

**EX POST FACTO AND DUE PROCESS CHALLENGES
TO NEVAD'S LIFETIME SUPERVISION LAW**

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1. Lifetime supervision is a form of punishment. *Palmer v. State*, 59 P.3d 1192, 1196, (Nev. 2002). A violation of any of its enacted provisions under NRS 213.1243 is punishable as a felony under paragraph (8) of that statute. It is a sentence for those who have committed a “sexual offense” as defined under NRS 176.0931(5)(c). Only a court may sentence a defendant to lifetime supervision. *Id.* at (1). In sum, NRS 213.1243 is a criminal statute.

2. Because the sentence is penal, any amendments/changes to NRS 213.1243 are not retroactive and are subject to the protections of the Ex Post Facto clause since those amendments change the definition of what was once innocent into a crime. Such changes increase the exposure of criminal punishment under paragraph (8) of that statute. See *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (“Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.”).

3. It logically follows under the Ex Post Facto clause that the penalty of the movement/residency restrictions in NRS 213.1243 enacted under SB 471 (Nev. 2007) and made effective on October 1, 2007 *may not* be retroactively applied to a defendant if they committed their sexual offense *before* that date. The State acquiesced in the Legislature’s refusal to apply these penal restrictions retroactively. See *ACLU of Nevada v. Masto*, 670 F.3d 1046, 1064-65 (9th Cir. 2012) (“The State represented, as a matter of law, that it had no authority under SB 471 to apply its movement and residency restrictions retroactively and that it will ‘absolutely’ not do so in the future.”). Likewise, the penalty/condition enacted later under NRS 213.1243 and made effective on October 1, 2009 prohibiting an offender from contacting and communicating with any victim or anyone that witnessed against them *may not* be applied retroactively upon an offender that committed their sexual offense *before* that effective date.

4. Paragraph (1) of NRS 213.1243 directs the State Board of Parole Commissioners (the “Board”) to “establish by regulation a program of lifetime supervision” for each offender. This includes establishing conditions of lifetime supervision. See *NAC 213.290(3)*. Since it is a felony under paragraph (8) of NRS 213.1243 to violate those conditions, the Board is essentially defining what conduct constitutes a crime in a quasi-legislative manner. If the Ex Post Facto clause prohibits the Legislature from retroactively applying the enacted penal movement/residency restrictions of the same statute *before* the date the defendant committed their sexual offense, the Board likewise, under the same terms/analysis, *may not* retroactively enact and apply conditions of supervised release upon any offender as impermissibly directed by paragraph (1) of this same criminal statute or any other law. Those conditions of supervised release change the definition of what is criminal under NRS 213.1243(8) and would be ex post facto laws since they are enacted *after* the predicate sexual offense was committed and are part of a penal sentence punishable as a felony if any of those conditions are violated.

5. The prohibition on retroactive legislative acts “restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Under *Garner v. Jones*, 529 U.S. 244 (2000), the Ex Post Facto clause also extends to acts committed by executive agencies like the Board. NRS 213.1243(1) impermissibly gives the Board unrestrained and arbitrary quasi-legislative power to define, enact, and retroactively apply potentially vindictive conditions of supervised release (which are essentially criminal laws) upon those they find especially unfavorable in violation of the very purpose of the Ex Post Facto clause. To hold otherwise would be naive given the pervasive attitudes towards sex offenders.

6. Furthermore, a defendant has a Fourteenth Amendment due process right to receive fair notice “of the severity of the penalty that a State may impose” prior to the commission of the sexual offense. *Gollehon v. Mahoney*, 626 F.3d 1019, 1023 (9th Cir. 2010) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)). NRS 213.1243(1) impermissibly permits the State to hold a secret agenda with respect to the severity of the lifetime supervision penalty until all other sentences have nearly expired. It is not until then that the defendant is eventually informed by the Board of the conditions of the lifetime supervision sentence which define the sentences severity. *See NAC 213.290(3)*. The severity of the sentence can reasonably be measured by the range of supervised release conditions themselves which relatively increase the exposure to criminal prosecution under paragraph (8) of NRS 213.1243. A sentencing statute/law that exposes a defendant to criminal penalties must be sufficiently definite in its terms prior to the commission of the sexual offense that warranted the sentence if the notice requirements under the Due Process clause are to be satisfied. *Bouie v. City of Columbia*, 378 U.S. 347, 350-52 (1964).

7. A condition of lifetime supervision, such as a prohibition against maintaining a post office box, exposes a defendant to a felony which is likely not part of “the law annexed to the [predicate sexual offense] when committed,” and is ex post facto according the rational of *Calder v. Bull*, 3 U.S. (3 Dall) 386, 390 (1798). Every condition of lifetime supervision enacted by the Board under paragraph (1) of NRS 213.1243 is likely ex post facto and violates the notice requirements of due process since those conditions are determined and defined long after the predicate sexual offense is committed and can only be enforced with a criminal penalty under paragraph (8) of that statute.

8. Such ex post facto and due process protections do not necessarily apply with the same force or effect to *conventional parole conditions* since violating them does not amount to a new criminal offense/sentence implicating additional restraints on liberty of which the defendant is not placed on notice before committing the predicate sexual offense that the lifetime supervision sentence is based. Unlike conventional parole where an offender is returned to prison to serve part or the remainder of their sentence for a parole violation, a violation of any condition of lifetime supervision results in a new felony conviction under NRS 213.1243(8). Lifetime supervision is not an act of grace like conventional parole. *See NRS 213.10705*. It is a criminal penalty that can only be served in the community. *See NRS 176.093(1) and (2)*. Due process and Ex Post Facto protections apply differently between conventional parole and lifetime supervision.

IMPERMISSIBLE DELEGATION OF LEGISLATIVE POWER

9. According to *Sheriff v. Luqman*, 101 Nev. 149, 153 (1985), an executive agency, like the Board, *may not* define what conduct constitutes a crime unless “suitable standards are *established by the Legislature* for the agency’s use of its power.” (emphasis added). Other than the few enacted

penalties/conditions discussed in paragraph #3 herein which are limited in application under the Ex Post Facto clause, the legislature has not established any standards to guide the Board in establishing conditions of lifetime supervision for an offender. The provisions of NAC 213.290 are not a legitimate source for such standards since the Nevada Administrative Code is not a legislative enactment. In any case, NAC Chapter 213 is void of such standards.

10. The legislature did not intend lifetime supervision to be a form of conventional parole. It was only intended to be a form of parole under very limited circumstances pursuant to paragraph (2) of NRS 213.1243. The provisions of that paragraph do not provide any standards to guide the Board in establishing conditions of lifetime supervision other than (1) supervision fees, (2) the standardless requirement to issue a written statement of supervised release conditions and to report violations, (3) the suspension of supervised release in order to permit induction into the military service, and (4) the application of interstate compact.

11. One might argue that the parole conditions in NRS §§ 213.1245 through 213.1263 could apply or provide guidance to the Board in establishing conditions of lifetime supervision. However, the limiting language used in NRS 213.1243(2) does not extend to those statutes or any other statutory provisions. Clearly the legislature intended to make a substantial distinction between conventional parole and lifetime supervision.

12. Without any standards, NRS 213.1243(1) impermissibly delegates full discretion of legislative power to the Board to unilaterally define what conduct constitutes a crime in establishing conditions of lifetime supervision. Nevada has procedures for defining crimes. *See Article 4 of the Nevada Constitution*. Paragraph (1) of NRS 213.1243 impermissibly circumvents those procedures in violation of the binding authority of *Luqman* at the expense of depriving an offender of their liberty for a new felony conviction under paragraph (8) of that statute if they violate a condition *established by the Board's standards* rather than the Legislature's. Until those standards are enacted by the Legislature, the law does not permit the Board to decide conditions of supervised release if violating them amounts to a felony.

13. Accordingly, a defendant's sentence to lifetime supervision must comport to the law that was in effect at the time they committed their sexual offense. *State v. Dist. Ct. (Pullin)*, 188 P.3d 1079, 1084 (Nev. 2008). Only ameliorative amendments to criminal laws may be applied retroactively if specifically intended by the legislature. *Sparkman v. State*, 590 P.2d 151, 155-56 (Nev. 1979). Creating or altering any standard for the Board to follow will change the definition of what is criminal under NRS 213.1243 and is surely not ameliorative in any respect. Such changes, if applied *after* the predicate sexual offense was committed, violate due process, are ex post facto, and are in violation of *Collins*, 497 U.S. at 43 ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."). Find out which amended version of NRS 213.1243 was in effect at the time your offense was committed and specifically refer to that version when challenging lifetime supervision in court.

14. If, for example, it was not a felony to maintain a post office box at the time the offender committed their sexual offense, that proscription cannot be enacted later under NRS 213.1243 *and retroactively applied* to the offender by the Legislature. Conditions of supervised release are enacted by the Board under paragraph (1) of this same criminal statute and any post office box proscriptions enacted by the Board are likewise penal and likewise prohibited from being retroactively applied upon any

offender under the binding authority of *Pullin* and the protections of the Due Process and Ex Post Facto clauses of the United States Constitution.

JURISDICTIONAL DEFECTS

15. “[T]he court’s statutory... power to adjudicate” is defined as subject matter jurisdiction. *Cotton v. United States*, 535 U.S. 625, 630 (2002). It logically follows that an unconstitutional statute deprives a court of subject matter jurisdiction rendering judgments void. See *Wright v. West*, 505 U.S. 277, 285 (1992) (“court without jurisdiction to impose sentence under unconstitutional statute”) (citing *Ex Parte Siebold*, 100 U.S. 371, 377 (1880)); *Ex Parte Smith*, 126 P. 655, 669 (Nev. 1912) (an unconstitutional statute “is a jurisdictional defect”); *Ex Parte Rosenblatt*, 14 P. 298, 299 (Nev. 1887) (holding that an unconstitutional law is *void* and insufficient to give jurisdiction to the court) (citing *Ex Parte Siebold*, *supra*).

16. If a court derives its power to adjudicate from a statute according to *Cotton* and binding Nevada authorities, then there can be no jurisdiction over the subject matter of lifetime supervision if the law that it is based upon is unconstitutional. A sentence under an unconstitutional law cannot be a legitimate basis to restrain one’s liberty.

17. NRS 176.0931(1) gives the court subject matter jurisdiction to sentence a defendant to lifetime supervision. The sentence is exclusively executed under NRS 213.1243. If paragraph (1) of NRS 213.1243 is unconstitutional, the sentence cannot be executed under that provision. Likewise, if the other provisions of that statute were enacted after the offender committed their offense, they too may not be enforced/executed. In sum, a court does not have jurisdiction to sentence anyone to lifetime supervision if they committed their crime before October 1, 2007. Fruthmore, there can be no jurisdiction for a court to convict a defendant for violating an unconstitutional condition of lifetime supervision.

CHALLENGING THE ERRORS

18. All conditions of supervised release determined by the Board under paragraph (1) of NRS 213.1243 and not already enacted under other provisions of that statute are likely unconstitutional for the reasons discussed in this article and may be challenged in a civil rights lawsuit. All other provisions of that statute enacted *after* the date the predicate sexual offense was committed likewise may be challenged in a civil suit if those provisions are retroactively applied upon an offender once they begin serving the lifetime supervision sentence. A challenge to these supervised release conditions can usually be done at any time once they are imposed since they are ongoing and continuous violations of constitutional rights.

19. If convicted before October 1, 2007, none of the provisions of NRS 213.1243 can be applied based on the Due Process and/or Ex Post Facto restrictions/protections discussed herein. The sentence to lifetime supervision would be unconstitutional, a jurisdictional defect, and post conviction remedies rather than a civil rights lawsuit must be used pursuant to *Heck v. Humphrey*, 512 U.S. 477, 485 (1994).

POST CONVICTION REMEDIES

20. A court cannot reasonably have jurisdiction to sentence an offender to a sentence that is incapable of being executed or is otherwise unconstitutional. The jurisdictional defects discussed herein (paragraphs #15 through #17) may be challenged in a motion to correct illegal sentence pursuant to NRS 176.555 if you choose to exclusively challenge just the lifetime supervision sentence. A sentence is illegal if the court goes beyond its authority by acting without jurisdiction. *Edwards v. State*, 918 P.2d 321, 324 (Nev. 1996). A court may correct an illegal sentence at any time notwithstanding “time constraints and procedural defaults.” *Id.*

21. Alternatively, habeas corpus may be used to challenge these jurisdictional defects. Broader relief is available under habeas corpus because (1) the sentence alone may be challenged and removed or (2) the entire plea agreement may be withdrawn. There are statutory procedural limitations in habeas corpus. See NRS §§ 34.726(1) (one year limit to file), 34.800 (unreasonable delay exceeding 5 years/laches), and 34.810(2) (second or successive petitions prohibited).

22. A claim is generally considered waived or otherwise procedurally defaulted if it is not *properly*, *timely*, and/or *previously* raised when it was available to the party. If a petition is untimely and/or successive, the claim can still be reviewed on its merits by demonstrating good cause and prejudice as to why it could not be properly, timely, and/or previously raised. *Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (holding that where a state prisoner defaults *federal* claims in state court, federal habeas is barred “unless the prisoner demonstrated cause for the default and actual prejudice as a result of the alleged violation of federal law.”). Ignorance of the law, negligence, and absentmindedness have never been accepted as a means to demonstrate cause.

23. Demonstrating cause and prejudice can be incredibly challenging. “The point of cause and prejudice... is to overcome the waiver. But this analysis of course assumes that the error in question is a waivable one. And jurisdictional defects are not.” *Kelly v. United States*, 29 F.3d 1107, 1112 (7th Cir. 1994), *overruled in part on other grounds by United States v. Ceballos*, 302 F.3d 679, 690 (7th Cir. 2002); *Chambers v. United States*, 22 F.3d 939, 945 (9th Cir. 1994) (“Whatever the scope of the cause and prejudice requirement, it clearly does not bar [habeas] review when a defendant raises a *jurisdictional* claim, such as the invalidity of the statute...”), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995) (emphasis in original).

24. Unlike a party’s responsibility to *timely* or *properly* raise claims, a court has an affirmative and independent obligation to assure itself of its own jurisdiction. *Kelly*, 29 F.3d at 1113; *Ex Parte Smith*, 126 P. 655, 671 (Nev. 1912) (“it is the duty of the court to determine whether it has jurisdiction of any case presented...”). A habeas petitioner cannot be faulted for not properly, timely, and/or not previously raising a jurisdictional defect which the court had a duty to do itself. Unconstitutional sentencing laws directly affect a court’s power/jurisdiction to adjudicate under them at all and are no exception. Sentencing laws are enacted by the legislature and confer the court with jurisdiction to adjudicate within the scope of the law’s provisions. “A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.” *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *Ex Parte Smith*, 126 P. at 671 (court may not give itself jurisdiction when not

conferred by law). Jurisdiction cannot be conferred under an unconstitutional law. Unconstitutional laws are without force and effect. They are not laws at all.

25. Jurisdiction cannot be conferred through the operation of waiver or procedural default. The ends of finality that procedural limits are based in habeas corpus are not legitimately served if the jurisdiction of the court to adjudicate the lifetime supervision sentence could be waived or procedurally defaulted at the expense of a defendant's liberty. Such void judgments/sentences based on unconstitutional laws cannot acquire validity in this manner. In sum "a jurisdictional defect cannot be procedurally defaulted" in a habeas action. *Kelly*, 29 F.3d at 1113.

SUMMARY

26. No one should be required to commit a felony under NRS 213.1243(8) by violating a condition of lifetime supervision in order to challenge that condition or the whole sentence. See *Wolfson v. Brammer*, 616 F.3d 1045, 1061 (9th Cir. 2010) (requiring a party to violate the law as a precondition to challenging it would turn respect for the law on its head). "A plaintiff need not expose himself to prosecution in order to challenge the constitutionality of a statute 'that he claims deters the exercise of his constitutional rights.'" *Wolfson*, 616 F.3d at 1058 (quoting *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979)). There is no reason why this fundamental principle cannot extend into the habeas corpus/post-conviction context for the violation of state and federal rights.

27. I have discussed this lifetime supervision issue with numerous inmates sentenced to it. I am frustrated that none choose to take the initiative to challenge it at all. Apparently, like sheeple, they are content with being under the supervision of the State. They have no legitimate basis to complain. Those that do take the initiative should exercise foresight and patience and carefully research the relative law, their issues, objectives, and the rules/procedures of every court they intend to litigate in to make informed and intelligent decisions.

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