IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE DELL MCNEILL, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 66697

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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STEVE DELL MCNEILL,	)	NO. 66697
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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ROUTING STATEMENT

Steve McNeill was convicted by jury verdict of one category B felony: Violation of Lifetime Supervision - NRS 213.1243. He received a 12 month to 36 month prison sentence. I:190-91.

McNeill's appeal is not presumptively assigned to Court of Appeals because it arises from category B felony, is not a plea, and challenges more than sentence imposed or sufficiency of evidence. NRAP 17(b)(1).

Nevada Supreme Court should hear his appeal because it addresses issues of first impression involving United States or Nevada Constitution, and raises substantial precedential and public policy questions. NRAP 17(a)(13) and (14).

McNeill's appeal addresses substantial precedential and public policy questions regarding statutory interpretation of NRS 213.1243 and separation

of powers under Article 3 of the Nevada Constitution. Court must decide if a person may be found guilty of felony crime –violation of lifetime supervision under NRS 212.1243 - if State charges person with violating a condition imposed by Board or Division but not listed in NRS 213.1243.

At trial, McNeill argued that if court interpreted NRS 213.1243 to allow Board of Parole Commissioners and Division of Probation and Parole to set parameters of crime then NRS 213.1243 was unconstitutionally vague, overbroad, and violated the separation of powers doctrine. III:476-77;484.

McNeill's appeal further addresses a *Batson* challenge when State used peremptory challenges to remove white males, State's failure to correctly notice expert, two motions for a mistrial, motion for directed verdict, denial of discovery, incorrect jury instructions, insufficiency of the evidence, motion for arrest of judgment alternatively judgment of acquittal, cruel and unusual punishment, and asks court to determine how State may present lifetime supervision cases at trial without prejudicing defendants.

JURISDICTIONAL STATEMENT

NRS 177.015 gives Court jurisdiction to review this appeal from jury verdict. I:169. District court filed final judgment on 09/18/14 and notice of appeal was filed on 10/10/14, within 30 day time limit established by NRAP 4(b). I:190-91;192-94.

ISSUES PRESENTED FOR REVIEW

I. DUE PROCESS, SEPERATION OF POWERS, AND OTHER CONSTITUTIONAL PROVISIONS PROHIBIT STATE AGENCY FROM SUPPLEMENTING LEGISLATIVELY CREATED ELEMENTS OF CRIME AND PROHIBIT STATE FROM PROSECUTING INDIVIDUAL ON VIOLATIONS NOT LISTED WITHIN STATUTE: NRS 213.1243.

II. EVIDENCE WAS INSUFFICIENT TO CONVICT; COURT VIOLATED SIXTH AND FOURTEENTH AMENDMENTS BY REMOVING ONE ELEMENT FROM JURY'S DECISION-MAKING PROCESS; AND, COURT ERRED IN ADMITTING INCOMPETENT EVIDENCE.

III. ERRONEOUS JURY INSTRUCTIONS.

IV. COURT ERRED IN DENYING MOTION FOR ARREST OF JUDGMENT AND/OR MOTION FOR JUDGMENT OF ACQUITTAL.

V. NRS 213.1243 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

VI. PREJUDICIAL ERROR OCCURRED WHEN WITNESSES TESTIFIED DEFENDANT WAS INCARCERATED PRIOR TO BEING PLACED ON LIFETIME SUPERVISION, COMPARED LIFETIME SUPERVISION TO PAROLE, CALLED HIM A SEX OFFENDER, AND SAID HIS WAS ONE OF THE MOST EGREGIOUS CRIMES.

VII. DUE PROCESS VIOLATED BY COURT FAILING TO REQUIRE STATE TO REVEAL CRIMINAL HISTORY OF WITNESSES OR INCONSISTENT STATEMENTS.

VIII. COURT ERRED IN ALLOWING STATE'S EXPERT TO TESTIFY.

IX. CUMULATIVE ERROR WARRANTS REVERSAL.

X. STRUCTURAL ERROR BASED ON *BATSON* CHALLENGE TO STATE STRIKING ALL WHITE MALES REQUIRES REVERSAL.

STATEMENT OF THE CASE

On 04/10/14, State filed criminal complaint charging McNeill with: (1) violation of lifetime supervision - NRS 213.1243, and (2) prohibited acts by a sex offender. I:031-2. State originally alleged crimes occurred on 12/13/13, but later changed timeframe to occurring from 12/14/12 to 03/10/14. I:67;I:89;I:126.

On 04/29/14, Justice Court held preliminary hearing and bound case to district court. I:003-85.

McNeill entered pleas of not guilty at 05/07/14 arraignment hearing.[1] I:239-42;M-I:226.

McNeill filed a pre-trial motion for discovery and a writ; but, he later withdrew his writ to ensure his right to speedy trial.[2]

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[1] *Information* filed on 05/05/14, *Amended Information* filed on 07/07/14. I:089-91;I:126-27; *Second Amended Information* at I:148-49.

[2] *Defendant's Discovery Motion* - I:096-93; State's Response - I:102-110; Hearing on 06/30/14 – II:243-58;M-227-28. *Defendant's Writ* – I:111-17; State's Return to Writ – I:120-25;Hearing on 07/07/14 – II:258a-l. *State filed notices of witnesses and expert* on 05/17/14 and 06/06/14. I:092-93;94-95.

Trial lasted three days beginning on 07/07/14 and ending on 07/09/14.[3] Upon completion of testimony, court dismissed count 2 in response to McNeill's request for directed verdict on both counts. III:490-01;498. State did not appeal. III:525-26.

Jury rendered guilty verdict on count 1. I:169.

On 07/30/14, district court denied McNeill's Motion for Arrest of Judgment pursuant to NRS 176.525; alternatively, Motion for Judgment of Acquittal pursuant to NRS 175.381. *Order*-I:188-89; *Hearing*-III:585-93.

On 09/10/14, court sentenced McNeill to a 12 to 36 month prison sentence. III:596-608;M-I:238.

STATEMENT OF THE FACTS

Parole and Probation Officer Ashley Mangan began her law enforcement career in corrections - seven years in Nevada prisons - before becoming a parole and probation officer in 2012. II:344-45;359. After training, she was assigned to the Division of Parole and Probation's sex offender unit in March of 2013. II:344-45;351-59.

One of the first cases Mangan received involved McNeill, a convicted sex offender, who had been on lifetime supervision for five years or more. II:344-45;360. Prior to Mangan's supervision, McNeil was monitored by

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[3] *Day 1:* 07/07/14 at II:259-328;M-I:231-32; *Day 2*: 07/08/14 at II:329-98;M-I:235-36; *Day 3*: 07/09/14 at III:399-584;M-I:235-36.

four different officers. II:360. Mangan did not recall McNeill receiving any violations before she handled his case. II:360.

McNeill testified that NcNeill signed three lifetime supervision agreements before she became his officer: (1) McNeill signed first lifetime supervision agreement on 11/08/07 while incarcerated before release from prison (II:346-51; *Exhibit #2*-III:6110; (2) second one – exact same document – on 12/04/07 while awaiting an order from the Parole Board on special conditions (II:351; - *Exhibit 3*-III:612); and (3) on 11/07/12, McNeill allegedly signed a third lifetime supervision agreement which contained special conditions (II:350;-521; - *Exhibit #4*-III:615-15).

Mangan described lifetime supervision as:

> – it's not really parole...if you violate lifetime supervision you would be subject to new felony charges. Where if you violated parole you would just be subject to parole violation. There are specific conditions that the Parole Board mandates that the offender comply by. Things like reporting, residence, reporting to your officer, curfew, submitting to urine analysis and things of that nature. II:345;360.

Mangan supervised people on parole and lifetime supervision the same. II:360.

Almost immediately upon receiving his case, Mangan and McNeill experienced problems. Mangan claimed she telephoned him but her calls never went through. II:351. Her first contact with McNeill occurred on

03/29/13 when he reported to Division of Parole and Probation and she was out on the road. II:351-52. She returned to meet him.

Mangan reviewed monthly report he filled out – line by line. II:352; *See Exhibit* #5-III:618. One of her first dictates was a new curfew: 5:00 PM to 5:00 AM. Because he was homeless, she told him he was required to stay near cross-streets of Main and Colorado – area where he slept at night - so she could spot check him for curfew requirement. II:352-3. She showed him his lifetime supervision agreement from 11/07/12 and discussed penalties he could receive for disobeying her orders. II:353.

Also, Mangan wanted McNeill to re-enroll in sex offender counseling. She could not remember checking with his counselor, Marcia Lee, to determine if he could attend.[4] II:366.

Mangan's next contact with McNeill was on 04/12/13. II:353; *See Exhibit* #6 – III:620-22. She again went over his monthly report, discussed counseling which he was no longer taking, changed his curfew to 8:00 PM, and had him draw map of area where he stayed. Mangan wanted to refer

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[4] Marcia Lee, a licensed and family therapist, testified McNeill was terminated from sex offender program on 12/22/12. II:436-38; *Exhibit 11*-III:636. He began treatment in March of 2008. II:435;439. During four years of therapy, McNeill completed his homework and attended sessions but after four years was making little or no progress. II;438;441-3.

him to Catholic Charities for food, bed, and assistance, but, he declined her offer. II:353-34.

During April, Mangan unsuccessfully attempted to find McNeill on streets during his curfew. One night she drove around where he slept and surveilled area at 8:20 PM and 9:40 PM, but she never found him. II:354.

In May, Mangan met McNeill on 05/08/13. II:354. *See Exhibit* 7 – III:623-26. She noticed his address was changed and asked him to draw another map. III:355.

Mangan did not see McNeill in June of 2013 because another officer handled his case. II:355; *See Exhibit 8* – II:627-29

Mangan spoke to McNeill over phone in July. She said he hung up on her twice and called her "f….. c…" during third phone call. II:355-56. But he appeared at Division on 07/11/13 and completed his monthly report. II:356. *See Exhibit* #9 – III:630-88.

On 07/11/13, Mangan discussed his noncompliance and arrested him. II:356. District Attorney's Office declined to proceed on her complaint and McNeill was later released. II:363-64.

Mangan next saw McNeill on 08/15/13. II:356. *See Exhibit* #10 – III:633-35. Mangan took him to meet with her supervisor, Brian Zana. II:356-57;366-69.

Mangan said McNeill refused to submit a urine sample, abide by curfew, and told them he would sleep wherever he wanted; but, he agreed to meet with her monthly. II:357;364. McNeill outlined his complaints with Mangan to Zane and refused to meet with her weekly. II:36768. Zane did not ask him to provide a urine sample but informed him that he needed to abide by conditions for lifetime supervision or warrant would issue for his arrest. II:368. Mangan documented file.

After 08/15/13, Mangan had no physical contact with McNeill.[5] II:358.

On 08/29/13, Zane received a cease and desist letter from McNeill. II:367-68;II:364365; *Exhibit A*-III:638-42. The letter was dated 08/19/13. III:638-42. Zane forwarded letter to Mangan and Attorney General. II:368.

In December of 2013, Mangan again requested District Attorney initiate criminal charges against McNeill. II:365. After three months of corrections and additional informational requests, District Attorney approved her demand and filed criminal complaint on 03/10/14. II:365.

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[5] On 02/27/14 she drove around looking for McNeill but did not locate him. II:365-66.

SUMMARY OF THE ARGUMENT

McNeill argues Legislature limited conditions for lifetime supervision to specific conditions listed in NRS 213.1243. Thus, he could not be held guilty of violating NRS 213.1243 if he disobeyed restrictions placed on him by Board and Division that were not listed in NRS 213.1243. District court's interpretation of NRS 213.1243 - allowing for additional conditions - rendered NRS 213.1243 unconstitutionally vague, overbroad, and violated separation of powers doctrine. III:476-77;484.

McNeill further contends evidence was insufficient to convict him of any violations. But if Court disagrees, Legislature's sentencing guideline when an offender violates one condition amounts to cruel and unusual punishment.

McNeill contests other erroneous rulings by district court or plain errors in his case which include: court's denial of his *Batson* challenge when State used all peremptory challenges to remove white males, State's inaccurate notice of expert, motions for mistrials and directed verdicts, denial of discovery, incorrect jury instructions, post-trial motions, and prejudicial errors involving State's presentation of lifetime supervision cases.

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ARGUMENT

I. DUE PROCESS, SEPARATION OF POWERS, AND OTHER CONSTITUTIONAL PROVISIONS PROHIBIT STATE AGENCY FROM SUPPLEMENTING LEGISLATIVELY CREATED ELEMENTS OF CRIME AND PROHIBIT STATE FROM PROSECUTING INDIVIDUAL ON VIOLATIONS NOT LISTED WITHIN STATUTE: NRS 213.1243.

A. Lifetime supervision conviction.

McNeill stands convicted of violation of NRS 213.1243, lifetime supervision, under Second Amended Information and Jury Instruction #3 as follows:

> on or between December 14, 2012 and March 10, 2014...willfully, unlawfully, knowingly, and feloniously violated the conditions of Lifetime Supervision imposed on Steve McNeill pursuant to having in 2004 been convicted of a Sex Offense that requires Lifetime Supervision in the Eighth Judicial District Court, Clark County, Nevada, to wit: by refusing to submit to a urinalysis, failing to report, failing to have his residence approved, failing to cooperate with his supervising officer, failing to maintain fulltime employment, failing to abide by a curfew, and/or terminated from his sex offender counseling.

I:149:153;169.

Because State pled violations as "and/or," jury only needed to find McNeill guilty of one of seven violations listed to return a guilty verdict. *See prosecutor's argument* - III:548. Court did not give special verdict.

B. NRS 213.1243 requirements.

NRS 213.1243 lays out statutory conditions a person must follow for lifetime supervision. In summation, conditions are that individual: (1) may only reside at a location approved by the Parole and Probation officer and must keep officer informed of his current address, (2) may not reside within 500 feet (or 1000 feet if the offender is a Tier 3 offender) of any place that is designed primarily for the use of children; (3) must comply with and pay for electronic monitoring, if the division deems it appropriate for the offender; (4) must follow instructions of electronic monitoring, if deemed appropriate and report any damage to device: and (5) have no communication with victim or witness of underlying crime.

NRS 213.1243 distinguishes mandatory conditions from discretionary conditions. Electronic monitoring is discretionary condition. Living at least 500 feet from a place designated primarily for children is mandatory condition.

Legislature did not incorporate statutes outlining requirements for the supervision of parolee into NRS 213.1243. NRS 213.1243 is the only statute containing conditions for lifetime supervision.

A violation of lifetime supervision is a new crime: category B felony.

A person found guilty receives a prison term of a minimum of 1 year and maximum of not more than 6 years. Court may also access a fine of not more than $5,000. NRS 213.1243(8).

C. Lifetime supervision conditions placed on McNeill.

McNeill began lifetime supervision after completing his sentence in C204263. I:085a-b. He signed three lifetime supervision agreements: (1) on 11/08/07 - "under duress" (I:030-32;III:611); (2) on 12/04/07 - same agreement (III:612); and (3) on 11/07/12 – same agreement but with added specific conditions as identified by Board of Parole Commissioners. III:614-16.

Under *standard requirements* defined by Board of Parole Commissioners, each person placed on lifetime supervision must abide by the following: (1) submit a monthly report, DNA, and appear in person at Division as required; (2) only reside at a residence approved by officer after obtaining approval; (3) no alcohol – must submit to medically recognized test for blood alcohol; (4) limitations on use of a controlled substance – submit to periodic testing; (5) no firearms or illegal weapons; (6) no associations with ex-felons or sexual offenders; (7) cooperate with supervising officers; (8) comply with all laws and registration requirements; (9) no out-of-state travel without permission; (10) seek and maintain

employment or maintain a program approved by officer; (11) pay supervision fees; (12) curfew; (13) participate in counseling if deemed necessary; (14) submit to polygraph if asked; (15) stay away from victim; (16) do not use alias or fictitious name unless approved by officer; (17) no P.O. box without permission; (18) no contact with person under the age of 18 years in secluded environment; (19) stay away from playgrounds, schools, movie theatre, business that caters primarily to children; and (20) submit to a search. III:611-13.

In November of 2012, Board added *special requirements* approved by Parole Board on 05/24/11: (1) no patronizing business with sexually related entertainment if deemed inappropriate by officer; (2) no electronic device accessing internet unless approved; (3) no alcohol; (4) no sexually explicit material unless approved; (5) comply with prescription medication; and (6) do not enter bar or lounge except for employment. III:616.

Standard requirements listed under the lifetime supervision agreements McNeill allegedly signed *mirror* mandatory conditions for parole of a sex offender listed in NRS 213.1245.

But, McNeill was not on parole and legislature did not incorporate requirements of NRS 213.1245 within NRS 213.1243.

D. Difference between NRS 213.1243 requirements and lifetime supervision agreements.

As noted within Section A, McNeill was charged and convicted of Violation of Lifetime Supervision - NRS 213.1243- occurring between 12/14/12 and 03/10/14: "refusing to submit to a urinalysis, failing to report, failing to have his residence approved, failing to cooperate with his supervision officer, failing to maintain fulltime employment, failing to abide by a curfew, and/or was terminated from his sex offender counseling." I:67;89;126;149;153.

Provisions #1, #2, #4, #7, #10, #12, and #13 of lifetime supervision agreements - as issued by Board of Parole Commissioners to all individuals on lifetime supervision - are ones State alleged McNeill violated in Second Amended Information and Jury Instruction #3.

But when comparing NRS 213.1243 with enumerated requirements in lifetime supervision agreements as developed by Board and Division, only two conditions that appear in NRS 213.1243 are in agreements: #2 – residence and #15 – no contact with victim.

When comparing conditions listed in NRS 213.1243 with alleged violations in State's charging documents, only one requirement listed in charging document is a condition promulgated by Legislature in NRS 213.1243: failure to have his residence approved. *See* NRS 213.1243(3).

E. McNeill's trial and post-verdict objections.

McNeill objected to State using conditions for lifetime supervision not included in NRS 213.1243 as violations and criminal acts three times by: (1) submitting jury instructions premised on wording of NRS 213.1243 and restricting jury findings of a violation to conditions in statute (*See* ISSUE III), (2) requesting directed verdict based on insufficient evidence of a violation based on conditions listed in NRS 213.1243 (*See* ISSUE II); and (3) filing post-trial motions within seven days of verdict. (*See* ISSUE IV).

In bench memorandum filed when submitting defense proposed jury instructions and in post-trial motion, McNeill argued only lifetime supervision conditions listed within NRS 213.1243 could constitute a criminal act under the plain meaning of NRS 213.1243. McNeill contended the written lifetime supervision agreements were not legally binding and contained more conditions than allowed by NRS 213.1243. I:142-47;175-179; I:180-83; *Hearing/argument at* III:465-99; III:585-92.

McNeill argued separation of powers doctrine prohibited Board and Division from creating conditions for lifetime supervision not enumerated within NRS 213.1243 because they would be creating elements of the crime. And, if court disagreed, McNeill said NRS 213.1243 was vague and

overbroad and should be stricken as unconstitutional. I:142-47;175-179; I:180-83; *Hearing/argument at* III:465-99 and III:585-92.

Court upheld Board and Division's decision to add conditions for lifetime supervision not listed in NRS 213.1243. Court found no violation of separation of powers and held statute was not vague or overbroad. III:484-90.

Court reasoned NRS 213.1243(1) allowed Board of Parole Commissioners to "establish by regulation a program of lifetime supervision." III:471. Board then instituted administrative regulations through NAC 213.290. III:471-90. In Nevada Administrative Code - NAC 213.290, Board directed itself to "establish conditions of lifetime supervision" for each person placed on lifetime supervision.

Therefore, district court concluded: "[f]air reading of the statute and the regs together is that there are additional conditions allowed to be established for lifetime supervision by the board, pursuant to the legislature's grant of authority..." II:475.

Court also held that NRS 213.1243(8) allowed for a conviction upon violation of Board imposed requirements because Legislature said: "a sex offender who commits a violation of a condition imposed upon him or her

pursuant to the program of lifetime supervision is guilty of a category B felony." II:477-78.

Court held the same when McNeill filed post-trial motion. III:591.

F. Standard of Review.

Court uses de novo review for issues of statutory construction and constitutional overlay, or for questions involving interpretation of constitutional provisions. *Jackson v. State*, 291 P.3d 1274, 1277 (Nev. 2012) (statutory and constitutional interpretation); *DeStefano v. Berkus*, 121 Nev. 627, 629 (2005)(interpreting statutes); *In re Contested Election of Mallory*, 282 P.3d 73, 741 (Nev. 2012) (interpreting Nevada Constitution).

G. NRS 213.1243: lifetime supervision is different from parole/probation.

NRS 213.1243 requires lifetime supervision program be monitored/supervised by parole and probations officers. NRS 213.1243(1).

But administration of lifetime supervision does not fall neatly within rules for parole or probation. The management of probation falls within the responsibility of judicial branch of the government, whereas executive branch is responsible for parole. *James v. State*, 244 P.3d 542, 547 (Alaska 2011). However, when a person is on parole, executive branch is merely supervising person after judicial branch imposed prison sentence.

When individual is convicted of a crime and placed on probation or parole, Division and Board have great leeway in setting rules because offender is under a term of imprisonment and has limited constitutional rights. *See* NRS 213.10705 (declaration regarding probation/parole); NRS 213.10988 (standards for parole or probation); NRS 213.1245 (mandatory conditions for parole of sex offender).

Chapter 213 contains numerous directives on how Board and Division must handle parole. For parole, NRS 213.12175 allows Board to: "impose any reasonable conditions on the parolee to protect the health, safety and welfare of the community, including, without limitation...[the three specific requirements listed]. NRS 213.1245 outlines specific rules Board may impose on parolees convicted of certain sex offenses. When establishing conditions for parole or probation, Division and Board are not creating new crimes but merely taking away privileges.

For lifetime supervision, only one statute – NRS 213.1243 – speaks to lifetime supervision conditions. Legislature did not incorporate statutes on parole conditions into NRS 213.1243. Legislature did not direct Board to "impose any reasonable conditions" for those on lifetime supervision as it did for parolees in NRS 213.12175.

Unlike probationers and parolees, a person placed on lifetime supervision does not have a sentence hanging over his/her head. Whereas a violation of a probation or parole condition imposed by Division or Board may result in the removal of further privileges and/or court imposing already existing sentence of imprisonment, a violation of a condition of lifetime supervision results in a *new* crime.

A conviction for crime violation of lifetime supervision: category B felony – maximum sentence of six years in prison with parole eligibility after one year.

H. NAC 213.290.

NRS 213.1243(1) directed Board of Parole Commissioners to "[e]stablish by regulation a program of lifetime supervision of sex offenders to commence after any period of probation or any term of imprisonment and any period of release on parole."

In March of 2000, Board formulated procedures – NAC 213.290 - for placing individuals on lifetime supervision. NAC 213.290 sets no guidelines for lifetime supervision requirements or conditions.

NAC 213.290 directs Division to submit list of sex offenders to be released from probation or parole to Board prior to their release. Board, or panel appointed by Board, hold hearings to determine conditions for each

individual placed on lifetime supervision. Prior to hearings, Division submits "recommendations for conditions of lifetime supervision of the sex offender." NAC 213.290 (4)(b). Subsequently, Division may request Board modify conditions ordered. NAC 213.290(5). There is no avenue for a sex offender or his attorney to seek participation in the decision for conditions but "Board may require the presence of the sex offender at the hearing." NAC 213.290(5).

NAC 213.290 does not list any conditions or rules to be placed on individuals who are on lifetime supervision.

Department of Public Safety, Board of Parole Commissioners and the Division of Parole and Probation, routinely issue standard requirements for all lifetime supervision individuals - as listed within lifetime supervision agreements given McNeill – and not all conditions listed are those within NRS 213.1243.

I. Statutory construction standard of review.

Court begins review of NRS 213.1243 by looking at language of statute with intent to give effect to its plain meaning.

Statutes must be given their plain meaning and construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133 (2001)

quoting Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502 (1990). Court presumes legislature enacts a statute "with full knowledge of existing statutes relating to the same subject.'" *Berkus at* 631.

When a statute's language is plain and unambiguous, Court may not look beyond the statute for a different meaning. *Berkus at 630; Nay v. State,* 123 Nev. 326, 331 (2007).

A statute or constitutional provision is ambiguous if capable of at least two reasonable yet inconsistent interpretations. *Hernandez v. Bennett-Haron,* 287 P.3d 305, 315 (2012).

J. Only one way to read NRS 213.1243.

The language of NRS 213.1243 is plain. *See* NRS 213.1243.

As McNeill argued, Legislature defined crime of violation of lifetime supervision by listing specific conditions for lifetime supervision in NRS 213.1243. I:142-47;175-179;I:180-83;III:465-99;585-92. Legislature did not give Board or Division authority to declare additional conditions for lifetime supervision not authorized by NRS 213.1243. This is only way to read NRS 213.1243; it is not ambiguous.

The fact Legislature expressed specific conditions for lifetime supervision and did not direct Division and Board to add other conditions shows Legislature's intent to limit requirements or conditions to ones listed

in NRS 213.1243. "'[E]xpressio unius est exclusio alterius,' expression of one thing is the exclusion of another." *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing Cramer v. State, DMV,* 240 P.3d 8, 12 (Nev. 2010).

The exclusion is also apparent when comparing NRS 213.1243 with NRS 213.12175. Legislature gave Board and Division power to formulate new conditions for parolees in NRS 213.12175 to protect the safety and welfare of the community. In NRS 213.1243, Legislature did not.

Additionally, Legislature did not incorporate any statutes related to parole or probation into NRS 213.1243. This Court presumes that when enacting legislation, Legislature does so "'with full knowledge of existing statutes relating to the same subject.'" *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005) *quoting State Farm*, 116 Nev. 290, 295 (2000) *quoting City of Boulder v. General Sales Drivers,* 101 Nev. 117, 118-19 (1985). Thus, Legislative intent was to exclude rules for parolees as conditions for lifetime supervision and to prohibit Board and Division from adding more conditions.

But district court held Legislature allowed Board and Division to establish conditions because Legislature directed Board to "establish by regulation a program...[to be supervised] by parole and probation officers." NRS 213.1243(1). Court further claimed NRS 213.1243(8) language

allowed Board and Division to formulate conditions: "For the purposes of prosecution of a violation by a sex offender of a condition imposed upon him or her pursuant to the program of lifetime supervision..." III:477-78.

Court erred in analysis by failing to follow the whole-text cannon for statutory interpretation. Under the whole-text canon, court views law as a whole, considering its structure and the relationship of the parts to the whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomas/West 2012). "[A] statute should be read to give plain meaning to all of its parts." *Gaines v. State*, 116 Nev. 359, 365 (2000). Instead of viewing NRS 213.1243 as a whole, court selected two phrases in two different sections for court's decision.

A review of NRS 213.1243 as a whole shows words "establish by regulation" merely allowed Board to put together a plan for enacting the lifetime supervision program while not giving Board power to create new conditions. The conditions for lifetime supervision are only those discussed in other sections of NRS 213.1243. Board was to implement the rules/conditions addressed within NRS 213.1243.

NRS 213.1243(9) further proves the only requirements an individual must follow for lifetime supervision are those listed in the statute. Section 9 states:

> The Board is not required to impose a condition pursuant to the program of lifetime supervision listed in subsections 3, 4 and 5 if the Board finds that extraordinary circumstances are present and the Board states those extraordinary circumstances in writing.

Thus, NRS 213.1243(9) contemplates that only conditions to be imposed are those listed in NRS 213.1243 but allows Board to remove conditions listed in subsections 3, 4, and 5 upon finding extraordinary circumstances if Board places such finding in writing.

But even if the words of NRS 213.1243 were – incorrectly - interpreted to allow Board to codify new conditions for lifetime supervision, Board did not do so in NAC 213.290. Instead, in NAC 213.290, Board said it could establish conditions. Board did not lay out what conditions it would establish in NAC 213.290 thereby giving itself full power to do anything. Thus, Board, not the legislature, gave itself authority to establish any conditions it wanted to establish.

District court further erred because NRS 213.1243(8) does not empower Board to prescribe conditions not listed within NRS 213.1243. Section 8 only describes the penalty for a violation of "condition imposed...pursuant to the program of lifetime supervision..." NRS 213.1243(8). For comparison, McNeill directs Court to consider NRS 453.146 where Legislature gave Board of Pharmacy very specific instructions for establishing drug schedules (See Section K following).

Here, Legislature did not give Board instructions to establish any other conditions.

Because a violation of NRS 213.1243 is a *new crime*, only conditions statutorily created can be used for a violation and conviction. Thus, a defendant may not be convicted of a *new crime* under NRS 213.1243 if accused of violating a condition of lifetime supervision put in place by Board and Division when that condition is not listed within NRS 213.1243. The reason for this – Legislature dictates actions constituting criminal conduct rather than Division or Board. Here, Legislature only directed Board to establish reasonable regulations rationally related to services required for implementation of the new lifetime supervision program.

Under plain meaning of NRS 213.1243, McNeill may only be prosecuted for a violation listed in statute because Legislature only directed Board to establish regulations for its agency to supervise lifetime supervision offenders. Legislature did not incorporate any rules for parolees or probationers within the statute and did not direct Board and Division to establish any other conditions.

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K. Separation of Powers.

If Legislative gave power to create conditions used for a violation of crime of lifetime supervision to Board and Division, it would be violating separation of powers because Board would be defining the crime.

Article 3, § 1 of Nevada Constitution defines separation of powers between Legislature, Executive Branch, and Judiciary. Legislature enacts laws, Executive Branch enforces laws, and Judiciary determines justiciable controversies. *N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs*, 310 P.3rd 583 (Nev. 2013). Nevada's constitution mirrors structure of separation of powers expressed in United States Constitution. *Commission on Ethics v. Hardy*, 125 Nev. 285, 292 (2009).

But unlike United States Constitution, Nevada's Constitution "contains an express provision prohibiting any one branch of government from impinging on the functions of another." *Id. at* 291-92. Article 3, § 1 states: "[N]o persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."

Legislature is the only branch of government with power to define what constitutes a crime. *Sheriff, Clark County v. Lugman*, 101 Nev. 149

(1985). In defining crimes, Legislature may not enact any law that conflicts with the federal and state constitution. *Thomas v. Nevada Yellow Cab Corp.*, 327 P.3d 518, 520-21 (Nev. 2014); *Finger v. State*, 117 Nev. 548 (2001)(legislature's abolishment of insanity defense found unconstitutional).

Art. 3, § 2 suggests legislature may authorize executive agency to adopt regulations which bind persons outside the agency if reviewed by a legislative agency. Although Legislature may delegate power to make regulations supplementing legislation, it may only do so if "the power given is prescribed in terms sufficiently definite to serve as a guide in exercising the power." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227 (2001); *State v. Frederick*, 299 P.3d 372, 375 (Nev. 2013).

Here, NRS 213.1243 did not advise in "terms sufficiently definite to serve as a guide in exercising the power" – or in any terms – what power was given to Board and Division to establish regulations and rules supplementing those listed within NRS 213.1243. *Banegas* at 227.

In *Sheriff, Clark County v. Lugman*, 101 Nev. 149 (1985), defendant challenged Legislature's delegation of power to Board of Pharmacy to promulgate schedules of controlled substances as a violation of separation of powers. The scheduling of drugs determined which drugs were controlled substances and penalty for a drug crime.

Lugman Court found "although the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend." *Id. at* 153. In NRS 453.146. Legislature gave Board of Pharmacy specific, definite guidelines to follow when promulgating schedules. *Lugman* Court found that standards given to Board of Pharmacy were sufficient to limit agencies authorization to fact finding to make drug statutes effective and definite and to assure agency would not act capriciously or arbitrary. *Id. at* 153-54. Therefore, Legislature did not violate separation of powers.

In contrast to *Lugman*, here, Legislature gave Board and Division no definite or specific guidelines for promulgating rules and conditions for lifetime supervision – other than the conditions specifically listed in NRS 213.1243 - nothing.

By interpreting NRS 213.1243 (and apparently Art. 3, § 1 and 2) as allowing Board and Division to establish conditions for lifetime supervision that amount to a crime, district court interpreted them in an unconstitutional manner thereby creating a violation of separation of powers.

If the legislature gives another branch of government power to make an otherwise legal act a crime, a violation of separation of powers under Article 3 § 1 of the Nevada Constitution arises.

L. District court's analysis renders NRS 213.1243 ambiguous, vague, and overbroad.

In this case and in others like it, when Division and Board decide which conditions for lifetime supervision to impose and those conditions are not within NRS 213.1243, Division and Board are deciding what criminal acts amount to a crime. District court's analysis of NRS 213.1243, allowing for additional conditions of lifetime supervision to be determined by Board and Division, renders NRS 213.1243 ambiguous, vague, and overbroad - unconstitutional.

1. Ambiguity.

If Court believes NRS 213.1243 is ambiguous, "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Antonin Scalia & Bryan A. Garner, Reading Law: *The Interpretation of Legal Texts* 296 (Thomson/West 2012). "Under the rule of lenity, 'the tie must go to the defendant.'" *State v. Javier C.*, 289 P.3d 1194, 1197 (Nev. 2012) *citing United States v. Santos*, 553 U.S. 507, 514 (2008). Thus, if Court believes NRS 213.1243 is ambiguous then Court must adopt McNeill's interpretation.

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2. Vague and overbroad.

If Court interprets NRS 213.1243 to allow Board and Division to add conditions for lifetime supervision not included in NRS 213.1243, NRS 213.1243 is vague.

A statute is unconstitutionally vague if it "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited [or] (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silver v. Eighth Judicial Dist. Court ex rel. County of Clark,* 122 Nev. 289, 293 (2006). The first part of the test addresses those subject to the statute and second part is concerned with those who enforce the statute. *Id.*

"Substantive due process demands definitive laws." *T.R. v. State*, 119 Nev. 646 (2004) (finding juvenile sex offender community notification statute void for vagueness); *Sheriff, Washoe County v. Burdg*, 118 Nev. 853 (2002) (indefinite wording of statute criminalizing possession of a majority of the components needed to manufacture a controlled substance renders the statute facially vague).

One reason NRS 213.1243 is rendered vague is because a person pleading guilty or found guilty of sex offense subject to lifetime supervision

under NRS 213.1243 is without notice as to what conditions he/she is subject to upon completion of underlying sentence - until placed on lifetime supervision.

Allowing Board and Division to create additional conditions not listed in NRS 213.1243 results in faulty pleas because defendants are without notice of the ramifications of lifetime supervision or what conduct will be prohibited. *Padilla v. Kentucky*, 559 U.S. 356 (2010)(finding counsel ineffective for failing to advise defendant that consequence of his plea was he could be deported); *People v. Fonville*, 291 Mich.App. 363 (2011)(conviction reversed when defense counsel did not inform defendant that as a consequence of plea he would be required to register as a sex offender).

Such a problem occurred in *Palmer v. State*, 118 Nev. 823 (2002). In *Palmer*, Court reversed order denying defendant's petition for writ of habeas and remanded Palmer's case to district court to determine if he understood lifetime supervision was direct consequence of plea and that he would be supervised after completing his sentence. *Palmer* Court held: "when a defendant pleads guilty to an offense that is subject to the lifetime supervision provisions, the totality of the circumstances in the record must

demonstrate that the defendant was aware of the consequence of lifetime supervision before entry of plea." *Id. at* 825.

Like *Palmer*, McNeill was without notice of consequences of life time supervision before entering a plea and at sentencing. I:85a-b:III:614. Although McNeill may or may not have known about conditions listed within NRS 213.1243 prior to plea, he could not learn of additional consequences and ramifications assessed by Board and Division until he was shown first of three lifetime supervision agreements on 11/08/07 – three years after sentencing.

Not only is there a lack of notice to individuals entering pleas to sex offenses when Board creates new conditions, allowing Board and Division to add conditions for lifetime supervision not listed within NRS 213.1243 encourages, authorizes, and fails to prevent arbitrary and discriminatory enforcement because of a lack of specific standards.

NRS 213.1243 contains no standards to stop arbitrary and discriminatory enforcement. Instead, it allows the enforcers of the law to decide what rules will be enforced and to create the law it wants to enforce. Here, because "vagueness so permeates the text...the statute cannot meet [due process] requirements in most applications" if interpreted to allow

Board and Division to create new conditions. *See Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. 505, 512 (2009).

The overbreath doctrine finds a statute unconstitutional if it infringes upon First Amendment rights - right to freedom of expression or association. *Silvar at* 296. But before finding a statute overbroad, Court balances State's legitimate need to protect the public and rights of individual citizens under the First Amendment. *Id. at* 298.

Barring statutory intervention, the rights of a person on lifetime supervision are restored (except those denied to felons). *See Coleman v. State*, 321 P.3d 863, 865 (Nev. 2014): NRS 176.0931(2) (person on lifetime supervision is not under a sentence of imprisonment). Thus, McNeill has same First Amendment rights - and similar rights under the Nevada Constitution - as other citizens. U.S. Const. Amend. 1, Nev. Const. Art. 1, § 1 and 10.

Unlike a parolee, McNeill regained his freedom of association and expression upon completion of his underlying sentence. But under conditions set by Board and Division, he was required to abide by same rules as a parolee – a person with fewer rights. McNeill was prohibited from associating with ex-felons or persons required to register as sex offender or persons under the age of 18 years in some instances, he was told

he must submit to a polygraph test when asked, he must submit to a urinalysis, he was prohibited from traveling out of State without permission, he had a curfew, he was prohibited from drinking alcohol, he was required to pay fees, he could not use the internet, he could not patronize businesses his officer deems inappropriate, he was required to seek and maintain full-time employment, and he was prohibited from being near movie theaters. All restrictions impinged on his freedom of association as well as his freedom of speech and freedom to travel.

Thus, if Court concludes Board and Division are allowed to add conditions for lifetime supervision not listed within NRS 213.1243, then NRS 213.1243 is overbroad and vague because it encourages, authorizes, and fails to prevent arbitrary and discriminatory enforcement because of a lack of specific standards. McNeill was without notice of lifetime supervision requirements until three years after sentencing thereby creating a violation of the right to due process and rendering his initial plea involuntary. State placed unconstitutional restrictions on McNeill's freedom of association, travel, and expression because he was not on parole but required to abide by same rules set for parole.

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II. EVIDENCE WAS INSUFFICIENT TO CONVICT; COURT VIOLATED SIXTH AND FOURTEENTH AMENDMENTS BY REMOVING ONE ELEMENT FROM JURY'S DECISION-MAKING PROCESS; AND, COURT ERRED IN ADMITTING INCOMPETENT EVIDENCE.

A. Standard of Review for insufficient evidence.

A criminal defendant's fundamental right to fair trial includes presumption of innocence. *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art. 1 § 8. Consequently, "[e]very person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt..." NRS 175.201.

When applying sufficiency of evidence test, Court decides whether jury, acting reasonably could have been convinced to that certitude [of beyond a reasonable doubt] by the [direct and circumstantial] evidence it had a right to consider. *Wilkins v. State*, 96 Nev. 397, 374 (1980). Court does not reweigh the evidence but reviews record to determine if competent evidence exists to prove each and "every element of a crime," as well as "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi at v. New Jersey*, 530 U.S. 466, 476 (2000); *In re Winship*, 397 U.S. 358, 364 (1970);

NRS 175.191; NRS 175.201.[6]

Court considers evidence in the light most favorable to prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Oriegel-Candido v. State*, 114 Nev. 378, 381, (1998).

B. No evidence and no jury decision on whether McNeill was a convicted sex offender ordered to lifetime supervision.

1. No evidence.

Under Information and Amended Information, State must prove beyond a reasonable doubt that McNeill had been convicted of Attempt Lewdness with a Child under age of 14 years, in Case No. C204263, and ordered subject to lifetime supervision. I:089-91;127.

Before trial commenced, to prevent undue prejudice from other bad acts, McNeill stipulated to being a sex offender subject to rules of lifetime supervision to prevent jury from knowing about underlying felony. II:261-62. Thereafter, State stuck language regarding prior conviction in documents, only indicating McNeill violated lifetime supervision conditions after being convicted of a Sex Offense in 2004. State filed Second Amended Information accordingly. I:126-27;148-49;II:262.

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[6] In *Stephans v. State*, 262 P.3d 727 (Nevada 2011), Court found the opposite by relying in part on *McDaniel v. Brown*, 558 U.S. -, -, 130 S.Ct. 665 (2010) rather than NRS 175.201. But *Brown* holding does not apply in light of NRS 175.201 because Brown was a federal habeas claim rather than a direct appeal.

Parties may stipulate to facts. *State v. Haberstroh*, 119 Nev. 173, 182, n. 8 (2003). But stipulations do not relieve State of burden of proving each element of an offense beyond a reasonable doubt in criminal proceedings. *State v. Williamson*, 343 P.3d 1, 15 (Ariz. App. 2015); *State v. Carreon*, 210 Ariz. 54, 64 (2005). Stipulations have "no greater weight or believability" than any other evidence admitted in a criminal trial. *Williamson* at 15.

"'[S]tipulations may bind the parties and relieve them of the burden of establishing the stipulated facts, [but] stipulations do not bind the jury, and jurors accept or reject them.'" *Williamson citing State v. Allen,* 220 P.3d 245, 247 (Ariz. 2009).

To prove McNeill was convicted of a sex offense in 2004 that required lifetime supervision, State needed to present certified copies of the conviction in C204263 during trial but outside presence of jury and not subject to jury review. State did not.

But even if documents had been presented, State still needed to present stipulation to jury by way of jury instruction. Court gave jury no instructions regarding the stipulation. Therefore, evidence was insufficient to convict because State failed to prove McNeill was previously convicted of sex offense and subject to lifetime supervision.

2. No verdict - violation of due process and right to jury trial.

NRS 175.161 directs trial court to "charge the jury" after closing arguments, by declaring testimony and law necessary for formation of the verdict. By failing to present stipulation to jury within jury instructions, court removed this element of the crime from their decision in violation of *Apprendi* and Sixth and Fourteenth Amendments.

"'[I]n criminal trials, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Lord v. State*, 107 Nev. 28, 39 (1991) quoting *Cage v. Louisiana*, 498 U.S. 39, 39 (1990); *also see Apprendi* at 476-77.

Court's removal of the element from jury decision means jury never reached a decision on whether McNeill sustained prior conviction for a sex offense and was ordered to lifetime supervision. Despite stipulation, State still needed to prove each and every element of the crime beyond a reasonable doubt. *Carreon at* 64.

Therefore, court denied McNeill right to a fair trial – due process - and right to a jury decision on each element. The *Due Process Clause* and *Sixth Amendment* mandate that every element or fact needed to establish maximum penalty for a crime be submitted to jury for determination as to

proof beyond a reasonable doubt. *Apprendi at* 490. Because double jeopardy has attached, Court must reverse and dismiss conviction.

C. No competent evidence regarding lifetime supervision agreements.

McNeill objected to introduction of three lifetime supervision agreements, purportedly signed by McNeill, for lack of foundation. *Exhibit #2*-III:6110; *Exhibit 3*-III:612; *Exhibit #4*-III:615-15); *Objections:* II:345;346; 350.

1. Serious record keeping problems.

A review of agreements indicates 11/07/12 document was never signed by Chief Parole Officer as required and person who allegedly witnessed McNeill sign made unidentifiable circular scratch marks as a signature. III:615. Thus, there is nothing to verify document is what it purports to be or if witness observed signature.

The 12/04/07 agreement is no better. The 12/04/07 agreement was both signed and witnessed by same person – an unknown person signing on behalf of a scribble mark – neither name is discernable and no employee identification numbers accompany signing. III:612.

The signatures on 11/08/07 document are discernable and signed by two different people as required. III:611. However, McNeill signed "under duress" while in prison. III:611.

The 11/08/07 and 12/04/07 agreements appear to be fugitive documents, as Defense indicated, and in violation of NAC 213.290. II:345. Under NAC 213.290, Board sets a hearing to determine conditions to be imposed after learning of offender's release date. Both 2007 agreements appear to have side stepped the process because neither contain information indicating date Board imposed these conditions. They are just standard forms.

In contrast, 11/07/12 agreement contains a directive from Board dated 05/24/11 attached to standard form indicating an activation date of 11/16/07 and allegedly signed on 11/07/12. III:614-16. But 11/07/12 agreement was never signed by Division.

Moreover, none of the lifetime supervision agreements contain markings showing they were filed in his district court case under seal. A filing with district court – under seal - should be a prerequisite for admission and enforcement of lifetime supervision agreements.

Thus, all three agreements contain genuine problems and court should have required additional foundation or excluded them.

2. Lack of foundation and authenticity.

As to lack of foundation, to properly authenticate documents and avoid denial of confrontation due to hearsay, NRS 51.135 requires that

documents are: "made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person..."

As discussed in the previous section, State failed to present evidence that agreements were "made at or near the time" because two lack verification that Board issued the standard conditions for McNeill, one was not signed by Division, and signatures on two agreements were mere scribbles.

A person without personal knowledge of documents may testify as a "qualified person" under NRS 51.135 if they understand the record-keeping system involved. *Thomas v. State*, 114 Nev. 1127, 1148 (1998).

In *Thomas*, during a death penalty hearing allowing for hearsay, two prison officials testified familiarity with procedures used in preparing incident reports and disciplinary findings and said reports were kept in the ordinary course of prison business. Moreover, they explained the process because they previously wrote such reports but had not written ones being introduced.

Here, Mangan did not testify that she was custodian of records, she was not working at Division at time documents were signed, she had no

knowledge if McNeill's signature was on documents because she was not present when and if he signed, and she never said she prepared lifetime supervision agreements or obtained signatures from offenders in the past. Unlike those in *Thomas*, she had no involvement in process.

Instead, Mangan testified exhibits were a true and accurate copy of documents kept in her file and that she used the documents in the course of her duties. II:345;350. She did not explain process on how documents ended up in her file. She read title of documents, claimed McNeill would have signed them, and said documents contained conditions ordered by Parole Board. III:350-51.

3. Incompetent evidence.

Because State failed to show a foundation and failed to authenticate agreements, Court may not use this incompetent evidence when deciding sufficiency. None of the agreements were filed with district court. Also, Division's record keeping procedures are incompetent because witnesses/signatories are not identifiable on forms and documents are not signed. Without agreements, State has no case.

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D. No evidence that McNeill violated NRS 213.1243 conditions.

1. Failing to have his residence approved.

In charging documents, State accused Victor of violating one requirement promulgated by Legislature in NRS 213.1243: failure to report/obtain approval for residence between 12/14/12 and 03/10/14.

NRS 213.1243(3) states in pertinent part:

> 3...Board shall require as a condition of lifetime supervision that the sex offender reside at a location only if:
> (a) The residence has been approved by the parole and probation officer assigned to the person.
> . . .
> (c) The person keeps the parole and probation officer informed of his or her current address.

a. Between12/14/12 and March 2013.

State presented no evidence McNeill failed to report or obtain approval of his current residence.

b. Between March 2013 and 03/10/14.

State presented monthly reports McNeill prepared for Division dated 03/19/13, 04/12/13, 05/08/13, 06/06/13, 07/11/13, 08/15/13 – all contained his address. III:618-35. Mangan never objected to his residence, thus approving them. II:344-45;351-59.

State presented no evidence he moved to another residence after 08/15/13.

Although Mangan had no physical contact with McNeill after 08/29/13, State did not present evidence that McNeill moved and did not report/obtain approval for residence.

> ***2. "Refusing to submit to a urinalysis, failing to report..., failing to cooperate with his supervising officer, failing to maintain fulltime employment, failing to abide by a curfew, and/or terminated from his sex offender counseling."***

If "failing to report" references not reporting to Mangan, then that and all allegations listed above as criminal acts are not conditions from NRS 213.1243.

a. Between12/14/12 and March 2013.

No evidence McNeill did not abided by rules except he was terminated from sex offender program on 12/22/12 after almost 4 years of treatment. II:435-389.

b. Between March 2013 and 03/10/14.

State presented monthly reports McNeill prepared for Division dated 03/19/13, 04/12/13, 05/08/13, 06/06/13, 07/11/13, 08/15/13. III:618-35.

On 07/11/13, after speaking to him about not attending counseling, not paying his fees, not working, and Mangan claiming she was not able to find him on the street during curfew, Mangan arrested him. II:356. District Attorney denied charges. III:356.

After his release from custody, McNeill visited Division on 08/15/13, McNeill refused to submit to urinalysis as directed by Mangan. II:356-357;366-69. This is the only known refusal during more than 4 years of lifetime supervision.

On 08/15/13, Mangan no longer wanted to supervise McNeill, claiming he was noncompliant - uncooperative. II:357. She took him to talk to her supervisor Brian Zana. II:367-68.

During conversation with Zana and Mangan, McNeill refused to abide by curfew and said he could sleep wherever. II:356-57; II:367-68. Zana did not ask him to provide urinalysis. III:368. McNeill recited Nevda Revised Statutes, arguing he was being required to follow conditions that were not required. III:367.

On 08/19/13, McNeill sent a cease and desist letter informing Division that he believed Division did not have legal authority over him and directed Division to cease and desist from any attempts to contact him. III:638-42.

Between 08/19/13 and 03/10/14, Mangan made one attempt to locate McNeill: 02/27/14. II:365.

As to the cease and desist letter, NRS 176.0931 allows a person under lifetime supervision to petition court or Board for release from the program.

Thus, McNeill's cease and desist letter could be considered a petition for release requiring Board or district court to set a hearing to decide if he qualified for release. Rather than forwarding his letter to Board or district court, Division sent it to Attorney General's Office and then began proceedings to prosecute McNeill for a violation of NRS 213.1243 in December of 2013.

Other than McNeill failing to appear at Division between September 2013 and March 2014, and claiming he refused urinalysis on 08/15/13, State failed to present proof – beyond a reasonable doubt - that he violated curfew, changed his residence, or failed to maintain full time employment during this time frame. Thus, conviction must be reversed because State did not present sufficient evidence for a violation of NRS 213.1243 and may not rely on his statements to prove crime.

III. ERRONEOUS JURY INSTRUCTIONS.

A. Standard of Review.

District court has broad discretion when settling jury instructions and Supreme Court generally reviews court's decision under an abuse of discretion or judicial error standard. *Hoagland v. State*, 240 P.3d 1043 (Nev. 2010). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson*

v. State, 117 Nev. 116, 120 (2001). Jury instructions that are an inaccurate statement of law involve a legal question subject to de novo review on appeal. *Nay v. State*, 123 Nev. 326, 330 (2007).

B. Incorrect jury instructions defining crime.

1. Court gave two jury instructions explaining lifetime supervision and one instruction explaining sex offender registration.

Court gave three jury instructions specifically explaining law for a conviction under Count 1.

Jury instruction #4 defined a "sex offender" as " person who, after, July 1, 1956, is or has been convicted of a statutory categorized sexual offense." I:154.

Jury Instruction #5 followed the language of NRS 213.1243(8), indicating "sex offender under a sentence of lifetime supervision program who commits a violation of a condition imposed on him pursuant to the program of lifetime supervision.." was guilty of the crime pled. I:155.

Third instruction had nothing to do with a violation of NRS 213.1243. Jury Instruction #6 addressed requirements for registration as a sex offender in NRS 179D.470(3). McNeill was not charged with violating NRS 179D.470. See I:126. Court indicated some semblance of this instruction was proposed by Defense; State objected. III:500-04;519-23.

Jury instructions given were incorrect and incomplete because court failed to instruct on specific conditions within NRS 213.1243, NRS 178D.470 was not a condition, and court did not instruct on stipulation.

2. Court rejected defense proposed jury instructions on lifetime supervision based on NRS 213.1243.

McNeill filed several proposed jury instructions based on NRS 213.1243 which court rejected. I:134-40.

Court rejected following Defense proposed jury instructions:

- #10 - addressing NRS 213.1243(3) - explaining residency condition. I:136.
- #11 based on NRS 213.1243(5) – further explanation of residency requirement. I:137.
- #12 following NRS 213.1243(6) - explaining electronic monitoring. I:138.
- #13 addressing NRS 213.1243(10) – no contact with victim/witnesses. I:139.
- #8 explaining only legislature could define lifetime supervision conditions. I:134.
- #9 stating which jury instructions addressed lifetime supervision conditions. I:135.

- #14 directing jury to find McNeill not guilty if State failed to prove beyond a reasonable doubt that he violated conditions listed within NRS 213.1243. I:140.
- #19 informing jury that court found State failed to meet its burden of proof. I:141.

3. Jury instructions were incorrect statement of law under NRS 213.1243.

McNeill incorporates all arguments within ISSUE I here to explain why conditions listed within NRS 213.1243 are the only conditions allowed for a violation of NRS 213.1243. Thus, instructions given were inaccurate.

Court is unable to conclude beyond a reasonable doubt that trial court's rejection of McNeill's proposed instructions that correctly stated law did not contribute to his conviction. *See Davis v. State*, 321 P.3d 867, 874 (Nev. 2014). The proposed jury instructions correctly explained conditions listed within NRS 213.1243 and supported McNeill's theory of the case that he could only be convicted of a violation of the conditions listed in NRS 213.1243.

C. Court abused discretion when failing sua sponte to correct mere presence instruction.

McNeill sought mere presence instruction based on McNeill's interactions on 08/15/13 with Mangan and Zana. I:130;III:449. McNeill

argued jury could not convict him based on his presence in Zana and/or Mangan's office and their conversations because State needed more than his statements. III:449-50.

Court rejected proposed instruction finding it misleading and not applicable, saying: "...if it were written as the mere fact that certain dialogue was had in...Zana's office doesn't itself mean that the defendant is guilty of the crimes charge. But we just simply don't give instructions along that line." III:451.

As district court recognized without directly saying, McNeill actually wanted a jury instruction on corpus delecti rule.

California courts give corpus delecti instruction, CALCRIM No. 359, which states in part:

> The defendant may not be convicted of any crime based on his out-of-court statement alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed...

People v. Rosales, 222 Cal.App.4th 1254, 1258-1261 (2014). One purpose for corpus delecti rule is to ensure that defendant is not convicted of crime that never occurred. *In re T.B.*, 11 A.3d 500, 504-505 (Pa. Super 2010).

Likewise, in Nevada, State must prove corpus delecti of crime before defendant's out-of-court statements or admissions may be considered. *Azbill v. State,* 84 Nev. 345, 351 (1968).

Here State presented no evidence McNeill changed residence, failed to report change in residence, violated curfew, refused urinalysis, or failed to maintain full time employment thereby requiring jury to rely on his alleged out-of-court statement.

Trial court abused its discretion because court is responsible for fully and correctly instructing the jury on the law applicable to the case by either assisting the parties collectively or by completing jury instructions sua sponte. *Crawford v. State*, 121 Nev. 744 754-55 (2005).

D. Failure to explain how to evaluate circumstantial evidence and evidence allowing for two reasonable conclusions amounts to inaccurate statement of law.

1. Defense proposed circumstantial evidence instruction.

Because State did not propose standalone circumstantial evidence jury instruction, McNeill submitted one based on CALCRIM 224. III:453-60.

> Before you may rely on circumstantial evidence to conclude that a fact necessary to find that Defendant guilty has been proved, you must be convinced that the State has proven each fact essential to that conclusion beyond a reasonable doubt.
>
> Also, before you may rely on circumstantial evidence to find the Defendant guilty, you must be convinced that the only

> reasonable conclusion supported by the circumstantial evidence is that the Defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions point to the Defendant being not guilty and another to the Defendant's guilt, you must accept the one that points to the Defendant being not guilty. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable. III:453-4.

Court agreed Defense proposed instruction was correct statement of law but found stock instructions sufficient. III:459.

Thus, jury received following instruction on circumstantial evidence:

> ...Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including circumstantial evidence, should be considered by you in arriving at your verdict... I:160.

Instructions given were incomplete. In Nevada, "circumstantial evidence alone may certainly sustain a criminal conviction...[if] all the circumstances taken together [] exclude to a moral certainty every hypothesis but the single one of guilt." *Buchanan v. State*, 119 Nev. 201, 217 (2003). Thus, circumstantial evidence instruction given allowed jury to reach decision contrary to *Buchanan.*

2. Defense proposed instruction on evidence susceptible to two reasonable interpretations.

McNeill proposed:

> If evidence is susceptible to two reasonable interpretations, one of which points to the Defendant's guilt and the other of which points to the Defendant's innocence, it is your duty to adopt the interpretation which points to the Defendant's innocence and reject the one which points to his guilt. I:132.

McNeill argued proposed instruction was structured on the presumption of innocence. III:461. "[I]f there's a fact that's in contention and [a juror doesn't] know one way or the other, the presumption of innocence trumps." III:461. In support, McNeill cited: NRS 175.161, *Bails v. State*, 92 Nev. 95 (1976); *Mason v. State*, 118 Nev. 554 (2002); *Crawford v. State*, 121 Nev. 744, 753-54 (2005).

California uses similar instruction:

> ....[I]f the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt...

CALJIC 2.01.

Court decided instructing jury that defendant was innocent until proven guilty in three other instructions was sufficient to cover the presumption of innocence. III:462-65.

In accord with court's decision, *Bail* and *Mason* Courts found no error in refusing to give "two reasonable interpretations" instruction when jury was properly instructed on reasonable doubt. But *Bail* and *Mason* did

not take into account appellate review problems that arise when instruction is not given.

Instructing jury on evidence capable of two reasonable interpretations is important because on appeal, it is duty of appellate court to determine sufficiency of the evidence in light most favorable to State; but, at trial, it is the duty of jury to consider evidence in light most favorable to Defendant. *People v. Bean*, 46 Cal.3d 919, 932-33 (1988). Thus, giving of the "two reasonable interpretations" assures appellate court and Defendant that jury followed correct directives and allows for more complete appellate review. There were no other instructions directing jury that if there was a tie then jury must interpret evidence in the light most favorable to State.

E. Reversible error.

In *Crawford v. State*, 121 Nev. 744, 753-54 (2004), Court held: [D]istrict court may not refuse a proposed instruction on the ground that the legal principle it provides may be inferred from other instructions. Jurors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case."

Trial court is required to instruct jury on general principles of law. *Brooks v. State*, 124 Nev. 203, 211 (2008). Court must instruct jury on how to evaluate circumstantial evidence sua sponte when State extensively relies on circumstantial evidence to prove guilt. *People v. Rogers*, 39 Cal.4th 826, 885 (2006). Ultimately, district court is responsible for providing jury with instructions that fully and correctly explain the law and may either assist in crafting correct instructions or sua sponte complete ones submitted by parties. *Crawford at* 754-75.

Trial courts must give complete and accurate theory of defense jury instructions when submitted. *Carter v. State*, 121 Nev. 759 (2005). Rejection of duty to acquit language on the theory of defense runs contrary to this Court's recent decisions. *Carter* at 766.

"Jury instructions are subject to harmless-error analysis if they don't involve the type of jury instruction error that 'vitiates all the jury's findings' and produces consequences that are necessarily unquantifiable and indeterminate.'" *Nay* at 333-34 *citing Wegner v. State*, 116 Nev. 1149, 1155-56 (2000) *quoting Neder v. United States*, 527 U.S. 1, 10-11 (1999).

Here, jury instructions defining crime of NRS 123.1243 are not subject to harmless error review because they were so inadequate that jury's verdict was unquantifiable and indeterminate.

As to remaining instructions, reversal is warranted because Court is unable to conclude beyond a reasonable doubt error in rejecting proposed instructions did not contribute to McNeill's conviction. *See Davis at* 874.

IV. COURT ERRED IN DENYING MOTION FOR ARREST OF JUDGMENT AND/OR MOTION FOR JUDGMENT OF ACQUITTAL.

A. Ruling.

Within 7 days after verdict, McNeill filed Motion for Arrest of Judgment and/or Motion for Judgment of Acquittal. I:175-79; State's Opposition I:180-88;Hearing-III:585-93.

Court denied motions by adopting reasons stated in State's Opposition. I:188;III:591. State presented two reasons for concluding NRS 213.1243 authorized Board to enact additional conditions for lifetime supervision. First, NRS 213.1243(1): "The Board shall establish by regulation…". Second, NAC 213.290(3) and (4): Nevada Administration Code said Board may establish conditions. State's Opposition: I:180-89.

Court concluded that a special verdict would have been beneficial because a vast majority of the violations were from Board's additional conditions. III:591-2.

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B. NRS 176.525.

NRS 176.525 provides that "court shall arrest judgment if the...information does not charge an offense or if the court was without jurisdiction of the offense."

McNeill argued district court was without jurisdiction because State failed to plead conditions listed within NRS 213.1243 thus failing to state a crime. A criminal court's jurisdiction to hear a case only extends to those matters law declares are criminal. *Ex parte Rickey*, 31 Nev. 82 (1909).

McNeill incorporates argument from ISSUE I and argues court abused its discretion when denying the motion.

C. NRS 175.381(2).

NRS 175.381(2) allows court to "set aside the verdict and enter a judgment of conviction if the evidence is insufficient to sustain a conviction."

McNeill incorporates argument from ISSUE I, ISSUE II, and ISSUE III, arguing evidence was insufficient to sustain verdict.

D. Directed/advisory verdict.

At close of trial, McNeill sought a directed or advisory verdict. Court denied. III:490-01;498.

Again, McNeill incorporates arguments from ISSUE I, ISSUE II, and ISSUE III, arguing evidence was insufficient and court should have given an advisory verdict. *See Combs v. State*, 116 Nev. 1178 (2000).

V. NRS 213.1243 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Under NRS 213.1243, violating one condition equals possible six years in prison.

Prosecutor argued in closing, "[D]efendant is guilty of violation of lifetime supervision under one of seven different theories, but you only have to pick one." III:548. Mangan testified one instance of failing to cooperate by refusing to give urine sample equaled two violations. II:366.

McNeill challenges statute itself - NRS 213.1243 - as being unconstitutional under Nevada and United States Constitution because the punishment does not fit the crime – it is shocking to the conscience. *Lloyd v. State*, 94 Nev. 167, 170 (1978)(cruel and unusual when sentence imposed is disproportionate to crime and shocking to the conscience). Only one of the seven conditions pled fell within NRS 213.1243: failure to obtain approval for residence.

The federal and Nevada Constitutions prohibit infliction of cruel and unusual punishment - defined as a sentence grossly unrelated to crime. U.S.

Const. Amend. VIII; Nev. Const. Art.1 § 6; *Santana v. Nevada*, 122 Nev. 1458, 1464 (2006), *Rose dissenting*. Definition of what is cruel and unusual is not precise. *Naovarath v. State*, 105 Nev. 525, 529-530 (1989).

A sentence of life without the possibility of parole for uttering a no account check when offender had three prior convictions is disproportionate to the crime and prohibited by Eighth Amendment. *Solem v. Helm,* 463 U.S. 277 (1983).

In contrast to *Solem*, in *Simms v. State*, 107 Nev. 438 (1991), a split court affirmed habitual adjudication resulting in life imprisonment without parole by giving deference to Legislature and sentencing court while recognizing sentence as unduly harsh. *Simms* Court discussed *Solem* and *Rummell v. Estelle*, 445 U.S. 265 (1980).

Legislature must use power to prescribe penalties with care and not enact penalties "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of dignity." *In re Lynch*, 8 Cal.3d 410, 424 (1972).

Here, the nature of the offense was basically a reporting violation. The offense was nonviolent, minor, and resulted in no injuries to anyone. Thus, sentence is disproportionate to the crime and violates prohibition against cruel and unusual punishment.

VI. PREJUDICIAL ERROR OCCURRED WHEN WITNESSES TESTIFIED DEFENDANT WAS INCARCERATED PRIOR TO BEING PLACED ON LIFETIME SUPERVISION, COMPARED LIFETIME SUPERVISION TO PAROLE, CALLED HIM A SEX OFFENDER, AND SAID HIS WAS ONE OF THE MOST EGREGIOUS CRIMES.

Although McNeill agreed to stipulate he was a sex offender subject to lifetime supervision to avoid prejudice, State repeatedly referred to him as a sex offender, asked witness if he was a sex offender (I:345), allowed witness to testify that he previously served prison time (I:346), witness claimed being placed on lifetime supervision was similar to parole (I:345) and witness referenced McNeill's prior sex offense conviction as one of the 23 most egregious offensives (I:368).

Additionally, although not objected to, charging document indicated McNeill was under lifetime supervision "in the Eighth Judicial District Court, Clark County, Nevada" - inferring same court that was handling his criminal case had been supervising him.

McNeill requested mistrial twice. II:346-49. First time, during Mangan's testimony; and, court gave a curative instruction. II:351. Second time, during Zana's testimony; after hearing arguments regarding cumulative effect, court denied motion finding a lack of manifest injustice. II:375-77;404-18.

McNeill was denied due process and prejudicial/reversible error occurred because of the three witnesses testifying, two mentioned his prior criminal activity.

In *Witherow v. State*, 104 Nev. 721, 724 (1988), Court held:

> Reference to prior criminal history is reversible error. *Walker v. Fogliani*, 83 Nev. 154, 425 P.2d 794 (1967). The test for determining a reference to prior criminal history is whether the jury could reasonable infer from the evidence presented that the accused had engaged in prior criminal activity. *Manning v. Warden*, 99 Nev. 82, 659 P.2d 847 (1983).

In *Witherow*, prosecutor commented on defendant's relationships with other men in prison and noted defendant filed writ of habeas corpus action while in prison. Using above test, Court concluded jurors could reasonably infer defendant had been involved in prior criminal activity.

Here, testimony of two of three witnesses evoked comments that McNeill was previously convicted of sex offense, spent time in prison, his conviction was for one of 23 most egregious offenses, and lifetime supervision was similar to supervision of parolees. Thus, jury knew about his prior criminal activity.

When defendant offers to stipulate to his prior conviction, prejudicial error occurs if State refuses to accept stipulation and introduces records of his conviction at trial. *Edwards v. State*, 122 Nev. 378 (2006); *also see Old Chief v. United States*, 519 U.S. 172 (1997). Here, same result occurred even

though State accepted stipulation because State introduced prior criminal activity through its witnesses.

As to two motions for a mistrial, Court reviews denial of motion for mistrial for abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264 (2006).

When defense moves for mistrial, defendant's request constitutes intention to forgo a double jeopardy challenge unless State was responsible for circumstance necessitating a mistrial and then double jeopardy prevents retrial. *Rudin v. State*, 120 Nev. 121, 142,143 (2004). Thus, district court erred in applying a manifest necessity standard to McNeills motions for a mistrial and erred in denying motions because State was responsible for errors.

VII. DUE PROCESS VIOLATED BY COURT FAILING TO REQUIRE STATE TO REVEAL CRIMINAL HISTORY OF WITNESSES OR INCONSISTENT STATEMENTS.

McNeill file Discovery Motion, specifically requested numerous discoverable items, to include but not limited to:

> 5. Any inconsistent statements made by any material witness in the case...[including] any inconsistent statements made to any employee or representative of the District Attorney's Office.
>
> 6. Any information on any criminal history of any material witness in the case, to include any juvenile, misdemeanors, or any other information that would go to the issue of credibility

and bias, whether or not the information is admissible by the rules of evidence. I:100.

See Motion at I:096-101. *State opposed in part.* I:102-110.

On 06/30/14, seven days before trial, court ruled:

As to request 5, Court stated: "I am going to ask that you make a record of that at the time of trial...State's position is during pretrial conferences that they don't have to give you that information...reserve that at the time of trial." II:253.

Court denied # 6, finding it "unreasonable burden and waste of taxpayer money." II:254. Court based decision on State claiming only witness would testify - probation officer. II:253-54. But three witnesses testified: two parole and probation officers and counselor.

District court's ruling meant State had no obligation to reveal inconsistent statements of its witnesses or their criminal histories – arrest or convictions.

Court erred because criminal histories – arrests and convictions- are discoverable. In *Bennett v. State*, 119 Nev. 589, 603 (2003) Court held State violated *Brady* when failing to disclose the juvenile criminal history of the accomplice.

Inconsistent statements are always discoverable. In *Lay v. State*, 116 Nev. 1185 (2000), Court reversed a conviction when State failed to reveal a change in a witness's testimony revealed during pre-trial interviews.

Due process gives government affirmative obligation to disclose exculpatory material to the defense, including evidence that could be used for impeachment, without McNeill required to ask again. *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Davis v. Alaska*, 415 U.S. 318 (1974))(impeachment with juvenile history); *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (new trial warranted when government withheld several pieces of critical impeachment evidence);*Mazzan v. Warden*, 116 Nev. 48, 67 (2000)(new trial granted when government withheld police report).

Additionally, specific instances of misconduct may be inquired into on cross-examination and impeachment by the use of extrinsic evidence is never collateral to the controversy when relevant to prove a witness's motive to testify in a certain way. *Lobato v. State*, 96 P.3d 765 (2004); *Also See Stinnet v. State*, 606 Nev. 192 (1990). Thus, criminal arrests and convictions are discoverable.

VIII. COURT ERRED IN ALLOWING STATE'S EXPERT TO TESTIFY.

State noticed Marcia Lee as an expert "expected to testify regarding the psychological treatment and therapy of sex offenders and Defendant's progress and compliance with therapy." I:092. State did not attach a curriculum vitia to motion and did not reveal reports on McNeill's progress/compliance with therapy. I:263. McNeill asked court prohibit Lee from testifying as an expert and from making conclusions. IIII:262-63;372-73.

Court allowed Lee to testify but prohibited her from going into reasons McNeill was terminated or if she thought he had future propensity to reoffend. III:262-63;372-74;422;425-26.

Lee testified McNeill was terminated from the program due to subjective factors she observed in group. III:438-40. Thus, while not stating the specific, based on her background as a therapist, jury could conclude she reached an opinion that McNeill was a problem. Court did not instruct on expert opinions.

Due Process required State provide notice of Lee as an expert witness not less than 21 days before trial and include: (1) brief statement and substance of subject matter of expert's testimony; (2) curriculum vitae, and (3) reports made by or at expert's direction. NRS 174.234(2).

NRS 50.275 allows an expert to testify to specialized knowledge if the court finds the expert is qualified "by special knowledge, skill, experience, training or education." Court looks at several nonexclusive factors to determine if an expert is qualified to render an opinion in a particular area: "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Perez v. State*, 313 P.3d 862, 867 (Nev. 2013) *citing Hallmark v. Eldridge*, 124 Nev. 492, 499 (2008). Because State did not provide necessary documentation, McNeill could not challenge Lee's credentials pre-trial or investigate her background.

Court abused its discretion and denied McNeill due process by allowing Lee's testimony without requiring State to follow NRS 173.234(2).

IX. CUMULATIVE ERROR WARRANTS REVERSAL.

Even if Court believes no single error is sufficient for reversal, Court may reverse on cumulative effect of error denying defendant due process. *Big Pond v. State*, 101 Nev. 1, 3 (1985); *Dechant v. State*, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). When deciding cumulative error, Court evaluates: "(1) whether the issue of guilt is close, (2) the quantity and character of the error[s], and (3) the gravity of the crime charged." *Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002). But

the overwhelming test is whether McNeil received a fair trial. Here, evidence was not overwhelming as discussed in ISSUE II. Serious errors involving jury instructions and all other issues addressed in brief show cumulative error.

X. STRUCTURAL ERROR BASED ON *BATSON* CHALLENGE TO STATE STRIKING ALL WHITE MALES REQUIRES REVERSAL.

Racial discrimination in the selection of jury members violates the defendant's rights, jurors' rights, and State's rights to receive an impartial trial. *Batson v. Kentucky*, 476 U.S. 79 (1986); *United States v. Lorenzo,* 995 F.2d 1448, 1453-54 (9th Cir. 1992)(constitution forbids striking even one prospective juror for discriminatory purpose); *Harrison v. Ryan,* 909 F.2d 84, 88 (3d Cir. 1990); *see also United States v. Lorenzo,* 995 F.2d 1448, 1453-54 (9th Cir. 1992).

A conviction will not stand if State engages in discriminatory jury selection. *Batson at* 87; *Diomampo v. State*, 124 Nev. 414, 423 (2008); *United States v. Rodriguez-Lara,* 421 F.3d 932, 940 (9th Cir. 2005)(structural error).

McNeill challenged State's use of peremptory challenges to strike five white males. II:303-06. McNeill is a white male. II:303.

Court denied *Batson* challenge at bench conference but allowed further argument later, after she released prospective jurors. II:303.

Court noted several white males remained on jury but made no specific record. II:306. Several Hispanic males and an African American female remained on jury. II:303. Court did not believe *Batson* applied to white males. II:304;306.

When a party raises a *Batson* challenge, Court uses a three part test to determine whether racial discrimination has occurred. *Kaczmarek v. State,* 120 Nev. 314 (2004). The test under *Batson,* requires the following:

> (1) the opponent of the peremptory challenge must make out a prima facie case of racial discrimination; (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial must then decide whether the opponent of the challenge has proved purposeful discrimination.

Ford v. State, 132 P.3d 574, 578 (Nev. 2006); *also see Miller-El v. Cockrell,* 537 U.S. 322, 338 (2003). "[A]n implausible or fantastic justification by the State may, and probably will, be found [under the third prong of *Batson*] to be pretext for intentional discrimination." *Diomampo, quoting Ford* at 578.

Step 1: State only removed white males when using peremptory challenges.

"[C]onstitutional protections against the race-based use of peremptory challenges apply to all prospective jurors irrespective of their classification

in a racial minority or majority group." *People v. Rivera*, 307 Ill.App.3d 821, 829 (1999). Thus, McNeill made a prima facie case.

Step 2: Although court did not believe *Batson* applied, she asked prosecutor to make a record of race neutral reasons. II:304.

Prosecutor removed Maude because he previously had dispute with police officers. III:304. Benson - previously arrested and no kids. II:304. People with no kids have no real responsibilities. II:305. Burgess – no children and took law class in college. II:305. Burris – he was an attorney and seemed to have a bias against prosecution. II:305.

Step 3: McNeill argued prosecutor's responses were pre-textual because other jurors also had no children remained: Lagomarsino and Vilchez. II:275;305. Moreover, Justin Walker recently was arrested for impaired driving, had no kids, and was not married and he was left on the jury while Benson was removed for a drug crime. II:283. Also, Bakkedahl, Hamilton, and Rivera had previous criminal activity or arrests. II:281-83.

McNeill noted people who had criminal histories or encounters with law enforcement that were not white males remained on jury. II:305. McNeill further noted Burris said he would follow the law. II:305.

Court again said that *Batson* did not apply but to the extent it did than all responses were race-neutral. III:306. Court noted there were 8 white males on jury without any specifics. III;306.

Who is left on jury is not part of the *Batson* test.

Diomampo Court reversed a conviction when prosecutor's reasons for using a peremptory challenge to strike a minority did not match up with the facts. In *Diomampo*, prosecutor claimed he struck one minority because man had difficulty understanding English language but did not remove a non-minority for same reason. *Id.* at 413-5. Another minority juror was removed by prosecutor because he thought prospective juror would have difficulty working with women on jury because he was adamant about his divorce. *Id.* at 425. However, record did not show that particular juror was adamant about his divorce. *Diomampo* Court found the reasons given by the prosecutor pre-textual and reversed the convictions.

Here, as in *Diomampo*, State's reasons were pre-textual.

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CONCLUSION

In view of above, McNeill asks Court reverse and dismiss his conviction.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of April, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 29th day of April, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ Carrie M. Connolly*
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