
14 exhaustion.

### 15 **III. DISCUSSION**

#### 16 **A. Cognizability – Ground 3**

17 Respondents argue that Ground 3 of the Petition alleges error under NRS §  
18 193.165, Nevada's deadly weapon enhancement sentencing statute, and therefore is not  
19 a cognizable federal habeas claim.

20 The Antiterrorism and Effective Death Penalty Act ("AEDPA") "places limitations  
21 on a federal court's power to grant a state prisoner's federal habeas petition." *Hurles v.*  
22 *Ryan*, 752 F.3d 768, 777 (9th Cir. 2014) (citing *Cullen v. Pinholster*, 563 U.S. 170, 181  
23 (2011)). When conducting habeas review, a federal court is limited to deciding whether a  
24 conviction violates the Constitution, laws, or treaties of the United States. 28 U.S.C. §  
25 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Unless an issue of federal  
26 constitutional or statutory law is implicated by the facts presented, the claim is not  
27 cognizable in federal habeas. *McGuire*, 502 U.S. 68.

28 Federal habeas relief is unavailable "for errors of state law." *Lewis v. Jeffers*, 497

1 U.S. 764, 780 (1990); *McGuire*, 502 U.S. at 67. A petitioner “cannot, merely by injecting  
2 a federal question into an action that asserts it is plainly a state law claim, transform the  
3 action into one arising under federal law.” *Caterpillar v. Williams*, 482 U.S. 386, 399  
4 (1987); *accord Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) (“A petitioner may  
5 not ‘transform a state law issue into a federal one merely by asserting a violation of due  
6 process . . . .’”) (quoting *Langford v. Day*, 110 F.3d 1380, 1381 (9th Cir. 1996)). To state  
7 a cognizable federal habeas claim based on state sentencing error, a petitioner must  
8 allege that the error was “‘so arbitrary or capricious as to constitute an independent due  
9 process or Eighth Amendment violation.’” *Richmond v. Lewis*, 506 U.S. 40, 50 (1992)  
10 (quoting *Lewis*, 497 U.S. at 780). A state court’s misapplication of its own sentencing laws  
11 does not violate due process thereby justifying federal habeas relief unless the petitioner  
12 can show “fundamental unfairness.” *Christian v. Rhode*, 41 F.3d 461, 469 (9th Cir. 1994).

13 Ground 3 alleges that “Cardenas-Ornelas’ sentence under NRS [§] 193.165, for a  
14 weapon enhancement as a separate offense, is an illegal sentence in violation of Mr.  
15 Cardenas-Ornelas’ constitutional rights secured by the Fifth, Sixth, Eighth, and  
16 Fourteenth Amendments of the United States Constitution.” (ECF No. 22 at 13.)  
17 Cardenas-Ornelas argues that NRS § 193.165(4) prohibits the imposition of an additional  
18 penalty where the use of a firearm or deadly weapon is a necessary element of such  
19 crime. (*Id.* at 14.) He asserts that NRS § 193.165(4) applies because he was convicted  
20 of second-degree murder based on a felony murder theory; thus, the consecutive term of  
21 imprisonment is illegal.

22 Respondents argue that the core of Ground 3 sounds entirely in state law because  
23 it involves the interpretation of NRS 193.165. Respondents assert that Ground 3 attempts  
24 to artificially federalize the claim by citing the Fifth, Sixth, Eighth, and Fourteenth  
25 Amendments. (ECF No. 39 at 6.) They point out that Cardenas-Ornelas’s only reference  
26 to the constitution is found in the heading of Ground 3 and he does not describe a  
27 constitutional violation based on the State Court’s imposition of the consecutive sentence.

28 In response, Cardenas-Ornelas claims Ground 3 alleges that the State Court

1 violated his constitutional rights by imposing “disparate sentences”—not by violating  
2 Nevada law. (ECF No. 46 at 2.) By specifically alleging a violation of constitutional rights,  
3 he argues he has raised more than a general due process violation.

4 Respondents reply that the relief Cardenas-Ornelas seeks for Ground 3 is entirely  
5 dependent upon the interpretation of Nevada law; thus, federal habeas relief is not  
6 available. (ECF No. 48 at 1-2.)

7 The Court finds that Ground 3 is not cognizable in federal habeas because it  
8 presents a purely state law claim and conclusory allegations. Nothing in Ground 3 or the  
9 claim presented on direct appeal indicates that Cardenas-Ornelas was denied due  
10 process and/or refers to the United States Constitution in any respect. (See ECF No. 22  
11 at 13-14; ECF No. 41-36 at 14-15.) Ground 3 does not allege a fundamental unfairness  
12 or any other arbitrary or capricious action. See *Richmond*, 506 U.S. at 50; *Christian*, 41  
13 F.3d at 469. Cardenas-Ornelas simply alleges that the state court misinterpreted NRS  
14 193.165. Accordingly, Ground 3 fails to state a cognizable claim for federal habeas relief.

#### 15 **B. Exhaustion – Ground 2**

16 Pursuant to 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner must first exhaust state  
17 court remedies on a claim before presenting that claim to the federal courts. This  
18 exhaustion requirement ensures that the state courts, as a matter of comity, will have the  
19 first opportunity to address and correct alleged violations of federal constitutional  
20 guarantees. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). “A petitioner has  
21 exhausted his federal claims when he has fully and fairly presented them to the state  
22 courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing *O’Sullivan v.*  
23 *Boerckel*, 526 U.S. 838, 844-45 (1999)). To satisfy the exhaustion requirement, a claim  
24 must have been raised through one complete round of either direct appeal or collateral  
25 proceedings to the highest state court level of review available. *O’Sullivan*, 526 U.S. at  
26 844-45. A properly exhausted claim “must include reference to a specific federal  
27 constitutional guarantee, as well as a statement of the facts that entitle the petitioner to  
28 relief.” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63

1 (1996)). Fair presentation therefore requires a petitioner to present the state courts with  
2 both the operative facts and the federal legal theory upon which the claim is based.  
3 *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The mere citation of case law  
4 does not exhaust a claim. *Id.* at 1003.

5 Ground 2 alleges that the State “[C]ourt erred in imposing a greater sentence on  
6 Mr. Cardenas-Ornelas for the weapon enhancement than that imposed on his similarly  
7 situated brother, Antonio, in violation of his constitutional rights to due process under the  
8 Fifth, Sixth, and Fourteenth Amendments.” (ECF No. 22 at 10.)

9 Respondents argue that Ground 2 is unexhausted because Cardenas-Ornelas  
10 failed to assert any constitutional due process challenge before the Nevada Supreme  
11 Court. (ECF No. 39 at 8-9.) They claim Cardenas-Ornelas’s opening brief cited no federal  
12 case law, instead citing Illinois case law, and only one federal statute, 18 U.S.C. § 3553,  
13 which does not address constitutional principles. Because bare citation to one federal  
14 statute is not enough to meet the fair presentation requirement under AEDPA,  
15 Respondents contend that Cardenas-Ornelas failed to give the Nevada Supreme Court  
16 notice of a constitutional due process challenge. To the extent the Nevada Supreme Court  
17 conducted an Eighth Amendment analysis of Cardenas-Ornelas’s claim, Respondents  
18 further argue that Ground 2 is still unexhausted as to the due process challenge.

19 Cardenas-Ornelas asserts that Respondents recognized the constitutional issue  
20 he raised in his opening brief and alerted the Nevada Supreme Court by using the term  
21 “cruel and unusual punishment” in their answering brief. (ECF No. 46 at 4 (“[A] sentence  
22 within the statutory limits is not cruel and unusual punishment where the statute itself is  
23 constitutional.”) (quoting ECF No. 41-40 at 24).) Because “cruel and unusual punishment”  
24 is a constitutional term of art, Cardenas-Ornelas argues that its use “arguably alerted the  
25 Nevada Supreme Court to the constitutional nature of the claim.” (*Id.*)

26 Respondents reply that a singular reference to “cruel and unusual punishment”  
27 was insufficient to exhaust a federal claim. To the extent it did, they argue that Cardenas-  
28 Ornelas would have an exhausted Eighth Amendment claim—not the “Fifth, Sixth, and

1 Fourteenth Amendment” due process violation he alleges in Ground 2. Thus,  
2 Respondents maintain that Ground 2 is unexhausted as to the due process claim.

3 The Court finds that Ground 2 is not exhausted. Cardenas-Ornelas’s opening brief  
4 gave no indication that he was raising a federal due process claim. The brief noted that  
5 Nevada law did not sufficiently address sentencing disparities between similarly situated  
6 defendants and, therefore, cited § 3553 and Illinois case law in support of his claim. None  
7 of the Illinois cases engage in a federal constitutional analysis but rely on Illinois statutes  
8 and case law. Likewise, § 3553 does not apply federal constitutional principles but simply  
9 discusses sentencing factors for violations of federal criminal provisions. The mere  
10 citation of this irrelevant federal statute and Illinois case law was insufficient to exhaust  
11 Cardenas-Ornelas’s due process claim. *See, e.g., Fields v. Waddington*, 401 F.3d 1018,  
12 1021 (9th Cir. 2005) (“Citation of irrelevant federal cases does not provide a state court  
13 with a fair opportunity to apply controlling legal principles to the facts bearing upon his  
14 constitutional claim.”); *Castillo*, 399 F.3d at 1003 (“Exhaustion demands more than drive-  
15 by citation, detached from any articulation of an underlying federal legal theory.”).

16 Even if the Nevada Supreme Court addressed Cardenas-Ornelas’s claim by  
17 applying Eighth Amendment principles, his due process claim is still unexhausted. On  
18 direct appeal, the Nevada Supreme Court concluded that Cardenas-Ornelas’s sentence  
19 “is not so ‘disproportionate to the offense as to shock the conscience.’” (ECF No. 42-2 at  
20 3 (citing *Blume v. State*, 915 P.2d 282, 284 (Nev. 1996).) Such language may have  
21 addressed an implied Eighth Amendment claim.<sup>2</sup> Nevertheless, Ground 2 does not allege  
22 an Eighth Amendment claim—it alleges a violation of Cardenas-Ornelas’s due process  
23 rights under the Fifth, Sixth, and Fourteenth Amendments. (ECF No. 22 at 10.) Where the  
24 constitutional claim raised in a cited case is not the same claim that the petitioner presents

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26 <sup>2</sup>*Blume* relies on a line of cases that establish that a sentence within statutory limits  
27 does not constitute cruel and unusual punishment under the Eighth Amendment “where  
28 the statute fixing punishment is not unconstitutional or the sentence imposed is not  
disproportionate to the crime in a manner so as to be shocking to the conscience.” *Lloyd*  
*v. State*, 576 P.2d 740, 743 (Nev. 1978); *see also Culverson v. State*, 596 P.2d 220, 221-  
22 (Nev. 1979).

1 in federal court, the case citation is insufficient to exhaust the claim presented in federal  
2 court. *E.g.*, *Shumway v. Payne*, 223 F.3d 982, 988 (9th Cir. 2000) (holding that a case's  
3 citation to the Sixth Amendment right to confront witnesses was insufficient to exhaust a  
4 claim addressing petitioner's federal rights to due process and to present at defense)  
5 (citing *Anderson v. Harless*, 459 U.S. 4, 7 n.3 (1982)). Because each federal legal theory  
6 must be individually presented to the state courts, but was not, the due process claim in  
7 Ground 2 was not fairly presented to the Nevada Supreme Court. Accordingly, Ground 2  
8 of the Petition is not exhausted.

### 9 **C. Options on a Mixed Petition**

10 Respondents' Motion addresses two of Cardenas-Ornelas's four grounds for relief.  
11 Cardenas-Ornelas has not exhausted Ground 2. A federal court may not entertain a  
12 habeas petition unless the petitioner has exhausted all available and adequate state court  
13 remedies for all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed  
14 petition" containing both exhausted and unexhausted claims is subject to dismissal. *Id.*  
15 Because Cardenas-Ornelas's Petition is mixed, he has three options: (1) file a motion to  
16 dismiss seeking partial dismissal of only the unexhausted claims; (2) file a motion to  
17 dismiss the entire petition without prejudice in order to return to state court to exhaust the  
18 unexhausted claims; and/or (3) file a motion for other appropriate relief, such as a motion  
19 for a stay and abeyance asking this Court to hold his exhausted claims in abeyance while  
20 he returns to State Court to exhaust the unexhausted claims.

### 21 **IV. CONCLUSION**

22 It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 39) in part  
23 Petitioner Luis Cardenas-Ornelas's Second Amended Petition (ECF No. 22) is granted.  
24 Ground 3 is dismissed as non-cognizable in federal habeas. Ground 2 is dismissed as  
25 unexhausted.

26 It is further ordered that, within 30 days of the date of this order, Cardenas-Ornelas  
27 must either:

- 28 1. File a motion to dismiss seeking partial dismissal of only the unexhausted claim

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(Ground 3);

2. File a motion to dismiss the entire Petition without prejudice in order to return to State Court to dismiss the unexhausted claim (Ground 3); and/or
3. File a motion for other appropriate relief, such as a motion for a stay and abeyance asking this Court to hold his exhausted claims in abeyance while he returns to State Court to exhaust the unexhausted claims.

Failure to timely comply with this order will result in the dismissal of Cardenas-Ornelas's mixed Petition without further advanced notice.

DATED THIS 31<sup>st</sup> day of January 2020.

  
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MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE