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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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PATRICK NEWELL,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:16-cv-00662-MMD-WGC

ORDER

This pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Nevada state prisoner Patrick Newell is before the Court on Respondents' motion to dismiss (ECF No. 18). Newell opposed (ECF No. 29), and Respondents filed a notice of no reply (ECF No. 31).

I. PROCEDURAL HISTORY AND BACKGROUND

On June 19, 2014, a jury convicted Newell of battery with use of a deadly weapon resulting in substantial bodily harm (Count 2); attempted assault with a deadly weapon (Count 3); and performance of an act in reckless disregard of persons or property resulting in substantial bodily harm (Count 4) (Exhibit 15).¹ The jury found Newell not guilty of attempted murder with a deadly weapon. *Id.* The convictions stemmed from an incident where a large, drunk, belligerent 35-year-old man was harassing 65-year-old Newell for a ride at a gas station. (See e.g., Exh. 13 at 10-16.) The situation devolved into an altercation, and Newell doused the victim with gasoline and lit him on fire, causing severe

¹Exhibits referenced in this order are exhibits attached to Respondents' motion to dismiss, ECF No. 18, and are found at ECF Nos. 19-23.

1 injuries. The state district court sentenced Newell as follows: 72 to 180 months for Count
2 2 and 24 to 60 months for Count 3 with both sentences to run concurrently. (Exh. 20.)
3 Count 4 was dismissed as redundant. (Id.) Judgment of conviction was filed on August
4 29, 2014. (Exh. 21.)

5 Newell filed a notice of appeal on September 19, 2014. (Exh. 23.) On December
6 24, 2015, in a published opinion, the Nevada Supreme Court affirmed the convictions.
7 (Exh. 31.) The state supreme court denied rehearing, and remittitur issued on March 7,
8 2016. (Exh. 38.)

9 In the meantime, on August 3, 2015, Newell filed a pro se state postconviction
10 habeas corpus petition challenging the computation of his good-time credits. (Exh. 28.)
11 The Nevada Court of Appeals affirmed the denial of the petition on December 14, 2016,
12 and remittitur issued on February 3, 2017. (Exhs. 42, 43.)

13 Newell dispatched his federal habeas petition for filing on November 14, 2016.
14 (ECF No. 6.) Respondents now argue that the petition is subject to dismissal because
15 neither ground is exhausted, and ground 2 fails to state a claim for which federal habeas
16 relief may be granted. (ECF No. 18.)

17 **II. EXHAUSTION**

18 A federal court will not grant a state prisoner's petition for habeas relief until the
19 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*,
20 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair
21 opportunity to act on each of his claims before he presents those claims in a federal
22 habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v.*
23 *Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has
24 given the highest available state court the opportunity to consider the claim through direct
25 appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916
26 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

27 A habeas petitioner must "present the state courts with the same claim he urges
28 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal

1 constitutional implications of a claim, not just issues of state law, must have been raised
2 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D.
3 Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must
4 be “alerted to the fact that the prisoner [is] asserting claims under the United States
5 Constitution” and given the opportunity to correct alleged violations of the prisoner’s
6 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v. Wood*, 195 F.3d
7 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple
8 and clear instruction to potential litigants: before you bring any claims to federal court, be
9 sure that you first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478,
10 481 (9th Cir. 2001) (quoting *Rose*, 455 U.S. at 520). “[G]eneral appeals to broad
11 constitutional principles, such as due process, equal protection, and the right to a fair trial,
12 are insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106 (citations omitted).
13 However, citation to state case law that applies federal constitutional principles will
14 suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc).

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

23 **III. INSTANT PETITION**

24 Newell sets forth two grounds. He argues in ground 1 that the state courts’
25 retroactive application of new limitations on the use of deadly force violated ex post facto
26 principles and deprived him of a defense that would otherwise have been available to him
27 when he committed his crime. (ECF No. 6 at 3, 8A-8D.) In ground 2 Newell claims that
28 the state courts’ creation of new limitations on the use of deadly force and ex post facto

1 application of these limitations violated his Fourteenth Amendment due process rights.
2 (ECF No. 6 at 5.)

3 First, this Court notes that the Constitution's Ex Post Facto Clause provides that
4 "[n]o State shall ... pass any ... ex post facto Law." Art. I, § 10, cl. 1. "As the text of the
5 Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of
6 its own force apply to the Judicial Branch of government.'" *Rogers v. Tennessee*, 532
7 U.S. 451, 456 (2001) (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)). The
8 Fourteenth Amendment Due Process and Article I Ex Post Facto Clauses protect the
9 common interests of fundamental fairness and the prevention of the arbitrary and
10 vindictive use of laws. However, the limitations on the retroactive application of judicial
11 interpretations of criminal statutes are rooted in due process. *Id.* at 456-457. Accordingly,
12 the Court views Newell's two grounds as actually setting forth a single claim—that the
13 state courts' retroactive application of new limitations on the use of deadly force violated
14 ex post facto principles and deprived Newell of a defense that would otherwise have been
15 available to him when he committed his crime in violation of his Fourteenth Amendment
16 due process rights.

17 Next, Respondents contend that Newell failed to properly raise this federal
18 constitutional claim to the highest Nevada court. (ECF No. 18 at 3.)

19 Under Nevada law, battery is justified in any circumstance that justifies homicide.
20 NRS § 200.275. NRS § 200.160 proscribes additional cases of justifiable homicide.

21 Homicide is also justifiable when committed:

22 1. In the lawful defense of the slayer, or his or her spouse, parent,
23 child, brother or sister, or of any other person in his or her presence or
24 company, when there is reasonable ground to apprehend a design on the
25 part of the person slain to commit a felony or to do some great personal
injury to the slayer or to any such person, and there is imminent danger of
such design being accomplished; or

26 2. In the actual resistance of an attempt to commit a felony upon the
27 slayer, in his or her presence, or upon or in a dwelling, or other place of
28 abode in which the slayer is.

1 NRS § 200.160.

2 At trial, Newell asserted that his actions were a justifiable battery because he
3 reasonably believed that the victim was committing felony coercion against him at the
4 time of the incident. (ECF No. 6 at 8B.) Newell proposed the following jury instruction:

5 Justifiable battery is the battery of a human being when there is
6 reasonable ground to apprehend a design on the part of the person battered
7 to commit a felony and there is [imminent] danger of such a design being
accomplished. This is true even if deadly force is used

8 (Exh. 31 at 3.) Over Newell’s objection, the district court added the following language
9 based on State v. Weddell, 43 P.3d 987 (Nev. 2002):

10 The amount of force used to effectuate the battery must be reasonable
11 and necessary under the circumstances. Deadly force cannot be used
unless the person battered poses a threat of serious bodily injury.

12 (Exh. 31 at 4.)

13 On direct appeal, Newell argued that the trial court unreasonably restricted his right
14 to present a justifiable battery defense when it added specific restrictions beyond those
15 found in NRS § 200.160. (ECF No. 24 at 9-18.) The Nevada Supreme Court concluded
16 that the district court did not abuse its discretion in giving the jury instruction. That court
17 reasoned that while a plain reading of NRS § 200.160 and NRS § 200.275 would appear
18 to justify any battery committed in reasonable apprehension of any felony or in resistance
19 of an attempt to commit any felony, “such an interpretation is unreasonable and absurd.”

20 (Exh 31 at 6.) The court considered its holding in Weddell and the United States Supreme
21 Court decision in Tennessee v. Garner, 471 U.S. 1 (1985) and explained:

22 [W]e extend our holding in Weddell to NRS 200.160 and require that in
23 order for homicide in response to the commission of a felony to be justifiable
24 under that statute, the amount of force used must be reasonable and
25 necessary under the circumstances. Furthermore, deadly force cannot be
26 used unless the person killed poses a threat of serious bodily injury to the
27 slayer or others. By extension, the amount of force used in a battery must
also be reasonable and necessary in order to be justified, and deadly force
cannot be used unless the person battered poses a threat of serious bodily
injury to the slayer or others. Because the district court correctly included
these requirements in its justifiable battery jury instruction, we hold that it
did not abuse its discretion.

28 (Exh. 31 at 9.)

1 In his petition for rehearing, Newell argued that the Nevada Supreme Court's
2 decision on direct appeal retroactively applied newly-created limitations on the use of
3 deadly force to Newell's case in violation of ex post facto principles and in violation of
4 federal due process. (Exh. 34.) The Nevada Supreme Court denied the petition in a
5 single-sentence order. (Exh. 35.)

6 Respondents are wrong that Newell has not exhausted the claim. Here, the claim
7 that forms the basis for Newell's federal petition arose when the Nevada Supreme Court
8 issued its published decision affirming his conviction and extending the Weddell holding.
9 At that point, Newell's available state remedy was a petition for rehearing, and he raised
10 his federal constitutional claim in that petition for rehearing. Accordingly, the federal claim
11 is exhausted.

12 **IV. CONCLUSION**

13 It is therefore ordered that Respondents' motion to dismiss (ECF No. 18) is denied.

14 It is further ordered that Respondents will have forty-five (45) days from the date
15 of this order to file an answer to the petition. The answer must contain all substantive
16 and procedural arguments, and it must comply with Rule 5 of the Rules Governing
17 Proceedings in the United States District Courts under 28 U.S.C. §2254.

18 It is further ordered that Petitioner will have thirty (30) days following service of
19 Respondents' answer in which to file a reply.

20 It is further ordered that Respondents' motion for extension of time to file a reply in
21 support of the motion to dismiss (ECF No. 30) is granted nunc pro tunc.

22 DATED THIS 31st day of July 2018.



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25 MIRANDA M. DU
26 UNITED STATES DISTRICT JUDGE
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