CODE: 4330
Patrick S. Davis
Redacted
Reno, NV 89512
Redacted
Defendant in Proper Person

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

State of Nevada	)	
Plaintiff,	)	
vs.	)	Case: Cr04-0130
Patrick Stephen Davis	)	Dept: No. 3
Defendant	)	

Defendant's Motion to Petition for Alternative Writ of Prohibition, First Amendment Petition.

COMES NOW, the Defendant, Patrick Stephen Davis, (hereinafter referred to as Defendant), in proper person, on his own behalf, and on behalf of all others, and respectfully petitions the Court to grant his Petition for Alternative Writ of Prohibition, and First Amendment Petition. This Alternative Writ of Prohibition is in relation to the civil sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290, (hereinafter referred to as Lifetime Supervision). Motion is based upon reasonable constitutional, jurisdictional and other grounds that challenge the legality of the proceedings per NRS 177.015, Section (4).

The Defendant respectfully asks the Second Judicial District Court of the State of Nevada in and for the County of Washoe, (hereinafter referred to as the Court or the same), to grant an injunction; based off of an Alternative Writ of Prohibition, and First Amendment Petition, against the State of Nevada, the Nevada Board of Parole Commissioners, (hereinafter referred to

as the Board or the same), the Nevada Division of Parole and Probation, (hereinafter referred to as the Division or the same), including the Chief and its Officers.

The injunction will direct the Agencies, Officers and Employees of the State of Nevada, to immediately cease and desist the imposition and enforcement of the constitutionally illegal conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290.

Upon further decision by this Court, the Defendant asks that the constitutionally illegal sentence of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243 and NAC 213.290, as applied to him and all others similarly situated, be permanently enjoined.

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

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Table of Contents:

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Table of Authorities:

Cited Cases:

Constitutional Amendments and Provisions:

Constitutional Convention Records:

Nevada Board of Parole Commissioners: Records:

Nevada Division of Parole and Probation: Division Directives:

Nevada Revised Statutes:

Other Authorities:

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Statement of the Facts:

(1) On or about December 30, 2003, Defendant was arrested by the Washoe County Sheriff's Office, and charged with the crimes of Use of Internet to Lure a Child, Open and Gross Lewdness, Attempted Sexual Assault, and Indecent Exposure, in Washoe County, Nevada.

(2) In February of 2004, Defendant voluntarily started a program of therapy with Agape Psychological Services, which he has completed and graduated from in July of 2011.

(3) On or about June 10, 2004, Defendant pleaded guilty for the crime of Use of Technology to Lure Children and was sentenced by Jerome M. Polaha, District Judge of the 2nd Judicial District in and for the County of Washoe to imprisonment in the Nevada State Prison System for a term of 16 to 72 months. The Court suspended the sentence and placed Defendant on 5 years probation and upon completion, on the "special sentence" of Lifetime Supervision.

(4) On or about May 6, 2008, Defendant honorably discharged his sentence of probation and commenced his "special sentence" of Lifetime Supervision. The Conditions of Lifetime Supervision were imposed by Officer Lewis of the Division, on or about April 6, 2008, without due process, and in violation of the timelines outlined in NAC 213.290. (Exhibit 1).

(5) The Board of Parole Commissioners formally imposed the Conditions of Lifetime Supervision upon Defendant on or about October 8, 2008, without notice to Defendant, without his presence, without due process, and without any findings of fact. On or about December 4, 2008, Defendant signed the new Agreement of Lifetime Supervision Conditions under duress, and threat of arrest by Officer Lewis, as a coerced conditional waiver. (Exhibit 2).

(6) The Board of Parole Commissioners modified the Conditions of Lifetime Supervision, as requested by Officer Howald of the Division of Parole and Probation, with notice and his presence, but without due process on or about September 21, 2010. (Exhibit 3, 4).

(7) On or about March 22, and June 1, 2011, Defendant appealed his travel condition, #9 of Lifetime Supervision to the Board. (Exhibit 5). On or about February 1, 2012, Defendant appealed all of his conditions of Lifetime Supervision to the Board. (Exhibit 6).

(8) The Board of Parole Commissioners, by their silence on the first matter, has declined to address the appeals in any manner or form, and without written notice of denial to Defendant.

Defendant asserts that the Board states that they are the final judiciary body to make an appeal to, and only the Board can impose, modify or vacate a condition of Lifetime Supervision.

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

Statement of the Case:

Defendant asserts that the Board of Parole Commissioners are acting beyond their authority of law, and are transcending the limitations of their jurisdiction in the exercise of judicial power in relation to Defendant and all others similarly situated.

> When asserting a "facial" challenge, the Defendant seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statutes in question, and in that sense, the threshold for facial challenges is a species of third party, or jus tertii, standing, City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, (1999).

Defendant respectfully asks the Court to start by looking at SB 192, (1995). The Legislative intent in relation to Lifetime Supervision was for this "special sentence" to be a *non-punitive civil sentence* designed as a regulatory tool to keep law enforcement informed of the current whereabouts of the recently released offender, in an *administrative capacity*. This was to be done by verifying the offender's address monthly with the Division of Parole and Probation.

This "special sentence" was also intended to deter future criminality by making it an enhancement penalty. It was never designed to arrest, and incarcerate an offender for conduct or behavior that is legal and constitutionally permissible, and is not a crime in and of itself.

> The intent of the Nevada Legislature has been held by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), and is quoted below.

- The Court, definitively states that this **"is not a form of parole, it is different".**
- The Court defines this as a "civil sentence".
- The Court determined that "this sentence is a form of punishment"; and that "the conditions are affirmative disabilities and restraints".
- The conditions as applied effectively "monitor all aspects of an offender's life", just the same as in parole or probation, and in many cases, are much harsher.
- And that the sentence of "Lifetime Supervision is a direct penal consequence of a guilty plea or a conviction"; and "has an automatic and immediate effect on the nature or length of Defendant's punishment".

Due to *Palmer*, the Defendant is asking this Court to decide in analyzing this motion:

> (1) whether the Board of Parole Commissioners may impose these conditions upon Defendant without any specific enumerated authorization in place in statute or regulation, to restrain his Constitutional Liberty Interests and First Amendment Rights,
>
> (2) how much punishment is legally and constitutionally allowed, according to the Constitution of the United States and the Constitution of the State of Nevada,
>
> (3) just how punitive the affirmative disabilities and restraints are and can constitutionally be, in relation to a civil sentence, in addition to a criminal sentence,
>
> (4) and whether the Defendant should be allowed to be present at the original hearing, or any other hearing held by the Board in relation to the Defendant, either with or without counsel, and if he has the constitutional right to be noticed and be heard.
>
> (5) And last, the Court will have to determine if these affirmative restraints of Constitutional Liberty Interests and First Amendment Rights place this civil sentence in violation of the *Void for Vagueness Clause*, the *Separation of Powers Clause*, the *Equal Protection Clause*, the *Ex Post Facto Clause*, the *Bill of Attainder Clause,* the *Procedural Due Process Clause*, including *Judicial Review*, the *Overbreadth Doctrine of the First Amendment*, and finally, the *Double Jeopardy Clause*.

Next, the Court should consider the Board of Parole Commissioners stance in relation to Lifetime Supervision as enumerated in the Operations of the Board, in Section (2) of Lifetime Supervision Hearings, where it is clear that they define this as a "form of parole", (Operations of the Board, 2011). This is in direct contradiction to the Nevada Supreme Court's ruling held in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002), that this sentence is "different that parole".

The Board of Parole Commissioners leave out a portion of NRS 213.1243, enumerated in (2), (a) and (b), where it concisely states the four (4) specific conditions that are the reasons it is a "limited" form of "parole", due to Defendants assertion that they wish to impose "parole type conditions", upon offenders sentenced to Lifetime Supervision.

Defendant asserts that the Board, in drafting NAC 213.290, has done this knowingly and willingly, and that the Board has a continuing desire to impose further punitive "parole type conditions" upon a civil offender, regardless of any decision held by the Courts or of the legality of restraining an offender's Constitutional Liberty Interests and First Amendment Rights.

> In construing a statute, the Court's objective is to ascertain the intent of Congress in enacting it and give effect to the legislative will, United States v. Gilbert, 266 F.3d 1180, 1183, (9th Circuit, 2001), citing Negonsott v. Samuels, 507 U.S. 99, 104, 113 S. Ct. 1119, (1993).

> The Courts have decided that "generally speaking, we narrowly construe ambiguous provisions of penal statutes", Carter v. State, 98 Nev. 331, at 334-335, 647 P.2d 374, (1982).
>
> Moreover the rules of statutory interpretation that apply to penal statutes require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction, State v. Wheeler, 23 Nev. 143, 152, 44 P.430, 431-32, (1896).
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> Whenever possible, we must interpret statutes so as to avoid conflicts with the Federal or State Constitutions, Summit v. State, 101 Nev. 159, 161, 697 P.2d 1374, 1376, (1985), quoting State v. Woodbury, 17 Nev. 337, 30 P. 1006, 1012, (1883).

The Nevada Legislature, in SB 192, (1995), was very clear in regards to placing an offender under the supervision of the Division of Parole and Probation "in order to verify their whereabouts", as an *administrative duty*. This assertion has merit due to the Policy and Procedure outlined in Division Directive 6.2.101, Contact Guidelines, Section 4, 5, and 6, which was originated on February 24, 1997. Defendant argues that this Policy and Procedure was the Division's original intention to implement and enforce an administrative caseload pursuant to the mandate incorporated in SB 192, (1995), and enumerated in NRS 213.1243.

This "Administrative Caseload" is exactly what satisfies the Nevada Legislative intent for Lifetime Supervision, in relation to this being a "non-punitive" sentence for an offender. The Division was aware that there might be special conditions, and in assessing the intent of the Legislature, determined that these could be handled on a case by case basis, based upon findings of fact by qualified individuals, and as ordered by the Board of Parole Commissioners.

Defendant delineates a timeline for four (4) important statutes that relate to imposing conditions for public safety. The Nevada Legislature enacted SB 192, (1995), which authorized NRS 176.0931, and NRS 213.1243 for Lifetime Supervision. In 1997, the Legislature enacted NRS 213.12175, which gives authority to the Board of Parole Commissioners to articulate and impose any reasonable condition upon a parolee to protect the health, safety, and welfare of the community. This statute *only* applies to parole. The Legislature did not authorize the Board of Parole Commissioners to impose any condition at will, to protect the health, safety, and welfare of the community upon civil offenders subject to Lifetime Supervision.

The Nevada Legislature specifically stated that "the Board of Parole Commissioners shall establish by regulation a program of Lifetime Supervision", NRS 213.1243, (1). Defendant

asserts that there is no such regulation. The Board only enacted one regulation, NAC 213.290, (2000), which is vaguely named "Notification; report; hearing; request to modify conditions"; and which does not include any relationship to the program of Lifetime Supervision.

NRS 213.1243 clearly states in the title, a part of the statute therein, which specifically refers to the program of Lifetime Supervision. In NAC 213.290, no such language exists in the title of the regulation, or therein. In the Nevada Constitution, in Article 4, titled Legislative Department; under Section 17, it states that an act is to embrace one subject only.

> In Nevada cases that have looked to this issue, the Nevada Supreme Court has stated that there must be a sufficient connection between the statute's title and the subject of the section, Humboldt County Commissioners, 6 Nev. 30, (1870); State v. Davis, 14 Nev. 439, 443, (1880), State ex rel. Dunn v. Board of Commissioners, 21 Nev. 235, 238, 29 Pac. 974, (1892); State ex rel. Norcross v. Board of County Commissioners, 22 Nev. 399, 404, 41 Pac. 145 (1895); State ex rel. Wichman v. Gerbig, 55 Nev. 46, 52, 24 P.2d 313, (1933); Tonopah & GRR v. Nevada-Cal. Trans. Co., 58 Nev. 234, 241, 75 P.2d 727, (1938).

The Court has decided, in many of the above entitled cases that only the principal subject embodied in the law needs to be expressed in the title. Defendant asserts that this regulation has never been enacted by the Board of Parole Commissioners, as mandated by the Nevada Legislature. There is no legal connection between the "program of Lifetime Supervision", the "conditions of Lifetime Supervision", and the "statutes of Lifetime Supervision".

> The statutes lack the necessary regulatory connection because they are not "narrowly drawn to accomplish the stated purpose". Due to the imprecision that the State relies on, which are not articulated in these statutes, the application of the conditions underlying the statutes suggest that the Legislative intent of a non-punitive purpose is a "sham or mere pretext", Kansas v. Hendricks, 521 U.S. 346, 371, 117 S. Ct. 2072, (1997)
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> As Justice Souter states in Smith v. Doe, 538 U.S. 84, 123 S. Ct 1140, (2003), "that public safety is, of course, a fundamental regulatory goal", as quoted in United States v. Salerno, 481 U.S. 739, 747, 107 S. Ct. 2095, (1987), "and that this objective should be given serious weight in the analysis. But, at the same time, it would be naïve to look no further, given pervasive attitudes toward sex offenders", Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, (1981).
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> "The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated claims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent

future ones", Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, (1963), as quoted in Smith v. Doe, 538 U.S. 84, 123 S. Ct 1140, (2003)

In NAC 213.290, in Section (4), (b), it *only* states that the Division may make recommendations to the Board of Parole Commissioners for the conditions of Lifetime Supervision. The imposition of Lifetime Supervision conditions is performed by the Board without enumeration of *any* condition, in *any* statute, and without due process or notification.

"It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression", Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, (1931); Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666, (1938).

This principle- "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty, Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, (1977); United States v. Harriss, 347 612, 617, 74 S. Ct. 808, (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, (1939).

The Board states that they may change these conditions at any time, therefore expressing the legal belief that they can authorize and change the conditions ex post facto.

The Supreme Court has explained that "if a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue' it must not be given retroactive effect", Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).

The Judicial Ex Post Facto Prohibition prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the Ex Post Facto Clause prevents such changes by legislation, Dale v. Haeberlin, 878 F.2d 930, 934 (6th Circuit 1989); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).

The *Due Process Clause* guarantees the constitutional right of "fair warning" and this right is implicated when individuals are not provided notice of the consequences of certain conduct before they engage in that conduct, causing them to also be in violation of the *Ex Post Facto Clause*. Criminal Statues must "give a person of ordinary intelligence 'fair notice' that his contemplated conduct is forbidden by the statute, United States v. Harriss, 347 612, 617, 74 S. Ct. 808, (1954); Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).

The Board also expresses the fact that due process is not required. NAC 213.290 states that they "*may*" require the offender's presence, but only upon a modification of a condition, not upon the original setting of conditions. During *any* hearing by the Board setting *any* conditions of Lifetime Supervision, the Board states on the Lifetime Supervision Agenda Notice that, "The Board will not entertain verbal input from any person other than the victim in this case".

The Procedural Due Process Clause only applies where the claimant has been deprived, or is in jeopardy of being deprived, of some type of liberty interest, Morrissey v. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972); Tarkanian v. Nat'l Collegiate Athletics Ass'n, 448 U.S. 179, 109 S. Ct. 454, (1988); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

Thus, if a liberty interest in not at stake, the claimant cannot assert the protections of due process. If, however, the government is attempting to infringe on a protected liberty interest, then it may do so only if it follows the procedures mandated by the Due Process Clause, Kelch v. Nevada Department of Prisons, 107 Nev. 827, 822 P.2d 1094, (1991); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1,7, 99 S. Ct. 2100, (1979).

The intent of the Nevada Legislature in relation to Lifetime Supervision, SB 192, (1995), was for this to be a ***non-punitive*** civil sentence; not to further punish an offender by imposing conditions for behavior or conduct that is not illegal in and of itself, or for past conduct.

Where legislative "will has been expressed in reasonable and plain terms, that language ***must*** ordinarily be regarded as conclusive." If the plain language of a statute renders its meaning reasonably clear, the Court will not investigate further unless its "application leads to unreasonable or impracticable results", United States v. Daas, 198 F.3d 1167, 1174, (9th Circuit 1999).

Defendant reasonably asserts that the setting of ***any*** conditions by the Nevada Board of Parole Commissioners, acting as a quasi-judiciary Board, is a further continuation of the sentencing phase of the original conviction and all procedural due process rights should apply.

The Board of Parole Commissioners is a quasi-judiciary board that exercises a judicial function, Stockmeier v. State, Dept. of Corrections, 127 Nev. Adv. Rep. 19, (2011); Witherow v. State, Board of Parole Commissioners, 123 Nev. 305, 167 P.3d 408, (2007); Raggio v. Board of Parole Commissioners, 80 Nev. 418, 395 P.2d 625, (1964), and State v. Kamedula, 127 Nev. Adv. Rep. 21, (2011).

The conditions are not determined and are set at a later date by the Board of Parole Commissioners after the original sentencing date of the District Court, Johnson v. State, 123 Nev. 139, 159 P.3d 1096, (2007).

This hearing should be held with the presence of counsel, just as in the original court proceeding. It should include current, up to date fact finding determinations by a qualified individual to authorize a condition, be pursuant to the Sentencing Guidelines, and like the Court, the Board should make these determinations based on the totality of the circumstances.

The Courts have also explained that the statutory requirement that "conditions of supervised release be reasonably related to the sentencing factors", United States v. Johnson, 998 F.2d 696, 697, 699, (9th Circuit 1993).

The terms imposed must be "reasonably related to…the nature and circumstances of the defendant, and the history and characteristics of the defendant, United States v. Schoenrock, 868 F.2d 289, 291, (8th Circuit 1989); United States v. Prendergast, 979 F.2d 1289, (8th Circuit 1992).

Defendant asserts that this is not done at all. In point of fact, there are no records of any findings of fact by the Board on or about October 10, 2008, in regards to Defendant. The Board states that they did not keep the records of the Lifetime Supervision hearings at the time, which are a violation of law and the rules of procedure for a judiciary hearing.

The Courts have made it very clear that "the government bears the burden of showing that a discretionary condition of supervised release is appropriate in a given case", United States v. Weber, 451 F.3d 552, 558-559, (9th Circuit 2006).

A condition of probation is not reasonable if it is found to be "unnecessarily harsh or excessive in achieving the goals of rehabilitation and community protection, United States v. Friedberg, 78 F.3d 94, 96, (2nd Circuit 1996); quoting United States v. Tolla, 781 F.2d 29, 34, (2nd Circuit 1986).

In order for the Board to abridge *any* Constitutional Liberty Interest or First Amendment Rights of an offender subject to the civil sentence of Lifetime Supervision, they would have to provide for this regulation as mandated by the Nevada Legislature. A restraint of these "Rights" would have to be enumerated in statute to provide notice of prohibited conduct to the offender. Clear guidelines are necessary for law enforcement that are neither arbitrary, nor discriminatory, nor vague or overbroad, and are narrowly defined to meet the stated purpose. If not, the statute or regulation is constitutionally illegal, by being in violation of the *Void for Vagueness Clause*.

The applicable rule is stated as follows: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violated the first essential of due process of law", Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, (1926).

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids", Champlin Rfg. Co. v. Commission, 286 U.S. 210, 242, 243, 52 S. Ct. 559, (1932); Cline v. Frink Dairy Co., 274 U.S. 445, 458, 47 S. Ct. 681, (1927); Small Co. v. American Sugar Rfg. Co., 267 U.S. 233, 239, 45 S. Ct. 295, (1925); United States v. Cohen Grocery Co., 255 U.S. 81, 89-92, 41 S. Ct. 298, (1921); International Harvester Co. V. Kentucky, 234 U.S. 216, 221-223, 34 S. Ct. 853, (1914); Lanzetta v. New Jersey,

306 U.S. 451, 59 S. Ct. 618, (1939); City of Chicago v. Morales, 527 U.S. 41, 56, 119 S. Ct. 1849, (1999); and State v. Father Richard, 108 Nev. 626, 836 P.2d 622, (1992).

The Nevada Supreme Court has articulated a clear test for vagueness challenges.

> The test is whether the terms of the statute are so vague that people of common intelligence must necessarily guess at their meaning, Sereika v. State, 114 Nev. 142, 955 P.2d 175, 177, (1998), citing Cunningham v. State, 109 Nev. 569, 570, (1993).
>
> The rule however, is not to be applied in a vacuum. The Court must consider the actions of the Defendant on a case by case basis. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by statute, United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, (1954).

The Board and the Division have colluded and conspired to cause the conditions of Lifetime Supervision to match the mandatory conditions of Parole as enumerated in NRS 213.1245. Mr. David Smith, an employee of the Board, states during an Open Public Meeting on August 31, 2011, that the Board may impose *any* condition which mirrors the language of any punitive criminal statute as they see fit. This was affirmed in the presence of Ms. Julie Smith, a Deputy Attorney General, who by her silence on the matter, agrees with Mr. Smith. By doing so, the Board is enforcing this punishment on an offender not subject to this statute, thereby causing this civil sentence to be punitive in nature and effect; and beyond the authority of the Board.

> It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. "The power to create presumptions is not a means of escape from constitutional restrictions", Bailey v. Alabama, 219 U.S. 219, 239, 31 S. Ct. 145, (1911).

If, in 1995, the Nevada Legislature wished to impose these types of conditions, they could have done so. However, since they defined this as "*a non-punitive tool* " as articulated in SB 192, (1995); they knew that the imposition of these types of conditions would place this civil sentence into a constitutionally illegal position by the State, which was a subject of deep concern for the Legislators. Defendant has brought these issues to the attention of the Board numerous times, and the actions of the Board to the attention of the Legislature. (Exhibit 7, 8, 9 and 10).

> The Courts say that even if a proposed condition meets this requirement, "it still must involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release,…that is, to achieve deterrence, public protection, or offender rehabilitation", United States v. T.M. 330 F.3d 1235, 1240, (9th Circuit 2003); United States v. Prendergast, 979 F.2d 1289, (8th Circuit 1992); United States v. Bass, 121 F.3d 1218, 1223, (8th Circuit 1997).

A reasonable nexus *must* exist between any special condition of probation and the crime for which it is imposed, and upon a fact finding determination. A condition of probation which requires or forbids conduct which is not itself criminal is valid only if that conduct is reasonably related to the crime of which defendant was convicted or to future criminality.

> These conditions result in a far greater deprivation of constitutional liberty than is "reasonably necessary to prevent recidivism, to protect the public, or promote any form of rehabilitation", United States v. T.M. 330 F.3d 1235, 1240, (9th Circuit 2003); States v. Scott, 316 F.3d 733, 736 (7th Circuit 2003).

Defendant asserts that by honorably completing his term of probation, which he served while under a suspended criminal sentence imposed by this Court, that he is entitled to the return of all of his Constitutional Liberty Interests and First Amendment Rights, except for those specifically withheld by Nevada Statute.

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

Issue # 1: Validity of Petition for Writ of Prohibition: First Amendment Petition

The imposition and enforcement of the Conditions of Lifetime Supervision that restrain the Constitutional Liberty Interests and First Amendment Rights of a citizen of the State of Nevada sentenced to a *non-punitive* civil sentence can not be ignored.

> In an application for a Writ of Prohibition alleging unconstitutional prior and continuing restraint of First Amendment Rights, the Court is required to render judgment on application not later that 30 days after application is filed, pursuant to a First Amendment Petition, NRS 34.185.

The imposition of such punitive conditions is clearly without lawful sentencing authority and is beyond the jurisdiction of the Board of Parole Commissioners.

> "A Writ of Prohibition is the proper remedy to restrain a district court from exercising a judicial function without or in excess of its jurisdiction", NRS 34.320; Hickey v. District Court, 105 Nev. 729,731,782 P.2d 1336, 1338 (1989); State v. Eighth

Judicial, 121 Nev. 225, 229, 112 P.3d 1070, 1073, (2005); Smith v. Eighth Judicial, 107 Nev. 674, 818 P.2d 849, (1991).

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

The Board of Parole Commissioners cannot validly sentence a convicted offender to a condition not enumerated in statute and not in effect at the time of the offense. Thus, the civil sentence of Lifetime Supervision is illegal and must be enjoined. The Conditions of Lifetime Supervision are still not enumerated in any statute or regulation of the State of Nevada.

"The object of a writ of prohibition is to restrain inferior courts from acting without authority of law in cases where wrong, damage, and injustice are likely to follow from such actions", Walcott v. Wells, 21 Nev. 47, 24 P. 367, (1890).

"The purpose of a writ of prohibition is not to correct errors, but to prevent courts from transcending the limitation of their jurisdiction in the exercise of judicial power", Goicoechea v. Fourth Judicial ex rel. County of Elko, 96 Nev. 287, 607 P.2d 1140, (1980); Cunningham v. Eighth Judicial ex rel. County of Clark, 102 Nev. 551, 729 P.2d 1328, (1986).

Defendant has legal and jurisdictional standing to challenge the constitutional legality of the statutes and conditions of Lifetime Supervision that are imposed upon him, on behalf of himself and all others similarly situated.

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

"A writ must issue where there is not a plain, speedy and adequate remedy in the ordinary course of law", NRS 34.170, NRS 34.330, Heilig v. Christensen, 91 Nev. 120, 532 P.2d 267, (1975); Ham v. Eighth Judicial, 93 Nev. 409, 566 P.2d 420, (1977); Houston Gen. Ins. Co. v. Eighth Judicial, 94 Nev. 247, 578 P.2d 750, (1978).

Issue # 2: Separation of Powers Clause:

The *Separation of Powers Clause* and philosophy is looked to as a bulwark against tyranny. "For if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, then no man or group of men will be able to impose its unchecked will". The tyranny of the

Board of Parole Commissioners is clear in the enactment and implementation of the Conditions of Lifetime Supervision.

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

Defendant asserts that the Board of Parole Commissioners, in imposing the conditions of Lifetime Supervision, are acting in a "quasi- judiciary capacity". By drafting and enacting the conditions, he asserts that they are acting in the "legislative capacity". And by improperly implementing the conditions, through non-articulated methods, causing them to be absent from the regulations or statutes; that this effectively allows the Board to skirt the requirements of the executive and legislative branches of government. These actions have then effectively disallowed the further review and approval of the Governor and the Legislature of Nevada.

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

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

> "Nothing is more common that for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Laws of this kind are the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, [such being the case here, in the Board of Parole Commissioners], and establish an aristocracy or an oligarchy; it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, therefore no man can be safe, nor know when they may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense", History of the Republic of the United States, (Hamilton), p. 34, (1859), quoting Alexander Hamilton.

Defendant asserts that the Board of Parole Commissioners is not impartial in this instance, and has knowingly and circumspectly, with malice and aforethought, violated the Constitutions of the State of Nevada, and the United States, and the mandate of the Nevada Legislature in SB 192, (1995), and NRS 213.1243.

> Again, James Madison expressed similar sentiments, agreeing with Hamilton by stating that "Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principle of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, [such as ours], and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights…..The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community", The Federalist, No. 44, p. 351, (Hamilton ed. 1880).

Defendant asserts that the Board of Parole Commissioners has overstepped the bounds of its authority by implementing the conditions of Lifetime Supervision, with no checks or safeguards to ensure that they were constitutionally legal by any other branch of government, therefore violating the *Separation of Powers Clause*.

> Thomas Jefferson reflected in his writings that "many despots would surely be as oppressive as one…..Little will it avail us that they are chosen by ourselves….The government we fought for is one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by others. For this reason that constitutional convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no one person should exercise the powers of more than one of them at the same time…..IF…the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly in many instances, decided rights which should have been left to judiciary controversy", Notes on the State of Virginia, (Jefferson), pp. 157-158, (Ford ed. 1894).

This Court should note that Jefferson was speaking to a situation that occurred over 200 years ago, but still has extreme relevance to this existing situation of today; where the Board of Parole Commissioners has usurped the authority of the 3 branches of government. The Board has pre-emptively decided the extent of the constitutional rights granted to offenders serving this civil sentence under their authority. The Board has used this illegal authorization to restrain the Constitutional Liberty Interests and First Amendment Rights of an offender, with no oversight or right of appeal granted to the offender. The deprivation of any constitutional rights, civil or political, previously enjoyed, is punishment.

Issue #3: Equal Protection Clause:

The *Equal Protection Clause*, provides that "no state shall…deny to any person within its jurisdiction the equal protection of the laws", Section 1, of the Fourteenth Amendment states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws."

The *Equal Protection Clause* can be seen as an attempt to secure the promise of the United States professed commitment to the proposition that "all men are created equal", Declaration of Independence, (1776). This is done by empowering the judiciary to enforce that principle against the states when they abridge the constitutional rights of its citizens.

> Justice Matthews stated that "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences in race, color, of nationality, and the equal protection of the laws is a pledge of the protection of equal laws", Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, (1886).
>
> Justice Brown, speaking for the Supreme Court stated that "the *Equal Protection Clause* had been intended to defend equality in civil rights, not equality in social arrangements". Justice Harlan, in a dissent, wrote, "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens", Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, (1896).
>
> Justice Harlan's dissent in *Plessy* has been vindicated as a matter of legal doctrine, and the clause has been interpreted as "imposing a general restraint on the government's power to discriminate against people based on their membership in certain

classes, including those based on race and sex", as held in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, (1954).

The Board of Parole Commissioners, by their actions in imposing the conditions of Lifetime Supervision violate the Equal Protection Clause,

(1) by not allowing the same privileges and rights to an offender as granted to someone on parole or probation, or to someone serving a civil sentence
(2) by not narrowly tailoring the conditions to serve a non-articulated government interest, when there is a less restrictive means to do so,
(3) by making the conditions far more punitive upon an offender than for any other civil sentence, without any findings of fact, and without due process,
(4) by restricting an offender's right to vote; right to travel; and right to privacy.

Justice Harlan Stone wrote: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry", United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, (1938).

The Court determined the levels of scrutiny to be observed, and held that if the law categorizes on the basis of race or national origin, or infringes a fundamental right: the law is unconstitutional unless it is "narrowly tailored" to serve a "compelling" government interest. In addition, there cannot be a "less restrictive" alternative available to achieve that compelling interest, Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, (1967)

The word "travel" is not found in the text of the Constitution. The 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence, United States v. Guest, 383 U.S. 745, at 757, 86 S. Ct. 1170, (1966).

Indeed, as Justice Stewart reminded us, the right is so important that it is "assertable against private interference as well as government action…a virtually unconditional personal right, guaranteed by the Constitution to us all", Shapiro v. Thompson, 394 U.S. 618, 643, 89 S. Ct. 1322, (1969), (concurring opinion).

Issue #4: Ex Post Facto: *U.S. Const. Amend 1; NV Const. Art. 1, Sec. 1 & 15.*

The United States Constitution provides that neither Congress nor any State may pass any *Ex Post Facto* law. Section 9, of Article 1, states that "No Bill of Attainder or *Ex Post Facto* law shall be passed, U.S. Constitution. The Nevada Constitution states in Section 15, of Article 1, that "No Bill of Attainder, *Ex Post Facto* law, or law impairing the obligation of contracts shall ever be passed".

Justice Chase explained over 200 years ago that "the Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime", Calder v. Bull, 3 U.S. 386, 389, 3 Dall. 386, (1789).

The Board of Parole Commissioners imposes punitive conditions upon Defendant for constitutionally protected conduct, which is innocent behavior in and of itself.

> By its terms, the Ex Post Facto Clause is a limitation on legislative powers and "does not of its own force apply to the Judicial Branch of the government", Marks v. United States, 430 U.S. 188, 191, 97 S. Ct. 990, (1977); Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).
>
> However, the Supreme Court has held that the Ex Post Facto principles apply to the judicial branch through the Due Process Clause, which precludes the judicial branch "from achieving precisely the same result" through judicial construction as would application of an Ex Post Facto Law, Bouie v. Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, (1964); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).
>
> Nonetheless, the prohibition on Ex Post Facto laws embodies "one of the most widely held value-judgments in the entire history of human thought", that is, that there should be no punishment without a law authorizing it, Rogers v. Tennessee, 532 U.S. 451, 462, 121 S. Ct. 1693, (2001).

The Defendant was convicted on June 10, 2004, and should have been sentenced under the conditions present in the law on their face at that time. No regulation enacted by the Board of Parole Commissioners has enumerated in statute ***any*** conditions of Lifetime Supervision.

> The Federal Courts of Appeals has universally suggested that the right to due process prevents judicially wrought retroactive increases in levels of punishment in precisely the same way that the ex post facto clause does when the changes are produced by legislation. "A State Supreme Court is barred by the due process clause from achieving by judicial construction a result which a state legislature could not obtain by statute", Jordan v. Watkins, 681 F.2d 1067, 1079, (5th Circuit 1982); Jordan v. Mississippi, 476 U.S. 1101, 106 S. Ct. 1942, (1986); Prater v. U.S. Parole Commission, 802 F.2d 948, 952, (7th Circuit 1986); Knapp v. Caldwell, 667 F.2d 1253, 1262, (9th Circuit 1982); Foster v. Barbour, 613 F.2d 59, 61-62, (4th Circuit 1980); Dale v. Haeberlin, 878 F.2d 930, (6th Circuit 1989).

Defendant asserts that the condition restricting his residency is illegal, which allows an Officer to determine where he lives, and permission to do so, was not enacted until 2005.

> Defendant refers to Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, (1977); Elrod v. Burns, 427 U.S. 347,362, 96 S. Ct. 2773, (1976); Scales v. United States, 367 U.S. 203, 81 S. Ct. 1469, (1961); Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Spilotro v. Nevada Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

Defendant states that the condition addressing contact with a victim of the crime was not enacted until 2009, and that both of these conditions are constitutionally illegal. Both of these

conditions were enacted after he was convicted, and these conditions have been placed and enforced upon him retroactively, along with all of the other conditions of Lifetime Supervision.

> An *Ex Post Facto* law is one which applies retroactively to disadvantage an offender's substantial personal rights, Weaver v. Graham, 450 U.S. 24, 28-29, 101 S. Ct. 960, (1981); Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S. Ct. 2290, (1977).

This "special sentence" is burdensome, due to the prior and continuing restraints of First Amendment Rights and Constitutional Liberty Interests, and is an increase in the penalty for which Defendant was originally sentenced.

> The *Ex Post Facto Clause* includes one that makes the punishment for the crime more burdensome after its commitment. Thus, two elements must be present for a law to operate as an *Ex Post Facto* law. First, the law must be retrospective; that is, it must apply to events occurring before its enactment. Second, it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable, Lynce v. Mathis, 519 U.S. 433, 441, 117 S. Ct. 891, (1997); Stevens v. Warden, 114 Nev. 1217, 969 P.2d 945, (1998).

In Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003), the Supreme Court held that the Alaska Registration Act did not constitute punishment and therefore was not a violation of the *Ex Post Facto Clause*, due to the fact that there was no imposition of any significant affirmative disabilities or restraints. This was a very close case, with a ruling that created four (4) dissents among the Justices. The Court looked at the totality of the case, and held that the statute's requirements did not impose punitive restraints, as

> (a) the statute imposed no physical restraint,
> (b) the statute did not restrain the activities which offenders might pursue, instead leaving them free to change jobs or residences,
> (c) any lasting and painful consequences of the information involved flowed from the fact of conviction, which is a public record,
> (d) while the statute required periodic updates of the public information, it had not been shown that these updates had to be made in person, and
> (e) in terms of the restraint imposed, the statute's registration system was not parallel to probation or supervised release.

Defendant asserts that the statutes and conditions of Lifetime Supervision do constitute punishment, both facially and as applied by the Board and the Division, and are therefore a violation of the *Ex Post Facto Clause* due to the fact that they:

(a) impose restraints of Constitutional Liberty Interests and First Amendment Rights,
(b) restrain constitutional activities which offenders might pursue, including the right to change jobs and residences, and creates a "chilling effect",
(c) create lasting and painful consequences which do not flow from the fact of conviction, but flow from the arbitrary and capricious actions of the Board, the Division, and the Parole Officers according to their own personal predilections,
(d) all periodic updates must be made in person, as applied, on a monthly schedule or more often, as determined arbitrarily by the Parole Officer,
(e) in terms of the restraint imposed, they are in many ways more harsh or are parallel to probation, parole, or supervised release, and
(f) the Board imposes many of the same mandatory restraints required by statute that are applicable to parole, NRS 213.1245, a criminal sentence, upon offenders sentenced to Lifetime Supervision, a civil sentence.

In *Smith*, the Court used the seven (7) "useful guidelines" in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, (1963) to consider whether the Act subjects offenders to an "affirmative disability or restraint". The Court inquired how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive. The conditions of Lifetime Supervision are punitive in nature and effect, and the disabilities and restraints are major and direct, and impact the offender for life.

This Court must consider the seven "useful guidelines", not only in the framework relating to the *Ex Post Facto Clause*, but also to the *Bill of Attainder Clause*, and the *Double Jeopardy Clause*. These "guidelines" have migrated into ex post facto case laws from double jeopardy jurisprudence, and have their earlier origins in cases under the *Sixth and Eighth Amendments*, as well as the *Bill of Attainder Clause*, and the *Ex Post Facto Claus.*

According to the Statutes of the State of Nevada at the time, the imposition of conditions by the Board of Parole Commissioners violate the *Ex Post Facto Clause*, thereby making the civil sentence of Lifetime Supervision constitutionally illegal.

Issue #5: Bill of Attainder: *U.S.C.A. Const. Art. 1, Sec. 9; NV Const. Art. 1, Sec 15.*

The United States Constitution states: in Article I, Section 9, that "No *Bill of Attainder* or ex post facto law shall be passed." The Nevada Constitution states in section 15, of Article 1, that "No *Bill of Attainder*, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed."

A logical starting place for an inquiry into the meaning of prohibition in regards to a *Bill of Attainder* is in its historical background. Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply, a few, however, simply described them. While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the *Bill of Attainder Clause* and its relevance to contemporary problems must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate.

> "The *Bill of Attainder Clause* was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against the legislative exercise of the judicial function, or more simply, trial by legislature", United States v. Brown, 381 U.S. 437, 440, 85 S. Ct. 1707, (1965).
>
> "A *Bill of Attainder* is any legislative act that applies to named individuals or an easily ascertainable group in such a way as to inflict punishment on them without a judicial trial", United States v. Brown, 381 U.S. 437, 448-49, 85 S. Ct. 1707, (1965); Spilotro v. State of Nevada, Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).

The *Bill of Attainder Clause* was not only intended as one implementation of the general principle of fractionalized power, but also reflected the Framer's belief that the legislative branch is not so well suited to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

> In 1810, Chief Justice Marshall, speaking for the Court stated that "A Bill of Attainder may affect the life of an individual, or may confiscate his property, or may do both", Fletcher v. Peck, 10 U.S. 87, 6 Cranch 87, 138, (1810).
>
> "The Court's pronouncement therefore served notice that the *Bill of Attainder Clause* was not to be given a narrow historical reading, (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups", Ogden v. Saunders, 25 U.S. 213, 12 Wheat 213, 286, (1827); United States v. Brown, 381 U.S. 437, 447, 85 S. Ct. 1707, (1965); Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, (1867); Ex parte Garland, 71 U.S. 333, 4 Wall 333, (1866).

Defendant asserts that the Board of Parole Commissioners has overstepped the bounds of its authority by implementing the conditions of Lifetime Supervision, with no checks or safeguards to ensure that they were constitutionally legal by any other branch of government.

> "Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,--the very class of cases most likely to be prosecuted by this mode", Constitutional Limitations, (Cooley), pp. 536-537, (8th ed. 1927); Commentaries of the Constitution of the United States, (Story), p. 210, (4th ed. 1873); History of the Republic of the United States, (Hamilton), p. 31, (1859), and quoted in Calder v. Bull, 3 U.S. 386, 389, 3 Dall 386, (1789). 386, 389, (1789); United States v. Lovett, 328 U.S. 303, 317-318, 66 S. Ct. 1073, (1946).

The conditions of Lifetime Supervision are not articulated in any statute or regulation, proving that the Board enacted and imposed the conditions illegally. The deprivation of any rights, civil or political, previously enjoyed, is punishment, the circumstances attending and the causes of the deprivation determining this fact. These conditions are arbitrary and discriminatory, and constitute a *Bill of Attainder*, as they clearly describe the parties to who they are applied to, and restrain Constitutional Liberty Interests and First Amendment Rights. The conditions inflict punishment upon a class of citizens without due process.

Issue #6: Due Process: *U.S.C.A. Const. Amend 1 &14; NV Const. Art. 1, Sec. 1, 8 & 18.*

Both the United States Constitution and the Nevada Constitution provide that no person shall be deprived of life, liberty or property without due process of law, United States Constitution, Amendment 1 and 14, (1776); Nevada Constitution, Section 1, 8, and 18, (1863).

Defendant asserts that the imposition of the conditions of Lifetime Supervision is a continuation of the original sentence. The Board denies proper notice to Defendant.

> The conditions of Lifetime Supervision are not determined and are set at a later date by the Board of Parole Commissioners after the original sentencing date of the District Court, Johnson v. State, 123 Nev. 139, 159 P.3d 1096, (2007).

The Board of Parole Commissioners is acting as a quasi-judiciary Board, where all procedural due process rights apply, along with the Sentencing Guidelines, just as in the original court proceeding. The Board, by not allowing the presence of Defendant at the setting of the Conditions, denies the right to argue against them, or to voice an appeal. By denying counsel, or the ability to object to the conditions, they deny judicial review, and the right to be heard.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case"', Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, (1985); quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, (1950); and Concrete Pipe v. Construction Laborers, 508 U.S. 602, 617, 113 S. Ct. 2264, (1993).

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'", Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, (1972); quoting Baldwin v. Hale, 68 U.S. 223, 1 Wall 223, 233, (1864); Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, (1965).

The United States Supreme Court has stated that these essential constitutional promises may not be eroded.

Defendant asserts that deprivation of liberty, next to deprivation of life, is the greatest punishment a State can impose upon an individual, and the importance of regaining one's liberty, or of keeping one's Constitutional Liberty Interests and First Amendment Rights should not be undervalued, and taken away without Procedural Due Process.

"Substantive due process requires that government action depriving a person of life, liberty or property have a rational, non-arbitrary connection to a legitimate purpose", Kelley v. Johnson, 425 U.S. 238, 96 S. Ct. 1440, (1976); Jefferies v. Turkey Run Consolidated School District, 492 F.2d 1, 4, (7th Circuit 1974).

"In determining whether a substantive right protected by the *Due Process Clause* has been violated, it is necessary to balance the 'liberty of the individual' and 'the demands of an organized society", Youngberg v. Romeo, 457 U.S. 307, 320, 102 S. Ct. 2452, (1982); quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, (1961).

"An individual's Constitutional Liberty Interests encompasses the ability to pursue interests of choice, to move from place to place unhindered by the government, and to choose freely any lawful way of living", Kelch v. Director, Nevada Dept. of Prisons, 10 F.3d 684, (9th Circuit 1993).

"A Liberty Interest is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints", Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 2805, (1992); quoting Poe v. Ullman, 367 U.S. 497, 542, 81 S. Ct. 1752, (1961).

Defendant asserts that once he completed and finalized his suspended sentence by honorably discharging his probation obligation in April of 2008, that all Constitutional Rights accorded to a citizen of the United States and the State of Nevada, were returned to him, absent

the ones described in statute, such as the right to vote, to hold public office, to serve on a jury, or to own a firearm. Even these may be returned to Defendant upon application and per time limits.

> In determining whether Defendant has obtained a constitutional liberty interest, one of the foremost relevant questions for the Court to consider is, whether or not Defendant has suffered a "sufficiently 'grievous loss' to trigger the protection of due process", Olim v. Wakinekona, 461 U.S. 238, 252, 103 S. Ct. 1741, (1983); citing Vitek v. Jones, 445 U.S. 480, 488, 100 S. Ct. 1254, (1980).
>
> Whether procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss", Joint Anti-Facist Refuge Committee v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, (1951); quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, (1970).
>
> An extremely relevant question is that the Court must look "to the nature of the interest at stake". Board of Regents v. Roth, 408 U.S. 564, 571, 92 S. Ct. 2701, (1972).

The Nevada Supreme Court held in *Kelch* that, whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer "grievous loss". The Court looked at the unqualified constitutional liberties granted to a parolee, and determined that, once granted parole, he has obtained many of the core values of unqualified constitutional liberty. If the Court considered the unqualified constitutional liberties of a person on probation, it would conclude that a probationer would have obtained more constitutional liberties than a parolee; due to the inherent nature of probation, and the Federal Probation Act, (1925); as probation is imposed under a suspended sentence, and is not a matter of legislative grace.

Defendant asserts that a reasonable and well-informed person of ordinary intelligence would contend that any person subject to a civil sentence, penalty, or fine should not be restrained of ***any*** Constitutional Liberty Interest or First Amendment Right by denying *Procedural Due Process* at any stage of ***any*** proceedings against him. By not providing for proper notice, presence at the hearing, discovery, and the ability for cross-examination and to confront witnesses, during any phase of ***any*** hearing held against the Defendant, determines this to be a constitutionally illegal action by the Board of Parole Commissioners.

> The ordinary mechanism that is used by the Supreme Court for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law", U.S. Constitution, 5th Amendment, is the test that the Supreme Court articulated in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, (1976).

Mathews dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process, Id. 424 U.S. at 335, as quoted in Hamdi v. Rumsfeld, 542 U.S. 507, 528, 124 S. Ct. 2633, (2004).

The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards", Id. at 335,

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property", Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, (1978).

The Court also noted that "the importance to organized society that procedural due process be observed" and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions".

"This is because we live in a society in which mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's liberty", O'Connor v. Donaldson, 422 U.S. 563, 575, 95 S. Ct. 2486, (1975).

When we turn to the question of whether the requirements of *Procedural Due Process* in general apply to the imposition of Lifetime Supervision conditions, one of the most compelling arguments is the Supreme Court's view of something similar in Morrissey v. Brewer, 408 U.S. 471,481, 92 S. Ct. 2593, (1972), where the Court looked at the issue of due process in relation to parole revocation hearings.

As Justice Blackman wrote, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege', Graham v. Richardson, 403 U.S. 365, 374, 91 S. Ct. 1848, (1971); Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, (1971); Pickering v. Board of Education, 391 U.S. 563, 568, 88 S. Ct. 1731, (1968).

The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the 14th Amendment, Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, (1972).

Once it is determined that due process applies, the question remains what process is due. It has been said so often by the Court and others that due process is flexible and calls for such procedural protections as the particular situation demands. "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action", Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, (1961); Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S. Ct. 1502, (1960).

Other jurisdictions have looked to this issue of due process in this context and one of the most compelling opinions is a recent one in Ex parte Jonathon Evans, Applicant, 2011 WL 1662384 (Texas Crim. App. 2011). The Texas Board of Parole Commissioners determined that they could impose conditions upon a person under their authority without a hearing, and without due process. In many Court battles between the Judicial Courts in Texas, the Texas Supreme Court, and the 5th Circuit Court of Appeals, it was held that a parolee was entitled to due process protections, including a hearing, prior to the imposition of sex offender conditions.

> The Court explained that "the grave risk of error that envelops the procedures used by the Board is most troubling".
> (1) By not allowing the parolee to review the evidence presented against him, he is unable to correct any misinformation placed in his packed that the Board reviews.
> (2) By not allowing the parolee to appear before the Board, the Board must act without mitigating or clarifying evidence from the parolee.
> (3) By not allowing the parolee to confront opposing witnesses, the parolee is unable to refute damning statements made against his interest, and the Board in unable to evaluate the credibility of the parolee against that of opposing witnesses.

Issue #7: First Amendment: ***U.S. Const. Amend 1; NV Const. Art. 1; Sec 1, 4, 9 & 10.***

The United States Supreme Court has stated that all Americans have a "right to associate" for the purposes of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.

> "The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties", Roberts v. United States Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, (1984); Burgess v. Storey County, 116 Nev. 121, 992 P.2d 856, (2000).

The Overbreadth Doctrine of the First Amendment may invalidate laws, such as these statutes, specifically NRS 176.0931, NRS 213.1243, and NAC 213.290 that infringe upon First Amendment Rights, and Constitutional Liberty Interests, and without procedural due process.

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

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

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

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

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

The restraint of First Amendment Rights of Defendant and all others similarly situated, by the use of the "conditions of Lifetime Supervision" answer the charge of overbreadth. The Court should agree that the claim survives this test and subject the statute and the conditions to further analysis in accordance with well-established principles of constitutional law.

The Supreme Court has stated in order to make a determination of this issue, that "because a claim of constitutionally protected right is involved, it 'remains our duty in a case such as this to make an independent examination of the whole record"', Cox v. Louisiana, 379 U.S. 536, 544, 85 S. Ct. 453, (1965); Edwards v. South Carolina, 372 U.S. 229, 235, 83 S. Ct. 680, (1963); Blackburn v. Alabama, 361 U.S. 199, 205, 80 S. Ct. 274, (1960); Pennekamp v. Florida, 328 U.S. 331, 335, 66 S. Ct. 1029, (1946).

Defendant asserts that the statutes and conditions are unconstitutionally overbroad in violation of the First and Fourteenth Amendments because it punishes mere association with an individual or individuals regardless of their political, religious, legal, therapeutic or employment situations. It does not require, nor has it been construed to require, any active participation in any illegal activity, but rather, it is a blanket denial of the right to associate, even with ones own family members if they were previously convicted of a crime. The conditions are not narrowly drawn in relation to association.

> The United States Constitution grants to local governments broad discretion to control and regulate the activities of citizens; however, such controls and regulations cannot sweep so broadly as to infringe the constitutional and organic rights of the individual. "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms, NAACP v. Alabama, 377 U.S. 288, 307, 84 S. Ct. 1302, 1314, (1964).
>
> The State can do so only through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited, Gregory v. Chicago, 394 U.S. 111, 118, 124-125, 89 S. Ct. 946, (1969).

Defendant is being restrained of his First Amendment Rights to associate by the burden of his only "criminal act" being "knowingly or unknowingly associating" without any intent of wrong doing or criminal activity. The "association" condition punishes an individual, not for his own criminal acts, but rather for his act of being in a public or a private place, for innocent behavior or conduct, performed with no intent or guilt, therefore clearly infringing upon the free exercise of his associational freedoms.

> Both the Fifth Circuit and the Supreme Court have recognized that under our system of justice, punishment must be predicated only upon personal guilt. "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct….that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the *Due Process Clause*, Scales v. United States, 367 U.S. 203, 224-225, 81 S. Ct. 1469, 1484, (1961); St. Ann v. Palisi, 495 F.2d 423, 425, (5th Circuit 1974).
>
> In *Scales*, the statute was challenged on the ground that it imputed guilt by mere association, and therefore infringed on First Amendment guarantees. The Supreme Court noted that a conviction could not be based upon "what otherwise might be regarded as merely an expression….unaccompanied by any significant illegal action to support it, or any commitment to undertake such action. Even "knowing" association with a group or status cannot be a punishable act just because some members of the group or status *might be* engaged in criminal conduct. In the opinion of the Court, the ordinance was unconstitutionally overbroad because it authorizes the punishment of constitutionally protected conduct, Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Coates v. City of Cincinnati, 402 U.S. 611, 615, 91 S. Ct. 1686, 1689, (1971).

The Board of Parole Commissioners violate the First Amendment Rights of the Defendant by requiring permission to associate. This is done by denying permission to attend churches to practice an offender's religion, by the allegation that minors or other offenders might be present, or that there is a Sunday school or daycare on the premises, which disallows the

Defendant from being in or near where children may congregate, or on "school grounds", regardless of the fact that adults are present. They further violate the constitutional right to work, by denying the constitutional liberty to associate, in relation to employment.

> First, in making association criminal: "The Board has the burden to show a compelling government interest to justify a restriction on petitioner's constitutional right to associate", Elrod v. Burns, 427 U.S. 347, 362, 96 S. Ct. 2773, (1976).
>
> Second, "mere association with a person or group cannot be made criminal", Scales v. United States, 367 U.S. 203, 81 S. Ct. 1469, (1961); Sawyer v. Sandstrom, 615 F.2d 311, (5th Circuit 1980); Spilotro v. Nevada Gaming Commission, 99 Nev. 187, 661 P.2d 467, (1983).
>
> And finally, "the State may not punish solely on the status or reputation of a person, Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145, (1968); Robinson v. California, 370 U.S. 660, 666, 82 S. Ct. 1417, (1962).

The "Right" is violated by not allowing association with whomever one wants, whenever one wants, wherever one wants, including association at parks, schools, movie theaters and other public places. Association includes church members, therapy group members, political party members, or people of a like mind, and even the right to associate with minors. This relates to attendance at political events, other public events, or even private events of a political nature. This is due to the allegation that a minor or another offender might be present, or that these events are held at a park, a school, or a movie theater. They infringe upon the right to protest, as many of these efforts are held in parks, schools, libraries, and other public places.

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

A restraint of First Amendment Rights is caused by the denial of a computer or any internet access, not only on the offender, but also on the offender's family.

> This is an important medium of communication, commerce, and information gathering, and in many instances, the only way one may apply for employment, United

States v. Crume, 422 P.3d 728, (8th Circuit 2005); United States v. Ristine, 335 F.3d 692, 696, (8th Circuit 2003); United States v. Wiedower, 634 F.3d 490, (8th Circuit 2011).

The Board violates the right to vote, by denying presence on school grounds, which also inhibits political associations, as many political events are held on school grounds. In our state, almost all of the state caucuses are held at schools, as are most of our voting poll stations. This restriction on schools, for parents of minor children, or grandchildren, deny the right to petition for issues relating to school budgets, which is a political process; as almost all discussions concerning the budget of schools are held on school grounds.

The Board further violates the rights of Defendant by denying him the right to continue his education, as the condition as imposed states that Defendant shall not be in or near a school or school grounds, with no grounds for relief. This means that the Defendant can not even attend an adult school, a truck driving school, or any school at all, except an online school, which they deny by the condition to not have access to the internet. It is a constitutional right to pursue an education and better oneself, as it relates to the pursuit of life, liberty and happiness.

> "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught, Tyson & Brother v. Banton, 273 U.S. 418, 443, 47 S. Ct. 426, 432, (1927).

All of these conditions as imposed will affect the Defendant for the rest of his life, as this is a life sentence, and many of these conditions give no ability to ever be less restrictive. And these conditions are non-appealable according to the Board, therefore denying due process and judicial review.

> The Court states that in the area of First Amendment Rights, as well as areas involving other constitutionally protected rights, "we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determinations of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding"', Haynes v. Washington, 373 U.S. 503, 515-516, 83 S. Ct. 1336, (1963); Stein v. New York, 346 U.S. 156, 181, 73 S. Ct. 1077, (1953).

Issue #8: Judicial Review:

In Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, (1803), the Supreme Court held that "Congress cannot pass laws that are contrary to the Constitution, and it is the role of the Judicial

system to interpret what the Constitution permits". The conflict in *Marbury* raised the important question of what happens when an Act of Congress conflicts with the Constitution. Justice Marshall answered that Acts of Congress that conflict with the Constitution are not law and the Courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position, Justice Marshall looked to the nature of the written Constitution…there would be no point in having a written Constitution if the Courts could just ignore it.

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"
>
> "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".

One of the key principles on which *Marbury* relies is the notion that for every violation of a vested legal right, there must be a legal remedy. Justice Marshall argued that the very nature of the judicial function requires the Courts to make this determination. Since it is a Court's duty to decide cases, the Courts have to be able to decide what law applies to each case. Therefore, if two laws conflict with each other, a Court must decide which law applies. Justice Marshall makes the following statements in *Marbury*:

> "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."
>
> "So, if a law, (statute) be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case comfortably to the law, disregarding the Constitution, or comfortable to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."
>
> "Those, then, who controvert the principle that the Constitution is to be considered in Court as a paramount law are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution, and see only the law."
>
> ***"This doctrine would subvert the very foundation of all written constitutions."***

The concept of judicial review was discussed by Alexander Hamilton, in the Federalist Papers, No. 78, where he states that under the Constitution, the federal courts would have not just the power, but the duty, to examine the constitutionality of statutes. Hamilton states:

> "[T]he Courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The *interpretation* of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the Judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution shall be preferred to statute, the intention of the people to the intentions of their agents."

On a request to appeal or modify a condition of Lifetime Supervision, the Board now states that, the only way an appeal or a modification to a condition may be filed is with the consent of the Supervising Officer of the offender, which allows bias and prejudice.

> The Courts have stated that "The most important limitation is that a probation officer may not decide the nature or extent of the punishment imposed upon a probationer," United States v. Pruden, 398 F.3d 241, 250, (3rd Circuit 2005), since "under our constitutional system the right to……impose the punishment provided by law is judicial…", Ex Parte United States, 242 U.S. 27, 41-42, 37 S. Ct. 72, (1916).

This is a judicial authority that the Board is delegating to a Parole and Probation Officer. This type of authority is non-delegable, and it is illegal. It is absurd to grant the Parole Officer the authority to determine if his or her actions are legal and proper, in their ***interpretation*** of the conditions, without an avenue of appeal open to an offender to re-consider the issue.

> The limitation is therefore of constitutional dimension, deriving from Article III's grant to the Courts of power over "cases and controversies", *Pruden*, 398 F.3d at 250, citing United States v. Melendez-Santana, 353 F.3d 93, 103, (1st Circuit 2003).
>
> It has been held that "duties imposed upon the Court cannot be discharged….by the probation officer", United States v. Stuver, 845 F.2d 773, (4th Circuit 1988).

Issue # 9: Double Jeopardy: *U.S.C.A. Const. Amend 5 & 14; NV Const. Art. 1; Sec. 1 & 8.*

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall be subject for the same offence to be twice put in jeopardy of life or limb, United States Constitution, Amendment V.

The Nevada Legislature, in enacting SB 192, (1995) performed admirably and drafted the law for this "special sentence" in a manner that did not violate the *Double Jeopardy Clause.* Only through the efforts of the Board of Parole Commissioners and the Division of Parole and Probation, has this well-written and researched law become "punitive in nature and effect" as applied to an offender serving the civil sentence of Lifetime Supervision.

> This protection applies to the states through the Fourteenth Amendment, Benton v. Maryland, 395 U.S, 784, 89 S. Ct. 2056, (1969). This has been incorporated into the Nevada Constitution, Nev. Const. Art. 1, & 8, cl. 1.
>
> The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for same offense after acquittal; (2) a second prosecution for same offense after conviction; and (3) multiple punishments for the same offense, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, (1969).
>
> The prohibition against multiple punishments prevents the government from punishing twice, or attempting a second time to punish criminally, for the same offense. Witte v. United States, 515 U.S. 389, 396, 115 S. Ct. 2199, (1995); Helvering v. Mitchell, 303 U.S. 391, 399, 58 S. Ct. 630, (1938).
>
> The *Double Jeopardy Clause* "at its most fundamental level…protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense", U.S. v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215, (9th Circuit 1994).

The Supreme Court has concluded that a "civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, in punishment" for the purposes of double jeopardy analysis, United States v. Halper, 490 U.S. 435, 448, 109 S. Ct. 1892, (1989). Even though *Halper* has been overturned for other reasons, this important concept still applies, and the current framework for double jeopardy analysis is completely recognized in the instant case and in this motion.

> It has long been recognized, however, that the Clause does not prohibit the imposition of any additional sanction that could, "in common parlance", be described as punishment. Hudson v. United States, 522 U.S. at 98-99, 118 S. Ct. 488, at 493, (1997). Rather, the Clause protects only against the imposition of multiple criminal punishments for the same offense, Id at 99, 118 S. Ct. at 493.
>
> The framework for the inquiry is well established, and the Court must "ascertain whether the Legislature meant the statute to establish civil proceedings, Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, (1997). This question has been held by the Nevada Supreme Court in Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002).
>
> The Court must first look to whether the Legislature intended the provision to be civil or criminal and then to whether the proceedings are so punitive" in fact" as to

persuade the Court that they may not legitimately be viewed as civil in nature despite Legislative intent, United States v. One Assortment of 89 Firearms, 465 U.S. 354,366, 104 S. Ct. 1099, (1984).

Whether a statutory "scheme" is civil or criminal "is first of all a question of statutory construction, Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, (1997).

The Court has to consider the statute's text and its structure to determine the legislative objective, Fleming v. Nestor, 363 U.S. 603, 617, 80 S. Ct. 1367, (1960).

Defendant argues that the statutes of Lifetime Supervision lack the necessary regulatory connection because they are not "narrowly drawn to accomplish the stated purpose". The State relies on this imprecision, which is not articulated in the statutes; and the application of the conditions underlying the statutes suggest that the Legislative intent of a non-punitive purpose is a "sham or mere pretext", Kansas v. Hendricks, 521 U.S. 346, 371, 117 S. Ct. 2072, (1997).

Based on a previously established rule exemplified in United States v. Ward, 448 U.S. 242, 248-49, 100 S. Ct. 2636, (1980), *Hudson* and *Ursery* articulate a two-part test for determining whether a particular punishment is criminal or civil in nature and effect, Hudson v. United States, 522 U.S. 93, at 98-99, 118 S. Ct. 488, at 493, (1997); and United States v. Ursery, 518 U.S. 267, 116 S. Ct. 2135, (1996).

This interpretation of the "intent-effects test" in these United States Supreme Court Opinions in *Ursery*, *Ward*, and *Hudson* has been upheld and followed by the Nevada Supreme Court. To define this "test" for the Court, the following definition of the two prongs used in assessing the double jeopardy implications of a civil sanction are,

(1) the first inquiry is whether the legislature intended the provision in question to be civil or criminal in nature, and even in those cases where the legislature has indicated an intention to establish a civil mechanism, which *Palmer* held, and that

(2) the court must further inquire into whether the statutory scheme is so punitive, either in purpose or effect, as to transform what was clearly intended as a civil remedy into a criminal penalty, Desimone v. State of Nevada, 116 Nev. 195, 996 P.2d 405, (2000); State v. Lomas, 114 Nev. 313, 955 P.2d 678, (1998); Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003); Rex Trailer v. United States, 350 U.S. 148, 76 S. Ct. 219, (1956)

The Nevada Supreme Court has "concluded that, on balance, it is sufficiently punitive in nature and effect as to render it a direct penal consequence", that "Lifetime Supervision is a form of punishment because of the affirmative disabilities and restraints it places on the sex offender", and that it is considered as a civil sentence, Palmer v. State, 118 Nev. 823, 59 P.3d 1192, (2002). The Defendant asserts that this satisfies the first and second prong of the test.

In a case involving community supervision for life in Nebraska, the Nebraska Supreme Court held that the intent-effects test as described above is the appropriate standard to determine whether the lifetime registration requirement and the community supervision requirement were punitive in nature and effect, State v. Payan, 277 Neb. 663, 765 N.W.2d 192, (Nebraska 2009).

Seven factors are looked to as "useful guideposts in determining whether this is punitive in nature, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, (1963); Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, (2003). This does not mean that all seven (7) must be satisfied to obtain the clearest proof necessary to over ride the statute, but only that these seven (7) factors must be considered as "useful guidelines". These seven (7) factors include:

(1) whether the sanction involves an affirmative disability or restraint, Ex Parte Garland, 4 Wall 333, 377, 71 U.S. 333, (1866); United States v. Lovett, 328 U.S. 303, 316, 66 S. Ct. 1073, (1946); Fleming v. Nestor, 363 U.S. 603, 617, 80 S. Ct. 1367, (1960)

(2) whether it has historically been regarded as a punishment, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 320-321, (1867); Ex parte Wilson, U.S. 417, 426-429, 5 S. Ct. 935, (1885); Mackin v. United States, 117 U.S. 348, 350-52, 6 S. Ct. 777, (1886);

(3) whether it comes into play only on a finding of scienter, Helwig v. United States, 188 U.S. 605, 610-612, 23 S. Ct. 427, (1903); Child Labor Tax Case, 259 U.S. 20, 37-38, 42 S. Ct. 449, (1922);

(4) whether its operation will promote the traditional aims of punishment-retribution and deterrence, United States v. Constantine, 296 U.S. 287, 295, 56 S. Ct. 223, (1935); Trop v. Dulles, 356 U.S. 86, 96, 111-112, 78 S. Ct. 590, (1958);

(5) whether the behavior to which it applies is already a crime, Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, (1922); United States v. La Franca, 282 U.S. 568, 572-573, 51 S. Ct. 278, (1931); United States v. Constantine, 296 U.S. 287, 56 S. Ct. 223, (1935);

(6) whether an alternative purpose to which it may rationally be connected is assignable for it, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 319, (1867); Child Labor Tax Case, 259 U.S. 20, 43, 42 S. Ct. 449, (1922); Lipke v. Lederer, 259 U.S. 557, 561-562, 42 S. Ct. 549, (1922); Trop v. Dulles, 356 U.S. 86, 96, 78 S. Ct. 590, (1958);

(7) whether it appears excessive in relation to the alternative purpose assigned, Cummings v. Missouri, 71 U.S. 277, 4 Wall 277, 319, (1867); Fleming v. Nestor, 363 U.S. 603, 615, 617, 80 S. Ct. 1367, (1960); United States v. Constantine, 296 U.S. 287, 56 S. Ct. 223, (1935); Rex Trailer v. United States, 350 U.S. 148, 76 S. Ct. 219, (1956)

Defendant asserts the following arguments for the seven (7) "useful guidelines" to determine that Lifetime Supervision is a violation of the *Double Jeopardy Clause*.

(1) The Nevada Supreme Court has stated that "Lifetime Supervision is a form of punishment because of the affirmative disabilities and restraints it places on the sex offender" and that they "have a direct and immediate effect on the range of punishment imposed", Palmer v. State, 118 Nev. 823, 59 P.3d 1192, 1195, (2002).

The opinion held in *Palmer*, has been held in other jurisdictions that have looked to this same issue of Lifetime Supervision, and the following State Supreme Courts have also determined that Lifetime Supervision or Community Supervision for Life is punitive in nature and effect. This has been determined in Ward v. Tennessee, 315 S.W. 3d 461, (Tennessee 2010); in Jamgochian v. New Jersey State Parole Board, 928 A.2d 1, (New Jersey 2007); in State v. Payan, 765 N.W. 2d 192, (Nebraska 2009); in State v. Lathrop, 781 N.W.2d 288, (Iowa 2010); and Iowa v. Baugh, No. 8-055/06-1599, (Iowa 2008), an unpublished opinion, but this opinion may be cited in briefs.

(2) The Nevada Legislature has introduced many punitive statutes to the Nevada Statutes that define punishment for an offender criminally sentenced, to either probation or parole, by clearly articulated conditions which may be imposed or are mandatory conditions.

(a) Probation conditions are articulated in NRS 176A.110; NRS 176A. 210; NRS 176A.400; NRS 176A.410; and NRS 176A.413, and Chapter 176A in general.

(b) Parole conditions are articulated in NRS 213.1245; NRS 213.1258; and NRS 213.12175, and in Chapter 213 in general.

(c) A condition which is imposed upon parole, probation, and Lifetime Supervision is articulated in NRS 213.1076.

(d) There are no Lifetime Supervision statutes that articulate any conditions that may be imposed or are mandatory conditions as described in the statutes above. By mirroring the language contained in many of these parole and probation statutes, in reference to the "civil" conditions imposed by the Board of Parole Commissioners, they are effectively inflicting punishment "de facto".

(3) A finding of scienter is not required, nor does it require inquiry into an offender's state of mind. Many of these conditions concern conduct or behavior that is constitutionally protected and is not a crime, in and of itself. There is not even the intent to commit a crime, NRS 193.190, Sheriff v. Burdg, 118 Nev. 853, 59 P.3d 484, (2002).

(4) By imposing conditions which mirror the language of punitive criminal statutes, specifically NRS 213.1245, the Board of Parole Commissioners has allowed and authorized conditions which, by definition as a criminal statute, addresses punishment, and promotes the traditional aims of punishment-retribution and deterrence.

(5) Many of the conditions relate to conduct which is not a crime in and by itself, which are Constitutional Liberty Interests and First Amendment Rights that are granted and guaranteed to a citizen of the United States and of the State of Nevada.

(6) The State might argue that public safety is a rational alternative purpose, due to "high rates of recidivism among convicted offenders". This has been proven false. (Exhibit 11). To indiscriminately take away Constitutional Liberty Interests and First Amendment Rights, upon arbitrary and capricious grounds, for the rest of their life is punishment, based upon this argument and rationale by the State.

(7) Even if this Court agrees that public safety is an rational alternative purpose, the Defendant asserts that these conditions as imposed and enforced are excessive in relation to any alternative purpose assigned, due to the restraints of Constitutional Liberty Interests and First Amendment Rights guaranteed to an offender placed on this "special sentence" of Lifetime Supervision, a civil penalty.

Defendant asserts that no rational reasonable alternative purpose exists that makes this punitive scheme as imposed and applied, and that is enforced in nature and effect, a *non-punitive* civil tool to help law enforcement keep better track of an offender. The only logical purpose is to further punish the offender for conduct that he has already been punished for, thereby causing Lifetime Supervision to be a constitutionally illegal violation of the *Double Jeopardy Clause*.

Defendant's Prayer for Relief:

WHEREFORE, the Defendant and all others similarly situated, pray for the following relief and respectfully request this Court to grant the following:

(1) an immediate temporary injunction per NRS 34.340, against the State of Nevada, the Board of Parole Commissioners, and the Division of Parole and Probation, commanding them to cease and desist imposing and enforcing the conditions of Lifetime Supervision, pursuant to NRS 176.0931, NRS 213.1243, and NAC 213.290, under application of an Alternative Writ of Prohibition. Injunctive relief may be granted by this Court pursuant to the Nevada Constitution in Article 6, Section 6, and NRS 33.010.

(2) a ruling within 30 days, pursuant to NRS 34.185, a First Amendment Petition.

(3) an Alternative Writ of Prohibition, per NRS 34.330, to enjoin the statutes of Lifetime Supervision, per NRS 176.0931, NRS 213.1243, and NAC 213.290, and command the State of Nevada, the Board of Parole Commissioners, and the Division of Parole and Probation, to cease and desist doing that which is prohibited by law.

(4) reasonable costs and fees, and any further relief the Court deems appropriate.

Affirmation: Pursuant to NRS 239B.030

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

Respectfully dated this _____ day of February, 2012.

_____

Affiant Patrick Stephen Davis
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

Verification:

STATE OF NEVADA)

WASHOE COUNTY) ss.

COMES NOW, the Defendant, Patrick Stephen Davis, being duly sworn under oath, and according to law, deposes and says: "That I am the Defendant in the foregoing-entitled action, and that I have read the Motion for Petition of Alternative Writ of Prohibition, and First Amendment Petition, and know the contents thereof; that the same is true of my knowledge, except for those matters therein contained stated upon information and belief, and, as to those matters, I believe them to be true".

"I certify that I have written the Motion for Petition of Alternative Writ of Prohibition, and First Amendment Petition and that it is not frivolous or interposed for any improper purpose".

"I further certify that to the best of my knowledge, this Motion complies with all applicable Nevada Rules of Appellate Procedure, and that every assertion in the Motion regarding matters of record are supported by appropriate references to the page and volume number".

_____

Patrick Stephen Davis
Defendant in Proper Person
Redacted
Reno, NV 89512
Redacted

SUBSCRIBED and SWORN to before me

This _____ day of February, 2012.

_____

NOTARY PUBLIC in and for said

County and State

TABLE OF EXHIBITS

Letters to the Board of Parole Commissioners:

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