

**DOUBLE JEOPARDY CHALLENGES TO NEVADA'S  
LIFETIME SUPERVISION SENTENCE**

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May 4, 2015**

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the First Amendment and is intended to promote positive  
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1. Lifetime supervision is a penalty for those who have committed a “sexual offense” as defined under NRS 176.0931(5)(c). The Nevada Supreme Court in *Palmer v. State*, 59 P.3d 1192, 1195 (Nev. 2002) took judicial notice that lifetime supervision was intended by the Legislature as a civil penalty. This appears likely why the district court chose not to advise Palmer of this penalty which, at the time, was perceived as a collateral rather than direct consequence of his guilty plea. Because of this, the Court in *Palmer* relied upon *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) to conclude that lifetime supervision “is sufficiently punitive in nature and effect as to render it a direct penal consequence of a guilty plea... which the defendant must be advised.” 59 P.3d at 1196 and n. 18.
2. This exact same test and rational is used to determine “whether a punishment labeled as civil is in reality criminal for Double Jeopardy purposes.” *Brewer v. Kimel*, 256 F.3d 222, 226 (4th Cir. 2001) (citing *Hudson v. United States*, 522 U.S. 93 (1997) which directs the use of *Mendoza-Martinez* to determine whether a civil penalty violates the Double Jeopardy Clause).
3. Despite its overt civil intent, if lifetime supervision is sufficiently punitive in nature and effect to render it a direct rather than collateral consequence based upon *Mendoza-Martinez* according to the court in *Palmer*, then its sufficiently penal to violate the Double Jeopardy Clause without further analyses.
4. To avoid violating the Double Jeopardy Clause, the legislature must *specifically* authorize cumulative punishments for the same criminal offense. *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *Athey v. State*, 797 P.2d 956, 958 (Nev. 1990). “The key to determining whether multiple... punishments violate double jeopardy is legislative intent. When the legislature intends to impose multiple punishments, double jeopardy is not invoked.” *Plascenica v. Alameida*, 467 F.3d 1190, 1204 (9th Cir. 2006).
5. As judicially noticed in *Palmer*, 59 P.3d at 1195, the Legislature expressly intended lifetime supervision as a civil penalty. The Legislature never intended it as a criminal penalty much less a cumulative criminal penalty. If lifetime supervision was so plainly punitive as a criminal penalty on its face, the *Palmer* court would not have found it necessary to use *Mendoza-Martinez* and inquire into legislative intent in its analysis.
6. A sentence to lifetime supervision does not require additional facts other than a conviction for a “sexual offense” as defined in NRS 176.0931 of which the defendant’s primary sentence is also based. According to *Blockburger*, 284 U.S. at 304, this is the hallmark of a double jeopardy violation: the provisions of NRS 176.0931 that the lifetime supervision sentence is based does not require proof of any additional facts to sentence a defendant that the primary sentence required for the same predicate offense.

7. Lifetime supervision is a cumulative *criminal* sentence never intended by the legislature in addition to the primary criminal sentence imposed for the same criminal offense. On balance, under the weight and binding authority of state and federal law, lifetime supervision boldly violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

8. If lifetime supervision violates the Double Jeopardy Clause, then the district court lacked subject matter jurisdiction under NRS 176.0931(1) to sentence any defendant to it at all. The sentence is a jurisdictional defect that requires correction.

### ***JURISDICTIONAL DEFECTS***

9. “[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 law 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 law “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*).

10. 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 it is unconstitutional for violating double jeopardy. A sentence under an unconstitutional law cannot be a legitimate basis to restrain a defendant’s liberty.

### ***CHALLENGING JURISDICTIONAL DEFECTS***

11. A law that violates double jeopardy is unconstitutional and is no law at all. It deprives a court of subject matter jurisdiction to adjudicate or otherwise sentence under it. As will be further demonstrated herein, the jurisdictional defect may be challenged at any time despite any procedural obstacles under habeas corpus pursuant to NRS §§ 34.360 through 34.830 or under a motion to correct illegal sentence pursuant to NRS 176.555. 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.

12. A sentence based upon an unconstitutional law not only deprives a court of jurisdiction to impose the sentence at all, the sentence would also be illegal. See *Edwards v. State*, 918 P.2d 321, 324 (Nev. 1996) (holding that a sentence is illegal if the court goes beyond its authority by acting without jurisdiction).

### ***JURISDICTIONAL DEFECTS CANNOT BE PROCEDURALLY DEFAULTED***

13. A claim is generally considered waived or otherwise procedurally defaulted in post conviction habeas corpus actions 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 timely, previously, or otherwise properly 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 demonstrates 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.

14. Demonstrating cause and prejudice to overcome a procedural default for a waived claim 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” which gave the court its jurisdiction), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995) (emphasis in original).

15. Unlike a party’s responsibility to properly or timely 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 implicate a court’s jurisdiction to adjudicate under them at all and are no exception.

16. Sentencing laws are enacted by the legislature through statutes and confer the court with jurisdiction to adjudicate within the scope of the statute’s provision. “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). An unconstitutional law is no law at all and cannot legitimately confer a court with jurisdiction. Such laws are without force or effect.

17. Likewise, jurisdiction cannot be conferred through the operation of waiver or procedural default in habeas corpus. The ends of finality that procedural limits are based in state and federal habeas corpus are not legitimately served if the jurisdiction of the court to adjudicate the lifetime supervision sentence could be waived or otherwise 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.

### ***RECOMMENDATIONS FOR RELIEF***

18. An attorney provides ineffective assistance under the Sixth Amendment by advising the defendant to enter into a plea agreement based on an illegal sentence. *Johnson v. Uribe*, 682 F.3d 1238, 1245 (9th Cir. 2012). 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). The entire plea negotiation would be based on an erroneous sentencing calculation of a life sentence fundamentally altering the bargaining position between the defendant and the state. For example, a defendant may decide that going to trial would have been a better decision than pleading guilty if they were not going to be exposed to an additional sentence of lifetime supervision which can last for life. The prejudice requirement for claims of ineffective

assistance of counsel is satisfied under the Sixth Amendment when the habeas petitioner demonstrates “that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In any case, according to paragraphs #13 through #17 herein, prejudice, like cause, need not be demonstrated for jurisdictional defects.

19. An appropriate remedy under habeas corpus for counsel’s ineffectiveness is to withdraw the plea agreement and send the habeas petitioner “back in the position he would have been in if the Sixth Amendment violation never occurred” by returning him “to the pre-plea stage of the proceedings.” *Johnson*, 682 F.3d at 1246 (quoting *Chioino v. Kernan*, 581 F.3d 1182, 1184 (9th Cir. 2009)).

20. In the alternative, I don’t think the court or the state will oppose a petitioner’s request to withdraw just the sentence despite any right to have the entire plea agreement withdrawn. Withdrawing a plea agreement does not prevent the State’s right to pursue another prosecution under the same charges including charges forgone when the plea was entered. Under these circumstances, a motion to correct illegal sentence pursuant to NRS 176.555 is a more efficient course of action than a habeas corpus. Based upon your particular circumstances, the choice is up to you whether to pursue a habeas corpus or a motion to correct illegal sentence.

21. Those that choose to challenge lifetime supervision should exercise patience, foresight, and carefully research the relative law, their objectives, and the procedures and rules of every court they intend to litigate their claims to make meritorious, informed, and intelligent decisions.

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