Patrick S. Davis
Redacted
Sparks, NV 89431
(775) Redacted
Plaintiff in Proper Person

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PATRICK STEPHEN DAVIS Plaintiff, vs. STATE OF NEVADA ET AL; Defendants	))))))	Case No. 3:13-CV-00559-MMD-WGC **OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

COMES NOW the Plaintiff, and opposes Defendants Motion to Dismiss for Failure to State a Claim filed pursuant to Fed. R. Civ. P. 12(b)(6), and respectfully requests the Court to deny the Motion in its entirety. This Response is based on Fed. R. Civ. P. 12(b)(6); 8(a); 15(1)(b); 15(2); the attached Memorandum of Points and Authorities and all other papers and pleadings filed therein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff brings this action against Defendants based on various statutes, directives, Policy and Procedure, custom and usage, and occurrences resulting from his status as an offender serving the **civil** sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290. He has discharged all criminal obligations to the State upon completion of his criminal sentence. Plaintiff alleges violations of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the US Constitution, and includes the same violations under sections of the Nevada Constitution. Plaintiff further claims violations of 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 and state and federal laws. Plaintiff seeks monetary damages including compensatory, punitive and exemplary damages in an amount of at least $100,000.00 per applicable claim under 42 U.S.C. 1983. Plaintiff further seeks declaratory and injunctive relief under 42 U.S.C. 1983 per appropriate claim for relief, and under 28 U.S.C. §§ 1331 and 2201 for

other claims of relief. In addition, Plaintiff prays for relief based on such other and further relief as the Court deems just and proper, in order to serve the interests of judicial economy.

II. STATEMENT OF FACTS

Plaintiff restates his Statement of the Facts as listed in the original complaint (ECF No. 1) on page 6-7, ¶ 25-36 and incorporates them herein by reference. The Statement of the Facts is not set out in "Examples" as described by Defendants. It actually precedes the Common Allegations-(Prior History exhibiting a Pattern of Behavior) section where "Examples" are listed starting on page 7-55, ¶ 37-289. All constitutional rights, privileges and immunities have been returned to Plaintiff under Court order on or about May 6, 2008 by Judge Polaha, District Court Judge of the Second Judicial District in and for the County of Washoe except those identified and withheld by law; to be granted even while serving his civil sentence of Lifetime Supervision.

III. LEGAL STANDARD FOR DENYING A MOTION TO DISMISS

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). Rule 12(b)(6) is read in conjunction with Federal Rule of Civil Procedure Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6) motion, the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994), Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and the court must draw all reasonable inferences in plaintiff's favor. *Twombly*, at 547. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556). The issue on a motion to dismiss for failure to state a claim "is not whether the [claimant] will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims" asserted. Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (quoting Scheuer v. Rhodes, 416, U.S. 232, 236 (1974)). The court interprets pro se pleadings liberally. Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir.1987), Haines v. Kerner, 404 U.S. 519, 520 (1972).

Rule 12(b)(6) motions are disfavored in the law, and a court will rarely encounter

circumstances that justify granting them. Mahone v. Addicks Utility District of Harris County, 836 F.2d 921, 926 (5th Cir. 1988). A court may dismiss a claim only when it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations found in the complaint. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A motion to dismiss should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him or her to relief. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1986).

Plaintiffs' constitutional allegations are clear in the Complaint, and Defendants arguments misconstrues the standards for dismissal under Rule 12(b)(6), that is, the complaint must contain … allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995). Plaintiffs' pleadings "contain something more … than … a statement of facts that merely creates a suspicion [of] a legally cognizable right of action" and raises a right to relief "above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The Plaintiff has clearly shown many constitutionally illegal customs and policies, both on their face and as applied. Defendants do not dispute, having these policies. Plaintiff has clearly met this burden in his Complaint; therefore he is entitled to move forward. Certainly, a plaintiff must generally "identify a policy or custom that gave rise to the plaintiff's injury *before he may prevail*." Mack v. City of Abilene, 461 F.3d 547 (5th Cir. 2006) (citing Canton v. Harris, 489 U.S. 378, 389 (1989)).

The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction ... any court of the United States….may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). In the context of the Act, the phrase "case of actual controversy ... refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." Medlmmune. Inc. v. Genentech. Inc., 549 U.S. 118, 128 (2007) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,240 (1937)). In order for a court to exercise jurisdiction, the facts alleged in a case must "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 127 (quoting Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270,273 (1941)

V. ARGUMENT

Defendants Motion to Dismiss for Failure to State a Claim is Untimely Filed

Defendants Motion to Dismiss was untimely filed pursuant to Fed. R. Civ. P. 12(1)(i). A defendant must serve an answer (i) "within 21 days after being served with the summons or complaint." Plaintiff respectfully requests the Court to deny the Defendants Motion to Dismiss for failure to state a claim in its entirety due to being untimely filed. Defendants did request an extension of time in a letter dated October 18, 2013, off of an allegation of insufficient service according to a Nevada Statute, which they discussed with Plaintiff. Plaintiff was willing to stipulate an extra 5 days to the Defendants upon notification to him of said statute, in a reply letter dated October 29, 2013, which Defendants declined to do. Plaintiff alleges that Defendants were cognizant of the date to file an answer, and Plaintiff did not stipulate to an extra 5 days.

Defendants Motion to Strike is unsupported by law, facts or argument

Defendants move to strike the Statement of the Facts in the original complaint listed on page 6-7, ¶ 25-36 as irrelevant, untimely and inflammatory. A move to strike cannot be presented under Fed. R. Civ. P. 12(b)(6), it must be based on Fed. R. Civ. P. 12(f). On this basis alone, the Court should deny the request. In addition, an allegation that pleads no legal support is simply an unsupported allegation. "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief", People v. Karis, 46 Cal. 3d 612, 758 P.2d 1189, (1988), as cited in People v. Duvall, 9 Cal. 4th 464, 886 P.2d 1252, (1995)).

Defendant's allege that the Statement of the Facts should be stricken because they are irrelevant, untimely and inflammatory. Assuming that the Statement of Facts include the Common Allegations and Examples, they are certainly relevant because they relate, not only to the legality of the conditions of Lifetime Supervision, a civil sentence, but to how those conditions were applied by Defendants. In fact, Defendants specifically derive their authority from NRS 176.0931, NRS 213.1243, and NAC 213.290, which ordered the Board of Parole Commissioners to promulgate the "program of Lifetime Supervision" by regulation in the Nevada Administrative Code (NAC), which has never been accomplished. Further, Plaintiff is seeking declaratory and injunctive relief which requires that he show that he faces a "real or immediate threat . . . that he will be wronged in a similar way." Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed. 2nd 351 (1992)).

The examples set forth in Plaintiff's complaint show the Defendant's pattern of behavior, which continues to this day, as shown by the facts set forth in each cause of action. It is necessary to show the Defendant's past actions, as well as their current actions, to support Plaintiff's allegations that he will continue to be harmed without this Court's order.

Defendant's also state that Plaintiff's twenty claims for relief do not contain any supporting facts. However, pursuant to FRCP 10(c), and as is common practice, previous facts and circumstances are to be adopted by reference (i.e. repeated, realleged and incorporated by reference). In cases of this magnitude, a claim for relief does not lend itself to a limitation of a single set of circumstances. Rather, while each of Plaintiff's claims for relief is based on a specific set of circumstances (cause of action), the circumstances, themselves, are unconstitutional because of how the conditions were imposed by Defendants in an arbitrary, capricious, and discretionary manner, rather than based on promulgated law, as well as how those conditions are applied each and every day to Plaintiff.

A. Section 1983 and Eleventh Amendment Immunity.

The Eleventh Amendment only bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds of the state," Edelman v. Jordan, 415 U. S. 651, 663 (1974). However, in Ex parte Young, 209 U. S. 123 (1908), the Supreme Court has stated, "it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." Scheuer v. Rhodes, 416 U.S. 232, 237 (1974).

In the instant case, Plaintiff is seeking monetary damages against individual defendants, and in accord with *Ex Parte Young*; and Plaintiff is seeking declaratory and prospective injunctive relief against the Defendants which is permissible in a § 1983 and § 2201 action.

The doctrine of *Ex parte Young* does not apply to a cause of action where a plaintiff seeks damages from the public treasury, however, damages awards against individual defendants in federal courts "are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." 416 U.S. at 238. That is, the Eleventh Amendment does not erect a barrier against suits to impose "individual and personal liability" on state officials under § 1983.

The Supreme Court held that state officials, sued in their individual capacities, are "persons" within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor

are state officers absolutely immune from personal liability under § 1983 solely by virtue of the "official" nature of their acts. Hafer v. Melo, 502 U.S. 21, 29-30 (1991).

Defendants identified as the State of Nevada, the Nevada Attorney General, Catherine Cortez-Masto, the Nevada Board of Parole Commissioners, the Nevada Department of Public Safety, and the Nevada Division of Parole and probation are not being sued under §1983. Thus, whether they are "persons" under § `983 is irrelevant. Rather, they are named Defendants for declaratory and injunctive relief pursuant to NRS 30.130. Plaintiff further seeks supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Moreover, the above named Defendants are parties to the action under 28 U.S.C. §§ 1331 and 2201, making it proper to name these agencies as Defendants. NRS 12.105 states that an agency that is capable of being sued in its own name is capable of being served and being a party to the action. The Defendants Motion to Dismiss based on the Eleventh Amendment should be denied.

1. State Officials as Defendants – Official Capacity.

The State officials named as Defendants should not be dismissed pursuant to §1983 for the same reasons that the state agencies should not be. Plaintiff is not seeking monetary damages for relief, but rather declaratory and prospective injunctive relief.

In *Kentucky* v. *Graham*, 473 U.S. 159 (1985), the Court sought to eliminate lingering confusion about the distinction between personal- and official-capacity suits. The Court emphasized that official-capacity suits "`generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Id.*, at 165 (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690, n. 55 (1978). Suits against state officials in their official capacity therefore should be treated as suits against the State. 473 U.S. at 166. Indeed, when officials sued in this capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. See Fed. Rule Civ. Proc. 25(d)(1). Because the real party in interest in an official capacity suit is the governmental entity and not the named official, "the entity's `policy or custom' must have played a part in the violation of federal law." Graham, supra, at 166 (quoting Monell, supra, at 694). Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage." 42 U. S. C. § 1983. "[A] state official in

his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because `official-capacity actions for prospective relief are not treated as actions against the State' "Graham, 473 U.S. at 167, n. 14). Plaintiff is seeking declaratory and prospective injunctive relief against the Defendants in their official capacity under 42 U.S.C. § 1983, and is further seeking alternative relief pursuant to 28 U.S.C. §§ 1331 and 2201. The Defendants Motion to Dismiss based on State Officials in their official capacity should be denied.

2. State Officials – Personal Capacity.

Personal-capacity suits seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, "on the merits, to establish personal liability in a §1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." Id. at 166. The plaintiff in a personal-capacity suit need not establish a connection to governmental "policy or custom. Officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person".” Id.

Congress provided § 1983 as a method for seeking relief against a state official for a federal constitutional violation. Hearth, Inc. v. Department of Public Welfare, 617 F.2d 381, 382-383 (5th Cir. 1980). Through § 1983, Congress sought "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Monroe v. Pape, 365 U. S. 167, 172 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting "under color of any [state] statute, ordinance, regulation, custom, or usage." § 1983. Congress enacted § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse of it.” Scheuer v. Rhodes, 416 U. S. 232, 243 (1974), (quoting Monroe v.Pape, supra, at 171-172). “Because of that intent, we have held that in § 1983 actions the statutory requirement of action ‘under color of’ state law is just as broad as the Fourteenth Amendment's ‘state action’ requirement.” Lugar v. Edmondson Oil Co., 457 U. S. 922, 929 (1982).

In this action, the Defendants sued individually acted under color of state law when they engaged in the actions which Plaintiff complains violated his constitutional rights. Therefore, it is proper to name the individual defendants, in their personal capacity, based upon the actions they took in their official capacity.

B. Qualified Immunity.

The existence of an affirmative defense will not support a rule 12(b)(6) motion to dismiss for failure to state a claim. Quiller v. Barclays, 727 F. 2d 1067, 1069, (11th Circuit 1984). In considering a defendant's motion to dismiss based on qualified immunity, the district court must examine the complaint to determine "whether under the most favorable version of the facts alleged, defendants' actions violate established law. Bennett v. Parker, 898 F 2d. 1530, (11th Circuit 1990). Public officials performing their duties are shielded from liability so long as their conduct does not breach "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, police officers are entitled to qualified immunity unless "(1) the officers' conduct violates a federal statutory or constitutional right, and (2) the right was clearly established at the time of the conduct, such that (3) an objectively reasonable officer would have understood that the conduct violated that right." Knussman v. Maryland, 272 F.3d 625, 633 (4th Cir. 2001).
The first step in deciding whether the Defendants are entitled to qualified immunity is to determine whether Plaintiff has alleged a violation of a federal statutory or constitutional right. Saucier v. Katz, 533 U.S. 194, 201 (2001); Trulock v. Freeh, 275 F.3d 391, 399 (4th Cir. 2001). Plaintiff invoked his 5th Amendment right which Defendants admit. Whether Plaintiff was arrested for invoking his constitutional right or for some other reason is not the basis for a Motion to Dismiss but rather a summary judgment motion. Plaintiff has alleged that Defendants falsely arrested him for invoking his 5th Amendment right to remain silent, a constitutional right.

The next step in the qualified immunity analysis is to determine whether the right at issue was clearly established at the time of the violation. *Saucier*, 533 U.S. at 201; *Trulock*, 275 F.3d at 400. The focus is on "the right [not] at its most general or abstract level, but at the level of its application to the specific conduct being challenged." Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994); *Knussman*, 272 F.3d at 638. "[O]ur analysis of whether the constitutional right at issue was clearly established must proceed at a high level of particularity. Id. In other words, the critical question is whether it was clearly established that the Defendants were aware of the right in question. The cases cited herein below clearly define that an Officer would have reasonably known that his conduct was violating Plaintiffs constitutional rights, therefore the Defendants' Motion to Dismiss based on qualified immunity should be denied at this juncture.

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

A plaintiff may demonstrate supervisory liability by showing that the defendant participated in violating plaintiff's rights, or that he directed others to violate them, or that he, as the person in charge, had knowledge of and acquiesced in his subordinates' violations. Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir.1995). "A defendant in a [§ 1983] action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988).

Plaintiff demonstrates that defendants were involved in, knew of or acquiesced to defendant agents' alleged misconduct. Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988) (finding heightened pleading standard for evaluating the sufficiency of civil rights complaints is satisfied if the complaint alleges "the specific conduct violating the civil rights at issue, the time and place of the unlawful conduct, and the identity of the responsible officials"), cert. denied, 489 U.S. 1065 (1989). Defendants herein admit that the supervisors Cole, Wood and Stieber knew and approved of Plaintiff's arrest prior to the arrest itself. (Motion to Dismiss, page 8, line 19). The Defendants further identify the individual Officers involved as Evans, Gothan, and Sackett. The Defendants clearly admit that they knew that Plaintiff intended to invoke his Fifth Amendment right and terminated the exam.

This violation of Plaintiff's 5th Amendment right is especially egregious in the instant case when the Defendants present a consent form to the Plaintiff that states that he has the Fifth Amendment right pursuant to NRS 648.187. At all times during the course of the polygraph exam, Plaintiff patiently and compliantly submitted to every stage of the polygraph exam and in no instance stated that he would not finish or submit to the exam. Plaintiff did not delay the exam and had a 1st Amendment right to raise objections and concerns, especially when the actions of the Defendants were directly in violation of the Nevada Revised Statutes. Plaintiff is required to co-operate with his supervising officer at all times, unless the cooperation abrogates his constitutional rights or violates his protections under federal or state law. The Defendants terminated the test, which they admit to doing, and Plaintiff asserts that his arrest was in retaliation of his invocation of his Fifth Amendment right, which was preceded by his appearance at a Nevada Parole Board hearing seeking a definition of "submit", and writing letters regarding the polygraph, other issues, and formal complaints. Defendants did not

terminate the exam and arrest him prior to his statement that he intended to invoke his 5th Amendment right. Six (6) Defendants admit to deciding to arrest Plaintiff which evidences that they violated Plaintiff's constitutional rights which satisfies the conspiracy Cause of Action.

In re Detention of Hawkins, 169 Wash. 2d 796, 238 P.3d 1175, (Washington 2010), the Washington Supreme Court held that the State is prohibited from compelling respondents to SVP commitment proceedings to submit to polygraph examinations, thus confirming that a person cannot be forced to take a sexual history polygraph when the outcome may be used in a pending case. In Jacobsen v. Lindberg, 238 P.3d 129, (Arizona 2010), the Arizona Court of Appeals held that probationers retain the right to invoke their protection against self-incrimination during polygraph examinations, which is consistent with decisions in other jurisdictions where polygraphs continue to be used as an integral part of treatment. The polygraph exam as given in the instant case is not part of any form of treatment at all, in fact, it is a utility polygraph exam.

The 9th Circuit Federal Court of Appeals came to the same conclusion as the Arizona Court of Appeals in a case with nearly identical factual background. United States v. Antelope, 395 F.3d 1128 (9th Circuit 2005). There, the Court held in favor of the right of a sex-offender defendant on supervised release to flatly refuse on Fifth Amendment grounds to participate in a sexual history examination and a polygraph test, both of which were part of court-ordered sex offender treatment. Id. at 1131. In determining Antelope was entitled to refuse these tests, the Court noted that a Fifth Amendment claim has two elements: "(1) that the testimony desired by the government carried the [real and appreciable, not remote, unlikely, or speculative] risk of incrimination….and (2) that the penalty he suffered [for refusing to answer] amounted to compulsion…" Id. at 1134. The Court held the risk that Antelope would incriminate himself was "real and appreciable" because he would not be able to withhold information regarding the past offenses implied by his refusal to comply. Id. at 1135. The Court had no doubt that if Antelope made incriminating admissions, he would be turned over to authorities and his admissions could be used against him; the danger was not "remote, unlikely, or speculative". Id.

The government's purpose in imposing the penalty is the determining factor in deciding whether a "penalty for the refusal to incriminate oneself" amounts to compulsion. Id. at 1137 (citing McKune v. Lile, 536 U.S. 24, 53, 122 S. Ct. 2017, (2002)). "Penalties ... that ... appear, starkly, as government attempts to compel testimony" such as the revocation of Antelope's supervised release to sanction him "for his self-protective silence about conduct that might

constitute other crimes" satisfy the compulsion requirement of the Fifth Amendment privilege analysis. Id. at 1137. This is despite the fact that "the disclosures sought here may serve a valid rehabilitative purpose". Id. at 1138. The Court held "that Antelope's privilege against self-incrimination was violated because Antelope was sentenced to a longer prison term for refusing to comply with [his] treatment program's disclosure requirements." Id.

In Mangarella v. State, 117 Nev. 130, 17 P.3d 989, (2001), the Court upheld the polygraph exam as it was directly tied to the condition regarding drug use. However, in doing so, the Court opined that if the reference to drug use was removed, the statute would be overbroad and vague. Nevertheless, Nevada law enforcement agencies lobbied the Nevada Legislature to do just that, and it did in the statutes addressing standard conditions for parole and probationers. However, there are no statutes relating to conditions for lifetime supervision. In fact, although the legislature directed the Board of Parole Commissioners to promulgate conditions for those on lifetime supervision, it has never done so. Thus, Plaintiff is challenging the condition as overbroad and vague. Plaintiff has clearly established that a reasonable officer should have known his conduct was violating a fundamental constitutional right. The Second Cause of Action and all related claims for relief should not be dismissed against the Defendants.

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

Defendants allege that Officer Evans and Woods simply did not support Plaintiff's efforts for modification of his conditions or other issues and that was the reason they informed him not to write any more letters concerning his conditions, polygraph, policies and procedures. However, Defendants miss the point in that the cause of action is not only against the officers, individually, but also the Board of Parole Commissioners. For clarification, Plaintiff is alleging that the Board of Parole Commissioners is and has violated his 1st amendment rights by refusing to hear any of his concerns unless his supervising officer supports it, regardless of the concern itself, thus denying him any redress for his concerns, violations, etc. Thus, the Policy and Procedure is constitutionally illegal under the 1st and 14th Amendment, as it gives a parole officer the authority to decide "cases and controversies" and provides no right of appeal.

Plaintiff is further alleging that the officers, individually, have and continue to violate his constitutional rights because they have advised him that he cannot write any more letters to them, regardless of the reason, and to do so will be viewed as a violation of his conditions and will be

grounds for his arrest. Thus, his ability to address any issue has been taken away by the individual officers because they refuse to hear any issue, regardless of its gravity.

The Courts have stated that "[T]he 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). "[u]nder 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). In the instant case, the Board has delegated the right to decide the nature or extent of Plaintiff's punishment to the individual officers. After all, if the individual officer doesn't support Plaintiff's concern or request, Plaintiff cannot go to the Board. Similarly, if the officer determines that Plaintiff is not allowed to do something or is required to do something, Plaintiff cannot go to the Board. It is absurd to grant the officer the authority to determine if his or her actions are legal and proper without providing an avenue of appeal to review the determination. This type of authority is non-delegable.

The limitation is therefore of constitutional dimension, deriving from Article III's grant to the Courts 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)). "[D]uties imposed upon the Court cannot be discharged….by the probation officer." United States v. Stuver, 845 F.2d 773, (4th Circuit 1988). Thus, the Fourth Cause of Action against Defendants must stand.

Curfew – Fifth Cause of Action.

The Defendants do not dispute that they have a Policy and Procedure that enforces a curfew. Defendants base its ability to enforce such a curfew on Latta v. Fitzharris, 521 F. 2d 246, 249 (9th Circuit) which states; "paroles and other conditional releases are not entitled to the full panoply of rights and protections possessed by the general public." However, the case cited is inapposite to the instant situation. Plaintiff is not on parole or probation, both of which are criminal in nature. In fact, he has satisfied all of his criminal obligations, is currently serving the civil sentence of lifetime supervision, and thus, is entitled to the full panoply of rights and protections possessed by the general public except for those specifically withheld by statute. Judge Polaha, on or about May 6, 2008, ordered the return of all constitutional rights, privileges and immunities to Plaintiff, even while serving his civil sentence of Lifetime Supervision.

In Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), the Nevada Supreme Court held and definitively stated that Lifetime Supervision "is not a form of parole, it is different", and held

that Lifetime Supervision is a "civil sentence". Defendants' reliance on Latta, in relation to lifetime supervision, is misplaced and erroneous, and causes deprivations of multiple fundamental rights, including the 1st amendment, just as it has in the instant case.

It is not reasonable to impose a parole or probation condition to a person on lifetime supervision because it is different from parole. Thus, an officer who supervises parolees, probationers and civil offenders should reasonably understand the differences and the scope of those differences. The fact that neither the Board of Parole Commissioners nor the Nevada Division of Parole and Probation refuses to acknowledge the difference or train their officers regarding the differences does not bestow qualified immunity upon them.

In Jamgochian v. New Jersey, 928 A.2d 1, (New Jersey 2007), the issue of curfew for an offender on community supervision for life, which is similar to Nevada's Lifetime Supervision sentence, was addressed. In that case, a curfew was imposed upon Jamgochian and he was not allowed to contest it. The Supreme Court stated that "[I]n concluding that the procedures utilized in imposing the curfew were flawed: (a) 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; (b) alternatively, we conclude that the doctrine of fundamental fairness requires more extensive procedures than permitted here; and (c) 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."

It is clear from the above discussion that Defendant Evans is not entitled to qualified immunity for this claim. Thus, Defendants' Motion to Dismiss the Fifth Cause of Action and all related claims for relief should be denied.

2. Search – Seventh Cause of Action; 5. Search Policy – Eighth Cause of Action.

Plaintiff, for purposes of this argument and for judicial economy, consolidates these two sections as Defendants argue similar facts and circumstances as a basis for dismissal. Plaintiff is a convicted offender serving the civil sentence of Lifetime Supervision. His conditions, which were imposed on him without notice, without counsel, without due process, and without any findings of fact, include a search condition. 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). Plaintiff started his sentence of lifetime supervision on or about May 6, 2008. However, prior to his release from probation, on or about April 6, 2008, Officer Lewis of the Division of Parole and Probation, imposed Plaintiff's conditions of lifetime supervision, and required him to accept the conditions under threat of arrest, even though the Board of Parole Commissioners is the only agency, exercising a judicial function, that can impose such conditions pursuant to the Nevada Legislature's direction in SB192 (1995) and NRS 213.1243. In fact, NAC 213.290 requires the Board to hold the imposition hearing before an offender is released from custody or his sentence expires. The Board of Parole Commissioners formally imposed the conditions of Lifetime Supervision upon Plaintiff on or about October 8, 2008.

The Nevada Supreme Court has determined "[t]he 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). As such, due process provides that Plaintiff be given notice and an opportunity to be heard for such a hearing. "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). Plaintiff was not given notice of the hearing and in fact, didn't even know that the hearing was being conducted. Further, he was not allowed counsel, or the opportunity to cross-examine officers at the Board hearing. However, even if he had been present, he would not have been allowed to be heard, pursuant to Board policy, which is clearly stated on their Notice of Hearing. As such, he was not allowed, either at the time of the imposition of his conditions by Officer Lewis or by the Board, to challenge his conditions. Thus, any and all conditions imposed upon him are a violation of his constitution due process rights and are therefore, illegal.

Contrary to Defendants' position, Plaintiff's complaint clearly alleges that two searches were performed on or about September 5, 2013. One was performed on Plaintiff's wife's cell phone, as Defendant Evans stated that Plaintiff had constructive possession, and therefore, access to it. The other search was performed on Plaintiff's refrigerator. The Board of Parole Commissioners has ordered that a search must be conducted pursuant to reasonable suspicion as stated in the conditions of Lifetime Supervision. However, when searching, Defendant Evans

specifically stated that he did not need reasonable cause to search pursuant to Directive 6.2.109, which states that a suspicionless search of an offender serving Lifetime Supervision is allowed without reasonable cause.

As set forth in Plaintiff's complaint and pursuant to Plaintiff's conditions, the Board is the only one that is allowed to impose or change conditions. The Nevada Division of Parole and Probation does not possess the authority to supersede the conditions as set by the Board. Defendants assert that they derive the authority to conduct warrantless, suspicionless searches from Samson v. California, 547 U.S. 843, 857, (2006), and United States v. Betts, 511 F.3d 872, 876, (9th Circuit 2007). These decisions relate to parole, a matter of legislative grace, for those serving a criminal sentence, or supervised release which is the federal form of parole. Plaintiff reasserts that he is serving the civil sentence of Lifetime Supervision, and therefore, retains his Fourth Amendment rights, and all other constitutional rights, privileges and immunities. Defendants continually refuse to acknowledge that there is a difference between probation, parole, supervised release and lifetime supervision, even though there is a case directly on point in Nevada. Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002),

"The suspicionless search is the very evil the Fourth Amendment was intended to stamp out". Boyd v. United States, 116 U. S. 616, 625-630 (1886); Indianapolis v. Edmond, 531 U. S. 32, 37 (2000) (as quoted in *Samson,* 547 U.S. at 858). The pre-Revolutionary "writs of assistance," which permitted roving searches for contraband, were reviled precisely because they "placed 'the liberty of every man in the hands of every petty officer.'" Id., 116 U. S., at 625. While individualized suspicion "is not an 'irreducible' component of reasonableness" under the Fourth Amendment, the requirement has been dispensed with only when programmatic searches were required to meet a "'special need' . . . divorced from the State's general interest in law enforcement." Edmond, 531 U. S. at 37 (quoting United States v. Martinez-Fuerte, 428 U. S. 543, 561 (1976)); Ferguson v. Charleston, 532 U. S. 67, 79 (2001).

In *Samson,* the suspicionless search was held to be legal due to the fact that it was specifically authorized by the California statute and that it is a criminal sanction. Unfortunately for Defendants, Plaintiff is on lifetime supervision which, again, is a civil sentence as defined in Palmer, and he is not subject to a criminal sanction. Further, the Nevada Legislature has not enumerated any statute that authorizes a suspicionless search, regardless of whether a person is on parole, probation or lifetime supervision.

The Court has "closely guarded" the "category of constitutionally permissible suspicionless searches". Delaware v. Prouse, 440 U.S. 648, 654-655 (1979). In special needs cases the Court has insisted upon programmatic safeguards designed to ensure evenhandedness in application; if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion." Id. (where a special need "precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U. S. 523, 532 (1967); United States v. Brignoni-Ponce, 422 U. S. 873, 882 (1975) ("[T]he reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government"). Here, by contrast, there are no policies in place—no "standards, guidelines, or procedures" . . . "—to rein in officers and furnish a bulwark against the arbitrary exercise of discretion that is the height of unreasonableness." *Prouse*, 440 U. S., at 650.

Plaintiff asserts that this Policy abrogates the search requirements as defined by the Nevada Board of Parole Commissioners that clearly enumerates that an Officer needs "reasonable suspicion." The Nevada Division of Parole and Probation is not allowed to supersede the conditions set by the Board, period. It doesn't matter if they believe they have the right to conduct warrantless searches, regardless of why or based on what. Therefore, Defendants' Motion to Dismiss Plaintiff's Seventh and Eighth Causes of Actions and all related claims for relief should not be dismissed against the Defendants.

C. Statute of Limitations.

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

The limitations clock on an action pursuant to § 1983 for false arrest "begins to run at the time the claimant becomes detained pursuant to legal process." Wallace v. Kato 549 U.S. 384,

397 (2007). "A false imprisonment ends once the victim becomes held pursuant to [legal process] – when . . . he is …arraigned on charges." Id. In the instant case, Plaintiff appeared and was arraigned on October 5, 2011. Id. Plaintiff filed his original Complaint on October 4, 2013. Therefore his claim is timely. The causes of action for abuse of process, intentional infliction of emotional distress, and malicious prosecution would also start then. Therefore, those claims are also not barred by the statutes of limitations.

All of these Policies, Procedures, and customs of the Defendants are currently in effect against the Plaintiff, and all actions by Defendants complained of are continuing to be applied to him. Plaintiff is currently subjected to these actions by Defendants and is constitutionally allowed to seek redress before this Court. The conditions of Lifetime Supervision are still active and in force against the Plaintiff, which allows him to seek a declaratory judgment, and an injunction if the statutes, actions and Policy and Procedure are proven to be constitutionally illegal. Therefore, Defendants' Motion to Dismiss based upon the allegation that the statutes of limitations has expired must be denied.

D. Standing.

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

Directive 6.2.109 places Plaintiff in imminent invasion of his legally protected Fourth Amendment right which is concrete and particularized, the right to be free from unreasonable searches. The action can be fairly traced to the Defendants as it is the Policy and Procedure that they operate under to supervise offenders placed under their authority, and which illegally supersedes the authority of the Nevada Board of Parole Commissioners.

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

Defendants assert that Plaintiff lacks standing to bring an action based on the search of his wife's cell phone. However, they ignore the fact that he, personally, has standing, to bring an action based on the search of his refrigerator and all of other suspicionless searches that the officers have conducted in the last 2 years. However, assuming *arguendo,* that this Court finds that Plaintiff lacks standing with respect to the searches, he is prepared to join his wife as a Plaintiff. In fact, concurrent with this Opposition, Plaintiff is filing a Motion for Permissive Joinder. Accordingly, Defendants Motion to Dismiss for standing should be denied.

E. Equal Protection.

Defendants assert that Plaintiff cannot state a claim under 42 U.S.C. §1983 because he is not a member of a protected class. However, Plaintiff alleges the Causes of Actions for equal protection with respect to a fundamental right. In Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1074-1075 (2000), the Supreme Court affirmed that the Equal Protection Clause protects individuals, as well as vulnerable groups and fundamental rights from vindictive state action. This approach to Equal Protection jurisprudence is referred to as a "class of one" claim. Under this theory, individuals who have been victimized by state or local officials, but who do not have a claim under a traditionally recognized Equal Protection category, can file a claim in federal court under 42 U.S.C. § 1983.

The Court has determined the levels of scrutiny to be observed, and held that if the law categorizes on the basis of race or national origin, **or** infringes a fundamental right, the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest. In addition, there cannot be a "less restrictive" alternative available to achieve that compelling interest. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, (1967). In other words, it must survive strict scrutiny in all its applications: on its face, as imposed, and as applied. Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest." Kramer v. Union Free School District, 395 U. S. 621, 395 U. S. 627 (1969). Further, legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S. at 381 U. S. 485.

"The Court has held that the right to counsel finds expression in the Sixth Amendment, and has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

Powell v. Alabama, 287 U.S. 45, 68-69 (1932). "The right to be heard would be, in many cases, be of little avail if it did not comprehend the right to be heard by counsel." Id.

Plaintiff's fundamental rights have been restored to him and he is serving a civil sentence. Plaintiff is seeking declaratory relief on the violations of Equal Protection based upon, not only §1983, but also §1331 and §2201. Plaintiff is attacking the Nevada statutes as applied, because it is as applied that the statutes improperly invade a fundamental right. Thus, Plaintiff is not required to be a member of a protected class to assert an action based upon the Equal Protection Clause. According, Defendants' Motion to Dismiss cause of action based on the Equal Protection Clause and all related claims for relief should be denied.

F. Eighth Amendment.

Plaintiff stipulates that this Cause of Action be dismissed against the Defendants.

G. Right to Travel and Right to Redress.

The State is correct when it states that Plaintiffs right to travel was limited by the fact of his criminal conviction. This applied when he was serving his criminal sentence of probation as imposed by the Court. The Defendants again argue that they can impose this restriction of the fundamental right to travel pursuant to *Latta,* 521 f.2d at 249, and Plaintiff again reasserts that he is not serving a criminal sentence, and he is not on parole, probation, or supervised release. Plaintiff is serving the civil sentence of Lifetime Supervision, and he retains the full panoply of constitutional rights, privileges and immunities except those specifically withheld by statute.

The Defendants are correct when they state that the Plaintiffs rights are significantly impinged by them, however, the authority to do so is in contention. As argued before on other rights, this deprivation of his fundamental right to travel has been denied to him without due process, to wit: without proper notice, without his presence, without the right to counsel, without the right of redress, and without any findings of fact, and without any basis to state that he poses a danger. In point of fact, the Defendants have determined Plaintiff to be a low risk to re-offend. Plaintiff has graduated from a state approved therapy group. According to his former therapist, and based off of empirical testing, it has been determined that his risk of recidivism is actually getting less and less, year by year that he is in the community, while he is gainfully employed, and with his family. This deprivation of a fundamental right does not survive strict scrutiny, nor does it survive the protections enumerated in the 1st and 14th Amendment.

Plaintiff asserts that all Policy and Procedure must be open for public review, especially when the issues presented place him under the policy and denies him his constitutional rights. The Policy does not meet the requirements for the State secrets privilege doctrine as it does not disclose sensitive information which might endanger national security. This material has to be made available upon request pursuant to 5 U.S.C. § 552 and NRS 233B.050. The Right to Travel, and the Right to Redress Causes of Actions and all related claims for relief should not be dismissed against the Defendants

IV. CONCLUSION

Based on the foregoing Opposition and Memorandum of Points and Authorities, the Court should deny the Defendants Motion to Dismiss in its entirety. For the reasons set forth hereinabove, Defendants are properly named as defendants in relation to the listed causes of actions and claims for relief and they are not immune from suit in federal court.

Plaintiff seeks denial of the following issues as listed by the Defendants:

The First Cause of Action and Claims for Relief 1, 2, 5-8, and 10-13 are timely.

The Second, Fourth, Seventh, and Eighth Causes of Action should not be dismissed as Defendants are not entitled to qualified immunity at this time and Plaintiff satisfies the standard that a reasonable Officer should have known his actions were violating a constitutional right pursuant to precedent held by a Court with similar circumstances.

The Third, Fifth, Sixth and Tenth Causes of Action do state a clear claim for relief and Plaintiff will amend his complaint for the first time pursuant to Fed. R. Civ. P. 15 to grant a more definite statement in order to further modify, clarify, and amend his claims for relief.

The Seventh and Ninth Causes of Action should not be dismissed as Plaintiff does have standing, and Plaintiff will file a Motion to join the other Plaintiffs to his amended Complaint.

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

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

Respectfully dated this 22nd day of November, 2013.

_____

Patrick Stephen Davis
Plaintiff in Proper Person

CERTIFICATE OF MAILING

I hereby certify as the Plaintiff in Proper Person, that on November 23, 2013, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, Opposition to Motion to Dismiss for Failure to State a Claim Pursuant to NRCP 12(B)(6), addressed to:

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