CODE: 2250
Patrick S. Davis
Redacted
Reno, NV 89512
Redacted
Defendant in Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

State of Nevada	)	
Plaintiff,	)	
vs.	)	Case: Cr04-0130
Patrick Stephen Davis	)	Dept: No. 3
Defendant	)	

Defendant's Motion for Declaratory Judgment

COMES NOW, the Defendant, Patrick Stephen Davis, (hereinafter referred to as Defendant), in proper person, on his own behalf, and respectfully petitions the Court to make a determination of his rights, and the rights of all others similarly situated, in relation to condition #14 of the Agreement of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290.

This Declaratory Judgment concerns restraints of Defendants Constitutional Liberty Interests enumerated in the United States Constitution, and the Nevada Constitution, and violations of the Nevada Revised Statutes.

These restraints and violations are performed by the Board of Parole Commissioners, (hereinafter referred to as the Board or the same); the Department of Public Safety, (hereinafter referred to as the Department or the same), including the Chief and its Officers; and the Division

of Parole and Probation, (hereinafter referred to as the Division or the same), including the Chief and its Officers, and relate to the issues set forth herein.

Defendant is legally allowed to seek judicial review of his constitutional rights.

> "Any person interested….whose rights, status or other legal relations are affected by a statute….may have determined any question of construction or validity arising under the….statute, or contract, and obtain a declaration of rights, status or other legal relations thereunder", pursuant to Nevada Revised Statute 30.040.

This Court has jurisdiction and authority to declare the rights of an individual.

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree, NRS 30.030.

The Constitutional Liberty Interests of Defendant may be reviewed by this Court.

> A contract may be construed either before or after there has been a breach thereof. NRS 30.050.

All pertinent parties that have an interest will be notified by Defendant.

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard, NRS 30.130.

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Statement of the Facts:

(1) On or about December 30, 2003, Defendant was arrested by the Washoe County Sheriff's Office, and charged with the crimes of Use of Internet to Lure a Child, Open and Gross Lewdness, Attempted Sexual Assault, and Indecent Exposure, in Washoe County, Nevada.

(2) In February of 2004, Defendant voluntarily started a program of therapy with Agape Psychological Services, which he has completed and graduated from in July of 2011.

(3) On or about June 10, 2004, Defendant pleaded guilty for the crime of Use of Technology to Lure Children and was sentenced by Jerome M. Polaha, District Judge of the 2nd Judicial District in and for the County of Washoe to imprisonment in the Nevada State Prison System for a term of 16 to 72 months. The Court suspended the sentence and placed Defendant on 5 years probation and upon completion, on the "special sentence" of Lifetime Supervision.

(4) On or about May 6, 2008, Defendant honorably discharged his sentence of probation and commenced his "special sentence" of Lifetime Supervision. The Conditions of Lifetime Supervision were imposed by Officer Lewis of the Division, on or about April 6, 2008, without due process, and in violation of the timelines outlined in NAC 213.290. (Exhibit 1).

(5) The Board of Parole Commissioners formally imposed the Conditions of Lifetime Supervision upon Defendant on or about October 8, 2008, without notice to Defendant, without his presence, without due process, and without any findings of fact. On or about December 4, 2008, Defendant signed the new Agreement of Lifetime Supervision Conditions under duress, and threat of arrest by Officer Lewis, as a coerced conditional waiver. (Exhibit 2).

(6) The Board of Parole Commissioners modified the Conditions of Lifetime Supervision, as requested by Officer Howald of the Division of Parole and Probation, with notice and his presence, but without due process on or about September 21, 2010. (Exhibit 3, 4).

(7) On or about March 22, and June 1, 2011, Defendant appealed his travel condition, #9 of Lifetime Supervision to the Board. (Exhibit 5). On or about February 9, 2012, Defendant appealed all of his conditions of Lifetime Supervision to the Board. (Exhibit 6).

(8) The Board of Parole Commissioners, by their silence on the first matter, has declined to address the appeals in any manner or form, and without written notice of denial to Defendant.

Defendant asserts that the Board states that they are the final judiciary body to make an appeal to, and only the Board can impose, modify or vacate a condition of Lifetime Supervision.

(9) The Defendant, has no plain, speedy, or adequate remedy by appeal or otherwise in the ordinary course of law to address these conditions; and restraints of Constitutional Liberty Interests, including First Amendment Rights and the punitive enforcement of an illegal sentence.

Statement of the Case:

Defendant asserts that the Board of Parole Commissioners and the Division of Parole and Probation are acting beyond their authority of law, and are transcending the limitations of their jurisdiction in the exercise of judicial power in relation to Defendant and all others similarly situated.

> When looking to the constitutional illegality of this sentence, that when asserting a "facial" challenge, the Defendant seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statutes in question, and in that sense, the threshold for facial challenges is a species of third party, or jus tertii, standing, City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, (1999).

Defendant respectfully asks the Court to start by looking at SB 192, (1995). The Legislative intent in relation to Lifetime Supervision was for this "special sentence" to be a *non-punitive civil sentence* designed as a regulatory tool to keep law enforcement informed of the current whereabouts of the recently released offender, in an *administrative capacity*. This was to be done by verifying the offender's address monthly with the Division of Parole and Probation.

This "special sentence" was also intended to deter future criminality by making it an enhancement penalty, in addition to any new charges that must be filed for the enhancement to take effect. At no time was it designed to arrest, charge, and incarcerate an offender for conduct or behavior that is legal and constitutionally permissible, and is not a crime in and of itself.

> The intent of the Nevada Legislature has been held by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), and is quoted below.
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> - The Court, definitively states that this **"is not a form of parole, it is different".**
> - The Court defines this as a "civil sentence".
> - The Court determined that "this sentence is a form of punishment"; and that "the conditions are affirmative disabilities and restraints".

- The conditions as applied effectively "monitor all aspects of an offender's life", just the same as in parole or probation, and in many cases, are much harsher.
- And that the sentence of "Lifetime Supervision is a direct penal consequence of a guilty plea or a conviction"; and "has an automatic and immediate effect on the nature or length of Defendant's punishment".

Due to *Palmer*, the Defendant is asking this Court to decide in analyzing this motion:

(1) whether the Board of Parole Commissioners may impose this condition upon Defendant without any specific enumerated authorization in place in statute or regulation; to restrain his Constitutional Liberty Interest to exercise his constitutional right to take the 5th Amendment and his right to refuse to answer any question, either criminal or civil in nature, as the Courts have held he has a right to,

(2) and whether this condition as imposed and enforced is constitutionally illegal punishment, according to the Constitution of the United States, the Constitution of the State of Nevada, and the Statutes of the State of Nevada.

Next, the Court should consider the Board of Parole Commissioners stance in relation to Lifetime Supervision as enumerated in the Operations of the Board, in Section (2) of Lifetime Supervision Hearings, where it is clear that they define this as a "form of parole", (Operations of the Board, 2011). This is in direct contradiction to the Nevada Supreme Court's ruling held in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), that this sentence is "different that parole".

The Board of Parole Commissioners leave out a portion of NRS 213.1243, enumerated in (2), (a) and (b), where it concisely states the four (4) specific conditions that are the reasons it is a "limited" form of "parole".

Defendant asserts that the Board, in drafting NAC 213.290, has done this knowingly and willingly, and it is the belief of the Defendant that the Board has a continuing desire to impose punitive conditions upon a civil offender, regardless of any decision held by the Courts or of the legality of restraining a Constitutional Liberty Interest.

In construing a statute, the Court's objective is to ascertain the intent of Congress in enacting it and give effect to the legislative will, United States v. Gilbert, 266 F.3d 1180, 1183, (9th Circuit, 2001), citing Negonsott v. Samuels, 507 U.S. 99, 104, 113 S. Ct. 1119, (1993).

The Courts have decided that "generally speaking, we narrowly construe ambiguous provisions of penal statutes", Carter v. State, 98 Nev. 331, at 334-335, 647 P.2d 374, (1982).

Moreover the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while

provisions which positively impact a defendant are to be given a more liberal construction, State v. Wheeler, 23 Nev. 143, 152, 44 P.430, 431-32, (1896).

Whenever possible, we must interpret statutes so as to avoid conflicts with the Federal or State Constitutions, Summit v. State, 101 Nev. 159, 161, 697 P.2d 1374, 1376, (1985), quoting State v. Woodbury, 17 Nev. 337, 30 P. 1006, 1012, (1883).

The Nevada Legislature, in SB 192, (1995), was very clear in regards to placing an offender under the supervision of the Division of Parole and Probation "in order to verify their whereabouts", as an *administrative duty*. This assertion has merit due to the Policy and Procedure outlined in Division Directive 6.2.101, Contact Guidelines, Section 4, 5, and 6, which was originated on February 24, 1997. Defendant argues that this Policy and Procedure was the Division's original intention to implement and enforce an administrative caseload pursuant to the mandate incorporated in SB 192, (1995), and enumerated in NRS 213.1243.

This "Administrative Caseload" is exactly what satisfies the Nevada Legislative intent for Lifetime Supervision, in relation to this being a "non-punitive" sentence for an offender. The Division was aware that there might be special conditions, and in assessing the intent of the Legislature, determined that these could be handled on a case by case basis, upon findings of fact, and as ordered by the Board of Parole Commissioners.

Defendant delineates a timeline for four (4) important statutes that relate to imposing conditions for public safety. The Nevada Legislature enacted SB 192, (1995), which authorized NRS 176.0931, and NRS 213.1243 for Lifetime Supervision. In 1997, the Legislature enacted NRS 213.12175, which gives authority to the Board of Parole Commissioners to articulate and impose any reasonable condition upon a parolee to protect the health, safety, and welfare of the community. This statute *only* applies to parole. The Legislature did not authorize the Board of Parole Commissioners to impose any condition at will, to protect the health, safety, and welfare of the community upon civil offenders subject to Lifetime Supervision, such as the condition of "submit to a polygraph", as imposed by the Board of Parole Commissioners.

The Nevada Legislature specifically stated that "the Board of Parole Commissioners shall establish by regulation a program of Lifetime Supervision", NRS 213.1243, (1). Defendant asserts that there is no such regulation. The Board only enacted one regulation, NAC 213.290,

(2000), which is vaguely named "Notification; report; hearing; request to modify conditions"; and which does not include any relationship to the program of Lifetime Supervision.

NRS 213.1243 clearly states in the title, as a part of the statute therein, and which specifically refers to the program of Lifetime Supervision. In NAC 213.290, no such language exists in the title of the regulation, or therein. In the Nevada Constitution, in Article 4, titled Legislative Department; under Section 17, it states that an act is to embrace one subject only.

> In Nevada cases that have looked to this issue, the Nevada Supreme Court has stated that there must be a sufficient connection between the statute's title and the subject of the section, Humboldt County Commissioners, 6 Nev. 30, (1870); State v. Davis, 14 Nev. 439, 443, (1880), State ex rel. Dunn v. Board of Commissioners, 21 Nev. 235, 238, 29 Pac. 974, (1892); State ex rel. Norcross v. Board of County Commissioners, 22 Nev. 399, 404, 41 Pac. 145 (1895); State ex rel. Wichman v. Gerbig, 55 Nev. 46, 52, 24 P.2d 313, (1933); Tonopah & GRR v. Nevada-Cal. Trans. Co., 58 Nev. 234, 241, 75 P.2d 727, (1938).

The Court has decided, in many of the above entitled cases that only the principal subject embodied in the law needs to be expressed in the title. Defendant asserts that this regulation has never been enacted by the Board of Parole Commissioners, as mandated by the Nevada Legislature. There is no legal connection between the "program of Lifetime Supervision", the "conditions of Lifetime Supervision", and the "statutes of Lifetime Supervision".

> The statutes lack the necessary regulatory connection because they are not "narrowly drawn to accomplish the stated purpose". Due to the imprecision that the State relies on, which are not articulated in these statutes, the application of the conditions underlying the statutes suggest that the Legislative intent of a non-punitive purpose is a "sham or mere pretext", Kansas v. Hendricks, 521 U.S. 346, 371, 117 S. Ct. 2072, (1997)
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> As Justice Souter states in Smith v. Doe, 538 U.S. 84, 123 S. Ct 1140, (2003), "that public safety is, of course, a fundamental regulatory goal", as quoted in United States v. Salerno, 481 U.S. 739, 747, 107 S. Ct. 2095, (1987), "and that this objective should be given serious weight in the analysis. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders", Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, (1981).
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> "The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated claims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones", Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, (1963), as quoted in Smith v. Doe, 538 U.S. 84, 123 S. Ct 1140, (2003)

In NAC 213.290, in Section (4), (b), it *only* states that the Division may make recommendations to the Board of Parole Commissioners for the conditions of Lifetime Supervision. The imposition of Lifetime Supervision conditions is performed by the Board without enumeration of *any* condition, in *any* statute, and without due process or notification.

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression", Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, (1931); Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666, (1938).
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> This principle- "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty, Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, (1977); United States v. Harriss, 347 612, 617, 74 S. Ct. 808, (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, (1939).

The Board states that they may change these conditions at any time, therefore expressing the constitutionally legal belief that they can authorize and change the conditions ex post facto.

> The Supreme Court has explained that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue' it must not be given retroactive effect", Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).
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> The Judicial Ex Post Facto Prohibition prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the Ex Post Facto Clause prevents such changes by legislation, Dale v. Haeberlin, 878 F.2d 930, 934 (6th Circuit 1989); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).
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> The *Due Process Clause* guarantees the constitutional right of "fair warning" and this right is implicated when individuals are not provided notice of the consequences of certain conduct before they engage in that conduct, causing them to also be in violation of the *Ex Post Facto Clause*. Criminal Statues must "give a person of ordinary intelligence 'fair notice' that his contemplated conduct is forbidden by the statute, United States v. Harriss, 347 612, 617, 74 S. Ct. 808, (1954); Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).

The Board of Parole Commissioners imposes punitive conditions upon Defendant for constitutionally protected conduct, which is innocent behavior in and of itself.

> By its terms, the Ex Post Facto Clause is a limitation on legislative powers and "does not of its own force apply to the Judicial Branch of the government", Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, (1977); Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).
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> However, the Supreme Court has held that the Ex Post Facto principles apply to the judicial branch through the Due Process Clause, which precludes the judicial branch

"from achieving precisely the same result" through judicial construction as would application of an Ex Post Facto Law, Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).

Nonetheless, the prohibition on Ex Post Facto laws embodies "one of the most widely held value-judgments in the entire history of human thought", that is, that there should be no punishment without a law authorizing it, Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).

The Defendant was convicted on December 23, 2003, and should have been sentenced under the conditions present in the law on their face at that time. No regulation enacted by the Board of Parole Commissioners has enumerated *any* conditions of Lifetime Supervision.

The Federal Courts of Appeals has universally suggested that the right to due process prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the ex post facto clause does when the changes are produced by legislation. "A State Supreme Court is barred by the due process clause from achieving by judicial construction a result which a state legislature could not obtain by statute", Jordan v. Watkins, 681 F.2d 1067, 1079, (5th Circuit 1982); Jordan v. Mississippi, 476 U.S. 1101, 106 S. Ct. 1942, (1986); Prater v. U.S. Parole Commission, 802 F.2d 948, 952, (7th Circuit 1986); Knapp v. Caldwell, 667 F.2d 1253, 1262, (9th Circuit 1982); Foster v. Barbour, 613 F.2d 59, 61-62, (4th Circuit 1980); Dale v. Haeberlin, 878 F.2d 930, (6th Circuit 1989).

This "special sentence" is burdensome, due to the prior and continuing restraints of First Amendment Rights and Constitutional Liberty Interests, and is an increase in the penalty for which Defendant was originally sentenced.

The *Ex Post Facto Clause* includes one that makes the punishment for the crime more burdensome after its commitment. Thus, two elements must be present for a law to operate as an *Ex Post Facto* law. First, the law must be retrospective; that is, it must apply to events occurring before its enactment. Second, it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable, Lynce v. Mathis, 519 U.S. 433, 441, 117 S. Ct. 891, (1997); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).

In Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003), the Supreme Court held that the Alaska Registration Act did not constitute punishment and therefore was not a violation of the *Ex Post Facto Clause*, due to the fact that there was no imposition of any significant affirmative disabilities or restraints. This was a very close case, with a ruling that created four (4) dissents among the Justices. The Court looked at the totality of the case, and held that the statute's requirements did not impose punitive restraints, as

(a) the statute imposed no physical restraint,
(b) the statute did not restrain the activities which offenders might pursue, instead leaving them free to change jobs or residences,
(c) any lasting and painful consequences of the information involved flowed from the fact of conviction, which is a public record,
(d) while the statute required periodic updates of the public information, it had not been shown that these updates had to be made in person, and
(e) in terms of the restraint imposed, the statute's registration system was not parallel to probation or supervised release.

Defendant asserts that the statutes and conditions of Lifetime Supervision do constitute punishment, both facially and as applied by the Board and the Division, and are therefore a violation of the *Ex Post Facto Clause* due to the fact that they:

(a) impose affirmative restraints of Constitutional Liberty Interests and First Amendment Rights,
(b) restrain constitutional activities which offenders might pursue, including the right to change jobs and residences, and creates a "chilling effect",
(c) create lasting and painful consequences which do not flow from the fact of conviction, but flow from the arbitrary and capricious actions of the Board, the Division, and the Parole Officers according to their own personal predilections,
(d) all periodic updates must be made in person, as applied, on a monthly schedule or more often, as determined arbitrarily by the Parole Officer,
(e) in terms of the restraint imposed, they are in many ways more harsh or are parallel to probation, parole, or supervised release, and
(f) the Board imposes many of the same mandatory restraints required by statute that are applicable to parole, NRS 213.1245, a criminal sentence, upon offenders sentenced to Lifetime Supervision, a civil sentence.

In *Smith*, the Court used the seven (7) "useful guidelines" in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, (1963) to consider whether the Act subjects offenders to an "affirmative disability or restraint". The Court inquired how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive. The conditions of Lifetime Supervision are punitive in nature and effect, and the disabilities and restraints are major and direct, and impact the offender for life.

The Board also expresses the fact that due process is not required. NAC 213.290 states that they "*may*" require the offender's presence, but only upon a modification of a condition, not upon the original setting of conditions. During the original hearing setting the conditions of

Lifetime Supervision, the Board states on the Lifetime Supervision Agenda Notice that, "The Board will not entertain verbal input from any person other than the victim in this case".

> The Procedural Due Process Clause only applies where the claimant has been deprived, or is in jeopardy of being deprived, of some type of liberty interest, Morrissey v. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972); Tarkanian v. Nat'l Collegiate Athletics Ass'n, 448 U.S. 179, 109 S. Ct. 454, (1988); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).
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> Thus, if a liberty interest in not at stake, the claimant cannot assert the protections of due process. If, however, the government is attempting to infringe on a protected liberty interest, then it may do so only if it follows the procedures mandated by the Due Process Clause, Kelch v. Nevada Department of Prisons, 107 Nev. 827, 822 P.2d 1094, (1991); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,7, 99 S. Ct. 2100, (1979).

Defendant asserts that the imposition of the conditions of Lifetime Supervision is a continuation of the original sentencing. The Board denies proper notice, presence, and counsel, and the opportunity to be heard to Defendant.

> The conditions of Lifetime Supervision are not determined and are set at a later date by the Board of Parole Commissioners after the original sentencing date of the District Court, Johnson v. State, 123 Nev. 139, 159 P.3d 1096, (2007).

The Board of Parole Commissioners is acting as a quasi-judiciary Board, where all procedural due process rights apply, along with the Sentencing Guidelines, just as in the original court proceeding. The Board, by not allowing the presence of Defendant at the setting of the Conditions, denies the right to argue against them, or to voice an appeal. By denying counsel, or the ability to object to the conditions at the original hearing, they deny judicial review, and the right to be heard.

> "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'", Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, (1985); quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, (1950); and Concrete Pipe v. Construction Laborers, 508 U.S. 602, 617, 113 S. Ct. 2264, (1993).
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> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'", Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, (1972);

quoting Baldwin v. Hale, 68 U.S. 223, 1 Wall 223, 233, (1864); Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, (1965).

The United States Supreme Court has stated that these essential constitutional promises may not be eroded.

Defendant asserts that deprivation of liberty, next to deprivation of life, is the greatest punishment a State can impose upon an individual, and the importance of regaining one's liberty, or of keeping one's Constitutional Liberty Interests and First Amendment Rights should not be undervalued, and taken away without Procedural Due Process.

> "Substantive due process requires that government action depriving a person of life, liberty or property have a rational, non-arbitrary connection to a legitimate purpose", Kelley v. Johnson, 425 U.S. 238, 96 S. Ct. 1440, (1976); Jefferies v. Turkey Run Consolidated School District, 492 F.2d 1, 4, (7th Circuit 1974).
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> "In determining whether a substantive right protected by the *Due Process Clause* has been violated, it is necessary to balance the 'liberty of the individual' and 'the demands of an organized society", Youngberg v. Romeo, 457 U.S. 307, 320, 102 S. Ct. 2452, (1982); quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, (1961).
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> "An individual's Constitutional Liberty Interests encompasses the ability to pursue interests of choice, to move from place to place unhindered by the government, and to choose freely any lawful way of living", Kelch v. Director, Nevada Dept. of Prisons, 10 F.3d 684, (9th Circuit 1993).
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> "A Liberty Interest is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints", Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 2805, (1992); quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, (1961).

The intent of the Nevada Legislature in relation to Lifetime Supervision, SB 192, (1995), was for this to be a ***non-punitive*** civil sentence; not to further punish an offender by imposing conditions for behavior or conduct that is not illegal in and of itself, or for past conduct.

> Where legislative "will has been expressed in reasonable and plain terms, that language ***must*** ordinarily be regarded as conclusive." Id. If the plain language of a statute renders its meaning reasonably clear, the Court will not investigate further unless its "application leads to unreasonable or impracticable results", United States v. Daas, 198 F.3d 1167, 1174, (9th Circuit 1999).

Defendant reasonably asserts that the setting of any conditions by the Nevada Board of Parole Commissioners, acting as a quasi-judiciary Board, is a further continuation of the sentencing phase of the original conviction and all procedural due process rights should apply.

The Board of Parole Commissioners is a quasi-judiciary board that exercises a judicial function, Stockmeier v. State, Dept. of Corrections, 127 Nev. Adv. Rep. 19, (2011); Witherow v. State, Board of Parole Commissioners, 123 Nev. 305, 167 P.3d 408, (2007); Raggio v. Board of Parole Commissioners, 80 Nev. 418, 395 P.2d 625, (1964), and State v. Kamedula, 127 Nev. Adv. Rep. 21, (2011).

The conditions are not determined and are set at a later date by the Board of Parole Commissioners after the original sentencing date of the District Court, Johnson v. State, 123 Nev. 139, 159 P.3d 1096, (2007).

This should be done with the presence of counsel, just as in the original court proceeding. The hearing should include any current, up to date fact finding determinations by a qualified individual to authorize a condition, be pursuant to the Sentencing Guidelines, and like the Court, the Board should make this determination based on the totality of the circumstances.

The Courts have also explained that the statutory requirement that "conditions of supervised release be reasonably related to the sentencing factors", United States v. Johnson, 998 F.2d 696, 697, 699, (9th Circuit 1993).

The terms imposed must be "reasonably related to…the nature and circumstances of the defendant, and the history and characteristics of the defendant, United States v. Schoenrock, 868 F.2d 289, 291, (8th Circuit 1989); United States v. Prendergast, 979 F.2d 1289, (8th Circuit 1992).

Defendant asserts that this is not done at all. In point of fact, there are no records of any findings of fact by the Board on or about October 10, 2008, in regards to Defendant. The Board states that they did not keep the records of the Lifetime Supervision hearings at the time, which are a violation of law and the rules of procedure for a judiciary hearing.

The Courts have made it very clear that "the government bears the burden of showing that a discretionary condition of supervised release is appropriate in a given case", United States v. Weber, 451 F.3d 552, 558-559, (9th Circuit 2006).

A condition of probation is not reasonable if it is found to be "unnecessarily harsh or excessive in achieving the goals of rehabilitation and community protection, United States v. Friedberg, 78 F.3d 94, 96, (2nd Circuit 1996); quoting United States v. Tolla, 781 F.2d 29, 34, (2nd Circuit 1986).

In order for the Board to abridge *any* Constitutional Liberty Interest of an offender subject to the civil sentence of Lifetime Supervision, they would have to provide for this regulation as mandated by the Nevada Legislature. A restraint of these "Rights" would have to be enumerated in statute to provide notice of prohibited conduct to the offender. Clear guidelines are necessary for law enforcement that are neither arbitrary, nor discriminatory, nor

vague or overbroad, and are narrowly defined to meet the stated purpose. If not, the statute or regulation is constitutionally illegal, by being in violation of the *Void for Vagueness Clause*.

> The applicable rule is stated as follows: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violated the first essential of due process of law", Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, (1926).
>
> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids", Champlin Rfg. Co. v. Commission, 286 U.S. 210, 242, 243, 52 S. Ct. 559, (1932); Cline v. Frink Dairy Co., 274 U.S. 445, 458, 47 S. Ct. 681, (1927); Small Co. v. American Sugar Rfg. Co., 267 U.S. 233, 239, 45 S. Ct. 295, (1925); United States v. Cohen Grocery Co., 255 U.S. 81, 89-92, 41 S. Ct. 298, (1921); International Harvester Co. V. Kentucky, 234 U.S. 216, 221-223, 34 S. Ct. 853, (1914); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, (1939); State v. Father Richard, 108 Nev. 626, 836 P.2d 622, (1992); City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999).

The Nevada Supreme Court has articulated a clear test for vagueness challenges.

> The test is whether the terms of the statute are so vague that people of common intelligence must necessarily guess at their meaning, Sereika v. State, 114 Nev. 142, 955 P.2d 175, 177, (1998), citing Cunningham v. State, 109 Nev. 569, 570, (1993).
>
> The rule however, is not to be applied in a vacuum. The Court must consider the actions of the Defendant on a case by case basis. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by statute, United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, (1954).

The Board of Parole Commissioners and the Division of Parole and Probation have colluded and conspired to cause this condition of Lifetime Supervision to match the mandatory conditions of Parole as enumerated in NRS 213.1245. Mr. David Smith, an employee of the Board, states during an Open Public Meeting on August 31, 2011; that the Board may impose *any* condition which mirrors the language of any punitive criminal statute as they see fit. By doing so, the Board is enforcing this "special sentence" and condition in a punitive manner on an offender not subject to this statute, which causes this civil sentence to be punitive in nature and effect; and is in excess of the jurisdiction and authority of the Board of Parole Commissioners.

It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. "The power to create presumptions is not a means of escape from constitutional restrictions", Bailey v. Alabama, 219 U.S. 219, 239, 31 S. Ct. 145, (1911).

If, in 1995, the Nevada Legislature wished to impose these types of conditions, they could have done so. However, since they defined this as "*a non-punitive tool* " as articulated in SB 192, (1995); they knew that the imposition of these types of conditions would place this civil sentence into a constitutionally illegal position by the State, which was a subject of deep concern for the Legislators. Defendant has brought these issues to the attention of the Board numerous times, and the actions of the Board to the attention of the Legislature. (Exhibit 7, 8, 9 and 10).

The Courts say that even if a proposed condition meets this requirement, "it still must involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release,…that is, to achieve deterrence, public protection, or offender rehabilitation", United States v. T.M. 330 F.3d 1235, 1240, (9th Circuit 2003); United States v. Prendergast, 979 F.2d 1289, (8th Circuit 1992); United States v. Bass, 121 F.3d 1218, 1223, (8th Circuit 1997).

A reasonable nexus ***must*** exist between any special condition of probation and the crime for which it is imposed, and upon a fact finding determination. A condition of probation which requires or forbids conduct which is not itself criminal is valid only if that conduct is reasonably related to the crime of which defendant was convicted or to future criminality.

These conditions result in a far greater deprivation of constitutional liberty than is "reasonably necessary to prevent recidivism, to protect the public, or promote any form of rehabilitation", United States v. T.M. 330 F.3d 1235, 1240, (9th Circuit 2003); States v. Scott, 316 F.3d 733, 736 (7th Circuit 2003).

Defendant asserts that by honorably completing his term of probation, which he served while under a suspended criminal sentence imposed by this Court, that he is entitled to the return of all of his Constitutional Liberty Interests and First Amendment Rights, except for those specifically withheld by Nevada Statute.

"We should never forget that the freedoms secured by the First Amendment: Speech, Press, Religion, and Petition for Grievance, are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, *even the most despised minorities"*, American Communications Assn. v. Douds, 339 U.S. 382, 412, 70

S. Ct. 674, (1950); Dennis v. United States, 341 U.S. 494, 499-500, 71 S. Ct. 857, (1951); as quoted in Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, (1958).

The *Equal Protection Clause*, provides that "no state shall…deny to any person within its jurisdiction the equal protection of the laws", Section 1, of the Fourteenth Amendment states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

The Board of Parole Commissioners, by their actions in imposing the conditions of Lifetime Supervision violate the Equal Protection Clause,

(1) by not allowing the same privileges and rights to an offender as granted to someone on parole or probation, or to someone serving a civil sentence
(2) by not narrowly tailoring the conditions to serve a non-articulated government interest, when there is a less restrictive means to do so,
(3) by making the conditions far more punitive upon an offender than for any other civil sentence, without any findings of fact, and without due process,
(4) by restricting an offender's right to vote; right to travel; and right to privacy.

Justice Harlan Stone wrote: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry", United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, (1938).

The Court determined the levels of scrutiny to be observed, and held that if the law categorizes on the basis of race or national origin, or infringes a fundamental right: the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest. In addition, there cannot be a "less restrictive" alternative available to achieve that compelling interest, Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, (1967)

Issue # 1: Constitutionality of Condition #14 of the Agreement of Lifetime Supervision:

The imposition and enforcement of this condition of Lifetime Supervision that restrains the Constitutional Liberty Interests of Defendant who is a citizen of the State of Nevada sentenced to a *non-punitive* civil sentence can not be ignored. The imposition and application of this type of punitive condition is clearly without lawful sentencing authority and is beyond the jurisdiction of the Board of Parole Commissioners. The Court may look at this situation under abuse of discretion, and under a Declaratory Judgment, per NRS 30.030.

The Court may also look at this condition as imposed under the application of judicial review, which the Board of Parole Commissioners denies to Defendant and all others similarly situated, Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, (1803).

Condition # 14: Polygraph Examination: *You shall submit to periodic polygraph examinations, as required by your supervising Officer.*

In looking at the terms of "submit to a polygraph test", the Courts have looked at many cases involving polygraph exams, and the rights of offenders in relation to incarcerated prisoners, parolees and probationers. The Courts have decided that these are serious legal issues relating to prison, parole, and probation or supervised release, while serving a criminal sentence. The burden for the State becomes much higher when affecting the constitutional rights of the Defendant who is serving a civil sentence, and is not incarcerated, nor on parole or probation.

In relation to the Defendant, and all others similarly situated, this condition, as applied, is not enumerated in regulation or statute. There is no definition for "submit". There is no connection of this polygraph exam to *any* form of therapy or treatment. This is not a forensic polygraph, it is a utility test, which has no scientific foundation or level of accuracy. (Exhibit 11). Defendant asserts that the Board states that this condition is a part of the statutes of Lifetime Supervision, and that this condition supersedes all other Nevada Revised Statutes, and the 5th Amendment of the Constitution.

The Division of Parole and Probation enforces this condition upon Defendant and states that he has to answer every question asked of him, regardless of the legality of the question per the Nevada Revised Statutes, and whether or not it is in violation of the Fifth Amendment. The Division further states that an offender *cannot* take the Fifth Amendment, even though it is clearly enumerated on the consent form that an offender has to sign before taking the polygraph exam. The Division asserts that an offender has to answer every question, or the offender will be arrested for a violation of this condition, therefore compelling the offenders answers. (Department of Public Safety, Records of Polygraph Exam for Defendant, September 7, 2011).

> The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." The

United States Supreme Court has held that this prohibition is not limited to circumstances where a defendant refuses to testify against himself at a criminal trial. "A person is privileged "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings", Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, (1973).

"Persons who have been convicted of crimes only lose their Fifth Amendment protections as to the facts and circumstances of the crime for which they have been convicted. The privilege is still applicable to questions relating to any other activity", Baxter v. Palmigiano, 425 U.S. 308, 316, 96 S. Ct. 1551, (1976).

"A state may require that a probationer truthfully answer questions posed by probation officers or other law enforcement personnel and impose sanctions if questions are not answered truthfully, but a State may not revoke probation because the probationer validly asserts the privilege", Minnesota v. Murphy, 465 U.S. 420, 438, 104 S. Ct. 1136, (1984).

An individual "need not incriminate himself in order to invoke the privilege", McCoy v. Commissioners, 696 F.2d 1234, 1236, (9th Circuit 1983); and an individual "may simply refuse to make any statements that place him at risk", Seattle Times v. United States, 845 F.2d 1520, (9th Circuit 1988).

"As a general rule, countervailing government interests, such as criminal rehabilitation, do not trump this right. Thus, when questions put to an offender, however relevant to his supervisory status, call for answers that would incriminate him in a pending or later criminal prosecution, he may properly invoke his right to remain silent", Minnesota v. Murphy, 465 U.S. 420, 435, 104 S. Ct. 1136, (1984).

The Supreme Court stated that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances", Ohio v. Reiner, 532 U.S. 17, 121 S. Ct. 1252, (2001).

These penalties are less significant than the penalty facing the Defendant in this case, arrest, and incarceration, which has already happened, and upon trial, the possibility of further incarceration for a specific term, which in certainly a loss of a Constitutional Liberty Interest, the interest being liberty itself.

The *Fifth Amendment Self-Incrimination Clause*, which applies to the States via the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself". The "Amendment speaks of compulsion", United States v. Monia, 317 U.S. 424, 427, 63 S. Ct. 409, (1943).

The Supreme Court has insisted that the "constitutional guarantee is only that the witness not be compelled to give self-incriminating testimony", United States v. Washington, 431 U.S. 181, 97 S. Ct. 1814, (1977).

Justice O'Connor acknowledged that "The Fifth Amendments text does not prohibit all penalties levied in response to a person's refusal to incriminate himself or

herself—it prohibits only the compulsion of such testimony", McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, (2002).

The Supreme Court's so-called "penalty cases" establish that the potential loss of one's livelihood through employment, the loss of the right to participate in political associations, and to hold public office, are capable of coercing incriminating testimony. These are described in Uniformed Sanitation Men Assn. Inc. v. Comm. Of Sanitation of N.Y. City, 392 U.S. 280, 88 S. Ct. 1917, (1968); Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, (1977).

Defendant asserts that he is being compelled in this situation, due to his arrest by Officer Evans of the Division, as a consequence of not answering 2 illegal questions, asked in violation of the Nevada Revised Statutes. This resulted in the loss of liberty itself, which would certainly be viewed by the Supreme Court as a factor of whether the Defendant is being compelled.

The decisions held by the Supreme Court that relate to the use of a polygraph while under "lawful incarceration" or for "penological concerns" still apply in this situation, even though Defendant is not incarcerated, but the principles in these cases concerning the Fifth Amendment do. Defendant is not under the auspices of being in prison, on parole, on probation, or on supervised release while serving a criminal sentence. Defendant is a citizen at liberty, in the State of Nevada, and in the United States, and is serving a *non-punitive* civil sentence. Therefore the burden for the State is much higher is this case, as the rights of the Defendant need to be addressed in relation to this restraint of liberty.

This submittal to a polygraph does not take any therapy considerations into effect, as the Supreme Court had to decide in *Mckune*, and the 9th Circuit in *Antelope*, as this is strictly a test performed by an agent of the State, akin to a compelled interrogation of Defendant. Upon review of the written questionnaire, the consent form, and the audio and video recordings of this "exam", this would be very apparent to the Court in the instant case.

A therapist was not asked to be present, and the Defendant's therapist, a licensed psychologist, had no input into the test. There is no articulated language in statute, as in Mckune, that determines that this test is needed for public safety, or for any other reason, except to further interrogate the offender at will. This could even be argued to be cruel or unusual punishment, as it relates to other civil sentences, and to interrogation and torture.

In the penalty cases of the Court, the cases relate to free citizens given the choice between invoking the Fifth Amendment privilege, and sustaining their economic livelihood. Those principles are not easily extended to the prison context, but are easily extended in this case, to the loss of liberty of Defendant.

The Supreme Court states that the privilege applies to the States through the Fourteenth Amendment, and determined that the right to remain silent is itself a liberty interest protected by that Amendment.

> The Court explained that "the Fourteenth Amendment secures against federal infringement…the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and to suffer no penalty*…for such silence", Malloy v. Hogan, 378 U.S. 1, 8, 84 S. Ct. 1489, (1964).
>
> Since *Malloy,* we have construed the text to prohibit not only direct orders to testify, but also indirect compulsion effected by comments on a defendant's refusal to take the stand, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, (1965).
>
> The Supreme Court has recognized that compulsion can be presumed from the circumstances surrounding custodial interrogation, Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, (2000).
>
> "The coercion inherent in custodial interrogations blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment…not to be compelled to incriminate himself'", Miranda v. Arizona, 384 U.S. 436, 439, 86 S. Ct. 1602, (1966).
>
> Without requiring the deprivation of any other liberty interest, we have found prohibited compulsion in the threatened loss of the right to participate in political associations, Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, (1977); forfeiture of government contracts, Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, (1973); loss of employment, Uniformed Sanitation Men Assn. Inc. v. Comm. Of Sanitation of N.Y. City, 392 U.S. 280, 88 S. Ct. 1917, (1968); and disbarment, Spevak v. Klein, 385 U.S. 511, 516, 87 S. Ct. 625, (1967).

Defendant asserts that none of these opinions of the Supreme Court contains any suggestion that compulsion should have a different meaning in the more serious and present context, a loss of liberty. And the Court further states, "Nor is there any support in our Fifth Amendment jurisprudence for the proposition that nothing short of losing one's livelihood is sufficient to constitute compulsion", *Turley*, 414 U.S. at 83. In this instance, the loss of liberty is far greater that the loss of one's livelihood, which, according to the Supreme Court would definitively constitute compulsion.

The Board of Parole Commissioners, by their imposition of this condition pursuant to a civil sentence; that an offender ***must*** submit to a polygraph test, and forego all of these rights, under the direction of the Division of Parole and Probation, and by a Department of Public Safety employee, is prejudicial, biased and discriminatory. In the conditions as listed, no authority is given to the allegation that these conditions supersede the Nevada Revised Statutes.

In the statutes pertaining to Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, not one thing is enumerated and either suggests or mandates that these statutes supersede any of the other Nevada Revised Statutes. The Division, in their application and enforcement of this condition, by the use of an examiner from the Department of Public Safety, who is a peace officer, arbitrarily and illegally asks questions that attempt to or do break confidentiality, as listed in

(1) therapeutic confidentiality, as listed in NRS 49.209 and NRS 49.247,
(2) husband-wife confidentiality, as listed in NRS 49.295,
(3) attorney-client privilege, as listed in NRS 49.095,
(4) accountant-client privilege, as listed in NRS 49.185, and
(5) medical confidentiality, as listed in NRS 49.225.

Many of these questions violate the Nevada Revised Statutes relating to the polygraph, as listed in Chapter 648. Many of these illegal questions asked by the examiner are:

(1) degrading, as listed in NRS 648.187, and
(2) of a sexual nature without the request or consent of the offender, per NRS 648.193,
(3) to circumvent, or in defiance of the law, per NRS 648.189 (5), and
(4) when an offender refuses to answer these questions, as listed in all of these statutes, or the ones noted previously regarding confidentiality, they are judged to be non-compliant, non-cooperative, and deceptive, and in the instant case, arrested for failure to answer questions, due to the assertion by Defendant, of the 5th Amendment of the United States Constitution.

The condition as applied, states that an offender must submit to the test, but it does not state that an offender has to:

(1) consent to the test, as listed in NRS 648.189(2),
(2) nor does it state that an offender ***must*** lose their 5th Amendment right to answer, as listed in NRS 648.187,

(3) nor does it state that it supersedes the laws and rights listed in NRS 648.103 to NRS 648.199 inclusive,
(4) specifically NRS 648.187, NRS 648.189, and NRS 648.193.
(5) nor does it state that it supersedes the laws and rights listed in NRS 49.015 To NRS 49.405 inclusive.

In looking at the following Nevada Statute, it states:

"**NRS 648.193 Inquiries into examinee's religion, political affiliation, sexual activities or affiliation with labor organization prohibited; exception.**
During a polygraphic examination, the examiner or intern shall not make inquiries into the religion, political affiliations, affiliations with labor organizations or sexual activities of the person examined unless the person's religion or those affiliations or activities are germane to the issue under investigation and the inquiries are made at the request of the person examined. (Added to NRS by 1985, 1331).

Defendant asserts that *shall not*, and *and* denotes mandatory language, and that the Officers of the Department of Public Safety, and the Officers of the Division of Parole and Probation can not violate the Nevada Revised Statutes by making words nugatory and superfluous.

"Statutes should be given their plain meaning and must be construed as a whole, and should not be read in a way that would render words or phrases superfluous, or make provisions nugatory", Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949, (1990); as quoted in Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001). There is presumption that every word, phrase and provision in enactment has meaning, Id. at 502-03.

The examiner who performed the polygraph in the instant case is Detective Jim Sackett, of the Department of Public Safety. When questioned about this statute by Defendant, where it was only partially listed on the consent form, declared that the Nevada Statutes did not apply to him, but only applied to "commercial polygraphers". He further stated that they could ask any questions that they wished, which Defendant asserts to be in violation of many of the Nevada Revised Statutes in relation to the polygraph, privacy, and confidentiality.

In a Washington Supreme Court decision in re Detention of Hawkins, 169 Wash. 2d 796, 238 P.3d 1175, (Washington 2010), the Court held that the State is prohibited from compelling respondents to SVP commitment proceedings to submit to polygraph examinations. This holding by the Court confirms that a person cannot be forced to take a sexual history polygraph when the outcome may be used in a pending examination. This is further addressed in a paper

presented entitled Taking the Fifth; Hawkins, Antelope, and Jacobsen, and How They Affect ATSA, by Kenneth Blackstone. (Exhibit 12).

The Maricopa County Public Defender's Office filed an *amicus curiae* brief to the Arizona Supreme Court in support of a holding by the Arizona Court of Appeals in Jacobsen v. State, Supreme Court No. CV-10-0309-PR, (2010).

Defendant is condensing the argument presented, however, he will supply the Court with the full *amicus curiae* brief and other supporting documentation relating to that case for the Court's further review. (Exhibit 13). This brief is condensed and quoted as follows:

The issue on appeal is one of statewide importance, is continuing in nature, and is dealt with on a daily basis by the Maricopa County Public Defender. The purpose of this amicus brief is to establish the widespread negative impact that would result from a reversal of the Courts of Appeals' decision. The use of polygraphs urged by the Petitioner would force probationers to choose between revocation of probation or compelled incriminating admissions, an untenable situation which undermines their rights, fails to comport with constitutional guarantees, and will discourage some probationers from seeking treatment.

Furthermore, implementation of the holding in *Jacobsen v. Lindberg* will not undermine the use of polygraphs or the ability of probation officers to promote sex offender programming and public safety. The court of appeals' decision is consistent with decisions in other jurisdictions which have held that probationers retain the right to invoke their protection against self-incrimination during polygraph examinations. Polygraphs continue to be used as an integral part of treatment in those jurisdictions.

The holding in *Jacobsen v. Lindberg* is consistent with decisions by other jurisdictions regarding Fifth Amendment protection for statements made during polygraph examinations. The decision by the Court of Appeals is clearly in accord with the laws of Arizona and this Court's decisions, and the current state of the law in Arizona is consistent with the law of other jurisdictions of the United States. The 9th Circuit Federal Court of Appeals came to the same conclusion as the Arizona Court of Appeals in a case with nearly identical factual background, United States v. Antelope, 395 F.3d 1128 (9th Circuit 2005). There, the Court held in favor of

the right of a sex-offender defendant on supervised release to flatly refuse on Fifth Amendment grounds to participate in a sexual history examination and a polygraph test, which were both part of court-ordered sex offender treatment, 395 F.3d 1128, 1131 (9th Circuit 2005).

In determining Antelope was entitled to refuse these tests, the Court noted that a Fifth Amendment claim has two elements:

> (1) that the testimony desired by the government carried the [real and appreciable, not remote, unlikely, or speculative] risk of incrimination….and
>
> (2) that the penalty he suffered [for refusing to answer] amounted to compulsion… *Id,* at 1134 (citations omitted).

The Court held the risk that Antelope would incriminate himself was "real and appreciable" because he would not be able to withhold information regarding the past offenses implied by his refusal to comply. *Id.* at 1135. The Court had no doubt that if Antelope made incriminating admissions they would be turned over to authorities and could be used against him; the danger was not "remote, unlikely, or speculative". *Id.* (internal quotes and citations omitted).

The government's purpose in imposing the penalty is the determining factor in deciding whether a "penalty for the refusal to incriminate oneself" amounts to compulsion. *Id.* at 1137 (citing McKune v. Lile, 536 U.S. 24, 53, 122 S. Ct. 2017, (2002) (O'Connor, J., concurring in 4-1-4 decision).

"Penalties ... that ... appear, starkly, as government attempts to compel testimony" such as the revocation of Antelope's supervised release to sanction him "for his self-protective silence about conduct that might constitute other crimes" satisfy the compulsion requirement of the Fifth Amendment privilege analysis. *ld.* at 1137 (emphasis in the original). This is despite the fact that "the disclosures sought here may serve a valid rehabilitative purpose". *Id.* at 1138. The Court held "that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with [his treatment program's disclosure requirements." *Id.*

The Third District California Court of Appeals ruled the same way over twenty years ago in another similar case. People v. Miller, 208 Cal. App. 3d 1311, 1315 (Ct. App. 1989). In that case, the defendant, who had pled guilty to committing a lewd and lascivious act upon a child, appealed a condition of his probation sentence that required him to submit to polygraph examination as violative of his Fifth Amendment rights. *Id.* at 1313-14. The court held that a defendant with such a requirement must truthfully answer the polygraph questions unless he properly invokes the privilege, and that unless he is required to answer despite a proper invocation of the privilege, no violation of the Fifth Amendment right is suffered. *Id* at 1315 (citing Minnesota v. Murphy, 465 U.S. 420, 427, 104 S. Ct. 1136, (1984)), "The mere requirement of taking the test in itself is insufficient to constitute an infringement of the privilege." *Id.*

In 1999, in Ex parte Renfro, a defendant convicted of indecency with a child argued that a requirement that he submit to a polygraph examination as a condition of probation violated his Fifth Amendment right against self-incrimination. 999 S.W.2d 557, 559 (Texas Appellate 1999). Citing to People v. Miller, 208 Cal. App. 3d 1311, (Ct. App. 1989), the Texas court found that the requirement to take the test, did not, in of itself, violate the Fifth Amendment. *Id.* at 561. A violation would only occur if "he invokes the privilege, shows a realistic threat of self-incrimination and nevertheless is required to answer. ..." *Id.*

A more recent Alaska Court of Appeals decision is also consistent with the law of Arizona on this issue. In James v. State, 75 P.3d 1065, (Alaska App. 2003), the court addressed the probation revocation of a sex offender who was rejected from treatment for consistently invoking his Fifth Amendment right not to admit to the offenses for which he was convicted after a trial in which he maintained his innocence, and which he was appealing at the time his probation was revoked. The Alaska Court of Appeals held that the defendant had a valid Fifth Amendment privilege not to answer questions about the charges for which he was convicted, and that his probation could not be revoked for invoking the privilege. *Id.* at 1072.

Jacobsen v. Lindberg is in harmony with prior Arizona law and the federal and state decisions *supra,* all of which recognize the constitutional right of a probationer to refuse to answer incriminating questions in the course of a polygraph examination.

In 1983, an Oregon sex offender treatment program for convicted offenders became one of the first states to use polygraph examinations as part of the program. In 1994, an Oregon appellate court addressed the issue of the availability of Fifth Amendment protection to a probationer while undergoing a polygraph examination. State v. Tenbusch, 131 Or. App. 634, 641 and 644, 886 P.2d 1077, 1081 and 1083 (Or. App. 1994).

The defendant in *Tenbusch* was placed on probation for sexually abusing his stepson. *ld.* at 636,886 P.2d at 1078. A term of his probation directed him to "submit to polygraph examinations about his sexual history, and about his compliance with probation, whenever directed by his Probation Officer or his sexual therapist." *Id.* After a polygraph which indicated he was untruthful about past offenses, the defendant admitted to his probation officer he had abused his stepdaughters. *Id.* at 636-37,886 P.2d at 1078-79. The Oregon court found that the defendant's conditions of probation did not allow him to refuse to take the polygraph examination or to answer untruthfully. *Id.* at 644, 886 P .2d at 1082. However, the probation conditions did not compel the defendant to make incriminating statements because he had the right to invoke the protection of the Fifth Amendment. *Id.* at 644, 886 P .2d at 1083. As in *Jacobsen,* the Oregon court found that the constitutional protection of the Fifth Amendment was not self-executing but had to be claimed by the probationer. *Id.* at 642, 886 P .2d at 108l.

This brief does not address ongoing concerns regarding the reliability of a polygraph examination but it is instructive to note that a Georgia study of sex offenders indicated that 10% of examinees actually made a false admission after an examination *incorrectly* indicated that the offender had been untruthful during the exam. Reasons given for the false admissions included, demonstrating a commitment to treatment, avoiding getting into trouble or feeling pressured by the polygraph examiner. *Id.*

When treatment providers in Oregon first began to use the polygraph in the early 1980's, the prosecutor offered conditional immunity to the offenders for prior unreported sexual crimes.

Hindman, *supra,* at 8. The prosecutor did so in recognition of three perceived needs; one, full disclosure allowed pertinent and directed treatment; two, victimized children could be identified early; and, three, immunity provided credibility to defense attorneys which, in tum, encouraged guilty pleas, saving victims from the trauma of participating in a public trial. *Id.*

A reversal of *Jacobsen* will result in a probationer facing a choice of admitting to incriminating conduct with the potential of additional imprisonment or rejecting probation. A rational probationer would choose to serve his present sentence rather than admit to new crimes and would eventually be released back into the community untreated.[2]

(1) A study of 1400 sex offenders on probation in Minnesota found that five percent of probationers who completed treatment were re-arrested for sexual offenses compared to eleven percent of offenders who either failed to complete treatment or did not participate in treatment. Reagan Daly. *Treatment and Reentry Practices for Sex Offenders: An Overview of States*, 5. New York: Vera Institute of Justice, 2008,
(2) The majority of convicted sex offenders will be placed on community supervision at some point either as a result of a suspended sentence or parole after release from prison. *Daly, supra,* at 1.

The *Jacobsen* decision was clear that it does not prohibit the use of polygraphs; instead, it affirms the ability of a probation department to obtain non-incriminatory information as to a defendant's background and actions. *Jacobsen,* slip. op. at 8, ~ 8.

Moreover, as research and experience continue to refine the use of polygraphs for treatment purposes, the type of information sought by providers can change. A significant goal of treatment is to promote public safety by assessing the risk of re-offending. One of the first uses of the polygraph examination was to verify information provided by the offender as to past behaviors and preferences, which could then be used to develop a treatment plan specific to the offender.

Therefore, in 2003, providers in the Sixth Judicial District in Iowa, which have used polygraphs since 1995, shifted the focus of the questioning in polygraph examinations away from "identifying the number of prior victims, confronting denial or addressing discrepancies in official records compared to offender admissions." Instead, attention was directed to better predictors of re-offending such as sexual drive, the ability to self-regulate, access to prior victims

and cooperation with supervision. This type of non-incriminating information is fully available under the holding in *Jacobsen,* facilitating treatment and maintaining public safety.

The polygraph test as currently performed by the examiners, who are employees of the Department of Public Safety, violate the constitutional rights of the Defendant and all others similarly situated, and violate the statutes of the State of Nevada, as noted above. This test was performed on Defendant, by Detective Jim Sackett, on or about September 7, 2011, and as applied, is done in order to circumvent or in defiance of the law as listed in NRS 648.189(5).

As a matter of law, according to the statutes of crimes on who constitutes a principal, specifically NRS 195.020, Officer Evans and Officer Gothan of the Division should also be held accountable for this violation of the Nevada Revised Statutes in this instant.

Officers have a duty to uphold the Nevada Revised Statutes, and should not violate them in order to enforce the law, due to their illegal *interpretation* of them. As cited above, the Courts interpretation of the 5th Amendment is consistent and clear; however, the Officers decide that these interpretations and opinions do not apply to them. This is punishment, intimidation, and harassment, and the Officers themselves should be held accountable for their actions, as it is a violation of Nevada law, specifically NRS 197.200, Oppression under Color of Office.

Defendant has had all of these constitutional rights violated in relation to him on or about September 7, 2011, during a polygraph test conducted on Defendant under the auspices of the Department of Public Safety, the parent department of the Division of Parole and Probation.

Defendant asserts that he is being compelled to violate his constitutional 5th Amendment right, and he was arrested by Officer Evans. Defendant was charged with failure to submit to the polygraph, and for non-cooperation in relation to the polygraph test, by taking his 5th Amendment right in relation to 2 sexual questions, which had been illegally asked, per NRS 648.193, and after six (6) hours of being extremely cooperative. An arrest and detainment would qualify as a loss of liberty of Defendant, which is a Constitutional Liberty Interest.

These statutes have been violated, and the constitutional rights of Defendant have previously been restrained upon his first polygraph exam, by Detective Von Rumpf, of the Department of Public Safety in 2008. This is not a one-time occurrence, this is standard

operating procedure for the examiners of the Department of Public Safety, to violate your rights during the course of what amounts to an interrogation, and unrelated to any therapeutic purpose.

When you look to the Policy and Procedure of the Division concerning the polygraph, specifically Division Directive 6.3.115, the policy would seem to support the argument that only a violation report or crime report may be generated, upon refusal to answer a question, and at no point does it ever say to arrest the offender for taking his constitutional Fifth Amendment right.

In a letter from Sergeant Helgerman, to Defendant's wife, dated March 24, 2011, the Sergeant states that all violations of conditions have to be reviewed by a supervising Officer, after the crime report has been written, in this case, by Officer Evans.

> "A supervisor would then review the report to determine, in part, if the subject may have violated the conditions. If the supervisor agrees, the report is forwarded to the Board or the Court. The Board or the Court has final determination whether the subject has violated a condition of supervision. In other words, there are multiple steps in the violation process in which more than one party would review the violations before making a determination as to whether the subject had, for example, violated their condition regarding contact with a minor or whether they cooperated with their parole officer." (Exhibit 14, pg. 15).

Defendant asserts that none of this was done, before the arrest of Defendant was made, which the Officer and the Division did not have to do. The time frame was to short, and did not allow for the further review and consideration of all of these steps.

Defendant had just brought all of these issues up in front of the Board of Parole Commissioners during an Open Public Meeting of the Board, on August 31, 2011, where the Division of Parole and Probation was present, specifically Lieutenant Helgerman.

Defendant asserts that Officer Evans and the Division violated his constitutional rights, by detaining and arresting him, and that this was done for intimidation and harassment purposes, due to his advocacy, during this hearing, and specifically in relation to the polygraph.

Defendant asserts that upon the use of this constitutional right, the Division will then further withhold other Constitutional Liberty Interests and First Amendment Rights from an offender, based off of the illegality of the polygraph test that they have performed.

The Detective, who is an examiner, and who conducts the test, has stated on the record, that he can help you pass the test, thereby also asserting that he can make you fail the test. This is a serious form of punishment, both in submitting to the test with coerced consent, and with no adequate guidelines to point law enforcement to, and upon their violation of the statutes of the State of Nevada. This condition as listed is overbroad and vague, is punitive in nature and effect, and is a violation of the constitutional rights already defined.

Defendant asserts that by compelling this information that the Board of Parole Commissioners, the Division of Parole and Probation, including the Chief of the Division and its Officers, and the Department of Public Safety and its Officers, are violating the above listed Nevada Revised Statutes listed above relating to confidentiality, and polygraphs, and that they are violating the Fifth and Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of Nevada.

Defendant asserts that Officer Evans, Officer Gothan, and Detective Sackett, in relation to Defendant in this instant, are committing Oppressions under Color of Office, NRS 197.200, and are in criminal violation of the Nevada Revised Statutes relating to coercion, NRS 207.190 (1), (c); harassment, NRS 200.571; and conspiracy, NRS 199.480 (3),(b),(c),(f),(g).

Defendant's Prayer for Relief to Court for Declaratory Judgment:

WHEREFORE, the Defendant prays for the following relief and respectfully requests this Court for the following:

(1) Grant a finding of the rights of Defendant, based on the arguments, points and authorities cited, in regards to this constitutionally illegal condition of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(2) Grant an immediate declaratory injunction against the State of Nevada; the Board of Parole Commissioners; the Department of Public Safety, including the Chief and its Officers; the Division of Parole and Probation, including the Chief and its Officers, commanding them to cease and desist imposing and enforcing this illegal condition #14 of the Conditions of Lifetime Supervision. Until this Court, or the Nevada Supreme Court, determines the constitutional

legality of the issue presented, Injunctive and Declaratory relief may be granted by this Court pursuant to the Nevada Constitution in Article 6, Section 6.

Defendant's Requests for Declaratory Relief:

The Defendant respectfully requests the Court to render a declaration that condition #14 of the Conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs who are the State of Nevada, the Board of Parole Commissioners, the Department of Public Safety , including the Chief and its Officers, and the Division of Parole and Probation, including the Chief and its Officers:

(3) the Procedural Due Process Clause of the United States Constitution, Amendment XIV.

(4) the Procedural Due Process Clause of the Nevada Constitution, Article 1 & 8, cl. 5.

(5) the Ex Post Facto Clause of the United States Constitution, Amendment I & IX, clause 10.

(6) the Ex Post Facto Clause of the Nevada Constitution, Article I & 15.

(7) by being Void for Vagueness, the Due Process Clause of the United States Constitution, Amendment V & XIV.

(8) by being Void for Vagueness, the Due Process Clause of the Nevada Constitution, Article 1, & 8, clause 1.

(9) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.095.

(10) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.185.

(11) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.209.

(12) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.225.

(13) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.247.

(14) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.295.

(15) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.187.

(16) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.189(5).

(17) have violated the Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.193.

(18) have violated the Nevada Revised Statutes as applied by Plaintiffs, by their actions and performance, pursuant to Oppression under Color of Office in NRS 197.200.

(19) have violated the Policy and Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Ethics in Division Directive 4.2.009C.

(20) have violated the Policy and Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Polygraphs in Division Directive 6.3.115.

(21) the prohibition against Equal Protection as contained in the United States Constitution, Amendment XIV, Section 1.

(22) the prohibition against Equal Protection as contained in the Nevada Constitution, Article 1, Section 2.

(23) Reasonable costs and attorney's fees, if an evidentiary hearing is to be held.

(24) Any further relief the Court deems appropriate.

Affirmation: Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Respectfully dated this _____ day of February, 2012.

_____

Affiant Patrick Stephen Davis
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

Verification:

STATE OF NEVADA)

WASHOE COUNTY) ss.

COMES NOW, the Defendant, Patrick Stephen Davis, being duly sworn under oath, and according to law, deposes and says: "That I am the Defendant in the foregoing-entitled action, and that I have read the Motion for Declaratory Judgment, and know the contents thereof; that the same is true of my knowledge, except for those matters therein contained stated upon information and belief, and, as to those matters, I believe them to be true".

"I certify that I have written the Motion for Declaratory Judgment and that it is not frivolous or interposed for any improper purpose".

"I further certify that to the best of my knowledge, this Motion complies with all applicable Nevada Rules of Appellate Procedure, and that every assertion in the Motion regarding matters of record is supported by appropriate references to the page and volume number".

_____

Patrick Stephen Davis
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

SUBSCRIBED and SWORN to before me
This _____ day of February, 2012.

_____

NOTARY PUBLIC in and for said
County and State

TABLE OF EXHIBITS