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1 **PETITION FOR WRIT OF CERTIORARI, MANDAMUS, AND/OR, IN THE**
2 **ALTERNATIVE, WRIT OF PROHIBITION**

3 COMES NOW, Petitioner EMERSON JOINER, by and through his Counsel,
4 Gary A. Modafferi, Esq., and respectfully petitions this Honorable Court for a Writ
5 of Certiorari, Mandamus, or in the Alternative, a Writ of Prohibition.

6 Petitioner is scheduled for criminal jury trial before the Honorable District
7 Court Judge Elizabeth Gonzalez in the Eighth Judicial District, Clark County,
8 Nevada. The offense is violation of lifetime supervision by convicted sex offender as
9 prohibited by NRS 213.1243. Petitioner has moved the District Court to dismiss the
10 offense against him because the statute, as applied to Petitioner, is unconstitutional.
11 Petitioner argues the lifetime supervision law is unconstitutional because it violates
12 the Ex Post Facto Clauses, the Contract Clauses, the Double Jeopardy Clauses, the
13 Due Process Clauses, the Vagueness Doctrines, and the Separation of Powers
14 Doctrines of the United States Constitution and the Constitution of the State of
15 Nevada. A motion to dismiss the offense was brought before the District Court but
16 denied. The District Court issued a stay of trial for 180 days pending application to
17 this Honorable Court to present the instant Petition.

18 **I.**

19 **RELIEF SOUGHT**

20 Petitioner is respectfully requesting that this Honorable Court continue the
21 stay granted by the District Court and grant the instant Petition. Ultimately,
22 Petitioner seeks to have the sentence of lifetime supervision imposed pursuant to
23 NRS 213.1243 declared unconstitutional and for this Court to direct the District
24 Court to dismiss the charge against Petitioner for the reasons argued in this Petition.
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II.

ISSUES PRESENTED FOR REVIEW

Whether Petitioner is entitled to the relief sought because his continued prosecution is premised upon a statute that violates multiple constitutional guarantees? These constitutional guarantees include:

- A. Whether Petitioner’s Continued Prosecution Violates the Vagueness Doctrines of the Due Process Clauses of the United States Constitution and the Constitution of the State of Nevada?
- B. Whether Petitioner’s Continued Prosecution Violates the Ex Post Facto Clauses of the United States Constitution and the Constitution of the State of Nevada?
- C. Whether Petitioner’s Continued Prosecution Violates the Separation of Powers Doctrine of the Constitution of the State of Nevada?
- D. Whether Petitioner’s Continued Prosecution Violates the Contract Clauses of the United States Constitution and the Constitution of the State of Nevada?
- E. Whether Petitioner’s continued Prosecution Violates the Double Jeopardy Clauses of the United States Constitution and the Constitution of the State of Nevada?

III.

STATEMENT OF THE CASE

On July 6, 2015, a preliminary hearing was held before the Honorable Ann E. Zimmerman, Justice of the Peace.¹ As a result, an information was filed on July 9, 2015, charging Petitioner with the offense of Violation of Lifetime Supervision by Convicted Sex Offender (NRS 213.1243).² On September 2, 2015, Petitioner filed his Motion to Dismiss for Violations of the Ex Post Facto Clauses, the Contract

¹ Transcript of Proceedings, Petitioner’s Appendix (hereinafter “PA”) at 1-10.

² PA 11-13.

1 Clauses, the Double Jeopardy and the Due Process Clauses of the United States
2 Constitution and/or the Constitution of the State of Nevada.³ Filed in support of this
3 Motion, was an appendix, used in Petitioner’s previous appeal to the Nevada
4 Supreme Court, which argued many similar issues. That appeal was ultimately
5 denied, as this Honorable Court found NRS 34.726 to be an inappropriate vehicle to
6 raise those claims.⁴

7 In the appendix supporting Nevada Supreme Court Appeal , No. 61889 the
8 following were presented to this Court: Guilty Plea Agreement in State v. Joiner,
9 C217917 filed on December 30, 2005, in which Petitioner to plead guilty to the
10 special sentence of lifetime supervision;⁵ an Information attached to the guilty plea
11 agreement stating that the date of offense for the crime which yielded the special
12 sentence of lifetime supervision occurred “on or between November 1, 2003 and
13 October 15, 2005;”⁶ a Judgment of Conviction filed on February 16, 2006
14 sentencing Petitioner to the special sentence of lifetime supervision,⁷ the lifetime
15 supervision agreement at issue, executed on August 24, 2011;⁸ a Petition for Writ of
16 Habeas Corpus (Post-Conviction) Requesting Release from Lifetime Supervision, or
17 in the Alternative, Motion to Strike Conditions of Lifetime Supervision, filed in C-
18 05-217917, on August 24, 2012;⁹ a Reply to State’s Opposition to Defendant’s
19 Petition for Writ of Habeas Corpus (Post-Conviction) Requesting Release from
20 Lifetime Supervision, or in the Alternative, Motion to Strike Conditions of Lifetime
21 Supervision filed in C-05-217917, on September 7, 2012;¹⁰ State’s Response, and
22

23 ³ PA 14-29. .

24 ⁴ PA 30-137. Request for relief in that appeal stemmed from DC Case No. C-05-
217917 and Nevada Supreme Court No. 61889.

25 ⁵ PA 32-37, the Agreement to plead guilty to lifetime supervision at PA 33.

26 ⁶ PA 38-39.

27 ⁷ PA 40-41.

28 ⁸ PA 42-44.

⁹ PA 45-81.

¹⁰ PA 82-94.

1 Motion to Dismiss Defendant’s Petition for Writ of Habeas Corpus (Post-
2 Conviction) Requesting Release from Lifetime Supervision, or in the Alternative,
3 Motion to Strike Conditions of Lifetime Supervision, filed in C-05-217917-1 on
4 September 6, 2012;¹¹ a Transcript of the hearing on the Petitioner’s previous motion
5 in C-05-217917, held before the Honorable James M. Bixler on October 9, 2012;¹²
6 Findings of Fact, Conclusions of Law and Order Denying the previous Motion in C-
7 05-217917, filed October 23, 2012.¹³

8 Also, supporting the motion challenging the statute’s constitutionality, filed
9 in the current prosecution, C-15-307794-1, were the attached exhibits; Exhibit A, 42
10 U.S.C. 1983 Complaint for Declaratory and Injunctive Relief, filed in the United
11 States District Court, District of Nevada on August 25, 2015, wherein Petitioner is
12 one of Does 1-16,¹⁴ Exhibit B, Preliminary Hearing transcripts in C-15-307794-1,¹⁵
13 Exhibit C, Information filed in C-15-307794-1,¹⁶ Exhibit D, Municipal Court record
14 dismissing with prejudice charge used as basis for charging Petitioner in this
15 contested offense, filed November 19, 2013.¹⁷

16 On September 29, 2015, the State filed State’s Opposition to Defendant’s
17 Motion to Dismiss for Violations of the Ex Post Facto Clauses, the Contract Clauses,
18 Double Jeopardy, and the Due Process Clauses of the United States Constitution
19 and/or the Constitution of the State of Nevada.¹⁸ On October 16, 2015, Petitioner
20 filed Reply to State’s Opposition to Defendant’s Motion to Dismiss for Violations of
21 the Ex Post Facto Clauses, the Contract Clauses, Double Jeopardy, and the Due
22 Process Clauses of the United States Constitution and/or the Constitution of the
23

24 ¹¹ PA 95-101.

25 ¹² PA 102-113.

26 ¹³ PA 114-122. See also PA 129-137.

27 ¹⁴ Pa 139-180.

28 ¹⁵ PA 181-191.

¹⁶ PA 192-195.

¹⁷ PA 198-199.

¹⁸ PA 198-208.

1 State of Nevada.¹⁹ The Reply raised several issues not initially included in
2 Petitioner’s original motion to dismiss including arguments supporting his
3 Vagueness Doctrine violation claims and a Separation of Powers violation claims.
4 Accordingly on October 26, 2015, the State filed State’s Response to Defendant’s
5 New Arguments Raised in his Reply and State’s Supplemental Response.²⁰ On
6 November 3, 2015, Petitioner filed Response to State’s Response to Defendant’s
7 New Arguments Raised in his Reply and State’s Supplemental Response.²¹ Attached
8 to this Response and supporting its premises were Exhibits A through C.²² These
9 include Exhibit A, Respondent’s Answering Brief filed on January 6, 2012, in
10 Goudge v. State, Cr. No. 59061, wherein the State conceded that, “**The decision of**
11 **whether to keep a sex offender under lifetime supervision falls within the**
12 **purview of punishment as used in Denson.”²³ Exhibit B, an Order from the United
13 States District Court filed on July 16, 2014 in ACLU v. Masto,²⁴ and Exhibit C, a
14 transcript of proceedings held before the Honorable James C. Mahan, on June 25,
15 2014 in ACLU v. Masto, clarifying his reasoning and order regarding the retroactive
16 application of S.B. 471. This resulted in the Attorney General for Nevada agreeing
17 not to retroactively apply the movement and residency restrictions of that law.²⁵**

18 On November 18, 2015, Petitioner filed Motion for Protective Order and
19 Order to Show Cause.²⁶ On November 18, a hearing on Petitioner’s Motion to
20 Dismiss was heard before the Honorable Elizabeth Gonzalez. She denied
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22

23 ¹⁹ PA 209-

24 ²⁰ PA 233-254.

25 ²¹ PA 255-264.

26 ²² PA 265-294.

27 ²³ PA 266-276 at PA 273. Denson v. State, 112 Nev. 68,915 P.2d. 284
(1996)(emphasis supplied).

28 ²⁴ PA 277-280.

²⁵ PA 280-295.

²⁶ PA 296-302.

1 Petitioner's Motion.²⁷ On December 7, 2015, an Order Denying Defendant's Motion
2 to Dismiss for Violations of Ex Post Facto Clauses, the Contract Clauses, Double
3 Jeopardy, and the Due Process Clauses of the United States Constitution and/or the
4 Constitution of the State of Nevada was filed.²⁸ On December 8, 2015, Petitioner
5 filed a Motion to Stay Proceedings Pending Application to the Nevada Supreme
6 Court for Writ of Mandamus and/or Prohibition Challenging this Honorable Court's
7 Order Denying Defendant's Motion to Dismiss for Violations of Ex Post Facto
8 Clauses, the Contract Clauses, Double Jeopardy, and the Due Process Clauses of the
9 United States Constitution and/or the Constitution of the State of Nevada.²⁹

10 On December 14, 2015, the Department of Parole and Probation filed Parole
11 and Probation Division's Opposition to Motion for Protective Order and Order to
12 Show Cause.³⁰ On December 16, 2015, a hearing was held on Defendant's Motion
13 for Protective Order and Order to Show Cause and the Court ordered the hearing on
14 Defendant's Motion for Stay, previously scheduled for December 23, 2015,
15 advanced for hearing on that same day.³¹ There being no objection by the State, the
16 District Court ordered the Motion for Stay be granted for a period of one hundred
17 eighty (180) days with all future dates vacated, to be reset if and when the stay
18 expires.³²

19 IV.

20 STATEMENT OF FACTS

21 The Petitioner's date of offense, which permitted the special sentence of
22 lifetime supervision pursuant to NRS 213.1243, is November 1, 2003.³³ As will be
23

24 ²⁷ PA 344-355, Transcript of Proceedings.

25 ²⁸ PA 303-304.

26 ²⁹ PA 305-325.

27 ³⁰ PA 326-335.

28 ³¹ PA 336.

³² PA 340-342.

³³ PA 33 and PA 38.

1 argued, this date is crucial in applying the multiple constitutional prohibitions
2 argued in this Petition.³⁴ The information states that Petitioner committed the offense
3 of Violation of Lifetime Supervision by Convicted Sex Offender by engaging in the
4 following conduct; “to-wit: by failing to enroll and/or complete sex offender
5 counseling and/or committing the crime of battery on April 19, 2012, and/or by
6 failing to cooperate with his supervisor.”³⁵

7 A codification of these elements or prohibited conduct did not exist in the
8 body of NRS 213.1243 on November 1, 2003, the offense date which permitted the
9 imposition of the sentence of lifetime supervision.³⁶ The Petitioner attempted to raise

10 _____
11 ³⁴ Though, this date is not mentioned in the body of the Information filed in C-15-
12 307794-1, See e.g. PA 11-12.

13 ³⁵ PA 11-12.

14 ³⁶ **1997 Statutes of Nevada, Page 1189 (Chapter 314, SB 133)**↓

15 consider the imposition of such conditions as would facilitate timely payments by
16 the defendant of his obligation, if any, for the support of a child and the payment of
17 any such obligation which is in arrears.

18 **Sec. 14. NRS 213.1243** is hereby amended to read as follows:

19 213.1243 1. The board shall establish by regulation a program of lifetime
20 supervision of sex offenders to commence after any period of probation or any term
21 of imprisonment and any period of release on parole. The program must provide for
22 the lifetime supervision of sex offenders by parole and probation officers.

23 2. Lifetime supervision shall be deemed a form of parole for the limited
24 purposes of the applicability of the provisions of NRS 213.1076, subsection 9 of
25 NRS 213.1095, NRS 213.1096 and subsection 2 of NRS 213.110.

26 3. A person who violates a condition imposed on him pursuant to the program
27 of lifetime supervision is guilty of a *category B* felony [.

28 4. A person found guilty of a felony pursuant to this section shall be punished
by imprisonment in the state prison for a definite term of not less than 1 year nor
more than 6 years, or by a fine of not more than \$5,000, or by both fine and
imprisonment. A person who is sentenced to imprisonment pursuant to this
subsection becomes eligible for parole when he has served one-third of the definite
period of time for which he has been sentenced, less any credit earned to reduce his
sentence pursuant to chapter 209 of NRS.] and shall be punished by imprisonment in
the state prison for a minimum term of not less than 1 year and a maximum term of
not more than 6 years, and may be further punished by a fine of not more than
\$5,000.

1 many of these constitutional issues before this Honorable Court in Joiner v. State,
2 S.C. No. 61889. Petitioner was foreclosed from raising these constitutional issues
3 because this Honorable Court held, “A person on Lifetime Supervision may not file
4 a post-conviction petition for writ of habeas corpus because he is not under a
5 sentence of imprisonment as required by NRS 34.724. See Coleman v. State, 130
6 Nev. _____, _____, 321 P.3d 863, 867 (2014). Therefore, because Joiner did not meet
7 the imprisonment requirement of NRS 39.724, he was not eligible for post-
8 conviction habeas relief.”³⁷

9 On July 6, 2015, a preliminary hearing was held alleging that Petitioner had
10 violated his special sentence of lifetime supervision.³⁸ A single witness testified at
11 the preliminary hearing. The witness was former Parole Officer Fernando Herrera.³⁹
12 Mr. Herrera told the Justice Court that the lifetime supervision agreement signed by
13 Petitioner indicated some of the rules and expectations of someone on lifetime
14 supervision.⁴⁰ Mr. Herrera stated the “important” rules in this case were, “the first is
15 rule no. 7, you shall cooperate all times with your supervising officer. Also, rule no.
16 8, laws and conduct, you shall comply with all rules municipal, county, state and
17 federal and ordinances and conduct yourself as a good citizen. Lastly, it was Rule
18 13, counseling participate in professional counseling if deemed necessary by the
19 Division of Parole and Probation.”⁴¹ Definitions for adequate cooperation or what it
20 meant to be a good citizen were not provided.

21 Officer Herrera testified that Petitioner refused to enroll for more sexual
22 offender counseling,⁴² even though while he was in prison Mr. Joiner completed
23

24 **Sec. 15.** (Deleted by amendment.)

25 ³⁷ Order of Affirmance, State v. Joiner, S.C. No. 61889, filed June 12, 2014.

26 ³⁸ PA 11, a transcript of the preliminary hearing is provided at PA 1-10.

27 ³⁹ PA 1. Preliminary hearing transcript (“PHT”) at 1.

28 ⁴⁰ PA 2 at PHT 6.

⁴¹ PA 2 at PHT 6.

⁴² PA 2 at PHT 8.

1 many similar classes.⁴³ Mr. Herrera also testified that he decided to violate Petitioner
2 because he was arrested on a battery charge even though that charge was dismissed
3 with prejudice without a finding of guilt.⁴⁴ When asked how Mr. Herrera decided to
4 violate the Petitioner’s special sentence of lifetime supervision for an offense for
5 which he was never convicted, Mr. Herrera testified, “Because he was arrested for
6 the crime of battery.”⁴⁵ Mr. Herrera testified that he did not recall having a
7 personality conflict with Petitioner.⁴⁶ Mr. Herrera admitted to the Court that, “none
8 of those things, prohibitions, none of the conditions, that Petitioner is now standing
9 accused of are found in any sections of law that define lifetime supervision.”⁴⁷ Mr.
10 Herrera further testified that the condition of counseling did not exist at law, and he
11 had sole discretion to determine whether such a condition be imposed on the
12 Petitioner.⁴⁸

13 The Justice Court would not entertain Petitioner’s objections to the vagueness
14 and it ordered Petitioner to stand trial.⁴⁹ The District Court held argument on
15 Petitioner’s Motion to Dismiss for multiple constitutional violations on November
16 18, 2015. Although the Nevada Attorney General’s Office was noticed about
17 Petitioner’s attack on the constitutionality of NRS 213.1243, that Office decided not
18 submit formal briefing on Petitioner’s motion.⁵⁰ The District Court denied
19 Petitioner’s motion to dismiss finding: “In 2006 the Defendant in his guilty plea
20 agreement agreed to the punishment of lifetime supervision. The sentence of lifetime
21 supervision is a judicial condition that was imposed at the time of his sentencing and
22 is part of his Judgment of Conviction. The conditions of his lifetime supervision
23

24 ⁴³ PA 4 at PHT 16.

25 ⁴⁴ PA 4 at PHT 13-14. See PA 197.

26 ⁴⁵ PA 4 at PHT 14.

27 ⁴⁶ PA 4 at PHT 15.

28 ⁴⁷ PA 3 at PHT 12.

⁴⁸ PA 3 at PHT 12.

⁴⁹ PA 5 at PHT 20.

⁵⁰ PA 345-346.

1 may be imposed by the Executive Branch. For that reason, the Motion to Dismiss is
2 denied.”⁵¹

3 V.

4 **JURISDICTIONAL STATEMENT**

5 This Court is authorized to review a petition for a writ of certiorari in cases
6 where a district court has considered the constitutionality of a statute or ordinance.⁵²
7 The constitutionality of a statute is a question of law that is reviewed *de novo*.⁵³

8 Mandamus is available to direct the district court to do what the law requires.
9 Such extraordinary relief is available where the Petitioner has no plain, speedy, and
10 adequate remedy in the ordinary course of law.⁵⁴ Consideration of a petition for
11 extraordinary relief may be justified where an important issue of law needs
12 clarification and public policy is served by the Supreme Court’s invocation of its
13 original jurisdiction.⁵⁵ Judicial economy and sound judicial administration militate
14 in favor of granting the requested relief at this point of the proceeding.⁵⁶
15 Specifically, a trial on the merits in this matter would be a waste of judicial
16 resources considering there exists no fair or logical manner to define the elements of
17 the crime because the conditions that comprise the offense of the special sentence of
18 lifetime supervision did not and do not exist at law.

19 ///

20 ///

21 _____
22 ⁵¹ PA 353.

23 ⁵² NRS 34.020(3); City of Reno v. District Court, 83 Nev. 201,202, 427 P.2d 4, 5
(1967).

24 ⁵³ Sheriff v. Burd, 118 Nev. 853,857, 59 P.3d 484,486 (2002).

25 ⁵⁴ Margold v. District Court, 109 Nev. 804, 805 (1993) A writ of mandamus is
26 available to compel the performance of an act which the law requires as a duty
27 resulting from an office, trust, or station, NRS 34.160, or to control an arbitrary or
28 capricious exercise of discretion. International Game Tech v. Dist. Ct., 124 Nev.
193, 197 (2008).

⁵⁵ Diaz v. Eighth Judicial District Court, 993 P.2d 50,116 Nev. 8 (2000).

⁵⁶ See e.g. State v. Babayan, 106 Nev. 155, 175-176 (1990)

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VI.

LEGAL ARGUMENT

A. **Petitioner’s Continued Prosecution Violates the Vagueness Doctrines of the Due Process Clauses of the United States Constitution and the Constitution of the State of Nevada.**

The alleged crime are detailed in the information which reads, “to-wit: by failing to enroll or complete sex offender counseling and/or committing the crime of battery on April 19, 2012, and/or failing to cooperate with his supervisor.”⁵⁷ These three conditions constitute the elements of the offense of violation of lifetime supervision by convicted sex offender in violation of NRS 213.1243. These elements were developed and imposed by the Nevada Board of Parole Commissioners. The challenged statute failed to codify a single punitive condition of lifetime supervision on the offense date which allowed for Petitioner’s special sentence of lifetime supervision.⁵⁸ The elements of the crime were created by an administrative, executive board.

The special sentence of lifetime supervision is comprised of punitive conditions attached to a lifetime supervision agreement formulated by the Board of Parole Commissioners. (Hereinafter, “Board”). The Board is given broad and sweeping power to determine the punitive conditions of lifetime supervision well after the offense date. This Honorable Court has held that, “lifetime supervision is a direct consequence because it is sufficiently onerous to constitute a form of punishment; it is imposed directly by the district court; and it increases the range of punishment to which a defendant is subject as a matter of law.”⁵⁹

⁵⁷ PA 11-12.

⁵⁸ The dates at issue were “on or between November 1, 2003 and October 15, 2005.” PA 38.

⁵⁹ Palmer v. State, 118 Nev. 823, 827 (2002)

1 Unfortunately, the punishment of lifetime supervision, and consequently the
2 crime of violating a lifetime supervision agreement, remains entirely undefined
3 under law because the conditions that comprise lifetime supervision remain
4 undefined by law. While the Board might be legally able to determine which
5 conditions are necessary to adequately supervise an offender, the conditions must be
6 pre-existent at law, at the time of offense, to pass constitutional muster. These
7 conditions are the elements of the offense of violation of lifetime supervision by
8 convicted sex offender.

9 The void-for-vagueness doctrine is predicated upon a statute’s repugnancy to
10 the Due Process Clause of the Fourteenth Amendment to the United States
11 Constitution.⁶⁰ A statute is unconstitutionally vague and subject to a facial attack if it
12 (1) fails to provide notice sufficient to enable persons of ordinary intelligence what
13 conduct is prohibited and (2) lacks specific standards, thereby encouraging,
14 authorizing, or even failing to prevent arbitrary and discriminatory enforcement.⁶¹

15 This Honorable Court has held that, “The first prong is concerned with
16 guiding those who may be subject to potentially vague statutes, while the second –
17 and more important prong is concerned with the enforcers of the statutes.”⁶² This
18 Court in Silvar stated that by requiring notice of prohibited conduct in a statute, the
19 first prong offers citizens the opportunity to conform their conduct to that law.
20 However, the second prong is more important because absent adequate guidelines, a
21 criminal statute may permit a standardless sweep, which would allow the police,
22 prosecutors, and juries “to pursue their personal predilections.”⁶³

23 The Petitioner is charged with failing to cooperate with his supervisor. This
24 crime does not provide adequate notice of the prohibited conduct. Officer Herrera’s
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26 ⁶⁰ State v. Burdy, 118 Nev. 853, 857, 59 P.3d. 484, 486 (2002)

27 ⁶¹ Id at 857, 59 P.3d. at 486-87.

28 ⁶² Silvar v. Dist. Ct., 122 Nev. 289, 291, 129 P.3d. 682, 685 (2006) Pitmon v. State,
Nev. Court of Appeals, 352 P.2d. 655 (2015)

⁶³ Id at 291, 129 P.3d. at 685.

1 preliminary hearing testimony presents a disturbing example of conduct prohibited
2 by the second prong of Silvar. The failure to provide adequate guidelines through a
3 statute allowed Officer Herrera to implement a standardless sweep prohibited by
4 Silvar. Similarly, the Petitioner was also accused of committing “the crime of
5 battery.” However, a Henderson Municipal Court Docket sheet was submitted as
6 proof that this matter was legally dismissed.⁶⁴ Because the statute lacks any
7 foundation as to prohibited conduct, the decision to violate the Petitioner’s lifetime
8 supervision was left with a parole officer, even though a court had dismissed the
9 case with prejudice. None of the components of Petitioner’s alleged violations were
10 known or could have been known by Petitioner when he either committed his
11 offense or was sentenced to the special sentence of lifetime supervision. This is
12 because they did not exist at law.

13 As previously argued, NRS 213.1243 was an empty vessel waiting to be filled
14 by the Board’s administrative fiat. At Petitioner’s preliminary hearing, his prior
15 parole officer conceded that none of the prohibitions or conditions that Petitioner
16 was accused of violating could be found in the law that defined lifetime
17 supervision.⁶⁵ The parole officer similarly admitted that the supervising officer’s
18 discretion included whether a class, a polygraph, a fine or any other condition would
19 be imposed as part of the sentence.⁶⁶

21 **B. Petitioner’s Continued Prosecution Violates the Ex Post Facto Clauses of**
22 **the United States Constitution and the Constitution of the State of**
23 **Nevada.**

24 The punitive conditions, and therefore the instant charge based upon those
25 conditions, violate the Ex Post Facto Clauses of the United States and Nevada
26 Constitutions. The challenged conditions that currently comprise the sentence of

27 ⁶⁴ PA 218.

28 ⁶⁵ PA 3 at condensed transcript page 12.

⁶⁶ Id.

1 lifetime supervision are a form of punishment because of the affirmative disabilities
2 and restraints they place on Mr. Joiner. They have a direct and immediate effect on
3 the range of punishment suffered by Mr. Joiner. Their fluid, evolving and retroactive
4 application is both illegal and unconstitutional. This prosecution is based upon an
5 illegal and unconstitutional sentence. Therefore, this prosecution must be dismissed.

6 The Board had been tasked with determining and implementing these punitive
7 conditions of lifetime supervision years after the commission of Mr. Joiner's
8 offense, years after the determination of his sentence, and years after his plea
9 agreement was negotiated. These conditions had not been codified in the law. The
10 challenged lifetime supervision conditions were not part of the sentence. A hearing
11 to challenge their imposition was not provided to Mr. Joiner. The challenged
12 conditions were imposed without notice as to their substance or with meaningful
13 opportunity to be heard about their imposition.

14 Both federal and state constitutions prohibit the passage of *ex post facto*
15 laws.⁶⁷ This prohibition forbids the passage of laws that impose punishments for acts
16 that were not punishable at the time they were committed or impose punishments in
17 addition to those prescribed at the time offense. The United States Supreme Court
18 has held that the clause is aimed at laws that "retroactively alter the definition of
19 crimes or increases the punishment for criminal acts."⁶⁸

20 This Honorable Court has previously held that, "lifetime supervision is a form
21 of punishment because of the affirmative disabilities and restraints it places on a sex
22 offender have a direct and immediate effect on the range of punishment imposed."⁶⁹
23 This Court stated that "courts have generally reasoned that post-release supervision
24 increases the maximum range of an offender's sentence, thereby directly and
25

26 ⁶⁷ U.S. Const. art. 1 § 10; Nev. Const. art. 1 § 15.

27 ⁶⁸ State v. Eighth Jud. Ct. (Logan D.), 129 Nev. Adv. Op. 52, 306 P.3d. 369 (2013)
28 citing Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed. 2d. 17 (1981)

⁶⁹ Palmer v. State, 118 Nev. 823, 827, 59 P.2d. 1192, 1196 (2002)

1 immediately affecting the defendant’s punishment.”⁷⁰ It is respectfully argued that to
2 comply with *ex post facto* prohibitions, the punitive conditions that increase an
3 offender’s punishment, must exist at law before the offense which yields that
4 sentence is imposed. These punitive conditions cannot be manufactured on ad hoc
5 basis outside of the law and outside of judicial sanction.

6 **C. Petitioner’s Continued Prosecution Violates the Separation of Powers**
7 **Doctrine of the Constitution of the State of Nevada.**

8 By allowing the Board to create the punitive conditions of the special sentence
9 of lifetime supervision, the Legislature has illegally invaded the constitutionally
10 protected authority of the judiciary to fashion and enforce sentences emanating from
11 their judgments of conviction. Nev. Const. art. 3, § 1 provides for three separate
12 departments of our government, the Legislative, the Executive, and the Judicial and
13 mandates that “no persons charged with the exercise of powers properly belonging
14 to one of these departments shall exercise any functions, appertaining to either of the
15 others ...” The doctrine of separation of powers is fundamental to our system of
16 government.⁷¹

17 The judicial department may not invade legislative and executive province.⁷²
18 Neither may the legislative and executive branches of government exercise powers
19 properly belonging to the judicial department.⁷³ The function of the judicial
20 department is the administration of justice. This function necessarily includes
21 sentencing and the determination of what punishments should accrue to a court
22 imposed sentence. The judiciary, as a coequal branch of government, possesses the
23 inherent power to protect itself and to administer its affairs.⁷⁴ These inherent powers
24 include rule-making and other incidental powers reasonable and necessary to carry
25

26 ⁷⁰ Id.

27 ⁷¹ Galloway v. Truesdell, 83 Nev. 13, 422 P.2d. 237 (1967)

28 ⁷² State v. District Court, 85 Nev. 485, 457 P.2d. 217 (1969)

⁷³ Graves v. State, 82 Nev. 137, 413 P.2d. 503 (1966)

⁷⁴ Sun Realty v. District Court, 91 Nev. 774, 542 P.2d. 1072 (1975)

1 out the duties required for the administration of justice. Any infringement by the
2 legislative upon such power is a degradation of our tripartite system of government
3 and strictly prohibited.⁷⁵

4 The offending language of NRS 213.1243 is as follows: “(1) **the Board shall**
5 **establish by regulation a program of lifetime supervision of sex offenders to**
6 **commence after any period of probation or any term of imprisonment and any**
7 **period of release on parole.** The program must provide for the lifetime supervision
8 of sex offenders by parole and probation officers”.... (3) a person who violates a
9 condition imposed on him pursuant to the program of lifetime supervision is guilty
10 of a category B felony.”⁷⁶

11 The law, as drafted, makes the punitive conditions established by the Board,
12 both the elements of the crime of violating lifetime supervision, and the actual
13 sentence of lifetime supervision. Both are subject to interpretation and imposition by
14 the executive branch of government. This paradigm is illegal and violates the
15 Separation of Powers Doctrine. The executive branch is not constitutionally
16 entrusted with the legislative function of defining what is criminal. The executive
17 branch is not constitutionally entrusted with the judicial function of administering
18 punishment pursuant to a judicially authorized judgment of conviction.

19
20 **D. Petitioner’s Continued Prosecution Violates the Contract Clauses of the**
21 **United States Constitution and the Constitution of the State of Nevada.**

22 The Petitioner’s plea agreement did not contain the challenged conditions of
23 lifetime supervision. The imposition of these challenged conditions of lifetime
24 supervision were neither contemplated nor negotiated within the parameters of that
25 contract. Accordingly, the subsequent inclusion of the contested conditions amounts
26

27 ⁷⁵ Dunphy v. Sheehan, 92 Nev. 259, 549 P.2d. 332 (1976)

28 ⁷⁶ NRS 213.1243, as it existed at the time of Petitioner’s offense and at the time
sentence was pronounced. See FN. 36.

1 to an unauthorized and unilateral amendment of the plea agreement by the State
2 through the powers of the omnipotent Board. This unauthorized amendment of the
3 plea agreement is a violation of both state and federal constitutional contract clause
4 protections.⁷⁷

5 The plea agreement in a criminal prosecution is a constitutionally protected
6 contract that invokes due process concerns should the State seek to unilaterally alter
7 its terms.⁷⁸ The plea agreement in Petitioner’s matter did not contemplate these
8 punitive conditions, being established and imposed in an *ad hoc* manner when he
9 entered into his plea agreement with the state, in large measure, because they simply
10 did not exist at law when the deal was struck.

11 When a plea bargain is made and a guilty plea entered, the promises of the
12 prosecutor are part of the inducement of the plea; and it is axiomatic that “no guilty
13 plea which has been induced by an unkept plea bargain can be permitted to stand.”⁷⁹
14 The Court in Gamble, reasoned that since the defendant relinquishes constitutional
15 protections by pleading guilty, a waiver of those protections must be knowingly and
16 voluntarily made; and that a waiver induced by an unfulfilled promise is invalid. A
17 waiver based on unknown future punitive lifetime supervision conditions could not
18 be knowingly and voluntarily made. Similarly, a plea agreement subject to unilateral
19 change, as has occurred in Petitioner’s case, is illusory.

22 ⁷⁷ Art. I, 10 of the United States Constitution. “No State shall...pass any law
23 impairing the obligation of contracts.” In Holloway v. Barret, 87 Nev. 385, 392
24 (1971). The Nevada Supreme Court interpreted the State Constitutional Contracts
Clause to be on par with the United States Contracts Clause.”

25 ⁷⁸ Santobello v. New York, 404 U.S. 257, 262 (1971) Holding that “when a plea
26 rests in any significant degree on a promise or agreement of the prosecutor, so that it
27 can be said to be part of the inducement or consideration, such promise must be
fulfilled.”

28 ⁷⁹ Gamble v. State, 95 Nev. 904, 604 P.2d. 335, 337 (1979) Citing Bryan v. United
States, 492 F2d. 775, 778 (5th Cir. 1974).

1 The prosecution is held “to the most meticulous standards of promise and
2 performance precisely because “it is the defendant’s rights which are being violated
3 when the plea agreement is broken or meaningless.”⁸⁰ The State has rendered this
4 plea agreement meaningless by introducing terms of punishment never contemplated
5 within the four corners of the contract.⁸¹The punitive conditions of supervised
6 release imposed administratively by the Board are outside of the contract process.

7 Before the State can be released from the strict terms of a judicially authorized
8 plea agreement, it must seek an evidentiary hearing and prove that it was the
9 Petitioner that caused the breach. The State cannot unilaterally, or through delegated
10 power, reject or materially alter the terms of a plea agreement. The challenged
11 conditions of lifetime supervision represent a breach of the binding agreement.

12
13 **E. Petitioner’s continued Prosecution Violates the Double Jeopardy Clauses**
14 **of the United States Constitution and the Constitution of the State of**
15 **Nevada.**

16 “The Double Jeopardy Clause protects against three distinct abuses: A second
17 prosecution for the same offense after acquittal; a second prosecution for the same
18 offense after conviction; and multiple punishments for the same offense.”⁸²
19 Imposition of the challenged conditions of lifetime supervision violates the
20 prohibition against multiple punishments for the same offense. Palmer instructs that
21 the challenged conditions are in fact punishment.

22 The Petitioner had been previously punished by the Court when the district
23 court sentenced Petitioner to prison and a special sentence of lifetime supervision.

24 ⁸⁰ Gamble, id, at 338.

25 ⁸¹ Gamble, id at 337. This Petitioner is requesting that the State not be allowed to
26 breach this bargain. The contested conditions of lifetime supervision represent a
27 direct violation of both state and federal contract clause protections.

28 ⁸² Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d. 240, 243 (1996)(quoting
United States v. Halper, 490 U.S. 435, 440, abrogated on other grounds by Hudson
v. United States, 522 U.S. 93 (1997)

1 Petitioner was punished again when he was resentenced by the Board to over twenty
2 punitive conditions that were not included in his guilty plea agreement or his
3 judgment of conviction. This resentencing violates the Double Jeopardy Clause’s
4 prohibition against multiple punishments for the same conviction.

5 The State has historically argued that, “the broad grant of authority contained
6 in the 1997 version of NRS 213.1243 delegates the determination of conditions to
7 the Board without limitation...”⁸³ This faulty reasoning allows for the indiscriminate
8 punishment of Petitioner beyond the sentence of the district court and at the wide-
9 ranging discretion of an administrative board. It allows for multiple punishments not
10 contemplated in the plea agreement nor imposed in the judgment of conviction.

11 A court should normally presume that a legislature did not intend multiple
12 punishments for the same offense absent a clear expression of legislative intent to
13 the contrary.⁸⁴ When the Legislature enacted the sentence of lifetime supervision but
14 failed to define its terms, the lifetime supervision law failed to express the clear
15 legislative intent necessary to judicially countenance multiple punishments for the
16 same offense.

17 It has long been held that criminal statutes must be “strictly construed and
18 resolved in favor of the defendant.”⁸⁵ No specific conditions can be gleaned from
19 the language of the statute as it existed when these offenses were committed.⁸⁶

21 ⁸³ PA 203-205.

22 ⁸⁴ Talancon v. State, 102 Nev. 294, 300, 721 P.2d. 764, 768 (1986)

23 ⁸⁵ Ebeling v. State, 120 Nev. 401, 91 P.3d. 599 (2004) Several of the challenged
24 conditions were expressly added into the sentence of lifetime supervision in 2007. It
25 must be presumed that until the Legislature acted to include specific conditions
26 within the definition of lifetime supervision because they believed the definition of
27 lifetime supervision did not include those specific conditions. This Court has held
28 that rule of statutory construction, “*Expressio unius est exclusio alterius*,” (the
expression of one thing is the exclusion of another) has been repeatedly confirmed
in this State.” Cramer v. State, 126 Nev. Adv. Op. 38 (2010) quoting, Galloway v.
Truesdell, 33 Nev. 13, 26, 422 P.2d. 237, 246 (1967). Use of this doctrine, when
considered with the rule that criminal statutes must be strictly construed in favor of

1 **CONCLUSION**

2 It is respectfully prayed that the Petition be granted.

3
4 Dated this 28th day of March, 2016.

5 By /s/ Gary A. Modafferi

6 _____
7 GARY A. MODAFFERI, ESQ.
8 Nevada Bar No. 12450
9 Attorney for Petitioner
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22 _____
23 the defendant, also known as the rule of leniency, combine to mandate that the terms
24 of lifetime supervision be strictly construed and resolved in favor of the Petitioner.
25 ⁸⁶ This Court has repeatedly held that a person may not be punished for a crime
26 unless his acts clearly fall within the language of the statute. NRS 213.1243 did not
27 contain the language of the challenged conditions. Sheriff v. Encoe, 110 Nev. 1317,
28 1318, 885 P.2d 596,598 (1994) stands for the principal that, “Penal statutes should
be so clear as to leave no doubt as to the intention of the Legislature, and where
reasonable doubt does exist as to whether the person charged with violation of its
provisions is within the statute, that doubt must be resolved in favor of the
individual.” This statute strays far from this mandate.

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on the 28th day of March, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I hereby certify that in accordance with NRAP 25(1)(d) I sent true and accurate copies of the Petition for Writ of Mandamus, Or in the Alternative, Writ of Prohibition, on the 28th day of March, 2016, via United States mail, prepaid First-Class postage affixed thereto addressed as follows:

The Honorable Elizabeth Gonzalez
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Erika W. Magana

An employee of
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