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7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 PATRICK STEPHEN DAVIS,  
11 Plaintiff,  
12 v.  
13 STATE OF NEVADA ET AL.;  
14 Defendants.

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

**RESPONSE TO PLAINTIFF'S MOTION  
FOR A PROTECTIVE ORDER**

15 Defendants the State of Nevada, Nevada Board of Parole Commissioners, Nevada  
16 Department of Public Safety, Nevada Division of Parole and Probation, Connie Bisbee, James  
17 Wright, Bernard Curtis, Claudia Steiber, Natalie Wood, Claudia Cole, Aaron Evans, James  
18 Gothan, James Sackett and Nevada Attorney General Catherine Cortez Masto, through their  
19 attorneys, CATHERINE CORTEZ MASTO, Attorney General, and LORI M. STORY, Deputy  
20 Attorney General, respond to Plaintiff's motion for protective order (dkt no. 13). The  
21 Defendants' response is made pursuant to Fed. R. Civ. P. 26(c) and is based on the attached  
22 Points and Authorities and all other papers and pleadings filed therein.

23 **POINTS AND AUTHORITIES**

24 **I. BACKGROUND**

25 In this is an action brought by *pro se* Plaintiff, Patrick Davis, a motion to dismiss (dkt.  
26 no. 6) and an unopposed motion for protective order to stay discovery (dkt. no. 10) await  
27 decision by the Court. The motion to stay discovery asserted the belief that conducting  
28 discovery on the unsettled claims would be a waste of resources, particularly where the

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1 parties expect that an amended complaint might be entertained by the Court. On March 10,  
2 2014, Plaintiff filed the instant motion seeking a protective order to preserve evidence (dkt no.  
3 13) along with multiple motions seeking leave to add parties and amend the complaint (dkt.  
4 nos. 11 and 12), requesting notice of deficiencies of the complaint on file (dkt no. 14) and  
5 scheduling order and requesting a discovery plan with special scheduling (dkt. no. 15).

## 6 II. ARGUMENT

### 7 A. Discovery in Civil Actions.

8 Pre-trial discovery is a federal civil action ordinarily “accorded a broad and liberal  
9 treatment.” *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 392 (1947). If no claim of  
10 privilege applies, a non-party can be compelled to produce evidence regarding any matter  
11 “relevant to the subject matter involved in the action” or “reasonably calculated to lead to the  
12 discovery of admissible evidence.” See Fed.R.Civ.P. 26(b)(1). This broad right of discovery is  
13 based on the general principle that litigants have a right to “every man's evidence,” *United*  
14 *States v. Bryan*, 339 U.S. 323, 331, 70 S.Ct. 724, 730 (1950), and that wide access to  
15 relevant facts serves the integrity and fairness of the judicial process by promoting the search  
16 for the truth. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

17 The Court may limit the extent of discovery otherwise allowed if the discovery sought  
18 could be “obtained from some other source that is more convenient, less burdensome, or less  
19 expensive,” the party has had ample opportunity to obtain the information by discovery in the  
20 appropriate action or the burden of the proposed discovery outweighs its likely benefit,  
21 “considering the needs of the case”... and “the importance of the discovery in resolving the  
22 issues.” See Fed. R.Civ.Pro. 26(b)(2).

23 The “duty to preserve evidence arises when a party knows or should know that certain  
24 evidence is relevant to pending or future litigation.” *Ashton v. Knight Transp., Inc.*, 772  
25 F.Supp.2d 772, 800 (N.D. Tex., 2011). Stated differently, the duty to preserve is triggered “not  
26 only during litigation, but also extends to the period before litigation when a party should  
27 reasonably know that evidence may be relevant to anticipated litigation.” *Morford v. Wal-Mart*  
28 *Stores, Inc.*, No. 2:09-cv-02251-RLH-PAL, 2011 WL 635220, at \*3 (D. Nev. Feb. 11, 2011);

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1 see *Surowiec v. Capital Title Agency, Inc.* 790 F.Supp.2d 997, 1004 (D. Az. 2011); *In re*  
2 *Napster Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1067–68 (D. Az. 2011).

3 Defendants recognize and concede their obligation to preserve evidence in their  
4 possession or under their control that is pertinent to the claims raised in Plaintiff's complaint.  
5 They have taken steps to do so by preserving documents and files related to Plaintiff's lifetime  
6 supervision during the relevant periods and all materials related to the polygraph session  
7 scheduled and commenced on September 7, 2011. These facts make the order sought by  
8 this motion unnecessary as to evidence that is in the possession and under the control of the  
9 named Defendants.

10 Plaintiff, however, moves the Court for a Protective Order to preserve evidence which  
11 relates almost exclusively to the misdemeanor criminal matter that followed Plaintiff's refusal  
12 to cooperate in the polygraph that has long ago been resolved with a deferred prosecution  
13 and subsequent dismissal. He contends that he seeks preservation of evidence that "the  
14 State would have or could have used against the Plaintiff in the original arrest and trial,"  
15 contending those documents are somehow applicable to the instant case. He argues for  
16 preservation of evidence that "he would have specifically asked for and any exculpatory  
17 evidence that would have been obtainable to his defense of the charge which was ultimately  
18 dismissed." Motion for Protective Order, (dkt. No. 13), pp. 2-3 (emphasis added).

19 Defendants oppose the motion for protective order on the basis that Plaintiff's  
20 arguments and identified discovery requests are, for the most part, inappropriate to this civil  
21 action, relating as they do to documents and records that may have existed in the prosecutor's  
22 files of a criminal proceeding that has already concluded and that Plaintiff admits he "would  
23 have asked for or obtained" in those proceedings but, apparently, did not. Plaintiff seeks  
24 discovery and preservation of many documents not in the possession of or available to  
25 Defendants. Moreover, Plaintiff improperly relies on legal rules and standards not applicable  
26 to civil actions. Defendants assert that the requests are overbroad and burdensome. The  
27 Court should deny Plaintiff's motion.

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1           **B. Plaintiff Seeks Preservation of Documents/Materials Based on Rules of**  
2           **Criminal Procedure.**

3           Plaintiff argues for a protective order to preserve documents, records, reports, and  
4 other voluminous evidence by relying on various rules of discovery relevant to criminal  
5 proceedings in state courts and based on his purported constitutional rights as a criminal  
6 defendant. Because this is not a criminal proceeding and Plaintiff is not a criminal defendant  
7 in this action, many of his arguments and authorities are misplaced or inapposite. Only  
8 federal law governs the duty to preserve evidence in cases litigated in federal court, even in  
9 diversity cases where questions of State law are decided. *See Glover v. BIC Corp.*, 6 F.3d  
10 1318, 1329 (9<sup>th</sup> Cir. 1993). NRS 171.1965 and NRS 174.235 are Nevada statutes that  
11 specifically address a criminal defendant's rights to discovery of evidence to be relied upon in  
12 criminal proceedings, both in preliminary hearings and at trial. Plaintiff could have relied on  
13 them in his criminal proceedings. However, they are not applicable here.

14           Mistakenly relying on these state criminal procedure statutes and case law supporting a  
15 criminal defendants' rights to incriminating and exculpatory evidence, Plaintiff seeks reports  
16 and statements that may or may not have been prepared or obtained by the prosecuting  
17 attorney ("the State") in his criminal proceedings. Apart from applying the wrong laws, Plaintiff  
18 also fails to explain why he did not obtain the evidence he now seeks from the proper source.  
19 What steps did he take at the time of those criminal proceedings to obtain discovery? What  
20 items was he purportedly unable to obtain? How are those items relevant or discoverable in  
21 these civil proceedings?<sup>1</sup> Instead, citing state laws and constitutional rights governing criminal  
22 proceedings, he offers a laundry list of items he claims to be entitled to obtain from the  
23 Defendants, even though much of the requested information, if it even exists, would have  
24 been gathered and retained by the prosecutor of the criminal proceedings and would not be  
25 held by the Defendants in this action or be under their control. *See Brewer v. Quaker State*  
26 *Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (only when evidence is in the party's

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28 <sup>1</sup> Plaintiff repeatedly relies upon criminal discovery statutes and rules, arguing materiality to a criminal defense  
and suggesting his rights as a criminal defendant entitle him to the listed information. This civil action is  
governed by different rules and his discovery requested should be judged by a different standard.

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1 control will it be held responsible for not producing it). The Nevada statutes relied upon by  
2 Plaintiff are not relevant to Federal Civil Rights actions, which are governed by the Federal  
3 Rules of Civil Procedure and 42 U.S.C. § 1983.

4 Plaintiff seeks statements and summaries of statements from various Parole and  
5 Probation officers and officials whom he contends were or would have been witnesses in the  
6 criminal proceedings. He seeks investigative reports, documents and inter-office  
7 communications, policies and procedures related to the polygraph exam commenced on  
8 September 7, 2011,<sup>2</sup> and records of his own statements “related in any way to Case No.: RCR  
9 2011-063998,” including any “notes of law enforcement”... “related to the same.” While some  
10 of these documents may be relevant to the claims raised and some may even be in the  
11 possession of Defendants, Plaintiff’s claims to entitlement rest in his purported rights as a  
12 criminal defendant – which he is not – rather than as a party to a civil action for money  
13 damages and prospective injunctive relief.

14 Taken as a whole, Plaintiff has outlined a “fishing expedition” of Moby Dick<sup>3</sup>  
15 proportions, hoping to drag a huge fish into the small boat that is this civil rights action. His  
16 broad-ranging requests for case notes, surveillance videos of the Department of Public Safety  
17 Polygraph Office, any reports of same, call logs, field notes, memos, call for services, officer  
18 log records and radio traffic in regards to RCR 2011-063998, criminal history information or  
19 acts concerning Plaintiff, forensic evidence, results of scientific tests, experiments or  
20 comparisons by crime scene analysts, laboratory technicians or others, tangible or  
21 demonstrative objects, books, papers or documents intended to be relied on at a trial that  
22 never occurred and related to a criminal proceeding that has long ago been resolved, can only  
23 be seen as over-burdensome and harassing in nature. Plaintiff offers nothing to show how the  
24 materials he lists are relevant to his claims or how they might lead to materials that are  
25 relevant as required by Rule 26.

28 <sup>2</sup> A polygraph that was commenced, but not completed due to Plaintiff’s obstreperous behaviors.

<sup>3</sup> *Moby Dick, or, The Whale* (1851), by Herman Melville.

1 Many of the items on Plaintiff's list of sought-after discovery do not relate to the facts of  
2 the criminal proceedings which followed his arrest for failure to comply with the terms of his  
3 lifetime supervision or with the directives of his supervising officers. It seems illogical that  
4 there would be forensic reports or analyses in a case alleging that the defendant refused to  
5 answer questions or to cooperate in the administration of a polygraph examination that was  
6 required by the conditions of his lifetime supervision for a sex offense. Defendants can only  
7 speculate that Plaintiff has cut and pasted as whole-cloth from some motion for discovery  
8 prepared for a criminal proceeding not even related to the matters at hand. The "evidence"  
9 that Plaintiff seeks because it might "provide[] grounds for the defense to attack the reliability,  
10 thoroughness and good faith of the police investigation" (Motion at 14, lines 23-24) is  
11 completely out of line with the charges that he faced for his refusal to comply with the  
12 directives of his supervising officers. The likely existence of maps, drawings or diagrams  
13 prepared in connection with or pertaining to the investigation of crimes for which Plaintiff was  
14 charged (*Id.* at lines 27-28) is far-fetched. Plaintiff's rights to due process and to confront  
15 witnesses against him and to "exculpatory evidence" are not relevant to this civil action. He  
16 has no entitlement to *Brady*<sup>4</sup> materials in this action, as he is not a criminal defendant.

17 The Court should deny the motion for protective order as moot, as seeking discovery  
18 that is not relevant to the claims raised in the complaint, and as requests designed to harass  
19 the Defendants. The Court should also caution the Plaintiff that such irrelevant and wide-  
20 ranging discovery demands are inappropriate and will not be favorably entertained.

- 21 1. The "State" as Referenced in this Motion is not the Defendants, but  
22 Rather, the Prosecutor's Office.

23 Plaintiff's motion should also be denied because the State, as referred to by Plaintiff in  
24 this motion, does not describe the Defendants. Rather, "the State" in relation to the criminal  
25 proceeding he is apparently concerned with, would be the prosecutor's office in that  
26 proceeding. Plaintiff has not named the prosecutor as a defendant and does not even identify  
27 the jurisdiction where the proceedings occurred.

28 <sup>4</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

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**C. Plaintiff's Discovery Requests Are Overbroad and Burdensome.**

Plaintiff's requests for the addresses and contact information for the various Defendants and other state officials should be denied as overbroad. There is no need to preserve this information as it is not subject to destruction. These parties are represented by counsel and as such, can be contacted through counsel. Neither can Plaintiff demonstrate that his requests for "any and all text messages between patrol officers, detectives, sergeants and any law enforcement personnel including any member of the Nevada Division of Parole and Probation and/or the Nevada Department of Public Safety, relative to the following Case No: RCR 2011-063998, or Plaintiff" are focused in any way to discover information or evidence relevant to the claims raised in the complaint, given that Plaintiff has been the subject of the Defendants' supervision since shortly after his arrest in 2003. Plaintiff's suggested discovery requests are outlandish in their breadth and irrelevant to the claims raised.

**II. CONCLUSION**

Defendants request the Court deny the motion for protective order. They recognize and accept their obligation to preserve evidence in their possession relevant to Plaintiff's claims. They have taken the necessary efforts to preserve and protect the records in their possession so that they can be produced at the appropriate time. Plaintiff's requests are overbroad, burdensome and not intended to elicit evidence to support his claims. They are intended to obtain classified or privileged information about him and about the workings of the Parole and Probation Office in his ongoing efforts to attack his lifetime supervision and its terms.

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1 Plaintiff is not a criminal defendant in this action and he is not entitled to ask these  
2 Defendants for records from the prosecutor's files related to a fully completed and closed case  
3 that ultimately resulted in no criminal charge being prosecuted. The Court should deny this  
4 motion.

5 DATED this 26<sup>th</sup> day of March, 2014.

6  
7 CATHERINE CORTEZ MASTO  
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8  
9 By:           /s/ Lori M. Story            
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