

1

2

3

4

5

6

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

7

8

9

SHELLY J. NEWTON,

10

*Petitioner,*

Case No. 2:17-cv-02894-KJD-GWF

11

vs.

ORDER

12

13

JOSEPH LOMBARDO,

14

*Respondent.*

15

16

This habeas action brought under 28 U.S.C. § 2241 by a then Nevada state detainee comes before the Court on a *sua sponte* inquiry as to whether the petition should be dismissed as wholly unexhausted and further under the abstention doctrine in *Younger v. Harris*, 401 U.S. 37 (1971). This order follows upon the Court's earlier show-cause order (ECF No. 4) and what appears to be petitioner's response thereto (ECF No. 6, at 13-14) filed with the amended petition that also was directed to be filed by the show-cause order.<sup>1</sup>

17

18

19

20

21

***Background***

22

23

The basic procedural history summarized in the show-cause order is not disputed by apposite and cogent argument in the response.

24

25

Petitioner Shelly Newton seeks the dismissal of two pending state criminal cases and her release from her then detention.

26

27

28

---

<sup>1</sup>The remaining material filed with the amended petition (ECF No. 6, at 9-12 & 15) is a photocopy of material submitted with the original petition (ECF No. 5).

1 In No. 16C318737, petitioner was charged with escape by a felony prisoner. She was  
2 found guilty by a jury verdict in that case on October 18, 2017. Subsequent to the show-  
3 cause order in this case, petitioner was sentenced on December 7, 2017, to a suspended  
4 sentence of 19 to 48 months with probation for an indeterminate period not to exceed three  
5 years. A judgment of conviction had not been entered as yet at the time of this Court's most  
6 recent review during the preparation of this order.<sup>2</sup>

7 In No. 16C318889, petitioner was charged with escape from electronic supervision.  
8 Petitioner pled no contest to the charge in an amended information on December 13, 2017,  
9 and was sentenced to time served. A judgment of conviction had not been entered as yet at  
10 the time of this Court's most recent review during the preparation of this order.

11 Petitioner is represented by the public defender in both cases.

12 The online records of the state appellate courts reflect only one proceeding brought  
13 by petitioner. Newton filed a proper person original petition for a writ of mandamus in the  
14 state supreme court on November 16, 2017, only days before the filing of this action, under  
15 No. 74464. She seeks a writ of mandamus directing the state district court to dismiss the  
16 pending cases and release her from custody. The petition remains pending for consideration  
17 by the state appellate courts.

18 The online inmate locator for the Clark County Detention Center, which is the last  
19 institutional address given by petitioner, does not reflect that petitioner currently is in custody  
20 at that facility.

## 21 ***Discussion***

### 22 ***Exhaustion***

23 A state criminal defendant seeking to restrain pending state proceedings via a federal  
24 writ of habeas corpus first must exhaust her state court remedies before presenting her  
25 constitutional claims to the federal courts. The exhaustion rule applicable to requests for  
26

---

27 <sup>2</sup>In addition to the allegations and papers presented, the Court takes judicial notice of the online  
28 docket records of the state district court and state appellate courts. *E.g., Harris v. County of Orange*, 682  
F.3d 1126, 1131-32 (9th Cir. 2012). The online docket records of the state courts may be accessed from:  
<https://www.clarkcountycourts.us/Anonymous/default.aspx> and <https://nvcourts.gov/Supreme/>.

1 federal pre-conviction intervention in pending state criminal proceedings is grounded in  
2 principles of judicial restraint that predate and operate independently of the statutory  
3 exhaustion requirement in § 2254(b)(1). See, e.g., *Braden v. 30<sup>th</sup> Judicial Circuit Court of*  
4 *Kentucky*, 410 U.S. 484, 489-92 (1973); *Carden v. Montana*, 626 F.2d 82, 83 (9th Cir. 1980).<sup>3</sup>

5 To satisfy the exhaustion requirement, the claim must have been fairly presented to  
6 the state courts completely through to the highest court available, in this case the state  
7 supreme court. E.g., *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*);  
8 *Vang v. Nevada*, 329 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must  
9 refer to the specific federal constitutional guarantee and must also state the facts that entitle  
10 the petitioner to relief on the federal constitutional claim. E.g., *Shumway v. Payne*, 223 F.3d  
11 983, 987 (9<sup>th</sup> Cir. 2000). That is, fair presentation requires that the petitioner present the state  
12 courts with both the operative facts and the federal legal theory upon which the claim is  
13 based. E.g., *Castillo v. McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion  
14 requirement insures that the state courts, as a matter of federal-state comity, will have the first  
15 opportunity to pass upon and correct alleged violations of federal constitutional guarantees.  
16 See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

17 In the present case, petitioner filed a proceeding in the state appellate courts only days  
18 prior to the filing of this matter; and that proceeding remains under consideration at this time.  
19 It therefore would appear that petitioner has not exhausted any claims, regardless of the  
20 content of her filings in the state appellate courts.

21 Moreover, an original petition for relief filed in the state appellate courts generally does  
22 not exhaust claims asserted therein. State appellate courts are not required to consider  
23 claims presented in such a petition on the merits, see, e.g., *Ex parte Hawk*, 321 U.S. 114  
24 (1944), and they generally do not do so. Where the state appellate courts decline to exercise  
25

---

26  
27 <sup>3</sup>*Accord Justices of Boston Muni. Court v. Lydon*, 466 U.S. 294, 333 (1984)(Stevens, J., concurring in  
28 part and concurring in the judgment); *Rose v. Lundy*, 455 U.S. 509, 515 (1982)(exhaustion doctrine predates  
statutory codification); *Ex parte Hawk*, 321 U.S. 114, 117 (1944)(applies to all habeas petitions challenging  
state custody to avoid interference with the administration of justice in the state courts).

1 original jurisdiction over such a petition and do not decide the merits of any claim raised  
2 therein, the proceeding exhausts no claims. *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 488  
3 (1975); *Ex parte Hawk*, 321 U.S. at 116; *Sweet v. Cupp*, 640 F.2d 233, 238 (9th Cir. 1981).  
4 *See also Castille v. Peoples*, 489 U.S. 346, 351 (1989)(presenting a claim in a procedural  
5 context in which the merits of the claim will not be considered, or will be considered only in  
6 special circumstances, does not constitute fair presentation of the claim); *Roettgen v.*  
7 *Copeland*, 33 F.3d 36, 38 (9th Cir. 1994)(applying the rule to the filing of an original  
8 extraordinary petition in a state high court).

9       Accordingly, the federal petition is subject to dismissal in the first instance because the  
10 petition is wholly unexhausted. Petitioner has not demonstrated that: (1) each federal claim  
11 in this matter was presented to the state courts through to the Supreme Court of Nevada; (2)  
12 the proceedings in the state appellate courts have concluded by the issuance of a remittitur  
13 or notice in lieu of a remittitur; and (3) the state appellate courts addressed the merits of the  
14 claims if the claims were presented in an original petition or other procedural context in which  
15 the merits would be considered only in special circumstances.

16       Petitioner's arguments seeking to avoid dismissal of the federal petition are frivolous.  
17 Petitioner urges, *inter alia*, that she "has never waived sovereign immunity," that assertion of  
18 state court jurisdiction over her "would be implying that plaintiff is a United States citizen  
19 verses [sic] a natural born citizen of the United States." and that "the fact that state officials  
20 have failed to acknowledge the rights of the plaintiff as a private person and in doing so has  
21 [sic] denied the United States Constitution and the separation of church and state." (ECF No.  
22 6, at 13-14.) These assertions follow upon similar assertions peppered throughout the  
23 original and amended petitions and associated papers together with, *e.g.*, assertions that the  
24 state court's jurisdiction is maritime and that the flags flying in the courtroom are maritime  
25 rather than United States flags. (ECF No. 5, at 13.)

26       These frivolous assertions fail to demonstrate adequate cause as to why the petition  
27 should not be dismissed without prejudice for lack of exhaustion. Petitioner further has not  
28 requested other appropriate relief, such as a stay; and petitioner in any event has not

1 demonstrated, *inter alia*, good cause for her failure to exhaust as a predicate for such a stay,  
2 particularly as to pending state criminal proceedings. Petitioner has an available procedural  
3 avenue of filing an appeal from her convictions in the state courts following upon entry of a  
4 judgment of conviction in each case, if she does so timely.

5 ***Younger Abstention***

6 As a general rule, even when the claims in a petition, *arguendo*, otherwise have been  
7 fully exhausted in the state courts, a federal court will not entertain a habeas petition seeking  
8 intervention in a pending state criminal proceeding, absent special circumstances. *See, e.g.,*  
9 *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Carden*, 626 F.2d at 83-85;  
10 *Davidson v. Klinger*, 411 F.2d 746 (9th Cir. 1969). This rule of restraint ultimately is grounded  
11 in principles of comity that flow from the abstention doctrine of *Younger v. Harris*, 401 U.S.  
12 37 (1971). Under the *Younger* abstention doctrine, federal courts may not interfere with  
13 pending state criminal proceedings absent extraordinary circumstances.

14 Petitioner's frivolous contentions in response to the show-cause order, referenced in  
15 the preceding section, fail to demonstrate adequate cause as to why the petition should not  
16 be dismissed without prejudice under the *Younger* abstention doctrine.

17 IT THEREFORE IS ORDERED that this action shall be DISMISSED without prejudice  
18 for lack of exhaustion and further under the *Younger* abstention doctrine.

19 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of  
20 reason would not find the district court's procedural dismissal to be incorrect or debatable.

21 The Clerk of Court shall enter final judgment accordingly, dismissing this action without  
22 prejudice.

23 DATED: December 19, 2017

24  
25  
26 

27 \_\_\_\_\_  
28 KENT J. DAWSON  
United States District Judge