CODE: 2250
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Reno, NV 89512
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Defendant in Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

State of Nevada)		
Plaintiff,)		
vs.)	Case:	Redacted
Redacted)	Dept:	No. 3
Defendant)		

Defendant's Motion to Correct an Illegal Sentence, First Amendment Petition, Petition for Writ of Prohibition, and Petition for Declaratory Judgments.

COMES NOW, the Defendant, Redacted, (hereinafter referred to as Defendant), in proper person, on his own behalf, and respectfully petitions the Court to grant his Motion to Correct the Illegal Sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290. Motion is based upon reasonable constitutional, jurisdictional and other grounds that challenge the legality of the proceedings per NRS 177.015, Section (4).

The Defendant respectfully asks the Second Judicial District Court of the State of Nevada in and for the County of Washoe, (hereinafter referred to as the Court or this Court), to grant an injunction; based off of an alternative Writ of Prohibition, against the State of Nevada, the Nevada Board of Parole Commissioners, (hereinafter referred to as the Board or the Board of Parole Commissioners), the Chief of the Nevada Division of Parole and Probation, and the Nevada Division of Parole and Probation, (hereinafter referred to as the Division or the Division

of Parole and Probation). This injunction will direct the Agencies, Officers and Employees of the State of Nevada, to immediately cease and desist the imposition and enforcement of the illegal conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290. Upon further decision by this Court, the Defendant asks that the constitutionally illegal sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290, as applied to him and all others similarly situated, be permanently enjoined.

Defendant requests that due to the prior and continuing restraints of First Amendment Rights and Constitutional Liberty Interests in relation to free speech, association, religion, and petition for grievance, as articulated in the United States Constitution in the First Amendment, and the Nevada Constitution in Section 9 of Article 1; per NRS 34.185, that this Writ of Prohibition be deemed a First Amendment Petition, and be granted within 30 days.

Defendant further requests that pursuant to the discretion of the Court, that the State offers a reply within 10 days of application of motion to this Court, upon verification of service, by documented receipt, per NRS 34.200 and NRS 34.340.

Defendant respectfully asks the Court to grant a series of Declaratory Judgments, to declare the Constitutional Liberty Interests and First Amendment Rights of Defendant, and all others similarly situated, that are granted and guaranteed to them as citizens, in the United States Constitution and the Nevada Constitution. These Constitutional Liberty Interests and First Amendment Rights are restrained by the Board of Parole Commissioners, the Division of Parole and Probation, including the Chief and its Officers, and relate to the issues set forth herein.

Defendant requests the Court to grant a series of Declaratory Judgments, to declare the rights of the Defendant and all others similarly situated, in relation to violations of the Nevada Revised Statutes as performed by the Board of Parole Commissioners, the Division of Parole and Probation, including the Chief and its Officers, and relate to the issues set forth herein.

"*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, and obtain a declaration of rights, status or other legal relations thereunder*", pursuant to Nevada Revised Statutes: 30.020, 30.030, 30.040, and 30.050.

Table of Contents:

Table of Authorities:

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Collins v. Kentucky, 234 U.S. 634, 638, 34 S. Ct. 924, (1914).

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Summary of Relief Sought and Prayed For:

(1) Defendant respectfully asks this Court to consider and grant this Motion to Correct the Illegal Sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 that this Court has placed upon Defendant.

(2) Defendant respectfully requests this Court to grant an immediate temporary injunction against the State of Nevada and the State of Nevada's Agencies commanding them to cease and desist imposing and enforcing the illegal conditions of Lifetime Supervision, which are not set forth in NRS 176.0931, NRS 213.1243, and NAC 213.290, until this Court, or the Nevada Supreme Court, determines the constitutional legality of the issues presented under application of alternative Writ of Prohibition, NRS 34.340.

(3) Defendant respectfully requests this Court to formally grant an alternative Writ of Prohibition to permanently enjoin this constitutionally illegal sentence, per NRS 34.330.

(4) Defendant further requests that due to the prior and continuing restraints of First Amendment Rights and Constitutional Liberty Interests in relation to free speech, association, religion, and petition for grievance, as articulated in the US Constitution in the First Amendment, the Nevada Constitution in Section 9 of Article 1; that pursuant to NRS 34.185, that this be considered a First Amendment Petition, and that Defendant be granted a determination by this Court within 30 days of application.

(5) Defendant asks this Court that due to the serious nature of the violations of the restraints of First Amendment Rights, that pursuant to the discretion of the Court, that the State offer a reply within ten (10) days of application of this writ, and no later than twenty (20) days, in order for this Court to make a determination within the thirty (30) day time frame.

(7) Additionally, Defendant respectfully requests this Court to render opinions through a series of Declaratory Judgments per NRS 30.040; on the severity of the violations of Constitutional Liberty Interests, as well as the illegal restraints of First Amendment Rights presented as applied to Defendant and all others similarly situated. This opinion would include restraints of Constitutional Liberty Interests guaranteed to Defendant in the Nevada Revised

Statutes, which the Board and the Division violate in relation to Defendant and all others similarly situated.

(8) Finally, Defendant respectfully requests that if the Court deems it necessary to hold an evidentiary hearing; that an attorney is appointed to represent him in pursuit of this Motion to Correct an Illegal Sentence, and an Alternative Writ of Prohibition, through a First Amendment Petition, and a Motion for Declaratory Judgment. Defendant respectfully suggests that since this Motion to Correct an Illegal Sentence addresses so many issues of constitutional violations of First Amendment Rights and Constitutional Liberty Interests, that the ACLU of Nevada be appointed as counsel to represent Defendant and all others similarly situated.

(9) Per the Discretion of the Court, Defendant requests a return of any and all fees incurred in bringing this motion in front of the Court, and any other relief the Court deems appropriate, due to the severe violations of Constitutional Liberty Interests and First Amendment Rights of Defendant and all others similarly situated.

Summary of Constitutional Issues Presented:

(1) Whether a Motion to Correct an Illegal Sentence and an Alternative Writ of Prohibition for Defendant and all others similarly situated are the proper remedies in this case to apply to the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, to enjoin this constitutionally illegal sentence.

(2) Whether the Legislature of the State of Nevada improperly relied on misrepresented and untrue facts as presented to them, upon the rankest of hearsay and promulgation of fear mongering by law enforcement, relating to the undocumented "high rates of recidivism" of offenders, in order to deem this "special civil sentence" of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, necessary for public safety based off of these "facts" as represented to them without any documented evidence of such "facts".

(3) Whether the Board of Parole Commissioners and the Division of Parole and Probation , including the Chief of the Division, have violated the *Overbreadth Doctrine* of the First Amendment of the United States Constitution and Section (9) of Article (1) of the Nevada Constitution, causing NRS 176.0931, NRS 213.1243 and NAC 213.290 to be void based upon

their restraints of Constitutional Liberty Interests relating to First Amendment Rights, by creating a "chilling effect on free expression and association"; therefore causing these statutes to be a constitutionally illegal sentence imposed on Defendant and all others similarly situated.

(4) Whether the Board of Parole Commissioners have violated the *Procedural Due Process* rights of the Defendant and all others similarly situated, by their imposition and application of the conditions of Lifetime Supervision upon Defendant pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290. The *Procedural Due Process* rights of the Defendant are violated for not providing for proper notice, presence, cross-examination, discovery, or ability to confront witnesses, upon unsworn testimony and hearsay, and without any fact finding determinations by a professional qualified to conduct same, and without counsel; thus depriving Defendant of his Constitutional Liberty Interests in regards to *Procedural Due Process*, thereby making the conditions punitive in nature and effect upon Defendant and causing Defendant's civil sentence of Lifetime Supervision and the conditions attendant thereto, to be void as a constitutionally illegal sentence.

(5) Whether the Board of Parole Commissioners has violated the *Procedural Due Process* rights of Defendant and all others similarly situated regarding the *Open Meeting Law*, pursuant to NRS 241.040 or has violated the Defendant's right during a *quasi-judicial hearing* to proper notice and presence, thus depriving Defendant of his constitutional right to cross-examination, discovery, or ability to confront witnesses, upon unsworn testimony and the rankest hearsay, and without any fact finding determinations by a professional qualified to conduct same, and without counsel; therefore causing Defendant's civil sentence of Lifetime Supervision and the conditions attendant thereto, to be void as a constitutionally illegal sentence.

(6) Whether the Board of Parole Commissioners and the Division or Parole and Probation, including the Chief of the Division, have illegally applied NRS 176.0931, NRS 213.1243 and NAC 213.290 by the imposition of conditions not enumerated in statute, that are so punitive in nature and effect upon Defendant and all others similarly situated, that such application was beyond their jurisdiction; thereby causing Defendant's sentence of Lifetime

Supervision and the conditions thereof, to violate The *Double Jeopardy Clause*, making Defendant's sentence a constitutionally illegal sentence.

(7) Whether the Court is aware that the same seven (7) "useful guidelines" as determined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, (1963), and held in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003) as applied to the analysis and determination by the Court to the constitutional issue of *Double Jeopardy* as described above are also to be applied to the analysis and determination of the constitutional challenges to *Ex Post Facto*, and *Bill of Attainder*, along with Defendant's other claims of unconstitutional factors that make the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290 to be a constitutionally illegal sentence placed upon Defendant and all others similarly situated.

(8) Whether the Board of Parole Commissioners and the Division of Parole and Probation, including the Chief of the Division, have violated the *Ex Post Facto Clause* of the 14th and 5th Amendments, causing NRS 176.0931, NRS 213.1243 and NAC 213.290 to be more burdensome and punitive in nature and effect when imposed on Defendant and all others similarly situated. This is done after conviction, and upon further application of conditions and penalties that are not articulated in the statute on its face at the time of sentencing, including verbal conditions; causing these statutes to be void based upon the deprivation of Constitutional Liberty Interests, including First Amendment Rights; thereby making Defendant's sentence of Lifetime Supervision a constitutionally illegal sentence.

(9) Whether NRS 176.0931, NRS 213.1243, and NAC 213.290 constitute a *Bill of Attainder* upon Defendant and all others similarly situated, due to the imposition of conditions that are not set forth or articulated in any statute or regulation. Whether this Bill of Attainder as imposed and enforced by the Board of Parole Commissioners and the Division of Parole and Probation, including the Chief of the Division, is constitutionally illegal by the use of conditions not listed in statute, by verbal conditions and orders imposed by the officers of the Division upon Defendant and all others similarly situated, based upon their own personal predilections and bias, including imposing arbitrary and discriminatory determinations. The statutes should be stricken as a *Bill of Attainder* for the illegal violations of Constitution Liberty Interests, including First

Amendment Rights that are guaranteed to a citizen in the 8th Amendment, thereby causing this civil sentence placed upon Defendant and all others similarly situated to be a constitutionally illegal sentence.

(10) Whether the Board of Parole Commissioners has violated the Due Process Rights of Defendant and all others similarly situated, including his First Amendment Rights, by not providing sufficient notice of ***any*** prohibited conduct in the statute; and by lacking ***any*** specific standards in the statute for law enforcement, including no legal definitions for many of the terms employed; thereby creating arbitrary and discriminatory enforcement, and causing NRS 176.0931, NRS 213.1243 and NAC 213.290 to be *Void for Vagueness*. This further allows law enforcement the ability to authorize a "standardless sweep" and "pursue their personal predilections"; all of which causes Lifetime Supervision to be punitive in nature and effect, as well as a further deprivation of Constitutional Liberty Interests, including First Amendment Rights, thereby making Defendant's sentence a constitutionally illegal sentence.

(11) Whether the Board of Parole Commissioners, the Division of Parole and Probation, and the Chief of the Division have violated the *Cruel or Unusual Doctrine* of the Nevada Constitution as articulated in Articles 1 & 6, cl. 3, and the Eighth Amendment of the United States Constitution, causing NRS 176.0931, NRS 213.1243 and NAC 213.290 by their application, to be cruel or unusual, making this sentence extremely disproportionate. It is so harsh and punitive in nature and effect, by violating and restraining many Constitutional Liberty Interests, including First Amendment Rights, so as to "shock the conscience", thereby causing these statutes to be void; therefore making the civil sentence of Lifetime Supervision placed upon Defendant and all others similarly situated a constitutionally illegal sentence.

(12) Whether the Board of Parole Commissioners and the State of Nevada have violated the *Procedural Due Process* rights of Defendant regarding the determination and placement of a violent sexual predator designation upon Defendant without proper notice and presence, and without a determination made by a person professionally qualified to conduct the same, thus depriving Defendant of his constitutional right to counsel, cross-examination, discovery, or ability to confront witnesses, upon unsworn testimony and the rankest hearsay; therefore causing

the civil sentence of Lifetime Supervision placed upon Defendant and all others similarly situated to be void as a constitutionally illegal sentence.

(13) Whether the Board of Parole Commissioners and the State of Nevada have violated the Separation of Powers Clause in the United States Constitution, and the Nevada Constitution, by drafting, enacting, implementing, imposing and enforcing the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290, upon the illegal application of such upon Defendant and all others similarly situated; and by not enumerating them in statute, therefore making them void as a constitutionally illegal sentence.

Statement of the Facts:

(1) On or about December 30, 2003, Defendant was arrested by the Washoe County Sheriff's Office for the alleged 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 since completed, and has graduated from the program in July of 2011. Defendant continues to voluntarily attend therapy for his own benefit and that of his family, and for the benefit of others who are in a similar situation.

(3) On or about February 29, 2004, a report for Defendant was generated by Mr. Stephen Ing of Ing Counseling for the Division of Parole and Probation and the Court, and this pre-sentence report, by a qualified and licensed marriage and family therapist, designated Defendant as a low risk to reoffend. Mr. Ing provides many of these pre-sentence reports for the Court, and is extremely familiar with the risk factors involved in making this type of determination. Mr. Ing also provides sex offender therapy for individuals subject to mandatory therapy while on parole, probation, or lifetime supervision in the State of Nevada, and has documented a recidivism rate for the clients attending his individual and group therapy counseling sessions at a rate of less than 1% in Northern Nevada, for over a 10 year period that Mr. Ing has been providing his services to the community, and the State.

(4) On or about June 10, 2004, Defendant pleaded guilty for the crime of Use of Technology to Lure Children. All other charges were dismissed by the Court at that time.

Defendant 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. This Court suspended the sentence and placed Defendant on 5 years probation, from which he was honorably discharged by this Court.

(5) In addition to the original sentence, the Court also placed Defendant on the "special sentence" of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290; under the authority of the Board of Parole Commissioners, and under the supervision of the Chief of the Division of Parole and Probation, and the Division of Parole and Probation, by and through the Department of Public Safety.

(6) On or about July 6, 2004, Defendant was evaluated by the Sex Offender Assessment Tier Level Rating Panel as a Tier Level One (1), as a possible risk of recidivism, the lowest level of threat to public safety requiring law enforcement notification only. In the more than seven (7) years since this assessment, per the re-evaluations conducted by the Panel upon a mandated review, Defendant has continued to remain a Tier Level One (1).

(7) On or about May 6, 2008, Defendant completed his sentence of probation and was honorably discharged by this Court, and immediately commenced his "special sentence" of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(8) The Board of Parole Commissioners imposed the conditions of Lifetime Supervision upon the Defendant on or about October 8, 2008, without proper notice to Defendant, and without Defendant's presence, and without ***any*** procedural due process, any findings of fact, any test by a qualified individual to conduct a determination on Defendant for therapy, or for any other restraint of Constitutional Liberty Interests and First Amendment Rights. On or about December 4, 2008, Defendant signed the Agreement of Lifetime Supervision under threat of arrest by Officer Lewis, as a coerced conditional waiver of his constitutional rights.

(9) On or about August 30, 2010, Dr. Robert Hemenway, of Agape Psychological Services, tested Defendant to determine his current risk of recidivism and threat to public safety, by the use of two (2) standard empirical testing methods. Again, Defendant scored at a low risk to re-offend. This information was presented in a report by Dr. Hemenway to the Board of

Parole Commissioners during the modification of conditions hearing on or about September 21, 2010. Dr. Hemenway, a licensed psychologist in the State of Nevada, is extremely familiar with the risk factors involved in sex offender therapy, and is well aware of the issues and public safety concerns of the State of Nevada. As a licensed psychologist, Dr. Hemenway is confirming Mr. Ing's original low risk designation of Defendant as determined by Mr. Ing in February of 2004. Dr. Hemenway also provides individual and group sex offender therapy in Northern Nevada, and has also documented a 1% recidivism rate for his clients for over a 10 year period that he has been providing this service to the community, and the State.

(10) The Board of Parole Commissioners modified the conditions of Lifetime Supervision, at the request of the Division of Parole and Probation, by Officer Alyssa Howald; with notice to Defendant and with his presence, but without procedural due process on or about September 21, 2010. This was only done after complaints were filed by Defendant regarding this illegal modification and enforcement of a condition by Officer Howald, without notice to the Board or their approval.

(11) On or about March 22, 2011 and June 1, 2011, Defendant has requested to the Board of Parole Commissioners, an appeal to one of his conditions of Lifetime Supervision, specifically travel, and has included all appropriate paperwork to do so, as required by NAC 213.290.

(12) The Board of Parole Commissioners, by their silence on the matter, has declined to address the appeal in any manner or form, and without written notice of denial to Defendant. In point of fact, more than seven (7) Board Hearings specifically addressing appeals, modifications and setting of the conditions of Lifetime Supervision for other offenders have proceeded without the inclusion of Defendant, even though the Board grants appeal requests to other offenders monthly, and in a timely manner. The Defendant further 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.

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

Statement of the Case:

Defendant states that I am the Defendant in this Motion to Correct an Illegal Sentence; and a Petition for Alternative Writ of Prohibition, and a First Amendment Petition, and Petition 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.

Defendant asserts that the following is a statement of the facts of the case founded on the illegal actions of the Board of Parole Commissioners and the Division of Parole and Probation, including the Chief of the Division, and its Officers, and the illegal actions taken by these State Agencies and their Officers against Defendant and all others similarly situated. Defendant asserts that because of 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).

The Defendant would like to address the Court, and state that this action has been pursued and brought by the frustration of the Defendant, in relation to the illegal actions and treatment he has received while serving his civil sentence of Lifetime Supervision. While on probation, and under the jurisdiction of this Court, Defendant did not have many of these issues and problems, as he had the Court to appeal to, if he felt the Division was acting beyond their authority.

In relation to the Defendant in addressing the Court, it is important to note that Defendant is not wasting the Court's time, as this is not a frivolous or a nuisance lawsuit; which he is sure the State will attempt to portray. This is a serious question of constitutional dimension.

In a point of fact, the Defendant did modify his conditions of probation with this Court, which was based upon a fact finding determination made by this Court, as presented by Defendant, his family and his licensed therapist. An avenue of appeal is always open to an offender who is under the Court's jurisdiction, with an impartial and fair person, who will look at

all the evidence presented, including allowing the Defendant to be present, and to speak and be heard, before making an informed decision.

Unfortunately, this is not the present case for the Defendant in relation to the Board of Parole Commissioners, and the Division of Parole and Probation, and its Officers. As the Court will see by the record presented in this case, and the exhibits, the Defendant has tried every avenue and approach he possibly can, in order to voice his concerns, and attempt to address his grievances.

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. 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, without an avenue of appeal open to an offender to re-consider the issue.

In looking to the issue of an appeal, Defendant asserts that the following applies, and that 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). 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).

To look further to this issue of appeal, the Defendant would like to offer a short summary of a very important ruling by the Supreme Court. Defendant is aware that the Judge of this Court is fully aware of this ruling, but it needs to be stated as a matter of the record in this case.

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 also argued that the very nature of the judicial function requires Courts to make this determination. Since it is a Court's duty to decide cases, 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. He 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 ought to be preferred to statute, the intention of the people to the intentions of their agents."

After advocating for his own self and others, the Defendant is left with no choice, but to attempt to bring his serious constitutional issues and concerns back in front of an impartial Judge, for a judicial review, a Judge who will look at the issues, and the evidence, and make an informed decision. This has now been done, as evidenced by this motion, even with the further punishments and verbal conditions the Board, the Division, and its Officers have imposed upon the Defendant. This has been partially done in order to force him to stop pursuing this, and to be quiet, under the continued threat of a violation of his condition to cooperate. Hopefully, this Court will make an informed determination that will be held in Defendants favor, for him, and for all others similarly situated.

In actual fact, the Defendant has to thank Officer Howald. If not for her, and her attempt to take away his family from him, the Defendant would likely have quietly finished out his sentence of Lifetime Supervision, as a law abiding citizen, and applied to this Court in the future to be released. Even though Defendant was always aware that this sentence might be illegal, until forced to do the research by Officer Howald's actions, it has now become clearly apparent to Defendant that it is an illegal sentence. Defendant is bringing the "clearest proof necessary" to analyze and determine that this "special sentence" of Lifetime Supervision violates many fundamental constitutional concepts, including Constitutional Liberty Interests and First Amendment Rights, therefore making it punitive in nature and effect, and a constitutionally illegal sentence.

When an Officer violates so many fundamental constitutional and familial rights of the Defendant, and his family, all based upon her own prejudice and bias, somewhere, somehow, fairness and justice needs to be fought for. Not only for himself, but for anyone who has to suffer this treatment, especially by this Officer, and many other Officers, who do not seem to care who's constitutional or familial rights that they trample on, due to our status as sex offenders. They apply this status to the families of the offenders also, which is a serious penalty for someone who is supporting an offender, and who is helping an offender to rehabilitate and reintegrate into society, and who has usually not been convicted of a crime.

Defendant prays for that relief from this Court, due to the fact that when Defendant was forced into this position, and discovered the constitutional illegality of the Officers actions, and in a more serious note, the Board and the Divisions actions; it became clear, that the violations of Constitutional Liberty Interests and restraints of First Amendment Rights needed to be addressed by a higher judicial authority than the Board of Parole Commissioners.

Before the Court can begin to look at the constitutional issues addressed further in this motion in all of the arguments presented to this Court, we must look first to the issue of the *Equal Protection Clause*. The *Equal Protection Clause*, which is a part of the Fourteenth Amendment to the United States Constitution, provides that "no state shall…deny to any person within 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", by empowering the judiciary to enforce that principle against the statutes.

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 or 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."

In Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, (1886), 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."

The Supreme Court stated in Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, (1896), speaking through Justice Brown, 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."

Since Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, (1954), 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.

In United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, (1938), 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."

The Court further defined this in Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, (1967), where 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.

In order for the Court to begin to understand the tangled web of legal issues involved, including the loss of Constitutional Liberty Interests and restraints of First Amendment Rights that are a part of this case, the Defendant respectfully asks the Court to start by looking at SB 192, which was introduced in 1995 through the Nevada Legislature. 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 would be in addition to the registration law, NRS 179D.470 that was enacted at the same time, and in the same bill, and which obligated a former offender to inform the State of their address yearly, and which applied to all other offenders, not just those currently in the system.

The State informed the Legislature that they needed this "special sentence" due to the "high rate of recidivism" that is "known" to be a problem amongst registered sex offenders. This was a malicious misrepresentation by law enforcement to the Legislature of the true facts of recidivism by registered sex offenders, which has been proven to be the second lowest rate of recidivism in the country. The true statistic averages a rate of 3.5% for repeat sex offenders convicted of a new sex crime, by registered or former convicted sex offenders. This is reported in many recent studies by the Department of Justice, Federal Bureau of Investigation, and other State Agencies across the country, and in many private studies.

Defendant is currently aware of three (3) States at this time, Colorado, Arizona, and Maryland; that are currently tracking the recidivism rate of offenders subject to Lifetime Supervision, or Community Supervision for Life, and the statistics show that it is around a 1%

recidivism rate for a study group of well over 7800 offenders. This is documented for the Court in the instant case in Issue #2: Recidivism Statistics.

This civil "special sentence" was also intended to deter future criminality by making Lifetime Supervision 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 an offender for conduct that is constitutionally permissible, and is not a crime in and of itself. This interpretation of 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).

Defendant asserts that this Court in looking at the decision in *Palmer*, and using that opinion in analyzing and determining this motion:

(1) *does not* have to determine that these conditions of Lifetime Supervision as imposed by the Board of Parole Commissioners are a direct penal consequence of a guilty plea or a conviction;

(2) or that this "special sentence" has an automatic and immediate affect on the nature or length of Defendant's punishment.

(3) The Court, in an extremely important issue, *does not* have to determine whether or not this is a form of parole. **It is not a form of parole, it is different.**

(4) The Court *does not* have to decide if it is a civil sentence,

(5) or if it is addressed as a *non-punitive* "special sentence", as the intent of the Legislature makes it extremely clear that it is.

(6) The Court *does not* have to determine whether it is a form of punishment;

(7) or that these conditions of Lifetime Supervision are affirmative disabilities or restraints,

(8) or that 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,

(9) as **all** of these questions have already been answered and decided by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002).

What this Court does have to decide, in analyzing this motion:

(1) is just how much punishment is constitutionally legally allowed, according to the Constitution of the United States and the Constitution of the State of Nevada,

(2) and just how punitive the affirmative disabilities and restraints are and can constitutionally be, in relation to a civil sentence, that is in addition to a criminal sentence.

(3) The Court will have to decide just how far the Board of Parole Commissioners can go to override and restrain the Constitutional Liberty Interests and First Amendment Rights of the Defendant, who is a citizen of the State of Nevada, and the United States of America and not subject to any criminal sentence,

(4) and whether Defendant should be allowed to be present at the original hearing, or any other hearing held by the Board in relation to the Defendant, either with or without counsel, and whether he has the constitutional right to be allowed to be heard.

(5) The Court will have to ask and decide whether the Board may impose these conditions upon Defendant without any specific enumerated authorization in place in statute or regulation, to restrain or violate the Constitutional Liberty Interests and First Amendment Rights of the Defendant and all others similarly situated, and

(6) whether they may do so without the Nevada Legislature's or Governor's legal approval of these restraints and violations, as they clearly do this without that approval.

(7) The Court will have to determine if these violations of Constitutional Liberty Interests and restraints of First Amendment Rights effectively place this civil sentence in violation of the *Procedural Due Process Clause*, the *Double Jeopardy Clause*, the *Ex Post Facto Clause*, the *Cruel or Unusual Punishment Clause*, the *Bill of Attainder Clause*, and the *Separation of Powers Clause*, as Defendant asserts it to be now, as currently imposed and applied by the Board of Parole Commissioners and enforced and applied by the Division of Parole and Probation.

(8) The Court will also have to determine if due process was allowed for Defendant in different situations and contexts by the Board, relating to the original hearing to impose the conditions, to the non-hearing to impose a dangerous sexual predator designation, and if this sentence is overbroad according to First Amendment standards, or if it is void for vagueness, which can also relate to the First Amendment, and all other Constitutional Liberty Interests.

(9) And finally, the Court will have to determine if the hearing held by the Board was an Open Public Meeting, a quasi-judiciary hearing, or an administrative hearing, and will then have to decide if Defendant's constitutional rights were violated in relation to that determination.

(10) After the Court decides all of these issues, then the Court will have to further decide if the Board and the Division, including the Officers, have violated many Nevada Revised Statutes in relation to Defendant and all other similarly situated.

Due to the severity of all of these issues, and the short time frame that these laws have been in effect, Defendant asserts that the Nevada Supreme Court has not had the opportunity to directly address the constitutional issues presented to this Court concerning the violations and restraints of Constitutional Liberty Interests and First Amendment Rights. These violations and restraints have been caused by the application of the conditions as imposed by the Board of Parole Commissioners, and enforced by the Division of Parole and Probation, including the Chief of the Division and its Officers.

This Court must, therefore predict how the Nevada Supreme Court would rule if it were to address this issue, S&R Metals, Inc. v. C. Itoh & Co., 859 F.2d 814, 816, (9th Circuit 1988). "In the absence of ….express guidance, we must apply the law as we predict the state's highest court would interpret and apply it", citing Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309, 1314, (9th Circuit 1984).

Next, another of the many items that the Court should consider is the Board of Parole Commissioners ongoing 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 in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), where the Court defines Lifetime Supervision as being "different than parole".

The Board of Parole Commissioners actually leave out a portion of the statute, enumerated in (2), (a) and (b) in NRS 213.1243, where it describes Lifetime Supervision as being a "limited" form of parole.

The actual language as enumerated of NRS 213.1243 is quoted as follows:

NRS 213.1243 Release of sex offender: Program of lifetime supervision; required conditions of lifetime supervision; penalties for violation of conditions; exception to conditions.

(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.

This is upon specification of four (4) enumerated circumstances, which define the issue of the narrow legal limits of this designation of "parole", thereby making all of these terms and legal definitions nugatory and superfluous, and by doing so, it is in excess of their jurisdiction to interpret the statute by either inserting language or taking it away.

The four (4) enumerated conditions that the Nevada Legislature defined for a "limited" form of parole are stated in the Nevada Revised Statute 213.1243, as follows:

(1) **NRS 213.1076 Fee to defray costs of supervision; regulations; waiver.**

(1) The Division shall:

(a) Except as otherwise provided in this section, charge each parolee, probationer or person supervised by the Division through residential confinement a fee to defray the cost of his or her supervision.

(b) Adopt by regulation a schedule of fees to defray the costs of supervision of a parolee, probationer or person supervised by the Division through residential confinement. The regulation must provide for a monthly fee of at least $30.

(2) **NRS 213.1095 Chief: Powers and duties.**

The Chief Parole and Probation Officer:

(9) Shall furnish to each person released under his or her supervision a written

statement of the conditions of parole or probation, instruct any parolee or probationer regarding those conditions, and advise the Board or the court of any violation of the conditions of parole and probation.

(3) **NRS 213.1096 Powers and duties of assistant parole and probation officers.**

Assistant parole and probation officers shall:

(1) Investigate all cases referred to them for investigation by the Board or by the Chief Parole and Probation Officer, or by any court in which they are authorized to serve.

(2) Supervise all persons released on probation by any such court or released to them for supervision by the Board or by the Chief Parole and Probation Officer.

(3) Furnish to each person released under their supervision a written statement of the conditions of parole or probation and instruct the person regarding those conditions.

(4) Keep informed concerning the conduct and condition of all persons under their supervision and use all suitable methods to aid and encourage them and to bring about improvement in their conduct and conditions.

(5) Keep detailed records of their work.

(6) Collect and disburse all money in accordance with the orders of the Chief Parole and Probation Officer or the court.

(7) Keep accurate and complete accounts of all money received and disbursed in accordance with such orders and give receipts therefor.

(8) Make such reports in writing as the court or the Chief Parole and Probation Officer may require.

(9) Coordinate their work with that of other social agencies.

(10) File identifying information regarding their cases with any social service index or exchange operating in the area to which they are assigned.

(4) **NRS 213.110 Regulations regarding parole; suspension of parole to permit induction into military service.**

(2) The Board, for good cause and in order to permit induction into the military

service of the United States, may suspend paroles during the period of the parolee's active service after induction into the military service.

Defendant asserts that at no point in this procedure of the Legislature deciding the definition of a "limited" form of parole does it tell the Board or the Division that any mandatory conditions, or any mandatory conditions of parole as stated in NRS 213.1245 are to be imposed upon Defendant and all others similarly situated as a requirement of this statute.

The Board further defines the punishments that may be imposed, completely leaving out the section that includes minor violations of conditions, articulated in NRS 213.1243, Section 3 (a). This is quoted from NRS 213.1243 Section 3 (a), as follows:

(3) A person who commits a violation of a condition imposed on him pursuant to the program of lifetime supervision is guilty of:

(a) If the violation constitutes a minor violation, a misdemeanor.

This further changes the statute's language to impose their own wishes and desires to make this even more punitive, by the imposition of felony charges for any violation, and further making the understanding of this sentence ambiguous to a reasonable person. This is not plain error; the wording of the statutes is unambiguous and plain in regards to these two (2) sections.

Defendant asserts that the Board has done this knowingly and willingly, upon their own personal predilections in relation to the punitive measures that they are imposing on a civil offender. Defendant argues that the Board of Parole Commissioners performs these actions in direct violation of the precedent and opinion of the Nevada Supreme Court in relation to Lifetime Supervision not being a form of parole as articulated in *Palmer*, and the intent of the Nevada Legislature, to be a non-punitive sentence. This is based off of the belief of the Defendant that the Board has a continuing desire to further impose punitive conditions upon an offender, regardless of the decision of the Court or the legality of restraining an offender's Constitutional Liberty Interests and First Amendment Rights.

In a situation where the Board is illegally creating law, and subjecting an offender to that illegal law; Defendant asserts that this process should be extremely transparent, which it is not,

and that while the Court makes an analysis and determination of this instant case, that all benefits of doubt or constitutional legality should be in favor of the Defendant.

In order to look at the conditions of Lifetime Supervision, Defendant asserts that we need to look at what the Courts have decided, and "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. 37, 356, 30 P. 1006, 1012, (1883).

In NRS 213.1243 it specifically states the four (4) conditions that are the reasons it is a "limited" form of "parole", enumerated very clearly and concisely. This statute does not grant the Board of Parole Commissioners the ability to impose *any* mandatory conditions of parole, which are enforced under a criminal statute and sentence, and upon a parolee, as specifically defined in NRS 213.1245. The Court will have to determine how the Board of Parole Commissioners "legally" imposed these conditions upon an offender subject to the civil sentence of Lifetime Supervision, or any other mandatory conditions, which are not expressly defined in statute. The statement that they may impose any condition at will, is just not enough.

The Nevada Legislature was very clear in regards to placing an offender under the Division of Parole and Probation in order to verify the whereabouts of a recently released offender, as an administrative duty. The Nevada Legislature, in an effort to reduce the cost to the State on an unfunded mandate, reasoned that since the offender would more than likely be aware of the policy and procedure of the Division in relation to reporting requirements, due to their previous interaction with the Division while on either parole or probation, that using an Agency already in place was appropriate, especially since there were no other requirements.

This assertion by Defendant has obvious merit due to the Policy and Procedure related in Division Directive 6.2.101, Contact Guidelines, which was originated on February 24, 1997. Defendant argues that this Policy and Procedure was the Division's original intention to implement an administrative caseload pursuant to the Lifetime Supervision mandate incorporated in SB 192, (1995), and enumerated in NRS 176.0931, and NRS 213.1243, in 1995. In looking at this Policy and Procedure, in section (4), (5), and (6), it states the following:

(4) **Administrative Caseloads**

1 Personal Contact (PC) every six months

(5) Special conditions, which are to be performed a set number of times per month, will receive monthly verification that they are being performed as ordered. These would include, but are not limited to: intensive or weekly outpatient counseling, attendance at a 12-step program, drug testing and community service work. Attempts to verify special conditions will be documented in OTIS and taken into consideration when determining whether special conditions have been addressed for the month.

(6) Special conditions, which do not require any sort of action, will not require verification. Examples of this type of condition are: search and seizure, no contact with a victim/co-offender and no drinking.

Defendant asserts that this "Administrative Caseload" is exactly what satisfies the Nevada Legislative intent in relation to this being a "non-punitive" sentence for an offender under supervision by the Division, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290. It addresses all of the same reasoning that Defendant applies in Condition #1 below, and quotes the following paragraph from there:

"If a condition were to be enforced on Lifetime Supervision, this is one that Defendant believes could be legally and constitutionally allowed to be placed upon an offender subject to the civil sentence of Lifetime Supervision as enumerated in NRS 176.0931, NRS 213.1243, and NAC 213.290, with a minor modification to the language in the DNA requirement. Looking at the "limited" terms of this sentence as enumerated in statute, it specifically allows the offender to keep in contact with his Parole Officer and satisfies all of the reasons the Nevada Legislature put

this law into place. This allows an Officer and offender to make monthly contact, through a written report to verify an offender's residence, through verification of mail confirming their residence, or any other means available, and to document their interaction, thereby complying with all the requirements of the statutes as written."

Defendant further asserts that the Division was aware that there might be a few special conditions, but in assessing the intent of the Legislature, they determined that these could be handled on a case by case basis, as determined upon a reasonable cause, directly related to the offender, and as directed to do so by the Board of Parole Commissioners.

In another pertinent issue relating to an unfunded mandate, it is very obvious that a clerk of the Division could handle the requirements of this "special sentence", as one (1) clerk could track hundreds of offenders monthly, if it had been applied as mandated. If there was an issue, the clerk could use any means necessary to verify any missing or uncorroborated information first, by phone, contacting the offender, the therapist, or any other means needed to obtain the correct information, and then at that time, if there was still an problem, bring it to the attention of the Parole Officer handling the caseload. Instead of the 25 Officers and the 2 Sergeants or more, that are currently being employed to handle this as applied by the Division, the workload could consist of 2 to 4 clerks, and 2 Officers.

This caseload estimate by Defendant has obvious merit also, according to Division Directive 3.3.123, Work Units, which states in C: Definitions that: "Administrative caseloads are staffed at 500 work units". A work unit is defined as 1 work unit equals 1 offender.

Since that time, The Board and the Division now assert that due to the offender being placed under their authority and under the supervision of the Division of Parole and Probation, that both of these State Agencies may enforce any condition of parole or any condition at all upon an offender; as verified by David Smith, an employee of the Board who drafts much of the legal language the Board relies on, during an Open Public Meeting on August 31, 2011.

The Board states that *any* condition which they deem appropriate can and will be placed upon an offender without due process, notice, presence, fact finding, or any determination by a

qualified individual regarding therapy or any other issue, and without any legal definition of any condition as enumerated in any current statutes of the State of Nevada.

In a situation relating to this meeting, it is interesting to note that a Deputy Attorney General is present at these types of Open Public Meetings, conducted by the Board of Parole Commissioners. Defendant assumes that the Deputy AG is there to make sure things are done legally and constitutionally. The Deputy Attorney General present in this instance, Ms. Julie Towler, did not make any statements on the record, and did not address any statements made by the public, law enforcement, or the Board.

Many of the issues presented had been looked at by other Courts, and brought up many issues of legality, according to Nevada law, and Federal law. It would seem to the Defendant that a part of the Deputy Attorney General's position, would be to advise the Board, on the record, of what these decisions and opinions meant, and how they applied to a situation where the Board was imposing a change in the law. This would be for the protection of the Board, and the State, due to illegality or constitutional concerns. No objection was noted in any of these situations, which is worrisome to the Defendant.

If the Attorney General is not aware of the effects of the actions of the Board, in relation to the legality of them, or of constitutional concerns, then that puts an enormous burden on the State and its citizens when they have to defend the legality of these decisions in Court. This is even truer, when they could have looked at the situation when it was presented. There is no excuse to put the State in this position, and then use the taxpayer's money to defend an unconstitutional application, when it could have been avoided at the outset.

This has happened in Ohio recently, due to the Ohio Supreme Court's consideration of the Registration law and the Adam Walsh Act. At this time, the State has lost between 10 and 15 million dollars due to the unconstitutionality of the law as written and passed by the Legislature. This is a very similar situation that could end up costing the State of Nevada funds defending many of these constitutional violations, and funds paying for those violations.

Defendant states that for an offender who may be subject to conditions imposed by the Board of Parole Commissioners, that there is ample precedent for an offender to be placed under

various statutes containing enumerated language to control their behavior or conduct. The Nevada Legislature has introduced many statutes that define punishment for an offender criminally sentenced, to either probation or parole, by the imposition of clearly articulated conditions which may be placed upon an offender, or are mandatory conditions for an offender.

(1) Probation conditions are articulated in NRS 176A.110; NRS 176A. 210; NRS 176A.400; NRS 176A.410; and NRS 176A.413.

(2) Parole conditions are articulated in NRS 213.1245; NRS 213.1258; and NRS 213.12175.

(3) Conditions which may be imposed upon either probation or parole are articulated in NRS 171.123; NRS 171.1231; NRS 171.1232; and NRS 213.1076.

(4) There are no Lifetime Supervision statutes such as these that articulate <u>any</u> conditions that may be imposed or are mandatory conditions as described in the statutes above.

In looking to the authority the Board has illegally granted themselves, we should also delineate a timeline for four (4) very important statutes as they relate to the imposition of conditions related to public safety. In 1995, the Nevada Legislature enacted SB 192, (1995), which articulated NRS 176.0931, and NRS 213.1243 in relation to Lifetime Supervision. In 1997, the Nevada Legislature enacted NRS 213.12175, which gives the authority to the Board of Parole Commissioners to institute and impose any reasonable condition upon a parolee to protect the health, safety, and welfare of the community. This statute only applies to parole; it does not apply to probation or Lifetime Supervision.

While the Legislature was drafting and enacting this statute, they could have mandated that it also applied to Lifetime Supervision, or to probation, as they had just dealt with the issue of Lifetime Supervision in the previous session, and it would have granted the Board the authority to impose conditions upon an offender subject to the civil sentence of Lifetime Supervision that accomplished these goals.

It is noteworthy that the Nevada Legislature did not give the Board of Parole Commissioners the authority to impose conditions for public safety to protect the health, safety, and welfare of the community upon civil offenders subject to Lifetime Supervision. The Board,

by the authority granted to them by the Nevada Legislature, enacted NAC 213.290 in 2000, which does not include any language or enumerated conditions as defined in the statute granting them the authority to impose these types of conditions of Lifetime Supervision which restrain Constitutional Liberty Interests and First Amendment Rights.

The Board of Parole Commissioners has never instituted a regulation to provide for a program of Lifetime Supervision as mandated by the Legislature, NRS 213.1243(1). It specifically states in NRS 213.1243(3) that a person, who commits a violation of a condition imposed on him pursuant to the program of Lifetime Supervision, shall be held accountable by a misdemeanor or felony charge, depending on the severity of the violation. Defendant asserts that there is no such regulation. They have only enacted a regulation that addresses timelines, notification and hearings, NAC 213.290 (2000), which is vaguely named "Notification; report; hearing; request to modify conditions".

The Legislature mandated that a regulation be enacted and determined it as the Program of Lifetime Supervision, and further articulated it in the law that the regulation would follow, in this case NRS 213.1243. In looking at the title of NRS 213.1243, it clearly states in the title of the statute, which is included as a part of the statute therein, and that specifically refers to the program of Lifetime Supervision. In NAC 213.290, no such language exists in the title of the regulation.

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 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. The Nevada Legislature specifically addressed the fact that "the Board of Parole Commissioners shall establish by regulation a program of Lifetime Supervision", NRS 213.1243. Defendant asserts that this has not been done by the Board of Parole Commissioners, as mandated by the Nevada Legislature.

Defendant asserts that there is no connection between the program of Lifetime Supervision, the conditions of Lifetime Supervision and these statutes of Lifetime Supervision, specifically NRS 176.0931 and NRS 213.1243. And even more specifically NAC 213.290, which the Board of Parole Commissioners has drafted and enacted as the regulation that they say gives the Board the authority to impose these conditions, by stating that they can place an offender under these or any other conditions which they deem necessary, at any time, and in any manner. In NAC 213.290, in Section (4)(b), it only states that the Division may make recommendations for the conditions of Lifetime Supervision.

This imposition of Lifetime Supervision conditions is performed by the Board without enumeration in ***any*** statute, without due process or notification, and that further, the Board states that they may change these conditions at any time, therefore expressing the legal belief that they can authorize and change the conditions ex post facto. The Board also expresses the fact that due process is not required. The Board 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 for the setting of 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". This denies any form of due process for Defendant and all others similarly situated, as it effectively states that you will not be allowed to speak and be heard.

Defendant asserts that this is all based upon their own personal predilections and without the legal authority to do so, that it is overbroad, and beyond the bounds of their authority, and is a constitutional violation of due process.

Therefore by not being listed in the statute(s), and without *any* due process, the conditions of Lifetime Supervision are being illegally imposed and enforced upon Defendant and all others similarly situated. "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).

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).

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 intent of the Nevada Legislature in enacting 176.0931 and 213.1243 relating to Lifetime Supervision, was that this was to be a *non-punitive* civil "special sentence" to enhance future crimes by an offender, and to keep law enforcement aware of the current whereabouts of the offender. This intent was not to punish an offender for behavior or conduct that is not illegal in and of itself, or for past behavior, while serving this "special sentence". 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 further argues that the Legislature Member who introduced the statutes of Lifetime Supervision in SB 192, (1995), stated publicly that the statutes were meant to be non-punitive in nature, as a means "to keep law enforcement aware of the current whereabouts of

known sex offenders", because as law enforcement stated to him, without any documented facts, that the perpetrator of a new sex crime would "more than likely" be found within this group.

In looking at the Board of Parole Commissioners stance in relation to this, Chairman Bisbee stated in an Open Public Meeting held on August 31, 2011, that she had spoken to the Legislative Member who introduced this bill, and his intent was that it be punitive in nature and effect, even though in the Legislative Record of SB 192, (1995), he firmly denies this being a violation of the *Double Jeopardy Clause*, due to the fact that the Legislature was not imposing any affirmative disabilities or restraints of Constitutional Liberty Interests and First Amendment Rights. During the course of this hearing, the Defendant addressed the Board numerous times relating to his advocacy and his stance on the legality of the Board's actions. He supplied the Board with numerous documents, on the record, in relation to this advocacy, and his attempts to shed light on the situation with the Nevada Legislature, and the Board of Parole Commissioners. While the Chairperson did respond, she actually stated that this issue probably should be addressed in Court. (Record of Open Public Meeting, August 31, 2011), (Exhibits 12, 13, 14, and 15 relating to the Board, and 1-11, and 16-28 relating to illegal actions).

This begs the question then, of just who illegally decided to impose these affirmative disabilities and restraints, which are punitive in nature and effect, and upon application and enforcement of the conditions relating to Lifetime Supervision upon Defendant and all others similarly situated. Defendant respectfully requests that the Court determine this question.

In regards to procedural due process for Lifetime Supervision, 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).

Defendant reasonably asserts that the setting of any conditions by the Nevada Board of Parole Commissioners, if they are 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. This would be done along with the Sentencing Guidelines, and the presence of counsel, just as in the original court proceeding. The hearing should include any current, up to date fact finding determinations to further impose a reasonable condition, which should be determined by

a qualified individual, or any other determination that the Board may make, which would have to be pursuant to the Sentencing Guidelines, and the Board needs to make this determination based on the totality of the circumstances and the record of the Defendant to date.

Defendant asserts that this is not done at all. In point of fact, no records exist of any findings of fact by the Board on or about October 10, 2008, as the Board has stated to Defendant that they do not keep the records of the Lifetime Supervision hearings, which in Defendant's belief are another violation of State law and the rules of procedure of a judiciary hearing.

Courts have held that the constitutional due process protections, like ex post facto protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing the criminal act.

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, 934, (6th Circuit 1989).

Defendant asserts that the Board of Parole Commissioners, in this instance of setting the conditions of Lifetime Supervision, is acting in a quasi-judiciary capacity. Because they have also drafted and enacted the conditions, Defendant asserts that they are also acting in the legislative capacity. Due to the round-a-bout and improper means of implementing the conditions through non-articulated methods, which have caused them to be absent from the regulation or statutes, that this further causes them to skirt the requirements of the executive branch of the government. Defendant asserts that they are further acting as the executive

branch. This has been done by disallowing the further review and approval of the Governor of the State, or of the Nevada Legislature.

The Board of Parole Commissioners has never had the regulation that they have drafted and enacted, specifically NAC 213.290, tested to determine the constitutional legality of the conditions that they impose, apply and enforce, as required by statute, in NRS 233B.031.

The Separation of Powers philosophy is looked to as a bulwark against tyranny. For if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, then no man or group of men will be able to impose its unchecked will. The tyranny of the Board of Parole Commissioners is clear in the drafting, enacting, implementation, and imposition of the conditions of Lifetime Supervision, which violates the *Separation of Powers Doctrine*.

James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny", The Federalist, No. 47, pp. 373-374, (Hamilton ed. 1880).

The framers of the Constitution understood that "barriers had to be erected to ensure that the Legislature would not overstep the bounds of its authority and perform the functions of the other departments", The Federalist, No. 48, pp. 383-384, (Hamilton ed. 1880). See generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton), and 78 (Hamilton); United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965).

The fact that the statute uses the classification of a sex offender as the touchstone for public safety, "sweeping in a significant number of people who [do not pose a high degree of likelihood of recidivism], serves to feed suspicion that something more than regulation of safety is going on. There is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." Smith v. Doe, 538 U.S. 84, 109, 123 S. Ct. 1140, (2003), (Souter, J., concurring in judgment). "Ensuring public safety is, of course, a fundamental regulatory goal and this objective should be given serious weight in the analysis." Id., at 108. "But at the same

time, it would be naive to look no further, given pervasive attitudes toward sex offenders." Id., 109.

Defendant argues that 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, Defendant asserts that 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).

The conditions will not be emplaced until an offender starts his sentence of Lifetime Supervision, which is imposed after a period of time has usually elapsed, due to the offender serving his incarceration, parole, probation, or residential confinement and the sentence will not start until these are completed, Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002).

When the Board imposes conditions which an offender can be further held accountable to as a matter of law, after the finalization of their criminal sentence, they subject the offender to an additional ex post facto burden and an increase in the penalty for the original sentence. Many of these current conditions subject an offender to be charged for a crime for behavior or conduct which otherwise is not illegal in and of itself, and which is a constitutional right for a person not subject to Lifetime Supervision.

Defendant's stance is that the Board of Parole Commissioners, through the "de facto" 20 standard conditions, and other special conditions, including extra verbal conditions, as imposed and applied, all of which entail a restraint of Constitutional Liberty Interests, including First Amendment Rights, and for conduct which is not a crime in and by itself, deny procedural due process rights to a person subject to this civil sentence.

In order to abridge the First Amendment Rights, or any other Constitutional Liberty Interest of an offender subject to the civil sentence of Lifetime Supervision, the Board would have to first provide for this regulation as asserted above, as mandated by the Nevada Legislature. Any abridgement of these First Amendment Rights, or any other Constitutional Liberty Interest, would have to be enumerated in statute in a written format to provide notice of said 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 so as not to intrude upon any First Amendment Right.

These punitive conditions are a serious violation of Constitutional Liberty Interests, including First Amendment Rights as currently followed and applied, especially in relation to an offender serving a civil sentence of Lifetime Supervision where all inherent Constitutional Liberty Interests and First Amendment Rights should be granted and guaranteed, as with any normal citizen. NRS 176.0931, NRS 213.1243 and NAC 213.290 do none of these and yet violate many First Amendment Rights, and many other Constitutional Liberty Interests.

The Board of Parole Commissioners and the Division of Parole and Probation have colluded and conspired to cause the conditions of Lifetime Supervision to match the mandatory conditions of Parole as enumerated in NRS 213.1245. Mr. David Smith, an employee of the Board, even states that the Board may impose *any* condition which mirrors the language of any criminal punitive statute as they see fit, during an Open Public Meeting on August 31, 2011; because they are the Board of Parole Commissioners and they are allowed to restrain an offender's Constitutional Liberty Interests and First Amendment Rights in any manner.

By mirroring the language of this statute, they are effectively enforcing this statute in a punitive manner against a person not subject to this statute, as an offender on Lifetime Supervision is not sentenced under any form of mandatory parole conditions. Defendant asserts that by doing so, it causes this civil sentence to be punitive in nature and effect, and is in excess of the jurisdiction and authority mandated to them by the Legislature of the State of Nevada.

By imposing conditions which mirror the language of punitive criminal statutes, such as the ones articulated in the Nevada Revised Statutes concerning Parole and Probation, and further follow a parole statute, specifically NRS 213.1245, the Board of Parole Commissioners has allowed and authorized conditions which, by definition as a criminal statute, addresses punishment and penalty, and promotes the traditional aims of punishment-retribution and deterrence. That is what the conditions of parole and probation are designed to do.

If, in 1995, the Nevada Legislature wished to impose these types of conditions, they could have done so, as they only needed to look to their own statutes to do so. However, since

they defined this as "*a non-punitive tool* designed to help law enforcement keep better track of offenders" as articulated in SB 192, (1995); they knew and were aware that the imposition and application of these types of conditions would place this civil sentence into the realm of the *Double Jeopardy Clause*, which was a subject the Legislators were very concerned with.

In this instance, the Legislature performed admirably and wrote the law in such a manner that it did not violate the *Double Jeopardy Clause*, by being a regulatory notification requirement only. Once again, it was meant to be an enhancement penalty for future criminality by an offender who has committed another crime as a repeat offender, as listed in the statute. This is clearly described in the Legislative minutes in relation to SB 192, (1995), and in NRS 176.0931.

Only through the efforts of the Board of Parole Commissioners in enacting, imposing and applying NAC 213.290, has this well-written and researched law become "punitive in nature and effect", by the narrow-mindedness, prejudice and bias of the employees of the Board of Parole Commissioners, and by the Division of Parole and Probation, including the Chief of the Division and the Officers, who use their personal predilections, prejudice and bias to advise the Board.

Defendant asks the Court how an employee of the Board or an Officer of the Division, who are not barred as an attorney in the State of Nevada, can write and draft the legal language the Board relies on, without the legal authority or training to do so, and without the abilities to perform the correct legal research that is needed to make sure that they propose constitutionally correct and proper legal advice. Defendant has had no problems finding all of these cases which relate directly to the imposition of conditions and laws upon an offender, and what the various Courts have determined to be the proper and constitutional legal requirements to be able to do so.

Defendant asserts that these "employees" of the Board and the Division are incorrectly and illegally offering legal advice, without the proper foundation to do so, using prejudice and bias, and upon arbitrary and discriminatory grounds to propose their "recommendations" of law.

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).

A reasonable nexus *must* exist between any special condition of probation and the crime for which it is imposed. 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.

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).

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).

And, 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).

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).

Defendant asserts that the conditions of Lifetime Supervision results in a far greater deprivation of Constitutional Liberty Interests and First Amendment Rights 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).

In looking at how the Division of Parole and Probation train their Officers, and how they *interpret* and apply the law to Defendant and all others similarly situated, Defendant would like the Court to consider the following. As the Supreme Court has noted, "our first point is the character of probation or parole….The purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able". The duty and attitude of the probation or parole officer reflect this purpose…..that while the officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client should dominate his professional attitude. The officer ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety, Gagnon v. Scarpelli, 411 U.S. 778, 783-785, 93 S. Ct. 1756, (1973); quoting Morrissey V. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972).

The Supreme Court also stated that "because the Officers function is not so much to compel performance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation, *Gagnon*, at 784. "Revocation…..is, if anything, commonly referred to as a failure of supervision", Id. at 785.

The Court has recognized that there are two basic categories of supervision, the "uncompromising approach", and the "social worker-medical approach". Of the two major types, the law enforcement or "cop" approach is "more inclined to violate or recommend revocation for probation violation", United States v. Jackson, No: 3:02-00181, (USDC Tennessee 2009).

Defendant asserts that in the Court's view, there is a statutory duty to promote and constructively aid in the rehabilitation of the offender and it should be the Officers core duty. In the Nevada Parole and Probation statement concerning Officer Expectations, it states that as a Parole Officer, you will "protect the community by encouraging and supporting offenders in their commitment to live a productive, law-abiding lifestyle. And if needed, you will address

substance abuse issues, mental health issues, and/or life-coping skills, such as education and employment".

Defendant asserts that this in not how the Division of Parole and Probation, including the Chief of the Division and its Officers are trained and operate, and how they interact with an offender, the family of the offender and friends of the offender. The Officers do many things to further punish the offender, to harass and intimidate the offender and the families of offenders. Some Officers do this to make the offender unemployed and homeless, to separate us from our families, and are constantly telling us that we should have thought of that before we committed our crime. The Officers violate all of our Constitutional Liberty Interests and First Amendment Rights, based off of this reasoning, as they believe that they are untouchable, due to qualified immunity, and that they are doing the right thing,

(1) because Defendant asserts that is how they are taught, and

(2) because Defendant believes most of them to be prejudiced and biased, due to lack of knowledge of offenders, including studies and statistics relating to them as a class.

Officers of the law bear a burden, as they are held to a higher standard when enforcing the law, that they should know the law, and be aware of how it relates to all situations, as part of their job duties, and as a moral issue, as they choose to perform this function, and work for the people of the State.

In a statement made by a police captain to a graduating class, the Captain stated, " Don't ever break the law, to enforce the law. At all times you will do your job constitutionally and compassionately. I will accept it no other way." This is definitely not how the Division of Parole and Probation train their Officers, or how they perform and operate.

A quote by Lord Acton, a historian and moralist comes to mind when describing many of the Officers of the Division of Parole and Probation, including the Chief of the Division, and the Board of Parole Commissioners. As Lord Acton noted, "Power tends to corrupt, and absolute power corrupts absolutely".

In another quote reflecting a similar idea, by the British Prime Minister in 1770, The Earl of Chatham, William Pitt, says: “Unlimited power is apt to corrupt the minds of those who possess it”.

And finally, a quote by Machiavelli comes to mind, when you consider the “Gestapo tactics” used by many of the Officers: “The ends justify the means”, as only the Officer can protect the public from the offender.

Defendant refers to a study conducted in the 1970’s, relating to prison guards, and unfettered power over the prisoners, which the psychological community has been unable to duplicate, because of the violence that happened during the course of the study. They actually had to cut the study short due to life-threatening injuries to both the “prisoners” and the “guards”. This study is documented in the Stanford Prison Experiment. (Exhibit 34).

There is a lot of controversy surrounding this study and the results obtained, but no one can argue with the actual events. When people are put in a position of authority without proper training, and without learning how to control their own personal prejudices and bias, Defendant asserts that the same results can be inferred in relation to Parole and Probation Officers.

This study seems to bear further fruit as to its validity when you look at a very recent example in 2004, of the Abu Ghraib prison in Iraq, where the prison guards were U.S. Military personnel. In a shocking re-occurrence of these events, the entire world has had to witness the shame of these actions as performed by our military, in denial of basic human rights.

Many parallels can also be drawn to the “Gestapo techniques” of the Nazi party, when you look at their treatment of the Jewish people, a despised minority in their eyes. Anything and everything was OK, as long as it was practiced against the Jewish people. In many respects, one can not say, “I was only following orders”, when the effects of this treatment were as horrendous as they were.

People who are in a position that affects the lives and rights of other people can not resort to that argument, as they have a personal moral obligation to do the right thing. Officers hide behind the authority of someone else who trains them or tells them that they are allowed to do this, according to the Divisions *interpretation* of the law. Maybe the duty of the Officer is to

research all of the applicable laws themselves, and make an informed decision of whether it is legal or not, as they apply these laws to the Defendant and all others similarly situated.

And with recent events in the world going on right now, one can see the relationships of power and its effects, from the Occupy Wall Street movement, and the violations of power the Officers of the law have inflicted upon the protesters, to the sick and absolute power of a mind like Moahmar Quaddafi, Suddam Hussein, and even Osama Bin Laden, and their minions and followers, and other despised leaders in that area of the world at the present time..

Many Officers work together to create this type of environment and to inflict further punishment upon an offender, or the family and friends of an offender. Defendant offers examples of these abuses in the discussions of the conditions, which are articulated further in this section.

No one seems to be outside the jurisdiction of these Officers, and the Division, according to their *interpretation* of the laws of the State of Nevada regarding parole, probation and Lifetime Supervision. (See Exhibits 2-10, 17-27).

The Defendant is asking the Court to determine the constitutional legality of the conditions as articulated, imposed, applied and enforced on Defendant and all other offenders similarly situated, that are subject to Lifetime Supervision under the authority of the Board of Parole Commissioners and enforced and applied by the Division of Parole and Probation.

Defendant is also asking the Court to determine the constitutionality of the Officers actions, in relation to the Constitution of the United States, and the Constitution of the State of Nevada, and the Nevada Revised Statutes.

The conditions of Lifetime Supervision were imposed and applied to Defendant by the Division of Parole and Probation, specifically by Officer Lewis, on or about April 6, 2008, without due process or any legal right to do so, as the Board had not specified the conditions the Defendant was to be placed under, and without any fact finding determination to confirm why the Defendant was ordered to be placed under the conditions of Lifetime Supervision.

The conditions were confirmed by the Board of Parole Commissioners on or about October 10, 2008, without Defendant's presence or any rights for Defendant related to due

process, and Defendant was notified of the conditions on or about December 4, 2008 by Officer Lewis. (Record of Hearing, October 10, 2008).

The conditions were further modified upon request of Officer Howald, on or about September 21, 2010, with Defendant's presence, but without due process, or any regard to sentencing guidelines, in an effort to make the conditions more punitive than before, causing an ex post facto situation. (Record of Hearing, September 21, 2010).

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. This Court will have to make a determination of the rights that they granted to Defendant upon that order.

"We should never forget that the freedoms secured by the First Amendment: Speech, Press, Religion, and Petition for Grievance, are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, *even the most despised minorities"*, American Communications Assn. v. Douds, 339 U.S. 382, 412, 70 S. Ct. 674, (1950); Dennis v. United States, 341 U.S. 494, 499-500, 71 S. Ct. 857, (1951); as quoted in Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, (1958).

The Agreement of Lifetime Supervision Conditions, (with minor changes for other offenders), as imposed and enforced upon Defendant, (Exhibit 1), and not listed in the Nevada Statutes relating to Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290, are as follows:

Condition # 1: Reporting/Release: *You are required to submit a written report as directed by your supervising Officer. The report will be true and correct in all respects. In addition, you shall report in person as directed by your supervising officer and submit a DNA sample as required.*

If a condition were to be enforced on Lifetime Supervision, this is one that Defendant believes could be legally and constitutionally allowed to be placed upon an offender subject to

the civil sentence of Lifetime Supervision as enumerated in NRS 176.0931, NRS 213.1243, and NAC 213.290, with a minor modification to the language in the DNA requirement.

Looking at the "limited" terms of this sentence as enumerated in statute, it specifically allows the offender to keep in contact with his Parole Officer and satisfies all of the reasons the Nevada Legislature put this law into place. This allows an Officer and offender to make monthly contact, through a written report to verify an offender's residence, through verification of mail confirming their residence, or any other means available, and to document their interaction, thereby complying with all the requirements of the statutes as written.

Defendant would like to offer an example of a situation, and his attempts to be cooperative and verify mail, based upon the *interpretation* of this by his supervising officer at the time. During an office visit, Officer Evans accused the Defendant of lying, and stated that he received "junk mail" at his residence with his name on it, and that he should bring this type of mail in to verify his residence.

Due to the fact that Defendant and his family pay all of their bills online, and take advantage of online billing, and that everything the family subscribes to is in the name of the spouse, the Defendant receives very limited mail, and there will be large gaps of time between receipts of mail.

Officer Evans then attempted to portray Defendant as not being in compliance with his Lifetime Supervision conditions, by attempting to intimidate the Defendant and threaten him with a violation of being non-cooperative. Defendant documented all the mail everyone in the family received for 4 months for Officer Evans; however, he was then accused of being a nuisance. (Exhibit 21, 22, 23).

The same situation occurred between Officer Evans and Defendant in relation to his automobile, and those of his family. Not only does the Division enforce the rule of notification upon Defendant concerning his automobile, the Division also wants to know every car Defendant has access to, drives, rents, or borrows, in each and every instance.

Please let the Court note that it is not necessary to include verbiage of enforcement of a condition that states that DNA samples must be submitted, as collection of a DNA sample is

done at the time of sentencing or prior, or at the time of release from incarceration, or while serving a term of parole or probation. If this goes unchanged, Officers will continue to take DNA, creating a backlog of tests to be run and cause confusion for both the Officer and the offender, and increased costs for the State. Nevada does not have indiscriminate funding to pay for tests two or three times when one documented test is sufficient.

In all actuality, the Defendant has been ordered to provide his DNA once, in relation to being convicted of a crime. In order to violate the rights of the Defendant again, it could very well be argued that the Court would again have to order the sample. Once the Defendant complies with the original order for collection, that order is deemed completed, and any further invasion of privacy or search of the Defendant would require a new order by the Court based upon a new conviction.

To indiscriminately say that the Defendant must continue to provide DNA samples based off of the whim of the Officer or the Board is arbitrary and capricious. Once the Defendant has completed his criminal sentence, any order continuing to apply to a criminal sentence would be void, and a form of double jeopardy. And this order requiring DNA collection at any time is not articulated in Nevada Statute.

Condition # 2: Residence: *You shall reside at a location only if it has been approved by your supervising Officer. You shall not change your place of residence without first obtaining permission from your supervising Officer.*

The Legislature has authorized the State, through the Board of Parole Commissioners and the Division of Parole and Probation, and the Court system to legally decide where an offender lives while on parole, probation, or residential confinement through very specific conditions enumerated in the Nevada Statutes, and relating to those situations explicitly. According to the Board and the Division, that while an offender is on Lifetime Supervision, the Officer must approve the residence and grant the Defendant permission to obtain, live and remain in *any* residence.

Defendant asserts that this restraint of a Constitutional Liberty Interest takes away the constitutional right to live where Defendant wants while serving a civil sentence. This is done

without any finding of fact that Defendant might be a continued threat to the safety of the public, and is also done after the successful completion of Defendant's probation with an honorable discharge. Defendant asserts that this is unwarranted and unjustified punishment, and that this restraint of liberty and further punishment is not listed or enumerated in any Nevada statute or regulation.

When looking to opinions held in Nevada relating to residence restrictions, the Court has held that the sentencing factors need to be related to rational and reasonable factors, and these opinions are related to a criminal sentence, not a civil sentence. The burden for the State would have to be much higher to infringe upon these rights of the Defendant, and would have to be articulated in the regulation that addresses these types of conditions, which they are not.

"Residence, work and curfew restrictions are imposed to ensure that the defendant is not living or working in circumstances that would undermine his rehabilitation or provide him with increased access to potential victims. They must be reasonably related to rehabilitation or the health, safety, or welfare of the community, Seim v. State, 95 Nev. 89, 93, 590 P.2d 1152, 1154, (1979).

In assessing the constitutional issues, we are also mindful of the additional protections that are available to a parolee, (where the State has a much higher ability to restrain an offender's constitutional rights due to the imposition of a criminal sentence, and not a civil sentence), to ensure that the provisions of the statute will not be used for improper purposes. If a parolee believes that he or she is being improperly treated, the parolee can request review of the restrictions by other officials in the Division of Parole and Probation or the sentencing court, or the Board of Parole Commissioners. Moreover, the Parole Officer can not unilaterally revoke a defendant's parole. Thus, the issue of the propriety of the curfew, residence or work restrictions could also be raised before a Court or the Board in any revocation proceeding, Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001).

In cases involving residency restrictions and the rights of parolees and probationers, many Circuit Courts and the Supreme Court have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not

serving parole, or probation. If the Courts have decided that these are serious issues for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests and First Amendment Rights of the Defendant while serving a civil sentence. No fact finding determination by a qualified individual was ever made that the Defendant required a condition that authorized where he lived, how he lived, or who he lived with while serving a civil sentence.

In relation to all others similarly situated, Defendant is aware of a current situation which is so egregious as to be so far outside the bounds of the authority granted under a civil sentence as to be ludicrous, and much more than just punishment, but also vindictive, intimidating and a form of continuing harassment in relation to an offender placed under this "civil sentence".

While on a home visit, Officer Howald felt, without any evidence to confirm that feeling, that an offender was alone, "in a secluded environment" with his 5 year old granddaughter; when in fact two (2) other adults were in the home at the time of the visit, which she admits. The offender was given permission to have his granddaughter and daughter live with him since his granddaughter's birth.

The Division, the Board, and specifically, Officer Howald have forced this person to move from his home and into an apartment by himself upon the unsworn and rankest hearsay and belief of Officer Howald. This was done with no evidence of a crime or of any issue in relation to the grandchild. In an attempt to keep his nuclear and extended family intact, the offender had the child tested by a specialized Licensed Psychologist, Dr. Earl Nielsen, after the alleged incident to determine if there were any issues involving the child. There were NONE.

This has cost the offender thousands of dollars for testing and for continually paying for two residences, yet the Division and Officer Howald continue to enforce this condition on the offender, thereby inflicting further punishment, financial punishment, and a restraint of constitutional liberty.

Officer Howald, in her infinite knowledge and wisdom and with all of her 'psychological training" has stated that she believes that it is better for this offender <u>not</u> to live with his family, even against his own wishes, those of both of his therapists, Dr. Robert Hemenway, and Dr. Earl

Nielsen, who are both licensed psychologists, and more importantly, those of his family, including his daughter, and the father of the children.

The Officer has gone further than this in harassing the offender, and has caused the offender to be subject to a curfew, upon no reasonable grounds, and that he have "no contact" at all, in any form or manner with his grandchildren, even in a public place, like a restaurant, and that he is not allowed to be at his own home that he pays for. He can not even be there when the family is out of town.

This extension of the conditions is all predicated on Officer Howald's subject and whim, upon arbitrary and capricious determinations, and without any evidence or fact finding determination, and without the approval of the Board of Parole Commissioners. Officer Howald is extending the conditions upon her own authority, and defining the language as she sees fit.

This restraint of liberty is not performed under any enumerated circumstances, but is all applied verbally by Officer Howald, who states that "you should have thought of that before you committed the crime", clearly showing prejudice and bias.

The Supreme Court has looked at this situation and "it expressly allowed all who were related by blood, adoption, or marriage to live together, and in sustaining the ordinance we were careful to note that it promoted family needs and family values, Village of Belle Terre v. Borass, 416 U.S. 1, 94 S. Ct. 1536, (1974).

In looking further, the Court states in Moore v. East Cleveland, 431 U.S. 494, 498, 97 S. Ct. 1932, (1977), that "when a city undertakes such intrusive regulation of the family, the usual judicial deference to the Legislature is inappropriate".

"This Court has long recognized that freedom in matters of marriage and family life is one of the liberties protected by the *Due Process Clause* of the Fourteenth Amendment", Cleveland Board of Education v. LaFluer, 414 U.S. 632, 639-640, 94 S. Ct. 791, (1974).

A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S. Ct. 625, (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S. Ct. 571, (1925), have consistently acknowledged a "private realm of family life which the state cannot enter", Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, (1944); Roe v. Wade, 410 U.S. 113,

152-153, 93 S. Ct. 705, (1973); Wisconsin v. Yoder, 406 U.S. 205, 231-233, 92 S. Ct. 1526, (1972); Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, (1972); Ginsberg v. New York, 390 U.S. 629, 639, 88 S. Ct. 1274, (1968); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 1681, (1965), Id. at 495-496 (Goldberg concurring), Id. 502-503 (White concurring); Poe v. Ullman 367 U.S. 497, 542-544, 549-533, 81 S. Ct. 1752, (1961); Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, (1967); May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840, (1953); and Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, (1942).

Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation, Poe v. Ullman, 367 U.S. 497, 542-544, 549-533, 81 S. Ct. 1752, (1961).

If this illegal condition is allowed to stand, anyone sentenced to a civil penalty such as a fine, or community service, or while under obligation to the Court to pay a fine or ticket, could have this condition imposed upon them, thereby creating the same absurd results.

Even the Legislature did not attempt to infringe upon this Constitutional Liberty Interest in the original Statute. Only later, in a series of laws which were struck down as unconstitutional, did this "special sentence" include this type of restraint, ACLU v. Masto, 719 F. Supp. 2d 1258, 1269, (D. Nevada 2008).

In fact, many offenders did not have this condition as a part of their original sentencing when convicted, as this condition was added by the Legislature in 2005, thereby making this condition for many offenders, an ex post facto condition, and a further violation of the constitutional rights of Defendant and all others similarly situated. Defendant states that in looking to the Legislative intent, that a modified form of this condition could be allowed to stand, but in its present interpretation and enactment, that it is a violation of the Constitutional Liberty Interests of Defendant and all others similarly situated.

Condition # 3: Intoxicants: *You shall not drink or partake of any alcoholic beverages to excess/or at all. Upon request by any Parole or Peace Officer, you shall submit to a medically*

recognized test for blood alcohol content. Failure to submit shall constitute a violation of your lifetime supervision. Test results of .08 blood alcohol or higher shall be sufficient proof of excess.

A citizen of the United States is granted the constitutional right to partake of an alcoholic beverage at any time, and only when a person is in excess of a legally determined amount of alcohol does it become a crime in certain situations such as operating a motor vehicle, or being drunk in public. The Nevada Legislature has authorized the Board to institute this condition on someone serving parole, and the Court may institute it on someone serving probation.

The Board of Parole Commissioners violates the Constitutional Liberty Interest of an offender on Lifetime Supervision, by applying this condition indiscriminately and arbitrarily, not on the basis of the crime, but instead, based on the personal predilections and recommendations of the Parole Officer.

This restraint is performed by the Board, with no ability for the Defendant, or all others similarly situated, to be heard, and to refute any recommendation or testimony, and without any fact finding determination of why a "no alcohol" condition is needed. If there is no relation to the original crime, or if there is no past or current abuse of alcohol, or any determination made on the record why Defendant should abstain from alcohol, then this condition should never be illegally imposed and enforced.

In addition, any submittal to a test, without reasonable cause, whether it is for alcohol or for any other reason, is a violation of a person's rights to an illegal search under the 4th Amendment. To force a person to submit, without their consent, to a test for alcohol levels in their own home is punishment, and even more so when this test can be performed at any time, as often as the Officer wishes, upon no articulated or reasonable causes, and upon the personal predilections of the Officer.

Defendant asserts that by restraining this Constitutional Liberty Interest of an offender, it becomes punishment for someone serving a civil sentence. In its current form, and upon application and enforcement by the Board of Parole Commissioners and the Division of Parole and Probation, this constitutes a punishment, for an act that in and by itself is not a crime.

In cases involving alcohol restriction and the rights of parolees and probationers, many Circuit Courts have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole, probation or supervised release. If the Federal Circuit Courts have decided that these are serious issues for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests of the Defendant while serving a civil sentence. No fact finding determination was ever made that the Defendant abused alcohol, or that there is any recent activity of abusive alcohol use.

Under the sentencing guidelines, the Court can require as a condition of supervised release that a offender "refrain from excessive use of alcohol". And that further, the Court can impose any other condition that "involves no greater deprivation of liberty than is necessary for the purposes set forth therein, United States v. Jackson, No. 3:02-00181, (District Court for Tennessee, Nashville, 2009)

Courts have imposed a total ban on the offender's use of alcohol only where the offender's alcohol use is tied to the underlying crime, United States v. Thurlow, 44 F.3d 46, 47, (1st Circuit 1995), or the evidence establishes such a ban is necessary and reasonably related to the offender's rehabilitation, United States v. Schave, 186 F.3d 839, 841-842, (7th Circuit 2002), (prior diagnosis of alcoholism).

The Courts have also imposed a total ban if there is a documented need to protect the offender's family from abuse, United States v. Cooper, 171 F.3d 582, 586-587, (8th Circuit 1999), or to protect the public, United States v. Modena, 302 F.3d 626, 636-637, (6th Circuit 2002), and United States v. McKissic, 428 F.3d 719, 723, (7th Circuit 2005).

In the 6th Circuit, imposition of an alcohol ban without information of the offender's abuse or use of alcohol is an abuse of discretion, *Modena*, Id. at 636. An offender's use of alcohol on weekends and smoking marijuana was held insufficient to justify a total alcohol ban, absent proof that the offender abused alcohol, United States v. Bass, 121 F.3d 1218, 1223-1224, (8th Circuit 1997). In United States v. Scherrer, 444 F.3d 91, 95-96, (1st Circuit 2006), the First Circuit struck a total alcohol ban during treatment for drug and alcohol abuse.

Defendant has actually been threatened with arrest for a violation of this condition, by Officer Howald and Officer Avilla, during a home visit, where they attempted to intimidate Defendant by harassing him in relation to a urine test. They claimed a urine test showed alcohol levels. The condition states that an offender "shall submit to a medically recognized test for alcohol levels".

Obviously, this test was negative for alcohol, as only a breathalyzer or a serum level blood test can accurately determine the level of alcohol in the bloodstream. By forcing Defendant to submit to an "alcohol" test, by the use of a urine test is intimidation and harassment.

Officer Howald and Officer Avilla intimidated and harassed Defendant and his family for over an hour and a half, while awaiting the ability of the Defendant to provide a sample for the urine test. (Exhibit 20). This is cruel or unusual punishment. Intimidation is a form of torture. And according to Nevada Statute, it is illegal to detain an individual for more that 60 minutes.

Defendant asserts that he has never abused alcohol, and there is no record of any abuse, or any documented reason to protect his family from abuse, or for the safety of the public, thereby making this condition for Defendant punitive in nature and effect. For all others similarly situated, there was no fact finding determination made by a qualified individual in order to impose this condition, therefore causing an abuse of discretion. This condition also violates the Defendant's Fourth Amendment right to an illegal search upon reasonable grounds.

Condition # 4: Controlled Substances: *You shall not use, purchase, or process any narcotic drugs, nor any dangerous drugs, unless first prescribed by a licensed physician; you shall submit to periodic tests to determine whether you are using a controlled substance, as required by your supervising Officer.*

Any submittal to a test, whether it is for drugs or any other reason, is a violation of a person's rights to an illegal search under the 4th Amendment. To force a person to submit, without their consent, is punishment, especially for someone serving a civil sentence. Defendant has had to submit too many urine tests by Officer Howald, in excess of any mandated amount, at least monthly, if not more often, to determine the use of drugs. No other Officer, before or after

Officer Howald, has ever forced Defendant to submit to a urine test that often, and upon no reasonable cause or suspicion. This was beyond her authority, and was imposed on Defendant as intimidation and harassment by Officer Howald.

In cases involving drug testing and the rights of parolees and probationers, many Circuit Courts have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole or probation. If the Courts have decided that these are serious issues for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests of the Defendant while serving a civil sentence.

When it comes to controlled substances, unlike alcohol which can be consumed legally, a user is by definition an abuser, United States v. Simmons, 130 F.3d 1223, (7th Circuit 1997). No fact finding determination was ever made that Defendant abused or used drugs, or that there is any recent activity of drug use or abuse. No drugs were involved in Defendant's crime, and he is, by definition, not an abuser, since he does not do drugs or have a history of drug use, and during the seven (7) and a half years of his supervision, has not tested positive for drugs or alcohol in any test administered by any Officer employed by the Division of Parole and Probation.

In United States v. Bonanno, 146, F.3d 502, 511, (7th Circuit 1998), the drug testing order which required the defendants to submit to urinalysis "at random…within the discretion of the probation officer" was beyond the parameters of the supervised release statute and gave the probation officer too much discretion in the management of the drug testing order.

In United States v. Melendez-Santana, 353 F.3d 93, 103, (1st Circuit 2003), it states that the Courts need not become involved in details such as scheduling tests, but Congress assigned the courts the responsibility of stating the maximum number of tests to be performed or to set a range, so they may not vest probation officers with the discretion to order an unlimited number of drug tests.

In United States v. Tulloch, 380 F.3d 8, 10-11, (1st Circuit 2004), the order giving the probation officer discretion to order unlimited drug tests is an improper delegation, but that

allowing the probation officer to determine the timing of the tests is a permissible administrative task.

Defendant states that the Board, in the illegal conditions of Lifetime Supervision, which they impose and implement, does not define any of these issues, causing the condition to be void, and it should be vacated in relation to Defendant and all others similarly situated.

Defendant respectfully requests that the Court articulate the definition of dangerous drugs. In this condition as enumerated, there is no definition, and the Officer, the Division, and the Board refuse to define it for the Defendant. This is extremely vague, arbitrary and capricious. The definition could be two (2) aspirin an hour, if you were to ask for the opinion of a medical practitioner, as that would be over the recommended dosage. Defendant asks the Court who is qualified to make these determinations of dangerous drugs? Defendant states that a person who is licensed to practice medicine in the State of Nevada should have been consulted to help the Board and the Division with this definition, and this determination of dangerous drugs.

Defendant asserts that as written, the condition is arbitrary and vague, and left to the personal predilections of the supervising Officer. Defendant is aware of an actual example, where a supervising Officer called the medical practitioner and asked why a particular drug was prescribed for the offender. This is a clear violation of the HIPAA laws, and the confidentiality laws of the State of Nevada, specifically NRS 49.225, and the rights of the offender, and the practitioner. An Officer may not question or dispense medical advice, nor does she/he have a license to prescribe narcotics or any other drugs.

This Officer was questioning the medical advice of the medical practitioner, who is licensed to practice medicine, against the patient's rights, and against the medical practitioner's rights, to provide care for the patient. This is extremely punitive in nature and effect, and no Parole and Probation Officer should ever be allowed to do that, unless they are licensed to practice medicine, as well as being a Parole and Probation Officer, and have obtained consent from the patient, according to the confidentiality laws and the Federal HIPAA Laws.

Condition # 5: Weapons: *You shall not possess, own, carry, or have under your control, any type of firearm or illegal weapon.*

This additional crime is already listed in the Nevada Revised Statutes in relation to a person convicted of a felony. Now it is listed again in the conditions of Lifetime Supervision. Defendant asks the Court for a clarification of the law and requests "does that mean a person can be charged twice, then enhance it by the law in NRS 176.0931, and then further enhance it with the use of the gun enhancement law, NRS 193.165".

A law or a condition that one can be held accountable for should be clearly written and defined so that a reasonable person of normal intelligence may understand the conduct prohibited and the penalties that could be imposed. It is already a crime for a convicted felon to own a gun, or be in possession of one. On a civil sentence, with these laws already in place, the Board of Parole Commissioners should just leave this issue alone, and let the existing laws rule.

Condition # 6: Associates: *You shall not associate with ex-felons or any person who is required to register as a sex offender under Nevada Law without permission from your supervising Officer.*

As a First Amendment Right, an offender has a Constitutional Liberty Interest to associate with whomever they wish, especially their own family, and that any infringement on this liberty, no matter how minor, is a serious punishment and restraint of liberty in and of itself.

In regards to making association criminal, first, "The Board has the burden to show a compelling government interest to justify a restriction on petitioner's constitutional right to associate", Elrod v. Burns, 427 U.S. 347,362, 96 S. Ct. 2773, (1976).

Second, "mere association with a person or group cannot be made criminal", Scales v. United States, 367 U.S. 203, 81 S. Ct. 1469, (1961); Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Spilotro v. Nevada Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

And finally, "the State may not punish solely on the status or reputation of a person, Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, (1968); Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, (1962).

Certain infringements upon the right of association may be justified by regulations adopted to serve compelling state interests, [such as in parole and probation], and unrelated to the suppression of ideas. And that these infringements shall not be achieved through means

restrictive of associational freedom, Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

First, "In assessing the reasonableness of a regulation, the Court must weigh heavily the fact that communication is involved", Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, (1939); Talley v. California, 362 U.S. 60, 80 S. Ct. 536, (1960); Saia v. New York, 334 U.S. 558, at 562, 68 S. Ct. 1148, (1948).

Second, "The regulation must be narrowly tailored to further the State's legitimate interest", DeJonge v. Oregon, 299 U.S. 353, 364-365, 57 S. Ct. 255, (1937); Lovell v. Griffin, 303 U.S. 444, at 451, 58 S. Ct. 666, (1938); Cantwell v. Connecticut, 308 U.S. 296, at 307, 60 S. Ct. 900, (1940)

And third, when Congress' exercise of one its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our "delicate and difficult task" to determine whether the resulting restriction can be tolerated, Schneider v. State, 308 U.S. 147, 161, 60 S. Ct. 146, (1939).

The statute and the conditions under it, quite literally establish guilt by association alone, without any need to establish that an individual's association poses the threat feared by the government in proscribing it, or with any intent to commit any illegal activity.

For the Defendant, an actual example is when the Officers of the Division disallow the rights of offenders in group therapy to associate with each other, even though they provide a valuable therapeutic tool for each other through accountability. This goes against the Division Policy which states: "that they wish to do everything possible to encourage and support the offender while helping to rehabilitate the offender". This can seriously impact and hamper the continuing therapy of offenders, which has also been made a condition of Lifetime Supervision.

In point of fact, for the Defendant and all others similarly situated, Officers of the Division have stated that we may not even chat or talk to each other as we are coming to or leaving therapy, while on our way to our vehicles or while we are waiting in the lobby, as they define this as association. In one instance for Defendant, when exiting a room that was used for therapy purposes at the psychologists office, and after being seen by Officer Howald, who was

with Officer Pierrott at the time, he was further questioned by Officer Evans during an office visit, about why I was in a private meeting with the therapist and another offender. This is a clear violation of confidentiality, as stated in NRS 49.209.

The Officers have also determined that we may not talk to each other while working on a grievance or a case while at the law library researching materials. They have threatened to violate two offenders who were discussing issues during a Legislative hearing during the 2011 Legislative session, as they do not want Defendant or any other offender to be present during these hearings or any other hearings, committees or Board hearings. This is a clear violation of the constitutional right of the Defendant or any other offender similarly sentenced to address grievances, a First Amendment Right. No Policy and Procedure or definitions are available to the Defendant to help him comply with the "rules" regarding the *interpretation* of the Nevada Revised Statutes by the Division.

Defendant is also aware of and has been in the same situation where two offenders were chatting while waiting in the lobby of the local Parole and Probation Office in Reno, and the Officers came out and made them stop, and threatened them with a violation of their conditions for associating. How petty, arbitrary, capricious, and punitive do the Officers wish to be?

It is required that an offender present themselves at the Office once a month, and then they are threatened with a violation for chatting while they are waiting. I am sure the Officers have many better things that they could be doing with their time, due to a very large workload, yet they continue to take the time to harass offenders, and threaten them with arrest. By making this type of association criminal, or any other association that the person chooses, it becomes punitive in nature and effect.

Another actual example would be where the Division of Parole and Probation enforces this even more arbitrarily in relation to employment, where if by chance, another offender might be working at the same place that an offender is applying to, they will not grant permission to work there and have even forced them to quit the position of employment that they had previously obtained.

In cases involving association relating to employment, and the rights of parolees and probationers, many Circuit Courts and the Supreme Court have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole or probation. If the Courts have decided that these are serious issues for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests and First Amendment Rights of the Defendant while serving a civil sentence. No fact finding determination was ever made that the Defendant was involved in any illegal activity while employed and at work, and/or with anyone else who Defendant was employed with.

In point of fact, since Defendant is involved in the construction trades, it is highly likely that he will always be in contact with some offender on parole, probation, a sex offender, or a previous offender. Defendant asks this Court if he will have to leave the construction trades, where he is highly qualified, and where he is currently employed, due to this *interpretation* of association by the Officers of the Division of Parole and Probation, because of his "association while working".

It has become axiomatic that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms", NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, (1963); Aptheker v. Secretary of State, 378 U.S. 500, 512-513, 84 S. Ct. 1659, (1964); Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, (1960).

Thus, the conditions contain the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment Rights, Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, (1966); Aptheker v. Secretary of State, 378 U.S. 500, 512-513, 84 S. Ct. 1659, (1964); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 84 S. Ct. 1302, (1964); NAACP v. Button, 371 U.S. 415, 438, 83 S. Ct. 328, (1963).

Defendant asserts that the restraint of liberty to associate is arbitrary and vague, and is subject to the personal predilections of the Officer, thereby making it a restraint of the First Amendment Rights of a civil offender and making it punitive in nature and effect.

Condition # 7: Cooperation: *You shall, at all times, cooperate with your supervising Officer and your behavior shall justify the opportunity granted to you by this Lifetime Supervision.*

The Board of Parole Commissioner and the Division of Parole and Probation have made it a crime to be non-cooperative. This violates the Defendant's First Amendment Rights by denying the Defendant's right to free speech, and the ability to address grievances. They do so without any definition of cooperation and without any policy and procedure which might address the issue to offer guidelines to both the Officer and the Defendant or any other offender.

The Officers stance in relation to cooperation is this: do as I say, and do not argue or talk back, or offer your point of view in order to address grievances, or actually address or file grievances, or you have committed a crime by "not cooperating with me, or with the Division". (Exhibits 2-10, and 17-27).

Cooperation as defined in Webster's Dictionary states: "working or acting *together* to achieve a common purpose, or for a joint benefit".

Defendant has been arrested on or about September 7, 2011, by Officer Evans, for a violation of Lifetime Supervision, for non-cooperation in relation to a polygraph test, where after being extremely cooperative for 6 hours during this "test", and upon Defendant exerting his 5th Amendment rights as described in the United States Constitution, and affirmed by the Nevada Supreme Court in Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001).

Defendant was promptly arrested for asserting this constitutional right and charged with non-cooperation for refusing to answer 2 illegal questions which he was legally allowed to do. Defendant asserted during the 6 hours he was involved in this "test', that he was extremely co-operative, and that the NRS statutes, specifically NRS 648.187, NRS 648. 189, and NRS 648.193, which relate to polygraph's, were being violated by the examiner, Detective Jim Sackett, who is employed by the Department of Public Safety.

Officer Evans, and Officer Gothan, of the Division of Parole and Probation, were principles in relation to these violations of the Nevada Statutes against Defendant, as they were present at the time of the infractions. In addition, many Nevada Revised Statues relating to

confidentiality were also being violated by the examiner, Detective Jim Sackett, in relation to Defendant. (Formal Complaint Pending).

In this situation, Officer Evans detained and arrested Defendant on this charge, which the District Attorney decided not to pursue, thereby causing this to be illegal arrest. When an Officer, upon unsworn testimony and upon no reasonable cause, detains and arrests an offender, the Officer violates the Constitutional Liberty Interests of Defendant, in the loss of liberty itself. This is further intimidation and harassment, and also causes a financial strain on Defendant in having to post bail, until such a time as the District Attorney decided not to pursue. This is punishment. (Formal Complaint Pending).

Defendant offers to the Court this extremely negative example of *cooperation*, which is a true story, and performed by a Parole Officer who had the same powers and duties of the Parole Officers with the Division of Parole and Probation. This situation occurred where a Parole Officer in Carson City forced women to be subject to his illegal sexual adventures. All 7 women said he asserted himself in these situations by stating that they had to *cooperate* with him in order not to go to jail, or not to go back to jail, because he had that power. One of the women was not even on parole or probation, but was just a friend of a person who was. And in another instance, outside of our State, a Federal Parole Officer in Oregon was recently sentenced to prison for a very similar situation.

Parole Officers lack the necessary training to handle everyday situations with an offender without resorting to the very real threat of arrest and incarceration, upon arbitrary and capricious determinations by the Parole Officer. In point of fact, they tend to act more like bullies, according to the studies done on bullying, and rationalize their behavior to the fact that a person has been convicted of a crime, so any further punishment is therefore, Ok. Defendant asserts that this is mostly due to a lack of training, and a lack of providing the Officer with the true facts of recidivism and other factors that relate to offenders, and their families.

The Officers in the Division use many intimidating and harassing behaviors in relation to an offender, and the families of offenders, in order to force them to cooperate, by the use of threats, intimidation and further punishment. Defendant asks this Court to define non-

cooperation, or cooperation, or both, in an enumerated and articulated opinion to let a citizen of the State of Nevada understand the conduct that they are being held accountable for. The Division states that anything an offender might do or say, or not do or say, could cause a person to be non-compliant and subject to a felony for being non-cooperative. Defendant asserts that this is arbitrary and capricious, and is applied upon the personal predilections of the Officer.

The Nevada Supreme Court has stated that an offender has the right to answer formal or informal questions as he sees fit, or not answer at all, in relation to his 5th Amendment right in *Mangarella v. State*. As the Officers are continually probing and questioning, an offender cannot be sure if they are going to incriminate themselves upon unspecified or un-enumerated circumstances due to these unspecified conditions. How can one conform their behavior to not commit a crime, when that behavior is unspecified and left to the personal predilections of the Officer? This is an extremely overbroad and vague condition which can be extremely punitive in nature, creating absurd results, and cause an offender to be convicted of a felony, and serve up to 6 years for something which might otherwise not be a crime, based off of the personal predilections and *interpretation*s of the Supervising Officer.

Defendant asserts that by infringing upon the First Amendment Right to free speech, and the right to address grievances, and by inflicting a serious punishment for behavior or conduct not specified or enumerated, without any clear guidelines for law enforcement, and with no definition of cooperation or non-cooperation, that this is punishment in relation to an offender for something that is not a crime in and by itself.

Defendant states that there is no "opportunity granted" to an offender by the Board of Parole Commissioners to serve this sentence. It is not parole, a matter of Legislative grace, or probation, a matter of a suspended sentence offered by the Court. You must be convicted of a specific crime listed in statute and be sentenced to Lifetime Supervision by the Court. For the Board of Parole Commissioners to assert that they are granting by their leave and grace, to an offender, the "special sentence" of Lifetime Supervision is demeaning and disrespectful and an ethical violation.

An offender does not have to "justify" anything to serve this sentence imposed upon him. This is just plain offensive and a show of power, prejudice and bias by the Board to the Defendant and all others similarly situated. This relates to the Board's stance that while on Lifetime Supervision, they presume to control an offender's life and every move, and they have the power and authority to deny an offender his or her Constitutional Liberty Interests and First Amendment Rights, without the legal authority to do so, by asserting that they have the authority to provide the Defendant this "opportunity granted".

Condition # 8: Laws and Conduct: *You shall comply with all municipal, county, state and federal laws, and ordinances; and conduct yourself as a good citizen. You shall comply with all offender registration requirements.*

This is a given, that Defendant or any other offender, just like every other citizen has to obey the laws. As applied to Defendant and all others similarly situated, the Board of Parole Commissioners is saying, that if an offender obtains a ticket for any reason, including a parking ticket, since an offender violated the law; they can now be charged with a felony count for a violation of Lifetime Supervision. This is absurd, and is an extreme further punishment upon the offender. "A statute should always be construed to avoid absurd results, General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348, (1995).

Defendant asks this Court to articulate and enumerate "the definition of a good citizen". Defendant respectfully asks the Court for a definition, as the Members of the Legislative, or the Members of the Board certainly seem reluctant to define this for the Defendant, and all others similarly situated, and the citizens of the State of Nevada. Defendant has continually asked for definitions from the Board and the Division due to his issues and concerns in relation to the affirmative restraints of his Constitutional Liberty Interests and First Amendment Rights, which he asserts is being a good and responsible citizen, by being aware of the enumerated definitions and thereby conforming his behavior to them.

The Defendant has also requested the Policy and Procedure relating to his conditions, from Officer Tiffany, Officer Howald, Officer Evans, Sergeant Diek, Sergeant Helgerman, and Lieutenant Gover, (Exhibit 25), and he is being continually punished by not being allowed to

travel with his family or for work, and by being harassed and arrested in relation to his advocacy. The company he works for has lost a million dollar contract due to this denial. In fact, Defendant is being responsible and is conducting himself as a good citizen, by being knowledgeable about the laws relating to him, and he is being further punished for it, because he voices concerns about the constitutional legality of his sentence, and his attempts to address grievances. This is additional punishment, plain and simple. More of this example currently relating to Defendant is described in the travel condition #9, and the polygraph condition #14.

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 of the Constitution. The ability to restrain and limit travel is extremely punitive in nature. This restraint is arguably legal in relation to Parole, which is a matter of Legislate grace, or Probation, which the Court has authority over, but not to the civil sentence of Lifetime Supervision.

As applied to Defendant, and all others similarly situated, this becomes even more punitive when the original condition is subject to a written public policy and procedure, which is supposed to be applied only to persons on Parole or Probation, serving time under a criminal sentence, specifically Division Directive 6. 3.131, (1998). 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 articulated in a book described as the Division of Parole and Probation *Sex Offender Manual*.

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

By imposing many more written public conditions and many more unknown written non-public conditions to the original 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 and 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.

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). Indeed, as Justice Stewart reminded us in Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, (1969), 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", Id at 643, (concurring opinion).

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. 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, at 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).

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. (Exhibit 16).

Defendant has appealed this condition to the Board of Parole Commissioners, and by their silence on the matter, they have declined to address this issue, with no articulated reason, or notice of denial to Defendant. (Exhibit 16).

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. Defendant asserts that this is a violation of equal protection rights and interstate commerce as well.

Condition # 10: Employment/Program: *You shall seek and maintain employment, or maintain a program approved by the Division of Parole and Probation and not change such*

employment or program without first obtaining permission. You shall accept a position of employment only if it has been approved by your supervising Officer.

Allowing the Board of Parole Commissioners and an Officer with the Division to deny an offender the right to work, or the right to change jobs, is a restraint of a Constitutional Liberty Interest and a violation of First Amendment Rights.

In cases involving employment and the rights of parolees and probationers, many Circuit Courts and the Supreme Court have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole or probation. If the Courts have decided that these are serious issues for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests of the Defendant while serving a civil sentence.

Sentencing judges have discretion to impose conditions of supervised release so long as the conditions are reasonably related to the sentencing factors enumerated, involve no greater deprivation of liberty that is reasonably necessary, and are consistent with the Sentencing Commission's pertinent policy statements, United States v. Bass, 121 F.3d 1218, 1223, (8th Circuit 1997); United States v. Prendergast, 979 F.2d 1289, (8th Circuit 1992). This enforcement of the employment condition by any Officer with the Division is an explicit occupational prohibition and therefore is subject to the limitations on imposing such conditions.

The Court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession, or limiting the terms on which the defendant may do so, only if it determines that:

(1) A reasonable direct relationship existed between the defendant's occupation, business, or profession and the conduct relevant to the offense of conviction, and

(2) Imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.

If the Court decides to impose a condition of probation or supervised release restricting a defendant's engagement in a specified occupation, business or profession, the court shall impose the condition for the minimum time and to the minimum extent necessary to protect the public, United States v. Choate, 101 F.3d 562, (8th Circuit 1996).

"Residence, work and curfew restrictions are imposed to ensure that the defendant is not living or working in circumstances that would undermine his rehabilitation or provide him with increased access to potential victims. They must be reasonably related to rehabilitation or the health, safety, or welfare of the community, Seim v. State, 95 Nev. 89, 93, 590 P.2d 1152, 1154, (1979).

In assessing the constitutional issues, we are also mindful of the additional protections that are available to a parolee, where the State has a much higher ability to restrain an offender's constitutional rights due to the imposition of a criminal sentence, to ensure that the provisions of the statute will not be used for improper purposes. If a parolee believes that he or she is being improperly treated, the parolee can request review of the restrictions by other officials in the Division of Parole and Probation or the sentencing court, or the Board of Parole Commissioners. Moreover, the Parole Officer can not unilaterally revoke a defendant's parole. Thus, the issue of the propriety of the curfew, residence or work restrictions could also be raised before a Court or the Board in any revocation proceeding, Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001).

In the conditions of Lifetime Supervision, this is not narrowly drawn to restrain the rights of the Defendant. The Officer may deny employment for any reason, whether or not it is a licensed business, or even one the offender owns themselves, thereby restraining another Constitutional Liberty Interest of anyone sentenced to Lifetime Supervision.

In the conditions of federal supervised release, the legislative history of this statute confirms that the United States Congress does not favor broad or overreaching use of occupational prohibitions. The condition may be imposed only if the occupation, business, or profession bears a reasonably direct relationship to the offense…..The Committee recognizes the hardship that can flow from preventing a person from engaging in a specific occupation. This

particular condition should only be used as reasonably necessary to protect the public. "It should not be used as a means of punishing the convicted person".

While "a sentencing Court has broad discretion in fixing conditions of probation", and we therefore review a sentence of probation under an abuse of discretion standard, we "carefully scrutinize unusual or severe conditions, such as one requiring an offender to give up a lawful livelihood", United States v. Cutler, 58 F.3d 825, 838, (2nd Circuit 1995).

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence", Cooter & Gell v. Hartmaxx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, (1990).

This allows an Officer, by the granting of their permission in this instance, to pursue their own personal predilections, and apply their own prejudice and bias; is arbitrary and capricious, and by doing so makes this a further form of punishment against an offender. An example would be that you can't work in a specific place, only because another offender or person on parole or probation works there, denying an offenders right to associate. Or the Officer will say that you can't work there, because I don't like that business or that it might, with no evidence to substantiate the claim, put you in contact with a minor.

While Defendant would agree, that perhaps the Toys-R-Us retail store might not be an acceptable place for an offender on parole or probation to work, he would argue that the warehouse for Toys-R-Us, should be an appropriate place for an offender to work while serving any sentence.

These definitions of denial are arbitrary, and are practiced daily by the Officers of the Division. Denying an offender the right to work, at a legally established business is a form of punishment, especially in this economic downturn, where the offender might only have been offered this one position in the last year. Then the Officers will continue to use intimidating, harassing and threatening behavior in relation to an offender, as a further form of punishment when they ask why the offender is not currently employed, and restrict his liberty even more for being non-compliant with this condition, by imposing a curfew, or by restricting his right to travel due to not being compliant with his other conditions.

Another actual example relating to other offender's similarly situated and brought to Defendant's notice through an advocacy website, is that many current offenders on Lifetime Supervision had the opportunity to work on the pipeline in Northern Nevada, due to many of them being in the construction trades. Almost as a blanket policy, they were denied the right to work on this pipeline project, even though many had been offered employment. WHY? Officers are granted no clear guidelines in determining why an offender may not work for any legal business, or what a legal business is, as evidenced during a recent parole hearing granted by the Board.

The Board of Parole Commissioners specifically state that the Division of Parole and Probation and its Officers have the right to decide what a legal business is, without any fact finding determination about the business, based upon arbitrary and discriminatory factors.

Defendant asserts that this causes the condition to be vague, overbroad, and a restraint of the constitutional right to employment, thereby causing the condition to be punitive in nature and effect. Defendant asserts that work, while employed by a legally recognized business in the State of Nevada, by the State of Nevada, in and by itself is not a crime.

Condition # 11: Supervision Fees: *Pay all applicable fees, fines, and restitution on a schedule as determined by the Division of Parole and Probation.*

This is another condition that could be legally and constitutionally allowable upon modification of the enumerated language, and by order of the Court, and a part of it is actually in the Lifetime Supervision statutes as written in one of the "limited" specifications. It is interesting to note that the Board denies that there are "limited" specifications, which the Board and the Division are required to adhere to; and which the Board ignores because they are "limiting", but which include the right to charge for supervision. Strangely enough, the Division then "charges for supervision", based off of this part of the statute which they ignore.

In cases involving supervision fees, fines and restitution and the rights of parolees and probationers, many Circuit Courts have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole, probation, or supervised release. If the Courts have decided that these are serious issues

for parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the Constitutional Liberty Interests of the Defendant, while serving a civil sentence after completion of his criminal sentence.

"Making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function, and therefore is non-delegable", Arnold v. United States, 271 F.2d 440, 441, (4th Circuit 1959).

Where "restitution is ordered as a condition of supervised release, determination of amount and scheduling of payments is non-delegable", United States v. Weichart, 836 F.2d 769, 772, (2nd Circuit 1988).

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); and that "restitution ordered in an amount to be determined by the probation officer is illegally imposed", United States v. Porter, 41 F.3d 68, (2nd District 1994).

This has been the conclusion of all but one of the other circuits that have considered this issue. Other Circuit Courts have held "that the sentencing court cannot delegate decisions as to amount of restitution or the scheduling of installed payments", United States v. Albro, 32 F.3d 173, (5th Circuit 1994); and that the "district court is free to receive and consider recommendations from probation officer, but court itself must designate the timing and amount of payments", United States v. Gio, 7 F.3d 1279, (7th Circuit 1994); and that "district court may not, after fixing amount of restitution, delegate ultimate authority for determining amounts of installments to probation officer", Dougherty v. White, 689 F.2d 142, 145, (8th Circuit 1982).

The Division and the Officers further determine that they have the legal right to allow an Officer to decide who and what gets paid, what the offender or the offender and his family may spend their own money on, by violating the rights of the offender in relation to searches, privacy, and confidentially, and by verbal and extra written conditions that Officers impose relating to the financial information of the offender.

The Division uses this condition to create a punishment for an offender by their intrusion into protected liberty interests of an offender, by violating the Fourth Amendment Right to be

secure in their persons, papers and property, by illegally searching bank accounts and other financial documents. Many Officers arbitrarily force offenders to bring in bank statements or other financial documents, such as income tax returns, which are protected personal documents of the offender, and in many cases confidential, to decide if the offender is spending their money per the discretion of the Officer. This is done in many cases, even though the offender is current on all fees, and owes no restitution or fines and fees.

This is a violation of the right to privacy, and confidentiality, and is further practiced as punishment against the offender, and in many cases, their family, especially if they are married or on an account with a son, daughter, mother or father, or are partners in a business, as Defendant is. The Officer is then violating the rights of privacy of people who are not even under their supervision and might never have been convicted of a crime and illegally punishing all of them.

Defendant asserts that any person, who has their personal and private financial records open to the *interpretation* and purview of individual Officers, is having their Fourth Amendment Right to illegal search being violated and that the offender's are being punished for something that by itself is not a crime.

Defendant asserts that by compelling this information that the Division of Parole and Probation, including the Chief of the Division and its Officers, are violating the following Nevada Statutes listed below relating to confidentiality, and are committing Oppressions under Color of Office, NRS 197.200. The confidentiality statutes are as follows: NRS 49.095, NRS 49.185, NRS 49.209, NRS 49.225, NRS 49.247, and NRS 49.295.

Condition # 12: Curfew: *You shall abide by any curfew imposed by your supervising Officer.*

Curfew is a restraint of liberty, plain and simple, for conduct that is not illegal in and by itself. It does not matter if it is for one hour a day or 12 hours a day, it is a substantial loss of a constitutionally protected liberty interest. Any attempt to infringe upon the Constitutional Liberty Interest of an offender serving a civil sentence, to be able to go where they please, when

they wish to go there, at whatever time it may be, is a restraint of liberty, is punitive in nature and effect, and is an affirmative disability and restraint.

The Board of Parole Commissioners has made the determination that without any procedural safeguards, that an Officer with the Division of Parole and Probation has the authority to place an offender on a curfew, at any time, without due process, or right to appeal, for as long as the Officer wishes to, without a review or a definitive timeline, and without reasonable cause.

The following opinions relating to curfew have been made by the Nevada Supreme Court regarding parole, where the burden for the State is much lower due to the offender being convicted and placed on a criminal sentence, which is different in this situation where Defendant and all others similarly situated are placed on a civil sentence.

"Residence, work and curfew restrictions are imposed to ensure that the defendant is not living or working in circumstances that would undermine his rehabilitation or provide him with increased access to potential victims. They must be reasonably related to rehabilitation or the health, safety, or welfare of the community, Seim v. State, 95 Nev. 89, 93, 590 P.2d 1152, 1154, (1979). The State has never determined that these types of conditions as applied to Defendant and all others similarly situated have a reasonable basis related to public safety, as they have done for an offender subject to parole, or probation.

In assessing the constitutional issues, we are also mindful of the additional protections that are available to a parolee, (where the State has a much higher ability to restrain an offender's constitutional rights due to the imposition of a criminal sentence, and not a civil sentence), to ensure that the provisions of the statute will not be used for improper purposes. If a parolee believes that he or she is being improperly treated, the parolee can request review of the restrictions by other officials in the Division of Parole and Probation or the sentencing court, or the Board of Parole Commissioners. Moreover, the Parole Officer can not unilaterally revoke a defendant's parole. Thus, the issue of the propriety of the curfew, residence or work restrictions could also be raised before a Court or the Board in any revocation proceeding, Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001).

This has been held in Jamgochian v. New Jersey, 928 A.2d 1, (New Jersey 2007); in relation to curfew for an offender on community supervision for life, which is similar to Nevada's Lifetime Supervision sentence.

The New Jersey Supreme Court states that "In concluding that the procedures utilized in imposing the curfew were flawed:

(a) we reject Jamgochian's argument that the Parole Board has no authority to impose a curfew according to the *laws of the State of New Jersey*;

(b) but we agree with Jamgochian that, notwithstanding the Board's power to impose a curfew, it could not validly exercise that authority without providing greater procedural safeguards and, thus, deprived him of due process of law;

(c) alternatively, we conclude that the doctrine of fundamental fairness requires more extensive procedures than permitted here; and

(d) we find that the absence of any procedural framework whereby Jamgochian could seek review, in the future, of the continued need for this curfew also violated his due process and fundamental fairness rights.

As the New Jersey Supreme Court recognized, in enacting N.J.S.A. 2C:43-6.4(b), the Legislature provided that persons serving a special sentence of community supervision for life, although "not actually on parole," *shall* be supervised "as if on parole." State v. Williams, 342 N.J. 83, 92, 775 A.2d 727, (New Jersey 2001). See also Sanchez v. N.J. State Parole Bd., 368 N.J. Super. 181, 187 (App. Div. 2004), app. dis., 187 N.J. 487 (2006); State v. Bond, 365 N.J. 430, 443, 839 A.2d 888, (2003).

In fulfilling this obligation, in New Jersey, the Parole Board's polestar is the statute itself, which declares that a person serving a special sentence of community supervision for life shall be subject "to conditions appropriate to protect the public and foster rehabilitation," N.J.S.A. 2C:43-6.4(b). It requires no further proof to conclude that the compelling interests so succinctly stated in N.J.S.A. 2C:43-6.4(b) fully empower the New Jersey Parole Board to impose a curfew upon an individual who has engaged in conduct that threatens the public or does not foster rehabilitation.

The Nevada Supreme Court held in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), that in the context of the statute according to the *laws of the State of Nevada*, it states that Lifetime Supervision is *"different that parole"*, thereby causing the State of Nevada to lose that polestar argument that this is the same supervision level as parole. And even with that provision in statute in New Jersey, the Supreme Court found the procedures lacking in relation to the constitutional rights of the offender. *Palmer* also held that this "special sentence" is to be applied after an offender finishes their criminal sentence of parole, probation or incarceration, as it can not be effective until released from the original criminal sentence.

There is also no provision in the statutes of Nevada that empower the Board to impose a condition for Lifetime Supervision for conduct that might threaten the public and does not foster rehabilitation. There is a provision in statute for the Board to apply that to an offender on parole, NRS 213.12175.

In point of fact, in the extreme majority of situations where a curfew has been enforced for an offender subject to Lifetime Supervision, there is no conduct that threatens the public, or any actual reasonable cause for the implementation of one. It is left to the personal predilections of the Officers, who in many instances impose a curfew upon arbitrary and capricious grounds, with no evidence or facts to support the imposition of a curfew.

In Nevada, there is no enumerated language in the statute, as in New Jersey, that provides the Board or the Division the authority to arbitrarily decide when an offender can be restrained of his Constitutional Liberty Interest to go where one pleases at any time that he wishes to. In point of fact, the language of the statutes of Lifetime Supervision as enumerated, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 do not contain any language that grants the Board and the Division the authority to impose a curfew upon an offender subject to a civil sentence.

As can be readily seen, in both New Jersey and Nevada, the condition that imposes a curfew outlines a process that operates without the input or involvement of the affected individual.

The individual is entitled to notice "upon imposition of the condition", (in Nevada, it is usually a verbal notice, and almost never a written notice) and notice of the Adult Panel's

determination in its review of the propriety of the condition, (in Nevada, the Board does not have to review the imposition of a curfew, unless the offender appeals to the Board). In both States, the regulation does not permit the individual to participate and does not provide any other rights normally associated with the principles of due process.

For example, this regulation (in Nevada, NAC 213.290), does not allow an individual serving a term of community supervision for life, (in Nevada, Lifetime Supervision): to be heard, either with or without counsel, prior to the rendering of a decision by the Adult Panel, (in Nevada, the Board); to view the evidence prior to the rendering of the Adult Panel's decision; to confront or call witnesses; or to offer relevant evidence.

In addition, the regulation contains no standards or limitations regarding the type of information that the Adult Panel, (In Nevada, the Board) may consider in imposing a special condition. As a result it permits the imposition of a special condition upon the consideration of the rankest of hearsay, and by way of a process that excludes the input or participation of the individual affected, (In Nevada, the same applies).

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In broader language, our state constitution declares that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Although this provision of our state constitution does not actually include the phrase "due process," it is well understood that, like the Fourteenth Amendment, it "protects against injustice and, to that extent, protects 'values like those encompassed by the principles of due process.'" Doe v. Poritz, 142 N.J. 1, 99 (New Jersey 1995); quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (New Jersey 1985).

In considering the application of these principles, we are required to determine whether a curfew infringes a liberty interest and, if so, whether the existing procedural framework fairly

and adequately safeguards that liberty interest from arbitrary or unreasonable governmental restriction.

As to the first aspect, the Parole Board does not argue, and it cannot be seriously alleged, that a prohibition from being anywhere except within the confines of one's home, every day, for eleven consecutive hours, does not impact the liberty interests secured by the federal and state constitutional guarantees of due process of law.

Instead, the troubling issue presented by this appeal is whether the existing procedures adequately safeguard such a Constitutional Liberty Interest from arbitrary governmental infringement. In considering this contention in the present context, the Supreme Court of New Jersey was satisfied that greater procedural protection was due than currently provided by N.J.A.C. 10A:71-6.11(l).

Due process is a flexible concept. Zinermon v. Burch, 494 U.S. 113, 127, 110 S. Ct. 975, 984, (1990). As Justice Frankfurter said, "'Due process' is, perhaps, the least frozen concept of our law -- the least confined to history and the most absorptive of powerful social standards of a progressive society." Griffin v. Illinois, 351 U.S. 12, 20-21, 76 S. Ct. 585, 591, (1956), (concurring opinion).

“At its most basic level, the concept of due process requires that an individual be given notice and the opportunity to be heard when the government seeks to limit or curtail a protectable interest”, Goss v. Lopez, 419 U.S. 565, 579, 95 S. Ct. 729, 738, (1975).

This constitutional guarantee is understood as providing the individual with "an opportunity to be heard at a meaningful time and in a meaningful manner." Ibid., citing Kahn v. United States, 753 F.2d 1208, 1218 (3rd Cir. 1985).

An individual's liberty interests should not be held hostage to the whim or beneficence of the government. "[P]rocess which is a mere gesture is not due process." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 657, (1950).

We are not convinced that absent today's judgment there is anything other than the unilateral action of the Board standing between Jamgochian and banishment to his home for eleven hours per day, every day, for the rest of his life. The constitutional principles we have

already discussed require greater safeguards than are represented by the Board's bald assertion that it will consider the matter again sometime in the future, Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633, (2004).

In relation to other offenders similarly situated, there is currently an offender who has been on an 8:00 pm curfew for over 4½ years. He has a wife who is very sick, and under a Doctor's care and he is not even allowed to go and obtain over the counter medication for his wife in the evening. He was punished for this when he tried to obtain some medication for his wife, and returned from the store located a few blocks away at 8:15. His current Supervising Officer can not even say why he is on a curfew, but continues to impose it anyway, with no definite date for a review of the condition, even though the offender has never been a problem or has caused any trouble.

This is a clear restraint of liberty, is arbitrary and discriminatory, by being completely at the discretion of the supervising Officer, with no clear legal guidelines to point an Officer to. A number of select Officers, including Officer Pierrott and Officer Howald, put most of the offenders they are supervising on a nightly curfew, for no reason other than to make a showing of their power over the offender, and upon no reasonable grounds, or for the safety of the public.

The Division of Parole and Probation, including the Chief of the Division and its Officers have unilaterally decided, without the approval of the Board of Parole Commissioners, that they can and do put all offenders on a curfew during the evening of Halloween.

This is imposed without any determination of threat to public safety, without any due process, and upon no reasonable grounds, and threatens the offender with a violation of their conditions without this specific condition being included in any agreement with the State of Nevada, or authorized by the Board or the Court.

The Division applies this "blanket policy" to everyone, regardless of whether they are on parole, probation, or Lifetime Supervision. This is beyond the jurisdiction of the Officer and the Division, as only the Board or the Court, can legally enhance a condition that they imposed.

This further restraint of a Constitutional Liberty Interest was imposed on Defendant this past Halloween, October 31, 2011, by Officer Evans, who even made an appearance at Defendant's home twice that evening, just to make sure he was following this verbal order.

This curfew condition was also imposed on Defendant on October 31, 2010, by Officer Howald. (Exhibit 28).

One interesting note to this, is that the Division states they only apply this condition to offenders who are a "high risk to the safety of the public" as defined in Officer Expectations, in relation to Operation Scarecrow. Defendant is a low risk to the safety of the public, as defined by the Sex Offender Tier Level Rating Panel.

Other State Supreme Courts have recently decided that the State may not do this. In one specific case, the offender sued for the right to operate a haunted house, and was granted permission to do so by the Court, as any restraint of this right would be a constitutional violation.

In documented studies that have been done, there have been no new sexual crime charges filed against a repeat offender on Halloween in the country. Any arrests made upon offenders are usually a violation of a condition, most likely a technical violation, or of an illegal restraint of rights, such as the Division of Parole and Probation is performing here, against the Defendant and all others similarly situated.

This also includes offenders on parole or probation, where in parole, the Board would have to impose that condition, and in probation, the Court would have to impose that condition, pursuant to the discretion of the Court, which is a judicial function. A parole and probation officer is not a judicial authority, even though here in the State of Nevada, they frequently act like they are the Judge, and an officer is not allowed to go beyond their authority, and impose additional sentencing factors.

Defendant asserts that this is beyond the authority and jurisdiction of the Division of Parole and Probation, and its Officers, in each circumstance described above, is arbitrary and capricious, and is a violation of the rights of the Defendant and all others similarly situated, and is a violation by the Officers and the Division, of Nevada statute, specifically NRS 197.200, Oppression under Color of Office.

Condition # 13: Counseling: *Participate in professional counseling if deemed necessary by the Division of Parole and Probation.*

The Division is illegally granted the arbitrary and discriminatory decision through its Officers to decide who has to attend counseling, while serving a sentence of Lifetime Supervision. Even following a completed course of counseling while incarcerated, the Division will force the offender to attend counseling again.

The Division determines, with no adequate guidelines, or any pertinent documented test administered by a licensed therapist, or any report or fact finding determination generated by someone licensed to determine a need for therapy, that an offender will have to continue to attend therapy until such a time as the Division decides they do not, which at this time is everyone on Lifetime Supervision who has not graduated from a program, and which could be for the rest of the offenders life. Any type of mandated therapy is punishment, specifically when they have never been assessed as needing therapy, and without any due process, or hearing, and especially when the financial burden for the therapy is placed on the offender, which is another form of punishment.

In cases involving counseling and the rights of parolees and probationers, many Circuit Courts have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole or probation. If the Courts have decided that these are serious legal issues relating to parole, probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the constitutional rights of the Defendant who is serving a civil sentence. No fact finding determination was ever made that the Defendant continued to need therapy after the successful conclusion of his court mandated therapy while on probation.

In point of fact, the Officers in the Division interact very little with Defendant's therapist, and when this condition was imposed on Defendant by Officer Lewis, the Officer did not ask the Psychologist for any information or determination by the therapist before imposing therapy upon Defendant, even though the licensed therapist was available at any time to discuss issues of concern for the Officer and the Division.

In looking to the issues the Courts have resolved is 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). 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).

Cases involving mental health treatment include United States v. Kent, 209 F.3d 1073, 1079, (8th Circuit 2000), where the Court order that if counseling "becomes necessary" probation officer may determine whether defendant must participate, was inconsistent with Article III because punishment is a judicial function, and the guidelines state that the court may impose that condition upon a finding of fact that therapy is needed. In United States v. Peterson, 248 F.3d 79, 85, (2nd Circuit 2001), the special condition of supervised release requiring sexual offender counseling "only if directed to do so by his probation officer" would be an impermissible delegation of judicial authority.

In United States v. Allen, 312 F.3d 512, 516, (1st Circuit 2002), the sentence requiring that the defendant *shall* participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer was not an unlawful delegation, as the sentencing order inclusion of the words "shall participate" imposed mandatory counseling, while merely delegating the administrative details.

Defendant's condition only states "participate if deemed necessary by the Division of Parole and Probation", without any fact finding determination by a qualified individual that therapy is warranted and needed and disregarding the four (4) years of therapy that Defendant had already completed while serving his probation term. In fact, the Board and the Division never even addressed the issue with the current therapist whom they had approved to provide therapy while Defendant was on probation, thereby pursuing a condition of therapy upon their own personal predilections, prejudice and bias.

This also created a large continued financial strain upon Defendant as the entire cost of therapy is borne by the offender subject to Lifetime Supervision, and can cause a violation for failure to pay which is unconstitutional by itself, as we as a nation, have no debtor's laws.

Defendant also asserts that this delegation by the Division is outside the bounds of authority granted to the Division as held in Seaton v. Mayberg, 610 F.3d 530, (9th Circuit 2010). In United States v. Pruden, 398 F.3d 241, 250, (3rd Circuit 2005), that Court states that "as order giving probation officer authority to decide whether or not defendant would have to participate in mental health program was improper".

In addition, the Division of Parole and Probation and the Officers believe that they are entitled to any and all medical and therapy records of the Defendant, without any fact finding determination that these records are needed for any legitimate purpose, as determined by either the Board or the Court. Defendant is not incarcerated, so there are no penalogical safety concerns, and Defendant has no communicable diseases, so no release of medical information for the safety of others is needed. Defendant is not a violent person, subjecting the citizens of the State to protection for violence, or the family of Defendant for violence. In fact, no issue of violence has ever been addressed in any previous situation of the Defendant before the Court, or anywhere else.

Defendant asserts that the release of any information about his evaluations or therapy is inconsistent with the realities of mental health treatment which, he argues, "presume an open and confidential exchange", Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, (1996), which recognizes psychotherapist privilege and the importance of confidentiality.

Defendant asserts that in Nevada, and according to Nevada Statute, that he has a right to confidentiality between himself and his psychologist, marriage and family therapist, and doctor, according to NRS 49.209, NRS 49.225, and NRS 49.247. These laws protecting the privacy and confidentiality rights of the Defendant have not been superseded by the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, and if they are, they would need to be defined in statute to do so, and have a fact finding determination to impose a finding of such.

Otherwise, the Board and the Division and its Officers could and do state that they may supersede any Nevada statute that they wish, at any time, and that these Nevada statutes and many others do not apply to Defendant or all others similarly situated, including the family of Defendant, if they arbitrarily and illegally decide otherwise, without an authorization of that supersedure in statute. For the Board and the Division to state that the Nevada Statutes do not apply to Defendant is an absurd statement, and is fully beyond their authority to determine.

In cases involving release of confidential information, in regards to the State's interests, the Court needs to be aware of the opinions outlining confidentiality quoted in Seaton v. Mayberg, 610 F.3d 530, (9th Circuit 2010). In relation to Defendant, no fact finding determination has ever been made by the original sentencing Court, or by the Board of Parole Commissioners to assert that they have a legitimate claim to the confidential and privileged information of Defendant regarding his treatment and therapy.

"We hold that the Fourteenth Amendment protects an inmate's rights to medical privacy, subject to legitimate penological interests, Powell v. Schriver, 175 F.3d 107, 112, (2nd Circuit 1999). "This Court already has accorded constitutional stature to the right to maintain the confidentiality of previously undisclosed medical information. It follows that prison officials can impinge on that right only to the extent that their actions are 'reasonably related to legitimate penological interests", Tokar v. Armontrout, 97 F.3d 1078, 1084, (8th Circuit 1996).

In deciding this issue, the Courts had to determine what the legitimate interest entailed, and in the line of cases leading to these decisions, the Courts have found that it must be of paramount concern, such as in Anderson v. Romero, 72 F.3d 518, 524, (7th Circuit 1995), where the legitimate interest was the release of HIV status among the prison population.

In Doe v. Wigginton, 21 F.3d 733, 740, (6th Circuit 1994), the Court struggled with the fact that there is no law that clearly establishes that a prison can violate the constitutional rights of offenders who are HIV positive.

It would stand to reason, as a legitimate penological interest that the Guards and other inmates should be able to protect themselves from infection, the same as with any other serious disease such as HIV, or a contagious disease, such as pink eye, or strep throat. But, the

disclosure would have to be narrowly drawn and specific to the information required to violate the confidentiality right of the offender, and disclosed by someone qualified to release the pertinent information, not upon the personal predilections of a Parole Officer.

In Harris v. Thigpen, 941 F.2d 1495, 1513, 1521, (11th Circuit 1991), the Court clearly determined that fact by stating that "The identification and segregation of HIV-positive prisoners obviously serves a legitimate penological interest. In Anderson v. Romero, 72 F.3d 518, 524, (7th Circuit 1995), the Court stated that "an inmate had no clearly established constitutional right to non-disclosure of HIV-status.

Some other Circuit Courts have held and recognized "a constitutional right to privacy in medical records", Lankford v. City of Hobart, 27 F.3d 477, 479, (10th Circuit 1994); Doe v. City of N.Y., 15 F.3d 264, 267, (2nd Circuit 1994); Pesce v. J. Sterling Motion High, 830 F.2d 789, 795-798, (7th Circuit 1987); and United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-80, (3rd Circuit 1980).

In Tucson Woman's Clinic v. Eden, 379 F.3d 531, (9th Circuit 2004), the Court stated that there was "a constitutionally protected interest in avoiding disclosure of personal matters including medical information". The Court went further, and offered a list of five factors to be considered among others to decide "whether the governmental interest in obtaining information outweighs the individual's privacy interest", Id. at 551. The five factors are;

(1) the type of information requested,

(2) the potential for harm in any subsequent disclosure,

(3) the adequacy of safeguards to prevent unauthorized disclosure,

(4) the degree of need for access, and

(5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

In determining when a proper governmental interest trumps a right to medical privacy, the Court stated that the five factors are "not exhaustive, and the relevant considerations will necessarily vary from case to case…..and in most cases, it will be the overall context, rather than the particular item of information, that will dictate the tipping of the scales", Id.

The Court has further held that the constitutional right to medical privacy "is a conditional right which may be infringed upon a showing or proper government interest", Ferm v. U.S. Trustee, 194 F.3d 954, 959, (9th Circuit 1999).

And finally, "Information relating to medical treatment and psychological counseling fall squarely with the domain protected by the constitutional right to informational privacy", Nelson v. NASA, 568 F.3d 1028, (9th Circuit 2008); Planned Parenthood v. Lawall, 307 F.3d 783, 789-790, (9th Circuit 2002); Norman-Bloodsaw v. Lawrence Berkley Lab, 135 F.3d 1260, 1269, (9th Circuit 1998); Roe v. Sherry, 91 F.3d 1270, 1274, (9th Circuit 1996); Doe v. Attorney General, 941 F.2d 780, 795-797, (9th Circuit 1991); Caesar v. Mountanos, 542 F.2d 1064, 1067-1068, (9th Circuit 1976).

Defendant believes *Nelson v. NASA* might have been narrowed by the Supreme Court in this instance, especially in relation to employment medical records, but that the general principle of confidentiality applies, unless a specific need is shown as in *Nelson*.

The 9th Circuit has even held that medical information may be privileged from introduction as evidence, in the context of evidentiary privilege rather than as a constitutional right, United States v. Chase, 340 F.3d 978, 985, (9th Circuit 2003)(en banc).

All of these opinions held by different Courts would strongly suggest that there is a constitutional right to medical privacy and confidentiality, unless there is a legitimate state interest in disclosure of relevant information.

Defendant asserts that since the psychologist, or any other type of therapist, or medical practitioner is a mandated reporter, according to Nevada Statute, that any relevant criminal activity or condition would be reported to the State, and not be subject to the rifling of Defendant's confidential and private information by a Parole and Probation Officer who is not qualified to determine what is relevant or not, but would more than likely, use the information gleaned from an illegal search of that information in an arbitrary, discriminatory and capricious manner, based off of their own personal predilections and bias.

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

In many cases involving polygraph exams, and the rights of defendants in relation to those tests, and more specifically, the rights of prisoners, parolees and probationers, many Circuit Courts and the Supreme Court have determined issues such as this. The Court has to remember that this is a civil sentence, not a criminal sentence, and the Defendant is not serving parole or probation. If the Courts have decided that these are serious legal issues relating to prison, parole, and probation or supervised release, while serving a criminal sentence, then the burden for the State becomes much higher when affecting the constitutional rights of the Defendant who is serving a civil sentence.

In order to look at the terms of "submit to a polygraph test", we need to look at what the Courts have decided, and "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. 37, 356, 30 P. 1006, 1012, (1883).

In context for these decisions in relation to the Defendant, this condition, as applied, is not enumerated in statute at all for Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290. There is no definition for "submit". Defendant asserts that these decisions relate to the instant case, as the Board states that these conditions are part of the statute.

Defendant asserts that the Division applies this condition upon Defendant and states that Defendant has to answer every question asked of him, regardless of the legality of the question per the Nevada Revised Statutes, and in violation of the Fifth Amendment, as they further state that offenders can not take the Fifth Amendment, and that we have to answer every question, or the offender will be arrested for a violation of this condition, therefore compelling our answers. (Department of Public Safety, Records of Polygraph Exam for Defendant, September 7, 2011).

The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." The United States Supreme Court has held that this prohibition is not limited to circumstances where a defendant refuses to testify against himself at a criminal trial. "A person is privileged "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings", Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, (1973).

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

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

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

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

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

The Court needs to keep in mind that Defendant's criminal rehabilitation has been performed, by honorably completing the probation terms as applied by this Court, under a suspended sentence. Defendant asserts he is serving a civil sentence that, as applied, is punitive in nature and effect, and is an affirmative disability and restraint.

Justice O'Connor acknowledged in McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, (2002), that "The Fifth Amendments text does not prohibit all penalties levied in response to a person's refusal to incriminate himself or herself—it prohibits only the compulsion of such testimony".

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

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

The *Fifth Amendment Self-Incrimination Clause*, which applies to the States via the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, (1964), provides that no person "shall be compelled in any criminal case to be a witness against himself". The "Amendment speaks of compulsion", United States v. Monia, 317 U.S. 424, 427, 63 S. Ct. 409, (1943). The Supreme Court has insisted that the "constitutional guarantee is only that the witness not be compelled to give self-incriminating testimony", United States v. Washington, 431 U.S. 181, 97 S. Ct. 1814, (1977).

Defendant asserts that he is being compelled in this situation, due to his arrest by Officer Evans, as a consequence of not answering 2 illegally asked questions, and the resultant loss of liberty itself, would certainly be viewed by the Supreme Court as a factor in the analysis of whether or not Defendant was being compelled.

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

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

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

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

In looking further to the aspects of being compelled, the Supreme Court in a holding in Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, (1964), states that the privilege applies to the States through the Fourteenth Amendment, determined that the right to remain silent is itself a liberty interest protected by that Amendment. We explained that "the Fourteenth Amendment secures

against federal infringement…the right of a person to remain silent unless he chooses to speak *in the unfettered exercise of his own will, and to suffer no penalty*…for such silence", Id. at 8.

Since *Malloy*, we have construed the text to prohibit not only direct orders to testify, but also indirect compulsion effected by comments on a defendant's refusal to take the stand, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, (1965).

The Supreme Court has recognized that compulsion can be presumed from the circumstances surrounding custodial interrogation, Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, (2000). "The coercion inherent in custodial interrogations blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment…not to be compelled to incriminate himself'", Miranda v. Arizona, 384 U.S. 436, 439, 86 S. Ct. 1602, (1966).

Without requiring the deprivation of any other liberty interest, we have found prohibited compulsion in the threatened loss of the right to participate in political associations, Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, (1977); forfeiture of government contracts, Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, (1973); loss of employment, Uniformed Sanitation Men Assn. Inc. v. Comm. Of Sanitation of N.Y. City, 392 U.S. 280, 88 S. Ct. 1917, (1968); and disbarment, Spevak v. Klein, 385 U.S. 511, 516, 87 S. Ct. 625, (1967).

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

The Board of Parole Commissioners, by their imposition of a condition pursuant to a civil sentence; that an offender must submit to a polygraph test, and forego all of these rights, under the direction of the Division of Parole and Probation, and by a Department of Public Safety

employee, is prejudicial, biased and discriminatory. In the conditions as listed, no preference is given to the allegation that these conditions supersede the Nevada Revised Statutes.

In the statutes pertaining to Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, nothing is enumerated and either suggests or mandates that these statutes supersede any of the other Nevada Revised Statutes. The Division, in their application and enforcement of this condition, by the use of an examiner from the Department of Public Safety, who is a peace officer, arbitrarily and illegally asks questions that attempt to or do break confidentiality, as listed in

(1) therapeutic confidentiality, as listed in NRS 49.209 and NRS 49.247,

(2) husband-wife confidentiality, as listed in NRS 49.295,

(3) attorney-client privilege, as listed in NRS 49.095,

(4) accountant-client privilege, as listed in NRS 49.185, and

(5) medical confidentiality, as listed in NRS 49.225.

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

(1) degrading, as listed in NRS 648.187, and

(2) of a sexual nature without the request or consent of the offender, per NRS 648.193,

(3) to circumvent, or in defiance of the law, per NRS 648.189 (5), and

(3) when an offender refuses to answer these questions, as listed in all of these statutes, or the ones noted previously regarding confidentiality, they are judged to be non-compliant, non-cooperative, and deceptive, and in the instant case, arrested for failure to answer questions, due to the assertion by Defendant, of the 5th Amendment of the United States Constitution.

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

(1) consent to the test, as listed in NRS 648.189(2),

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

(3) nor does it state that it supersedes the laws and rights listed in NRS 648.103 to NRS 648.199 inclusive,

(4) specifically NRS 648.187, NRS 648.189, and NRS 648.193.

(5) nor does it state that it supersedes the laws and rights listed in NRS 49.015 To NRS 49.405 inclusive.

In looking at the following Nevada Statute, it states:

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

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

The polygraphic examiner in this instant case, Detective Jim Sackett, of the Department of Public Safety, when questioned about this statute by Defendant, where it was only partially listed on the consent form, declared that the Nevada Statutes did not apply to him, but only applied to "commercial polygraphers", and that they could ask any questions that they wished, in violation of all of the above noted statutes. (Formal Complaint Pending).

The polygraph test as currently performed by the examiners, employees of the Department of Public Safety, violate the constitutional rights of the Defendant and all others similarly situated, and violate the statutes of the State of Nevada, as noted above. This test was performed on Defendant, by Detective Jim Sackett, on or about September 7, 2011, and as

applied, is done in order to circumvent or in defiance of the law as listed in NRS 648.189(5). (Formal Complaint Pending).

This laws and constitutional rights have previously been restrained for Defendant upon his first polygraph exam, by Detective Von Rumpf, in 2008.

In relation to all other offenders, Defendant asserts that this same procedure takes place in relation their rights also, and is a violation of NRS 197.200.

As a matter of law, according to the statutes of crimes on who constitutes a principal, specifically NRS 195.020, Officer Evans and Officer Gothan should also be held accountable for this violation of the Nevada Revised Statutes in this instant. Officers have a duty to uphold the Nevada Revised Statutes, and should not violate them in order to enforce the law, due to their illegal *interpretation* of them. As cited above, the Courts interpretation of the 5th Amendment is consistent and clear; however, the Officers decide that these interpretations and opinions do not apply to them. This is punishment, intimidation, and harassment, and the Officers themselves should be held accountable for their actions, as it is a violation of Nevada law, specifically NRS 197.200, Oppression under Color of Office. (Formal Complaint Pending).

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

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

Defendant asserts that not only is this condition constitutionally illegal to impose originally, but any subsequent arrest and detainment is a further violation of his constitutional rights, especially when Defendant asserted his constitutional 5th Amendment Right, and quoted the applicable NRS statutes and the applicable Nevada Supreme Court decision held in

Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001); and the decision held in United States v. Antelope, 395 F.3d 1128, (9th Circuit 2005).

When you look to the Policy and Procedure of the Division concerning the polygraph, specifically Division Directive 6.3.115, the policy would seem to support the argument that only a violation report or crime report may be generated, upon refusal to answer a question, and at no point does it ever say to arrest the offender for taking his 5th Amendment right.

In a letter from Sergeant Helgerman, to Defendant's wife, dated March 24, 2011, the Sergeant states that all violations of conditions have to be reviewed by a supervising Officer, after the crime report has been written, in this case, by Officer Evans. "A supervisor would then review the report to determine, in part, if the subject may have violated the conditions. If the supervisor agrees, the report is forwarded to the Board or the Court. The Board or the Court has final determination whether the subject has violated a condition of supervision. In other words, there are multiple steps in the violation process in which more than one party would review the violations before making a determination as to whether the subject had, for example, violated their condition regarding contact with a minor or whether they cooperated with their parole officer." (Exhibit 16, pg. 15).

Defendant asserts that none of this was done, before the arrest of Defendant was made, which the Officer and the Division did not have to do. The time frame was to short, and did not allow for review and consideration of all of these steps. Due to the fact that the Defendant had just brought all of these issues up in front of the Board of Parole Commissioners during an Open Public Meeting of the Board, on August 31, 2011, Defendant asserts that Officer Evans and the Division violated his constitutional rights, by detaining and arresting him, and that this was done for intimidation and harassment purposes, due to his advocacy.

In point of fact, according to the Nevada Revised Statutes, that upon a misdemeanor offense, the law allows for an Officer to cite an offender, and order them to appear in Court. No arrest in this instance was mandated or needed.

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

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

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

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

Condition # 15: No contact: *You shall not have contact or communicate with a victim of the offense who testified against you, or solicit another person to engage in such contact or communication on your behalf without permission from your supervising Officer.*

This condition was not written into the law until 2009, but the Board imposes it on any person subject to Lifetime Supervision, due to it being listed in the criminal statute of NRS 213.1245, and by doing so, makes it a violation of the *Ex Post Facto Clause*.

Defendant asserts that this is also a violation of the First Amendment Right to association, as an offender serving a civil sentence should not have any rights to association "chilled". The same argument that applies to association in Condition # 6, also applies here.

The Defendant asks the Court, does the Board of Parole Commissioners or the Nevada Legislature do this in relation to any other civil sentence? A comparison of civil State Statutes should be applicable here, not only to this condition, but to all of the others also, to help the Court make an informed determination.

Condition # 16: Alias Names: *You shall not use aliases or fictitious names without permission of your supervising Officer.*

By allowing an Officer to grant permission for this, you violate the right of the offender to work and obtain employment for themselves. In order to obtain a business license, you need to obtain a certificate of fictitious name, which is a legal right. If an offender applied for this certificate without the permission of the Officer, they could be charged with a violation of this condition, and be arrested for trying to work and pay their bills.

This is absurd, and is arbitrary and capricious. "A statute should always be construed to avoid absurd results, General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348, (1995). Again, this condition is not listed in statute, but the principle applies.

The Officer can use arbitrary and discriminatory means, based upon their own personal predilections and bias, to deny the ability of the offender to work for themselves by owning their own business and obtaining employment. Defendant asserts that the ability to own a business, and pursue personal freedoms in relation to employment is a constitutional right, and should not be denied.

Condition # 17: Post Office Box: *You shall not obtain a post office box unless you have obtained permission from your supervising Officer.*

This is a violation of a person's right to obtain correspondence in a written format for any reason. A person subject to a civil sentence has the right to obtain mail at a post office box and the right to enter the premises of a Post Office, and the right to conduct business at the Post Office.

The Defendant was informed by Officer Lewis, his Supervising Officer at the time, that she did not even want him in a Post Office and denied him the right to go there. This is punitive.

Defendant was told by Officer Lewis that he is not allowed to pick up the mail of the company he works for from the company's post office box. Why? It is not his post office box; it is the company's.

This is arbitrary, discriminatory and punitive in nature and effect, and is a violation of an offender's First Amendment Rights.

Condition # 18: No Contact with Persons under 18 Years of Age: *You shall not have contact with a person less than 18 years of age in a secluded environment unless another adult who has never been convicted of an offense listed in NRS 179D.410 is present and that you obtain permission from your supervising Officer in advance of each such contact.*

The only definition for "a secluded environment" has been offered by Lieutenant Helgerman of the Division of Parole and Probation during an Open Public Meeting of the Board of Parole Commissioners on August 31, 2011. Lieutenant Helgerman verified that the State did not have a definition of "a secluded environment", or any Policy and Procedure for a "secluded environment", and he referred to the definition in Webster's Dictionary, which states that "secluded" means "out of sight of the public".

Defendant will refer to the argument and opinion held by the Iowa Supreme Court in Iowa v. Lathrop, 781 N.W. 288, (Iowa 2010), which addresses this type of condition, with the further opinions of many other courts included. This has been vacated as applied to probation; and Lifetime Supervision, as a civil penalty, does not give the State the right to enforce punitive conditions such as this.

The Defendant points to several perceived flaws in the no-contact probation condition, asserting that this restriction is too broad, rendering it unreasonable, with no clear definitions for a secluded environment, making it vague, and is an abuse of discretion. The condition imposed here could literally prohibit almost any and all contact with any person under the age of eighteen regardless of how unintended, incidental, or innocuous such contact might be unless the offender has obtained permission from his supervising officer.

Thus, without prior approval of his probation officer, the offender risks a violation by simply leaving his house. A total ban on all communication with all minors without an

exception for incidental communication where other responsible adults are present would, in effect, require the offender to become a hermit. A walk to the local fast food restaurant may place the offender in contact with children playing on the sidewalk, the paper boy delivering newspapers, or an underage clerk taking payment for his purchase. It would be valid for a condition to reflect "no contact with a minor involved in the crime", as applied individually to a case that involved a minor, but not to a case where no minor was involved. Iowa v. Lathrop, 781 N.W. 288, (Iowa 2010).

The Vermont Supreme Court refused to enforce an almost identical probation restriction in State v. Rivers, 178 Vt. 180, 878 A.2d 1070, 1072, (Vermont 2005). In *Rivers*, a condition of the defendant's probation was the prohibition of any "contact with children under the age of sixteen without prior approval of the probation officer", Id. at 1076. The defendant was found to have violated this condition when he attended a local fair and stood in line near minors under sixteen years of age, Id. at 1071.

Aside from the defendant's proximity to these minors, there was no evidence that he "physically touched, initiated or sought conversation with, or otherwise stalked any particular children", Id. at 1071-1072. On the defendant's appeal from the district court's finding that he had violated the terms of his probation, the Supreme Court of Vermont noted that the restriction in question was not specific to the defendant's victim, nor was it limited to private locations presenting "greater dangers to the protected class and to a probationer's rehabilitation", Id. at 1074.

This condition, the Court pointed out, would require the defendant "to refrain from going to numerous public places where essential daily business is transacted".

In addition to the Vermont Supreme Court, intermediate courts of appeal in two states have held in unpublished opinions that similar blanket no-contact conditions on probation were unduly restrictive, State v. Lacey, No. 23261, 2009 WL 4268572, (Ohio Ct. Appeals, 2009); State v. Jones, No. W2008-01877-CCA-R3-CD, 2010 WL 432418, (Tenn. Crim. Appeals, 2010).

In *Lacey*, the Ohio Court of Appeals held that a probation condition that the defendant "have no contact with any non-relative under the age of eighteen" was unduly broad, by

prohibiting unintended chance, and fleeting encounters with a juvenile that have no nexus with criminal conduct, Id. at 1, and 2. The Court ruled that the trial court erred in imposing the no-contact probation condition, Id. at *1.

In *Jones*, the defendant was "not allowed unsupervised contact with any minor child under eighteen years of age, including his own children, Id at 1. The Tennessee Court of Criminal Appeals held the term "unsupervised contact" rendered the condition overbroad and not properly defined and unduly restrictive, Id. at 4. Noting the restriction would include "telephone conversations, emails, and letters" and "would also preclude the defendant from entering a retail establishment if the clerk was alone and happened to be under the age of eighteen" the Court ruled "the condition is too indefinite to be reasonable or realistic", Id.

This common probation condition could extend to any number of other public places where children are regularly present such as grocery stores, movie theatres, libraries, fast food restaurants, parks, or even streets where children often congregate. When removed from the context of victim-contact or private locations, where different considerations apply, such a broad rule severely restricts a probationer's liberty while doing little to rehabilitate the offender or prevent the behavior that led to the no-contact condition in the first place, Id. at 1075.

The Court concluded this "blanket no-contact condition" was "overbroad and unduly restrictive of probationer's freedom and autonomy" and lacked "sufficient precision", Id. at 1074, 1076.

When placing and enforcing conditions for an offender on a civil sentence, not on probation or parole, and while not serving a criminal sentence, they should be less restrictive than probation or parole, if any are to placed at all, because this is not probation, and it is not parole. An offender has actually completed his probation, or parole, or residential confinement. This condition becomes even more punitive as the State has no definition for "in a secluded environment". (Exhibit 19). Many absurd results can be reached on the personal predilections and bias of the Officer. "A statute should always be construed to avoid absurd results, General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348, (1995). Again, not articulated in the statutes related to Lifetime Supervision

The First Amendment Right to associate relates to a minor, as the condition is imposing a restraint of liberty in relation to anyone under 18 years old. This could cause an Officer to exclude an offender from attending a church of their choosing, due to the fact that they might have children present. Another example would be where the crime was against an adult, but the Board imposes this condition against the offender anyway, and it does not relate to the crime.

Another actual example is where the Defendant was told that he was not compliant with this condition when he was in the middle of a public restaurant, with a minor under 18, his 6 month old granddaughter, and with 5 adult members of his family present, who knew of his crime, and with 50 other patrons in the restaurant, including employees of the restaurant, and he was told that he had violated this condition for being in a "secluded environment". (Exhibit 3,11).

This was told to him by Officer Howald, and was verified by Lieutenant Helgerman, who, at the time, was the Sergeant of the Unit. The offender has asked everyone, and every State Agency concerned, including the Board, what a "secluded environment" is, and no answer or definition has been offered or was forthcoming, as verified by Officer Tiffany, until Lieutenant Helgerman offered a very limited one at this Open Public Meeting. (Exhibit 19, 22, 23, 24, 25).

Defendant asserts that due to the arbitrary and discriminatory enforcement of this condition, and because of its overbroad terms, and with no legal definition for the "in a secluded environment", that this creates additional punishment for an issue which in and by itself is not a crime. This includes all of the reasoning of the Iowa Supreme Court, the Vermont Supreme Court, and the Ohio and Tennessee Courts of Appeals, and is also a violation of the First Amendment Right to associate.

Condition # 19: Presence: *You shall not be in or near:*

(a) A playground, school, or school grounds;

(b) A motion picture theater;

(c) A business that primarily has children as customers or conducts events that primarily children attend.

It is a restraint of Defendant's First Amendment Rights, that the Board and the Division, including its Officers, arbitrarily decide that a person subject to a civil sentence not be allowed to go to playgrounds, parks, schools, movie theaters or a businesses that primarily children attend, and in many cases, churches. The Board and the Division consider a church with a Sunday school to be off-limits, under any circumstances, for the rest of your life. It is constitutionally illegal for the Board and the Division to bar an offender by limiting access to public recreational facilities, businesses and public and private educational entities.

It is illegal for the Board and the Division to restrain the ability of the Defendant to attend an adult school of his choosing; to further his education, job skills, and knowledge. This is punitive in nature and effect. No allowance is given for the fact that the person can be in the presence of his family while attending a school function, a movie with his wife and kids, or art town in downtown Reno in Wingfield Park. An example would be that the Officer could say that you are not allowed to go to McDonalds, as many children go there. The Defendant asserts that this is punishment by restricting the pursuit of happiness, liberty, education, association for political purposes, and free speech.

Defendant asserts the following opinions to the Court to determine that this condition is illegal as imposed and enforced upon him:

The United States Supreme Court has stated that all Americans have a "right to associate" for the purposes of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties", Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

The Overbreadth Doctrine provides that a law is void on its face if it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment Rights, such as the right to free expression or association", City of Las Vegas v. District Court, 118 Nev. 859, 59 P.3d 477, (2002); Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006); Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, (1940).

Even minor intrusions on First Amendment Rights will trigger the Overbreadth Doctrine, because an overbroad law will have a "chilling effect on free expression and association", and thus impact the "breathing space" of First Amendment rights, thereby making an overbroad law unconstitutional, Wyche v. State of Florida, 619 So. 2d 234, (Florida 1993); NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, (1963); Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006).

Even a clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct, Zwickler v. Koota, 389 U.S. 241, 249-250, 88 S. Ct. 391, (1967).

The loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitute irreparable injury, New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, (1971).

In Supreme Court Discussions that have looked to whether these are constitutional rights or "privileges" granted by the State, and whether these justifications require consideration of First Amendment Rights, it is necessary to have in mind the standards according to which their sufficiency is to be measured, Elrod, Sheriff v. Burns, 427 U.S. 347, 96 S. Ct. 2673, (1976).

First, "it is firmly established that a significant impairment of First Amendment Rights must survive exacting scrutiny", Buckley v. Valeo, 424 U.S.1, 96 S. Ct. 612, (1976); NAACP v. Alabama, 357 U.S. 449, 460-61, 78 S. Ct. 1163, (1958).

Second, "this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment Rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct", Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976).

Thus, encroachment "cannot be justified upon a mere showing of a legitimate state interest", Kusper v. Pontikes, 414 U.S. 51, 58, 94 S. Ct. 303, (1973).

Third, "the interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest", Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976); Williams v. Rhodes, 393 U.S. 23, 31-33, 89 S. Ct. 5, (1968); NAACP v.

Button, 371 U.S. 415, 433, 83 S. Ct. 328, (1963); and Bates v. Little Rock, 361 U.S. 515,524, 80 S. Ct. 42, (1960).

Fourth, "the gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights", United Public Workers v. Mitchell, 330 U.S. 75, 85, S. Ct. 556, (1947).

The government must employ means closely drawn to avoid unnecessary abridgement, Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976).

Finally, "A State may not choose means that unnecessarily restrict constitutionally protected liberty, 'Precision of regulations must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties, Kusper v. Pontikes, 414 U.S. 51, 58, 94 S. Ct. 303, (1973); United States v. Robel, 389 U.S. 258, 88 S. Ct. 419, (1967); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, (1960).

Certain infringements upon the right of association may be justified by regulations adopted to serve compelling state interests, [such as in parole and probation], and unrelated to the suppression of ideas. And that these infringements shall not be achieved through means restrictive of associational freedom, Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

First, "In assessing the reasonableness of a regulation, the Court must weigh heavily the fact that communication is involved", Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, (1939); Talley v. California, 362 U.S. 60, 80 S. Ct. 536, (1960); Saia v. New York, 334 U.S. 558, 562, 68 S. Ct. 1148, (1948).

Second, "The regulation must be narrowly tailored to further the State's legitimate interest", DeJonge v. Oregon, 299 U.S. 353, 364-365, 57 S. Ct. 255, (1937); Lovell v. Griffin, 303 U.S. 444, at 451, 58 S. Ct. 666, (1938); Cantwell v. Connecticut, 308 U.S. 296, at 307, 60 S. Ct. 900, (1940).

Third, Access to the "streets, sidewalks, parks, schools, and other similar public places….for the purpose of exercising [First Amendment Rights] cannot constitutionally be denied broadly", Food Employees v. Logan Valley Plaza, 391 U.S. 308, at 315, 88 S. Ct. 1601, (1968).

And finally, free expression "must not, in the guise of regulation, be abridged or denied", Hague v. CIO, 307 U.S. 496, at 516, 59 S. Ct. 954, (1939).

In our system of law, defining crimes and fixing penalties are legislative, not judicial functions, United States v. Evans, 333 U.S. 483,486, 68 S. Ct. 634, (1948).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of public opinion", Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, (1943).

Because overbroad laws, like vague ones, deter privileged activity, petitioner believes that cases cited firmly establish petitioners standing to raise an overbreadth challenge, Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, (1972); Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, (1951).

Even the fact that an enactment provides adequate notice of the acts it prohibits does not absolve it of the vice of overbreadth. "The objectionable quality of …overbreadth does not depend upon absence of fair notice to a criminally accused or upon un-channeled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application", NAACP v. Button, 371 U.S. 415, 432-433, 83 S. Ct. 328, 338, (1963).

Defendant is denied the right to be present in or near parks, sidewalks, schools, or any place that a minor might congregate, which could be a McDonald's with a playroom area. It also includes movie theaters, or any business that primarily has children as customers, which disallows the family from attending events, or any event that children might attend, such as the fair, a carnival, an amusement park, or the library. Defendant could inadvertently walk into a store that was conducting a children's event such as building a playhouse at Home Depot, and be arrested for association, presence, or in the vicinity of a minor without permission. This

"condition" as applied creates absurd results, based upon arbitrary and discriminatory grounds and upon the personal predilections of the Officer.

The United States Constitution grants to local governments broad discretion to control and regulate the activities of citizens; however, such controls and regulations cannot sweep so broadly as to infringe the constitutional and organic rights of the individual. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms, NAACP v. Alabama, 377 U.S. 288, 307, 84, S. Ct. 1302, 1314, (1964).

One of the protected freedoms involved in this case is the First Amendment guarantee of freedom of association, Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, (1971); Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. (1968). This right to freely associate is not limited to those associations which are "political in the customary sense" but includes those which "pertain to the social, legal and economic benefit of the members", Griswold v. Connecticut, 381 U.S. 479, 483, 85 S. Ct. 1678, 1681, (1965). "The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others, are implicit in the First and Fourteenth Amendments, Bykofsky v. Borough of Middletown, 401 F. Supp 1242, 1254, (M.D.Pa. 1975).

Defendant asserts that this denial to be in or near schools, playgrounds, parks, motion picture theaters, or to associate in these areas for any reason, either knowingly or unknowingly, is far beyond the authority of the Board of Parole Commissioners and the Division of Parole and Probation, including the Chief of the Division to determine and impose, without proper guidelines, and upon a particularized fact finding determination for each offender.

Condition # 20: Search: *You shall submit to a search of your person, property under your 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.*

Defendant will start out with the following, the definition of The Fourth Amendment of the Constitution of the United States which affirms that:

"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."

Defendant is offering the definition of two (2) important Sections of the Nevada Constitution in regards to this search issue also, and they affirm that:

Section. 1. ***Inalienable rights.*** *All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.]*

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.*

Denying the Defendant and all others similarly situated their constitutional rights as articulated in the Fourth Amendment of the Constitution, who are subject to the civil sentence of Lifetime Supervision, is punitive in nature and effect. In many instances relating to Defendant, the State has violated this right in relation to searches. They do this even to family members or other persons that an offender might be residing with, even against their own policy and procedure; a policy and procedure for an offender under parole, probation, or other criminal offenders, Division Directive 6.2.109, (1998).

The Division and its Officers perform illegal searches off of an *interpretation* of the cloudy constitutional issue of a conditional waiver, which does not allow for informed consent, is not voluntary, and is a violation of the Fourth Amendment. This has been looked at for probation in United States v. Consuelo-Gonzalez, 521 F.2d 259, (9th Circuit 1975).

In the Fourth Circuit, the Court has stated that no situation can occur to perform a search without a search warrant, upon the sworn affidavit of the Parole Officer, United States v.

Bradley, 571 F.2d 787, (4th Circuit 1978); and United States v. Workman, 585 F.2d 1205, (4th Circuit 1978).

In looking at this search issue further, the Defendant asserts that the Division authorizes searches that can and have been performed against him and his family, as the Division states that they can perform these searches against anyone in the residence, and not under the legal authority of the Board of Parole Commissioners; in relation to the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

This is due to Division's *interpretation* of the laws regarding all of these situations, and their opinion that families are just collateral consequences of the civil sentence the offender is serving, and all of the families Constitutional Liberty Interests and First Amendment Rights are forfeit also.

Defendant is respectfully bringing the following facts and rulings to the Court's attention. Even though Defendant is aware that the Court is fully cognizant of these issues and opinions, they need to be addressed by Defendant in the record of the case. These facts relate to different types of searches and how the Courts analyzed the cases and determined the opinions and decided the legality of many different situations.

Defendant will address many rulings by the Supreme Court of the State of Nevada on this subject of search, including many Circuit Court opinions and United States Supreme court rulings. These are rulings that relate to the following search issues, such as *reasonable cause, probable cause*, Officer *hunches*, or even as the Division tries to put it, "*articulating a concern*". They will include opinions held by the Courts on the *plain view doctrine, a protective sweep, consent, a conditional waiver, exigent circumstances*, and *hot pursuit*.

Defendant asserts that the Officers in the Division of Parole and Probation do not follow proper *Policy and Procedure* as outlined for *Search and Seizure* in Directive Number 6.2.109.

Defendant offers his opinions and research on the *plain view doctrine*, due to the following situation, because of his extended conversation with Sergeant Helgerman, concerning this specific search issue, during an illegal search performed on or about February 12, 2011, by Officer Evans, Officer Ashby, and Sergeant Helgerman. Sergeant Helgerman was the Sergeant

in command of the unit, and was also one of the training Officers. This is in regards to the *Plain View Doctrine*. (Exhibit 23).

There are 3 criteria that all must be met by an Officer in regards to either a search of the item, or the seizure of it. These 3 criteria are plainly spelled out in Luster v. State, 115 Nev. 431, 991 P.2d 466, (1999), and Ford v. State, 122 Nev. 796, 138 P.3d 500, (2006),which follow a precedent held by the United States Supreme Court.

(1.) The initial intrusion of the police must be lawful.

(2.) The police must inadvertently discover the *incriminating evidence*.

(3.) It must be *immediately apparent* to the police that the items they observe may be evidence of a crime.

Under the *immediately apparent* requirement of this doctrine, the search or seizure of the property in plain view is presumptively reasonable, assuming that there is *probable cause* to "associate the property with criminal activity". In Johnson v. State, 97 Nev. 621, 637 P.2d 1209, (1981), the ruling states that "plain view by itself is never sufficient to justify warrantless "search" or "seizure"; instead you have to consider the "totality of the circumstances".

Some of the items that were searched, that were considered to be in *plain view* in this situation, are letters addressed to different Officers in the Division of Parole and Probation, and other letters addressed to the Board of Parole Commissioners, the Nevada Legislature and the Department of Public Safety. These items were not all written by Defendant, as some were written by members of Defendant's family. They were awaiting further review by our attorney, which places them under the attorney-client privilege of the NRS Statutes in Chapter 49.

According to the law regarding personal property, which is NRS 193.021, until we actually mail these documents and they are received, they are subject to all requirements of *probable cause*. They are further protected by the NRS Statutes on privilege. Many of them cause the additional issue of documents belonging to a third party. In order to conduct a "search" upon them, consent or probable cause would be required.

Since the Officers were adamant in the fact that they could search these documents at any time, because they fell under the *Plain View Doctrine*. Defendant has continually asked of the

Division and the Officers, what "evidence" was *immediately apparent* that *associated this property with criminal activity* that could make this search a legal search?

Which part of these letters addressed to the agencies or Officers listed above constitute *incriminating evidence*? Or is the fact that I or members of my family are writing letters to these agencies *incriminating* enough? Where is the documented evidence of a crime? What was the documented *probable cause* in relation to these letters?

The Officer in charge, Sergeant Helgerman, made a point stating that some of these letters, which he could clearly see, were addressed to Officers under his command in the Division. The Sergeant made what I consider to be a strange request to Defendant that he wanted the Defendant to give him these letters instead of mailing them. He specifically asked if the Defendant trusted him and why the Defendant wanted to mail them instead of letting him take them at that time.

Since they were not all addressed to Officers in the Division, the Defendant did not think that it was appropriate, along with the fact that Defendant and his family were awaiting a review from counsel. Officer Evans did speak up, and said he understood the reasoning behind Defendant's objection, specifically due to the fact that Defendant wished counsel to review the letters first.

Defendant offers his opinions and research in relation to *probable cause*, and is providing the following Nevada Supreme Court decision. In Doleman v. State, 107 Nev. 409, 812 P.2d 1287, (1991), which also follows a United States Supreme Court ruling, the following definition applies:

Probable cause to conduct a warrantless "search" or arrest exists when police have reasonable trustworthy information of facts and circumstances that are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed by a person to be "searched" or arrested.

Defendant offers his opinions and research in a ruling by the Nevada Supreme Court concerning *reasonable cause* in Hollander v. State, 82 Nev. 345, 418 P.2d 802, (1966), which provides the following definition to follow:

Reasonable cause for arrest or "search" consists of such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that a person to be arrested or "searched" is guilty and includes suspicious conduct of person in presence of Officers.

Due to the Sergeant's *interpretation* of *probable cause* or *reasonable cause*, he has evinced an awareness of reasonable trustworthy information of facts and circumstances that led him to believe as an Officer of ordinary care and prudence that an offense has been or is being committed. He should have documented these *facts* to support his allegations in relation to their "search" on that day. Defendant asserts that there was no probable or reasonable cause and that the search was performed for harassment purposes, in violation of the Policy and Procedure of the Division, in violation of the 4th Amendment, and is a violation of NRS 200.571.

During the course of this home visit, my wife and I noticed many violations of the Division's own *Policy and Procedure* regarding "searches" outlined in Division Directive 6.2.109. There are many different forms of "search" recognized by the directive, but a "search" of a third person's personal property and areas, one who is not under the Division's supervision, and who has not given *consent*, would not be allowed without a warrant. It would have to follow the 4th Amendment, or Section 18, have documented *probable cause*, a warrant sworn to in front of a magistrate, or be subject to *exigent circumstances*.

My daughter is extremely upset that her personal and private areas of the residence and her personal property itself, are searched. She wonders what the attraction is, that her panty drawer is continually searched by these Officers in the Division. Her panties are not in *plain view* and there were no *exigent circumstances* present for the Officers, including Officer Ashby, Officer Howald, and Sergeant Helgerman to conduct a "search" of her bedroom dresser and bathroom cabinets and drawers. (Exhibit 2, 4, 6, 20).

In another interesting side note to the *plain view doctrine*, I would assume that the Division and its Officers will continue to use this *interpretation* to further intimidate and harass my daughter and wife or other families of offenders. I realize that the dresser that contains their panties, money and jewelry is in *plain view* and due to the Division believing that if they

articulate a concern, they can search any third party area or personal property of a third party without *consent*, and without their presence at any time in relation to *plain view* or my *conditional waiver*.

My family would like the Court to know that they have helped me research all of this and that they have read and understand all of these rulings and are fully aware of their civil rights and the decisions rendered by the Nevada Supreme Court, and are very interested in the constitutional legality of this sentence as applied to them, as decided by this Court.

According to Division Directive 6.2.109, any search conducted under a *conditional waiver*, again, for someone serving a criminal sentence, and which would only apply to any area that Defendant *frequents*, and that does not *obviously* belong to a *third party*. Defendant and his family have made it very apparent that this bedroom and bathroom belong to my daughter from day one, 7 and a half years ago, as Defendant did again on that day. It is very *obvious* that it belongs to her and is not a *common area*.

But, for some strange reason, during the last eight (8) months, this seems to be an area that never escapes a "search" by a male Officer, who always searches alone and without our presence, as mandated in their own Policy and Procedure, especially a search of her medicine cabinet and her panty drawers.

No female Officer except Officer Howald has ever "searched" these personal areas in the past 7 and a half years that I have been on supervision by the Division. In the last 8 to 10 months, our family has had issues concerning these third party areas and third party personal property in relation to illegal searches and seizures by Officer Howald, Officer Avilla, Officer Evans, Officer Ashby, Officer Peirrott, Sgt. Diek, and Sgt. Helgerman.

Other Division Officers, including Officer Ramos, Officer Lewis, Officer Flores, and other male and female Officers that were here with my Supervising Officer at the time never violated any of my wife's or daughter's constitutional rights until Officer Howald and the other officers listed. Now this has become a continuing concern in regards to these personal areas of an obvious third party, mostly because of recent actions of Officers of the Division of Parole and Probation.

In relation to searches, the Courts have recognized many types relating to Parole and Probation Officers. A legally justified administrative walk-through of the *common areas* of the residence and personal property areas of the offender is approved without a warrant as it relates to supervision by an Officer. Defendant and all others similarly situated have to invite an Officer into their home and allow the Officer to do this.

In United States v. Bradley, 571 F.2d 787, 788, (4th Circuit 1978), the Court stated that "unless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer". This is held for someone on parole, a matter of legislative grace, while serving a criminal sentence. Defendant is serving a civil sentence, where the burden for the State would be a higher standard, according to law.

This ruling was held in United Stated v. Workman, 585 F.2d 1205, (4th Circuit 1978), which applied this same opinion to probation. Again, now this has been held for someone on probation, a matter of the discretion of the Court to grant, while serving a criminal sentence. Again, Defendant is serving a civil sentence, where the burden for the State would be a higher standard, according to law.

In United Stated v. Workman, 585 F.2d 1205, (4th Circuit 1978), the Court stated that "the restriction on a probation officer's authority to search does not preclude warrantless visits to the probationer's home or place of employment. Inherent in the probation officer's duty to 'use all suitable methods…to aid probationers and to bring about improvements in their conduct and condition'". A visit, however, is not a search, and cannot be conducted like one, Wyman v. James, 400 U.S. 309, 317-318, 91 S. Ct. 381, (1971); Latta v. Fitzharris, 521 F.2d 246, 256, (9th Circuit 1975).

Not does the lack of authority to conduct a warrantless search prohibit a probation officer from acting as any other officer in *exigent circumstances*. Thus, he may search and seize articles as an incident to a lawful arrest, Martin v. United States, 183 F.2d 436, (4th Circuit 1950).

Since his authority to visit places him lawfully in the probationer's home, he can seize contraband and instruments or evidence in *plain view*, Coolidge v. New Hampshire, 403 U.S. 443, 464-473, 91 S. Ct. 2022, (1971).

For his own safety, he can frisk the probationer without consent, and he can conduct a search with consent, Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, (1968); Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, (1973).

Defendant asserts that consent was not given in any of these situations, and that nothing was in plain view, as incriminating evidence, and that there were no exigent circumstances in any of these situations, and there was no reasonable or probable cause to conduct a warrantless search, upon an authorized and legal home visit.

Although parole and probation officers have been accorded broad authority so that they may effectively discharge their duties, *Bradley* and *Martin* establish that they must obtain search warrants in the absence of recognized exceptions to the requirements of the Fourth Amendment.

The Courts have determined that there is a difference between an *administrative search* and an *investigatory search*. During the course of this walk-through of the residence, if there is a true belief that an Officer may fear for their safety, a *protective sweep* of the area may be done.

There is also the possibility that an Officer might see *immediately apparent* evidence of a crime according to the plain view doctrine, or be involved in a situation that might present itself concerning exigent circumstances These *might* give reason to conduct a "search" without a warrant.

In these types of situations, the Court, upon challenge and review, would consider the "totality of the circumstances" in order to decide if it was a legal "search". This has been determined in State v. Ruscetta, 123 Nev. 299, 163 P.3d 45, (2007). In almost every other court rulings that concern a "search"; it would have to be legally justified by a warrant, upon documented probable cause, especially when there was a "reasonable time frame" to obtain one.

The actual wording in relation to Defendant, is that according to the condition as stated, the offender has to *submit* to this search, not that he has to *consent* to it. This is the wording in the Lifetime Supervision agreement that he signed in a *conditional waiver* to a "search" of any of

his residence and our personal property **only** based upon "reasonable cause". At no time would a *conditional waiver* to "search" be considered consent to "search" another person's property or person.

A *conditional waiver* may grant the legal limited ability to "search" without a warrant upon Defendant, but only with *reasonable or probable cause*, which would fit the narrow decision granted by the 9th Circuit of the Unites States in United States v. Consuelo-Gonzalez, 521 F.2d 259, (9th Circuit 1975).

This is a decision that has stood the test of time and many attempts to overturn it. It has been in effect since 1975 and it is strange that the Division and the Board have never heard of it, or just choose to ignore it. It very narrowly defines the applicability of a *conditional waiver* and how that *conditional waiver* applies to someone *on probation*, or as later defined, *on parole*. Lifetime Supervision is defined differently than either probation or parole in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002).

The actual wording that the 9th Circuit defined in relation to this *conditional waiver* to search in United States v. Consuelo-Gonzalez, 521 F.2d 259, (1975) is as follows:

"That an offender submit to a search of their person or property conducted in a reasonable manner at a reasonable time by a Probation Officer" and that the court ruled that there must be "reasonable cause" to instigate this search.

If the State of Nevada through the Division or the Board wishes to justify the legality of the use of a *conditional waiver*, it would stand to reason that they would review the cases that might have called this situation into court. And then they would further review the applicable legal decisions to draft and enforce a condition which would withstand the court's scrutiny. I believe that this has not been done, and that the Board and the Division have drafted this *conditional waiver* in such a way as to actually cause it to be challenged more often in a court of law.

This is blatantly disregarding the integrity and rulings of the 9th Circuit Court of Appeals of the United States. This is the Court that has jurisdiction over Nevada rulings, and which the Nevada Supreme Court follows with their rulings after consideration of our laws as drafted.

With the almost effortless ability nowadays to research and determine the intent of the courts view in these instances, this should have been done and it should be reflected in the wording of the condition.

The Division has created a situation that has become even more "punitive in effect" and could cause any "search" instigated under this *conditional waiver* to be further challenged, reviewed by the Court, and most likely, overturned. The Court would follow their own rulings in regards to "subsequent events or circumstances to retroactively justify the seizure or an illegal search" in State v. Stinnett, 104 Nev. 398, 760 P.2d 124, (1988), and Schmitt v. State, 488 Nev. 320, 97 P.2d 891, (1972). This would entail any *evidence of a crime* that might or might not be found. Anything to do with the "search" would be tainted and never be able to be used again. This would be compelling reasoning for obtaining a legal "search warrant" to begin with, if there is any question or doubt.

The 4th Circuit's Decision in 1978 on a *conditional waiver* is even stricter, the opinion ruling that there must be a warrant for any "search" of any area, regardless of it being an offender or someone on parole or probation. This view would negate the need for a *conditional waiver* in any situation. This is documented in United States v. Bradley, 571 F.2d 787, (4th Circuit 1978). This was further followed up in United States v. Workman, 585 F.2d 1205, (4th Circuit 1978), also in 1978 to effectively apply it to probation. It is interesting to note here that no other decision since then has applied these rulings to Lifetime Supervision.

For the Court, an interesting side note comes into play in all of these situations. All of these rulings concern someone on parole, probation, or supervised release, while serving such under a criminal sentence. Defendant and all others similarly situated are convicted and placed on Lifetime Supervision, and they are not currently on parole, probation, or residential confinement and they are serving a civil sentence, not a *criminal sentence*.

Even the Division Directive 6.2.109 does not actually cover this correctly, as it applies to parolees, probationers, or other *criminal offenders*. Defendant is currently a civil offender and has completed and been released from all of his *criminal* sentences.

A *protective sweep* of the area would only entail searching *reasonable* areas relating to where a person might hide from your view and areas in the "immediate vicinity" of the person being "detained" as the object of this "search" in regards to your personal safety. This protective sweep would only be able to occur on the existence of *reasonable grounds* that you feared for your safety. The applicable wording is "specific and articulable grounds sufficient to support reasonable belief posing danger is present". This is a Nevada Supreme Court ruling made in Hayes v. State, 106 Nev. 543, 797 P.2d 962, (1990).

The court has considered the possible areas that a person might *reasonably* try to hide from an Officer who feared for their safety, and I believe that *reasonable and prudent* people, would decide that a panty drawer or medicine cabinet, in an area that I or my wife was not present, would pose no personal danger or threat to an Officer.

During the course of this home visit on February 12, 2011, Sergeant Helgerman, Officer Evans and Officer Ashby were invited into our home. My Supervising Officer at the time, Officer Evans, escorted me outside onto the rear deck. Since I was outside of the residence at that time, should a "search" even have been conducted? This is another interesting question that is posed by the Officers actions on that day.

Sergeant Helgerman went upstairs after asking my wife if anyone else was home and Officer Ashby immediately went to the garage area. Both of these Officers searched areas of the residence without consent, or documented evidence that they "*feared for their own safety*". They certainly searched these areas alone, and without the presence of me or my wife. If they "*feared for their own safety*", why would they separate, and why would they not protect a citizen of the State of Nevada, who was holding a 10 month old child?

If there was indeed a threat, they should first protect the public they are sworn to serve, and then control the area to be searched while calling for more Officers to conduct the "search" or *protective sweep* and provide backup in relation to the threat.

In other rulings by the Nevada Supreme Court, they actually confirm that a "search" is taking place by the opening of cabinet doors, cabinet drawers, and medicine cabinets. The Court

has defined what constitutes a “search” and the “limits” and “scope” of one, in many variable situations to further help guide an Officer with legal definitions.

The Courts have also defined that a person is allowed to be in the presence of the Officer while a search is being performed pursuant to a warrant, and your Division Directive 6.2.109 states the same thing, that a “search” shall only be conducted in the presence of the offender. Our presence was never asked for during this *harassment* “search”.

In most rulings concerning exigent circumstances, the opinion rulings grant a “search” **only** as it relates to a medical emergency, an unattended child, or “urgent need to pursue investigation which involves substantial and imminent threat of death or bodily injury”. If there was an issue of “a consequence which would frustrate a legitimate law enforcement effort”, the Officers could “detain” a suspect with “reasonable and articulable grounds” while they obtained a warrant.

The “totality of the circumstances” would be reviewed to determine if there was an “objectively reasonable basis” to conduct an emergency situation which could entail a “search”. One of the many rulings concerning exigent circumstances is Howe v. State, 112 Nev. 458, 916 P.2d 153, (1996).

In Johnson v. State, 97 Nev. 621, 637 P.2d 1209, (1981), one of the determining definitions in relation to exigent circumstances is that the “*search must not be a planned warrantless search with the accompanying intent to either arrest or obtain evidence*”.

In this particular case, since Officer Evans escorted me out onto the back deck, and removed me from the house, and Sgt. Helgerman, and Officer Ashby split up and “searched” different areas of the residence alone, I believe that this “search” was planned, and was used to harass, or as an attempt to find some type of evidence of a crime, without legal authority, and which was not found, as there was none.

In relation to “articulating a concern”, or “articulable grounds”, to conduct a “search”, the majority of the opinions concern cases involving a “pat down” for weapons in a “Terry Stop”. It has been determined that there has to be “more than an inchoate and unparticularized suspicion

or hunch"; but rather that there must be some sort of "objective justification" to conduct a limited search only. This opinion is provided in State v. Lisenbee, 116 Nev. 1124, 13 P.3d 947, (2000).

If you apply this ruling to other cases, it further backs up the need for *reasonable or probable cause*. An Officer may not just have a hunch, with no justifiable suspicion, to violate a person's constitutional rights.

Under the rules of Parole, or the rules of Probation, a search such as any of these might be legally justifiable if you were to examine the "totality of the circumstances". Under the civil sentence of Lifetime Supervision and the decision by the 9th Circuit, the 4th Circuit, and several Nevada Supreme Court Cases, this could be litigated to define many terms and obtain a broad opinion in relation to this issue.

Any "search" would first have to ask the questions of whether a "*conditional waiver*" is applicable to a civil sentence, and whether consent was "freely and intelligently given" based on the *coerciveness* of the signing of one. Then it would have to be decided if the conditions set by the Board are not "punitive in nature" and a legal consequence of the *Double Jeopardy Clause*.

Then the question would be whether or not an offender on a civil sentence is under "Constructive Custody" in order to limit a person's constitutional protection under the 4th Amendment and the Nevada Constitution. This concept has been defined to someone on parole or probation, a person under the control of the prisons, on residential confinement or out on bail. The Nevada Supreme Court would have to rule on all of these issues and more, first.

Then the search itself could be called into question, by any or all of the reasoning and decisions noted above. Any Parole or Probation Officer should be fully versed in these rulings and issues. There should be serious training and testing to determine that an Officer is fully informed of the myriad number of situations that might present themselves. If they wish to hold an offender accountable for their actions, then they also must be accountable for their actions in the same situation.

In section D. Procedure, of Division Directive 6.2.109, it states that **the constitutional rights of citizens are of paramount concern**.

During this home visit conducted on February 2, 2011, Defendant asserts that an improper "search" was performed under his rules of Lifetime Supervision, Section 18 of the Constitution of the State of Nevada, and the Fourth Amendment of the United States Constitution. Defendant states that his family's constitutional rights were violated in regards to this "search".

Defendant asserts that The Division of Parole and Probation Policy and Procedure outlined in Division Directive 6.2.109 was violated by Officer Evans, Officer Ashby, and Sgt. Helgerman in this situation, and we further believe that this type of "search" and how it was conducted is a violation of the Nevada Statutes, specifically NRS 195.020, NRS 199.480, NRS 200.571, NRS 207.190, and NRS 197.200.

Defendant asserts that there was no documented *probable cause*; there was no documented *consent* to "search" of any *third party* area. There was no documented *threat* to the safety of the Officers, such as a *protective sweep* would require. There was no *immediately apparent* evidence of a crime in relation to the *Plain View Doctrine*. In regards to exigent circumstances, there was no "emergency" present to conduct a "search". There was no contraband or evidence found during this illegal "search". There was no consent form signed by any third party person on site. There was no consent asked for in any form or manner by any of the 3 Officers present. There was no "hot pursuit", or any reason to justify why a warrant could not have been obtained within a reasonable time frame to instigate this "search" upon "reasonable and articulable suspicion" of facts.

On September 22, 2010, in the afternoon, a home visit for Defendant was conducted by Officer Howald and Officer Peirrott. During the course of this visit Officer Perrott asked to look in a case that I carry papers in. I advised Officer Perrott that this case contained legal papers, protected under the attorney-client privilege and therapeutic papers, covered under the doctor-patient privilege. Officer Perrott continued to search anyway, even to the point of reading and separating papers that were inside. (Exhibit 5).

I realize that I have signed a coerced conditional waiver regarding search under my rules of Lifetime Supervision. I also realize that there might be a case made for the safety of the

Officer regarding a hidden weapon being inside the case. Both of these instances should have been dismissed by looking inside the case to determine if, in fact there was a weapon present. Under no instance should Officer Peirrott have gone any further.

I believe this to be an improper search under my rules of Lifetime Supervision and the Fourth Amendment of the United States Constitution by Officer Peirrott, and by Officer Howald, as a principle to the search. Under *State vs. Lisenbee*, a hunch does not even justify the search. Clearly there was no reasonable cause to search the papers or the bag beyond a visual confirmation for the safety of the Officer.

While visiting with another Officer or providing backup, the Officer also has a responsibility to be aware of the rules of the person they are visiting, and the different applications and consequences of those rules. Again, is this an issue of training, or confusion in the Division itself, or a careless disregard for the potential liability that such actions might generate? Many Officers do not distinguish between probation or parole, a criminal sentence, and Lifetime Supervision, a civil sentence.

Defendant discusses the rest of the situation on the afternoon of September 22, 2010, which was a Lifetime Supervision home visit conducted by Officer Howald and Officer Peirrott. This illegal search was in relation to Defendant's wife and the violation of her rights, and the violation of Policy and Procedure. She states, "I was not at home at the time of this visit but fortunately my 18 year old daughter, Alexandra, was present and upstairs to witness what I believe to be another unnecessary and illegal search. My "personal property", not the parolee/probationer's or in our case lifetime supervision client's property, was searched without any reason to believe that rules were violated and evidence would be found. I believe that this search <u>*was*</u> conducted for the purpose of harassment. (Exhibit 4).

On August 1, 2010, in another situation relating to Defendant and his family, an illegal seizure was performed by Officer Howald, Officer Avilla, and Sergeant Diek, the Sergeant of the Unit at the time of the seizure, upon no reasonable cause, and with the ability to obtain a warrant. There were no exigent circumstances present, and no reasonable cause for the Officers to seize this computer. (Exhibit 6).

Defendant discusses the rest of the situation on the afternoon of August 1, 2010, which was a Lifetime Supervision home visit conducted by Officer Howald and Officer Avilla. This illegal seizure was in relation to Defendant's wife, her personal property, the violation of her rights, and a violation of Policy and Procedure. She states, "On August 1, 2010, the above named Officers seized my computer, from my designated home office, which had been approved by the Division of Parole and Probation at the onset of my husband's probation. This was absolutely done without my knowledge or consent, and more importantly, without ***probable cause*** and without a warrant. For the last six years my computer has been password protected and under my control per the request of the Division of Parole and Probation. My husband is no longer on probation; he is currently on lifetime supervision and under a different set of conditions." (Exhibit 1).

It is apparent that the Division does not understand the situations that apply to their conduct while conducting a home visit. This is even more troubling when it is looked at in relation to a search. The Division has safeguards in place, specifically Division Directives, however, the Officers do not follow them.

In relation to the rulings by the Courts, the Division does not care either. The Board and the Division define this as a form of parole, and all parole search decisions are applicable in their *interpretation* of the statutes. This ignores the ruling by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), where it is defined as being "different that parole".

In an interesting note to the training provided by the Division, at a recent Open Public Meeting of the Board of Parole Commissioners, on August 31, 2011, Lieutenant Helgerman states, that the Division does not train their Officers to violate these principles, or the constitutional rights of the citizens of Nevada. Yet, at the time these situations happened, Lieutenant Helgerman was a Sergeant in the Unit, tasked with training Officers.

It appears to the Defendant, that Sergeant Helgerman, now Lieutenant Helgerman, can not say he properly trains his Officers in proper search techniques; by following the laws, the conditions, and Policy and Procedure, when he so flagrantly violates this himself.

What is even more troubling, is that during the recent Open Public Meeting of the Board of Parole Commissioners, on August 31, 2011, Lieutenant Helgerman introduced a change to this condition, which states that they can perform a search at any time, specifically without a warrant and without reasonable cause. Lieutenant Helgerman introduced this based off of a ruling for parole, in 2006, in Sampson v. California, 547 U.S. 843, 126 S. Ct. 2193, (2006).

This decision held by the Court, concerned a narrow interpretation of the search issue, as it applies to an offender on parole in California, where the applicable state statute specifically states that they may do this. This is not the same in statute in Nevada, for a person on parole, or a person on Lifetime Supervision, where nothing is stated in statute.

Defendant finds this even more worrisome, as present at this Open Public Meeting, was Deputy Attorney General Julie Towler, who should help the Board interpret the legality of these opinions as applied to Nevada Statutes and Law. It seems that the Attorney General is not so worried about the constitutional applications of any condition that is applied to an offender under Lifetime Supervision, further corroborating the need to bring this to the attention of the Court.

Defendant asserts that all of these situations violate the Fourth Amendment Rights of the Defendant, and his family, and that this condition, as applied, violates the opinions held by the Nevada Supreme Court, Federal Circuit Courts, and the Supreme Court of the United States.

This condition is illegal to impose, apply, and enforce by the Board of Parole Commissioners, and the Division of Parole and Probation, including the Chief, and its Officers.

Condition # 21: Special Conditions of your Lifetime Supervision:

Special Conditions are even more punitive in nature and effect, as they are based off of the recommendations of the Supervising Officer for Defendant at the time of the hearing to impose them, in this case, Officer Lewis, and without Defendant's presence or ability to be heard. (Record of Lifetime Supervision, Original Hearing for Defendant, October 10, 2008). They are recommended to the Board by the Officer, upon no sworn facts, and without any input from a therapist or other licensed individual to make a qualified determination, to decide what further punishment the Division, and the Officer at the time, may inflict. This is based off of

their own personal bias and prejudice, and upon their own personal predilections, and in many cases, repeating a condition from the 20 “mandatory conditions”.

They even include conditions which were enjoined in ACLU v. Masto, 719 F. Supp. 2d 1258, 1269, (DC. Nevada 2008). Again, how many times can an offender be held accountable for something which is not a crime, in and of itself. If an offender violates a condition of Lifetime Supervision, and then also violates a special condition of Lifetime Supervision, with almost exactly the same language, are they two separate crimes that an offender will be charged with? This is unreasonable and absurd. “A statute should always be construed to avoid absurd results, General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348, (1995). And as Defendant continually asserts, these conditions of Lifetime Supervision are not articulated in any statute.

If a special condition were to be imposed by the Board, it should have a direct relationship to the crime itself, in order to constitutionally promote rehabilitation and to further public safety. This should be done in specially articulated circumstances, with clear guidelines for the Officers to follow, and with the lightest restraint of Constitutional Liberty Interests and First Amendment Rights possible, in relation to an offender civilly sentenced to Lifetime Supervision.

Special Condition #1: *Not possess any electronic device capable of accessing the internet and not access the internet through any such device or any other means, unless possession of such a device or such access is approved by the parole and probation officer assigned to the subject.*

Defendant asserts that this is a further restraint of First Amendment Rights, which is caused by the denial of a computer or internet access, not only on the offender, but also on the offenders family, which is an important medium of communication, commerce, and information gathering, and in many instances, the only way one may apply for employment, United States v. Crume, 422 P.3d 728, (8th Circuit 2005); United States v. Ristine, 335 F.3d 692, 696, (8th Circuit 2003); United States v. Wiedower, 634 F.3d 490, (8th Circuit 2011).

For the Board of Parole Commissioners to restrain the First Amendment Right to own, possess, access or use a computer and access the internet for the Defendant, and the Defendant's family, in order to pursue a medium of communication, commerce, and information gathering is a violation of a Constitutional Liberty Interest.

This condition does not meet constitutional muster. The U.S. Supreme Court ruled in Ashcroft, Attorney General v. ACLU, 540 U.S. 944, 124 S. Ct. 399, (2003), that content based restrictions on free speech are unconstitutional. In this case, the Supreme Court held that a statute imposing criminal penalties upon Internet content providers, even if attempting to protect minors, was not the least restrictive means available to meet that government interest and enforced an injunction against enforcement of the statute.

A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another…is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve", Reno v. ACLU, 521 U.S. 844, 874, 117 S. Ct, 2329, (1997).

When defendant challenges a content based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute, Id. at 874.

Content based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content based restrictions on speech be presumed invalid, R.A.V. v. ST. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, (1992); and that the Government bear the burden of showing their constitutionality, United States v. Playboy Entertainment, 529 U.S. 803, 817, 120 S. Ct. 1878, (2000).

In a situation relating to the Defendant, Officer Lewis deemed it inappropriate and a violation of this condition, if Defendant accessed the intranet computer at his local bank, an intranet computer that only allowed him access to his personal bank accounts. This was burdensome on Defendant, was based upon no reasonable cause, was a further form of harassment and punishment, and was a clear violation of his First Amendment Rights.

In another example, Officer Lewis, Officer Howald, and Officer Pierrott, have all attempted to search the phones of Defendant's wife and daughter, due to the fact that they have internet connectivity. This is due to their *interpretation* of this condition, that it applies to anyone the Defendant lives with or is in contact with, and can be done at any time, upon no reasonable cause, based upon their own personal predilections.

The Division enforces the rule that they can search a phone, and re-call anyone the offender might have contacted with or spoke with, to warn them of the fact that the person is a sex offender, regardless of State Tier Level Rating. They have even done this on phones that belong to other members of the family of the offender. They have done this with the further intent to punish the offender, in relation to work, friends, or other private conversations. With no clear guidelines to point an Officer to, they pursue their own personal predilections and make this condition arbitrary and capricious, and a violation of civil rights to privacy, of the offender and others, all under color of law.

This is harassment and punishment, and is an illegal restraint of Defendant's family's constitutional rights, and the same is applied by these Officers to other offenders and the families of offenders similarly situated.

Officer Howald and Officer Avilla, upon their own decision, and under the authority of Sergeant Diek and Lieutenant Gover, actually seized the computer of Defendant's wife, on August 1, 2010. This was performed with no reasonable suspicion, and without a warrant. It was a computer that was not turned on, was in the wife's personal office, and was password protected. This was done after the Officer had the Defendant call the wife, and ask for her password and permission to search the computer, which she denied to the Officers. This computer was not in Defendant's possession at the time, and Officer Howald searched the residence alone. (Exhibit 6).

These Officers consider Defendant's wife to be a convicted offender also, and under the authority of the Board and the Division and its Officers, pursuant to the conditions of Lifetime Supervision. During this illegal seizure, they also attempted to illegally search the computer of

Defendant's daughter, which was located in her room, was turned off, and was password protected and not in Defendant's possession at the time. (Exhibit 2, 6).

This illegal seizure of the computer owned by the Defendant's wife, was further exacerbated by an illegal search. This search was performed by Officer Evans, under the authority of Sergeant Helgerman and Lieutenant Wood. This illegal search was performed on March 31, 2011, and April 1, 2011, due to the same *interpretation* of the condition, regarding access, search and seizure, by Officer Evans. Defendant's wife has never been convicted of any crime, and she is not under the Division's authority, as she is a free citizen of the State of Nevada, and of the United States. (Formal Complaint Pending).

The Division and its Officers performed this illegal seizure and illegal search in violation of the Division Directive governing these interactions with third parties and personal property, and upon previous knowledge that Defendant's wife, and Defendant's daughter were in possession of personal computers that were password protected as requested by the Division.

Officer Howald, Officer Avilla, Sergeant Diek, Lieutenant Gover, Officer Evans, Sergeant Helgerman, and Lieutenant Wood, denied access to a computer that was able to access the internet, not to Defendant, but to Defendant's wife. The Division and its Officers retained possession of this computer for over 8 months, until after they illegally searched it, in violation of United States Supreme Court precedent that governs this type of situation. Due to a present lawsuit that has been filed against these Officers, the Division, the Board, and the State of Nevada, Defendant will not cite the applicable cases governing this situation, in this motion, until such a time as they are needed in the current litigation.

To subject a civil offender, and their family, to this type of condition is punitive in nature and effect, and is an impermissible restriction upon free speech and it violates the First Amendment Rights, and the Fourth Amendment Rights of the Defendant, and the Defendant's family.

Special Condition #2: *You shall not drink or partake of any alcohol beverages to excess. Upon request by any Parole or Peace Officer, you shall submit to a medically recognized test for*

blood alcohol content. Failure to submit shall constitute a violation of your parole. Test results of .08 blood alcohol or higher shall be sufficient proof of excess.

This is the same condition as enumerated above in condition #3: Intoxicants; except for the fact that now the Board of Parole Commissioners is stating that I am on parole. I am not on parole, I am on Lifetime Supervision, which is different that parole, Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). Defendant asks this Court, first, why would I have to satisfy this condition twice, and why can the Board attempt to charge me twice for conduct which is not a crime in and by itself, and for which I have a constitutional right to do. Especially when one of these conditions relate to parole, which Defendant is not serving a sentence that it can be related to. Please refer to the argument in Condition #3 above. Since this is a Special Condition, the recommendation for this would have to come from Officer Lewis, who deems Defendant to be on parole for this purpose, and the Board agrees, by the inclusion of this condition.

Special Condition #3: *Not possess any sexually explicit material that is deemed inappropriate by the Parole and Probation Officer assigned to the subject.*

For the Board of Parole Commissioners to restrain the First Amendment Right to possess any sexually explicit material is a violation of Defendant's constitutional rights. This condition does not meet constitutional muster. In United States v. Guagliardo, 278 F.3d 868, (9th Circuit 2002), quoted in United States v. Antelope, 395 F.3d 1128, (9th Circuit 2005), the Court held that the provision which prohibited an offender from possessing "any pornographic, sexually oriented, or sexually stimulating materials", was vague, and also included the finding that legal adult pornography was permissible.

The U.S. Supreme Court ruled in Ashcroft, Attorney General v. ACLU, 540 U.S. 944, 124 S. Ct. 399, (2003), cert. granted, that content based restrictions on free speech are unconstitutional. In this case, the Supreme Court held that a statute imposing criminal penalties upon Internet content providers, even if attempting to protect minors, was not the least restrictive means available to meet that government interest and enforced an injunction against enforcement of the statute.

A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another…is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve", Reno v. ACLU, 521 U.S. 844, 874, 117 S. Ct. 2329, (1997).

When defendant challenges a content based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute, Id. at 874.

Content based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content based restrictions on speech be presumed invalid, R.A.V. v. ST. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, (1992); and that the Government bear the burden of showing their constitutionality, United States v. Playboy Entertainment, 529 U.S. 803, 817, 120 S. Ct. 1878, (2000).

Defendant asserts that to subject a civil offender to this condition is punitive in nature and effect, is an affirmative disability and restraint, and is an impermissible restriction upon free speech and violates the First Amendment Rights of the Defendant, and the Defendant's family.

Special Condition #4: *If you are classified as a Tier 3 Sex Offender, unless approved by the P&P Officer assigned to you and by a treating psychiatrist, psychologist or counsel, you may not knowingly be within 500 feet of any place or structure that is designed primarily for the use by or for children.*

Defendant asserts that to further impose conditions that were enjoined by the opinion in ACLU v. Masto, 719 F. Supp. 2d 1258, 1269, (DC. Nevada 2008) on an offender subject to Lifetime Supervision; is a violation of their constitutional rights, and is a violation of the *Ex Post Facto Clause*. Defendant is not a Tier 3 Sex Offender, as he is designated a Tier Level One (1), by the Sex Offender Tier Level Rating Panel, the State Agency designated to do so, since July of 2004. This condition should not be applied to Defendant in any manner or form, and should not even be listed on his conditions as a special condition.

Many offenders still have those conditions imposed upon them, which should never have been applied to them due to the temporary injunction of those statutes, and then the permanent enjoinder of this condition. This makes it an illegal sentence due to ex post facto reasons for those offenders who still have this listed on their conditions. The Board continues to ignore this issue, and does nothing to remove the language from the imposed conditions, causing confusion amongst offenders and officers. This is illegal and punitive in nature and effect.

Special Condition #5: *Exception #18, to read no contact with persons under 18 years of age, with exception of own children.*

Defendant was granted permission to have contact with his children, alone, and in a secluded environment, by this Court, after sentencing. This was due to the Division of Parole and Probation not wishing to grant this permission to Defendant. Permission was granted by this Court upon request of Defendant, his wife, daughter, and therapist, a licensed psychologist, in a motion to modify his conditions of probation, in 2004. The rest of the argument is Condition #18 is still applicable to this condition of Lifetime Supervision as imposed. This Court had the legal authority in statute to enforce this condition while Defendant was on probation, which he has been honorably discharged from by this Court.

Special Condition #6: *Exception #19, to read: be present in locations, only while accompanied by wife or another adult.*

Defendant was granted this permission by this Court, after the original sentencing, due to the same circumstances as noted above. The Division of Parole and Probation did not wish to grant this permission to Defendant. This permission was granted by this Court upon request of Defendant, his wife, daughter, and therapist, a licensed psychologist, in a motion to modify the conditions of probation that were currently placed upon Defendant by this Court.

The Court, at the time of sentencing, expressed a wish for Defendant to petition the Division of Parole and Probation for this permission, as it was expressly a situation within their power and authority to grant to Defendant upon those specific articulated terms. The Division denied the petition with no reasonable cause, and upon motion to this Court on appeal, this permission was granted.

In a situation relating to Defendant, that has happened while serving his sentence of Lifetime Supervision; Officer Howald attempted to verbally change the desires of this Court. The modification hearing was expressly held for the purpose of a modification of condition #18, as verified by all of the paperwork submitted by the Division, through Officer Howald, and pursuant to NAC 213.290.

During the course of this modification hearing, the Board denied Officer Howald the modification she was requesting, specifically that Defendant have no contact with his 6 month old granddaughter, even in a public place, with many adults present. Officer Howald verbally attempted to have condition #19, pursuant to special condition #6, modified by the Board at that hearing, and that was granted to Defendant by this Court. Since the Board had considered this condition and followed the Courts opinion in relation to Defendant, the Board declined to hear Officer Howald's verbal modification request. (Record of Modification Hearing for Defendant, September 21, 2010).

Officer Howald has shown a tendency, to attempt to override the conditions imposed by the Court, or the conditions imposed by the Board at any time, upon her own personal predilections. This is not the only time Officer Howald did not follow the rules of procedure in relation to the Court's orders, or the Board's orders. This is arbitrary and capricious, and is outside the bounds of the authority granted to Officer Howald through the Court, the Board, and the Division.

In relation to Defendant, this condition of Lifetime Supervision still fails, as the Board is stating that Defendant will have to employ an adult chaperone to attend any situation that might occur on school grounds, including his own attendance in a school, to further his own education, in parks, playgrounds, movie theaters, or anywhere children might congregate, which could be anywhere in public. This could also be applied to his right to vote, or for a political reason which Defendant could be involved with. The argument presented in Condition # 19 above is still applicable for Defendant and all others similarly situated.

Special Condition #7: *Exception # 18, to read not contact with persons under 18 years of age, with exception of own children and grandchildren, and without the permission of your parole officer in each and every instance.*

Defendant asserts that the argument in Condition # 18 above is still applicable and is especially relevant concerning the permission in each and every instance. This condition was improperly and illegally imposed by Officer Howald, Defendant's Supervising Officer at the time, before requesting a Board hearing to modify the conditions of Lifetime Supervision, pursuant to NAC 213.290. (Exhibit 3).

By modifying this condition, Defendant asserts that this was a violation of the *Ex Post Facto Clause*. During the meeting, Officer Howald, also attempted to modify Condition #19, and Special Condition #6, verbally in front of the Board, without following any of the procedures contained in violation of NAC 213.290, causing this to be a violation of Nevada Statute 197.200.

Verbal Conditions:

The Defendant asserts that a Parole and Probation Officer under the direction of the Division of Parole and Probation, and the Chief of the Division does not have the legal right to take away *any* Constitutional Liberty Interests or First Amendment Rights. The Officers perform this by the imposition of verbal, arbitrary and discriminatory conditions upon an offender sentenced to the civil penalty of Lifetime Supervision; and that verbal conditions are in excess of their jurisdiction and authority, thereby causing these conditions to be punitive in nature and effect, and more burdensome on the offender after sentencing, and a violation of the *Ex Post Facto Clause*, and the Officers are in violation of Nevada Revised Statute 197.200.

Officers do this in relation to any behaviors or conduct which they do not like, or which they wish to curtail, especially behaviors and conduct the Defendant might constitutionally enjoy exercising, and is free to do so.

This is documented in a situation relating to Defendant, about writing letters to the Division to address grievances, issues of concern, or documenting interactions between the Officer, the Division and the Defendant. This verbal condition was imposed on Defendant, and was informed by Officer Evans, Sergeant Helgerman, and Lieutenant Wood, that they were

enforcing this verbal condition to not write any further letters, upon further threat of arrest for non-cooperation, in violation of an order of the Officers. (Exhibit 27).

Upon further review with one of the 3 Officers involved in this decision, Officer Evans, the Defendant had some of these concerns clarified, but there was still a continuing further restraint of liberty. This is a clear violation of the Nevada Constitution, as Article 1, section 9 state that: "Every citizen may freely speak, write and publish his sentiments on all subjects", and "no law shall be passed to restrain or abridge the liberty of speech or the press." When an Officer institutes a verbal condition, and enforces it with a threat of punishment, by non-cooperation, an arbitrary law has been established, thereby making this a restraint of the First Amendment Rights of Defendant, and is in excess of their jurisdiction and authority.

Another restraint of liberty happened in the same situation as above, as the same 3 Officers, Officer Evans, Sergeant Helgerman, and Lieutenant Wood, imposed another verbal condition on the Defendant. This verbal condition as imposed stated: that the only way Defendant or his family may contact the Attorney General of the State of Nevada, is through his attorney, on the attorney's letterhead, directing a question of law or grievance to the Attorney General. These 3 Officers further stated that the Defendant is not allowed to contact the Attorney General personally by telephone, or any other means, but must contact the Attorney General only by mail. (Exhibit 27).

This is punitive, it is a violation of First Amendment Rights to petition for grievance, and is a violation of the Nevada Constitution in Section 9 of Article 1, and it is in excess of their jurisdiction and authority. This is also a violation of the right to represent oneself, as articulated in the Supreme Court rules of Nevada, SCR 253, and held in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, (1975), and followed in Harris v. State, 113 Nev. 799, 942 P.2d 151, (1997).

A further example is that the family of an offender on Lifetime Supervision, upon a verbal order of Officers of the Division, where they are not being allowed to have a personal computer in the residence, or any means whereby they could obtain access to the internet, such as a smart phone, or a smart TV, or a Game Boy or Nintendo, in order to satisfy their *interpretation* of the condition of no internet access for the offender. This is in excess of their

jurisdiction and is a violation of a First Amendment Right to free speech and commerce. Please refer to the argument in special condition #1 and special condition #3.

In relation to searches, under the contested authority of the conditional waiver signed by the Defendant and all others similarly situated, and without the consent of the person involved; Officers have verbally stated that they may search any member of the family's vehicles, rooms, personal property, smartphones and computers at any time, without reasonable cause, and without a warrant. Officers of the Division have actually done this to Defendant and Defendant's family, and others similarly situated, with no search warrant or reasonable cause, in violation of the Fourth Amendment, upon *interpretation* of this condition, and the law, by the Officer, and which is in excess of their jurisdiction and authority.

This is specifically why the Founders of our Nation enumerated in the Fourth Amendment that no search shall be conducted without a warrant upon sworn oath by an Officer and based upon probable cause. The Defendant asserts that this is a clear violation of not only the offender's rights, but the rights of their families, and friends, especially First Amendment Rights and Fourth Amendment Rights, thereby making these verbal conditions punitive in nature and effect as applied to Lifetime Supervision.

One of the most punitive examples of a verbal condition, is when Officer Howald made the father of the family move out of his home, without any direct evidence of any harm to any child in the home, against his wishes, upon unsworn testimony, and completely at the personal predilection of the Officer, who is biased and prejudiced, and that this verbal condition as enforced is beyond her jurisdiction and authority as a Parole Officer.

Defendant asserts and believes that the Division of Parole and Probations specifically train their Officers to violate the Constitutional Liberty Interests and First Amendment Rights of offenders and their families, all in the name of "public safety". They do this with the use of intimidating and harassing techniques, akin to "Gestapo tactics" to force offenders to conform their behavior to their own personal predilections. Many Officers take delight in doing this, due to personal prejudice and bias, as these offenders are "just" sex offenders, and deserve no respect or rights, according to them, and as evidenced by their actions. This prejudice and bias has been

further transferred to the families of offenders, as many Officers have actually asked wives, sons and daughters why they are still with the offender, or why do they support them and live with them. This is punitive in nature and effect, and clearly shows prejudice and bias.

Issue # 1: Remedy to Correct Illegal Sentence: Legality of Petition

Defendant is legally allowed to appeal a sentence if the appeal is based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings, NRS 177.015, Appeals to District Court and Supreme Court, Section 4; Davis v. State, 115 Nev. 17, 974 P.2d 658, (1999); Franklin v. State, 110 Nev. 750, 751-752, 877 P.2d 1058, 1059, (1994).

This Court may correct an illegal sentence at any time, NRS 176.555; Davidson v. State, 124 Nev. Adv. Rep. 76, 192 P.3d 1185, (2008); Haney v. State, 124 Nev. Adv. Rep. 40, 185 P.3d 350, (2008).

A challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional, Iowa v. Lathrop, 781 N.W. 2d 288, (Iowa 2010).

Because this motion is addressed to the inherent authority of the Court to correct its own alleged mistake, then the District Court has inherent authority to correct an illegal sentence at any time. The same is true of a sentence that, although within the statutory limits, was entered in violation of the Defendant's right to *Due Process*. Thus, the time limits and other restrictions with respect to a petition for post-conviction relief do not apply to a motion to correct a sentence based on a claim that the sentence was illegal or was based on an untrue assumption of fact that amounted to a denial of due process, Passanisi v. State, 108 Nev. 318, 831 P.2d 1371, (1992).

NRS 176.555 provides that "The district court may correct an illegal sentence at any time". The Supreme Court of Nevada has recognized that the power of the District Court is inherent. The inherent power to correct an illegal sentence, like the inherent power to modify sentences based on mistakes about a defendant's record, must necessarily include the power to entertain a motion to correct an illegal sentence. Because of the very nature of the remedy sought in a motion for relief from a sentence that is either facially illegal or is a result of a

mistaken assumption regarding a criminal defendant's record, time constraints and procedural defaults do not apply, Edwards v. State, 112 Nev. 704, 918, P.2d 321, (1996); Opinion No. 97-23 of the Office of the Attorney General of the State of Nevada, (1997).

While examination of legislative history is unnecessary when statutory language is clear and unambiguous, Acklin v. McCarthy, 96 Nev. 520, 612, P.2d 219, (1980), in the instant case, the language is certainly unclear and ambiguous when it states that a violation of a condition will result in charges, yet fails to identify the conditions that an offender may be charged with.

A review of the legislative history of SB 192 enacted in 1995 reveals the fact that this civil sentence was to be non-punitive in nature, as the offender has already been punished for his crime by either serving his criminal sentence, and either obtaining parole or "cleaning up" his sentence; or the offender was placed under a suspended sentence by the Court and granted probation, and finalized his probation. By placing the defendant under the same conditions as "parole", the Board of Parole Commissioners did not conform the sentence to that prescribed by statute. A judgment of conviction must conform to the punishment prescribed by statute and when a sentence does not conform, it is erroneous and must be corrected, State v. Johnson, 75 Nev. 481, 346 P.2d 291, (1959).

Accordingly, sentences pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 are in violation of SB 192 enacted in 1995, are illegal and should be corrected. NRS 176.555 provides that a sentencing court may do so at any time. Moreover, Nevada Supreme Court precedent indicates the correction should occur whether the mistake in rendering judgment works to the extreme detriment of the Defendant, Warden v. Peters, 83 Nev. 298, 429 P.2d 549, (1967), or the mistake benefits the Defendant, State v. Johnson, 75 Nev. 481, 346 P.2d 291, (1959).

There are further sound reasons for requiring correction of illegal sentences in this matter. If the conviction and sentence for a crime makes the punishment harsher than that in the statute, it violates the constitutional prohibition against *Ex Post Facto* laws, Goldsworthy v. Hannifin, 86 Nev. 252, 468 P.2d 350, (1970); Thompson v. State, 102 Nev. 348, 721 P.2d 1290, (1986).

If the conviction and sentence for a crime imposes two criminal sentences upon Defendant, it violates the constitutional prohibition against the *Double Jeopardy Clause*,

Levingston v. Sheriff-Washoe County, 114 Nev. 306, 956 P.2d 84, (1998); Desimone v. State of Nevada, 116 Nev. 195, 996 P.2d 405, (2000); and State v. Lomas, 114 Nev. 313, 955 P.2d 678, (1998).

The Legislature is empowered to define crimes and determine punishments, and the judicial branch should encroach upon that domain lightly, Deveroux v. State, 96 Nev. 388, 610 P.2d 722, (1980). In the instant case the Legislature specifically decided that this civil sentence pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 is to be *non-punitive* in nature.

While some might argue that where sentences derive from plea bargains and guilty pleas, defendants waive any challenge to defects in their respective judgments and sentences, such an argument is unpersuasive. A defendant can waive certain rights in the plea bargaining process, Cruzado v. State, 110 Nev. 745, 879 P.2d 1195, (1994).

However, a defendant does not forego the substantive right to challenge the jurisdictional validity of his sentence by pleading guilty, United States v. Caperell, 938 F.2d 975 (9th Circuit 1991); Giese v. Chief of Police, Reno, 87 Nev. 552, 489 P.2d 1163, (1971); United States v. Palacios-Casquete, 55 F.3d 557, (11th Circuit 1995) cert denied; United States v. Burns, 934 F.2d 1157, (10th Circuit 1991) cert denied; and United States v. Shulman, 940 F.2d 91, (4th Circuit 1991).

The Court has concluded that the defendant cannot waive his or her rights to post-conviction remedies as part of a plea agreement, and the fact that an illegal sentence results from a plea bargain and guilty plea should not insulate it from review and correction, Hood v. State, 111 Nev. 335, 890 P.2d 797, at 797, (1995).

The illegality of the application and enforcement of the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, to restrain the Constitutional Liberty Interests and First Amendment Rights of a citizen of the State of Nevada sentenced to a *non-punitive* civil sentence can not be ignored. The imposition of such sentences clearly exceeds lawful sentencing authority. Unfortunately, correcting the illegal sentences will require further expenditure of judicial resources. However, the procedure for correcting an illegal sentence does not entail relitigation of the entire case.

A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time, Edwards v. State, 112 Nev. 704, 918, P.2d 321, (1996).

An "illegal sentence" for purposes of a statute identical to NRS 176.555 was defined by the District of Columbia Court of Appeals as "one 'at variance with the controlling sentencing statute' or "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided". Allen v. United States, 495 A.2d 1145, 1149, (District Court Columbia 1985); quoting Prince v. United States, 432 A.2d 720, 721, (District Court Columbia 1981); and Robinson v. United States, 454 A.2d 810, 813, (District Court Columbia 1982).

A Nevada District Court cannot validly sentence a convicted offender to a condition not enumerated in a statute and not in effect at the time of the offense. Thus, the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, are illegal and must be corrected. These conditions, at this time, are still not enumerated in any statute or regulation of the State of Nevada, continuing to make them a violation of the *Ex Post Facto Clause,* the *Double Jeopardy Clause, the Bill of Attainder Clause,* and the *Due Process Clause*.

The alternative Writ must state generally the allegation against the party to whom it is directed and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the Court from which it is issued, and to show cause before such Court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter, NRS 34.340.

A temporary injunction may be granted in the following case, NRS 33.010.

A petitioner who has tendered a showing of ongoing and irreparable harm justifies the provisional determination that the Court should consider the matter further to ascertain whether the facts justify the issuance of an interlocutory writ of mandamus or prohibition, Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 128, 906 P.2d 230, (1994).

A Writ of Prohibition is the proper remedy to restrain a district court from exercising a judicial function without or in excess of its jurisdiction, NRS 34.320; Hickey v. District Court,

105 Nev. 729,731,782 P.2d 1336, 1338 (1989); State v. Eighth Judicial, 121 Nev. 225, 229, 112 P.3d 1070, 1073, (2005); Smith v. Eighth Judicial, 107 Nev. 674, 818 P.2d 849, (1991).

It is clear that a writ of prohibition must issue when there is an act to be "arrested" which is "without or in excess of the jurisdiction" of the trial judge, NRS 34.320, Culinary Workers v. District Court, 66 Nev. 166, 210 P.2d 454, (1949); Seaborn v. District Court, 55 Nev. 206, 29 P.2d 500, (1934); Raggio v. Board of Parole Commissioners, 80 Nev. 418, 395 P.2d 625, (1964); and Ham v. Eighth Judicial, 93 Nev. 409, 566 P.2d 420, (1977); Smith v. Eighth Judicial, 107 Nev. 674, 818 P.2d 849, (1991).

The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such actions, Walcott v. Wells, 21 Nev. 47, 24 P. 367, (1890).

The purpose of a writ of prohibition is not to correct errors, but to prevent courts from transcending the limitation of their jurisdiction in the exercise of judicial power, Goicoechea v. Fourth Judicial ex rel. County of Elko, 96 Nev. 287, 607 P.2d 1140, (1980); Cunningham v. Eighth Judicial ex rel. County of Clark, 102 Nev. 551, 729 P.2d 1328, (1986).

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).

A writ must issue where there is not a plain, speedy and adequate remedy in the ordinary course of law, NRS 34.170, NRS 34.330, Heilig v. Christensen, 91 Nev. 120, 532 P.2d 267, (1975); Ham v. Eighth Judicial, 93 Nev. 409, 566 P.2d 420, (1977); Houston Gen. Ins. Co. v. Eighth Judicial, 94 Nev. 247, 578 P.2d 750, (1978).

It is true that neither mandamus nor prohibition is appropriate in the face of alternative remedies, Heilig v. Christenson, 91 Nev. 120, 532 P.2d 267, (1975).

However, each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted, Shelton v. District Court, 64

Nev. 487, 185 P.2d 320, (1947); Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 652 P.2d 1183, (1982).

Additionally, where an important issue of law needs clarification and public policy is served by this Court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified, Ashokan v. State Dept. of Ins., 109 Nev. 662,667, 856 P.2d 244,247, (1993); Business Computer Rentals v. State Treas., 114 Nev. 63, 953 P.2d 13, (1998).

Prohibition is not a writ of right, but one of sound judicial discretion, to be issued or refused according to the facts and circumstances of each particular case. Like all other prerogative writs, it is to be used with caution and forbearance, for the furtherance of justice, and securing order and regularity in judicial proceedings in cases where none of the ordinary remedies provided by law are applicable, Walcott v. Wells, 21 Nev. 47, 24 P. 367, (1890); O'Brien v. Trousdale, 41 Nev. 90, 167 P. 1007, (1917).

"The Writ of Prohibition issues only in the sound judicial discretion of the Court for the furtherance of justice", Ex Rel. Hatch v. District Court, 50 Nev. 282, 257, P. 831, 833, (1927); as quoted in Bowler v. First Judicial, 68 Nev. 445, 452, 234 P.2d 593, (1951).

Finally, mandamus or prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of the Court, Hickey v. District Court, 105 Nev. 729,731,782 P.2d 1336, 1338, (1989); Halverson v. Sec. State, 124 Nev. Adv. Rep. 47, 186 P.3d 893, (2008).

However, even when an arguable adequate remedy exists, the Court may exercise its discretion to entertain a petition for mandamus under circumstances of urgency or strong necessity, or when an important issue of law needs clarification, and sound judicial economy and administration favor the granting of the petition, State v. Second Judicial District Court, 118 Nev. 609, 55 P.3d 420, (2002); Scarbo v. Eighth Judicial, 125 Nev. Adv. Rep. 12, 206 P.3d 975, (2009).

The fact that an appeal is available from the final judgment does not preclude the issuance of a writ of prohibition, particularly in circumstances where the trial court is alleged to

have exceeded its jurisdiction and the challenged order is not appealable, G.&M. Properties v. Second Judicial, 95 Nev. 301, 594 P.2d 714, (1979).

In an application for a Writ of Prohibition alleging unconstitutional prior and continuing restraint, pursuant to a First Amendment Petition, the Court is mandated to and shall render judgment on application of writ not later than 30 days after application is filed, NRS 34.185.

Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional. To meet that burden, the challenger must make a clear showing of invalidity, Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006); Sheriff v. Burdg, 118 Nev. 853, 59 P.3d 484, (2002); Gallegos v. State, 123 Nev. 289, 163 P.3d 456, (2007); and Grayned v. City of Rockland, 408 U.S. 104, 92 S. Ct. 2294, (1972).

To mount a successful facial challenge in State Court, a party is not required under precedent of United States Supreme Court to establish that no set of circumstances exists under which challenged statute would be valid, City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999).

When asserting a "facial" challenge, the petitioner seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute 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 asserts that due to the legal arguments and opinions of the Court's quoted above, that he has legal standing to challenge the constitutional legality of the statutes and conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 that have been imposed upon him, on behalf of himself and all others similarly situated.

Issue #2: Due Process: Determination of Fact: Recidivism Statistics:

According to the sponsor of the bill, Senator Mark James, one of the most important reasons that the Nevada Legislature enacted SB 192, in 1995, and imposed the "special sentence" of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, upon Defendant and all others similarly situated; was the "fact", presented by law enforcement, of the "high rates of recidivism" that are "known" to be a problem amongst previously convicted sex

offenders. There was no documented evidence, study, or statistic that related to this "high rate of recidivism", presented or documented in the legislative record.

The second reason given, was the "fact" that if a new sexual offense occurs, the police first look to the known sex offenders and "most of the time, it is more than likely that the perpetrator will be found within this group". This is again presented without supporting evidence by law enforcement.

The last reason given for SB 192, (1995), in relation to Lifetime Supervision, was that it was intended to provide law enforcement personnel with a *non-punitive* tool to assist them in solving new sex crimes.

The legislative record of SB 192, (1995), has many statements by individual legislative members and law enforcement were made concerning this "high rate of recidivism" of convicted sex offenders. However, there is not one documented study or statistic that a person can refer to in the legislative record that points to this "high rate of recidivism". There is nothing at all that specifically points to any study or statistic in regards to Lifetime Supervision, though the record does reflect two (2) State Supreme Court decisions from other States, relating to civil commitment.

In order to look at recidivism, Defendant asserts the following reasonable definition, as this is one of the most easily tracked statistics in the country. While there can be problems with definitions, Defendant asserts that "recidivism", is "a second or subsequent sexual offense perpetrated by an already convicted sex offender for a new sexual offense.

It may well be argued that these types of crimes are underreported, and that the true rate of offenses is unknown, and that assertion, in that context, may be true. But, these types of statements can not be applied to a study that is conducted in relation to the actual rates of sexual offenses, and the actual rates of re-offense when comparing a new sexual offense by a previously convicted sex offender. If one were to extrapolate the results of these documented studies and statistics that have been done, and apply them to the as yet undocumented and unknown sexual offenses, Defendant would assert that the same rate of recidivism as currently documented would

apply to those cases also, due to the fact of the size of these studies that have been performed on convicted sex offenders for many years.

Statistics can be misused with or without malice. One of the main statistics that the Supreme Court uses in analyzing the "facts" about recidivism is quoted in Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003). This was a presented in a recent case for the Court in relation to the determination of recidivism in McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, (2002), where they looked at some of the statistics that resulted from a Study done in 1997, by the Department of Justice.

One of the conclusions of the Study was that: "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault". See Sex Offenses 27, U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6, (1997). States thus have a vital interest in rehabilitating convicted sex offenders. *McKune*, Id. at 32. This statement by itself is correct.

However, to use this one fact, in an improper context, to describe the recidivism rate of convicted sex offenders is a malicious misrepresentation of the Study, and its results. This fact is only true in the relationship between convicted sex offenders and those convicted of other crimes. Convicted rapists and pedophiles are four (4) times more likely to re-offend for that specific crime, than other convicted offenders. Most sex offenders do not fall into one of these two categories, and this does not relate to the recidivism rate of sex offenders in general.

In a point of fact, in this study and in many other recent studies conducted since that time, the re-arrest rate for a convicted sex offender for a new sex crime is roughly 5.3% for all sex offenders, including rapists and pedophiles. The re-conviction rate is even less, averaging around 3.5% for all convicted sex offenders accused of committing a new crime. This is a very telling statistic. When you apply the rate quoted above, that rapists and pedophiles are four (4) times more likely to reoffend than any other type of offender, then that effectively drops the recidivism rate for all other sex offenders who have been convicted of a sex crime that is not related to rape or pedophilia, down to less than 1% for all of the new sex crimes that are

committed every day. Another rather telling statistic, which adds perspective in relation to this, is that over 90% of all sex crimes are committed by a new offender.

In *Mckune*, the statement is made that "sex offenders are a serious threat in this Nation". In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide. U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 1, (1997).

In many recent studies by the U.S. Dept. of Justice, Bureau of Justice Statistics, and the Federal Bureau of Investigation, it has been found that the rates for this type of offense have dropped off dramatically over the last 12 years. In Bulletin NCJ 231327, entitled Criminal Victimization, 2009, the rates for rape/sexual assault had dropped to a rate of 125,910 reported cases in 2009 from a reported rate of 355,000 cases in 1995, a 65% decrease in the number of confirmed and documented cases. This is consistent with a drop in several other categories of crimes. (DOJ, Criminal Victimization, 1997).

Defendant asserts that it is not due to the fact of the registration laws, or any other laws aimed directly as sex offenders. This rate is dropping even with the huge increase in the number of sex offender laws that are constantly being put in place across the country. And this is continually dropping even with an increase in the sexting laws, the registration laws, the reporting laws, the pornography laws, and all other sex offense related laws.

Defendant is presenting to the Court many studies and statistics which confirm the "low rate of recidivism" of convicted sex offenders, in relation to committing a new sexual offense.

In 2004, the Department of Justice, Bureau of Justice statistics released a study entitled "Recidivism of Sex Offenders Released from Prison in 1994". In this study, the re-arrest rate for a convicted released sex offender was 5.3% in the first three (3) years. In looking at this even closer, the re-conviction rate for those arrests was 3.5%. That statistic would be the accurate rate of "recidivism" as defined above.

This study followed 9,691 male prisoners released during 1994 who were convicted as sex offenders, The study also followed 262,420 male prisoners who were released in 1994 and not convicted of a sex crime, but were convicted of other felony crimes. The study totaled 272, 111 actual prisoners released in 1994 in 15 states. Many significant factors and statistics resulted

from this study, which is more recent that the study listed in *Mckune* and *Smith*. Defendant asserts them as follows:

(1) The re-arrest rate is only 5.3% of all new sexual offenses, and the re-conviction rate for those arrests is only 3.5%, due to the fact of false allegation, and the fact that almost all new sex offenses are committed by new offenders, not previously convicted sex offenders.

(2) When comparing offense numbers, out of a total of 272,111 prisoners, the actual number of released sex offenders who committed a new crime of any type was 4,163 offenders, however the actual number of other offenders who committed a new crime of any type was 179, 391.

(3) In a conclusion to this study, it was determined that contrary to widespread opinion, once-caught sex offenders have a very low recidivism rate. With or without treatment, more that 87% of the once-caught offenders do not commit another sex crime, and with treatment, the likelihood of re-offending is even lower.

(4) In contrast, according to the study, 69 % of all other types of criminals go back to prison, and they do so within five (5) years. Over a longer period of time, other FBI statistics show that about 74% of all other types of offenders return to prison.

(5) When that figure is compared to only 2% to 13%, the recidivism rate for sex offenders in reality is only a tiny fraction of what it is for all other types of crime. This is not what the public believes and certainly not what they have heard.

Recently, many studies have been done on recidivism rates, and the Defendant would like to present a number of them to the Court, in summary form, and will include all of them as exhibits, to further corroborate the true "low rate of recidivism" of convicted sex offenders.

(1) The State of Washington, in 2004, directed the State Institute for Public Policy to analyze the impact and effectiveness of current sex offender sentencing policies. This report describes the recidivism rates of 4,091 Washington State sex offenders from 1994 to 1998. (Exhibit 29). In the summary of the report, it states that

(a) compared with the full population of felony offenders, sex offenders have the lowest recidivism rates for felony offenses, (13%), and

(b) sex offenders have the lowest recidivism rates for violent felony offenses, (6.7%), but

(c) sex offenders have the highest rates for felony sex offenses, (2.7%). This statistic compares favorably with the DOJ studies, and all of the studies that Defendant has included for the Court's review.

(d) This rate is compared against other offenders released from prison, so when you look at the actual result of that, it means that 97.3% of the time, it is a new sex offender who is committing a new sexual offense, not a previously convicted offender.

In a conclusion that bolsters another part of this argument concerning therapy, sex offenders who complete SSOSA, an outpatient treatment program, have the lowest recidivism rates in all categories. In a quote from the study, it states that "the relatively low 'base rate' of recidivism makes it challenging to predict re-offending".

(2) A recently released study entitled "The California Sex Offender Management Board's Report to the Legislature and Governor's Office, January 2008, (Exhibit 30), states the following:

(a) Solid information about the recidivism of sex offenders is one of the key building blocks for good policy and effective management in sex offender treatment.

(b) There is a growing body of solid knowledge about sex offender recidivism.

(c) In fact, the majority of sex offenders do not re-offend sexually over time.

(d) Additionally, research studies over the past two decades have consistently indicated that recidivism rates for sex offenders are, in reality, lower than the re-offense rates for most other types of offenders.

(e) Many of the preconceived notions surrounding sexual abuse appear to be based on myths and misconceptions rather than empirical studies.

(f) In a definition supplied by this study, they look at "recidivism risk" and state that "it is conceptually defined as the strength of an individual's tendency to relapse into a previous condition or mode of behavior, after the person has experienced an official

intervention such as imprisonment. Any offender who re-offends after the initial official intervention would be conceptually considered to be a recidivist."

(g) In a summary of the study, after a 3 year follow up, only 3.55% of the convicted sexual offenders were returned to prison for a new sexual related offense.

(h) Only 4.57 of the convicted sexual offenders were returned to prison for a new non-sexual related offense.

(i) This study was conducted on 4,287 sex offenders released from CDCR Institutions in 2003.

(j) In the majority of the time, the released sex offenders were returned to prison for a violation of parole, which for sex offenders, is the harshest parole in the country in relation to the restraints that are imposed upon a parolee.

(3) In Arizona, a study was conducted of 3,205 sex offenders who were released over a 15 year period from 1984 to 1998. (Exhibit 30, pg. 77). Among the sex offenders releases, the following was stated:

(a) 25.2% returned to prison once, with an average time of 6.85 years for a new felony conviction.

(b) However, they returned with only a 5.5% recidivism rate for a new sexual offense.

(c) No study was done of how therapy might have interacted with the rates.

(d) This study did not differentiate between new sexual offenses, and technical violations of parole, which have a large influence on the statistics, as a return to prison for possessing pornography or something similar is not really a new sexual offense, and care needs to be taken when looking at some of these studies.

(4) The State of Ohio Department of Rehabilitation and Corrections, (ODRC), completed a 10 year follow up study for sex offender recidivism. (Exhibit 30, pg. 78). ODRC followed 879 sex offenders released in 1989. The report, dated April 2001, provided the following results.

(a) Re-commitment for a new non-sexual offense was 14.3%.

(b) Re-commitment for a new sex offense, which was significantly lower, was 8.0%.

(c) Sex offenders who returned for a sex related offense did so with a few years of release, 50% within 2 years, and 67% within 3 years.

(d) No study was done of how therapy might have interacted with the rates.

(e) This study did not differentiate between new sexual offenses, and technical violations of parole, which have a large influence on the statistics, as a return to prison for possessing pornography or something similar is not really a new sexual offense, and care needs to be taken when looking at some of these studies.

(5) The New York State Department of Correctional Services, Division of Program Planning, Research and Evaluation completed a 9 year follow up study on 556 prisoners with sex offenses released in 1986. (Exhibit 30, pg. 78). The study found the following:

(f) The rate of return for a non-sexual offense was 16%.

(g) The rate of return for a sexual offense, which was significantly lower, was 6%.

(h) No study was done of how therapy might have interacted with the rates.

(i) This study did not differentiate between new sexual offenses, and technical violations of parole, which have a large influence on the statistics, as a return to prison for possessing pornography or something similar is not really a new sexual offense, and care needs to be taken when looking at some of these studies.

(6) The Minnesota Department of Corrections reported in April of 2007, the results of a 12 year study on recidivism. (Exhibit 30, pg. 78). This study was conducted on 3,166 who were released between 1990 and 2002.

(a) The rate of return to prison for a new sexual offense was 12%.

(b) The conviction rate for a new sexual offense was less, at 10%.

(c) And the re-incarceration rate of those new convictions was even less, at 7%.

(d) This study did not differentiate between new sexual offenses, and technical violations of parole, which have a large influence on the statistics, as a return to prison for possessing pornography or something similar is not really a new sexual offense, and care needs to be taken when looking at some of these studies.

(7) In another study done in Arizona, the Arizona Department of Corrections, (ADC),

completed an analysis of sex offenders released from ADC custody over a 10 year period from July 1988 through June 1998. (Exhibit 32). 2,444 sex offenders were released from ADC custody over the ten year period.

(a) 20.8% returned at least once to the custody of the ADC,

(b) But, only 14.2% returned for a new felony conviction, and

(c) Only 3.2% returned for a new felony sex offense.

(d) This study did take into account the difference between technical violations and prisoners released with no parole, and with parole, and found that

(e) Among the 2,444 released, 1,087 were released on parole, and

(f) Among this group, only 0.7% were found to have committed a new sex offense, if they were under parole supervision at one time, and

(g) Out of that figure, only 0.1% committed the offense while under active parole supervision.

(8) In a recent study in California in July of 2011, (Exhibit 35), when looking to the civil commitment of sex offenders, the State documented a recidivism rate for sex offenders released on parole since 2005. In the study the results were:

(a) Out of over 14, 000 offenders referred to the evaluation of the Department of Mental Health, it was found that over 59% of the released sex offenders violated their parole due to technical reasons.

(b) However, out of that rate only 1% of the paroled sex offenders committed a new crime, for which they were convicted, and

(c) Out of the entire 14, 000 inmates released on parole since 2005, only one had committed a new sex offense, thereby making the recidivism rate for paroled sex offenders in California since 2005, less than 0.1 percent.

In looking at the recidivism rates of sex offenders on Lifetime Supervision, or Community Supervision for Life, in three (3) states that have published the results of state sponsored studies, (Exhibit 33), they have shown that:

(1) In Maryland, (Exhibit 32), during the 18 months from July of 2008 to December of 2009, over 2300 sex offenders were under active supervision, and the statistics show:

(a) Between 87% and 94% of sex offender cases closed each month were closed in satisfactory status or by revocation in response to a “technical” violation.

(b) These offenders were not convicted of a new offense.

(c) Less than one third of one percent, (0.03%), of the sex offenders under active supervision were charged with a new sexual offense.

(2) In Colorado, (Exhibit 32), during 2009, 590 sex offenders were on active supervision, and in 2009, 1,496 offenders were sentenced to prison, and 166 were granted probation for a sexual offense, and the following statistic was documented:

(a) less that 1% of actively supervised offenders committed new felonies and misdemeanors.

(b) Remaining offenders were revoked for “technical” violations of probation or parole.

(c) No study was done of how therapy might have interacted with the rates.

(3) In Arizona, (Exhibit 32), 2,344 offenders were under active lifetime supervision, during a period from May of 1993 to August of 2000, and the rates showed:

(a) Approximately, 6.8% of the convicted sex offenders committed a new criminal offense.

(b) Of those, only 1.8% committed a new sexual offense.

(c) In 2009, only 2.9% were convicted of a new felony charge, including sex offenses.

(d) In 2009, 33.8% were returned to prison for a technical violation, due to the fact that parole and probation restrictions on sex offenders are the harshest in the country.

Defendant would like to offer the Court the following studies and statistics relating to the effects of therapy on convicted sex offenders. The public has been told for many years that “treatment doesn’t work”, and that for “sex offenders nothing works”, but there are a number of major studies that indicates otherwise.

(a) The Campbell Collaboration analysis of over 22,000 individuals found that treatment reduced recidivism by 37%.

(b) Canada's Karl Hanson's 2000 analysis found a reduction of 41%.

(c) Oshkosh Correctional's meta-analysis from 79 separate studies of over 11,000 sex offenders found that people who participated in treatment programs had a 59% re-arrest reduction for any crime.

(d) According to Alexander's 1998 study, since 1943 those who were treated in jails, hospitals, and outpatient clinics found their way back to prison at a rate of 33% compared to those who had no treatment.

(e) By 2005, almost all relevant preventative programs showed that re-arrest rates were being reduced by greater that half. With some new treatment philosophies, reductions have been reported as high as 91%.

Exaggerated fear is a poor basis for public policy. It raises a nearly unbreachable barrier to the truth. And a policy that is based on the realities…of low recidivism, of responsiveness to treatment and of the relationship between the vast majority of offenders and their victims….offers the only hope for reducing or eliminating one of our society's saddest and most challenging problems.

If the reality is kept in mind, that once a sex offender is caught, most of the problem ceases, that preventative programs can help almost all the rest of the once caught, then clearly treatment must be the goal. When a politician is calling for tougher sentences and not backing it up with any programs, then he is looking for votes, not solutions. The public's fear would not be so intense today if it were not being propelled by all the exaggerated and often totally false recidivism claims.

Courts must look at the actual facts of recidivism in the correct context, and enjoin constitutionally illegal laws that have been placed on offenders due to the undocumented and malicious hearsay presented as "fact" by proponents of bills and by legislators who are knowingly and willingly letting these distorted "facts" be presented.

Issue #3: Free Speech, Association, Redress for Grievance, and Exercise of Religion: *U.S. Const. Amend 1; NV Const. Art. 1; Sec 1, 4, 9 & 10.*

The United States Supreme Court has stated that all Americans have a "right to associate" for the purposes of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties", Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

The Overbreadth Doctrine provides that a law is void on its face if it "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment Rights, such as the right to free expression or association", City of Las Vegas v. District Court, 118 Nev. 859, 59 P.3d 477, (2002); Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006); Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, (1940).

Even minor intrusions on First Amendment Rights will trigger the Overbreadth Doctrine, because an overbroad law will have a "chilling effect on free expression and association", and thus impact the "breathing space" of First Amendment rights, thereby making an overbroad law unconstitutional, Wyche v. State of Florida, 619 So. 2d 234, (Florida 1993); NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, (1963); Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006).

Even a clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct, Zwickler v. Koota, 389 U.S. 241, 249-250, 88 S. Ct. 391, (1967).

The loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitute irreparable injury, New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140, (1971).

In Supreme Court Discussions that have looked to whether these are constitutional rights or "privileges" granted by the State, and whether these justifications require consideration of

First Amendment Rights, it is necessary to have in mind the standards according to which their sufficiency is to be measured, Elrod, Sheriff v. Burns, 427 U.S. 347, 96 S. Ct. 2673, (1976).

First, "it is firmly established that a significant impairment of First Amendment Rights must survive exacting scrutiny", Buckley v. Valeo, 424 U.S.1, 96 S. Ct. 612, (1976); NAACP v. Alabama, 357 U.S. 449, 460-61, 78 S. Ct. 1163, (1958).

Second, "this type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment Rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct", Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976).

Thus, encroachment "cannot be justified upon a mere showing of a legitimate state interest", Kusper v. Pontikes, 414 U.S. 51, 58, 94 S. Ct. 303, (1973).

Third, "the interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest", Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976); Williams v. Rhodes, 393 U.S. 23, 31-33, 89 S. Ct. 5, (1968); NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, (1963); and Bates v. Little Rock, 361 U.S. 515,524, 80 S. Ct. 42, (1960).

Fourth, "the gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights", United Public Workers v. Mitchell, 330 U.S. 75, 85 S. Ct. 556, (1947).

The government must employ means closely drawn to avoid unnecessary abridgement, Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, (1976).

Finally, "A State may not choose means that unnecessarily restrict constitutionally protected liberty, 'Precision of regulations must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties, Kusper v. Pontikes, 414 U.S. 51, 58, 94 S. Ct. 303, (1973); United States v. Robel, 389 U.S. 258, 88 S. Ct. 419, (1967); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, (1960).

In regards to making association criminal: First, "The Board has the burden to show a compelling government interest to justify a restriction on petitioner's constitutional right to associate", Elrod v. Burns, 427 U.S. 347, 362, 96 S. Ct. 2773, (1976).

Second, "mere association with a person or group cannot be made criminal", Scales v. United States, 367 U.S. 203, 81 S. Ct. 1469, (1961); Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Spilotro v. Nevada Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

And finally, "the State may not punish solely on the status or reputation of a person, Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, (1968); Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, (1962).

Certain infringements upon the right of association may be justified by regulations adopted to serve compelling state interests, [such as in parole and probation], and unrelated to the suppression of ideas. And that these infringements shall not be achieved through means restrictive of associational freedom, Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

First, "In assessing the reasonableness of a regulation, the Court must weigh heavily the fact that communication is involved", Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, (1939); Talley v. California, 362 U.S. 60, 80 S. Ct. 536, (1960); Saia v. New York, 334 U.S. 558, 562, 68 S. Ct. 1148, (1948).

Second, "The regulation must be narrowly tailored to further the State's legitimate interest", DeJonge v. Oregon, 299 U.S. 353, 364-365, 57 S. Ct. 255, (1937); Lovell v. Griffin, 303 U.S. 444, at 451, 58 S. Ct. 666, (1938); Cantwell v. Connecticut, 308 U.S. 296, at 307, 60 S. Ct. 900, (1940).

Third, Access to the "streets, sidewalks, parks, schools, and other similar public places….for the purpose of exercising [First Amendment Rights] cannot constitutionally be denied broadly", Food Employees v. Logan Valley Plaza, 391 U.S. 308, at 315, 88 S. Ct. 1601, (1968).

And finally, free expression "must not, in the guise of regulation, be abridged or denied", Hague v. CIO, 307 U.S. 496, 516, 59 S. Ct. 954, (1939).

In our system of law, defining crimes and fixing penalties are legislative, not judicial functions, United States v. Evans, 333 U.S. 483, 486, 68 S. Ct. 634, (1948).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of public opinion", Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, (1943).

Because overboard laws, like vague ones, deter privileged activity, petitioner believes that cases cited firmly establish petitioners standing to raise an overbreadth challenge, Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, (1972); Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, (1951).

Even the fact that an enactment provides adequate notice of the acts it prohibits does not absolve it of the vice of overbreadth. "The objectionable quality of …overbreadth does not depend upon absence of fair notice to a criminally accused or upon un-channeled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application", NAACP v. Button, 371 U.S. 415, 432-433, 83 S. Ct. 328, 338, (1963).

In the instant case, the Board's restraint of the First Amendment Rights of Defendant and all others similarly situated, by the use of the "conditions of Lifetime Supervision" answer the charge of overbreadth. The Court should agree that the claim survives this test and subject the statute and the conditions to further analysis in accordance with well-established principles of constitutional law. (Agreement of Lifetime Supervision Conditions).

Defendant asserts that the statutes and conditions are unconstitutionally overbroad in violation of the First and Fourteenth Amendments because it punishes mere association with an individual or individuals known to be ex-felons or sex offenders regardless of their political, religious, legal, and therapeutic or employment situations. It does not require, nor has it been construed to require, any active participation in any illegal activity, but rather, it is a blanket denial of the right to associate, even with ones own family members if they were previously convicted of a crime. The conditions are not narrowly drawn in relation to association.

Defendant is denied the right to be present in or near parks, sidewalks, schools, or any place that a minor might congregate, which could be a McDonald's with a playroom area. It also includes movie theaters, or any business that primarily has children as customers, which disallows the family from attending events, or any event that children might attend, such as the fair, a carnival, an amusement park, or the library. Defendant could inadvertently walk into a store that was conducting a children's event such as building a playhouse at Home Depot, and could be arrested for association, presence, or in the vicinity of a minor without permission. This "condition" as applied creates absurd results, based upon arbitrary and discriminatory grounds and upon the personal predilections of the Officer.

The United States Constitution grants to local governments broad discretion to control and regulate the activities of citizens; however, such controls and regulations cannot sweep so broadly as to infringe the constitutional and organic rights of the individual. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms, NAACP v. Alabama, 377 U.S. 288, 307, 84 S. Ct. 1302, 1314, (1964).

One of the protected freedoms involved in this case is the First Amendment guarantee of freedom of association, Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, (1971); Williams v. Rhodes, 393 U.S. 23, 89 S. Ct. (1968). This right to freely associate is not limited to those associations which are "political in the customary sense" but includes those which "pertain to the social, legal and economic benefit of the members", Griswold v. Connecticut, 381 U.S. 479, 483, 85 S. Ct. 1678, 1681, (1965). "The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others, are implicit in the First and Fourteenth Amendments, Bykofsky v. Borough of Middletown, 401 F. Supp 1242, 1254, (M.D.Pa. 1975).

The First Amendment thus limits the permissible scope of association, such an enactment can be upheld only if it proscribes conduct which threatens public safety or constitutes a breach of the peace, Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, (1972);

Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, (1942); State v. Ecker, 311 So.2d 104, (Florida 1975).

Defendant in the instant case is being restrained of his First Amendment Rights to associate by the burden on his only "criminal act" in associating "knowingly or unknowingly" with ex-felons or sex offenders without any intent of wrong doing or criminal activity. This right is being restrained on Defendant and all others similarly situated and could incur a misdemeanor or felony charge for otherwise innocent activity, therefore clearly infringing upon the free exercise of his associational freedoms, Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980).

An enactment which criminalizes ordinary associational conduct not constituting a breach of the peace runs afoul of the First Amendment, Coates v. City of Cincinnati, 402 U.S. 611, 615, 91 S. Ct. 1686, 1689, (1971). "The First and Fourteenth Amendment do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people", Id., at 614.

The State can do so only through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited, Gregory v. Chicago, 394 U.S. 111, 118, 124-125, 89 S. Ct. 946, (1969).

The "Association" condition before the Court punishes an individual not for his own criminal acts, but rather for his act of being in a public or private place, and associating with individuals whom he knows or does not know to be ex-felons, and punishes the Defendant for innocent behavior performed with no intent or guilt.

Both the Fifth Circuit and the Supreme Court have recognized that under our system of justice, punishment must be predicated only upon personal guilt. "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct….that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the *Due Process Clause*, Scales v. United States, 367 U.S. 203, 224-225, 81 S. Ct. 1469, 1484, (1961); St. Ann v. Palisi, 495 F.2d 423, 425, (5th Circuit 1974).

In *Scales*, the statute was challenged on the ground that it imputed guilt by mere association, and therefore infringed on First Amendment guarantees. The Supreme Court noted that a conviction could not be based upon "what otherwise might be regarded as merely an expression….unaccompanied by any significant illegal action to support it, or any commitment to undertake such action. *Scales* thus teaches that even knowing association with a group or status cannot be a punishable act just because some members of the group or status *might be* engaged in criminal conduct. Defendant in *Scales* was convicted solely on the basis of his companionship or direct contact with other criminal persons. He was not charged with any criminal activity, but only upon mere association which made his conduct criminal. In the opinion of the Court, the ordinance was unconstitutionally overbroad because it authorizes the punishment of constitutionally protected conduct, Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Coates v. City of Cincinnati, 402 U.S. 611, 615, 91 S. Ct. 1686, 1689, (1971).

"It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught, Tyson & Brother v. Banton, 273 U.S. 418, 443, 47 S. Ct. 426, 432, (1927).

The Overbreadth Doctrine of the First Amendment may invalidate laws, such as these statutes, specifically NRS 176.0931, NRS 213.1243, and NAC 213.290 that infringe upon First Amendment Rights, and other Constitutional Liberty Interests, especially without procedural due process.

The Nevada Legislature mandated that the Board of Parole Commissioners enact a regulation; to be determined the program of Lifetime Supervision, and further articulated it in the law the regulation would follow, in this case NRS 213.1243[1], (1995). The Board has only enacted a regulation that addresses timelines, notification and hearings, NAC 213.290 (2000), which is vaguely named "Notification; report; hearing; request to modify conditions". In fact, no mention of the program of Lifetime Supervision is included in the language of the regulation as drafted and enacted by the Board, NAC 213.290, (2000). No articulation of any condition of

Lifetime Supervision is present in the statutes on their face, only the mention that a condition may be imposed. This is overbroad and vague in and by itself.

In order for this Court to make an informed and reasonable decision in regards to these restraints of liberty as imposed, the Court must look further in this petition, to the Agreement of Lifetime Supervision Conditions. The Board of Parole Commissioners has drafted, enacted and enforced these conditions without articulating them in the statute that they state gives them the authority to do so, specifically NRS 213.1243 and NAC 213.290, (2000). The Board considers this Agreement of Lifetime Supervision as their articulated legal right to impose conditions, even conditions which restrain First Amendment Rights and other Constitutional Liberty Interests.

The Defendant states that this "Agreement" is a coerced conditional waiver that is not backed by any legal authority to impose it. The Division enforces these conditions of Lifetime Supervision, which are not an articulated part of any statute. The Division of Parole and Probation also enforces many verbal orders and conditions, as imposed by the Officers of the Division in relation to offenders on Lifetime Supervision, which further restrain the Constitutional Liberty Interests and First Amendment Rights of the Defendant and all others similarly situated.

Defendant asserts that in order to impose a condition to abridge the First Amendment Rights of an offender subject to a civil sentence in any manner, no matter how minor, they would have to first provide for this regulation. And the Defendant would further assert that any restraint of these First Amendment Rights, or any other Constitutional Liberty Interest, by and through a regulation, and further through a condition imposed by the Board, would have to be enumerated in a written format in the statute, and provide notice of prohibited conduct in the statute to the offender, and clear guidelines to law enforcement, 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 language in the statute should be neither arbitrary or discriminatory, nor be vague or overbroad, and be extremely narrowly defined so as to intrude upon any First Amendment Right lightly, if at all, especially in relation to an offender serving a civil sentence.

NRS 176.0931, NRS 213.1243 and NAC 213.290 do none of these and yet restrain many First Amendment Rights and violate many Constitutional Liberty Interests, by the use of 20 “de facto” standard conditions, and further special conditions, and verbal conditions, which are not articulated in the statutes, with no inquiry into an individualized analysis by any persons qualified to conduct same, and which mirror the punitive criminal sanctions imposed on offenders subject to parole or probation, and in many situations, are even more punitive in nature and effect as applied upon Defendant and all others similarly situated.

Defendant asserts that by ambiguously and discriminatorily interpreting the language of the statutes to impose any conditions upon an offender at will, in any manner or form, with no regard to Constitutional Liberty Interests, including First Amendment Rights, is an overbroad and illegal use of administrative judicial authority.

Defendant’s belief, as a reasonably well informed person of ordinary intelligence, is that all inherent Constitutional Liberty Interests, including First Amendment Rights are granted and guaranteed to an offender serving a civil sentence, the same as they would be to a normal citizen, unless a specific right has been determined to be forsaken due to a previous crime, such as the right to own a firearm, or the right to vote, and the right to serve on a jury, pursuant to the Nevada Revised Statutes. Many offenders currently on Lifetime Supervision have actually been granted the right to vote upon completion of their criminal sentence, exactly the same as all other citizens of the State and the Union.

The State, through the Board of Parole Commissioners, the Division of Parole and Probation, and the Chief of the Division violate the First Amendment Rights of the Defendant by requiring permission to associate, by denying permission to attend churches to practice an offender’s religion due to association, by the allegation that minors or other offenders might be present, or due to the fact that there might be a Sunday school or daycare on the premises, to disallow the Defendant from being in or near where children may congregate, regardless of the fact that adults are present. They violate the right by not allowing association with whomever one wants, whenever one wants, wherever one wants, including association at parks, schools, movie theaters and other public places.

The right to associate includes church members, therapy group members, political party members, or people of a like mind, or even the right to associate with minors. This right relates to the attendance at political events, to attend other public events, or even private events of a political nature, due to the alleged fear that a minor or other offender might be present, or that these events are held at a park, school, or movie theater. They even infringe upon the right to protest, or petition for grievance as many of these efforts are held in parks, schools, libraries, and other public places where minors or other offenders could be present. They further violate the constitutional right to work by denying the constitutional liberty to associate, in relation to employment.

A further restraint of First Amendment Rights is caused by the denial of a computer or internet access, not only on the offender, but also on the offenders family, which is an important medium of communication, commerce, and information gathering, and in many instances, the only way one may apply for employment, United States v. Crume, 422 P.3d 728, (8th Circuit 2005); United States v. Ristine, 335 F.3d 692, 696, (8th Circuit 2003); United States v. Wiedower, 634 F.3d 490, (8th Circuit 2011).

The Board violates the right of the offender to vote, by denying the right to be present on school grounds, which also inhibits political associations, as many political events are held on school grounds. In our state, almost all of the state caucuses are held at schools, as are most of our voting poll stations. Because of this restriction on schools, as parents of minor children, or grandchildren, the right to petition for issues relating to school budgets, which is a political process, are denied, as almost all discussions concerning the budget of schools are held on school grounds.

The Board further violates the rights of Defendant by denying him the right to continue his education, as the condition as imposed states that Defendant shall not be in or near a school or school grounds. This means that Defendant can not even attend an adult school, a truck driving school, or any school at all, except an online school, which they deny by the condition to not have access to the internet. It is a constitutional right to pursue an education and better oneself, as it relates to the pursuit of life, liberty and happiness. How does denying the

Defendant the right to better oneself be considered rehabilitative, or a reintegration into society. By learning and acquiring knowledge, the Defendant becomes a better citizen, by being more aware of the laws and issues of the present day society.

The Board and the Division violate the right to free speech, by denying the right to attend political events held at public places, by verbally denying permission to write letters to address grievances, by disallowing the right to address grievances to the Attorney General, unless an attorney is involved, a further violation of another constitutional right to represent oneself. The Parole Officer violates the First Amendment rights of an offender, by the interpretation and imposition of a condition that enforces cooperation with the Officer in any manner or form, upon the Officers personal predilections, which they use to deny rights to address grievance, and other First Amendment Rights.

Most of these conditions as imposed will affect the Defendant for the rest of his life, as this is a life sentence, and many of these conditions give no ability to ever be less restrictive. In point of fact, for this Defendant, the Board of Parole Commissioners refuses to hear any appeal to any condition imposed on Defendant, even though more than seven (7) hearings have been held by the Board to date that concern appeals for other offenders. This is punitive in relation to this Defendant, as he is being punished for questioning the actions of the Board and the Division, and petitioning for grievance in relation to the illegality of their punitive scheme and violations of First Amendment Rights and Constitutional Liberty Interests. This also infringes upon the right to appeal a sentence as the Board states that they have sole jurisdiction over the Defendant and his conditions of Lifetime Supervision.

The Defendant asserts that they violate the Overbreadth Doctrine of the First Amendment by denying an offender the right to free speech, the right to associate, the right to practice a religion, and the right to petition for grievance. This is applied to Defendant and all others similarly situated by the use of arbitrary and discriminatory means, with no clear guidelines for law enforcement to follow or for conduct prohibited, with no enumerated circumstances in statute, and upon vague and overbroad terms. This is based upon an Officers personal bias and predilections, and the Board of Parole Commissioners personal bias and prejudice, therefore

causing it be an illegal restraint of First Amendment Rights and Constitutional Liberty Interests, thereby causing these statutes relating to Lifetime Supervision, specifically NRS 176.0931, NRS 213.1243, and NAC 213.290, to be a constitutionally illegal sentence.

The Supreme Court has stated in order to make a determination of this issue, that "because a claim of constitutionally protected right is involved, it 'remains our duty in a case such as this to make an independent examination of the whole record"', Cox v. Louisiana, 379 U.S. 536, 544, 85 S. Ct. 453, (1965); Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, (1963); Blackburn v. Alabama, 361 U.S. 199, 205, 80 S. Ct. 274, (1960); Pennekamp v. Florida, 328 U.S. 331, 335, 66 S. Ct. 1029, (1946); and Fiske v. Kansas, 274 U.S. 380, 385-386, 47 S. Ct. 655, (1927).

The Court states that in the area of First Amendment Rights, as well as areas involving other constitutionally protected rights, "we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determinations of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding"', Haynes v. Washington, 373 U.S. 503, 515-516, 83 S. Ct. 1336, (1963); Stein v. New York, 346 U.S. 156, 181, 73 S. Ct. 1077, (1953).

Defendant asserts that this Court should consider the stance and opinions of the United States Supreme Court, Circuit Courts, and State Courts that were held when determining this issue of an overbreadth challenge, and any other challenge to Constitutional Liberty Interests and First Amendment Rights of the Defendant and all others similarly situated.

Issue #4, Due Process: Procedural Due Process: *U.S.C.A. Const. Amend 1 &14; NV Const. Art. 1, Sec. 1, 8 & 18.*

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

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 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*.

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.

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).

In determining whether Defendant has obtained a Constitutional Liberty Interest, including First Amendment Rights, 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). Another 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 Supreme Court has determined that "to obtain a protectable right, 'a person clearly must have more that an abstract need or desire for it. He must have more that a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it", Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,7, 99 S. Ct. 2100, (1979); citing Board of Regents v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, (1972).

Defendant asserts that he has a valid claim to all of his Constitutional Liberty Interests and First Amendment Rights and that he is legitimately entitled to them by the completion and honorable discharge of his criminal sentence and that these proceedings should not abrogate the Constitutional Liberty Interests and First Amendment Rights due a person in the United States Constitution and the Nevada Constitution.

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 of their Constitutional Liberty Interests, including First Amendment Rights to *Procedural Due Process* at any stage of any proceedings against him, or all others similarly situated. By not providing for proper notice, hearing, presence, cross-examination, discovery, or the ability to confront witnesses, and upon unsworn testimony and hearsay, during any phase of any hearing against the Defendant, this makes it punitive in nature and effect, and is a

constitutionally illegal action. (Record of Lifetime Supervision, Original Hearing for Defendant, October 10, 2008).

For example, as the Nevada Supreme Court, and the Supreme Court has determined, whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer "grievous loss". When the court looked at the unqualified constitutional liberties granted to a parolee in *Kelch*, the court determined that a parolee, once granted parole, which is a matter of legislative grace, has obtained many of the core values of unqualified constitutional liberty. If the Court were to consider the unqualified Constitutional Liberty Interests of a person on probation, the Court would more than likely conclude that the probationer would have obtained many more Constitutional Liberty Interests than parole offers, due to the inherent nature of the sentencing Court in granting probation, per the Federal Probation Act (1925), as probation is emplaced under a suspended sentence by the Court, and is not a matter of legislative grace.

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).

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).

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).

In looking at the issue of Due Process, the Government has a necessary interest in autonomy in order to effectively pursue a particular goal, and the Defendant (and all others similarly situated), contend that process is due before he is deprived of his constitutional right, Hamdi v. Rumsfeld, 542 U.S. 507, 528, 124 S. Ct. 2633, (2004).

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).

Also see Heller v. Doe, 509 U.S. 312, 330-331, 113 S. Ct. 2637, (1993); Zinermon v. Burch, 494 U.S. 113, 127-128, 110 S. Ct. 975, (1990); United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, (1987); Schall v. Martin, 467 U.S. 253, 274-275, 104 S. Ct. 2403, (1984); and Addington v. Texas, 441 U.S. 418, 425-427, 99 S. Ct. 1804, (1979).

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. 424 U.S. at 335, as quoted in Hamdi v. Rumsfeld, 542 U.S. 507, 528, 124 S. Ct. 2633, (2004).

Defendant asserts that his Constitutional Liberty Interests and First Amendment Rights are affected by the State of Nevada's actions, by and through the Board of Parole Commissioners imposition and enforcement of the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

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).

"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).

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

In regards to procedural due process for Lifetime Supervision, 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).

The Defendant reasonably asserts that this setting of the conditions of Lifetime Supervision is a part of the original sentence as determined by the Court, and as applied by the Nevada Board of Parole Commissioners, as a quasi-judiciary Board, is a further continuation of the sentencing phase of the original conviction. All procedural due process rights should apply, along with the Sentencing Guidelines, just as in the original court proceeding, where Defendant was granted a suspended sentence and probation.

Courts have held that the constitutional due process protections, like ex post facto protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an offender could have anticipated at the time of committing the criminal act.

Since the conditions of Lifetime Supervision are not articulated in ***any*** statute, an offender ***can not*** have anticipated ***any*** punishment for ***any*** acts which he committed where he would be sentenced to Lifetime Supervision based upon his conviction for committing a criminal act, and being sentenced to a civil penalty.

Therefore by not being listed in the statute(s), and without ***any*** due process, the conditions of Lifetime Supervision are being illegally imposed and enforced upon Defendant and all others similarly situated, without due process.

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).

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).

The Federal Courts of Appeals have 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, 10179, (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).

Defendant asserts that the Board of Parole Commissioners, in this instance of setting the conditions of Lifetime Supervision, are acting in a quasi-judiciary capacity. Defendant also asserts that due to the fact that the Board has also drafted and enacted the conditions, through non-articulated means, that they are also acting in the legislative capacity. And last, Defendant states that due to the round-a-bout means of implementing the conditions through non-articulated methods, which have caused them to be absent from the regulation or statutes of the State, that they have further caused them to skirt the requirements of the executive branch of the government, and that the Board is also acting as the executive branch of the State, by disallowing the further review and approval of the Governor of the State, or of the Nevada Legislature.

The Separation of Powers philosophy is looked to as a bulwark against tyranny. For if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, then no man or

group of men will be able to impose its unchecked will. The tyranny of the Board of Parole Commissioners is clear in the drafting, enacting, implementation, and imposition of the conditions of Lifetime Supervision, which violates the *Separation of Powers Doctrine,* and because they do it without notice, or Defendant's presence, or ability to be heard, they violate the Procedural Due Process Clause.

James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny", The Federalist, No. 47, pp. 373-374, (Hamilton ed. 1880).

The framers of the Constitution understood that "barriers had to be erected to ensure that the Legislature would not overstep the bounds of its authority and perform the functions of the other departments", The Federalist, No. 48, pp. 383-384, (Hamilton ed. 1880). See generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton), and 78 (Hamilton); United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965).

The conditions will not be emplaced until an offender starts his sentence of Lifetime Supervision, which is imposed after a period of time has usually elapsed, due to the offender serving his incarceration, parole, probation, or residential confinement and the sentence will not start until those are completed. When the Board imposes conditions which an offender can be further held accountable to as a matter of law, they subject the offender to an additional punitive burden and an increase in the penalty for the original sentence. Many of these current conditions subject an offender to be charged for a crime for behavior or conduct which otherwise is not illegal for any other person not subject to Lifetime Supervision.

Defendant's stance is that the Board of Parole Commissioners, through the "de facto" 20 standard conditions that are imposed, entail a restraint of many Constitutional Liberty Interests, including First Amendment Rights, and therefore should afford all procedural due process rights to a citizen subject to this civil sentence.

Defendant asserts that the constitutionally illegal sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, should be vacated for Defendant

and all others similarly situated for failure to provide for *Procedural Due Process*, and because of the seriousness of the constitutional issues presented, should be enjoined.

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 Texas, in Court of Criminal Appeals of Texas, Ex parte Jonathon Evans, Applicant, 2011 WL 1662384 (Texas Crim. App. 2011).

The Texas Board of Parole Commissioners determined that they could handle the imposition of the setting of 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.

Defendant would like the Court to take into consideration all of the cases above to make a determination of the civil rights of the Defendant relating to the *Procedural Due Process Clause*.

Issue # 5: Due Process: Determination of Open Public Meeting or Quasi-Judiciary Hearing: *U.S.C.A. Const. Amend 1 &14; NV Const. Art. 1, Sec. 1, 8 & 18.*

This Court must look to the legality of the hearing that imposes the conditions of Lifetime Supervision upon Defendant and all others similarly situated. Defendant asserts that this hearing is illegally held, is not transparent, and that the Board of Parole Commissioners actions and deliberations were undertaken without his presence, and without due process.

(Record of Lifetime Supervision, Original Hearing for Defendant, October 10, 2008). Notice, presence and counsel should be constitutionally provided to Defendant based off of the following arguments.

Defendant is respectfully requesting that this Court make a determination of the nature of the hearing to set conditions for Lifetime Supervision, as described in NAC 213.290, Section 3, 4, and 5 inclusive; and based off of the following three (3) reasonable interpretations of Defendant.

(1) Whether the hearing imposing the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 is an Open Public Meeting, defined by the Open Meeting Law, in Chapter 241 of the Nevada Revised Statutes, as currently held by the Board of Parole Commissioners.

(2) Whether the hearing imposing the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 is a "Quasi-Judicial Hearing", exempt from the requirements of the Open Meeting Law, as currently held by the Board of Parole Commissioners.

(3) Whether the hearing imposing the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 is an "administrative proceeding" held by the Board of Parole Commissioners in an administrative capacity, and not in a "Quasi-Judicial" capacity or an "Open Public Meeting" capacity.

Defendant asserts that the opinion of the Supreme Court in Kent v. United States, 383 U.S. 541, 554, 86 S. Ct. 1045, (1966), is one of the most compelling decisions relating to this situation, in stating that, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony…without hearing, without effective assistance of counsel, and without a statement of reasons".

In looking to the first interpretation, the Nevada Legislature has specifically declared its intent in adopting the Open Meeting Law that "in enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent

of the law that their actions be taken openly and that their deliberations be conducted openly, NRS 241.010.

To ensure that public bodies take actions and deliberate openly, NRS 241.020(1), the Nevada Open Meeting law, contained within the NRS 241 Chapter relating to this law, requires that public bodies "must give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest to that person will be discussed", Attorney General v. Board of Regents, 119 Nev. 148, 155, 67 P.3d 902, 906, (2003); Witherow v. Board of Parole Commissioners, 123 Nev. 305, 167 P.3d 408, (2007).

Public bodies must post public notice of their meetings, NRS 241.020(3) (a); and must also give notice of their meeting "to any person who has requested notice", NRS 241.020(3) (b). The notice must include an agenda that denotes a period for public comment, NRS 241.020(2)(c)(3).

Defendant asserts that the Nevada Supreme Court has ordered notice in this situation to Defendant, as the Court has stated that "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). By so stating, and since the meeting or hearing relates directly to the Defendant or all others similarly situated, that the Board of Parole Commissioners must provide documented, timely notice to Defendant, and allow Defendant to be present, with or without counsel.

Defendant argues that exceptions to the Open Meeting Law must be narrowly construed, and that unless the Legislature expressly exempts an agency from the Open Meeting Law or unless judicial or "quasi-judicial" exception applies, the rule of publicity governs, McKay v. Board of County Commissioners, 103 Nev. 490, 493, 746 P.2d 124, 125-26, (1987).

The Board of Parole Commissioners of the State of Nevada is not exempt from the requirements of the Open Meeting Law, according to Nevada Statute, unless they are acting in a quasi-judiciary capacity, according to Nevada Statute, such as in parole hearings.

The Board will argue that they are exempt from the Open Meeting Law and that it does not apply to them in this situation. In *Witherow*, quoting *Stockmeier*, the Court held that in

determining whether or not the psychological review panel hearings were exempt from the Open Meeting Law, the Court stated that they were not, and that the hearings were subject to the Law. In these cases it was also decided that parole hearings are exempt from the Open Meeting law, due to the Legislative intent and Nevada Statute that parole hearing are quasi-judicial proceedings in nature and effect.

The Nevada Legislature has specifically exempted judicial procedures from the Open Meeting Law's requirements, NRS 241.030(4)(a) which provides that NRS Chapter 241 does not apply to judicial proceedings. Further, the Nevada Supreme Court held that "a quasi-judicial proceeding is sufficiently akin to a judicial proceeding to render it exempt from the Open Meeting Law, Stockmeier v. State Dept. of Corrections, 122 Nev. 385, 390, 135 P.3d 220, 223, (2006).

Again, Defendant asserts that the Nevada Supreme Court has ordered notice in this situation to Defendant, as the Court has stated that "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). By so stating, and since the meeting or hearing relates directly to the Defendant or all others similarly situated, and where as a matter of law, that the Board of Parole Commissioners must provide documented, timely notice to Defendant, and allow Defendant to be present and with counsel.

Defendant reasonably asserts that the setting of any conditions by the Nevada Board of Parole Commissioners, as a quasi-judiciary body, is a further continuation of the sentencing phase of the original conviction and all procedural due process rights should apply, along with the Sentencing Guidelines, and presence of counsel, just as in the original court proceeding.

They should include any current, up to date fact finding determinations to further impose a reasonable condition upon Defendant, which are related to Defendant, and which should be determined by a qualified individual authorized to conduct same, or any other determination that the Board may make. These conditions would have to be pursuant to the Sentencing Guidelines, and the Board needs to make this determination based on the totality of the circumstances and the record of the Defendant to date.

Defendant asserts that none of this is done at all. In point of fact, no records exist of any findings of fact by the Board on or about October 10, 2008, as the Board states to Defendant that they did not keep the records of the Lifetime Supervision hearings before 2010, which Defendant also believes to be a violation of law.

NAC 213.290 states in Section 5 that "the Board may require the presence of the sex offender at the modification hearing, thereby stating that the offender need not be present, which would signify that this is not a quasi-judicial hearing, since it does not meet the *Stockmeier* or *Kamadula* requirements, and according to the Board, that the *Procedural Due Process Clause* does not apply to Defendant.

In looking further to the Board's stance in relation to this, in the limited public notice listing the imposition or modification of the conditions of Lifetime Supervision, it states that "The Board will not entertain verbal input from any person other than the victim in this case", (Lifetime Supervision Agenda).

This statement by the Board declares that this is not an Open Public Meeting according to the Open Meeting Laws, and that it is not a quasi-judicial hearing, where, as a matter of law, every offender has a right to be heard. There is no agenda item for public comment, and there is no due process offered to Defendant or any other offender similarly situated.

The Board has recently taken a new stance in relation to a modification hearing, or an appeal to a hearing, and they have decided that the only way an offender may contact the Board to schedule a hearing is through the offender's Supervising Officer, and the Officer must agree with the request before it will be heard.

This action is illegal, as judicial authority in non-delegable. Putting the appeal rights of the offender, in the hands of an Officer, is frightening. This allows an Officer the authority to impose any condition that they wish, and if you wish to appeal, the Officer denies it. I refer to my previous arguments about "Gestapo tactics" in this situation, since it is so far outside the boundaries of reasonable judicial behavior.

This is punitive in nature and effect, and is a further affirmative disability and restraint placed upon the offender in violation of the rights of appeal.

Defendant would like the Court to look further at this issue by taking into account all of the reasoning listed above in Issue #4, Procedural Due Process, and apply all of that reasoning and assertions to this argument also.

In *Stockmeier*, the Court concluded that quasi- judicial proceedings were exempt from the Open Meeting Law, and explained that "at a minimum, a quasi-judicial proceeding must afford each party,

(1) the ability to present and object to evidence,

(2) the ability to cross examine witnesses,

(3) a written decision from the public body, and

(4) an opportunity to appeal to a higher authority", Id. at 391-392, 135 P.3d at 224.

The Court, in stating this, that even though they do not specifically define that the Defendant must be present, that in order to do (1) and (2), presence would have to be required, and notice would have to be given to Defendant to comply. Defendant asserts that since these minimum requirements were not met, that the Board cannot justify the imposition of the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, as they were not acting in a quasi-judiciary capacity.

In the dissent in *Witherow*, Justice Hardesty and Justice Maupin contend that "by defining quasi-judicial proceedings as any that provide due process protections, which the Board does not do here, the *Stockmeier* holding creates an absurd result by permitting public bodies to easily circumvent the Open Meeting Law, and in the instant case, the requirements of a quasi-judicial hearing. "A statute should always be construed to avoid absurd results, General Motors v. Jackson, 111 Nev. 1026, 1029, 900 P.2d 345, 348, (1995).

In another well-founded argument, which bears a similarity to this situation, in Kelch v. Director, Nevada Dept. of Prisons, 10 F.3d 684, 687, (9th Circuit 1993), where the Court analyzed the argument by determining whether there was a loss of a Constitutional Liberty Interest, and whether the Board violated that constitutional right. In analyzing this argument, Defendant asserts almost the same questions to the Court, that

(1) whether Defendant obtained all of his Constitutional Liberty Interests and First Amendment Rights, except those specifically retained by Nevada Statute, upon completion of his suspended criminal sentence and honorable discharge from probation, and

(2) if he did, whether the Board's restraint and violation of those Constitutional Liberty Interests and First Amendment Rights violated substantive due process.

In determining whether Kelch obtained a Constitutional Liberty Interest, one of the relevant questions is whether he 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). In Morrissey V. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972), the Supreme Court held that once a prisoner is granted parole, its termination inflicts a 'grievous loss' on the parolee, Id. at 482.

Defendant asserts that in the instant case, that the loss of many of his Constitutional Liberty Interests and First Amendment Rights is more than sufficient to trigger the 'grievous loss' requirement.

In determining whether the due process clause affords the Defendant the protection he seeks, 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 Supreme Court has determined that "to obtain a protectable right, 'a person clearly must have more that an abstract need or desire for it. He must have more that a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it", Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,7, 99 S. Ct. 2100, (1979); citing Board of Regents v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, (1972).

Defendant asserts that he has a "legitimate valid claim of entitlement" to all of his Constitutional Liberty Interests and First Amendment Rights and that he is legitimately entitled to them by the completion and honorable discharge of his criminal sentence and that these proceedings should not abrogate the Constitutional Liberty Interests and First Amendment Rights due a person in the United States Constitution and the Nevada Constitution.

Defendant argues that at the moment the Court discharged him from probation with an honorable discharge from a criminal sentence, that he obtained the vested, substantive due process rights of a citizen listed in the United States Constitution and the Nevada Constitution, and regardless of the procedures used by the Board, that those rights could not be taken away, Wood v. Ostrander, 879 F.2d 583, 589, (9th Circuit 1989).

"Substantive due process protects individuals against government acts 'that are prohibited, regardless of the fairness of the procedures used to implement them", Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, (1986), cert. denied, 111 S. Ct. 341, (1990), or as Defendant asserts, the unfairness of the procedures used to implement them against Defendant and all others similarly situated.

Defendant also asserts the opinions and arguments in State v. Kamedula, 127 Nev. Adv. Rep. 21, (2011), which also follows a line of previous cases, and by examining a similar situation regarding due process with the use of the "judicial function test". The Nevada Supreme Court takes the opportunity in *Kamedula* to define the test as follows.

The "judicial function test" is a means of determining whether an administrative proceeding is quasi-judicial by examining the hearing entity's function, Witherow v. Board of Parole Commissioners, 123 Nev. 305, 312, 314, 167 P.3d 408, 412-414, (2007). If the hearing entity's function is judicial in nature, its acts qualify as quasi-judicial, Id.

In determining whether a hearing entity's function is judicial, other jurisdictions consider whether the hearing entity has authority to:

(1) exercise judgment and discretion;

(2) hear and determine or to ascertain facts and decide;

(3) make binding orders and judgments;

(4) affect the personal property rights of private persons;

(5) examine witnesses and hear the litigation of the issues on a hearing; and

(6) enforce decisions or impose penalties",

Craig v. Stafford Constr, Inc., 271 Conn. 78, 856 A.2d 372, 377, (Connecticut 2004); quoting Kelley v. Bonney, 221 Conn. 549, 606 A.2d 693, 703, (Connecticut 1992). The Court also

considered whether a sound policy basis exists for protecting the hearing entity from suit, Ascherman v. Natanson, 23 Cal. App. 3d 861, 100 Cal. Rptr. 656, 659, (California 1972). In looking at this situation, "the primary factors which determine the nature of the proceedings are:

(1) whether the administrative body is vested with discretion based upon evidentiary facts;

(2) whether it is entitled to hold hearings and decide the issue by application of rules of law to the ascertained facts and, more importantly;

(3) whether its power affects the personal or property rights of private persons".

These factors are not exclusive, and determining whether a proceeding is quasi-judicial is an imprecise exercise because many different types of entities perform judicial functions, Id. at 377. The Nevada Supreme Court has previously used the judicial function test in this state to determine whether entities act in a quasi-judicial manner when performing their administrative duties, Marvin v. Fitch, 126 Nev. Adv. Rep. 18, 232 P.3d 425, (2010); Witherow v. Board of Parole Commissioners, 123 Nev. 305, 312, 167 P.3d 408, 412, (2007); Raggio v. Board of Parole Commissioners, 80 Nev. 418, 423, 395 P.2d 625, 627, (1964), and the Court further states that they will expressly adopt the judicial function test to determine this fact in doing so in the future.

Defendant asserts that the Board cannot have it all ways, by being exempt from the Open Meeting Law, by being exempt from the requirements of due process during a "quasi-judicial" hearing, and by being exempt from the judicial function test as an administrative Board, in order to hold a hearing where they affect, violate and restrain the Constitutional Liberty Interests and First Amendment Rights of the Defendant and all others similarly situated.

Defendant asserts that the Board can not be allowed to meet and hold a hearing to impose 'legally binding' conditions upon Defendant, which are not articulated in statute, without notice to Defendant, and without his presence, and decide the fate of an Defendant subject to Lifetime Supervision, for the rest of his life, without due process during the course of the hearing. This is a violation of a quasi-judiciary hearing, and it is completely beyond the bounds of the authority of the Board of Parole Commissioners, and the intent of the Nevada Legislature.

Defendant asserts that the suspension of his Constitutional Liberty Interests and First Amendment Rights involves state action that adjudicates important interests of the Defendant. In arguing this, Defendant asserts such suspension of rights "are not be taken away without procedural due process required by the Fourteenth Amendment", Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, (1969); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, (1971).

This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege", Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, (1963); Slochower v. Board of Education, 350 U.S. 551, 76 S. Ct. 637, (1956); Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, (1958); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970); Londoner v. Denver, 210 U.S. 373, 385-386, 28 S. Ct. 708, (1908); Goldsmith v. Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, (1926); and Opp Cotton Mills v. Administrator, 312 U.S. 126, 61 S. Ct. 524, (1941).

Defendant asserts that he is entitled to his Constitutional Liberty Interests and First Amendment Rights due to completing his criminal sentence by honorably discharging his probation that was granted to him by this Court.

The State might argue that due process during these course of this hearings is not relevant, as he has already been convicted and sentenced to Lifetime Supervision. The holding in Johnson v. State, 123 Nev. 139, 159 P.3d 1096, (2007), where the Court has stated that "the conditions are not determined and are set at a later date by the Board of Parole Commissioners", would seem to belie this reasoning as Defendant asserts that this is a continuation of the original sentencing hearing.

The State might argue that procedural due process during this hearing need not be afforded to him because it is outweighed by governmental interests, such as cost or public safety. While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process, Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970); quoting Kelly v. Wyman, 294 F.Supp. 893, 901, (SDNY 1968).

The hearing required by the *Due Process Clause* must be "meaningful", Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, (1965), and "appropriate to the nature of the case", Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 657, (1950).

While many controversies have raged…about the *Due Process Clause,* it is fundamental that except in emergency situations, (and this is not one), due process requires that when a State seeks to terminate an interest such as that here involved, in must afford "notice and opportunity for hearing appropriate to the nature of the case", before the termination of rights becomes effective, Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-156, 61 S. Ct. 524, (1941); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, (1969); Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970); Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, (1971).

"In reviewing State action in this area, the Court must look to substance, not to bare form, to determine whether constitutional minimums have been honored", Willner v. Committee on Character, 373 U.S. 96, 106-107, 83 S. Ct. 1175, (1963).

Courts have held that the constitutional due process protections, like ex post facto protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing the criminal act. 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); and Dale v. Haeberlin, 878 F.2d 930, (6th Circuit 1989).

Defendant asserts that the Board of Parole Commissioners held the hearing to set the conditions of Lifetime Supervision illegally, and without procedural due process, thereby causing as applied to Defendant and all others similarly situated; affirmative disabilities and restraints, including loss of Constitutional Liberty Interests and First Amendment Rights, which are then punitive in nature and effect, therefore making the hearing to impose the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 constitutionally null and void.

Issue # 6: Double Jeopardy: *U.S.C.A. Const. Amend 5 & 14; NV Const. Art. 1; Sec. 1 & 8.*

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, U.S. Const. Amend. V.

This protection applies to the states through the Fourteenth Amendment, Benton v. Maryland, 395 U.S, 784, 89 S. Ct. 2056, (1969). This has been incorporated into the Nevada Constitution, Nev. Const. Art. 1, & 8, cl. 1.

The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for same offense after acquittal; (2) a second prosecution for same offense after conviction; and (3) multiple punishments for the same offense, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, (1969).

The prohibition against multiple punishments prevents the government from punishing twice, or attempting a second time to punish criminally, for the same offense. Witte v. United States, 515 U.S. 389, 396, 115 S. Ct. 2199, (1995); Helvering v. Mitchell, 303 U.S. 391,399, 58 S. Ct. 630, (1938).

The *Double Jeopardy Clause* "at its most fundamental level…protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense", U.S. v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215, (9th Circuit 1994).

The Supreme Court has concluded that a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, in punishment" for the purposes of double jeopardy analysis, United States v.

Halper, 490 U.S. 435, 448, 109 S. Ct. 1892, (1989). Even though *Halper* has been overturned for other reasons, this important concept still applies, and the current framework for double jeopardy analysis is completely recognized in the instant case and in this motion.

It has long been recognized, however, that the Clause does not prohibit the imposition of any additional sanction that could, "in common parlance", be described as punishment. Hudson v. United States, 522 U.S. at 98-99, 118 S. Ct. 488, at 493, (1997). Rather, the Clause protects only against the imposition of multiple criminal punishments for the same offense, Id at 99, 118 S. Ct. at 493.

The framework for the inquiry is well established, and the Court must "ascertain whether the Legislature meant the statute to establish civil proceedings, Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, (1997). In the instant case, this question has already been satisfied by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002).

The Court must first look to whether the Legislature intended the provision to be civil or criminal and then to whether the proceedings are so punitive" in fact" as to persuade the Court that they may not legitimately be viewed as civil in nature despite Legislative intent, United States v. One Assortment of 89 Firearms, 465 U.S. 354,366, 104 S. Ct. 1099, (1984).

Whether a statutory "scheme" is civil or criminal "is first of all a question of statutory construction, Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, (1997).

The Court has to consider the statute's text and its structure to determine the legislative objective, Fleming v. Nestor, 363 U.S. 603, 617, 80 S. Ct. 1367, (1960).

Defendant argues that the statutes of Lifetime Supervision 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, Defendant asserts that 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).

Based on a previously established rule exemplified in United States v. Ward, 448 U.S. 242, 248-49, 100 S. Ct. 2636, (1980), *Hudson* and *Ursery* articulate a two-part test for

determining whether a particular punishment is criminal or civil in nature and effect, Hudson v. United States, 522 U.S. 93, at 98-99, 118 S. Ct. 488, at 493, (1997); and United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, (1996).

This interpretation of the "intent-effects test" in these three (3) United States Supreme Court Opinions in *Ursery*, *Ward*, and *Hudson* has been upheld and followed by the Nevada Supreme Court in Levingston v. Sheriff-Washoe County, 114 Nev. 306, 956 P.2d 84, (1998); Desimone v. State of Nevada, 116 Nev. 195, 996 P.2d 405, (2000); and State v. Lomas, 114 Nev. 313, 955 P.2d 678, (1998).

To define this "test" for the Court, the following definition of the two prongs used in assessing the double jeopardy implications of a civil sanction are,

(1) the first inquiry is whether the legislature intended the provision in question to be civil or criminal in nature, and even in those cases where the legislature has indicated an intention to establish a civil mechanism,

(2) the court must further inquire into whether the statutory scheme is so punitive, either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty, Desimone v. State of Nevada, 116 Nev. 195, 996 P.2d 405, (2000); State v. Lomas, 114 Nev. 313, 955 P.2d 678, (1998); Rex Trailer Co. v. United States, 350 U.S. 148,154, 76 S. Ct. 219, (1956), Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003).

In order to satisfy the first prong of this "test", the court must first look to the issue of whether the Nevada Legislature intended this provision to be civil or criminal in nature. In SB 192, (1995), of the 68th Session of the Nevada Legislature in 1995, it clearly states in the Legislative Record that the Nevada Legislature determined this provision to be civil in nature. The Legislative intent was for it to be a non-punitive tool designed to help law enforcement keep better track of offenders, by "knowing the whereabouts of previously convicted offenders". This was affirmed by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). The Defendant asserts that this satisfies the first prong of this test.

In order to satisfy the second prong of this "test", the Court must further inquire into whether the statutory scheme is so punitive, either in purpose or effect, as to transform what was

clearly intended as a civil remedy into a criminal penalty. In order to determine whether this statutory scheme is punitive "in effect", the Court must first look to the liberty interests of the person sentenced to this civil penalty under these statutes. This court has "concluded that, on balance, it is sufficiently punitive in nature and effect as to render it a direct penal consequence", and that "Lifetime Supervision is a form of punishment because of the affirmative disabilities and restraints it places on the sex offender", Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). The Defendant asserts that this satisfies the second prong of the test.

In order to make a further determination of the second prong and determine whether the statutory scheme is so punitive either in purpose or effect, as to transform what was clearly intended as a civil penalty into a criminal penalty, seven factors are looked to as "useful guideposts", Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, (1963). This does not mean that all seven (7) must be satisfied to obtain the clearest proof necessary to over ride the statute, but only that these seven (7) factors must be considered as "useful guidelines" to further help define and decide the issue. These factors include:

(1) whether the sanction involve an affirmative disability or restraint, Ex Parte Garland, 4 Wall 333, 377, 71 U.S. 333, (1866); United States v. Lovett, 328 U.S. 303, 316, 66 S. Ct. 1073, (1946); Fleming v. Nestor, 363 U.S. 603, 617, 80 S. Ct. 1367, (1960);

(2) whether it has historically been regarded as a punishment, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 320-321, (1867); Ex parte Wilson, U.S. 417, 426-429, 5 S. Ct. 935, (1885); Mackin v. United States, 117 U.S. 348, 350-352, 6 S. Ct. 777, (1886); and Wong Wing v. United States, 163 U.S. 228, 237-238, 16 S. Ct. 977, (1896);

(3) whether it comes into play only on a finding of scienter, Helwig v. United States, 188 U.S. 605, 610-612, 23 S. Ct. 427, (1903); Child Labor Tax Case, 259 U.S. 20, 37-38, 42 S. Ct. 449, (1922);

(4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, United States v. Constantine, 296 U.S. 287, 295, 56 S. Ct. 223, (1935); Trop v. Dulles, 356 U.S. 86, 96, 78 S. Ct. 590, (1958), (opinion of the Chief Justice), Id. at 111-112, (Brennan concurring);

(5) whether the behavior to which it applies is already a crime, Lipke v. Lederer, 259 U.S. 557, 562, 42 S. Ct. 549, (1922); United States v. La Franca, 282 U.S. 568, 572-573, 51 S. Ct. 278, (1931); United States v. Constantine, 296 U.S. 287, 295, 56 S. Ct. 223, (1935);

(6) whether an alternative purpose to which it may rationally be connected is assignable for it, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 319, (1867); Child Labor Tax Case, 259 U.S. 20, 43, 42 S. Ct. 449, (1922); Lipke v. Lederer, 259 U.S. 557, 561-562, 42 S. Ct. 549, (1922); United States v. La Franca, 282 U.S. 568, 572, 51 S. Ct. 278, (1931); Trop v. Dulles, 356 U.S. 86, 96, 78 S. Ct. 590, (1958); Fleming v. Nestor, 363 U.S. 603, 615, 617, 80 S. Ct. 1367, (1960);

(7) whether it appears excessive in relation to the alternative purpose assigned, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 319, (1867); Helwig v. United States, 188 U.S. 605, 610-612, 23 S. Ct. 427, (1903); United States v. Constantine, 296 U.S. 287, 295, 56 S. Ct. 223, (1935); Rex Trailer Co. v. United States, 350 U.S. 148, 154, 76 S. Ct. 219, (1956); Child Labor Tax Case, 259 U.S. 20, 43, 42 S. Ct. 449, (1922); Fleming v. Nestor, 363 U.S. 603, 615, 617, 80 S. Ct. 1367, (1960).

These factors must be considered in relation to the punitive measures imposed, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty, State v. Lomas, 114 Nev. 313, 955 P.2d 678, (1998).

In a very similar case involving community supervision for life in Nebraska, the Nebraska Supreme Court held that the intent-effects test as described above is the appropriate standard to determine whether the lifetime registration requirement and the community supervision requirement were punitive in nature and effect, State v. Payan, 277 Neb. 663, 765 N.W.2d 192, (Nebraska 2009).

Defendant asserts by the following discussion of each issue listed above, that the conditions as applied to Defendant and all others similarly situated, who are serving the "special sentence" of Lifetime Supervision, as imposed by the Board of Parole Commissioners have violated the *Double Jeopardy Clause*. The "conditions" of Lifetime Supervision, as articulated

and imposed by the Board of Parole Commissioners, and applied and enforced by the Division of Parole and Probation, are punitive in nature and effect, thereby violating these guidelines and providing the "clearest proof necessary" to determine this to be a criminal penalty, thereby causing it to be in violation of the *Double Jeopardy Clause* and to be a constitutionally illegal sentence.

In order for this Court to make an informed and reasonable decision in regards to these restraints of Constitutional Liberty Interests and First Amendment Rights as imposed, the Court must look further in this motion and petition, to the Agreement of Lifetime Supervision Conditions. In NAC 213.290, the Board states this is the legal authority to impose ***any*** condition upon an offender sentenced to Lifetime Supervision. By so asserting, then the analysis becomes looking further at the conditions that are imposed and applied.

The Court should look to the Statement of the Case, and Defendant's arguments to all of the conditions imposed, including the special conditions, and the use of verbal conditions when analyzing these seven (7) "useful guidelines" to determine the scope of the affirmative disabilities and restraints imposed upon Defendant and all others similarly situated. The Board of Parole Commissioners has drafted, enacted and enforced these conditions without articulating them in the statute that they assert gives them the authority to do so, specifically NAC 213.290, (2000). The Board considers this Agreement of Lifetime Supervision as their articulated legal right to impose conditions. The Defendant states that this "Agreement" is a coerced conditional waiver that is not backed by any constitutional legal authority to grant the ability to impose these types of restraints of Constitutional Liberty Interests and First Amendment Rights.

The Division enforces these conditions of Lifetime Supervision, which are not an articulated part of any statute. The Division of Parole and Probation also enforces many verbal orders and conditions, as imposed by the Officers of the Division in relation to offenders on Lifetime Supervision, which further restrain the constitutional liberties of the Defendant and other offenders, thereby making it more punitive in nature and effect.

Defendant asserts that by ambiguously and discriminatorily interpreting the language of the statute to impose any condition upon an offender at will, in any manner or form, with no

regard to Constitutional Liberty Interests, including First Amendment Rights, is an overbroad and illegal use of administrative judicial authority, and is punitive in nature and effect.

Defendant asserts the following arguments, including all of the arguments and case cites in the Statement of the Case in this Motion, that will help this Court to analyze and determine why the result of the seven (7) "useful guideposts" should be held to be punitive in nature and affect; thereby making them an affirmative disability and restraint of Constitutional Liberty Interests and First Amendment Rights, therefore causing the civil "special sentence" of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, to be a violation of the *Double Jeopardy Clause*.

(1.) The Nevada Supreme Court has stated that "Lifetime Supervision is a form of punishment because of the affirmative disabilities and restraints it places on the sex offender" and that they "have a direct and immediate effect on the range of punishment imposed", Palmer v. State, 118 Nev. 823, 59 P.3d 1192, 1195, (2002).

In looking at the addition of the statement of this case to the context of punishment, this would have to increase the analysis and determination of the Nevada Supreme Court in relation to how punitive they actually are. In addition, a summary look of all other civil penalties could be looked at by this Court, in order to determine just how punitive this civil sentence is in relation to other civil sentences.

The opinion held in *Palmer*, has been held in other jurisdictions that have looked to this same issue of Lifetime Supervision, the following State Supreme Courts have also determined that Lifetime Supervision or Community Supervision for Life is punitive in nature and effect. This has been determined in Ward v. Tennessee, 315 S.W. 3d 461, (Tennessee 2010); in Jamgochian v. New Jersey State Parole Board, 928 A.2d 1, (New Jersey 2007); in State v. Payan, 765 N.W. 2d 192, (Nebraska 2009); in State v. Lathrop, 781 N.W.2d 288, (Iowa 2010); and Iowa v. Baugh, No. 8-055/06-1599, (Iowa 2008), an unpublished opinion due to further review time limits, but this opinion may be cited in briefs.

(2.) The Nevada Legislature has introduced many punitive statutes to the Nevada Statutes that define punishment for an offender criminally sentenced, to either probation or parole, by the

imposition of clearly articulated conditions which may be placed upon an offender or are mandatory conditions for an offender.

(a) Probation conditions are articulated in NRS 176A.110; NRS 176A. 210; NRS 176A.400; NRS 176A.410; and NRS 176A.413.

(b) Parole conditions are articulated in NRS 213.1245; NRS 213.1258; and NRS 213.12175.

(c) Conditions which may be imposed upon either probation or parole are articulated in NRS 171.123; NRS 171.1231; NRS 171.1232; and NRS 213.1076.

(d) There are no Lifetime Supervision statutes such as these that articulate any conditions that may be imposed or are mandatory conditions as described in the statutes above.

By mirroring the language contained in many of these parole and probation statutes, verbatim in many instances, in reference to the "civil" conditions imposed by the Board of Parole Commissioners, they are effectively inflicting punishment "de facto" by the restraint of Constitutional Liberty Interests and First Amendment Rights on an individual who has been civilly sentenced to Lifetime Supervision, thereby making it punitive in nature and effect. The Defendant asserts that these conditions must be "historically regarded as punishment"; since the same conditions are imposed upon an offender on parole or probation, and the Board has chosen to mirror the language of conditions that have been in place for many years for those offenders criminally subject to parole or probation.

(3.) A finding of scienter is not required to allege or convict an offender for a violation of a condition of Lifetime Supervision, and does not require inquiry into an offender's state of mind. Almost all of these violations concern conduct or behavior that is constitutionally protected and is not a crime, in and of itself. In many cases for an offender, in order to violate these conditions and commit a crime, there is not even the intent to commit a crime, NRS 193.190, Sheriff v. Burdg, 118 Nev. 853, 59 P.3d 484, (2002).

(4.) By imposing conditions which mirror the language of punitive criminal statutes, such as the ones described above, in guideline (2), and conditions which further follow a parole statute, specifically NRS 213.1245, the Board of Parole Commissioners has allowed and

authorized conditions which, by definition as a criminal statute, addresses punishment, and promotes the traditional aims of punishment-retribution and deterrence. That is what the conditions of parole and probation are designed to do.

If the Nevada Legislature in 1995 wished to impose these types of conditions, they could have done so, as they only needed to look to their own statutes to do so. But since they defined this as "a *non-punitive* tool designed to help law enforcement keep better track of offenders" as articulated in SB 192, (1995); they knew and were aware that the imposition of this type of conditions would place this civil sentence into the realm of double jeopardy, which was a subject the Legislators were very concerned with.

The Legislature in 1995 performed admirably and had written the law in such a manner that it did not violate the *Double Jeopardy Clause*, as it was meant to be an enhancement penalty for future criminality, by an offender who has committed another crime as a repeat offender, as listed in the statute. This is clearly described in the Legislative minutes in relation to SB 192, (1995).

Only through the efforts of the Board of Parole Commissioners and the Division of Parole and Probation, including the Chief and its Officers, has this well-written and researched law become "punitive in nature and effect". Defendant asserts that this argument satisfies the punishment-retribution and deterrence question.

(5.) In viewing the conditions of Lifetime Supervision, almost all of the conditions relate to behavior which is not a crime in and by itself. They are actually behaviors and conduct which are Constitutional Liberty Interests that are granted and guaranteed to a citizen of the United States and of the State of Nevada, many of them First Amendment Rights.

Defendant asserts that he has the right to work, a right to travel, within and without the State, to attend church, to speak freely, to partake of alcohol, to have a Post Office Box, to be able to go into the Post Office, to go to the movies, to go to parks, to go to school, and to get an education. The Defendant further asserts that he has the right to be able to associate with anyone he chooses, at any time, and at any place.

Defendant states that it is his right to write letters, contact his Legislators, or petition for grievance with the Attorney General or any other State Agency, including the Board of Parole Commissioners, the Department of Public Safety, the Division of Parole and Probation, and the Chief of the Division.

The conditions that are already crimes in and of themselves, such as an ex-felon in possession of a firearm, are addressed separately in NRS 179.0931. NRS 193.165 already is an enhancement law that places another penalty on an offender if they were to commit another crime, while using a weapon.

The same issue applies to drug use, and to obeying other laws of the State. In every instance, no matter what crime you might commit in the future, you could be subject to a 6 year felony sentence, many times over, because this law enhances anything an offender might do, including getting a traffic ticket, and if a minor is involved, could cause numerous felony charges, for nothing more than getting into an auto accident. How much punishment is the Board trying to impose, by illegally enhancing anything an offender might do, especially when it is not normally a crime in and by itself, and is a constitutional right.

(6.) The State might argue that there is a rational alternative purpose which these conditions might fall under, such as public safety, due to the “high rates of recidivism among convicted offenders”. This “high rate of recidivism” has been proven to not be the case. The State might argue that we have to keep the children safe. The Defendant agrees that public safety could and should be a concern, the same as with any other crime, and the recidivism attached to that specific crime.

But, to frivolously and indiscriminately take away many Constitutional Liberty Interests, including many First Amendment Rights, upon arbitrary and capricious grounds, for the rest of their life, as this is a Lifetime Sentence, is punishment. The State may assert that this is all done in the name of public safety, but to inflict this punishment on someone serving a civil sentence, meant to be non-punitive in nature and effect, who has already been punished for the crime by the criminal sentence he has already served, is overbroad, illegal and punitive in nature and effect.

Lifetime Supervision is not parole, the Nevada Supreme Court affirmed this in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). It is different. It is also different than probation, as an offender on probation has to finish his sentence of probation in order to start his sentence of Lifetime Supervision, and the same applies to parole, residential confinement, or incarceration.

Defendant asserts, that while the State may argue that there may be a rather murky alternative purpose, that the purpose has to be defined in the law, or that the restraint of liberty as imposed is to far outside the bounds of what a reasonable person of ordinary intelligence would assume to be a civil sentence, with no clear guidelines for law enforcement to be directed to, or no clear guidelines to conform your behavior to, in order to comply with the law.

Therefore, the Defendant further asserts that no rational, reasonable alternative purpose exists, that might continue to make this punitive scheme as applied, and that is practiced in nature and effect, a *non-punitive* tool to help law enforcement keep better track of an offender, except to further punish the offender.

(7.) Even if this Court were to agree that there is a murky alternative purpose, such as public safety, a very overbroad term, the Defendant would assert that by the arguments listed above, and by the following arguments included here, that these conditions as imposed and enforced are excessive in relation to any alternative purpose assigned, due to the many violations and restraints of Constitutional Liberty Interests, including First Amendment Rights guaranteed to an offender placed on this “special sentence” of Lifetime Supervision, a civil penalty.

(**.) In order to further address these issues to determine whether they are punitive in nature and effect in relation to the seven (7) factors articulated above, Defendant offers these further arguments relating to the interpretation of the statutes by the Board of Parole Commissioners and the Division of Parole and Probation. They concern the constitutionally illegal actions performed by the Board of Parole Commissioners and further help and define the issues presented and give the “clearest proof necessary” that Lifetime Supervision is punitive in nature and effect, thereby making it a constitutionally illegal sentence.

Looking at 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, it

is clear that they define this as a form or parole, (Operations of the Board, 2011, Appendix 1). This is in direct contradiction to the Nevada Supreme Court's stance in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). The Court defines Lifetime Supervision as being "different than parole".

The Board of Parole Commissioners actually leave out a portion of the statute, enumerated in (2) (a) and (b) in NRS 213.1243, that describes Lifetime Supervision as being a "limited" form of parole, upon specification of four enumerated circumstances, thereby making all of these terms nugatory and superfluous, and by doing so, it is in excess of their jurisdiction to interpret the statute by either inserting language or taking it away, State v. Jepsen, 46 Nev. 193, 196, 209 P.2d 501,502, (1922); Cirac v. Lander County, 95 Nev. 723, 602 P.2d 1012, (1979); Erwin v. State, 111 Nev. 1535, 908 P.2d 1367, (1995); Charlie Brown Constr. Co. v. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949, (1990).

They further define the punishments that may be imposed, completely leaving out the section that includes minor violations of conditions, articulated in NRS 213.1243, Section 3 (a).

This further changes the statutes language to impose their own wishes and desires to make this more punitive in nature and effect. This is not plain error; the wording of the statutes is plain and unambiguous in regards to these 2 sections, and its meaning clear and unmistakable, In re Walters' Estate, 60 Nev. 172, 104 P.2d 968, (1940).

It is the Defendant's assertion that the Board has done this knowingly and willingly and that it is a direct violation of the precedent and opinion of the Nevada Supreme Court in relation to Lifetime Supervision not being a form of parole as articulated in *Palmer*, and their further wish to impose punitive conditions upon an offender.

The Board of Parole Commissioners and the Division of Parole and Probation have colluded and conspired to cause the conditions of Lifetime Supervision to match the mandatory conditions of Parole as enumerated in NRS 213.1245. By mirroring the language of this statute, they are effectively enforcing this statute, against a person not subject to this statute, as an offender on Lifetime Supervision is not sentenced under any form of mandatory conditions.

By doing this, they continue to make this civil sentence punitive in nature and effect, and in excess of their jurisdiction and authority mandated to them by the Legislature, with the Legislative intent that this is to be a non-punitive sentence, designed to keep law enforcement aware of the whereabouts of the offender, by having them register monthly with the Division of Parole and Probation.

Defendant has addressed the conditions and issues of Lifetime Supervision with the 2011 Nevada Legislature and the Board of Parole Commissioners. Defendant has asserted to the Board of Parole Commissioners that they are improperly placing these conditions upon an offender subject to Lifetime Supervision as they are punitive in nature and effect, and are a restraint of Constitutional Liberty Interests, including First Amendment Rights. The Board of Parole Commissioners declines to address Defendant in relation to these claims, or offer any form or manner of appeal to Defendant to legally challenge the imposition and interpretation of conditions upon Defendant.

Issue # 7: Smith v. Doe: Relevant Factors for Court to Consider:

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. In making that decision, the Supreme Court directly analyzed many of the same reasons that specifically relate to the relevant arguments Defendant presents herein, in the instant case and motion, which do impose extremely significant affirmative disabilities and restraints upon Defendant and all others similarly situated.

For the Supreme Court, this was a very close case, with a ruling that created four (4) dissents among the Justices. The case could have easily tipped the other way, with only a few confirmed affirmative disabilities and restraints thrown into the mix. Defendant asserts that in looking at the instant case, in relation to *Smith*, that there are an extreme number of confirmed affirmative disabilities and restraints that are thrown into the mix, which would surely tip the balance the other way, if the Supreme Court were to look at this case.

Defendant asserts that this Court should allow for the following reasoning when analyzing and determining this case, and that the Court should "therefore predict how the Nevada Supreme Court (Supreme Court) would rule if it were to address this issue", S&R Metals, Inc. v. C. Itoh & Co., 859 F.2d 814, 816, (9th Circuit 1988). "In the absence of ….express guidance, we must apply the law as we predict the state's (nation's) highest court would interpret and apply it", citing Fiorito Bros. v. Fruehauf Corp., 747 F.2d 1309, 1314, (9th Circuit 1984).

The Supreme Court looked at the totality of the record available, and determined that the statute's requirements in *Smith* did not impose punitive restraints, as

(a) the statute imposed no physical restraint,

(b) the statute did not restrain the activities which offenders might pursue, instead leaving them free to change jobs or residences,

(c) any lasting and painful consequences of the information involved flowed from the fact of conviction, which is a public record,

(d) while the statute required periodic updates of the public information, it had not been shown that these updates had to be made in person, and

(e) in terms of the restraint imposed, the statute's registration system was not parallel to probation or supervised release.

Defendant asserts that the statutes of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, and the conditions, as applied, by the Board and the Division, underneath the statutes as listed, impose punitive restraints and affirmative disabilities, as

(a) the statutes, as applied, impose physical restraints of Constitutional Liberty Interests including many restraints of First Amendment Rights,

(b) the statutes, as applied, restrains almost all of the constitutional activities which offenders might pursue, including the right to change jobs and residences, and creates a "chilling effect" upon Defendant due to his loss of many First Amendment Rights, and other Constitutional Liberty Interests,

(c) the statutes, as applied, create lasting and painful consequences which do not flow from the fact of conviction, but flow from the arbitrary and capricious exercises and whims of the Board, the Division, and the Parole Officers according to their own personal predilections, prejudice and bias,

(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, the statutes, as applied, 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 Court determined that the Act imposed no physical restraint; were less harsh that the sanctions of occupational debarment, which is non-punitive; and did not restrain the activities an offender may pursue, but leaves them free to change jobs or residences, or any other Constitutional Liberty Interest or First Amendment Right which they choose to pursue, as guaranteed to Defendant and all others similarly situated in the Constitution.

Defendant asserts that in analyzing this according to the seven (7) "guidelines" stated, that the statutes of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, and the conditions, as applied, underneath the statutes, imposes many physical restraints, can include the sanctions of occupational debarment, as determined by the Parole Officer, and restrains almost all activities that an offender may pursue, and does not leave them free to change jobs or residences, and "chills" many other Constitutional Liberty Interests and First Amendment Rights of the Defendant and all others similarly situated.

This Court must consider the seven (7) "useful guidelines" in analyzing the instant case, not only in the framework relating to the *Double Jeopardy Clause*, in Issue # 6, as previously discussed in this motion, but also to the framework of the *Ex Post Facto Clause*, in Issue #8, and the *Bill of Attainder Clause*, in Issue #9.

These seven (7) "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 Clause, Smith*, Id. at 96.

The *Mendoza-Martinez* factors are designed to apply in various constitutional contexts, and as the Supreme Court has stated, "they are neither exhaustive nor dispositive", United States v. Ward, 448 U.S. 242, 248-49, 100 S. Ct. 2636 (1980); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366, 104 S. Ct. 1099, (1984), but are "useful guideposts", Hudson v. United States, 522 U. S. 93, at 98-99, 118 S. Ct. 488, at 493, (1997).

In *Smith*, the Act's rational connection to a non-punitive purpose, is a "most significant" factor in our determination that the statute's effects are not punitive, United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, (1996). In this determination, it was found that the Act has a legitimate, non-punitive purpose of "public safety, which is advanced by alerting the public to the risk of sex offenders in their community", Doe v. Otte, 259 F.3d 979, 991, (9th Circuit 2001).

Defendant asserts that in the instant case, the interest in public safety is not a sufficient enough governmental interest to violate the Constitutional Liberty Interests and First Amendment Rights of Defendant and all others similarly situated.

This "interest of the State" is performed by the use of affirmative disabilities and restraints, which are not listed as required in statute, and are punitive in nature and effect. They create a "chilling effect" on those Constitutional Liberty Interests and First Amendment Rights; therefore making the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, an illegal constitutional restraint due to the *Double Jeopardy Clause*, the *Bill of Attainder Clause*, the *Ex Post Facto Clause*, and the *Due Process Clause*.

This includes violations of the United States Constitution found in the 1st, 5th, 6th, 8th, and 14th Amendments. It also includes violations of the Nevada Constitution found in the 1st, 8th, and 15th Articles. Further, in includes violations of the Nevada Revised Statutes as applied to Defendant and all others similarly situated.

Defendant argues that the statutes lack the necessary regulatory connection because they are not "narrowly drawn to accomplish the stated purpose", Id. Due to the imprecision that the State relies on, which are not articulated in these statutes, Defendant asserts that 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).

Therefore by not being listed in the statute(s), and without *any* due process, the conditions of Lifetime Supervision are being illegally imposed and enforced upon Defendant and all others similarly situated. "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).

Defendant further argues that the Legislature Member who introduced the statutes of Lifetime Supervision in SB 192, (1995), stated publicly, and on the record, that the statutes were meant to be non-punitive in nature, as a means "to keep law enforcement aware of the current whereabouts of known sex offenders", because as law enforcement stated to him, without any documented facts, that the perpetrator of a new sex crime would "more than likely" be found within this group. It has been statistically proven that over 90% of new sex crimes are committed by a new offender, not a previously convicted offender, as explained in Issue #2, Recidivism Statistics.

In looking at the Board of Parole Commissioners stance in relation to this, Chairman Bisbee stated in an Open Public Meeting held on August 31, 2011; that she had spoken to the Legislative Member who introduced this bill, and his intent was that it was to be punitive in nature and effect. In the Legislative Record of SB 192, (1995), he firmly denies this being a violation of the *Double Jeopardy Clause*, due to the fact that the Legislature was not imposing any affirmative disabilities or restraints of Constitutional Liberty Interests and First Amendment

Rights. This begs the question then, of just who decided to impose these affirmative disabilities and restraints, which are punitive in nature and effect, and which upon application and enforcement become constitutionally illegal. Defendant respectfully requests that the Court determine this very important and serious question.

Due to the complexity of the case in *Smith*, and the analysis of the factors that were used in the determination, the Judges disagreed on exactly what was enough to constitute an affirmative disability and restraint that would impact a liberty interest. Across the Court though, the Justices did recognize many very important facts and factors in that analysis to a liberty interest, and that these are exactly the same issues that Defendant is asking the Court to analyze in the instant case to make a determination.

The standards for evaluating these factors are apparent in the Courts reasoning, and if applied to the factors in the instant case, clearly show that they are affirmative disabilities and restraints in violation of the *Double Jeopardy Clause*, the *Bill of Attainder Clause*, the *Ex Post Facto Clause*, and the *Due Process Clause*.

In the dissents in *Smith*, which expressly look at those factors of affirmative disabilities and restraints, Justice Stevens expressed the view that:

(1) the registration duties imposed on convicted sex offenders by statutes such as Alaska's were punitive, as these unique consequences of conviction of a sex offense

(a) severely impaired such an offender's liberty,

(b) were imposed on everyone who was convicted of a relevant criminal offense, and

(c) were imposed on only those criminals; and

(2) that the retroactive application of such statutes violated the Constitution's *Ex Post Facto Clause*.

Defendant asserts that due to the reasoning of Justice Smith in this dissent, and the factors listed, that the same logic and reasoning applies to the instant case. It is clear that these conditions of Lifetime Supervision, as applied, severely impact an offender's liberty, and are affirmative disabilities and restraints. All of the rest of the reasoning is exactly the same. This

Court has to remember that the main reason the case in *Smith* was decided in favor of the State, was that there were NO affirmative disabilities and restraints of a Constitutional Liberty Interest

In another argument by Justice Stevens, he relies on 2 of the opinions analyzed and held in *Smith*, and Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, (2003). He analyzes the fact that these two (2) cases raise questions about statutes that impose affirmative obligations on convicted sex offenders. The Court's opinions in both cases fail to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty. If no liberty interests were implicated, it seems clear that neither statute would raise a colorable constitutional claim, Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, (1976).

Proper analyses of both cases should therefore begin with a consideration of the impact of the statutes on registrant's freedom. Defendant asserts that in the instant case, it is all relevant to the impact that the statutes have on his freedom, and therefore is a constitutional claim. And due to that impact on Defendant's freedom, these factors cause the statutes, both facially and as applied, violate the *Double Jeopardy Clause*, the *Bill of Attainder Clause*, the *Ex Post Facto Clause*, and the *Due Process Clause*.

In the judgment of Justice Stevens, he states that "these statutes unquestionably affect a constitutionally protected interest in liberty", using the reasoning in Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, (1971).

In further looking at the dissent by Justice Stevens, he states that "It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three (3) characteristics, which in the aggregate are not present in any civil sanction". These sanctions are quoted as follows:

(1) they constitute a severe deprivation of the offender's liberty,

(2) are imposed on everyone who is convicted of a relevant criminal offense, and

(3) are imposed only on those criminals.

Unlike any of the cases that the Supreme Court has cited, a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction. Justice Stevens states that "No matter how often the Court may repeat and manipulate multifactor tests that have

been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders *and on no one else* as a result of their convictions are not part of their punishment".

Defendant agrees with this reasoning, that the criminal conviction does carry the burden of sanctions, and while Defendant was serving his criminal sentence, all of these burdens were imposed legally, but now that Defendant is serving his civil sentence, all of these burdens are being imposed illegally in violation of the Constitution of the United States and the Constitution of the State of Nevada. Defendant also agrees with Justice Stevens and argues that the statutes of Lifetime Supervision satisfy all three of these reasons, and are therefore constitutionally illegal, and that they violate the *Double Jeopardy Clause*, the *Bill of Attainder Clause*, the *Ex Post Facto Clause*, and the *Due Process Clause*.

In looking at Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, (1997), Justice Stevens reasons that a law that permits the civil commitment of a person was not an ex post facto law. One of the main reasons is because it is not predicated on the crime and conviction. Another was that a hearing was held by the State, that provided for due process, and that used a determination by a person qualified to conduct it, that the person suffered from a serious enough medical or mental condition to impose a sanction upon his liberty. And finally, in a very important distinction, Justice Stevens states that "While one might disagree in other respects in *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burdens imposed by that statute".

He further states that "It is therefore clear to me that the Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. As the Court recognizes, 'recidivism is the statutory concern' that provides the supposed justification for the imposition of such retroactive punishment. Reliance on that rationale here highlights the conclusion that the retroactive application of these statutes constitute a flagrant violation of the protections afforded by the *Double Jeopardy Clause*, and the *Ex Post Facto Clause, Smith"*, Id. at 189.

Defendant asserts that while the statutes themselves were in effect at the time of the original sentencing, that the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, were not in effect, due to not being enumerated in <u>*any*</u> statute, as required by the normal considerations of constitutional law. This makes them a constitutional violation of the *Ex Post Facto Clause,* the *Double Jeopardy Clause*, the *Bill of Attainder Clause*, and the *Due Process Clause*.

In another dissent in *Smith*, by Justice Ginsburg, and joined by Justice Breyer, they expressed the view that:

(1) it was unclear whether the Alaska Legislature had conceived of the statute at issue as a regulatory measure or as a penal law,

(2) therefore, this statutes purpose and effect ought to be neutrally evaluated as to whether the statute ranked as penal for ex post facto purposes,

(3) under such an evaluation, the statute ought to be held to be punitive in effect, and

(4) thus, the retroactive application of the statute was incompatible with the Constitution's *Ex Post Facto Clause.*

Justice Ginsberg and Justice Breyer state that: "Beyond doubt, the Act involves an "affirmative disability or restraint", and it "imposes onerous and intrusive obligations on convicted sex offenders". Furthermore, it resembles historically common forms of punishment. Another telling factor, is that past crime alone triggers the Act, and is the "touchstone", not the current dangerous of the offender. This "touchstone" adds to the impression that the Act retributively targets past guilt, *i.e.*, that is "revisits past crimes more than it prevents future ones". What ultimately tips the balance for them is the fact that of its excessiveness in relation to its "non-punitive" purpose.

One of the deciding factors which they espouse on is that "and meriting the heaviest weight in the judgment, the Act makes no provision whatever for the possibility of rehabilitation". However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring.

Defendant asserts that due to the reasoning of Justice Ginsburg, and joined by Justice Breyer in this dissent, and the factors listed, that the same logic and reasoning applies to the instant case.

In the analysis in *Smith*, Justice Souter explained that "only the clearest proof" that a law is punitive based on substantial factors will be able to overcome the legislative intent, *Ward*, supra, at 249. He further defines this by stating that this heightened burden makes sense only when the evidence of legislative intent clearly points in the civil direction, *Hudson*. This created a serious issue for Justice Souter, and he states, "This means that for me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way, *Smith, Id.*.

Defendant asserts that in the instant case, the legislative intent clearly points in a civil direction. Only upon application of conditions not articulated in statute and imposed by the Board of Parole Commissioners, and upon application by the Division of Parole and Probation, does the law become constitutionally criminal in effect, due to the extreme number of affirmative disabilities and restraints imposed, which are punitive in nature and effect, in relation to a civil sentence.

Justice Souter also explained that public safety is, of course, a fundamental regulatory goal, 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 civil claims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones, *Kennedy*, supra, at 169. That argument can claim support, too, from the severity of the burdens imposed. In making this

statement, Justice Souter states that the Ex Post Facto Clause was meant to prevent "arbitrary and potentially vindictive legislation".

Courts have held that the constitutional due process protections, like ex post facto protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing the criminal act.

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, 934, (6th Circuit 1989).

In a reasonable assertion by the Defendant, he argues that one of the most compelling arguments in relation to the statutes of Lifetime Supervision, is that these statutes are designed to be an enhancement penalty, and not an additional penalty for conduct and behavior which is constitutionally permissible, and not a crime in and of itself. This is based off of the enumerated language of the statutes in question, and due to the fact that a misdemeanor or felony charge could be assessed, but only after an offender violated a condition of Lifetime Supervision, which are articulated in NRS 176.0931, section (5)(a), and NRS 213.1243, section (3), (4), and (5) inclusive.

The other conditions of Lifetime Supervision as imposed by the Board of Parole Commissioners, which are not articulated in the statutes, do not meet these standards as almost all conduct listed in this agreement is a violation of a Constitutional Liberty Interest or a First Amendment Right, and are not a threat to public safety or the well-being of a citizen of the state.

No other mandatory condition, or restraint of a Constitutional Liberty Interest or a First Amendment Right, is articulated or listed in any of the statutes of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, thereby making the conditions as imposed and applied punitive in nature and effect, and a clear restraint of Constitutional Liberty Interests and First Amendment Rights, and is beyond the authority of the Board and the Division.

Issue #8: Ex Post Facto: *U.S. Const. Amend 1; NV Const. Art. 1, Sec. 1 & 15.*

Article 1 of the United States Constitution provides that neither Congress nor any State may pass any *Ex Post Facto* law, U.S. Const. Art. 1; NV Const. Art. 1, Sec.1 & 15.

Over 200 years ago, Justice Chase explained 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).

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).

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).

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).

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 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 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 *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).

One of the arguments that the Defendant wishes to address is that he was convicted on June 10, 2004, and that he should have been sentenced under the conditions present in the law on

their face at that time. No conditions of Lifetime Supervision are present in the law as enumerated in NRS 176.0931 or NRS 213.1243, or as mandated by the Legislature to the Board of Parole Commissioners in NRS 213.1243 and further defined in NAC 213.290. No regulation enacted by the Board of Parole Commissioners has addressed or enumerated any conditions that may be implemented, it has only vaguely asserted that there are conditions.

The Defendant asserts that the Board uses a "de facto" blanket policy of 20 conditions, and any other special conditions that they feel are appropriate, and that these conditions are not enumerated in the statutes as written, and are imposed without any due process or with any documented reason, and are constitutionally illegal to impose due to judicial construction.

Courts have held that the constitutional due process protections, like ex post facto protections, do extend to proscribe judicially enforced changes in interpretations of the law that unforeseeably expand the punishment accompanying a conviction beyond that which an actor could have anticipated at the time of committing the criminal act.

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).

The Defendant further asserts that the imposition of a condition restricting his residency by allowing an Officer to determine where he lives and by the granting of permission to do so, was not enacted until 2005, and also states that the imposition of the condition addressing contact with a victim of the crime was not enacted until 2009, and that both of these conditions are constitutionally illegal, Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, (1977); Elrod v. Burns, 427 U.S. 347,362, 96 S. Ct. 2773, (1976); Scales v. United States, 367 U.S. 203, 81 S. Ct.

1469, (1961); Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Spilotro v. Nevada Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

Defendant asserts that both of these conditions were enacted after he was convicted, and that both of these conditions have been placed and enforced upon him retroactively, along with all of the other conditions of Lifetime Supervision, thereby making the sentence more burdensome, and punitive in nature and effect, due to the prior and continuing restraints of First Amendment Rights and Constitutional Liberty Interests, and it is an increase in the penalty for which he was originally sentenced, according to the laws at the time as enumerated in the Statutes of the State of Nevada, and that these conditions violate the *Ex Post Facto Clause*, thereby making the civil sentence of Lifetime Supervision to be constitutionally illegal.

Issue #9. 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 in section 15, of Article 1, states: "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 best available evidence indicates that 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 Separation of Powers philosophy is looked to as a bulwark against tyranny. For if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, then no man or group of men will be able to impose its unchecked will. The tyranny of the Board of Parole Commissioners is clear in the implementation of the conditions of Lifetime Supervision.

James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny", The Federalist, No. 47, pp. 373-374, (Hamilton ed. 1880).

The framers of the Constitution understood that "barriers had to be erected to ensure that the Legislature would not overstep the bounds of its authority and perform the functions of the other departments", The Federalist, No. 48, pp. 383-384, (Hamilton ed. 1880). See generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton), and 78 (Hamilton); United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965).

Nothing is more common that for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Laws of this kind are the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, [such being the case here, in the Board of Parole Commissioners], and establish an aristocracy or an oligarchy; it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, therefore no man can be safe, nor know when they may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a

mockery of common sense, History of the Republic of the United States, (Hamilton), p. 34, (1859), quoting Alexander Hamilton.

Again, James Madison expressed similar sentiments, agreeing with Hamilton by stating that "Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principle of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, [such as ours], and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights…..The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community, The Federalist, No. 44, p. 351, (Hamilton ed. 1880).

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.

Every one 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); 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); 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).

Defendant asserts that the Board of Parole Commissioners is not impartial in this instance, and has knowingly and circumspectly violated the Constitution of the State of Nevada and the mandate of the Nevada Legislature, and the further interaction of the Governor of the State, by not articulating and including in the regulation that the Board enacted, specifically NAC 213.290, with the conditions of Lifetime Supervision. There is no legal authority for the Board to impose these conditions, as they are not defined in any form or manner, in any statute in the State of Nevada, and have been implemented in a "round-a-bout means", without the authority of the Nevada Legislature or of the Governor of the State. The Board of Parole Commissioners has never had the constitutionality of this statute checked as required by the statutes relating to the enactment of regulations in the State of Nevada.

Thomas Jefferson reflected in his writings that "many despots would surely be as oppressive as one…..Little will it avail us that they are chosen by ourselves….The government we fought for is one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others. For this reason that constitutional convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no one person should exercise the powers of more than one of them at the same time…..IF…the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy, Notes on the State of Virginia, (Jefferson), pp. 157-158, (Ford ed. 1894).

It is of vital importance for this Court to note, that Jefferson was speaking to a situation that occurred more than 200 years ago, but still has extreme relevance to an existing situation of today, where the Board of Parole Commissioners has usurped the authority of the 3 branches of government, and have pre-emptively decided the extent of the constitutional rights granted to the

offenders serving a civil sentence under their control, and further, have used this illegal authorization and ability to restrain those First Amendment Rights and constitutional liberties of an offender with no oversight or right of appeal granted to the offender.

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

The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.

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. This authority was vested with the Board of Parole Commissioners with the mandate to establish a program of Lifetime Supervision for an offender, and under the further obligation that these conditions were to be a non-punitive tool designed to help law enforcement keep better track of the offender, SB 192, (1995). The mandate concerned enacting a program of Lifetime Supervision, and articulating the program in a regulation.

The conditions of Lifetime Supervision are not articulated in any statute or regulation, specifically NRS 176.0931, NRS 213.1243, and NAC 213.290, further providing proof that the Board enacted and applied these conditions illegally. These conditions are arbitrary and discriminatory, and further constitute a *Bill of Attainder*, as they clearly proscribe the parties to who they are applied to, and further restrain the Constitutional Liberty Interests and First

Amendment Rights of Defendant and all others similarly situated, and inflict punishment upon a class of citizens without presence during a fair hearing or continuation of sentencing after trial.

Issue # 10, Due Process: Void for Vagueness: *U.S.C.A. Const. Amend 14; Nevada Const. Art. 1, Sec 1 & 8.*

It is a basic principle of *Due Process* that an enactment is *Void for Vagueness* if its prohibitions are not clearly defined. Vague laws offend several important values, Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, (1972).

Defendant asserts that these statutes are *Void for Vagueness* both in the sense that they "fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, (1954), and because it encourages arbitrary and erratic arrests and convictions, Thornhill v. Alabama, 310 U.S. 88, 97, 60 S. Ct. 736, (1940).

First, vague laws may trap the innocent by not providing fair warning, Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, (1972); Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S. Ct. 275, (1961); United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, (1954); Jordan v. De George, 341 U.S. 223, 230-232, 71 S. Ct. 703, (1951); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, (1939); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, (1926); 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).

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them, Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, (1972); Coates v. Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, (1971); Gregory v. Chicago, 394 U.S. 111, 120, 89 S. Ct. 946, (1969); Interstate Circuit v. Dallas, 390 U.S. 676, 684-685, 88 S. Ct. 1298, (1968); Ashton v. Kentucky, 384 U.S. 195, 200, 86 S. Ct. 1407, (1966); Giaccio v. Pennsylvania, 382 U.S. 399, 86 S. Ct. 518, (1966); Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91, 86 S. Ct. 211, (1965); Kunz v. New York, 340 U.S. 290, 71 S. Ct. 312, (1951); Saia v. New York, 334 U.S. 558, 559-560, 68 S. Ct. 1148, (1948); Thornhill v.

Alabama, 310 U.S. 88, 97-98, 60 S. Ct. 736, (1940); and Herndon v. Lowry, 301 U.S. 242, 261-264, 57 S. Ct. 732, (1937).

A vague law impermissibly delegates basic policy matters to policeman, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Where First Amendment interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be…proscribed, Edwards v. South Carolina, 372 U.S. 229, 236, 83 S. Ct. 680, (1963), this assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation, Kalven, the Concept of the Public Forum: Cox v. Louisiana, 379 U.S. 536, 544, 85 S. Ct. 453, (1965); Garner v. Louisiana, 368 U.S. 157, 200, 202, 82 S. Ct. 248, (1961).

Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms", Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, (1964), it "operates to inhibit the exercise of those freedoms", Cramp v. Board of Public Instruction, 368 U.S. 278, 287, 82 S. Ct. 275, (1961).

Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone'….than if the boundaries of the forbidden areas were clearly marked, Baggett v. Bullitt, 377 U.S. 360, 372, 84 S. Ct. 1316, (1964), quoting Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, (1958); Interstate Circuit v. Dallas, 390 U.S. 676, 684-685, 88 S. Ct. 1298, (1968); Ashton v. Kentucky, 384 U.S. 195, 200, 86 S. Ct. 1407, (1966); Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S. Ct. 1116, (1965); Smith v. California, 361 U.S. 147, 150-152, 80 S. Ct. 215, (1959); Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, (1948); and Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, (1931).

In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning", Garner v. Louisiana, 368 U.S. 157, 200, 202, 82 S. Ct. 248, (1961), and here, we are "relegated….to the words of the ordinance itself", Coates v. Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, (1971), and to the interpretation the court has given to analogous statutes, Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, (1972), and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it, Lake Carriers Assn. v. MacMullan, 406

U.S. 498, 506-508, 92 S. Ct. 1749, (1972); Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, (1972); Ehlert v. United States, 402 U.S. 99, 105, 107, 91 S. Ct. 1319, (1971); Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, (1961).

"Extrapolation", of course, is a delicate task, for it is not within our power to construe and narrow state laws, United States v. 37 Photographs, 402 U.S. 363, 369, 91 S. Ct. 1400, (1971).

Condemned to the use of words, we can never expect mathematical certainty from our language, American Communications Assn. v. Douds, 339 U.S. 382, 412, 70 S. Ct. 674, (1950).

In Cox v. Louisiana, 379 U.S. 536, 85 S. Ct. 453, (1965), the Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views, Edwards v. South Carolina, 372 U.S. 229, 236, 83 S. Ct. 680, (1963); Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S. Ct. 900, (1940).

In Coates v. Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, (1971), the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner "annoying to persons passing by", and we held that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance".

Here, in the instant case, Defendant asserts that "the conditions" are impermissibly vague by not articulating or defining *any* conditions in the statutes relating to Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, and that it allows arbitrary and discriminatory enforcement.

Similarly, the Court, in numerous other cases have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences, Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91, 86 S. Ct. 211, (1965); Staub v. City of Baxley, 355 U.S. 313, 78 S. Ct. 277, (1958); Saia v. New York, 334 U.S. 558, 559-560, 68 S. Ct. 1148, (1948); Schneider v. State, 348 U.S. 147, 60 S. Ct. 146, (1939); Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666, (1938); Hague v. CIO, 307 U.S. 496, 59 S. Ct. 954, (1939).

If on its face the challenged provision is repugnant to the *Due Process Clause*, specification of details of the offense intended to be charged would not serve to validate it, United States v. Reese, 92 U.S. 214, 221, 2 Otto 214, (1875); Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, 453, (1905); Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, (1939).

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).

Defendant asserts that when compared to what the Court said in 1876, that it relates to the same issues being raised today, in regards to status or class, about a broad criminal statute enacted by Congress: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large", United States v. Reese, 92 U.S. 214, 221, 2 Otto 214, (1875); Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, (1972).

"Only a word needs to be said regarding Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, (1939). The case involved a New Jersey statute of the type that seek to control 'vagrancy'. These statutes are in a class by themselves, in view of the familiar abuses to which they are put….Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided". Id. at 540.

Defendant asserts that the Board of Parole Commissioners in enacting NAC 213.290 has cast a net large enough to ensnare every offender who belongs to a specified class, "sex offender on Lifetime Supervision", and for behavior or conduct which by itself is not a crime, but rather constitutionally protected conduct, and by so doing have allowed arbitrary and discriminatory enforcement by absent and imprecise terms in the statute on its face.

In People v. Moss, 309 N.Y. 429, 131 N.E. 2d 717, (1956), the Court stated that "a vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest. Defendant states that the conditions are the cloak for the Board to further punish an offender by making constitutionally protected Liberty Interests a crime, which are innocent behavior, so that they can further arrest and convict an offender for violating, up to and including debtors penalties.

Chief Justice Hewart, in Frederick Dean, 18 Crim. App. 133, 134, (1924) said: "It would be in the highest degree unfortunate if in any part of the country those who are responsible for setting in motion the criminal law should entertain, connive at, or coquette with the idea that in a case where there is not enough evidence to charge the prisoner with an attempt to commit a crime, the prosecution may, nevertheless, on such insufficient evidence, succeed in obtaining and upholding a conviction under the Vagrancy Act, (1824)."

Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure", Thornhill v. Alabama, 310 U.S. 88, 97-98, 60 S. Ct. 736, (1940). It results in a regime in which the poor and the unpopular are permitted to "stand on the sidewalk…only at the whim of any police officer", Shuttlesworth v. Birmingham, 382 U.S. 87, 90, 86 S. Ct. 211, (1965).

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); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, (1926); 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); Collins v. Kentucky, 234 U.S. 634, 638, 34 S. Ct. 924, (1914); International Harvester Co. V. Kentucky, 234 U.S. 216, 221-223, 34 S. Ct. 853, (1914); People v. Belcastro, 356 Ill. 144,

190 N.E. 301, (Illinois 1934); People v. Licavoli, 264 Mich. 643, 250 N.W. 520, (Michigan 1933), and Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, (1939).

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).

The *Void for Vagueness Doctrine* is predicated upon a statute's repugnancy to the Due Process Clause of the 14th Amendment to the United States Constitution, Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400, (1975); Cunningham v. State, 109 Nev. 569, 570, 855 P.2d 125,125, (1993); Sheriff v. Burdg, 118 Nev. 853, 855, 59 P.3d 484, 485, (2002); Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006).

A statute is unconstitutionally vague and subject to facial attack if it

(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited, and

(2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement, Kolender v. Lawson, 461 U.S. 352,357, 103 S. Ct. 1855, (1983); Sheriff v. Burdg, 118 Nev. 853, 855, 59 P.3d 484, 485, (2002); State v. Father Richard, 108 Nev. 626, 629, 836 P.2d 622, 624, (1992); City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999); Gallegos v. State, 123 Nev. 289, 292, 163 P.3d 456, 458, (2007).

The first prong is concerned with guiding those who may be subject to potentially vague statutes, while the second-and more important-prong is concerned with guiding the enforcers of statutes. By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law, City of Las Vegas v. District Court, 118 Nev. 859, 864, 59 P.3d 477, 481, (2002).

However, the second prong is more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which allows the Board and the Division's Officers to pursue their personal predilections, Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, (1983).

NRS 213.1243 is a criminal statute because it provides for a misdemeanor or felony criminal charge for behavior or conduct which by itself might not be considered a crime. Criminal Statutes are designed to punish persons because they have committed specific prohibited acts. This charge can lead an offender to be penalized for up to a maximum 6 year prison term for each violation of conditions that are not listed in the statute. Because of the penalties imposed, this court has to consider the application of this statute to be criminal in nature. NAC 213.290, is a regulation based off of the constitutional legality of NRS 213.1243, and neither of these statutes list the specific conduct which is prohibited.

Both of these statutes refer to a condition of Lifetime Supervision, which has never been defined or articulated in statute as the Legislature intended and the law states. This allows the Division of Parole and Probation to authorize a "standardless sweep", with no "adequate guidelines", which allows the Officers of the Division "to pursue their personal predilections".

A statute may be struck down under the vagueness doctrine's first prong if it does not provide adequate notice to the public of the prohibited conduct. Without adequate notice, citizens would be frustrated in their attempts to conform their conduct to the contours of this statute, Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006); City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999); City of Las Vegas v. District Court, 118 Nev. 859, 864, 59 P.3d 477, 481, (2002). Because NRS 176.0931, NRS 213.1243 and NAC 213.290 fail to provide adequate notice of the conduct prohibited, the petitioner argues that the statutes are unconstitutionally vague under the first prong of this test.

A statute may be struck down under the second prong if the language of the statute fails to specify the circumstances for which a person could be arrested. Thus, the enforcing officer has arbitrary discretion over deciding whether a particular un-enumerated circumstance supplies the necessary probable cause for arrest. This standard could shift from Officer to Officer or

circumstance to circumstance because the statute lacks definitive guidelines. These inconsistent standards could lead to absurd results, Silvar v. Eighth Judicial District Court, 122 Nev. 289, 129 P.3d 682, (2006); Gallegos v. State, 123 Nev. 289, 292, 163 P.3d 456, 458, (2007).

NRS 176.0931, NRS 213.1243 and NAC 213.290 do not specify what conduct is prohibited, and therefore does not specify the circumstances for which a person could be arrested, as it only specifies the penalties imposed for the violations of the Statutes. The Defendant argues that the statutes are unconstitutionally vague under the second prong of this test.

A statute may also be struck down under the second prong if it does not allow for clear, specific or adequate guidelines to point law enforcement to, and due to that reason, it encourages and creates arbitrary and discriminatory enforcement, Gallegos v. State, 123 Nev. 289, 292, 163 P.3d 456, 458, (2007); City of Las Vegas v. District Court, 118 Nev. 859, 864, 59 P.3d 477, 481, (2002); Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, (1983).

NRS 176.0931, NRS 213.1243 and NAC 213.290 as written do not specify enumerated conditions, as it only provides for a major or minor violation, without adequate guidelines to point law enforcement to; it only specifies the penalties which will be imposed for any violation of a condition, thereby creating arbitrary and discriminatory enforcement. The petitioner argues that the statutes are unconstitutionally vague under the second prong of this test.

A statute may be void for vagueness, and therefore unconstitutional, if the statute contains no intent element, yet it imposes criminal sanctions on what is otherwise non-criminal activity, City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999). The Defendant argues that an offender has the intent to do anything constitutionally permitted to him or her, and that might otherwise not be a crime, but an Officer could cause an offender to be arrested for non-specific criteria, and that he could be imprisoned for up to 6 years based off of the unsworn assertion of a parole officer.

Purpose of the fair notice requirement under vagueness doctrine is to enable the ordinary citizen to conform his or her conduct to the law, as no one may be required at peril of life,

liberty, or property to speculate as to the meaning of penal statutes, City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999).

While the absolute precision in drafting statutes is not necessary, the Legislature "must, at a minimum, delineate the boundaries of unlawful conduct." Some specific conduct must be deemed unlawful so individuals will know what is permissible behavior and what is not, Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S. Ct. 1686, (1971).

The procedural requirements that bring a person within the scope of NRS 176.0931, NRS 213.1243 and NAC 213.290 are extremely cloudy. Since there are no conditions listed and enumerated, but only those imposed by the Board in violation of the First Amendment and many other constitutional liberties, how does the defendant know from the statutes provisions on its face what behavior or conduct they have to violate to be formally charged with a crime? Ignorance of the Law is not an excuse, but when there is no Law to be ignorant of as stated in the statute, then the law begs for arbitrary and discriminatory practices, especially by the Board of Parole Commissioners and the Division of Parole and Probation.

Defendant asks the Court, as stated by the Statutes, and on their face, what is the violation of a condition that constitutes a crime? Any conduct that the petitioner engages in could be construed to be a crime, as there is no specific crime enumerated at all, yet whatever conduct the person might have done or might do is punishable for just doing it as interpreted by the Division of Parole and Probation with no proof or evidence that any real crime has been committed.

Because it fails to answer any of these questions, NRS 176.0931, NRS 213.1243 and NAC 213.290 cause ordinary citizens to have to guess at their meanings and fails to give adequate notice of the law so that the citizen can conform their conduct to its requirements. The Defendant asserts that these laws are void for vagueness and therefore unconstitutional, are more burdensome after conviction, are punitive in nature and effect, are a restraint of First Amendment Rights and Constitutional Liberty Interest, and that these statutes in relation to Lifetime Supervision should be stricken as a constitutionally illegal sentence.

Issue # 11: ***Cruel or Unusual Punishment: U.S. Const. Amend 8; NV Const. Art. 1, Sec. 6.***

The *Eighth Amendment* of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 6, of Article 1, of the Nevada Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonable detained."

Unlike Federal Courts and the United States Constitution, the Nevada Constitution and the Nevada Courts have held that a punishment can be either cruel or unusual under the *Eighth Amendment* if it "is so unreasonably disproportionate to the offense as to shock the conscience", Chavez v. State, 125 Nev. Adv. Rep. 29, 213 P.3d 476, 489, (2009).

The U. S. Supreme Court has long held, and recently reiterated, that "[t}he concept of proportionality is central to the *Eighth Amendment*." Graham v. Florida, 130 S. Ct. 2011, 2021, (2010).

Based on this concept, the Supreme Court has held that the *Eighth Amendment* is offended when a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality", Harmelin v. Michigan, 501 U.S. 957, 1005, 111 S. Ct. 2680, (1991). The petitioner asserts that under this concept, the Court must look to any other civil penalty imposed to determine the disproportionate amount of constitutional restraints of liberties as applied to any civil sentence, and then further compare them to the 'special sentence" of Lifetime Supervision.

And while *Eighth Amendment* jurisprudence has "not been a model of clarity" Courts nonetheless are required to determine if a sentence is unconstitutionally disproportionate, Lockyer v. Andrade, 538 U.S. 63, 72, 123 S. Ct. 1166, (2003).

To determine whether a punishment is cruel or unusual, [in context of the Nevada Constitution], Courts must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society", Estelle v. Gamble, 429 U.S. 97, 102, 97 S. Ct. 285, (1976); quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, (1958).

"This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change", Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 2649, (2008); quoting Furman v. Georgia, 408 U.S. 238, 382, 92 S. Ct. 2726, (1972).

Defendant asserts that in the years leading up to the *Civil Rights Movement* in the 1960's, many of these same types of cruel and unusual measures were practiced against the members of the African-American class, and in previous decades, to vagrants, and to the female gender. Many Supreme Court opinions have resulted which thoroughly tested the fairness of the restraints imposed, and many statutes across the country were found to be wanting in both of these contexts.

While Sex Offenders are held in low esteem by the majority of the population at the present time, one can not strip their First Amendment Rights and Constitutional Liberty Interests away from them, based on repugnance, especially while serving a civil sentence. If this were allowed to happen by the Courts, who is next? This is certainly cruel or unusual punishment, as applied.

The *Cruel and Unusual Punishments Clause* prohibits the imposition of inherently barbaric punishments under all circumstances, Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, (2002). "[P]unishments of torture," for example, "are forbidden", Wilkerson v. Utah, 99 U.S. 130, 136, 9 Otto 130, (1879). Defendant asserts that torture is subjective; it does not have to be physical torture to qualify, as it can be mental torture. Being deprived of contact, such as in solitary confinement is a form of torture.

Being deprived of your First Amendment Rights and constitutional liberties is also a form of mental torture, and/or an inherently barbaric punishment, especially when enacted for life, as one has the constitutional right that "All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness", Nevada Constitution, Art 1, Section 1.

Defendant asserts that being deprived of being able to further your education, by not being allowed to attend school, or to vote at a school, or attend a political function at a school, as no allowance is made by the Board for being at a school catering to adults is barbaric, cruel and unusual punishment. As the condition is written, an offender can be held liable for even being near a school or school grounds for the rest of an offender's life. This is certainly cruel, as it extinguishes any hope of the offender bettering himself in life by obtaining and furthering his education and level of experience. This could certainly impact an offender's employment, life, family, education, and his pursuit of happiness.

Being deprived of a means of communication, commerce and information gathering, by not allowing access to the internet or intranet, and by not being allowed to own or access a computer, for the rest of an offender's life, even for access to a computer to obtain employment is certainly another form of cruel or unusual punishment imposed upon a civil offender.

It is certainly a barbaric, cruel and unusual punishment when one is not allowed to be able to live with one's own nuclear or extended family. The right to live with one's own family is paramount, Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, (1977). This is certainly the case in this situation, as an individual Officer has to grant permission to the offender, which can be based off of arbitrary and discriminatory means, upon the personal predilections of the Officer, which can and often lead to absurd results, sometimes creating a situation which could bankrupt offenders and their families.

By limiting a civil offender's right to travel for either business or pleasure for the rest of an offender's life is certainly cruel or unusual and barbaric in any instance. This also relates to a curfew placed upon an offender. It is a constitutional right to be able to go where one wants, at any time one wants, with whoever one pleases, by any means that is satisfactory to the person, and at his total discretion and ability. Any infringement upon this right is cruel.

By requiring that an offender participate in counseling for the rest of one's life is cruel and unusual punishment. This is done by the Board with no certified or legal recommendation by anyone who is qualified to make that determination, and it is based off of the personal predilections of the Officer. "As deemed necessary", is a vague imposition relating to a

condition, one of many, and one in which an offender might never satisfy. Who deems it necessary? An Officer does not have the scope of training to determine an issue such as this, as medical treatment is far outside the boundaries of an Officer, unless that Officer is also licensed to perform therapy or holds a therapy certification or is licensed to practice medicine. Many Officers even question the medical advice of a practitioner of medicine.

These are certainly forms of mental torture, as it inflicts hopelessness on an offender, and their family, especially on an offender who has already paid their debt to society by the original criminal sentence that an offender has already served.

If it is the goal of the Nevada Legislature, the Board of Parole Commissioners, and the Division of Parole and Probation to rehabilitate an offender, and re-integrate them into society after successfully completing their criminal sentence, and serving a term of parole or probation, why would they impose further punitive measures upon an offender, in many cases much harsher than the previous conditions while serving a criminal sentence, on a civil sentence, if it is meant to be non-punitive in nature?

These cases and examples of true situations underscore the essential principle that, under the *Eighth Amendment*, the State must respect the human attributes even of those who have committed serious crimes. The court must remember that this is "supposed" to be a civil sentence, meant to be non-punitive in nature, SB 192, (1995).

Previous Supreme Court's Precedents consider punishments challenged not as inherently barbaric, but as disproportionate to the crime. The concept of proportionality is central to the *Eighth Amendment*. Embodied in the Constitution's ban on cruel and unusual punishment is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense", Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, (1910).

The Supreme Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements standards by certain categorical restrictions on the death penalty.

In the first classification, the Court considers *all* of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Defendant asserts that in order to make a determination of cruelty; that this court would have to look at the proportionality of the conditions of Lifetime Supervision, which are articulated, drafted, and enacted by the Board of Parole Commissioners. These conditions are not articulated in the statutes of the State, specifically NRS 176.0931, NRS 213.1243, and NAC 213.290 that define the "special sentence" of Lifetime Supervision.

This in not the case in such statutes that control the conditions imposed upon an offender serving a sentence on parole or under a suspended sentence, and serving a term of probation. The Court must look to the proportionality of the conditions between the three sets of conditions and statutes relating to each. Even in cases where there is no specified condition for parole or probation, a statute such as NRS 213.12175 grants the Board the authority to impose a condition upon an offender for the reasons of public safety, but only for an offender on parole, which is stated in clearly defined language.

A starting point for the "excessive punishment" determination is whether the sentence "shocks the conscience." This threshold is clearly met by the facts of the present issue, as is this Court's requirement that the punishment "shock the conscience", Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, (2004).

This sentence "shocks the conscience", when you look at the application of the conditions of Lifetime Supervision, which are punitive in nature and effect as imposed by the Board of Parole Commissioners, to a sentence which has been determined to be a non-punitive civil life sentence. This is an affirmative disability and restraint of many Constitutional Liberty Interests, including First Amendment Rights, as noted in all of the arguments of Defendant.

Any reasonable citizen of ordinary intelligence would be "shocked" at the levels to which the Board of Parole Commissioners have illegally imposed the restraints of First Amendment Rights and Constitutional Liberty Interests upon a citizen of the State, in relation to a civil penalty that has been defined by the Legislature to be non-punitive in nature, SB 192, (1995).

Any citizen of this State would further wonder, when sentenced to any civil penalty or sanction, am I next? Is the State of Nevada going to take away my constitutional rights?

Issue # 12: Due Process: Determination of Dangerous Sexual Predator: U.S. Const. Amend 8 & 14; NV Const. Art. 1 & 8:

Defendant respectfully requests that the Court determine whether or not a determination of a dangerous sexual predator can be enforced upon Defendant, based off of being convicted of a crime, without any hearing to conduct that determination, and without any person licensed and qualified to make that determination. Defendant addresses this with the following arguments.

(1.) Defendant's sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290 is disproportionate relative to the legislative intent that the sentence was intended for offenders who are "dangerous sexual predators, people with a high degree of likelihood of recidivism" in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

(2.) The Lifetime Supervision statutes of NRS 176.0931, NRS 213.1243, and NAC 213.290 are arbitrary and capricious where the procedural protections in determining whether an offender is a "dangerous sexual predator, people with a high degree of likelihood of recidivism" are completely absent from its text in opposition to the statute's legislative intent and in violation of the Due Process Clause of the Fourteenth Amendment.

(3.) Defendant's Lifetime Supervision hearing is null and void where the State Board of Parole Commissioners acted without an adjudication, determination, or any fact finding by a qualified individual to conduct same, that he is in fact a "dangerous sexual predator, people with a high degree of likelihood of recidivism" in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Legislative intent

Though the text of NRS 176.0931 does not literally require that an offender be a "dangerous sexual predator, [a person] with a high degree of likelihood of recidivism," the legislative intent does. "Legislative intent… is not always evident from the plain language of the statute and in that event, the courts must look to legislative history for guidance," Khatib v.

County of Orange, 2010 Daily Journal D.A.R. 6507, 6509, (9th Circuit 2010). It is an undisputed fact that *the legislative intent of lifetime supervision was to "oversee dangerous sexual predators, people with a high degree of likelihood of recidivism.*" Palmer v. State, 118 Nev. 823, 59 P.3d 1192, 1195 (2002). "The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,"" United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, (1989), (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, (1982). "In such cases, the intention of the drafters, rather than the strict language controls." *Ibid*. In other words, even if the literal text of NRS 176.0931 does not require a court to find that petitioner is a "dangerous sexual predator, [a person] with a high degree of likelihood of recidivism," the legislative intent controls and such a finding is a mandatory and significant element of lifetime supervision.

There is other evidence that suggests an offender must be a dangerous sexual predator before serving a term of lifetime supervision: NRS 176.0931(3) states in pertinent part that a person under lifetime supervision may "petition the sentencing court or the State Board of Parole Commissioners" meeting certain requirements and served the minimum term where "the court or the Board ***shall*** grant a petition for release from a special sentence of lifetime supervision *if… the person is not likely to pose a threat to the safety of others*, as determined by a person professionally qualified to conduct psychosexual evaluations." The term ***shall*** denotes mandatory language. Offenders who are "dangerous sexual predators, people with a high degree of likelihood of recidivism" clearly "pose a threat to the safety of others" and appear likely the target of the statute. It therefore logically follows that if an offender *must* be released if they no longer pose such a threat (where all statutory conditions are met), they would have to pose the same threat before being required to serve a term of lifetime supervision.

The Legislature did not intend to waste limited and valuable resources supervising offenders who are not found to be "dangerous sexual predators, people with a high degree of likelihood of recidivism." To hold to otherwise would be at odds with the Legislature's intent and compromises public safety while taxing this states crippling budget. A truly dangerous

sexual predator would likely not oppose a statutory requirement that their supervision be compromised and diluted amongst offenders who are not dangerous sexual predators. Public safety demands more as intended by the Legislature's intent of this statute.

Evidentiary Standard

"Lifetime supervision is a form of punishment because the affirmative disabilities and restraints it places on the sex offender have a direct and immediate effect on the range of punishment imposed," *Palmer,* at 1196. The mere fact that a defendant is convicted of a "sexual offense" as defined under NRS 176.0931(5)(2)(C) is not necessarily evidence in and of itself that an offender is in fact a "*dangerous sexual predator,* [a person] with a high degree of likelihood of *recidivism*" that warrants the imposition of lifetime supervision. If it were, then no one could possibly apply under NRS 176.0931(3) to be released since the mere fact of their conviction would be evidence enough to eternally and perpetually keep them on supervision. A statute should not be construed to make its words or phrases superfluous or to make a provision nugatory or insignificant, Corley v. United States, 556 U.S. 303, 129 S. Ct. 1558, (2009); Butler v. State, 120 Nev. 879, 892-893, 102 P.3d 71, 81, (2004). Failure to follow the legislative intent of the lifetime supervision statute will sweep entire categories of offenders to be supervised where many do not pose a high degree of likelihood of recidivism.

The standard of proof required to find an offender a "dangerous sexual predator, [a person] with a high degree of likelihood of recidivism" should be beyond a reasonable doubt in light of the liberty interest at stake (one's freedom from punitively restrictive supervision) and the stigmatation that follows being labeled a dangerous sexual predator, In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, (1973).

Winship stands for the proposition that no one should lose their liberty and suffer stigmatation without due process of law in both civil and criminal matters alike. It is not necessarily the finding of guilt or other adjudications, but the consequences of such that are the target such as (for example) loss of liberty to incarceration, probation, parole, and its stigmatizing effects. The loss or restraint of liberty under lifetime supervision is significant enough to meet the *Winship* standard for proof beyond a reasonable doubt.

Proportionality of Sentence

"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportional to the offense," Graham v. Florida, 130 S. Ct. 2011, 2021, (2010). In this case, it is not necessary to rely on consensus or subjective analysis to determine proportionality where the Nevada Legislature has narrowly drawn a clearly objective line to only the most dangerous offenders: "dangerous sexual predators, people with a high degree of likelihood of recidivism." *Palmer,* at 1195.

Defendant has not been adjudicated as a "dangerous sexual predator, [a person] with a high degree of likelihood of recidivism" but yet was sentenced to a term of lifetime supervision. Defendant's sentence is therefore disproportionate relative to its legislative intent in violation of the Eighth and Fourteenth Amendments.

Public Safety Analysis

Pursuant to NRS 176.0931(1) an offender must be sentenced to a term of Lifetime Supervision if convicted of a "sexual offense" as defined by paragraph 5(2)(C) without a finding that they are "dangerous sexual predators, people with a high degree of likelihood of recidivism." The fact that the statute uses this classification as the touchstone, "sweeping in a significant number of people who [do not pose a high degree of likelihood of recidivism], serves to feed suspicion that something more than regulation of safety is going on. There is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." Smith v. Doe, 538 U.S. 84, 109, 123 S. Ct. 1140, (2003) (Souter, J., concurring in judgment). "Ensuring public safety is, of course, a fundamental regulatory goal and this objective should be given serious weight in the analysis." Id., at 108. "But at the same time, it would be naive to look no further, given pervasive attitudes toward sex offenders." Id., 109.

Prejudice

Defendant has been wrongly sentenced to a term of Lifetime Supervision where he has not been adjudicated as a "dangerous sexual predator, people with a high degree of likelihood of recidivism." He now must suffer a very serious restriction of his Constitutional Liberty Interests

and First Amendment Rights which is punitive in nature and effect and be stigmatized as a "*dangerous sexual predator*, people with a high degree of likelihood of *recidivism"* which is defamingly characteristic of the statute's legislative intent.

Arbitrary and Capricious

"The touchstone of due process is protection of the individual against arbitrary action of government," District Attorney's Office v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 2337, (2009) (Stevens, J. dissenting), (citing Meachum v. Fano, 427 U.S. 215, 226, 96 S. Ct. 2532, (1976); Wolf v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, (1974); County of Sacramento v. Lewis, 523 U.S. 833, 845-846, 118 S. Ct. 1708, (1998). When government action is so lacking in justification that it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense," Collins v. Harker Heights, 503 U.S. 115, 128, 112 S. Ct. 1061, (1992), it violets due process). *Osborne*, at 2337.

The literal text of NRS 176.0931(1) imposes lifetime supervision on *anyone* convicted of a "sexual offense" as defined under paragraph 5(2)(C) arbitrarily sweeping in vast numbers of offenders *without regard* to the Legislature's intent that they be "dangerous sexual predators, people with a high degree of likelihood of recidivism." Without first making such a finding before imposing this sentence, the statute is arbitrary and capricious in violation of due process under the Fourteenth Amendment.

Invalid Hearing

Defendant was under the impression that he would indeed have to serve a term of lifetime supervision provided at some point before serving the sentence that he would be adjudicated as a "dangerous sexual predator, [a person] with a high degree of likelihood of recidivism" as intended by the Legislature. See *Palmer*, at 1195. In the three (3) determinations that have been made, two of them by persons qualified to conduct the same, (a marriage and family therapist, who provides pre-sentence reports for the Court, and a psychologist, both licensed and practicing in Nevada), and by the State of Nevada, in setting the tier level of Defendant, all three (3) of these determinations have found that Defendant is a low risk to re-offend. Since such adjudication was never made by the Court, or by persons qualified to determine the issue, the

terms and conditions imposed on Defendant by the State Board of Parole Commissioners are wholly null and void, are punitive in nature and effect, are affirmative disabilities and restraints, illegal, and violate the Constitutional Liberty Interests and First Amendment Rights of the Defendant, and all others similarly situated.

Other Venues

The Supreme Court of Idaho recently looked at this situation in relation to a violent sexual predator designation. This was in Smith v. Idaho, Docket No. 33254, Opinion No. 22, (2009). While Defendant would agree that Smith, the petitioner in the case, should warrant that designation, the fact is, the State did not properly carry out its duties according to the Constitution.

In looking at the case, the Court held that the statutory framework for the VSP designation in Idaho presents significant constitutional shortcomings. The Court held that ruling in this case, even though the petitioner was granted a hearing, with counsel, and was so designated by a person qualified to conduct that determination.

In the State of Nevada, the designation is applied without any hearing, without any due process, and without counsel. There is also no determination by a person qualified to conduct the same, that the Defendant is a dangerous sexual predator. In fact, he is designated a Tier Level One, the lowest level of concern, according to the Sex Offender Tier Level Rating Panel of the State of Nevada.

The Supreme Court in Idaho vacated Smith's determination as a violent sexual predator based off of these constitutional violations of due process, which were even less serious than in the instant case.

This was also done after the Court considered the seriousness of the case, and looked at other State Supreme Courts that ruled in a similar situation. The high court of New York has recognized that an individual's private interest, his liberty interest in not being stigmatized as a sexually violent predator, is substantial. The ramifications of being classified and having that information disseminated fall squarely within those cases that recognize a liberty interest where there is some stigma to one's good name, reputation or integrity, coupled with some more

"tangible" interest that is affected or a legal right that is altered. More than "name calling by public officials", the sexually violent predator label "is a determination of status" that can have a considerable adverse impact on an individual's ability to live in a community and obtain or maintain employment. This was held by the New York Supreme Court in People v. David W., 733 N.E. 2d 206, 210-211, (New York 2000). See also People v. Bell, 778 .Y. S.2d 837, 843, (New York Superior Court 2003).

The Utah Supreme Court has also recently addressed this issue in State v. Briggs, WL 5191446, (Utah 2008). The Court concluded that the provision of the registration statute which requires the State to identify an offender's "primary and secondary targets" implies that the offender is currently dangerous and violates his right to procedural due process unless the offender is provided with notice and an opportunity to be heard as to whether he is currently dangerous. Id. At 1. The Court reasoned that "by including information implying that the offender is currently dangerous, Utah's registry damages the offender's reputation and changes his legal status, depriving him of a protected liberty interest. Like the list of those who drank excessively in *Constantineau*, the statutorily mandated designation of "currently dangerous" changes the legal status of listed offenders. The registry attaches a "badge of infamy", officially designating listed offenders as prone to future criminality.

This follows upon the rulings in Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, (1971), and Wieman v. Updegraff, 344 U.S. 183, 191, (1952), which defined the issue of procedural due process in these types of situations as presented to the Courts.

In California, in a recent study finalized this year in July, out of 31, 462 referrals to the Department of Mental Health for review as a violent sexual predator, the actual rate designated as one was 0.3 percent. The audit found that the State referred far more cases that the law permits. Another interesting statistic found in California is that since 2005, 59 % of the releases sex offenders violated their parole, however, just 1% committed a new offense, and out of the 134 convicted sex offenders who committed a new crime, only 1 had done so. This makes the recidivism rate for sex offenders paroled in California since 2005, 0.1 %. (Exhibit 35).

Issue # 13: Due Process: Separation of Powers Clause:

The *Separation of Powers Clause* and philosophy is looked to as a bulwark against tyranny. For if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, then no man or group of men will be able to impose its unchecked will. The tyranny of the Board of Parole Commissioners is clear in the implementation of the conditions of Lifetime Supervision.

James Madison wrote, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny", The Federalist, No. 47, pp. 373-374, (Hamilton ed. 1880).

The framers of the Constitution understood that "barriers had to be erected to ensure that the Legislature would not overstep the bounds of its authority and perform the functions of the other departments", The Federalist, No. 48, pp. 383-384, (Hamilton ed. 1880). See generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton), and 78 (Hamilton); United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965).

Nothing is more common that for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Laws of this kind are the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, [such being the case here, in the Board of Parole Commissioners], and establish an aristocracy or an oligarchy; it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, therefore no man can be safe, nor know when they may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense, History of the Republic of the United States, (Hamilton), p. 34, (1859), quoting Alexander Hamilton.

Again, James Madison expressed similar sentiments, agreeing with Hamilton by stating that "Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principle of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, [such as ours], and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights…..The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community, The Federalist, No. 44, p. 351, (Hamilton ed. 1880).

Defendant asserts that the Board of Parole Commissioners is not impartial in this instance, and has knowingly and circumspectly, with malice and aforethought, violated the Constitution of the State of Nevada and the mandate of the Nevada Legislature, and the further interaction of the Governor of the State, by not articulating and including in the regulation that the Board enacted, specifically NAC 213.290, with the conditions of Lifetime Supervision.

There is no legal authority for the Board to impose these conditions, as they are not defined in any form or manner, in any statute in the State of Nevada, and have been implemented in a "round-a-bout means", without the authority of the Nevada Legislature or of the Governor of the State. The Board of Parole Commissioners has never had the constitutionality of this statute checked as required by the statutes relating to the enactment of regulations in the State of Nevada.

Defendant asserts that the Board of Parole Commissioners, in this instance of setting the conditions of Lifetime Supervision, are acting in a "quasi- judiciary capacity". Because they have also drafted and enacted the conditions, Defendant asserts that they are also acting in the legislative capacity. Due to the round-a-bout and improper means of implementing the

conditions through non-articulated methods, which have caused them to be absent from the regulation or statutes, that this further causes them to skirt the requirements of the executive branch of the government. Defendant asserts that they are further acting as the executive branch. This has been done by disallowing the further review and approval of the Governor of the State, or of the Nevada Legislature. The Board of Parole Commissioners has never had the regulation that they have drafted and enacted, specifically NAC 213.290, tested to determine the constitutional legality of the conditions that they impose and enforce, as required by statute, in NRS 233B.031.

Thomas Jefferson reflected in his writings that "many despots would surely be as oppressive as one…..Little will it avail us that they are chosen by ourselves….The government we fought for is one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others. For this reason that constitutional convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no one person should exercise the powers of more than one of them at the same time…..IF…the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy, Notes on the State of Virginia, (Jefferson), pp. 157-158, (Ford ed. 1894).

It is of vital importance for this Court to note, that Jefferson was speaking to a situation that occurred more than 200 years ago, but still has extreme relevance to an existing situation of today, where the Board of Parole Commissioners has usurped the authority of the 3 branches of government, and have pre-emptively decided the extent of the constitutional rights granted to the offenders serving a civil sentence under their control, and further, have used this illegal authorization and ability to restrain those First Amendment Rights and constitutional liberties of

an offender with no oversight or right of appeal granted to the offender. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.

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, therefore violating the *Separation of Powers Clause*. This authority was vested with the Board of Parole Commissioners by the Nevada Legislature, with the mandate to establish a program of Lifetime Supervision for an offender, and under the further obligation that these conditions were to be a non-punitive tool designed to help law enforcement keep better track of the offender, SB 192, (1995). The mandate concerned enacting a program of Lifetime Supervision, and articulating the program in a regulation, which Defendant asserts was never done as intended by the Board of Parole Commissioners, as mandated by the Nevada Legislature

Defendant's Prayer for Relief: For Court To Grant Motion to Correct an Illegal Sentence; Alternative Writ of Prohibition; First Amendment Petition; and Declaratory Judgment:

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

(1) Grant a finding in favor of Defendant and all others similarly situated, on all counts, based on the arguments presented, and the points and authorities of law cited, while looking to the totality of the circumstances when assessing, analyzing, determining and rendering this opinion, while further considering *all* of the issues raised in regards to the constitutionally illegal sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(2) Make a ruling within 30 days, due to the severity of the restraints and violations of the First Amendment Rights and Constitutional Liberty Interests of Defendant, and all others similarly situated, including the violations of Nevada Statutes protecting Defendant and all others similarly situated, pursuant to NRS 34.185, a First Amendment Petition.

(3) Forthwith correct and void the Defendant's constitutionally illegal "special sentence" of Lifetime Supervision, per NRS 176.555, as placed upon him by this Court, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(4) Grant an immediate temporary injunction against the State of Nevada and the State of Nevada's Agencies, including the Board of Parole Commissioners, the Division of Parole and Probation, including the Chief of the Division and its Officers, commanding them to cease and desist imposing and enforcing the illegal conditions of Lifetime Supervision, which are not set forth in NRS 176.0931, NRS 213.1243, and NAC 213.290, until this Court, or the Nevada Supreme Court, determines the constitutional legality of the issues presented, under application of alternative writ of prohibition, per NRS 34.340. Injunctive and declaratory relief may be granted by this Court pursuant to the Nevada Constitution in Article 6, Section 6.

(5) Grant an alternative writ of prohibition, to further enjoin these statutes of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, and command the State of Nevada, the Board of Parole Commissioners and the Division of Parole and Probation, by and through the Department of Public Safety, to cease and desist doing that which is prohibited by law, for Defendant and all others similarly situated, per NRS 34.330.

Defendant's Requests for Declaratory Relief:

(6) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by being overbroad and not narrowly drawn, to restrain the First Amendment of the United States Constitution, (US Const., Ament, I).

(7) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the right to practice a religion without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, 4, cl. 5).

(8) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the right to assemble or associate without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1 & 10).

(9) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the right to free speech without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, & 9).

(10) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the right to petition for grievance without government interference which is protected by the Nevada Constitution, (Nev. Const., Art, 1, 4, cl. 5).

(11) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Procedural Due Process Clause of the United States Constitution, (US Const., Ament, XIV).

(12) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Procedural Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 5).

(13) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by not providing for proper hearing, the Due Process Clause of the United States Constitution, (US Const., Ament, V & XIV).

(14) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by not providing for proper hearing, the Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(15) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Double Jeopardy Clause of the United States Constitution, (US Const., Ament, V & XIV).

(16) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Double Jeopardy Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(17) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Ex Post Facto Clause of the United States Constitution, (US Const., Ament, I & 9, cl 10.).

(18) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Ex Post Facto Clause of the Nevada Constitution, (Nev. Const., Art, I & 15).

(19) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Bill of Attainder Clause of the United States Constitution, (US Const., Ament, V & XIV).

(20) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Bill of Attainder Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(21) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by being Void for Vagueness, the Due Process Clause of the United States Constitution, (US Const., Ament, V & XIV).

(22) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by being Void for Vagueness, the Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(23) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Cruel and Unusual Punishment contained in the United States Constitution, (US Const., Ament, VIII).

(24) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Cruel or Unusual Punishment contained in the Nevada Constitution, (Nev. Const., Art, I & 8, cl. 5).

(25) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by not providing for proper hearing and upon no qualified determination of a violent sexual predator, the Due Process Clause of the United States Constitution, (US Const., Ament, V & XIV).

(26) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, by not providing for proper hearing and upon no

qualified determination of a violent sexual predator, the Due Process Clause of the Nevada Constitution, (Nev. Const., Art, 1, & 8, cl. 1).

(27) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Separation of Powers Doctrine contained in the United States Constitution, (US Const., Ament, VIII).

(28) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the Separation of Powers Doctrine of the Nevada Constitution, (Nev. Const., Art. I, Section 1 & 3, Art. 3, 4, 5, and 6, inclusive).

(29) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.095.

(30) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.185.

(31) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.209.

(32) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.225.

(33) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.247.

(34) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in NRS 49.295.

(35) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to confidentiality in relation to any other specific confidentiality statute, upon further determination, and located in Chapter 49.

(36) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to the hearing required by the Open Meeting Law in NRS 241.010, and NRS 241. 020, and pursuant to the Open Meeting Law in relation to any other specific statute, upon further determination, and located in Chapter 241.

(37) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.187.

(38) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.189(5).

(39) 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 Nevada Revised Statutes as applied by Plaintiffs, pursuant to polygraphs in NRS 648.193.

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

(41) 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 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Ethics in Division Directive 4.2.009C, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(42) 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 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Search and Seizure in Division Directive 6.2.109, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(43) 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 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Polygraphs in Division Directive 6.3.115, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(44) 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 Procedure of the Department of Public Safety as applied by Plaintiffs, pursuant to Travel in Division Directive 6.3.116, as applied to NRS 176.0931, NRS 213.1243, and NAC 213.290.

(45) Render a declaration of whether, 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 Procedure of the Department of Public Safety as applied by Plaintiffs, according to the Administrative Investigations Manual, pursuant to NRS 289.055.

(46) Render a declaration of whether the Attorney General of the State of Nevada, tand the Attorney General, Public Integrity Office, have violated the Policy and Procedure of the Attorney General as applied by Plaintiffs, according to their internal Investigations Manual, pursuant to NRS 289.055.

(47) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Illegal Search and Seizure, in violation of the Fourth Amendment as contained in the United States Constitution, (US Const., Amend. V).

(48) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Illegal Search and Seizure contained in the Nevada Constitution, (Nev. Const., Art. 18).

(49) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Interstate Commerce as contained in the United States Constitution, (US Const., Art. 1, Section 8, Clause 3).

(50) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Interstate Commerce as contained in the Nevada Constitution, (Nev. Const., Art. 10, Section 2).

(51) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Equal Protection as contained in the United States Constitution, (US Const., Amend. XIV, Section 1).

(52) Render a declaration that NRS 176.0931, NRS 213.1243, and NAC 213.290 violate, both facially and as applied by the Plaintiffs, the prohibition against Equal Protection as contained in the Nevada Constitution, (Nev. Const., Art. 1, Section 2).

(53) Reasonable costs and attorneys fees.

(54) Any further relief the Court deems appropriate.

By: _____
Redacted
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

Affirmation: Pursuant to NRS 239B.030

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

Respectfully dated this _____ day of December, 2011.

By: _____
Affiant Redacted
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

Verification:

STATE OF NEVADA)
WASHOE COUNTY) ss.

Defendant, Redacted, being duly sworn under oath, according to law, deposes and says:

That I am the Defendant in the above-entitled action, that I have written and read the foregoing Motion to Correct an Illegal Sentence; Petition for alternative Writ of Prohibition, based upon a First Amendment Petition; and Petition 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.

By: _____
Redacted
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

SUBSCRIBED and SWORN to before me
This _____ day of December, 2011.

_____
NOTARY PUBLIC in and for said
County and State

TABLE OF EXHIBITS

(12)	Exhibit 12, Letter 2, Lifetime Supervision, A Civil Penalty.	7
(13)	Exhibit 13, Letter in Response from Chair, Connie Bisbee.	2
(14)	Exhibit 14, Letter 3, Response to Chair, Connie Bisbee.	3
(15)	Exhibit 15, Letter 4, Compilation of “Letters to the Legislature”.	29
(16)	Exhibit 16, Letter 5, Appeal of Travel Conditions, Compilation of Letters.	15

Division of Parole and Probation:

(17)	Exhibit 17, Parole and Probation, Compilation of Letters 1, Ethics and Respect, Officer Evans, Officer Howald.	11
(18)	Exhibit 18, Parole and Probation, Compilation of Letters 2, Cooperation, Officer Evans, Sergeant Helgerman, Lieutenant Gover.	5
(19)	Exhibit 19, Parole and Probation, Compilation of Letters 3, Secluded Environment, Officer Tiffany, Sergeant Helgerman.	7
(20)	Exhibit 20, Parole and Probation, Compilation of Letters 4, Illegal Seizure, Officer Howald, Officer Avilla, Sergeant Helgerman.	29
(21)	Exhibit 21, Parole and Probation, Compilation of Letters 5, Junk Mail, Residence Mail, and Opening Letters, Officer Evans.	13
(22)	Exhibit 22, Parole and Probation, Compilation of Letters 6, Cooperation, Office Visits, Officer Evans.	11
(23)	Exhibit 23, Parole and Probation, Compilation of Letters 7, Cooperation, Home Visits, Officer Evans, Officer Ashby, Sergeant Helgerman.	9
(24)	Exhibit 24, Parole and Probation, Compilation of Letters 8, Point of Contact, Officer Tiffany, Sergeant Helgerman.	12
(25)	Exhibit 25, Parole and Probation, Letter 9, Requests for Directives, Officer Tiffany, Sergeant Helgerman, Lieutenant Gover.	11
(26)	Exhibit 26, Parole and Probation, Letter 10, Requests for Violation Reports, Arrest Procedure, Officer Evans.	5

(27) Exhibit 27, Parole and Probation, Letter 11, 3
Denial of Letters for Grievance, Officer Evans, Sergeant Helgerman, Lieutenant Wood.

(28) Exhibit 28, Parole and Probation Letter 11, 2
Halloween Letter, Officer Howald.

Research and Studies:

(29) Exhibit 29, State of Washington, 5
Recidivism, (August 2005).

(30) Exhibit 30, California Report to Governor, 45
Recidivism, (January 2008).

(31) Exhibit 31, State of New York, 11
Recidivism, (2006).

(32) Exhibit 32, State of Arizona, (ADC), 3
Recidivism, (September 1998).

(33) Exhibit 33, States of Maryland, Colorado, Arizona, 3
Recidivism, (2009).

(34) Exhibit 34, Stanford Prison Experiment, (August 1971). 11

(35) Exhibit 35, State of California, 3
Sex Offender Commitment, (July 2011).