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

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| 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 #9 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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State v. Kamedula, 127 Nev. Adv. Rep. 21, (2011)…………………………………….…..7

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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 1, 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.

- 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 travel within or without the State of Nevada.
>
> (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, a part of the statute therein, 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).
>
> "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).
>
> 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).
>
> 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).
>
> 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 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).
>
> 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).

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 8, 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).

**Issue # 1: Constitutionality of Condition:**

The imposition and enforcement of this condition of Lifetime Supervision that restrain 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 # 9: Out of State Travel:** *You shall not leave the State without first obtaining written permission from your supervising Officer.*

The right to travel is an inherent right in the Constitution of the United States. The ability to restrain and limit travel is extremely punitive in nature.

> The word "travel" is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence, United States v. Guest, 383 U.S. 745, at 757, 86 S. Ct. 1170, (1966).

This restraint is arguably legal in relation to Parole, which is a matter of Legislate grace, or Probation, for which the Court has authority over. This condition is illegal in relation to Lifetime Supervision due to the fact that there is no enumeration in Nevada Statute to restrain this right on an offender subject to the civil sentence of Lifetime Supervision.

> Indeed, as Justice Stewart reminded us, the right is so important that it is "assertable against private interference as well as government action…a virtually unconditional personal right, guaranteed by the Constitution to us all", Shapiro v. Thompson, 394 U.S. 618, 643, 89 S. Ct. 1322, (1969), (concurring opinion).

As applied to Defendant, and all others similarly situated, this becomes even more of a restraint when the original condition is subject to a written public policy and procedure, which is meant to be applied only to persons on Parole or Probation, serving time under a criminal sentence, as stated in Division Directive 6.3.116, Travel Permits, (1999). The offender is then subject to many more "conditions" in order to satisfy and be granted "permission" by the supervising officer of his constitutional right to travel.

Then, if an offender satisfies the "conditions" listed in the written public policy and procedure, the Division has a further written, non-public policy and procedure. This is articulated in a book described as the Division of Parole and Probation *Sex Offender Manual*, referenced in Division Directive 6.3.116, Section C, Procedures, (7). In this Manual, which an offender cannot see, read or obtain a copy of, in order to modify his behavior to the "conditions" imposed, the Division states that they may deny the right to travel or permission to do anything

else, which an offender has a constitutional right to do, by the use of further additional unknown guidelines that may be used to arbitrarily deny permission by the Supervising Officer.

> Without pausing to identify the specific source of the right, we began by noting that the Court has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement", Id. at 629.

By imposing many more written public conditions and many more unknown written non-public conditions to the original un-enumerated condition, the Division of Parole and Probation, by application have made the right to travel so punitive in nature and effect that an offender might never be able to travel for any reason at any time for the rest of his life, as Lifetime Supervision is a life sentence. Defendant asserts that this condition as applied to a civil sentence is punitive in nature and effect and due to this being extremely arbitrary, discriminatory and overbroad, is punishment. The right to travel is not a crime in and of itself.

In a further review of the provisions of the Lifetime Supervision clause, it demonstrates that it violates a Constitutional Liberty Interest to travel.

> The right to travel embraces three different components: the right to enter and leave another State; the right to be treated as a welcome visitor while temporarily present in another State; and for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State, Saenz v. Roe, 526 U.S. 489, 119 S. Ct. 1518, (1999).

Defendant's right to travel is restricted for the rest of his life. Defendant asserts that this also violates his equal protection rights and interstate commerce as well.

> We further held that a classification that had the effect of imposing a penalty on the exercise of the right to travel violated the Equal Protection Clause "unless shown to be necessary to promote a *compelling* government interest", Id at 634.

The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States". A review of the provisions of Lifetime Supervision demonstrates that this requirement is an additional

punishment that will be imposed for the entire life of the defendant. The restrictions are not benign in nature.

> Although the Supreme Court will give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment, Califano v. Goldfarb, 430 U.S. 199, at 210, 97 S. Ct. 1021, (1977); Williams v. Rhodes, 393 U.S. 23, at 29, 89 S. Ct. 5, (1968); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-733, 102 S. Ct. 3331, (1982).

Defendant asserts that this condition is unconstitutional and is a deprivation of a Constitutional Liberty Interest without due process of law, in violation of the Fifth Amendment of the United States, and is further unconstitutional due to

> (a) an abridgement of defendant's freedoms of speech, press, and assembly, in violation of the First Amendment,
> (b) a further penalty imposed on defendant without due process, and therefore a bill of attainder,
> (c) the imposition of cruel or unusual punishment in violation of the Eighth Amendment, Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, (1964).

Defendant attacks the condition, both on its face and as applied, as an unconstitutional deprivation of a Constitutional Liberty Interest guaranteed in the Bill of Rights. The Government has conceded that the right to travel is protected by the Fifth Amendment. The Supreme Court has declared that the right to travel is "an important aspect of the citizen's liberty" guaranteed in the Due Process Clause of the Fifth Amendment.

> The Court stated that: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment…Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country…may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values", Kent v. Dulles, 357 U.S. 116, 127, 78 S. Ct. 1113, (1958).
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> The Court has also stated that "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective", Bolling v. Shapre, 347 U.S. 497, 499-500, 74 S. Ct. 693, (1954).
>
> The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in places for travel. The condition therefore is patently not a regulation "narrowly drawn to prevent the supposed evil", Cantwell v. Connecticut, 310 U.S. at 307, 60 S. Ct. 900,

(1940), "yet here as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms", NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, (1963).

Defendant asserts by illegally restricting his right to travel, both for business and pleasure, with his family or without his family; by Officer Lewis, Officer Howald, and Officer Evans, and the Division of Parole and Probation, and its Officers; that this restraint violates the Constitutional Liberty Interest of the Defendant. This is done by application of conditions not articulated in statute, and by the extension of the parameters of a condition that is overbroad and beyond their jurisdiction to enhance, and their legal authority to do so.

**Issue #2: Equal Protection Clause:**

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 *Equal Protection Clause* can be seen as an attempt to secure the promise of the United States professed commitment to the proposition that "all men are created equal", Declaration of Independence, (1776). This is done by empowering the judiciary to enforce that principle against the states when they abridge the constitutional rights of its citizens.

> Justice Matthews stated that "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences in race, color, of nationality, and the equal protection of the laws is a pledge of the protection of equal laws", Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, (1886).
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> Justice Brown, speaking for the Supreme Court stated that "the *Equal Protection Clause* had been intended to defend equality in civil rights, not equality in social arrangements". Justice Harlan, in a dissent, wrote, "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens", Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, (1896).
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> Justice Harlan's dissent in *Plessy* has been vindicated as a matter of legal doctrine, and the clause has been interpreted as "imposing a general restraint on the government's power to discriminate against people based on their membership in certain classes, including those based on race and sex", as held in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, (1954).

The Board of Parole Commissioners and the Division of Parole and Probation, by their actions in imposing this condition of Lifetime Supervision violate the Equal Protection Clause,

(1) by not allowing the same privileges and rights to an offender serving any other civil sentence in the State of Nevada
(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 travel; and right to pursue business interests, interstate commerce, and life, liberty, and happiness.

> 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).
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> 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)
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> Indeed, as Justice Stewart reminded us, the right is so important that it is "assertable against private interference as well as government action…a virtually unconditional personal right, guaranteed by the Constitution to us all", Shapiro v. Thompson, 394 U.S. 618, 643, 89 S. Ct. 1322, (1969), (concurring opinion).

**Issue #3: Ex Post Facto: *U.S. Const. Amend 1; NV Const. Art. 1, Sec. 1 & 15.***

The United States Constitution provides that neither Congress nor any State may pass any *Ex Post Facto* law. Section 9, of Article 1, states that "No Bill of Attainder or *Ex Post Facto* law shall be passed, U.S. Constitution. The Nevada Constitution states in Section 15, of Article 1, that "No Bill of Attainder, *Ex Post Facto* law, or law impairing the obligation of contracts shall ever be passed".

> Justice Chase explained over 200 years ago that "the Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime", Calder v. Bull, 3 U.S. 386, 389, 3 Dall. 386, (1789).

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).
>
> 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 June 10, 2004, 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 in statute *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 condition denying the right to travel has never been enumerated in statute, and therefore is enacted after he was convicted, and that this condition has been placed and enforced upon him retroactively, along with all of the other conditions of Lifetime Supervision.

> An *Ex Post Facto* law is one which applies retroactively to disadvantage an offender's substantial personal rights, Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, (1981); Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S. Ct. 2290, (1977).

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, to travel, and to pursue any constitutional activity not expressly denied to them by statute
> (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 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.

This Court must consider the seven "useful guidelines", not only in the framework relating to the *Ex Post Facto Clause*, but also to the *Bill of Attainder Clause*, and the *Double Jeopardy Clause*. These "guidelines" have migrated into ex post facto case laws from double jeopardy jurisprudence, and have their earlier origins in cases under the *Sixth and Eighth Amendments*, as well as the *Bill of Attainder Clause*, and the *Ex Post Facto Claus.*

According to the Statutes of the State of Nevada at the time, the imposition of conditions by the Board of Parole Commissioners violate the *Ex Post Facto Clause*, thereby making the civil sentence of Lifetime Supervision constitutionally illegal.

**Issue #4: Bill of Attainder: *U.S.C.A. Const. Art. 1, Sec. 9; NV Const. Art. 1, Sec 15.***

The United States Constitution states: in Article I, Section 9, that "No *Bill of Attainder* or ex post facto law shall be passed." The Nevada Constitution states in section 15, of Article 1, that "No *Bill of Attainder*, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed."

A logical starting place for an inquiry into the meaning of prohibition in regards to a *Bill of Attainder* is in its historical background. Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply, a few, however, simply described them. While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the *Bill of Attainder Clause* and its relevance to contemporary problems must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate.

> "The *Bill of Attainder Clause* was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the

separation of powers, a general safeguard against the legislative exercise of the judicial function, or more simply, trial by legislature", United States v. Brown, 381 U.S. 437, 440, 85 S. Ct. 1707, (1965).

"A *Bill of Attainder* is any legislative act that applies to named individuals or an easily ascertainable group in such a way as to inflict punishment on them without a judicial trial", United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965); Spilotro v. State of Nevada, Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

The *Bill of Attainder Clause* was not only intended as one implementation of the general principle of fractionalized power, but also reflected the Framer's belief that the legislative branch is not so well suited to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

In 1810, Chief Justice Marshall, speaking for the Court stated that "A Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both", Fletcher v. Peck, 10 U.S. 87, 6 Cranch 87, 138, (1810).

"The Court's pronouncement therefore served notice that the *Bill of Attainder Clause* was not to be given a narrow historical reading, (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups", Ogden v. Saunders, 25 U.S. 213, 12 Wheat 213, 286, (1827); United States v. Brown, 381 U.S. 437, 447, 85 S. Ct. 1707, (1965); Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, (1867); Ex parte Garland, 71 U.S. 333, 4 Wall 333, (1866).

Defendant asserts that the Board of Parole Commissioners has overstepped the bounds of its authority by implementing the conditions of Lifetime Supervision, with no checks or safeguards to ensure that they were constitutionally legal by any other branch of government.

"Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,--the very class of cases most likely to be prosecuted by this mode", Constitutional Limitations, (Cooley), pp. 536-537, (8th ed. 1927); Commentaries of the Constitution of the United States, (Story), p. 210, (4th ed. 1873); History of the Republic of the United States, (Hamilton), p. 31, (1859), and quoted in Calder v. Bull, 3 U.S. 386, 389, 3 Dall 386, (1789). 386, 389, (1789); United States v. Lovett, 328 U.S. 303, 317-318, 66 S. Ct. 1073, (1946).

The conditions of Lifetime Supervision are not articulated in any statute or regulation, proving that the Board enacted and imposed the conditions illegally. The deprivation of any rights, civil or political, previously enjoyed, is punishment, the circumstances attending and the

1 causes of the deprivation determining this fact. These conditions are arbitrary and
2 discriminatory, and constitute a *Bill of Attainder*, as they clearly describe the parties to who they
3 are applied to, and restrain Constitutional Liberty Interests and First Amendment Rights. The
4 conditions inflict punishment upon a class of citizens without due process.

5 **Issue #5: Due Process: *U.S.C.A. Const. Amend 1 &14; NV Const. Art. 1, Sec. 1, 8 & 18.***

6 Both the United States Constitution and the Nevada Constitution provide that no person
7 shall be deprived of life, liberty or property without due process of law, United States
8 Constitution, Amendment 1 and 14, (1776); Nevada Constitution, Section 1, 8, and 18, (1863).

9 Defendant asserts that the imposition of the conditions of Lifetime Supervision is a
10 continuation of the original sentence. The Board denies proper notice to Defendant.

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> 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
14 procedural due process rights apply, along with the Sentencing Guidelines, just as in the original
15 court proceeding. The Board, by not allowing the presence of Defendant at the setting of the
16 Conditions, denies the right to argue against them, or to voice an appeal. By denying counsel, or
17 the ability to object to the conditions, they deny judicial review, and the right to be heard.

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> "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).
>
> "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).

27 ***The United States Supreme Court has stated that these essential constitutional promises may not be eroded.***
28

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).
>
> "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).
>
> "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).
>
> "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).

Defendant asserts that once he completed and finalized his suspended sentence by honorably discharging his probation obligation in April of 2008, that all Constitutional Rights accorded to a citizen of the United States and the State of Nevada, were returned to him, absent the ones described in statute, such as the right to vote, to hold public office, to serve on a jury, or to own a firearm. Even these may be returned to Defendant upon application and per time limits.

> In determining whether Defendant has obtained a constitutional liberty interest, one of the foremost relevant questions for the Court to consider is, whether or not Defendant has suffered a "sufficiently 'grievous loss' to trigger the protection of due process", Olim v. Wakinekona, 461 U.S. 238, 252, 103 S. Ct. 1741, (1983); citing Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, (1980).
>
> Whether procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss", Joint Anti-Facist Refuge Committee v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, (1951); quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970).
>
> An extremely relevant question is that the Court must look "to the nature of the interest at stake". Board of Regents v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, (1972).

The Nevada Supreme Court held in *Kelch* that, whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer “grievous loss”. The Court looked at the unqualified constitutional liberties granted to a parolee, and determined that, once granted parole, he has obtained many of the core values of unqualified constitutional liberty. If the Court considered the unqualified constitutional liberties of a person on probation, it would conclude that a probationer would have obtained more constitutional liberties than a parolee; due to the inherent nature of probation, and the Federal Probation Act, (1925); as probation is imposed under a suspended sentence, and is not a matter of legislative grace.

Defendant asserts that a reasonable and well-informed person of ordinary intelligence would contend that any person subject to a civil sentence, penalty, or fine should not be restrained of *any* Constitutional Liberty Interest or First Amendment Right by denying *Procedural Due Process* at any stage of *any* proceedings against him. By not providing for proper notice, presence at the hearing, discovery, and the ability for cross-examination and to confront witnesses, during any phase of *any* hearing held against the Defendant, determines this to be a constitutionally illegal action by the Board of Parole Commissioners.

> The ordinary mechanism that is used by the Supreme Court for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not “deprived of life, liberty, or property, without due process of law”, U.S. Constitution, 5th Amendment, is the test that the Supreme Court articulated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, (1976).
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> *Mathews* dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process, Id. 424 U.S. at 335, as quoted in Hamdi v. Rumsfeld, 542 U.S. 507, 528, 124 S. Ct. 2633, (2004).
>
> The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute procedural safeguards”, Id. at 335,
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> “Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property”, Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, (1978).
>
> The Court also noted that “the importance to organized society that procedural due process be observed” and emphasizing that “the right to procedural due process is

‘absolute’ in the sense that it does not depend upon the merits of a claimant's substantive assertions”.

> “This is because we live in a society in which mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s liberty”, O’Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, (1975).

When we turn to the question of whether the requirements of *Procedural Due Process* in general apply to the imposition of Lifetime Supervision conditions, one of the most compelling arguments is the Supreme Court’s view of something similar in Morrissey v. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972), where the Court looked at the issue of due process in relation to parole revocation hearings.

> As Justice Blackman wrote, “this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or a ‘privilege’, Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, (1971); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, (1971); Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, (1968).
>
> The question is not merely the “weight” of the individual’s interest, but whether the nature of the interest is one within the contemplation of the “liberty or property” language of the 14th Amendment, Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, (1972).
>
> Once it is determined that due process applies, the question remains what process is due. It has been said so often by the Court and others that due process is flexible and calls for such procedural protections as the particular situation demands. “Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action”, Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, (1961); Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S. Ct. 1502, (1960).

Other jurisdictions have looked to this issue of due process in this context and one of the most compelling opinions is a recent one in Ex parte Jonathon Evans, Applicant, 2011 WL 1662384 (Texas Crim. App. 2011). The Texas Board of Parole Commissioners determined that they could impose conditions upon a person under their authority without a hearing, and without due process. In many Court battles between the Judicial Courts in Texas, the Texas Supreme Court, and the 5th Circuit Court of Appeals, it was held that a parolee was entitled to due process protections, including a hearing, prior to the imposition of sex offender conditions.

> The Court explained that “the grave risk of error that envelops the procedures used by the Board is most troubling”.

(1) By not allowing the parolee to review the evidence presented against him, he is unable to correct any misinformation placed in his packed that the Board reviews.
(2) By not allowing the parolee to appear before the Board, the Board must act without mitigating or clarifying evidence from the parolee.
**(3)** By not allowing the parolee to confront opposing witnesses, the parolee is unable to refute damning statements made against his interest, and the Board in unable to evaluate the credibility of the parolee against that of opposing witnesses.

**Issue #6: Judicial Review:**

In Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, (1803), the Supreme Court held that "Congress cannot pass laws that are contrary to the Constitution, and it is the role of the Judicial system to interpret what the Constitution permits". The conflict in *Marbury* raised the important question of what happens when an Act of Congress conflicts with the Constitution. Justice Marshall answered that Acts of Congress that conflict with the Constitution are not law and the Courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position, Justice Marshall looked to the nature of the written Constitution…there would be no point in having a written Constitution if the Courts could just ignore it.

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"
>
> "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".

One of the key principles on which *Marbury* relies is the notion that for every violation of a vested legal right, there must be a legal remedy. Justice Marshall argued that the very nature of the judicial function requires the Courts to make this determination. Since it is a Court's duty to decide cases, the Courts have to be able to decide what law applies to each case. Therefore, if two laws conflict with each other, a Court must decide which law applies. Justice Marshall makes the following statements in *Marbury*:

> "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."

"So, if a law, (statute) be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case comfortably to the law, disregarding the Constitution, or comfortable to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

"Those, then, who controvert the principle that the Constitution is to be considered in Court as a paramount law are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution, and see only the law."

***"This doctrine would subvert the very foundation of all written constitutions."***

The concept of judicial review was discussed by Alexander Hamilton, in the Federalist Papers, No. 78, where he states that under the Constitution, the federal courts would have not just the power, but the duty, to examine the constitutionality of statutes. Hamilton states:

"[T]he Courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The *interpretation* of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution shall be preferred to statute, the intention of the people to the intentions of their agents."

On a request to appeal or modify a condition of Lifetime Supervision, the Board now states that, the only way an appeal or a modification to a condition may be filed is with the consent of the Supervising Officer of the offender, which allows bias and prejudice.

The Courts have stated that "The most important limitation is that a probation officer may not decide the nature or extent of the punishment imposed upon a probationer," United States v. Pruden, 398 F.3d 241, 250, (3rd Circuit 2005), since "under our constitutional system the right to……impose the punishment provided by law is judicial…", Ex Parte United States, 242 U.S. 27, 41-42, 37 S. Ct. 72, (1916).

This is a judicial authority that the Board is delegating to a Parole and Probation Officer. This type of authority is non-delegable, and it is illegal. It is absurd to grant the Parole Officer the authority to determine if his or her actions are legal and proper, in their *interpretation* of the conditions, without an avenue of appeal open to an offender to re-consider the issue.

The limitation is therefore of constitutional dimension, deriving from Article III's grant to the Courts of power over "cases and controversies", *Pruden*, 398 F.3d at 250, citing United States v. Melendez-Santana, 353 F.3d 93, 103, (1st Circuit 2003).

It has been held that "duties imposed upon the Court cannot be discharged….by the probation officer", United States v. Stuver, 845 F.2d 773, (4th Circuit 1988).

**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, and of all others similarly situated, 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. 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:**

Render a declaration that condition #9 of the Agreement of Lifetime Supervision: Out of State Travel, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs,

(1) the Procedural Due Process Clause of the United States Constitution, (US Const., Ament, XIV).

(2) the Procedural Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 5).

(3) by being overbroad and not narrowly drawn, to restrain the First Amendment of the United States Constitution, (US Const., Ament, I).

(4) the right to practice a religion without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, 4, cl. 5).

(5) the right to assemble or associate without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1 & 10).

(6) the right to free speech without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, & 9).

(7) the right to petition for grievance without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, 4, cl. 5).

(8) the Ex Post Facto Clause of the United States Constitution, (US Const., Ament, I & 9, cl 10.).

(9) the Ex Post Facto Clause of the Nevada Constitution, (Nev. Const., Art, I & 15).

(10) by being Void for Vagueness, the Due Process Clause of the United States Constitution, (US Const., Ament, V & XIV).

(11) by being Void for Vagueness, the Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(12) the prohibition against Cruel and Unusual Punishment contained in the United States Constitution, (US Const., Ament, VIII).

(13) the prohibition against Cruel or Unusual Punishment contained in the Nevada Constitution, (Nev. Const., Art, I & 8, cl. 5).

(14) the prohibition against Equal Protection as contained in the United States Constitution, (US Const., Amend. XIV, Section 1).

(15) the prohibition against Equal Protection as contained in the Nevada Constitution, (Nev. Const., Art. 1, Section 2).

(18) the prohibition against Interstate Commerce as contained in the United States Constitution, (US Const., Art. 1, Section 8, Clause 3).

(19) the prohibition against Interstate Commerce as contained in the Nevada Constitution, (Nev. Const., Art. 10, Section 2).

(20) Render a declaration of whether the Board of Parole Commissioners, the Chief of the Division of Parole and Probation, the Division of Parole and Probation, the Chief of the Department of Public Safety, and the Department of Public Safety have violated the Policy and

1 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Travel in
2 Division Directive 6.3.116, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.
3 (21) Render a declaration of whether the Board of Parole Commissioners, the Chief of
4 the Division of Parole and Probation, the Division of Parole and Probation, the Chief of the
5 Department of Public Safety, and the Department of Public Safety have violated the Policy and
6 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Ethics in
7 Division Directive 4.2.009C, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.
8 (22) Render a declaration of whether the Board of Parole Commissioners, the Chief of
9 the Division of Parole and Probation, the Division of Parole and Probation, the Chief of the
10 Department of Public Safety, and the Department of Public Safety have violated the Nevada
11 Revised Statutes as applied by Plaintiffs, by their actions and performance, pursuant to
12 Oppression under Color of Office as articulated in NRS 197.200.
13 (17) Reasonable costs and attorneys fees.
14 (18) Any further relief the Court deems appropriate.
15 **Affirmation: Pursuant to NRS 239B.030**
16 The undersigned does hereby affirm that the preceding document does not
17 contain the social security number of any person.
18 Respectfully dated this _____ day of February, 2012.
19
20 Affiant Patrick Stephen Davis
21 Defendant in Proper Person
Redacted
22 Reno, NV 89512
Redacted
23
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27
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**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 foregoing 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 of Declaratory Judgment complies with all applicable Nevada Rules of Appellate Procedure, and that every assertion in the Motion regarding matters of record are 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

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## TABLE OF EXHIBITS

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