Cynthia A. Davis
Redacted
Sparks, NV 89431
(775) Redacted
Plaintiff in Proper Person

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PATRICK STEPHEN DAVIS Plaintiff, vs. STATE OF NEVADA ET AL; Defendants	Case No. 3:13-CV-00559-MMD-WGC **MOTION FOR PERMISSIVE JOINDER AND MOTION TO AMEND**

COMES NOW, Cynthia A. Davis, (hereinafter known as Plaintiff 2), in proper person and on her own behalf, and respectfully requests the Court to add her as an additional Plaintiff in the above entitled action. Plaintiff 2 seeks redress for her claims for relief against Defendants, and each of them, individually and in their official capacities, jointly and severally, based upon knowledge, information, and reasonable belief derived therefrom. This Motion for Permissive Joinder and Motion to Amend is based on Fed. R. Civ. P. 15; Fed. R. Civ. P. 19; Fed. R. Civ. P. 20; Fed. R. Civ. P. 21; the attached Memorandum of Points and Authorities and all other papers and pleadings filed therein.

JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the federal Constitutional violations that will be alleged in an amended Complaint that will be filed by Plaintiffs if this Motion for Permissive Joinder and Motion to Amend is granted. Jurisdiction is granted to this Court pursuant to 28 U.S.C. § 1331 and 1343. Plaintiff 2s' causes of action arise under 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; 42 U.S.C. § 1988; and are due to the deprivation by Defendants of Plaintiff 2s' rights, privileges and immunities secured to her under the First; Fourth; Fifth; and Fourteenth Amendments to the United States Constitution.

This Court has supplemental jurisdiction over Plaintiff 2s' causes of action arising under Nevada state law pursuant to 28 U.S.C. § 1367. This court has jurisdiction to issue injunctive and declaratory relief pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

Venue lies in the Northern Division of the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1391(a)(1) and 28 U.S.C. § 1391(b)(2). The causes of action alleged herein arise from factual allegations occurring in this judicial district. One or more of the Defendants is a political subdivision of the State of Nevada, and the underlying acts, omissions, events, injuries and related facts upon which the present action is based occurred in Washoe County, Nevada.

On information and belief, it is alleged that each of the named Defendants reside and work in this judicial district, and Plaintiff 2 resides in this judicial district.

NATURE OF THE ACTION

As will be alleged with greater clarity in an amended Complaint to follow this Court's decision regarding the Motion to Dismiss and this Motion for Permissive Joinder and Motion to Amend, this will be an action for monetary damages; declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1981, 1983, 1985, 1986 and 1988; violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution; violations of the Constitution of the State of Nevada; and violations of the laws of the State of Nevada, against the named Defendants. These Defendants include the Chairman of the Board of Parole Commissioners; the Director and Officers of the Nevada Department of Public Safety; the Chief and Officers of the Nevada Division of Parole and Probation; in their individual and official capacities, and is also a complaint against the State of Nevada; the Nevada Attorney General; the Nevada Department of Public Safety; and the Nevada Division of Parole and Probation.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff 2 respectfully requests to join this action based on various causes of action that are similar to or are based on the same or similar arguments and sets of circumstances as Plaintiff 1 in the above entitled action. In the Defendants' Motion to Dismiss, on page 13, lines 16-28, the Defendants argue that Plaintiff 1 does not have standing to bring this suit against them as the actions being contested were actually performed against Plaintiff 2. In order to protect her constitutional rights and privileges and in the interests of judicial economy, Plaintiff 2 seeks to join the above entitled action against Defendants so that she may be heard and a complete disposition made concerning the serious allegations of constitutional violations against the Defendants.

II. BACKGROUND

Plaintiff 2 brings this action against Defendants based on various statutes, directives, Policy and Procedure, custom and usage, and occurrences as applied to her as the spouse of an offender serving the **civil** sentence of Lifetime Supervision. Plaintiff 2 has never been convicted of a crime, and retains all the rights and privileges due her as a citizen of the United States and of the State of Nevada. Plaintiff 2 alleges violations of the First, Fourth, Fifth, and Fourteenth Amendments of the US Constitution, and includes the same violations under articles and sections of the Nevada Constitution. Plaintiff further claims violations of 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 and state and federal laws. Plaintiff seeks monetary damages including compensatory, punitive and exemplary damages in an amount of at least $100,000.00 per applicable claim under 42 U.S.C. 1983. Plaintiff further seeks declaratory and injunctive relief under 42 U.S.C. 1983 per claim for relief, and under 28 U.S.C. §§ 1331 and 2201 for other claims of relief. In addition, Plaintiff prays for relief based on such other and further relief as the Court deems just and proper, in order to serve the interests of judicial economy.

Defendants have moved to dismiss the original complaint filed by Plaintiff 1 on various grounds including statute of limitations issues, sovereign and qualified immunity; failure to state a justiciable claim, and for failure to properly join a party to the action. The Motion to Dismiss is pending before this Court.

III. ARGUMENT

The United States Supreme Court has championed the cause of litigants who file their own lawsuits. It is well settled law that the allegations of such a [pro se] complaint, "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers, Haines v. Kerner, 404 U.S. 519,520 (1972). See also Maclin v. Paulson, 627 F.2d 83, 86 (CA7 1980); French v. Heyne, 547 F.2d 994,996 (CA7 1976).

Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Haines*, supra, at 520, 521. quoting Conley v. Gibson, 355 U.S. 41, 45, 46, (1957). And, of course, the allegations of a complaint are generally taken as true for purposes of a motion to dismiss. Cruz v. Beto, 405 U.S. 319,322 (1972).

Rule 8(f) provides that 'pleadings shall be so construed as to do substantial justice.' We frequently have stated that *pro se* pleadings are to be given a liberal construction. Baldwin County Welcome Center v. Brown, 466 U.S. 147,104 S. Ct. 1723, (1984).

In Rabin v. Dep't of State, 980 F. Supp. 116, No. 95-4310, (U.S. Dist. Ct. E.D. NY, 1997), the court noted that *pro se* plaintiffs should be afforded "special solicitude."

1. Under Federal Rule of Civil Procedure 20; Permissive Joinder is applicable to Plaintiff 2 in the instant case.

Plaintiff 2 asserts that permissive joinder is applicable to her as the Courts have ruled that persons "may be joined in one action if any right to relief is asserted . . .with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(2). "The first prong, the 'same transaction' requirement, refers to similarity in the factual background of a claim." Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). The "same transaction" requirement is generally evaluated on a case-by case basis. Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974).

As a preliminary matter, the purpose of Rule 20(a)(2) is to promote judicial efficiency by allowing a plaintiff to sue multiple defendants in one case regarding a single transaction or occurrence. See 7 Charles A. Wright et al., *Fed. Prac. & Proc. § 1651* (3d ed. 2001) (discussing history of Rule 20 and noting that it codified common-law rule that defendants "could be sued jointly or severally, at plaintiff's option" (emphasis added)).

Whenever feasible, the persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made.

2. Permissive Joinder promotes judicial economy and trial convenience.

Plaintiff 2s' motion seeks permissive joinder of parties and is governed by Federal Rule of Civil Procedure 20(a), which provides in pertinent part that:

> "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."

"The purpose of [Rule 20(a)] is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1332 (8th Cir. 1974); see also Bridgeport Music, Inc. v. 11C Music, 202 F.R.D.

229, 231(M.D. Tenn. 2001). This purpose is in accord with the underlying principle of the Federal Rules of Civil Procedure to permit "the broadest possible scope of action consistent with fairness to the parties." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966).

The rule imposes two specific requisites to the joinder of parties:

(1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence, or series of transactions or occurrences; and

(2) some question of law or fact common to all the parties must arise in the action.

Mosley, 497 F.2d at 1333.

The common question test "does not require that all questions of law and fact raised by the dispute be common. Yet, neither does it establish any qualitative or quantitative test of commonality." *Id*. at 1334. This test is usually easy to satisfy. *Bridgeport Music*, 202 F.R.D. at 231 (citing 4 James Wm. Moore et al., *Moore's Federal Practice* ¶ 20.04 (3d ed. 1999)).

The transactional test "requires that, to be joined, parties must assert rights, or have rights asserted against them, that arise from related activities – a transaction or an occurrence or a series thereof." *Bridgeport Music*, 202 F.R.D. at 231 (citations omitted). "The words 'transaction or occurrence' are given a broad and liberal interpretation in order to avoid a multiplicity of suits." Lasa Per L'Industria Del Marmo Societa Per Azioni v.Alexander, 414 F.2d 143, 147 (6th Cir. 1969). The test is not easily applied and "generally requires a case by case analysis." *Bridgeport Music*, 202 F.R.D. at 232.

3. Permissive Joinder is construed liberally and is strongly encouraged.

That the claims of the Plaintiff 2 arise from the same or similar sets of facts as the claims of Plaintiff 1, namely, the Defendants failure to comply with the provisions of the United States and Nevada Constitutions—does not make them "identical" claims. The mere fact that Defendants argue that their Policy and Procedure overrides the conditions as set by the Board of Parole Commissioners on Plaintiff 1, and overrides the United States and Nevada Constitutions on Plaintiff 1 and all other Plaintiffs to be joined certainly bears strict scrutiny by this Court. The claims do, however, provide sufficient grounds for the joinder of these claims in a single lawsuit. See Fed. R. Civ. P. 20(a) ("All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same

transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action" (emphasis added)); see also Inman v. Commissioner, 871 F. Supp. 1275, 1276 (E.D. CA. 1994) (citing text).

Indeed, "joinder of claims, parties, and remedies is strongly encouraged" in order to entertain "the broadest possible scope of action consistent with fairness to the parties." United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); see also League to Save Lake Tahoe v. Tahoe Regional Planning Agency; 558 F2d 914, 917 (9th Cir. 1977) ("permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits").

More fundamentally, even if the several claims are identical, and even if Plaintiff 2s' claims were jurisdictionally barred that would still not be grounds to dismiss her viable federal claims. As Rule 20 expressly provides, "Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more Defendants according to their respective liabilities." *Id*.

4. Permissive Joinder does not cause prejudice or delay.

Whether to allow permissive joinder is within the sound discretion of the district court. Even if a plaintiff meets the requirements for permissive joinder under Rule 20(a), courts have broad discretion to refuse joinder or to sever a case in order "to protect a party against embarrassment, delay, expense, or other prejudice . . . ." Fed. R. Civ. P. 20(b). Coleman v. Quaker Oats, 232 F.3d 1271, 1296 (9th Cir. 2000) (explaining that permissive joinder must "comport with the principles of fundamental fairness").

Under Federal Rule of Civil Procedure 20, joinder is proper if (1) the plaintiffs asserted a right to relief arising out of the same transaction and occurrence and (2) some question of law or fact common to all the plaintiffs will arise in the action. See Fed.R.Civ.P. 20(a); Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir.1980). Even once these requirements are met, a district court must examine whether permissive joinder would "comport with the principles of fundamental fairness" or would result in prejudice to either side. *Desert Bank*, 623 F.2d at 1375. Under Rule 20(b), the district court may sever the trial in order to avoid prejudice.

In the instant case, as Plaintiff 1 and Defendants are awaiting a decision on the Defendants Motion to Dismiss, and no discovery has been granted due to a Motion to Stay

Discovery, no embarrassment, delay, expense, or other prejudice is possible or applicable at this early stage in the proceedings. If permissive joinder is granted by this Court to Plaintiff 2 at this time, and at this early stage in the proceedings, no harm to Defendants is caused by the joinder.

5. Plaintiff is timely with respect to Permissive Joinder.

Plaintiff 2 is well within the timelines delineated to add parties as set by the Rule 26(f) conference and discovery meeting, and joinder of the parties is well before the cutoff dates as notated in the Motion for Discovery Plan and Scheduling Order with Special Scheduling Requested, filed concurrently with this motion, and which states as follows:

3. Amending the Pleadings and Adding Parties. The parties will have until at least Wednesday, April 16, 2014, 90 days before the discovery cut-off date, to file any motions to amend the pleadings or to add parties. This date exceeds the outside limit presumptively set by LR 26-1(e)(2) by sixty days.

6. Plaintiff has standing with respect to Permissive Joinder.

Plaintiff 2 alleges violations of her constitutional rights under the Fourth Amendment pursuant to the United States Constitution; and Article 1, Section 18 of the Nevada Constitution. Plaintiff 2s' allegations fall within the statutory timelines for tort actions in Nevada. The State has admitted that the Defendants searched her cell phone without her permission or consent, without a warrant, and without probable cause that a crime had occurred or was about to occur. Plaintiff 2 has had previous issues with the Nevada Division of Parole and Probation and their Officers in relation to illegal searches and seizures among other issues, thereby setting the standard for applicable previous behavior and knowledge of the issue by the Officers. Exhibits of letters documenting this previous behavior and her concerns as directed to the Nevada Division of Parole and Probation and the Nevada Board of Parole Commissioners will be provided to the Court in the amended complaint if this Motion is granted.

Plaintiff has met all elements of standing. To satisfy Article III's standing requirements, a plaintiff must show "injury in fact, causation, and redressability." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Continuous and pervasive acts resulting in reasonable fear is enough for injury in fact. Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 184-185 (2000).

Directive 6.2.109 as applied, places Plaintiff 2 in imminent invasion of her legally protected Fourth Amendment right, which is concrete and particularized, the right to be free from

unreasonable and suspicionless searches. The action can be fairly traced to the Defendants as it is the Policy and Procedure that they operate under to supervise offenders placed under their authority, which they also apply to anyone and any item in a common area of the residence, and which illegally supersedes the authority of the Nevada Board of Parole Commissioners.

In challenges to statutes that threaten fundamental rights, the standing requirement does not require a litigant to be prosecuted or actually threatened with prosecution before he may challenge the statute. Virginia v. American Booksellers Ass'n, 484 U.S. at 389-90, (1988); Doe v. Bolton, 410 U.S. 179, 188 (1973). Rather, a litigant need only show a "reasonable threat of prosecution for conduct allegedly protected by the Constitution." Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 625 (1986).

The State has correctly and succinctly argued that the United States Supreme Court has established that there are certain minimal requirements that must be met before a party has standing to bring an action before the court.

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is:

(a) concrete and particularized, see Allen v. Wright, 468 U.S. 737,765, 104 S. Ct. 3315, 3327 (1984); Warth v. Seldin, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–741, n. 16, 92 S. Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972); and

(b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’ ” *Whitmore, supra,* 495 U.S., at 155, 110 S. Ct., at 1723 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)).

Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41–42, 96 S. Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Id.*, at 38, 43, 96 S. Ct., at 1924, 1926. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

An injury in fact occurred as described above and in the original complaint in Plaintiff's Seventh Cause of Action as it relates to an illegal search of his wife's cell phone, "for the express purpose of checking to see if a password was present on the phone," as the Defendants contend. Complaint (ECF No.1), p. 82, lines 8-10 and 14-15, and some. The State argues that Plaintiff 1 has not and cannot assert that his own rights have been violated where the cell phone allegedly searched without permission belongs to another.

Plaintiff 1 alleged that the Defendants claimed that he was in constructive possession of this cell phone when it was searched without his or his wife's permission. The State now disputes the assertion of constructive possession, and claims that he has no legal standing in this instance, and is asking the Court to dismiss this claim. However, as the aggrieved party, Plaintiff 2 does have uncontested standing in the issue of the illegal search, and did not grant permission to the Officers for the illegal search, nor was she asked to grant consent as Policy and Procedure of the Nevada Division of Parole and Probation dictates.

Plaintiff 1 has acknowledged that his conditions of Lifetime Supervision require that he submit to a "search of his person, property under [his] control, or place of residence, by a Parole Officer, at any time, of the day or night without a warrant, upon reasonable cause as ascertained by the Parole Officer." Complaint (ECF No.1), p. 84, lines 8-11. Plaintiff 1 argues that these conditions as imposed and applied are constitutionally illegal, and imposed without due process, which is one part of his actionable causes

The State argues that Plaintiff 1's assertions on behalf of his wife and daughter, *see e.g. id*. at 84-85, are not proper where he has expressly disavowed their desire to participate as parties in these proceedings. *Id.* at 25, paragraph 134. Plaintiff 2 argues that the context of the wording was misapplied by the State, as it was always her intention to file a lawsuit in this matter. After researching the federal rules of civil procedure, and understanding how the case would probably have been joined in actual fact by the Court, Plaintiff 2 requests permissive joinder in the interests of judicial economy and all stated arguments by her, which includes arguments related to the Federal Rules of Civil Procedure.

Defendants argue that the Seventh Cause of Action should be dismissed on this basis as they argue that Plaintiff 1 lacks standing to complain about injuries suffered only by others, Singleton v. Wulff, 428 U.S. 106, 113, 96 S. Ct. 2868, 2874 (1976) (federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis

of the rights of third persons not parties to the litigation) Barrows v. Jackson, 346 U.S. 249, 255, 73 S. Ct. 1031, 1034 (1953); see also Flast v. Cohen, 392 U.S. 83, 99 n. 20, 88 S. Ct. 1942, 1952 (1968); McGowan v. Maryland, 366 U.S. 420, 429, 81 S. Ct. 1101, 1106, 6 L.Ed.2d 393 (1961).

Plaintiff 2 and the other parties who will be filing Motions for Permissive Joinder argue that The Federal Rules of Civil Procedure, Rule 21: Misjoinder and Nonjoinder of Parties states:

"Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party".

7. Plaintiff 2s' Claims are within the Statute of Limitations

The State has correctly argued that the statute of limitations in a § 1983 suit is that provided by the State for personal injury torts. Owens v. Okure, 488 U.S. 235, 249-250, 109 S. Ct. 573 (1989); see also Wallace v. Kato, 549 U.S. 384, 387, 197 S. Ct 1091 (2006); Douglas v. Noell, 567 F.3d 1103, 1109 (Ninth Cir. 2011). The statute of limitations for bringing a personal injury tort action in Nevada is two years. Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam_ (citing NRS 11.190(4)(c), (e)).

In most instances, the two year date is set from the time of the event, however, in certain circumstances, the 2 year date can actually start much later that the actual instance in question. The timeline for a person who has been falsely arrested "begins to run at the time the claimant becomes detained pursuant to legal process." Wallace v. Kato 549 U.S. 384, 397 (2007). "A false imprisonment ends once the victim becomes held pursuant to [legal process] – when . . . he is …arraigned on charges." Id.

"[O]n the subject of the statute of limitations, [w]hat a complaint must plead is enough to show that the claim for relief is plausible. Complaints need not anticipate defenses and attempt to defeat them. The period of limitations is an affirmative defense. The Courts have held many times that, because complaints need not anticipate defenses, Rule 12(b)(6) is not designed for motions under Rule 8(c)(1)." Richards v. Mitcheff, 696 F.3d 635, 637-38 (7th Cir. 2012) (internal citations omitted); see also United States Gypsum Co. v. Indiana Gas Co.,350 F.3d 623 (7th Cir. 2003).

The issues presented in the instant case relate to actions performed by the Defendants on October 31, 2011, October 31, 2012, October 31, 2013, and one of the illegal searches performed on August 14, 2013, amongst other dates to be identified for the Court in the amended complaint.

The present action was filed on October 4, 2013, and all causes of actions relating to Plaintiff 2 fall well within the statutes of limitations for tort actions in Nevada, and therefore permissive joinder in the instant case is applicable.

8. Qualified Immunity is not applicable for Defendants at this stage of Proceedings.

The State argues that the Defendants retain qualified immunity in regards to this illegal search and this Cause of Action should be dismissed. The existence of an affirmative defense will not support a rule 12(b)(6) motion to dismiss for failure to state a claim. Quiller v. Barclays, 727 F. 2d 1067, 1069, (11th Circuit 1984).

Even if the State is correct that qualified immunity exists in the instant case, and the Court agrees, the qualified immunity would only apply to the § 1983 action for monetary damages, not the declaratory and injunctive relief that Plaintiff 2 is also seeking from the Court.

The Defendants have already admitted that they searched the cell phone of Plaintiff 2, a fact that is now not contested. In order to make a claim for qualified immunity, the Defendants have to admit that the situation actually happened; and then the Court must determine whether the action was constitutionally legal, and whether qualified immunity would apply to that action.

In considering a defendant's motion to dismiss based on qualified immunity, the district court must examine the complaint to determine "whether under the most favorable version of the facts alleged, defendants' actions violate established law. Bennett v. Parker, 898 F 2d. 1530, (11th Circuit 1990). Public officials performing their duties are shielded from liability so long as their conduct does not breach "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In other words, police officers are entitled to qualified immunity unless "(1) the officers' conduct violates a federal statutory or constitutional right, and (2) the right was clearly established at the time of the conduct, such that (3) an objectively reasonable officer would have understood that the conduct violated that right." Knussman v. Maryland, 272 F.3d 625, 633 (4th Cir. 2001).

The State argues that in assessing whether an official is entitled to immunity is a two prong inquiry and Plaintiffs agree with this argument. Under the first prong, the Court asks whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001).

Under the second prong we examine whether the right was clearly established. Id. To be "clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. Anderson v. Creighton, 483 U.S. at 639, 107 S. Ct. 3034, (1987), (internal quotation marks omitted).

In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. ____, 131 S. Ct. 2074, 2083 (2011), quoting Malley v. Briggs, 475 U.S. 335, 341, (1986). The court may examine either prong first, considering the circumstances. Pearson v. Callahan, 555 U.S. at 236, 129 S. Ct. 808

A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right." *Creighton*, 483 U.S. at 640, 107 S. Ct. 3034; see also Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 1098 (1986).

The Constitution of the United States is the pre-eminent law of the land. The Fourth Amendment to the Constitution states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Nevada Constitution in Article 1, Section 18 is similar in respect to the Fourth Amendment of the United States Constitution and is stated as follows:

"ARTICLE. 1. - Declaration of Rights…Sec. 18. Unreasonable seizure and search; issuance of warrants. The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.

The Fourth Amendment grew out of American colonial opposition to British search and seizure practices, most notably the use of writs of assistance, which gave customs officials broad latitude to search houses, shops, cellars, warehouses, and other places for smuggled goods. The Honorable M. Blane Michael, Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth, 85 N.Y.U.-5-L. Rev. 905, 907-09 (2010); see generally William J. Cuddihy, The

Fourth Amendment: Origins and Original Meaning 602-1791 (2009).

James Otis, a lawyer who challenged the use of writs of assistance in a 1761 case, famously described the practice as "plac[ing] the liberty of every man in the hands of every petty officer" and sounded two main themes: (1) “the need to protect the privacy of the home (what he called the "fundamental . . Privilege of House),” Michael, supra, at 908, and (2) "the inevitability of abuse when government officials have the sort of unlimited discretion sanctioned by the writ," Id. at 909. The Supreme Court has described Otis's argument as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." Boyd v. United States, 116 U.S. 616, 625 (1886).

Today, a warrantless search is per se unreasonable under the Fourth Amendment, unless one of "a few specifically established and well-delineated exceptions" applies. Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)) (internal quotation marks omitted). One of those exceptions allows the police, when they make a lawful arrest, to search "the arrestee's person and the area within his immediate control." Id. at 339 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)) (internal quotation marks omitted).

Plaintiff 2 argues that the special sentence of Lifetime Supervision, a civil sentence placed upon her husband does not grant the authority to the Nevada Division of Parole and Probation and its Officers to supersede the United States and Nevada Constitutions as they apply to her. Even if she is in a common area of the residence, her person, papers, and effects shall not be violated, without a warrant and without consent.

In United States v. Musgrove, 2011 WL 4356521 (E.D.Wis. 2011) (Joseph, M.J.) the legal question the Court had to decide was: “When a computer is in screensaver mode, does a police officer’s touching a key or moving the mousepad in order to reveal the contents of the screen constitute a Fourth Amendment “search”?” The defendant in that case argued, among other things, that taking his computer out of screensaver mode to see the Facebook Wall was a “search” that required some sort of justification under the Fourth Amendment.

Musgrove was based on the fact that an Officer could search anything on a person that had been arrested. In the instant case, Plaintiff 2 was not arrested, ruling out that argument completely, and the Policy and Procedure of the Nevada Division of Parole and Probation does not authorize third party searches, or consentless searches of a third party’s property.

The ruling by the Court decided that a search in *Musgrove* was a close call because the officer did not actively open any files. A truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a "search" for Fourth Amendment purposes. Arizona v. Hicks, 480 U.S. 321, 328 (1987). However, the Court further decided in *Musgrove* that this was not such a case. By touching a key or moving the mouse, the officer put into view the Facebook wall, which was not previously in view. Though a close call, the Court concludes that this was a search, however minimal, which required further authority, a warrant or consent. The government submits that the officer's manipulation of the computer was for the purpose of seizing the computer, not to conduct a preliminary search. However, intent is not generally relevant in assessing whether a search ensued. See, e.g., United States v. Mann, 592 F.3d 779, 784 (7th Cir.2010),(citing Platteville Area Apt. Ass'n v. City of Platteville, 179 F.3d 574, 580 (7th Cir.1999)). The Court ruled that the defendant's Facebook wall was to be suppressed due to an illegal search by the Officer.

In State v. Smith, 920 N.E.2d 949 (Ohio 2009), the Ohio Supreme Court distinguished cell phones from other "closed containers" that have been found searchable incident to an arrest and concluded that, because an individual has a high expectation of privacy in the contents of her cell phone, any search thereof must be conducted pursuant to a warrant, id. at 955. And most recently, in Smallwood v. State, __ So. 3d __, 2013 WL 1830961 (Fla. May 2, 2013), the Florida Supreme Court held that the police cannot routinely search the data within an arrestee's cell phone without a warrant, id. at *10. The court read Gant as prohibiting a search once an arrestee's cell phone has been removed from his person, which forecloses the ability to use the phone as a weapon or to destroy evidence contained therein. Id.

9. Federal Rule of Civil Procedure 15 applies in the instant case.

Generally, Federal Rule of Civil Procedure 15(a) liberally allows for amendments to pleadings. As no amendment has yet been filed in the instant case, due to Defendants Motion to Dismiss, the Court should allow permissive joinder to any party who has (1) a right to relief arising out of the same transaction and occurrence and (2) some question of law or fact common to the plaintiffs will arise in the action.

If Defendants are not granted their Motion to Dismiss, Plaintiff 1 has already requested of this Court the right to amend the original complaint in his Opposition to the Motion to Dismiss, and permissive joinder of parties at this time would be appropriate and applicable under this rule.

Under Rule 15(a), "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court . . . ; and leave shall be freely given when justice so requires."

Plaintiff 2 contends that she is filing the present motion before the Defendants have served their responsive pleadings. The Defendants have not yet filed answers to the original complaint as Defendants have filed a Motion to Dismiss, which is not considered a responsive pleading within the meaning of Rule 15(a). Young v. Track, Inc., 324 F.3d 409, 415 n.6 (6th Cir. 2003).

Rule 15(a) allows amendment of the original complaint without the leave of the Court. With respect to Rule 15(a), the courts are divided on the issue of whether, prior to service of a responsive pleading, a party may amend its pleading under Rule 15(a) to add or drop parties without first obtaining leave of court.

Some courts take the position that joining parties is governed by Rule 21, and that an amended pleading that changes the parties requires leave of court even though it is filed before a responsive pleading is served. See, e.g., Williams v. United States Postal Serv., 873 F.2d 1069, 1072 n.2 (7th Cir. 1989); United States ex rel. Tucker v. Thomas Howell Kiewit (USA) Inc., 149 F.R.D. 125, 126 (E.D. Va. 1993); International Bhd. of Teamsters v. AFL-CIO, 32 F.R.D. 441 (E.D. Mich. 1963).

Other courts and commentators, however, take the position that prior to service of a responsive pleading, parties may amend pleadings under Rule 15(a) to add or drop parties without leave of court. See, e.g., United States ex rel Precision Co. v. Koch Indus., Inc., 31 F.3d 1015, 1018-19 (10th Cir. 1994); Washington v. New York City Bd. of Estimate, 709 F.2d 792, 795 (2d Cir. 1983); McClellan v. Mississippi Power & Light Co., 526 F.2d 870, 872-73 (5th Cir. 1976), mod. in part on other grounds, 545 F.2d 919 (5th Cir. 1977); Matthews Metals Products, Inc. v. RBM Precision Metal Products, Inc., 186 F.R.D. 581, 583 (N.D. Cal. 1999); 3 James Wm. Moore et al., Moore's Federal Practice § 15.16[1] at 15-54 (3d ed. 2000).

Plaintiff 2 and all others known Plaintiffs who are also in the process of filing their Motions for Permissive Joinder and Motions to Amend at this time are not attempting to amend the original complaint without leave of the Court. All additional Plaintiffs in the instant action before this court are respectfully requesting this Court to grant them leave to join and amend the

original complaint upon their Motions to the Court at the same time to promote judicial economy.

Federal Rule of Civil Procedure 15(a)(2) provides that "[t]he court should freely give leave [to amend a complaint] when justice so requires". Fed. R. Civ. P. 15(a)(2). The district court has the discretion to decide whether to grant Plaintiff leave to amend. Swanson v. U.S. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996); Jordan v. County of Los Angeles, 669 F.2d 1311, 1324 (9th Cir.1982), vacated on other grounds, 459 U.S. 810 (1982). In its exercise of this discretion, the court applies Rule 15 to "facilitate [a] decision on the merits, rather than on the pleadings or technicalities." U.S. v. Webb, 655 F.2d 977, 979 (9th Cir. 1981). Furthermore, the court interprets the language for granting amendments under Rule 15 with "extreme liberality." Id.

When deciding whether to grant leave to amend, a court must consider: (1) whether the amendment was filed with undue delay; (2) whether the movant has requested the amendment in bad faith or as a dilatory tactic; (3) whether movant was allowed to make previous amendments which failed to correct deficiencies of the complaint; (4) whether the amendment will unduly prejudice the opposing party and; (5) whether the amendment is futile. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (citing Foman v. Davis, 371 US 178, 182 (1962)).

The five factors are not considered equally. Prejudice is the most important factor and is given the most weight. *Eminence*, 316 F.3d at 1052. Therefore, "[a]bsent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Id. See also Talwar v. Creative Labs, Inc., No. CV 05-3375, 2007 WL 1723609 (C.D. Cal. June 14, 2006) (finding the plaintiffs should be granted leave to amend because additional discovery would not unduly prejudice the defendant and the defendant did not make a strong enough showing of bad faith on the part of the plaintiffs or that the plaintiffs requested leave to amend as a dilatory tactic, despite the suspect timing of the filing).

The Ninth Circuit has also held that one of the five *Foman* factors alone is not sufficient to justify the denial of a request for leave to amend. The Ninth Circuit has found that undue delay alone "is insufficient to justify denying a motion to amend" and has "reversed the denial of a motion for leave to amend where the district court did not provide a contemporaneous specific

finding of prejudice to the opposing party, bad faith by the moving party, or futility of the amendment." Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999).

Courts give special consideration to pro se litigants requesting leave to amend a complaint. "Courts are particularly reluctant to deny leave to amend to pro se litigants." Flowers v. First Hawaiian Bank, 295 F.3d 966, 976 (9th Cir. 2002). In particular, "[u]nless it is absolutely clear that no amendment can cure the defect … a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action." Lucas v. Dept. of Corrections, 66 F.3d 245, 248 (9th Cir. 1995).

8. Federal Rule of Civil Procedure 19 applies to Plaintiff 2 in the instant case.

Plaintiff 2 argues that in the instant action, the Court should consider the effect of Rule 19 on her as she believes is applies to her. Plaintiff 2 argues that Rule 19 should require her to be joined as a party in the above entitled action before this Court.

The Federal Rules of Civil Procedure, Rule 19: Required Joinder of Parties states:

(a) PERSONS REQUIRED TO BE JOINED IF FEASIBLE.

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) *Joinder by Court Order.* If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) *Venue.* If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) WHEN JOINDER IS NOT FEASIBLE.

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) PLEADING THE REASONS FOR NONJOINDER.

When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) EXCEPTION FOR CLASS ACTIONS.

This rule is subject to Rule 23.

Plaintiff 2 argues that Clause (1) of Rule 19 stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or “hollow” rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter.

Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability. See Reed, supra, 55 Mich.L.Rev. at 330, 338; Note, supra, 65 Harv.L.Rev. at 1052–57; Developments in the Law, supra, 71 Harv.L.Rev. at 881–85.

Plaintiff 2 argues that if a person as described in subdivision (a)(1)(2) is amenable to service of process and his or her joinder would not deprive the court of jurisdiction in the sense of competence over the action, then they should be joined as a party; and if he or she has not been joined, the court should order either of them to be brought into the action. If a party joined has a valid objection to the venue and chooses to assert it, he or she will be dismissed from the action. Plaintiff 2 does not raise an objection to venue and is not asserting one, and does not wish to be dismissed from the instant action before this Court.

10. Federal Rule of Civil Procedure 21 applies to Plaintiff 2 in the instant case.

Plaintiff 2 argues that in the instant action, the Court should not grant the Motion to Dismiss on the grounds raised by the Defendants of failure to properly join a party to the action.

The Federal Rules of Civil Procedure, Rule 21: Misjoinder and Nonjoinder of Parties states:

"Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party".

A person may be added as a party at any stage of the action on motion or on the court's initiative (see Rule 21); and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his or her absence, may be made as late as the trial on the merits (see Rule 12(h)(2), as amended; cf. Rule 12(b)(7), as amended).

However, when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)), making the motion itself can properly be counted against him as a reason for denying the motion.

A joinder question should be decided with reasonable promptness, but decision may properly be deferred if adequate information is not available at the time. Thus the relationship of an absent person to the action, and the practical effects of an adjudication upon him and others, may not be sufficiently revealed at the pleading stage; in such a case it would be appropriate to defer decision until the action was further advanced. Cf. Rule 12(d).

IV. CONCLUSION

For the reasons as set forth above, Plaintiff 2 respectfully requests that this Court grant the Motion for Permissive Joinder and Motion to Amend in the above entitled action. This is

pursuant to Federal Rule of Civil Procedure 15; Federal Rule of Civil Procedure 19; Federal Rule of Civil Procedure 20; and Federal Rule of Civil Procedure 21; and the Memorandum of Points and Authorities. Plaintiff 2 further requests that the Motion to Dismiss filed by the Defendants be denied in its entirety as the allegations and facts are of constitutional dimension and a ruling on the merits of the case should be allowed by the Court.

AFFIRMATION PURSUANT TO FED.R.CIV.P. 5.2(a)

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

Respectfully dated this 10th day of March, 2014.

_____

Cynthia A. Davis
Plaintiff in Proper Person

CERTIFICATE OF MAILING

I hereby certify as the Plaintiff in Proper Person, that on March 10, 2014, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, Motion for Permissive Joinder and Motion to Amend addressed to:

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_____
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