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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ISIDRO VILLANUEVA,  
*Petitioner,*  
  
vs.  
  
DIRECTOR, NEVADA DEPARTMENT  
OF CORRECTIONS, *et al.*,  
*Respondents.*

3:10-cv-00225-LRH-VPC  
ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents’ motions (## 13 & 16)<sup>1</sup> to dismiss, which seek dismissal of the petition as a mixed petition for lack of complete exhaustion as to all claims.

***Background***

Petitioner Isidro Villanueva seeks to challenge his 2005 Nevada state conviction, pursuant to a guilty plea, of lewdness with a child under the age of fourteen years.

Petitioner did not file a direct appeal, but he did file a timely state post-conviction petition. The state district court determined that petitioner had been deprived of his right to a direct appeal. The district court accordingly allowed petitioner to pursue his direct appeal claims in a state post-conviction petition, with appointed counsel, brought pursuant to *Lozada v. State*, 110 Nev. 349, 871 P.2d 944 (1994). Under *Lozada*, a Nevada state petitioner who has been unconstitutionally denied a direct appeal

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<sup>1</sup>What appears to be the same motion to dismiss has been filed or docketed twice.

1 may pursue a counseled state post-conviction petition raising all direct appeal claims that would have  
2 been available on a timely direct appeal, which then are considered *de novo* by the Supreme Court of  
3 Nevada on the *Lozada* petition appeal.

4 Following the state district court's consideration of the *Lozada* petition, petitioner, through  
5 counsel, filed an appeal to the Supreme Court of Nevada. This *Lozada* petition appeal constitutes the  
6 only time that claims were presented to the Supreme Court of Nevada, whether properly or otherwise.

7 Following the *Lozada* petition appeal and prior to seeking federal habeas relief, petitioner did  
8 not file a state post-conviction petition seeking to present any claims of ineffective assistance of *Lozada*  
9 counsel or other claims of ineffective assistance of counsel in prior proceedings.

#### 10 ***Governing Law***

11 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court remedies  
12 on a claim before presenting that claim to the federal courts. To satisfy this exhaustion requirement,  
13 the claim must have been fairly presented to the state courts completely through to the highest court  
14 available, in this case the Supreme Court of Nevada. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156  
15 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the  
16 petitioner must refer to the specific federal constitutional guarantee and must also state the facts that  
17 entitle the petitioner to relief on the federal constitutional claim. *E.g.*, *Shumway v. Payne*, 223 F.3d 983,  
18 987 (9<sup>th</sup> Cir. 2000). That is, fair presentation requires that the petitioner present the state courts with  
19 both the operative facts and the federal legal theory upon which the claim is based. *E.g.*, *Castillo v.*  
20 *McFadden*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement insures that the state courts,  
21 as a matter of federal-state comity, will have the first opportunity to pass upon and correct alleged  
22 violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 731, 111  
23 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

24 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed petition  
25 presenting both exhausted and unexhausted claims must be dismissed without prejudice unless the  
26 petitioner dismisses the unexhausted claims or seeks other appropriate relief.

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1           **Ground 1**

2           In Ground 1, petitioner alleges that he was denied effective assistance of counsel in violation  
3 of the Sixth and Fourteenth Amendments, and “is actually innocent based upon the deprivation of  
4 effective assistance of counsel.” He alleges that he was denied effective assistance of counsel when trial  
5 counsel failed to object to the imposition of a special sentence of lifetime supervision, failed to  
6 recommend an appeal as to the constitutionality of the special sentence of lifetime supervision, and  
7 failed to challenge the constitutionality of the statutes authorizing a special sentence of lifetime  
8 supervision as violating a constitutional right to travel. He further alleges that his guilty plea was not  
9 knowing and voluntarily entered due to ineffective assistance of trial counsel because he had advised  
10 his attorney that he had witnesses who would testify that he did not inappropriately touch the victim and  
11 that the accusations were part of a plot but counsel failed to investigate these witnesses.

12           No such claims, *i.e.*, that petitioner was deprived of effective assistance of trial counsel or that  
13 the guilty plea was not knowing and voluntary due to ineffective assistance of trial counsel, were  
14 presented to or considered by the Supreme Court of Nevada on the *Lozada* petition appeal.<sup>2</sup>

15           Petitioner does not present any argument specific to Ground 1 that would establish that the  
16 claims therein were fairly presented to the Supreme Court of Nevada.

17           Petitioner instead urges that the Court has chosen to treat respondents’ motion to dismiss as a  
18 motion for summary judgment because it issued a *Klinge* notice order, that a procedural default can  
19 be excused upon a showing of actual innocence, and that he has presented affidavits allegedly  
20 establishing his actual innocence that preclude entry of summary judgment.

21           Petitioner’s argument is meritless with regard to the exhaustion issue before the Court.

22           First, the Court’s issuance of a form *Klinge* notice order advising a *pro se* litigant of the  
23 requirements for opposing a motion to dismiss and/or motion for summary judgment, as applicable,  
24 does not constitute an election by the Court to treat a motion to dismiss instead as a motion for summary  
25 judgment. Respondents filed a motion to dismiss. The *Klinge* notice, as applicable to this case, thus  
26 merely informed petitioner of the need to respond to the motion to dismiss, as such.

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28           <sup>2</sup>See #14, Exhs. 6 & 7.

1 Second, the issue on the motion to dismiss is lack of exhaustion, not procedural default.  
2 Regardless of whether or not a petitioner claims actual innocence, he first must exhaust all claims that  
3 he seeks to present on federal habeas review in the state courts, through to the Supreme Court of  
4 Nevada. Petitioner did not so here.

5 Third, accordingly, petitioner's effort to establish actual innocence has nothing to do with the  
6 requirement that he first exhaust state judicial remedies.

7 Given that petitioner has failed to provide any specific argument seeking to establish that  
8 Ground 1 was fairly presented to the Supreme Court of Nevada if his generalized arguments fail, he has  
9 consented to the grant of respondents' motion as to Ground 1 pursuant to Local Rule LR 7-2(d).<sup>3</sup>

10 The Court accordingly holds that Ground 1 is not exhausted.

11 ***Ground 2***

12 In Ground 2, petitioner alleges that he was denied rights to due process and a fair trial under the  
13 Sixth and Fourteenth Amendments because: (a) criminal defense counsel was ineffective in that he did  
14 not file a direct appeal after being requested by petitioner to challenge the constitutionality of the statute  
15 requiring that he register as a sex offender; and (b) the *Lozada* remedy is inadequate as a matter of law  
16 as applied by the Supreme Court of Nevada.

17 In the motion to dismiss, respondents contend that the portion of Ground 2 identified as part (a)  
18 above is not exhausted. The claim in Ground 2(a) was not presented on the *Lozada* petition appeal.  
19 In his opposition, petitioner states that he "accepts his opponents [sic] admission of error of a  
20 constitutional magnitude."<sup>4</sup> Over and above the fact that respondents conceded no such constitutional  
21 error, petitioner's nonresponsive statement operates as a failure to address the exhaustion issue raised  
22 by the motion to dismiss. He thus has consented to the grant of respondents' motion as to Ground 2(a)  
23 pursuant to Local Rule LR 7-2(d).

24 The Court accordingly holds that Ground 2(a) is not exhausted.

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26 <sup>3</sup> See, e.g., *Wrzesinski v. Wells Fargo Bank, N.A.*, 2011 WL 2413843, at \*1 (D. Nev. June 10, 2011); *Harvey v.*  
27 *Washington Mutual Bank, F.A.*, 2011 WL 2415189, at \*1 (D. Nev., June 10, 2011); *Flynn v. Liner Grode Stein, etc.*,  
2010 WL 4121886, at \*7 (D. Nev., Oct. 15, 2010).

28 <sup>4</sup>#18, at electronic docketing page 3.

1           **Ground 3**

2           In Ground 3, petitioner alleges that he was denied rights to due process and a fair trial under the  
3 Sixth and Fourteenth Amendments because: (a) Nevada’s sexual offender lifetime supervision statute  
4 is unconstitutional under the Sixth and Fourteenth Amendments; and (b) he was denied effective  
5 assistance of counsel when counsel failed to perfect a direct appeal claiming: (1) that he is actually  
6 innocent because the victim made up the allegations; (2) that the lifetime supervision statute is  
7 unconstitutional; and (3) that the imposition of a special sentence of lifetime supervision without a jury  
8 determination violated his right to a jury trial under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.  
9 2348, 147 L.Ed.2d 435 (2000), and following cases.

10           With regard to the substantive claim in Ground 3(a), the Supreme Court of Nevada held that the  
11 related claim presented to that court was not yet ripe for adjudication on the following grounds:

12                                 . . . Villanueva contends that application of the lifetime  
13 supervision provisions under NRS 176.0931 is unconstitutional because  
14 it violates the Equal Protection Clause and the constitutional right to  
15 travel, and that application of the lifetime supervision and parole  
16 conditions under NRS 213.1243, NRS 213.1245, and NRS 213.1255 is  
17 unconstitutional because they infringe upon First Amendment rights.  
18 However, the specific conditions of lifetime supervision and conditions  
19 of parole will not be determined until after a hearing conducted just prior  
20 to parole or expiration of the term of imprisonment. We decline to  
21 speculate on the effects of conditions not yet defined or that may never  
22 materialize, see NRS 213.1243(9); NRS 213.1245(3); NRS 213.1255(4).

23 #14, Ex. 7, at 2-3.

24           Presenting a claim in a procedural context in which the merits of the claim will not be  
25 considered, or will be considered only in special circumstances, does not constitute fair presentation of  
26 the claim. *See, e.g., Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380  
27 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). The claims that petitioner presented to  
28 the Supreme Court of Nevada were not yet ripe for adjudication on the merits, and therefore were not  
fairly presented for purposes of the exhaustion doctrine. This of course means, however, that these  
particular claims would not appear to have accrued as yet for purposes of the federal limitation period.  
*Cf.* 28 U.S.C. § 2244(d)(1)(D) (delayed accrual as to claims as to which the factual predicate for same  
could not have been discovered previously through the exercise of reasonable diligence).

Ground 3(a) therefore is not exhausted.

1 With regard to the claims of ineffective assistance of counsel in Ground 3(b), no such claims  
2 were presented to the Supreme Court of Nevada on the *Lozada* petition appeal. In his opposition  
3 memorandum, petitioner refers to materials such as the pro se state post-conviction petition that he filed  
4 in the state district court. In order to satisfy the exhaustion requirement, however, petitioner must  
5 present the claims through to the Supreme Court of Nevada. That was not done here.<sup>5</sup> The claims of  
6 ineffective assistance of counsel in Ground 3(b) were not included in the fast track statement filed in  
7 the Supreme Court of Nevada on the *Lozada* petition appeal nor were they considered by that court.<sup>6</sup>

8 Ground 3(b) therefore also is not exhausted.

9 Accordingly, the petition is subject to dismissal as a mixed petition because Grounds 1, 2(a),  
10 and 3 are not exhausted. The entire petition therefore must be dismissed without prejudice unless  
11 petitioner dismisses the unexhausted claims and/or seeks other appropriate relief.

12 IT THEREFORE IS ORDERED that respondents' motions (## 13 & 16) to dismiss are  
13 GRANTED, consistent with the remaining provisions set forth below. The Court holds that Grounds  
14 1, 2(a), and 3(hereafter, the "unexhausted claims") are not exhausted.

15 IT FURTHER IS ORDERED that petitioner shall have thirty (30) days from entry of this order  
16 within which to mail to the Clerk for filing a motion for dismissal without prejudice of the entire  
17 petition, for partial dismissal only of the unexhausted claims, and/or for other appropriate relief. The  
18 entire petition will be dismissed without further advance notice if petitioner fails to do so timely.

19 DATED this 6th day of February, 2012.

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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE

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<sup>5</sup>The Court makes no implicit determination that the claims in Ground 3 are the same as claims in the state post-  
27 conviction petition and any supplement thereto in the state district court.

28 <sup>6</sup>See #14, Exhs. 6 & 7.