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Respondent.

PETITION FOR REHEARING

Counsel for Respondent

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1 **POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3
4 **NRAP 40(c)(2)** provides the circumstances under which this Court
5 may consider a rehearing include the following:

6
7 (i) When the court has overlooked or
8 misapprehended a material fact in the record or a
9 material question of law in the case,

10 As explained below, this Court should grant rehearing on the denial of
11 Newell's request for a new trial on Count 2-Battery with Use of a Deadly
12 Weapon with Substantial Bodily Harm. The Court has overlooked or
13 misapprehended a material question of law in that it failed to consider the Ex
14 Post Facto implications of retroactively applying the newly created
15 limitations on the use of deadly force to Newell.
16

17
18 **I.**

19 The creation of crimes after the commission
20 of the fact, or, in other words, the subjecting of
21 men to punishment for things which, when they
22 were done, were breaches of no law, and the
23 practice of arbitrary imprisonments, have been, in
24 all ages, the favorite and most formidable
25 instruments of tyranny.

26 Alexander Hamilton, Federalist, no. 84.
27
28

1 Both the United States and Nevada Constitutions contain specific
2 clauses which prohibit the creation of laws ex post facto.¹ While the
3 language of clauses in question only directly forbid the legislative creation
4 of such laws, "...the Supreme Court has held that ex post facto principles
5 apply to the judicial branch through the Due Process Clause, which
6 precludes the judicial branch 'from achieving precisely the same result'
7 through judicial construction as would application of an ex post facto law."²
8 "Judicial ex post facto" prevents the judicially wrought retroactivity of law
9 the same way that the Ex Post Facto Clause prevents such changes by
10 legislation.³

15 The prohibition on ex post facto law "...forbids the passage of laws
16 that impose punishments for acts that were not punishable at the time they
17 were committed or impose punishments in addition to those prescribed at the
18 time of the offense."⁴ Accordingly, to be ex post facto, a law must both
19 operate retrospectively and disadvantage the person affected by either
20
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23 ¹ U.S. Const. art. I, § 9, cl.3; Nev. Const. art. 1, § 15.

24 ² Stevens v. Warden, Nevada State Prison, 114 Nev. 1217, 1221, 969 P.2d
25 945, 948 (1998) citing Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S.Ct.
26 1697, 12 L.Ed.2d 894 (1964); see also United States v. Burnom, 27 F.3d
283, 284 (7th Cir.1994); Forman v. Wolff, 590 F.2d 283, 284 (9th Cir.1978).

27 ³ Id.

28 ⁴ State v. Eighth Jud. Dist. Ct. (Logan D.), 129 Nev. Adv. Op. 52, 306 P.3d
369, 382 (2013) citing Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960,
67 L.Ed.2d 17 (1981).

1 changing the definition of criminal conduct or imposing additional
2 punishment for such conduct.⁵
3

4 The retrospective elimination of a legal defense, which existed at the
5 time of the conduct was committed, violates the prohibition against ex post
6 facto laws--- “A law that abolishes an affirmative defense of justification or
7 excuse contravenes Art. I, § 10, because it expands the scope of a criminal
8 prohibition after the act is done.” Collins v. Youngblood, 497 U.S. 37, 49,
9 110 S. Ct. 2715, 2723, 111 L. Ed. 2d 30 (1990). “It is settled, by decisions
10 of this court so well known that their citation may be dispensed with, that
11 any statute which punishes as a crime an act previously committed, which
12 was innocent when done, which makes more burdensome the punishment for
13 a crime, after its commission, or which deprives one charged with crime of
14 any defense available according to law at the time when the act was
15 committed, is prohibited as ex post facto.” Beazell v. Ohio, 269 U.S. 167,
16 169-70, 46 S. Ct. 68, 68, 70 L. Ed. 216 (1925).
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22 In the instant case, Newell’s theory was that he was legally entitled to
23 use deadly force to protect himself from a felony coercion. His theory was
24 supported by both a plain reading of NRS 200.160 and the common law in
25 place when NRS 200.160 was adopted. As recently as 2014 this court noted:
26
27

28 ⁵ Id.

1 "The plain language of [NRS 200.160] does not differentiate between the
2 types of felonies from which a person may defend himself."⁶ Absent a
3 crystal ball, there was no way for Newell to reasonably foresee the new
4 limitations which this court now creates on the use of deadly force to protect
5 against a felony.⁷
6
7

8 This court's decision has saw fit to apply this new rule to Newell
9 retrospectively and therein lies the problem---this court's decision
10 retrospectively limits a defense which was available to Newell at the time
11 when the act was committed, hence the decision as written violates ex post
12 facto principles.
13
14

15 "To fall within the ex post facto prohibition, a law must be
16 retrospective-that is, 'it must apply to events occurring before its
17

18 ⁶ Davis v. State, 130 Nev., Adv. Op. 16, 321 P.3d at 873 (2014). Given
19 these comments it is impossible to foresee that this court would rely upon
20 the doctrine of absurdity---aka Scrivener's error---to disregard the plain and
21 unambiguous meaning of NRS 200.160. The extension the holding of
22 Weddell, 118 Nev. 206, 43 P.3d 987 (2002), in particular, is not foreseeable
23 given the quoted language from Davis and the fact that Weddell was decided
24 upon the grounds of direct legislative action regarding the fleeing felon rule
25 rather than judicial reliance upon the rule of absurdity.

26 ⁷ "Therefore, we extend our holding in Weddell to NRS 200.160 and require
27 that in order for homicide in response to the commission of a felony to be
28 justifiable under that statute, the amount of force used must be reasonable
and necessary under the circumstances. Furthermore, deadly force cannot be
used unless the person killed poses a threat of serious bodily injury to the
slayer or others." Newell v. State, 131 Nev. Adv. Op. 97 (2015) (emphasis
added).

1 enactment'-and it 'must disadvantage the offender affected by it,' by altering
2 the definition of criminal conduct or increasing the punishment for the
3 crime." ⁸ Here both conditions are met---Newell's conduct occurred before
4 this court's creation of new limitations on the use of deadly force and the
5 limitations in question altered his ability to present a defense. Further, this
6 court's extension of Weddell was unforeseeable given the common law, the
7 plain reading of NRS 200.160 and this court's comments in Davis. ⁹

11 CONCLUSION.

12 The use of deadly force might well strike this court as an extreme
13 response to a felony coercion where substantial bodily harm was not
14 threatened. Setting someone aflame in such circumstances might even be
15 characterized as morally reprehensible---but under a plain reading of NRS
16 200.060 as well as the common law history of defending against the
17

20 ⁸ Stevens v. Warden, Nevada State Prison, 114 Nev. 1217, 1221, 969 P.2d
21 945, 948 (1998) (quoting Lynce v. Mathis, 519 U.S. 433, 441, 117 S.Ct.
22 891, 137 L.Ed.2d 63 (1997) quoting Weaver v. Graham, 450 U.S. 24, 29,
101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).

23 ⁹ "The Supreme Court has explained that "[i]f a judicial construction of a
24 criminal statute is 'unexpected and indefensible by reference to the law
25 which had been expressed prior to the conduct in issue,' it must not be given
26 retroactive effect." Bouie, 378 U.S. at 354, 84 S.Ct. 1697 (citation omitted);
27 see also Holguin v. Raines, 695 F.2d 372, 374 (9th Cir.1982) ("the principle
28 of fair warning implicit in the ex post facto prohibition requires that judicial
decisions interpreting existing law must have been foreseeable"). Stevens v.
Warden, Nevada State Prison, 114 Nev. 1217, 1221, 969 P.2d 945, 948
(1998).

1 commission of felony it was justified and legal. This court changed the law,
2 relying upon the doctrine of absurdity. The change was unforeseeable.

3
4 To change the law in hindsight, even for actions as extreme as
5 Newell's violates ex post facto principles. As our highest court has noted,
6 "...imposing criminal sanctions for nonproscribed conduct has always been
7 considered a hallmark of tyranny—no matter how morally reprehensible the
8 prosecuted party." United States v. Marcus, 560 U.S. 258, 268, 130 S. Ct.
9 2159, 2167-68, 176 L. Ed. 2d 1012 (2010).

10
11 Based on the foregoing, rehearing should be granted. This court
12 should strike the provisions of the decision which retrospectively apply the
13 new limits on the use of deadly force to Newell. As to count 2, Newell
14 should be given a new trial in which he is allowed to present the defense
15 without the shackles created by retrospective application of a new rule which
16 did not exist at the time the charged conduct was committed.

17
18 Respectfully submitted,

19
20 PHILIP J. KOHN
21 CLARK COUNTY PUBLIC DEFENDER

22
23 By: /s/ Scott L. Coffee
24 SCOTT L. COFFEE, #5607
25 Deputy Public Defender
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Respectfully submitted,

By: /s/ Scott L. Coffee
SCOTT L. COFFEE, #5607
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