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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PATRICK STEPHEN DAVIS,

Plaintiff,

v.

STATE OF NEVADA ET AL.;

Defendants.

Case No.: **3:13-cv-00559-MMD-WGC**

REPLY TO OPPOSITION TO MOTION TO DISMISS

Defendants the State of Nevada, Nevada Board of Parole Commissioners, Nevada Department of Public Safety, Nevada Division of Parole and Probation, Connie Bisbee, James Wright, Bernard Curtis, Claudia Steiber, Natalie Wood, Claudia Cole, Aaron Evans, James Gothan, James Sackett and Nevada Attorney General Catherine Cortez Masto ("Defendants"), through their attorneys, CATHERINE CORTEZ MASTO, Attorney General, and LORI M. STORY, Deputy Attorney General, Reply to Plaintiff's Opposition to the Defendants' Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6).

The Defendants' Reply is based on the above-referenced rule of civil procedure, the attached Points and Authorities and all other papers and pleadings filed in this matter.

I. BACKGROUND

Plaintiff Patrick S. Davis complains against the Defendants based on various directives and events resulting from Plaintiff's status as a sex offender subject to Lifetime Supervision, seeking monetary damages and declaratory and injunctive relief. *Id.* at 114-115.

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Carson City, NV 89711

Plaintiff is a convicted sex offender based on his December of 2003, guilty plea to the charge of Use of Internet to Lure a Child in violation of NRS 201.560. Although he successfully completed his term of probation, he remains subject to lifetime supervision as a sex offender. Complaint (ECF No. 1), p. 6. On October 4, 2013, Plaintiff filed his Civil Rights Complaint.

II. IRRELEVANT HISTORICAL

Initially, Defendants move to strike the Statement of Facts provided in the Complaint, set out as "Examples." The 55 page narrative is not the substance of Plaintiff's claims.

Pursuant to Fed. R. Civ. P. 12(g) any motions allowed under Rule 12 may be joined together in a single motion. Fed. R. Civ. P. 12(f) permits the Court to strike from a pleading "any redundant, immaterial, impertinent, or scandalous matter…." Moreover, the rules of evidence would prohibit the introduction of any evidence to establish the truth of this inflammatory recitation of alleged prior bad acts for lack of relevance. *See,* Fed. R. Evid. 404(a)-(b); NRS 48.045.

Defendants object to any attempt by Plaintiff to employ these facts to support his claims for relief. All actions described in the Examples occurred before October 4, 2011, and fall outside the statute of limitations imposed for § 1983 claims. Plaintiff must rely only upon relevant, timely facts to support the claims he brings. Fed. R. Evid. 402. Plaintiff cannot rely on purported misdeed by unnamed defendants which allegedly occurred at a time long-passed to bolster the weakness of the facts he relevant the claims he is attempting to prosecute through his Complaint.

The Court should strike the Statement of Facts from the Complaint as redundant, immaterial and inflammatory.

III. LEGAL STANDARD FOR MOTION TO DISMISS

In considering a motion to dismiss, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). A dismissal under Federal Rule of Civil Procedure 12(b)(6) is essentially a ruling on a question of law. *North Star International v.*

Arizona Corp. Comm., 720 F.2d 578, 580 (9th Cir. 1983). To grant dismissal, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet v. Wand International Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). Dismissal can be based on the lack of a cognizable theory or the absence of sufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984).

Plaintiff's Complaint should be dismissed because: 1) The State of Nevada, its agencies and Officials are immune from suit in federal court; 2) Plaintiff failed to state claims against Defendants Cortez- Masto, Bisbee, Wright and Curtis; 3) Plaintiff's claims against Defendants Evans, Gothan, Sackett, Steiber, Cole and Wood are barred by qualified immunity or by the statute of limitations; 4) Plaintiff failed to plead the necessary elements of an Equal Protection cause of action; 5) Plaintiff failed to plead the necessary elements of an Eighth Amendment Cruel and Unusual Punishment cause of action; 6) Plaintiff failed to plead the necessary elements of a claim under the First Amendment.

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IV. REBUTTAL

A. Section 1983 and Eleventh Amendment Immunity.

The State of Nevada, the Nevada Board of Parole Commissioners, the Nevada Department of Public Safety and the Nevada Division of Parole and Probation are not "persons" for purposes of § 1983. *See, Arizonans for Official English v. Arizona*, 520 U.S. 43, 69, 117 S.Ct. 1055, 1069 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 68, 71, 109 S.Ct 2304, 23 (1989). Thus, they are not properly named as defendants in this § 1983 action in this federal court.

These defendants also enjoy immunity from suit in federal court under the Eleventh Amendment of the U.S. Constitution. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Pittman v. Oregon Employment Dep't*, 509 F.3d 1065, 1071 (9th Cir. 2001); *see, Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057 (1978). The State of Nevada does not waive its immunity from suit conferred under the Eleventh Amendment of the United States Constitution. NRS 41.031(3).

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Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

This immunity also bars suits against state agencies. *See, P.R. Aqueduct & Sewer Auth.v. Metchalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 687 (1993); *Welch v. Texas Dept. of Highways and Public Transportati*on, 483 U.S. 468, 480, 107 S.Ct. 2941, 2949-2950 (1987) (plurality opinion); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th cir. 1997); *O'Grady-Sullivan v. State of Nevada,* 2011 WL 6301047 *3 (D.Nev. 2011) (Plaintiff's § 1983 claims against the Nevada Department of Public Safety and the Nevada Highway Patrol are dismissed because these are state agencies and state agencies are not persons under § 1983).

Plaintiff's suggestion that these defendants are named for purposes of declaratory and injunctive relief pursuant to NRS 30.130 is unavailing. This provision addresses actions for declaratory or injunctive relief in Nevada state courts and does not nullify the immunity granted by the Eleventh Amendment. Supplemental jurisdiction is not available where there is no original federal jurisdiction over the defendants that would require them to appear and answer. 28 U.S.C. § 1367 provides in pertinent part:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise in Federal statute, in any civil action of which the district courts have *original jurisdiction*, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such *original jurisdiction* that they form part of the same care of controversy under Article III of the United States Constitution.

Id. Where the defendants are immune from suit in federal court, they cannot be held to answer on supplemental jurisdictional grounds. The Court should dismiss the State of Nevada, the Department of Public Safety and the Nevada Board of Parole Commissioners from this action with prejudice.

B. State Officials as Defendants.

1. Official Capacity.

State officials sued in their official capacity for money damages are not persons for purposes of § 1983. *See, Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24, 117 S.Ct. 1055, 1069-1070 (1997); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007). Naming a person in their official capacity is an alternative way of pleading an action against

the entity of which that person is an officer. *See, Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099 (1985); *see also, Holley v. Cal. Dep't of Corr.*, 599 F.3d 1108, 111 (9th Cir. 2010) (treating suit against state officials in their official capacities as a suit against the state of California).

Defendants Jim Wright and Bernie Curtis act in supervisory roles as the head of their state agencies, the Nevada Department of Public Safety and the Nevada Department of Parole and Probation, respectively. Defendant Connie Bisbee is the Chairman of the Nevada Board of Parole Commissioners and she is appointed by the Governor. NRS 213.108(3). Under *Graham*, these defendants are immune from suit in their official capacities. 473 U.S. at 166. Defendants point out that, in his arguments opposing dismissal, Plaintiff fails to differentiate among the various defendants he has named in his various arguments. His failure to do so should be construed as an attempt to obfuscate the facts. The lack of specifics also diminishes the strength of his arguments. While claims against other defendants in their official capacity may be legally appropriate, in this instance, Plaintiff fails to show how or why Defendants Cortez Masto, Wright, Curtis or Bisbee are appropriate defendants, even for purposes of injunctive or declaratory relief. Moreover, the Complaint is devoid of facts to show that these individuals were in any way complicit in the alleged violations of Plaintiff's claimed rights.

2. Personal Capacity.

To name a state official as a defendant in a civil rights action in his or her personal capacity, the official must have been the proximate cause of the injury, because no state agency can be held liable under § 1983 on a *respondeat superior* theory. *Ashcroft v. Iqubal*, 556 U.S. 662, 676, 129 S.Ct. 1937 (2009); *Robertson v. Sichel,* 127 U.S. 507, 515–516, 8 S.Ct. 1286 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"); *see, Rizzo v. Goode*, 423 U.S. 362, 365-66, 96 S.Ct. 598, 602 (1976)

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555 Wright Way
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(The federal court has no legal power to "inject itself into the internal disciplinary affairs of [] state agenc[ies]).[1]

The complaint does not contain allegations that James Wright, Bernie Curtis or Connie Bisbee had been directly involved or personally aware of the events of which Plaintiff complains. Rather, Plaintiff alleges that other defendants failed to follow policies and procedures in effecting his Lifetime Supervision and the arrest that occurred on September 7, 2011.[2] Plaintiff's single reference to Director Wright and Division Chief Curtis in the Eighth Cause of Action merely identifies them as part of the DPS and the P&P in a bald assertion of conspiracy. Such bald, vague and conclusory allegations of official participation are not sufficient to overcome this motion to dismiss. *Ivey v. Bd. Of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *see also, Jones v. Cmty. Redev. Agency,* 733 F.2e 646, 649 (9th Cir. 1984) (finding conclusory allegations, without factual support, insufficient to state a claim under § 1983). Defendant Catherine Cortez Masto, the Attorney General for the State of Nevada is not mentioned anywhere within the body of the complaint. Defendants Cortez Masto, Wright, Curtis and Bisbee should be dismissed from this action.

C. Statute of Limitations.

The statute of limitations for bringing a civil rights action in Nevada is two years. *See, Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam) (citing NRS 11.190(4)(c), (e). In the First Cause of Action, Plaintiff alleges that his Fifth and Sixth Amendment rights were violated by Defendants Evans, Sackett and Gothan during a polygraph proceeding which was conducted on September 7, 2011. The First Cause of Action and all related Claims for Relief refer to acts that occurred on or before September 7, 2011, more than two years before the filing of the instant lawsuit on October 4, 2013. These claims and allegations are, therefore, untimely and should be dismissed.

[1] Plaintiff's reliance on cases such as *Monroe v. Pape*, 365 U.S. 167, 172 (1961) and *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) cannot be persuasive, where those cases have been explicitly or implicitly overruled by subsequent law. *See, e.g., Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2036 (1978); *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984).

[2] The implication of this allegation is that the defendant -officials, Wright, Curtis and Bisbee, had formulated proper policies, but that other defendants failed to follow them. This implication supports dismissal of these defendants.

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Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

D. Qualified Immunity.

Defendants are entitled to qualified immunity from the clams alleged in this complaint. Qualified Immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that is clearly established at the time of the challenged conduct." *Reichle v. Howard*, ____ U.S. _____, 132 S.Ct. 2088, 2093 (2012). This is an immunity from suit, not a mere defense to liability. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 815 (2009). It is designed to "ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Id*. *quoting Anderson v. Creighton*, 483 U.S. 635, 640, n.2, 107 S.Ct. 3034 (1987).

Assessing whether an official is entitled to qualified immunity is a two prong inquiry. The court may examine either prong first, considering the circumstances. *Pearson v. Callahan*, 555 U.S. at 236, 129 S.Ct. 808. The court must ask whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). And, the court must determine whether the right was clearly established at the time the alleged violation occurred. *Pearson*, 555 U.S. at 231, 129 S.Ct. at 815. To be "clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034 (internal quotation marks omitted). The "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, ___ U.S. ____, 131 S.Ct. 2074, 2083 (2011).

Plaintiff complains that the Defendants violated his rights (1) when they arrested him for declaring that he would refuse to answer questions if they were posed to him during a polygraph mandated by the conditions of his Lifetime Supervision and for his blatant lack of cooperation in that process, (2) when they searched his residence and personal items in the common areas of the residence without a search warrant and without "reasonable cause," (3) when they imposed a curfew on him for Halloween in 2011, and (4) when they directed him to cease his in appropriate correspondence to the Parole Board.

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

Plaintiff's Complaint and in his Opposition to the Motion to Dismiss are premised on the presumption that his Lifetime Supervision is a "civil sentence" and despite this "civil sentence," Nevada law and his signed agreement to the terms of his Lifetime Supervision he is entitled to the full panoply of Constitutional rights and protections. This premise is unjustified given the existing legal precedent in 2011.

In 2002, the Nevada Supreme Court considered whether the imposition of Lifetime Supervision was part of a criminal sentence requiring that a defendant intending to plead guilty to a sex offense be fully informed of the Lifetime Supervision requirement as part of his sentence. *Palmer v. State*, 118 Nev. 823, 830, 59 P. 3d 1192, 1196 (Nev. 2002).

> Despite some indications that the Nevada Legislature intended lifetime supervision to be a civil law enforcement tool, we conclude that, on balance, it is sufficiently punitive in nature and effect as to render it a direct penal consequence of a guilty plea, a consequence of which the defendant must be advised. 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.

Id.

Thus, Plaintiff is not serving a civil sentence, he is serving a criminal sentence of Lifetime Supervision through which he is subject to criminal prosecution for violations of the conditions of his supervision.

1. Arrest for Failure to Cooperate and Refusing to Take Polygraph – Second Cause of Action.

Plaintiff alleges that his Fourth and Fifth Amendment rights were violated by Defendants Sackett, Evans and Gothan when they arrested him for a violation of the conditions of his Lifetime Supervision.

> To establish his Fifth Amendment claim, [Plaintiff] must prove two things: (1) that the testimony desired by the government carried the risk of incrimination, and (2) that the penalty he suffered amounted to compulsion.

United States v. Antelope, 395 F.3d 1128, 1134 (9th Cir. 2005) (citations omitted). In *Antelope*, the probationer (Antelope) was convicted of possession of child pornography and, as a condition of his probation, he was required to successfully complete a sexual abuse

treatment program which included the requirement that he provide full sexual history and submit to polygraph examination to confirm the truth of the sexual history given. *Id.* at 1130. Antelope refused to submit the history absent assurances that his revelations would not later subject him to criminal prosecution. *Id.* As a result of his refusal, Antelope's conditional release was revoked and he was returned to prison. *Id.* The Ninth Circuit Court of Appeals considered his Fifth Amendment claim and held that Antelope could properly invoke his right against self-incrimination because things he might reveal in his sexual abuse therapy could incriminate him under the state law that required his therapist to report Antelope's sex crimes against minors. The court noted that the risk of incrimination was real and present and that the revocation of his probation was sufficient as an act of compulsion. *Id.*

Plaintiff alleges that after approximately six hours of Plaintiff delaying the polygraph proceedings by objecting to the questions to be asked, asserting his right to have counsel present during "questioning" and insisting he would not respond to several of the proposed questions, Defendants Sackett, Evans and Gothan terminated the examination and, exercising their discretion as supervising officers, directed Plaintiff to present himself to the main P&P office in Reno where he was subsequently arrested for failing to cooperate with P&P officers.

Plaintiff's actions violated the requirement that he submit to a polygraph examination upon his supervising officer's request. *Id.* at 58, lines 12-13. Plaintiff also violated the condition that he cooperate with his supervising officer at all times. Thus, the arrest was for a violation of the conditions of his supervised release. "[T]he Constitution offers no protection to an individual who, for example, asserts a general intent to refuse to answer any questions at a court hearing, *Antelope*, 395 F.3d at 1134, *citing United States v. Pierce*, 561 F.2de 735, 741-42 (9th Cir. 1977), or in circumstances where the statement are "highly unlikely" to incriminate. *Seattle Times Co. v. United States Dist. Court*, 845 F.2d 1513, 1520 (9th Cir. 1988)(Reinhardt, J., concurring). "[I]maginary and insubstantial hazards of incrimination…[do not] support a Fifth Amendment claim." *Minor v. U.S.*, 396 U.S. 87, 98, 90 S.Ct. 284 (1969).

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Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

Plaintiff offers nothing to suggest that he was threatened criminal charges based on his responses in the polygraph examination. Neither does he suggest that he was threatened with incarceration if his responses revealed criminal behavior. There is no Nevada law that would compel the examiner or the Supervising Officers to report him or charge him for conduct that might be revealed through his responses.

Plaintiff also asserts that the polygraph examiner was provided with a consent form with notice of his Fifth Amendment rights during the pre-polygraph process as required by NRS 648.187. He argues this notice proves he had the right to invoke the Fifth Amendment during the polygraph. Chapter 684 regulates the conduct of "Private Investigators, Private Patrol Officers, Polygraphic Examiners, Process Servers, Repossessors and Dog Handlers." *See,* NRS Chapter 684. The specific provisions related to polygraph examiners, NRS 684.183 through 684.199, impose obligations on the polygraph examiner, particularly if the results of the polygraph are to be used as evidence in a court proceeding, and the directive relates solely to the examiner's performance as a licensed professional.[3] It in no way alters or enhances Plaintiff's legal status as a Convicted Sex Offender subject to Lifetime Supervision. Plaintiff has misconstrued the statute and his claim must fail as a matter of law.

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

In September of 2011, Plaintiff had no clearly established right to refuse to participate in the required polygraph examination given that there was no threat of actual incrimination. Neither did he have a clearly established right to refuse to cooperate with the instructions and

[3] The statute provides:
Person examined must be advised of right to refuse to answer incriminating or degrading questions
Except in the case of an investigation of its own affairs conducted by a law enforcement agency, an examiner or intern shall, before beginning a polygraphic examination, inform the person examined that he or she has the right to refuse to answer any questions if the answer would tend to incriminate or degrade the person.

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

requests of his Supervising Officers. When Defendants Evans and Gothan, with the procedurally required approval of their supervising officers, Cole, Wood and Steiber, determined to arrest Plaintiff, their actions were taken in a good faith belief that they were entitled to make such an arrest under the conditions imposed on Plaintiff as part of his Lifetime Supervision.[4] *See,* NRS 213.1243(3); *Palmer*, 118 Nev. at827, 59 P.3d at 1195-97. Defendants Evans, Gothan, Cole, Wood and Steiber are entitled to qualified immunity and the Second Cause of Action and all related claims for relief should be dismissed.

2. Interference with Right to Petition – Fourth Cause of Action.

Plaintiff contends that Defendant Evans and Defendant Wood violated his First and Fourteenth Amendment rights when they informed him he was not to "write any more letters to the Division of Parole and Probation concerning any issues that Plaintiff had with his conditions, the polygraph, Policy and Procedure, or answer to any questions that he might pose." Complaint (ECF No.1), p. 72. Plaintiff further complains that the Parole Board refused to hear his petitions for modification to the terms of his conditions without the support of his Supervising Officers. Plaintiff was not foreclosed from petitioning for change. Rather, he was required to enlist the support of his Supervising Officers.

> "[P]robationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free." *United States v. Consuelo-Gonzalez,* 521 F.2d 259, 265 (9th Cir.1975) (en banc).... To determine whether conditions of supervised release impermissibly infringe upon a probationer's rights, a reviewing court must inquire "whether the limitation[ ][is] primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." *Id.* at 262 n. 14.

United States v. Bee, 162 F.3d 1232, 1234-35 (9th Cir. 1998). As argued, ***supra***. Plaintiff is not serving a civil sentence, but continues serving his criminal sentence of Lifetime Supervised Release. Thus, it is necessary and appropriate for the conditions of his release to serve the interests of his rehabilitation and public safety. Requiring him to obtain the support

[4] Contrary to Plaintiff's assertion in the Opposition brief, Defendants do not admit to any of the allegations set out in the Complaint. All purported admissions made in the Motion to Dismiss or in this Reply are derived from allegations in Plaintiff's Complaint and are treated as true solely for the purposes of this Motion pursuant to Fed. R. Civ. P. 12(b)(6).

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

of the officers who know him best, who work with him on a daily basis, and who understand his mindset and motivations, as well as anyone might, before considering petitions for modification of conditions of release or supervision is not an abuse of discretion and is not a violation of the Plaintiff's First Amendment rights to petition for redress. Procedural requirements are necessary and common in judicial and quasi-judicial proceedings. *See, e.g.* Federal Rules of Civil Procedure, Local Rules of Practice of District of Nevada.

The directive to discontinue his correspondence to the Parole Board provided Plaintiff notice that Defendants Evans and Woods did not support Plaintiff's efforts in harassing the Parole Board or in seeking modification of his supervision conditions. Plaintiff has not shown that the Defendants' actions to limit or discourage Plaintiff's ongoing and contentious correspondence with the Parole Board violated his Constitutional rights. The Defendants' actions were reasonably taken in support of the policies of the Parole Board and was reasonably intended to effectively supervise Plaintiff and to diffuse the harassing nature of Plaintiff's correspondence and petitions to the Board of Parole Commissioners.[5] Defendants Evans and Woods are entitled to qualified immunity on this cause of action. The Fourth Cause of Action and all related claims for relief should be dismissed.

3. Curfew – Fifth Cause of Action.

Plaintiff bases his opposition to dismissal of this claim on his contention that he is not a probationer or parolee subject to limitations on his civil rights and protections because his Lifetime Supervision is different. Opposition to Motion to Dismiss (Oppo.) pp. 12-13. Defendants agree that the Nevada Supreme Court determined in *Palmer* that Lifetime Supervision is different from probation. However, Defendants and the Nevada Supreme Court disagree with Plaintiff about the nature of the difference. In fact, the state high court did not find that the purported civil sentence provided fewer constraints or collateral consequences from the criminal conviction, but rather that it created perhaps greater consequences because

[5] In his Opposition to the Motion to Dismiss, Plaintiff has mutated his Fourth Cause of Action from a claim that the Board has refused to entertain his petitions for modification without the support of his Supervising Officers to a claim that the Supervising Officers, themselves, have flatly refused to entertain any of his questions, concerns, or requests. Defendants cannot be expected to defend against a moving target and the Court should take the Complaint as it is pled, not as it is expanded in Plaintiff's brief.

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

it allowed for new felony charges resulting from a violation of the conditions of that supervised release. *Palmer*, 118 Nev. at 829-830, 59 P.3d at 1196.

Contrary to his assertions otherwise, Plaintiff is, in fact, still serving a continuing criminal sentence imposed at the time he entered his guilty plea to the crime of Luring a Child. *See, Palmer*, 118 Nev. at, 830. In fact, "[l]ifetime 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." *Id*. at 1196. As recognized by the Nevada Supreme Court,

> [i]n certain instances, the conditions imposed may limit an offender's right to travel, live or work in a particular place. Additionally those subject to lifetime supervision are often prohibited from engaging in a variety of activities including: (1) having a blood alcohol level over .10; (2) associating with other ex-felons or registered sex offenders or with persons under 18 in a secluded environment; (3) accepting a new job without approval from the Division of Parole and Probation; (4) having a post office box; and (5) being in or near movie theaters, playgrounds or businesses catering primarily to children. Finally, some offenders are required to attend counseling, **abide by a curfew**, **take polygraph examinations**, submit to medical tests for controlled substances, or **allow searched of their persons or property**. In essence, lifetime supervision involved actual monitoring of aspect of the offender's daily life to ensure that conditions deemed necessary to protect the community are satisfied.

Palmer, 118 Nev. at 829, 50 P.2d at 1196 (emphasis added).

Given the known parameters of Lifetime Supervision as defined by the Nevada Supreme Court at the time of the alleged offense, Defendant Evans is entitled to qualified immunity on Plaintiff's claim of a First, Fifth or Fourteenth Amendment violation arising from the imposition of a temporary curfew on Halloween Night.

Evans's actions were in conformity with the intent and spirit of the conditions of Plaintiff's Lifetime Supervision, given that Plaintiff pled guilty to crimes against a child of a sexual nature. Defendant Evans acted with a reasonable belief that his actions in limiting Plaintiff's opportunities to interact inappropriately with young children were in line with the terms and intentions of the conditions of Plaintiff's Lifetime Supervision and in the interest of public safety. Moreover, as acknowledged in the Complaint, the curfew allowed an alternative

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

for Plaintiff's family to participate in the Halloween activities by directing him to make himself absent from the home. The curfew could not reasonably be construed to violate Plaintiff's rights as they exist following his conviction. *See, Latta v. Fitzharris,* 521 F.2d 246, 249 (9th Cir.1975) (*en banc*) (plurality opinion) (parolees and other conditional releases are not entitled to the full panoply of rights and protections possessed by the general public). This Cause of Action and all related claims for relief should be dismissed.

4. Search – Seventh Cause of Action.

Plaintiff acknowledges that he is a convicted sex offender subject to Lifetime Supervision by the Nevada Division of Parole and Probation pursuant to Nevada Revised Statute (NRS) §§ 213.1095(9) and 213.1096(3). Complaint (ECF No.1), p. 6, lines 12-17; p. 6, lines 19-21. The terms of the supervision were made clear to Plaintiff before his release from parole as required. *Palmer v. State*, 118 Nev. at 827, 59 P.3d at 1194-95 ("Before the expiration of a term of imprisonment, parole or probation, the sex offender receives written notice of the particular conditions of his lifetime supervision, as well as an explanation of those conditions from a parole and probation officer.") Failure to abide by the conditions of lifetime supervision is a Category B felony punishable by a prison term of one to six years and a fine of up to $5,000.00. *Id.*, NRS 213.1243(8).

Under *Palmer* and Nevada statutes, it was reasonable for the Defendants to believe a search of Plaintiff's residence and items in that residence which might reasonably be accessed by Plaintiff was proper and constitutional. *Id.* at 84, lines 8-10. Given the alleged facts, Plaintiff has not stated a violation of his constitutional rights when Defendant Evans "searched" a cell phone found lying in the common area of Plaintiff's residence to ensure that the phone was password protected, as required by Plaintiff's conditions of supervision.[6] Neither was the search of the refrigerator unreasonable given Defendant Evans's understanding of the law and Plaintiff's legal status as a subject of Lifetime Supervision.[7]

[6] The purported search is described as turning the phone on to ensure that it was password protected. The Defendant is not alleged to have accessed the contents of the phone or to have reviewed its call or search histories. *See, generally* Complaint, pp. 81-85.

[7] This search is alleged to have consisted of the officer opening the refrigerator and peering inside. Complaint, p. 83.

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555 Wright Way
Carson City, NV 89711

As argued above, Plaintiff's status subjects him to searches without "reasonable cause." Moreover, his arguments of a reasonable expectation of privacy must be discounted given the fact and conditions of his Lifetime Supervision. His reliance on cases such as *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979) and *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975) are not forthcoming or apropos. The circumstances of a search of an unknown, unsupervised, free citizen's automobile during a traffic stop made without cause or suspicion cannot be reasonably or rationally compared to the search of Plaintiff's wife's phone and his refrigerator complained of here. Plaintiff pled guilty to the sex offense charged and submitted himself to the criminal sentence it entailed, including the impingements on his freedoms created by the conditions of the required Lifetime Supervision.

The Seventh Cause of Action does not present a violation of Plaintiff's constitutional rights as he has no expectation of privacy in his personal residence given the terms of his Supervision. *See, Palmer*, 118 Nev. 823, 829, 59 P.3d 1196. Defendant Evans acted in good faith in the performance of his duties as Plaintiff's Supervising Officer and he is entitled to qualified immunity against this claim.

5. Search Policy – Eighth Cause of Action.

A policy that permits warrantless, suspicionless searches, as alleged in the Eighth Cause of Action, does not violate a parolee's or probationer's Fourth Amendment rights. *See, Samson v. California,* 547 U.S. 843, 857 (2006); *United States v. Betts,* 511 F.3d 872, 876 (9th Cir. 2007) (applying rule to people on supervised release). Plaintiff's sentence of Lifetime Supervision also subjects him and his household to such intrusions without suspicion. *Palmer*, 118 Nev. at 829, 59 P.3d at 1196. Given these facts, Plaintiff cannot show that Defendants DPS, P&P, Wright, Curtis, or Evans violated his Constitutional rights by implementing or following the policy which permitted such searches.[8]

Moreover, Plaintiff's bald suggestion that he was entitled to due process before the imposition of the terms of his supervision is a non-starter. Plaintiff received all the requisite

[8] Plaintiff does not allege that the policy violates his rights, directly. Rather he alleges that the policy violates a condition of his Lifetime Supervision which were imposed by the Parole Board. Complaint (ECF No. 1) P. 87, lines 12-15. He further alleges this violates state law.

due process during his criminal proceedings and sentencing when he was have been fully informed that he would be subject to Lifetime Supervision with conditions such as those of which he now complains. The Eighth Cause of Action does not state a constitutional violation. The Eighth Cause of Action and all related claims for relief should be dismissed as the named Defendants are entitled to qualified immunity for their actions.

E. Standing.

Defendants argue that Plaintiff lacks standing to bring claims based on purported injury to others' rights or which are speculative in nature. Plaintiff argues that he has met the requirements to support his standing to bring the claims in his Complaint as his claims are not speculative because he is subject to imminent invasion of his legally protected Fourth Amendment right…." Oppo. at 17.

This argument must fail in light of *Palmer* and the fact that Plaintiff's Fourth Amendment rights have been significantly abrogated by the fact of his guilty plea and conviction for a sex offense and the concomitant imposition of Lifetime Supervision as part of his punishment for that crime. *See, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). Plaintiff cannot state that he has suffered an injury in fact, based on possible future searches. He lost his right to object given the terms of his Lifetime Supervision.

Plaintiff lacks standing to complain about injuries suffered only by others. *Singleton v. Wulff*, 428 U.S. 106, 113, 96 S. Ct. 2868, 2874 (1976); *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034 (1953); *see also, Flast v. Cohen*, 392 U.S. 83, 99 n. 20, 88 S.Ct. 1942, 1952 (1968); *McGowan v. Maryland*, 366 U.S. 420, 429, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961). The claims raised in the Seventh Cause of Action are not his to raise. The alleged unreasonable search of a cell phone belonging to his wife cannot be claimed as a violation of Plaintiff's rights.

In opposition to dismissal and contrary to his affirmative representation in the original complaint that his wife and daughter are not parties to the action, Plaintiff suggests that he will seek permissive joinder of these individuals as party complainants. However, as of the date of this writing, no joinder has occurred. Until such joinder is made, if it is offered and permitted

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

under the rule, the Court should dismiss any claims raised by Plaintiff for alleged violations of the rights of others who are not presently a party to the action.

As to Plaintiff's Ninth Cause of Action which claims a violation of his constitutional right to travel as guaranteed by the First and Fourteenth Amendments based on the alleged prospective denial of his request to be allowed to travel frequently for work, Plaintiff offers no opposition to dismissal. Because Plaintiff lacks standing to complain about the future economic harm to his employer, *Barrows,* 346 U.S. at 255, 73 S.Ct. at 1034; *McGowan,* 366 U.S. at 429, 81 S.Ct. at 1106, particularly those that are speculative. *Aetna Life Insurance Co. of Harford, Conn.,* 300 U.S. at 240, 57 S.Ct at 463. The Ninth Cause of Action and any related claims for relief should be dismissed.

F. Equal Protection.

In opposing dismissal of his Equal Protection claims, Plaintiff asserts that he is a "class of one" because he has been "victimized by state or local officials" and he has no traditionally recognized Equal Protection claims, citing to *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000). Under *Willowbrook* any claim for an equal protection violation can be made by a class of one if the plaintiff alleges that he or she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.* at 564, 120 S.Ct. at 1074.

In the Fifth and Sixth Causes of Action (curfew claims), Plaintiff claims that the Defendants violated his right to equal protection of the law by imposing a curfew on him for Halloween night. Although not set out in the Complaint, Plaintiff now argues that the "Nevada Statutes as applied"…" improperly invade a fundamental right" because he has had his "fundamental rights"… "restored to him and he is serving a civil sentence." Oppo. at 19.

First, Defendants note that Plaintiff does not identify any particular Nevada statute in the Fifth or Sixth Causes of Action to which he might be referring in this argument. Second, as argued numerous times by Defendants, Plaintiff has not had his rights restored and he is not serving a civil sentence. He continues to serve his criminal sentence of Lifetime Supervision, as imposed at his sentencing. Third, the application of a curfew to Plaintiff on the

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

single night of Halloween cannot be described as being anything less than a restraint that is narrowly tailored to serve the "compelling government interest" of preserving public safety generally and specifically the security of young children in their own neighborhoods. The curfew was imposed against Plaintiff to prevent opportunities for Plaintiff to repeat his offense by providing him direct and unsupervised access to young children. *See, Palmer*, 118 Nev. at 827-828 ("Statements of key legislative leaders indicate that the [sex offender Supervision] legislation was intended to create a 'serious civil penalt[y]' to oversee 'dangerous sexual predators, people with a high degree of likelihood of recidivism.'")

G. Eighth Amendment.

In his Opposition to the Motion to Dismiss, Plaintiff stipulates to the dismissal of any claim of an Eighth Amendment violation. The Court should accept this stipulation and dismiss this Claim for Relief.

H. Right to Travel and Right to Redress.

Plaintiff alleges in his Tenth Cause of Action that Defendants have violated his First and Fourteenth Amendment rights because his request to modify the condition of his Lifetime Supervision limiting his right to travel was improperly denied. In opposing dismissal, Plaintiff argues that he contests the Defendants authority to limit his right to travel because he has been denied due process in the decision-making. He claims he is entitled to proper notice, his presence at a hearing with counsel and with finding of fact that he poses a danger.

Plaintiff fails to state a claim for relief. As previously argued, as a person subject to supervision by the P&P, Plaintiff's constitutional rights are significantly impinged in the interests of public safety. *Latta,* 521 F.2d at 249. Limitation on the travel rights of a convicted sex offender is logically related to an important government interest – protecting its citizens, particularly its children by allowing officials to keep close watch on its known predators.

Where Plaintiff's right to travel was limited by the fact of his criminal conviction and resulting Lifetime Supervision, which was obtained by means of a proper criminal proceeding and guilty plea, he cannot now contend that he did not receive the process that was due before his rights were limited.

Attorney General's Office
Department of DMV/DPS
555 Wright Way
Carson City, NV 89711

V. CONCLUSION

As argued in the Motion to Dismiss and supported in this Reply, the Court should grant dismissal of this Complaint because: (1) it is brought against improper defendants, (2) it seeks redress from defendants who are immune from suit, (3) it raises claims that are too old or for which there exists no standing to complain, and (4) it fails to state claims for which relief may be granted.

Moreover, Defendant should not be granted leave to amend the Complaint where his original representations of fact are contrary to the legal claims raised or contradict specific representations made in the original Complaint as to the true parties in interest.

DATED this 4th day of December, 2013.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Lori M. Story
LORI M. STORY
Deputy Attorney General

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this date I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, addressed to:

PATRICK S. DAVIS
REDACTED
SPARKS, NEVADA 89431

DATED this 4th day of December, 2013.

/s/ Janice M. Riherd
JANICE M. RIHERD
An Employee of the State of Nevada

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