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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

PETER J. MUNOZ, JR.,

*Petitioner,*

vs.

GREGORY SMITH, *et al.*,

*Respondents.*

3:11-cv-00197-LRH-RAM

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on respondents' motion to dismiss. (ECF No. 93.)

***Background***

Petitioner Peter Munoz challenges his 2006 Nevada state conviction, pursuant to an *Alford* plea, of attempted lewdness with a child under the age of 14 and a special sentence of lifetime supervision imposed by the judgment of conviction.

Ground 1 of the first amended petition raised a number of issues regarding the special sentence of lifetime supervision. (ECF No. 69, at 8-12.) On respondents' first motion to dismiss, the Court held that Ground 1 of the first amended petition (a) was ripe for decision because the conditions of lifetime supervision had been set following Munoz' release from physical custody and (b) was not subject to dismissal for lack of exhaustion due to an absence of then-available state corrective process. (ECF No. 81, at 1-3.) The Court directed further briefing, on a second motion to dismiss, on the issue of whether the claims in Ground 1 challenged only the conditions of rather than the fact of confinement – *i.e.*, challenged only certain conditions of the sentence of lifetime supervision and not the sentence itself – and thus were cognizable instead only under 42 U.S.C. § 1983. (*Id.*, at 4-5.)

1 In the briefing on the second motion to dismiss, Munoz conceded that some of the claims in  
2 Ground 1 challenged only lifetime supervision conditions and therefore were not cognizable; but he  
3 maintained that other claims therein challenged the validity of lifetime supervision itself. The Court,  
4 in turn, agreed with respondents that Ground 1 consisted of a vague assortment of claims of different  
5 constitutional violations. The Court granted the motion to dismiss in part and gave Munoz an  
6 opportunity to file an amended petition “that abandons the claims for relief that are not available under  
7 habeas corpus and that enumerates each claim for relief that does remain.” (ECF No. 86.)

8 In the second amended petition, Munoz presents an amended Ground 1 with four subgrounds.  
9 As backdrop to the individual claims, he alleges, *inter alia*, that: (1) at the time of his plea, sentencing  
10 and judgment of conviction in 2006, the then-existing lifetime supervision statute, N.R.S. 213.1243,  
11 *as amended through 2005 Laws, ch. 507, § 35*, did not identify any specific conditions of such lifetime  
12 supervision; (2) under N.R.S. 213.290, the conditions of lifetime supervision are not established until  
13 just prior to the inmate’s release from physical custody, via a proceeding as to which Munoz did not  
14 receive either prior notice or an opportunity to be heard; and (3) he thus did not learn what specific  
15 conditions were imposed until April 3, 2013, following his release from physical custody. (ECF No.  
16 89, at 10-14.)

17 In Ground 1(a), Munoz alleges that Nevada’s lifetime supervision laws are void for vagueness  
18 in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments because the Nevada  
19 statutes do not provide fair notice to a defendant such as Munoz of the lifetime supervision conditions  
20 that will be imposed until after he has completed his prison sentence, as the statutes did not specify what  
21 conditions may be imposed and what lifetime supervision thus meant. He alleges that the failure of the  
22 statute to define lifetime supervision renders the sentence of lifetime supervision unconstitutional. (*Id.*,  
23 at 14-15.)

24 In Ground 1(b), Munoz alleges that Nevada’s lifetime supervision laws violate constitutional  
25 prohibitions against *ex post facto* laws and impairment of contracts because they retroactively vary the  
26 terms contained in plea bargains, including his own. He alleges that “an Ex Post Facto violation occurs  
27 where the law at the time of crime contained no definition of lifetime supervision, and seven years after  
28 the crime, the State defined lifetime supervision as [containing numerous specific conditions].” He

1 concludes that “[b]ecause Munoz’s sentence of lifetime supervision violates the Ex Post Facto clause,  
2 it is unconstitutional and Munoz is entitled to immediate release from lifetime supervision.” (*Id.*, at 15-  
3 16.)

4 In Ground 1(c), Munoz alleges that the failure to advise him of the potential conditions of his  
5 lifetime supervision at the time of his plea renders his plea unknowing and involuntary. He alleges  
6 further that “[t]he lifetime supervision conditions operate as a substantial impairment to the preexisting  
7 contractual relationship between the state and Munoz as set forth in his plea bargain by imposing new  
8 terms not negotiated with drastically increased lifetime supervision conditions in violation of Article  
9 I, § 10, of the United States Constitution.” (*Id.*, at 16.)

10 In Ground 1(d), Munoz alleges that: (1) under the recent decision in *McNeill v. State*, 375 P.3d  
11 1022, 1026 (Nev. 2016), the parole board cannot impose conditions of lifetime supervision that are not  
12 specifically enumerated in N.R.S. 213.1243; (2) the State therefore could not lawfully impose any  
13 conditions of lifetime supervision on Munoz because no specific conditions were enumerated in N.R.S.  
14 213.1243 at the time of his conviction; (3) this clarification of state law must be applied retroactively  
15 to Munoz’ case under *Fiore v. White*, 531 U.S. 225, 228 (2001); and (4) Munoz additionally has a  
16 constitutionally protected liberty interest in having Nevada law applied to him in the same manner as  
17 it is applied to similarly situated litigants, under *Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980). He  
18 concludes that “[s]ince no conditions of lifetime supervision may be imposed, Munoz is entitled to  
19 immediate release from lifetime supervision.” (*Id.*, at 16-17.)

20 In the motion to dismiss, respondents contend that: (1) Ground 1(d) is duplicative of Grounds  
21 1(a) and 1(b); (2) Grounds 1(b) and 1(d) are not cognizable; and (3) Ground 1(d) is not exhausted.

## 22 ***Discussion***

### 23 ***Allegedly Duplicative Claims***

24 Respondents contend that Ground 1(d) is duplicative because (1) Ground 1(d) alleges “that  
25 because no conditions were enumerated in the statute at the time of [Munoz’] conviction, no conditions  
26 may be imposed on him now,” while (2) Ground 1(a) “challenges the statute in place at the time of  
27 Munoz’s conviction” and Ground 1(b) “challenges the application of new conditions on Munoz’s  
28 lifetime supervision.” (ECF No. 93, at 3.) The Court is not persuaded. These three claims all clearly

1 present distinct legal claims arising under different constitutional guarantees. The fact that the distinct  
2 legal claims all arise from a common core of operative fact – the imposition of conditions of lifetime  
3 supervision despite no conditions being enumerated in the statute at the time of the conviction and/or  
4 the time of the offense – does not make the claims duplicative claims when they are based on different  
5 legal theories. The Court told Munoz that he needed to specifically enumerate his claims, and he did  
6 so. No duplicative legal claims are presented.

7 ***Cognizability***

8 Respondents contend that Grounds 1(b) and 1(d) are not cognizable in habeas rather than under  
9 § 1983 pursuant to controlling case law including *Nettles v. Grounds*, 830 F.3d 922 (9<sup>th</sup> Cir. 2016) (*en*  
10 *banc*). Respondents contend that these claims “address not the legality of the imposition and validity  
11 of lifetime supervision, but the conditions imposed upon Munoz’s release on lifetime supervision.”  
12 They urge that “[e]ven if this Court granted Munoz relief on [the claims], the remedy would not be  
13 immediate release from lifetime supervision, but an analysis of the conditions that could be applied to  
14 his lifetime supervision under applicable state law.” (ECF No. 93, at 5.)

15 Respondents misread petitioner’s current claims and are arguing the merits, not cognizability.  
16 Munoz clearly claims that the State can impose *no* lifetime supervision conditions on him because there  
17 were *no* conditions enumerated in the statute at what he claims is the relevant time. There thus would  
18 be no – under petitioner’s theory of the case on the claims – possible permissible conditions for the  
19 Court to parse from impermissible conditions. Moreover, Munoz also clearly alleges on both claims  
20 that the alleged constitutional violations require that he be “released from lifetime supervision,” not  
21 merely from certain conditions but not others. Indeed, if petitioner’s claims ultimately were to prove  
22 to have merit, it would be difficult to discern a distinction with a difference between a purportedly valid  
23 sentence of lifetime supervision that could impose no conditions and an invalid sentence of lifetime  
24 supervision. Whether Munoz will be entitled to the relief requested is a matter to be determined on the  
25 merits, but he clearly has alleged claims that are cognizable in habeas. He challenges the sentence itself,  
26 not merely certain conditions.

27 In this same vein, respondents argue in the reply memorandum that Munoz’ claims misapply  
28 state law because in *McNeill* the Supreme Court of Nevada applied an amended version of the statute

1 in force after the inmate's underlying term sentence was discharged rather than the version of the statute  
2 in force at the time of either the offense or conviction. (ECF No. 97, at 4-5.)

3 Respondents point to what Munoz instead appears to argue is an incongruity in the *McNeill*  
4 decision. The relevant statute, N.R.S. 213.1243, was amended in 1997, 2005, 2007 and 2009. The  
5 statute did not enumerate any conditions of lifetime supervision until the 2007 amendment, which were  
6 thereafter expanded further in 2009.<sup>1</sup> Both McNeill's and Munoz' offenses and convictions occurred  
7 prior to the 2007 amendment, and the conditions of their lifetime supervision sentences were imposed  
8 years later – after the 2007 amendment in McNeill's case and the 2009 amendment in Munoz' case.<sup>2</sup>  
9 In *McNeill*, the Supreme Court of Nevada held that the only lifetime supervision conditions that could  
10 be imposed under Nevada state law were those set forth in the statute. The state high court did not  
11 expressly distinguish between the different amended versions over time when it discussed the statute,  
12 but it clearly applied the 2009 amended version of the statute.<sup>3</sup> If Nevada state law requires that only  
13 conditions that are set forth by the legislature in the statute can be imposed on a defendant, then a  
14 question potentially arises as to whether, under federal constitutional law, any such conditions can be  
15 imposed on a defendant where no conditions were set forth in the statute at the time of his offense  
16 and/or conviction. It does not appear from the *McNeill* opinion that any such federal law issue was  
17 expressly addressed in that case. It does appear that such federal law issues are being raised in this case.  
18 Respondents again are arguing what in truth are merits issues as cognizability issues.<sup>4</sup>

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20 <sup>1</sup>See N.R.S. 213.1243, as variously amended by 1997 Laws, ch. 203, § 7; 1997 Laws, ch. 314, §14; 2005 Laws,  
21 ch. 507, § 35; 2007 Laws, ch. 418, § 5; 2009 Laws, ch. 300, § 2.

22 <sup>2</sup>The *McNeill* opinion reflects that McNeill's lifetime supervision began approximately five years prior to  
23 March 2013, which substantially lines up with the November 16, 2007, sentence expiration date shown on the NDOC  
24 inmate locator page for McNeill. The state district court's online docket sheet reflects that McNeill was charged and  
25 convicted in 2004 in No. 04C204263 in the Eighth Judicial District Court for Nevada.

26 <sup>3</sup>Compare *McNeill*, 375 P.3d at 1025 & 1026-27, with N.R.S. 213.1243, as amended by 2009 Laws, ch. 300, §  
27 2, and N.R.S. 213.1243, as amended by 2007 Laws, ch. 418, § 5.

28 <sup>4</sup>The Court will not be bound by any explicit or implicit holdings by the state supreme court on any federal  
constitutional issues that follow upon *McNeill*'s core state law holding that the only conditions that may be imposed  
under Nevada law are conditions set forth in the statute. The Court expresses no opinion, however, as to the proper  
resolution of any merits issue in this case. Cf. *Matthew Corzine v. Adam Laxalt*, 2017 WL 3159990, at \*4-6 (D. Nev.,

(continued...)

1 Grounds 1(b) and 1(d) therefore present federal law claims that are cognizable in a federal  
2 habeas proceeding. The Court notes, however, that Munoz includes allegations in Grounds 1(a) and  
3 1(b) regarding alleged violations of Nevada constitutional law. (See ECF No. 89, at 14, line 12, & 15,  
4 lines 20-21.) Such claims are not cognizable in a federal habeas proceeding. See 28 U.S.C. § 2254(a).

5 Accordingly, Grounds 1(b) and 1(d) present cognizable federal law claims, but the Nevada state  
6 constitutional law claims in Grounds 1(a) and 1(b) are not cognizable.<sup>5</sup>

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8 <sup>4</sup>(...continued)

9 July 25, 2017), *affirmed in part*, 708 Fed.Appx. 379, No. 17-16605 (9<sup>th</sup> Cir., Dec. 26, 2017) (rejecting related arguments  
10 in a § 1983 action); see also *American Civil Liberties Union v. Masto*, 670 F.3d 1046, 1050-51 & 1061-66 (9<sup>th</sup> Cir.  
11 2012) (the State of Nevada judicially admitted that certain movement and residency restrictions adopted in 2007 in  
N.R.S. 213.1243 could not be applied retroactively to offenders convicted of offenses prior to the adoption of the  
restrictions). Petitioner, however, clearly presents claims that are cognizable in federal habeas corpus.

12 The Court further expresses no opinion at this juncture as to any potential procedural or representation issues  
13 that might arise if, in the final analysis, Munoz potentially were entitled only to an order vacating only some but not all  
14 conditions rather than vacating the lifetime supervision sentence in its entirety. The Court will cross that bridge only if  
15 and when the situation should arise. At present, petitioner clearly is seeking a full release from the lifetime supervision  
sentence. See generally *Richard Lee Carmichael v. Jo Gentry*, No. 2:16-cv-01142-RFB-GWF, ECF No. 19 (D. Nev.,  
March 13, 2018) (discussing procedural and representation ramifications of possibility that a claim in the Federal Public  
Defender’s then-as-yet-unfiled amended petition might arise instead under § 1983).

16 <sup>5</sup>Respondents additionally urge that Ground 1(d) is “a new claim not previously presented in the first-amended  
17 petition,” that the Court’s prior order permitted amendment only to enumerate the grounds “currently” in Ground 1 of  
18 the first-amended petition, and that “Munoz never received permission to present the claim in his amended petition.”  
19 (ECF No. 93, at 4.) The Court does not read its prior order as restrictively. (See ECF No. 86, at 2.) The point of the  
20 opportunity for amendment was for petitioner to seek to assert claims regarding the sentence of lifetime supervision that  
21 (a) were cognizable claims challenging the sentence itself rather than only certain conditions and (b) were clearly  
enumerated rather than “a vague collection of different claims of constitutional violations.” (*Id.*) The Court does not  
read its order as requiring that petitioner first seek permission to present an arguably new legal theory challenging the  
lifetime supervision sentence within the second amended petition.

22 Petitioner responded to the above argument as an argument challenging the timeliness of Ground 1(d) under the  
23 one-year limitation period, although respondents actually made no such argument in the motion to dismiss. (ECF No.  
24 96, at 6.) Respondents did thereafter respond with an untimeliness argument in the reply. (ECF No. 97, at 3.) The  
25 Court is not persuaded – on this timeliness issue that the parties essentially backed into – that Ground 1(d) is untimely.  
26 At the outset, however, petitioner’s suggestion that the claim is timely because it was raised within one year of the  
*McNeill* decision is not persuasive. A state court decision in another case does not constitute a “factual predicate” for a  
27 claim for purposes of delayed accrual under 28 U.S.C. § 2244(d)(1)(D). *Shannon v. Newland*, 410 F.3d 1083, 1088-89  
28 (9<sup>th</sup> Cir. 2005). As the Court noted in the preceding section, however, the distinct legal claims in Ground 1 all arise from  
a common core of operative facts – the imposition of conditions of lifetime supervision despite no conditions being  
enumerated in the statute at the time of the conviction and/or the time of the offense. The absence of any statutory  
conditions at the allegedly relevant prior time was specifically alleged in both the original *pro se* petition and the first  
amended petition. Munoz included, *inter alia*, the following allegation in both pleadings, which was identical except for

(continued...)

1           **Exhaustion**

2           Respondents acknowledge the Court’s prior holding that the absence of available state corrective  
3 process precludes dismissal of the claims challenging the lifetime supervision sentence for lack of  
4 exhaustion. (See ECF No. 81, at 2-3.) Respondents urge, however, that because Munoz is challenging  
5 “the Parole Board’s application of non-enumerated conditions on his lifetime supervision” in Ground  
6 1(d), he has available state remedies via a state court action under § 1983 or a petition for a writ of  
7 mandamus or prohibition. (ECF No. 93, at 6.) Again, petitioner is challenging the lifetime supervision  
8 sentence itself, not merely certain conditions under the sentence. The Court remains unpersuaded by  
9 respondents’ exhaustion argument, as nothing alleged specifically in Ground 1(d) leads to a conclusion  
10 contrary to that reached previously herein with regard to exhaustion of the other claims.

11           Ground 1(d) is not subject to dismissal for lack of exhaustion.<sup>6</sup>

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14           <sup>5</sup>(...continued)

15           verb tense: “Notably, no condition of lifetime supervision [is/was] identified in the statute, the statute providing no  
16 notice at all of what such conditions [will/would] ultimately be.” (ECF No. 9, at 30; ECF No. 69, at 10.) Relation back  
17 ordinarily will be allowed when a new claim is based on the same core of operative facts as the earlier pleading but  
18 asserts a different legal theory. *E.g.*, *Mayle v. Felix*, 545 U.S. 644, 664 n.7 (2005). Ground 1(d) relates back to the  
19 prior pleadings as it alleges a new legal theory premised upon *McNeill* that is based on the same core of operative facts  
20 as the prior pleadings. (Indeed, respondents have argued that Ground 1(d) is duplicative of Grounds 1(a) and 1(b),  
21 reflecting the congruity of the core of operative facts underlying the claims.) The Court further notes that respondents  
22 did not raise any timeliness defense to the related claims in the first amended petition and instead argued that the claims  
23 regarding lifetime supervision were not even ripe yet at that point. (ECF No. 76, at 5-6.) The Court is not persuaded by  
24 the late-breaking timeliness defense to Ground 1(d), which is pursued for the first time in a reply in response to an  
25 opposition argument by petitioner.


26           <sup>6</sup>The Court is not persuaded that Ground 1(d) is barred by procedural default due to application of some – as  
27 yet unspecified – state procedural bar. This is another issue that the parties “backed into” with no procedural-default  
28 defense being raised in the motion to dismiss but with petitioner taking up the issue in his opposition to the motion to  
dismiss. (See ECF No. 96, at 6-7.) While the Court has entertained successive motions to dismiss in this case primarily  
on issues noted by the Court, the original response order nonetheless prohibits serial presentation of defenses, expressly  
including procedural default. (See ECF No. 73.) If respondents wished to seek dismissal of a ground on the basis of  
untimeliness, procedural default and/or any other affirmative defense, the time to do so was in the motion to dismiss, not  
in the reply. In any event, it is difficult to discern what Nevada state procedure a petitioner would employ – short of  
noncompliance and then being subjected to prosecution – to raise the claim in Ground 1(d). The State routinely opposes  
claims challenging lifetime supervision prior to an inmate’s release as not being ripe before conditions are imposed; but,  
thereafter, the former inmate cannot bring a state post-conviction petition raising the issue because his term sentence has  
expired. On the briefing provided, the Court is not persuaded that (a) there was an available procedure and opportunity  
for Munoz to present the claim in Ground 1(d) that (b) he then failed to timely pursue in a manner that gives rise to the  
application of a specific established state procedural bar that (c) he cannot possibly overcome given the timing of the  
2016 *McNeill* decision establishing the underlying state law predicate for the federal claim.

1 IT THEREFORE IS ORDERED that respondents' motion to dismiss (ECF No. 93) is  
2 GRANTED IN PART and DENIED IN PART such that the claims asserted under the Nevada State  
3 Constitution in Grounds 1(a) and 1(b) are DISMISSED without prejudice as noncognizable but with  
4 all other claims asserted in the second amended petition, including all federal law claims in Grounds  
5 1(a) and 1(b), remaining before the Court.

6 IT FURTHER IS ORDERED that, within **thirty (30) days** of entry of this order, respondents  
7 shall file an answer to the remaining claims in the second amended petition and that petitioner may file  
8 a reply within **thirty (30) days** of service of the answer.

9 Given the age of this case, the Court is endeavoring even more so to resolve the matter as  
10 promptly as is possible. Any requests for extension of time based upon scheduling conflicts between  
11 this case and other cases in this District should be sought in the later-filed case, absent extraordinary  
12 circumstances.

13 DATED this 24th day of September, 2018.

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17 LARRY R. HICKS  
18 UNITED STATES DISTRICT JUDGE  
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