March 1, 2011

Honorable Board of Parole Commissioners
1677 Old Hot Springs Road, Suite A
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RE: Lifetime Supervision: a Civil Penalty

Honorable Board Members:

A number of issues concerning Lifetime Supervision were presented during a recent open public meeting of the Board of Parole Commissioners. This meeting of the Board took place in your offices in Carson City on January 20, 2011, starting at 1:00 pm. I would like to address these issues and present many facts to the Board, while also hoping that I will be allowed to present these facts at a future open public meeting.

In 1995, in SB 192, the Legislature of the State of Nevada introduced the special sentence of Lifetime Supervision. This special sentence was intended to be a civil penalty, not a criminal penalty, due to the constitutional issues of double jeopardy. This is clearly defined by the Legislature to be a civil penalty, and has been formally documented as such by the Nevada Supreme Court in Palmer v. State.

The intent of the Legislature was to keep a current record of the whereabouts of recently convicted and released sex offenders, due to the "*fact*" that "*if a sex crime is committed, we will find the perpetrator within this group*". That is how law enforcement presented their "*facts*" to the Legislature at that time.

We have documented evidence that this is an outright misrepresentation. Our facts come from the Department of Justice, the Federal Bureau of Investigation, and various States that keep their own recidivism statistics. We also have various studies instigated by law enforcement that reach the same conclusion. The true facts state that those sexual offenders placed on Lifetime Supervision have an average rate of documented recidivism in the 1% range. This is also true in Northern Nevada as documented by the 2 local therapists and the sex offender therapy groups.

The National average for all repeat sex offenses and all offenders, not just those on Lifetime Supervision, is higher, but still at a very low rate of recidivism. It ranges in the 5% range, with documented results that drop that rate with the use of therapy. Another compelling statistic was how the rate dropped after being on supervision for 3 years and then again after 5 years. No other time limit shows this large differential drop in recidivism and after 5 years the rate flattens out. The studies take into account the support of offender's families, friends, and various other factors. The Board should look at all of these statistics to learn the true facts of the recidivism rates.

By taking all of this information into account, the true facts of recidivism state that 94 to 95% of *all new sex offenses are committed by a new offender*, **not a repeat one**. And this rate is in the 98 to 99% range that a person on Lifetime Supervision **will not** have committed the new crime. This is by far the lowest rate of recidivism for any offender of any crime in the country.

The intent of the Lifetime Supervision law was to keep law enforcement informed of the residence and whereabouts of recently released sex offenders and to have a way to verify that information monthly. This is documented in the minutes of the meetings on SB 192, and all of the minutes of all of the meetings in relation to NRS 176.0931, and NRS 213.1243 since that time. We have copies of all of these minutes, from any legislative committee that addressed the issue since 1995. The Registration law passed in 1995 requires a yearly verification of residence and employment. The Lifetime Supervision law gives law enforcement the ability to have monthly verification of residence, employment and vehicle usage. This verification was to be performed by the Division of Parole and Probation, and was to be administered by the Board of Parole Commissioners. No other conditions were formally written into law at that time.

This is further documented in the original language of the law with no mandatory conditions presented and the following 2 changes to the original language of NRS 213.1243 since 1995:

This section was further amended by section 5 of Senate Bill No. 354 (2007), ch. 418, Stats. 2007, at p. 1918, to provide certain conditions on where a sex offender may reside if the sex offender is subject to lifetime supervision. The sex offender may reside at a location only: (1) if the residence is approved by the parole and probation officer of the person; (2) if the facility houses more than three persons who have been released from prison, the facility is a facility for transitional living for released offenders that is licensed pursuant to chapter 449 of NRS; and (3) if the person keeps the parole and probation officer informed of his current address. The State Board of Parole Commissioners may choose not to impose one of those conditions if it finds that extraordinary circumstances exist and states those circumstances in writing.

This section was further amended by section 2 of Assembly Bill No. 325 (2009), ch. 300, Stats. 2009, at p. 1299, to require as a condition of lifetime supervision that the sex offender not have contact or communicate with a victim of the sexual offense or witness who testified against the sex offender or solicit another person to engage in such contact or communication on behalf of the sex offender, unless approved by the Chief Parole and Probation Officer or his designee and a written agreement is entered into and signed.

No other changes, conditions or requirements are listed, which is consistent with the intent of the Legislature in relation to Lifetime Supervision being a civil penalty. There are many instances in the Nevada Revised Statutes of mandatory conditions for parole or probation, and the ability to modify, change, and add conditions to those offenders on parole or probation only. There are none for Lifetime Supervision.

Lifetime Supervision is not a form of parole, except for the **limited** applicability of:

NRS 213.1243 Release of sex offender: Program of lifetime supervision; penalty.

2. Lifetime supervision shall be deemed a form of parole for:

(a) The **limited** purposes of the applicability of the provisions of NRS 213.1076, subsection 9 of NRS 213.1095, NRS 213.1096 and subsection 2 of NRS 213.110; and
(b) The purposes of the Interstate Compact for Adult Offender Supervision ratified, enacted and entered into by the State of Nevada pursuant to NRS 213.215.

Lifetime Supervision is not a form of parole as defined by the Nevada Supreme Court in Palmer v. State. It is different. It is not a form of probation, as the special sentence cannot commence until after you serve your original sentence, suspended sentence, or any term of parole, probation or residential confinement. It is defined as follows:

NRS 176.0931 Special sentence for sex offenders; petition for release from lifetime supervision.
1. If a defendant is convicted of a sexual offense, the court shall include in sentencing, in addition to any other penalties provided by law, a special sentence of lifetime supervision.
2. The special sentence of lifetime supervision commences after any period of probation or any term of imprisonment and any period of release on parole.

We believe that this erroneous *interpretation* of "*parole*" for Lifetime Supervision has been in large part driven by the Division of Parole and Probation. The Division has placed the Board in a position the Board should not be in. By instigating this form of "*parole*" for those on Lifetime Supervision, and by having the Board approve it, they have effectively tried to absolve themselves of the responsibility that the enforcement of these illegal actions entail. They can and often do say, "*We are only enforcing the conditions the Board has placed upon the Offender*". With many recent court rulings concerning issues such as these, the Division is still as liable as the Board is for the *misinterpretation* of the Legislative intent of the Lifetime Supervision Law.

The intent of the Legislature was to provide law enforcement with a non-punitive tool to assist them in solving crimes. It was designed to effectively track and verify the residence of a recently released offender so that law enforcement would know where they are. The intent was to place as few conditions on the offender as needed, to regulate their civil penalty, so as not to place it in the realm of double jeopardy.

Since this is a civil penalty, and effectively starts after any period of incarceration, parole, probation, suspended sentence or residential confinement, the offender is not in "*constructive custody*". It should not reflect a restraint of liberty of the offender's rights, as they are only serving a civil sentence, meant to be non-punitive in nature. Any restraint of liberty is punitive in nature.

The Board of Parole Commissioners in their current *interpretation* of the statute, are making it punitive. They are also applying a criminal set of mandatory conditions, through the use of NRS 213.1245. This mandatory set of conditions only apply to someone under Legislative Grace, on parole, as the law is written, not someone under the special sentence of Lifetime Supervision. The enforcement of this inappropriate *interpretation* of the law and mandatory conditions of parole were described on the record during the meeting on January 20, 2011. This effectively places this statute in violation of the double jeopardy clause of the Nevada and United States Constitution.

The Nevada Supreme Court has declared Lifetime Supervision to be punitive in nature as applied by the Board of Parole Commissioners and the Division of Parole and

Probation in Palmer v. State. In the intervening years since this ruling in 2002, the Board of Parole Commissioners and the Division of Parole and Probation have made it even more punitive by the establishment of 20 conditions, most of which have a further restraint of liberty. As of this date, 3 other State Supreme Courts have declared Lifetime Supervision, or Community Supervision for Life, to be punitive in nature, with the illegal placement of conditions upon an offender who is under a civil penalty.

There are no current mandated conditions for Lifetime Supervision per the Nevada Revised Statutes or the Nevada Administrative Code, except for the residency requirement and contact with a victim. If the Board chooses not to address this issue, there is a high probability the law will be challenged as unconstitutional. We believe one reason that it is unconstitutional is that it has deviated so far from the original Legislative intent. We are currently starting to work with the Senate and Assembly Judiciary Committees of the Nevada Legislature in response to this. We will be supplying them with copies of all correspondence with the Board and the Division. We will make them aware of the statistics relating to recidivism of offenders and many of the various studies that have been conducted to help educate them to the true facts of the issues we are presenting. We will offer proof of the restraint of liberty that has been enforced on offenders during the intervening years. And we will state our case, and our seriousness about bringing a lawsuit for the illegal violation of double jeopardy.

In 1995, the Nevada Legislature mandated in NRS 213.1243, that "the Board of Parole Commissioners **shall** establish by regulation a program of lifetime supervision". We believe that this was never done as mandated, and the only regulation that addresses any issue of Lifetime Supervision has been NAC 213.290. The constitutional validity of this regulation has never been reviewed as required per NRS 233B.050, Section 1, subsection (e) as specified at least once every 10 years. This regulation deals almost exclusively with the timelines that the various agencies in the State of Nevada have to meet in order to place an offender under Lifetime Supervision. We intend to ask the Legislature if this fits their mandate for a clear, comprehensive and definitive program by regulation of Lifetime Supervision.

The Board of Parole Commissioners has violated the rights of due process in relation to the review of the offender in hearings related to NAC 213.290 and their placement under these mandatory 20 conditions. Since the placement of conditions is a furtherance of the court sentence, mandatory requirement of an offender's presence should be paramount. A decision by the Nevada Supreme Court in Johnson v. State declaring that the conditions will be placed upon an offender by the Board at a later date would seem to confirm that the presence of an offender and the granting of all "court rights" would be required to satisfy due process. In recent Tennessee Supreme Court rulings regarding this issue, they affirmed that an offender has a due process right, as they are not under constructive custody, and any restraint of liberty should be approached cautiously and with all facts in hand. The condition needs to have a relation to the crime, in order for the application of one to be enforced. This is becoming a common ruling across the country in State Supreme Court decisions. We believe that the Nevada Supreme Court would agree in these rulings as one of the basic premises for these decisions is Palmer v. State.

At this time, the Board could effectively counter these arguments by relaxing and repealing the mandatory conditions they place all Lifetime Supervision offenders under. By allowing the full use of due process in the Lifetime Supervision hearings. By requiring the presence of the offender and allowing them to speak on their behalf. By allowing an offender discovery and the ability to rebut reports of progress supplied by the Division of Parole and Probation. By allowing an offender to present their side of issues, to call witnesses and provide appropriate letters of recommendations. By placing an offender on a formal condition only as it applies to their crime; and after a careful, thorough and documented review of facts in order to restrain their liberty for the furtherance of public safety reasons. A number of offenders on Lifetime Supervision are a Tier Level 1, the least likely to re-offend as determined by the use psychological tests. These tests have been ordered by the Nevada Legislature, and yet no credence is given to their ratings in regards to conditions placed on Offenders.

In order for the Board of Parole Commissioners to effectively carry out this civil sentence and not place an offender in the realm of double jeopardy, the most minimum of conditions should be placed and enforced on each offender. The Board should carefully look at the circumstances of the crime, the progress report of the offender supplied by Parole and Probation, and whether or not they have truly violated any conditions while on either parole or probation. They should look at the effect of therapy with a report from the therapist, and whether they have been honorably discharged from any previous sentence, parole, or probation. They should consider their family situation, and if they are effectively re-integrating into society. They should consider their employment history and whether they continue to be gainfully employed. They should only impose a condition as it relates to the crime, and only after careful consideration of the facts. Any restraint of liberty should be carefully avoided, and any condition that does so should be fully documented with facts to explain the restraint. Any imposed condition should have a graduated application, requiring less supervision and restraint as an offender comes closer to the end of their sentence, or with a further review of their status on a specified timeline. Lifetime Supervision offenders can ask for release of their special sentence at 10 years and the Board shall release an offender if all conditions are met.

I am supplying the Board with a copy of the applicable NRS statutes, NRS 176.0931 and NRS 213.1243, highlighted to document the facts. I am supplying a copy of Palmer v. State, also with highlights to bring your attention to the applicable legal opinions of the Nevada Supreme Court. And the Board should seriously consider the ruling in Jamgochian v. State of Tennessee, as it relates to due process. The Board should look at all of the rulings issued across the country in any review that they may undertake. There are many other decisions, rulings, studies and statistics that reflect all of this information. We hope that the Board will decide to initiate constructive discussions with all appropriate agencies in attendance. We are willing to supply information, statistics and court rulings with the hope that the Board will obtain a better understanding of the law in relation to Lifetime Supervision. We know that all of the information that we present is true in all respects. It is from the most reputable sources that we could find. Government agencies that are currently responsible for tracking these crimes and statistics. We have made an informative decision to represent these facts as they are, and not use any form of *interpretation* to alter the information presented.

I would find it a privilege to discuss this issue further with the Board and to present all of the information that I have brought to your attention. I have all of the minutes of all of the Legislative Committees, and I have the Legislative summary of SB 192. I am in possession of most of the current Westlaw opinions of applicable Lifetime Supervision rulings across the country. I have the statistics from the Department of Justice, The Federal Bureau of Investigation, and many States that prove the recidivism rates. I have copies of the studies that show sex offender rates of recidivism and how therapy is the best choice for reducing the already low rate of recidivism. I have letters from our local therapists that document these rates in Northern Nevada. I would hazard an informative guess that the rates would remain consistent from Southern Nevada, or other areas of the State.

I appreciate your time in reviewing these serious issues that I am bringing to your attention. Thank you for your time and effort in regards to these concerns.

Sincerely,

Alexandra Davis
President
Nevadans for Civil Liberties