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In the Supreme Court of the State of Nevada

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JESUS ADAMS,

Appellant(s),

vs.

STATE OF NEVADA, BOARD OF PAROLE COMMISSIONERS,

Respondent(s).

No. 51985

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APPELLANT'S OPENING BRIEF

APPEAL FROM THE 8TH JUDICIAL DISTRICT COURT, DEPT. 23

Respectfully submitted by:

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Are the mandatory parole conditions dealing with polygraph examinations and the corresponding statutes (NRS 176A.410 and NRS 213.1245) unconstitutionally vague and overbroad as currently written, as they provide no limitations or guidance on the scope of polygraph examinations?
2. Are the mandatory parole conditions, as imposed upon the Plaintiff, Jesus Adams, unconstitutionally vague and overbroad, as currently written, as they provide no limitations or guidance on the scope of polygraph examinations?
3. If the mandatory parole conditions, dealing with polygraph examinations, and the corresponding statutes (NRS 176A.410 and NRS 213.1245) unconstitutionally vague and overbroad, as currently written, since they provide no limitations or guidance on the scope of polygraph examinations, was the Parole Board's revocation of Jesus Adams' parole, in January, 2008, an unconstitutional and illegal action?
4. Did the District Court err in granting the State's Motion to Dismiss for Failure to State a Claim, pursuant to NRCP 12(b)(5)?

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STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiff/Appellant, Jesus Adams, filed a Complaint for Declaratory Relief, before the Eighth Judicial District Court,[1] following a hearing before the Parole Board, which resulted in his parole being revoked for a period of one (1) year. Adams argued before the District Court, that based upon the Nevada Supreme Court's prior ruling in Mangarela v. State, 117 Nev. 130, 17 P.3d 989 (2001),[2] the mandatory parole condition for sex offenders (specifically the provision for polygraph examinations) is unconstitutionally vague, ambiguous, and overbroad, and that the polygraph exam and interview of Jesus Adams was unconstitutional and inadmissible, and could not be used as the basis for the Parole Board's revocation of Jesus Adams' parole.

COURSE OF PROCEEDINGS AND DISPOSITION IN LOWER COURT

On February 11, 2008, Jesus Adams filed a Complaint in Clark County District Court, seeking Declaratory Relief.[3] The State of Nevada's responsive pleading was a Motion to Dismiss, based on NRCP 12(b)(5), which was filed on March 28, 2008.[4] On April 14, 2008, Plaintiff filed an Opposition to the Motion to Dismiss, and a Counter-Motion for Summary Judgment.[5] On or about April 15, 2008, the State filed its Reply and Opposition to Plaintiff's Counter-Motion for Summary Judgment.[6] On May 8, 2008, the Motion to Dismiss, and Counter-Motion for Summary Judgment, came on for hearing in Department 23 of the Eighth Judicial District Court, with the

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1 A copy of Adams' Complaint is included in the Appendix at pgs. 1-10.

2 A copy of the Mangarela case is included in the Appendix at pgs 76-82.

3 See Appendix pgs. 1-10.

4 A copy of the State's Motion to Dismiss is included in the Appendix at pgs. 11-19.

5 A copy of Adams' Opposition and Counter-Motion is included in the Appendix at pgs. 20-141.

6 A copy of the State's Reply is included in the Appendix at pgs. 142-148.

Honorable Jack B. Ames, substituting for suspended Judge Elizabeth Halverson. The Court granted the State's Motion to Dismiss, and denied Jesus Adams' Counter-Motion for Summary Judgment.[7] Notice of Entry of Order was filed on or about June 11, 2008.[8] It is from this ruling that Jesus Adams now appeals.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

The Plaintiff, Jesus Adams, was previously convicted of a sex offense, a felony, and was sentenced to Life with the Possibility of Parole. He was thereafter incarcerated in the State of Nevada. Subsequently, he was seen by the Nevada Board of Parole Commissioners, and was granted parole. On or about April 22, 2005, he was released from prison, on supervised parole.

On or about October 11, 2007, the Plaintiff, Jesus Adams was compelled by the Nevada Department of Public Safety, Division of Parole and Probation (hereinafter P&P) to submit to a polygraph examination and interview, pursuant to the terms of his parole agreement.[9] During the course of the polygraph examination and interview, certain information was elicited from Jesus Adams, by representatives of P&P, which allegedly formed a basis for P&P to take Jesus Adams back into custody, and which also allegedly formed a basis for P&P to bring Jesus Adams in front of the Board of Parole Commissioners, for a Parole Violation Hearing.[10]

On January 3, 2008, the Parole Violation/Revocation Hearing occurred. During the course of the hearing, counsel for Jesus Adams argued that the information obtained from Mr. Adams during the course of his polygraph examination and interview, was obtained in violation of his Constitutional Rights, based primarily on the Nevada Supreme Court case of Mangarella v. State,

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[7] A copy of the Court Transcript is included in the Appendix at pgs. 149-151.

[8] A copy of the Notice of Entry of Order, along with the Court's Order, is included in the Appendix at pgs 152-156.

[9] A copy of Jesus Adams' Mandatory Conditions of Parole (dated 12-07-2004) is included in the Appendix at pgs. 159-160.

[10] A copy of Jesus Adams' Parole Violation Report, (dated October 18, 2007) is included in the Appendix at pgs. 43-54.

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117 Nev. 130, 17 P.3d 989 (2001). During the Parole Violation/Revocation Hearing, the Parole Commissioners conferred with the Nevada Attorney General's Office to determine how to proceed, in light of the Mangarella case. The Parole Board trailed the hearing for several hours, to allow the Nevada Attorney General's Office to research the issue and to make a determination regarding how to proceed. After several hours, the Attorney General's office requested additional time to research the issue, and the Parole Board continued the hearing for Jesus Adams until January 10, 2008.

On January 10, 2008, the Parole Violation/Revocation Hearing for Jesus Adams was reconvened. The Parole Board indicated that the Attorney General's Office had reviewed the legal issues, and had instructed the Parole Board to proceed forward. The Parole Board was instructed that they could consider all evidence presented, including the evidence obtained from, and in association with, the polygraph examination and interview of October 11, 2007. No basis was given for proceeding in the face of the objections raised previously, specifically, the case of Mangarella v. State, 117 Nev. 130 , 17 P.3d 989 (2001). Based upon the information elicited at the time of the polygraph examination, the Parole Board determined that Jesus Adams' parole should be revoked, and he should remain incarcerated, for a period of one (1) year. As of the filing of this Brief, Mr. Adams is still incarcerated. Even if he is re-paroled prior to the Supreme Court's review of this matter, the issue is not moot, as the same Sex Offender Parole Conditions apply to Mr. Adams whenever he is on parole, and he will have lifetime supervision.

Following the January 10, 2008, Parole Revocation Hearing, at which three (3) Parole Board Commissioners decided to revoke Mr. Adams' parole for one year, such decision had to be ratified by at least one other Parole Board Commissioner. On or about January 15, 2008, counsel for Jesus Adams sent correspondence to the Nevada Board of Parole Commissioners, setting forth the reasons why Mr. Adams and his counsel felt that his due process rights had been violated, setting forth the legal basis for such argument, and requesting that the Parole Board "not" ratify the

decision made by the "southern board," and instead, reinstate Mr. Adams to his parole.[11] Additional information was provided to the Board by letter dated January 22, 2008.[12] A follow up letter was sent to the Board on January 28, 2008.[13] By letter dated February 4, 2008, the Board of Parole Commissioners indicated its decision to deny Mr. Adams' appeal, and indicating that the original order revoking Mr. Adams' parole, would be upheld.[14]

ARGUMENT

Standard of Review.

The Supreme Court has indicated previously that it reviews de novo, a District Court's Order Granting a Motion to Dismiss, pursuant to NRCP 12(b)(5).[15] Further, the State's Motion to Dismiss Jesus Adams' Complaint "is subject to a rigorous standard of review on appeal."[16] The Court must recognize all factual allegations in Mr. Adams' Complaint as true, and draw all inferences in his favor.[17] Finally, the Complaint should be dismissed, "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief."[18]

Parole Condition is an Unconstitutional Violation of Jesus Adams' Due Process Rights.

As the Supreme Court can clearly see, the primary basis for the Plaintiff's challenge of the

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[11] A copy of the January 15, 2008, correspondence is included in the Appendix at pgs. 55-92.

[12] A copy of the January 22, 2008, correspondence is included in the Appendix at pgs. 93-94.

[13] A copy of the January 28, 2008, correspondence is included in the Appendix at pg. 95.

[14] A copy of the February 4, 2008, correspondence is included in the Appendix at pg. 96.

[15] Buzz Stew v. City of North L.V., 124 Nev. Adv. Op. No. 21, 47262 (4-17-2008), 181 P.3d 670, citing Senut v. Lacavo, 122 Nev. 499, 134 P.3d 733 (2006).

[16] Id.

[17] Id.

[18] Id., citing Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000); Schmidt v. Washoe County, 123 Nev., 159 P.3d 1099, 1103 (2007), additional citations omitted.

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constitutionality of NRS 213.1245 is the case of Mangarella v. State.[19] Understandably, the Parole Board, and the Nevada Attorney General's Office, wanted the lower court to dismiss the Plaintiff's Complaint, and rule that subsection 1(f) of NRS 213.1245 was not unconstitutionally vague or overbroad. It is in the interest of the State, the Parole Board, and the AG's office, to want to conduct periodic polygraph examinations on parolees, on any issue, whether such issues relate to the underlying crime, or any crime whatsoever. Of course, the Division of Parole and Probation wants to be able to ask any question they desire of a parolee. Unfortunately, the lower court bought into their argument, and dismissed the Plaintiff's Complaint.[20] The lower court's holding, however, violates every parolee's right to due process, as previously indicated by the Nevada Supreme Court.

Article 1, Section 8, subsection 5, of the Nevada Constitution, indicates that "No person shall be deprived of life, liberty, or property, without due process of law." The 5th and 14th Amendments to the United States Constitution read similarly, as follows:

> Amendment V
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .[21]
>
> Amendment XIV
>
> Section 1. 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 within its jurisdiction the equal protection of the laws.[22]

How does "due process" relate to the issues currently before this Court? Black's Law Dictionary indicates the following:

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19 Mangarella v. State. 117 Nev. 130, 17 P.3d 989 (2001), See Appendix pgs. 76-82.

20 See Appendix pgs. 149-156.

21 See Amendment V to the United States Constitution.

22 See Amendment XIV to the United States Constitution.

> The concept of "due process of law" as it is embodied in [the] Fifth Amendment demands that a law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a reasonable and substantial relation to the object being sought. . . . Aside from all else, "due process" means fundamental fairness and substantial justice.[23]

The State of Nevada Division of Parole and Probation violated Jesus Adams, and brought him back before the Parole Board, for a violation hearing, based upon information that was obtained during an unconstitutionally required polygraph examination.[24] It is clear, and undisputed, that the Parole Board relied upon information obtained during the polygraph examination and interview, in making its determination to revoke Mr. Adams' parole.

Why was it unconstitutional? Because the parole condition, as written, and as set forth in NRS 176A.410(1)(g), allows the division of Parole and Probation to conduct a polygraph examination on any issue. NRS 176A.410 currently reads in pertinent part as follows:

> NRS 176A.410. Required terms and conditions for sex offenders; powers and duties of court; exceptions.
>
> 1. Except as otherwise provided in subsection 3, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant:
>
> . . . .
>
> (g) Submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant;[25]
>
> . . . .

Why is it unconstitutional to allow the Division of Parole and Probation to conduct a polygraph examination on any issue? Because the Nevada Supreme Court has held that NRS

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[23] Black's Law Dictionary, Sixth Edition, 1990, pg. 500-501, citing to U.S. v. Smith, D.C. Iowa, 249 F.Supp. 515, 516; Vaughn v. State, 3 Tenn.Crim.App. 54, 456 S.W.2d 879, 883.

[24] See Appendix pgs. 43-54.

[25] NRS 176A.410. The Court should note that NRS 176A.410 and NRS 213.1245 are used interchangeably throughout this Opposition and Countermotion. NRS 176A.410 applies to probationers, and NRS 213.1245 applies to parolees. The language at issue relating to polygraph examinations, is the same in both statutes, and they were modified concurrently as part of Senate Bill 412 in 2001. NRS 213.1245 applies to the present case, as Jesus Adams is a parolee. The reason that this Appeal often refers to NRS 176A.410, instead of NRS 213.1245, is that in the case of Mangarella, the Court was dealing with a probationer instead of a parolee, and consequently, in that case, NRS 176A.410 applied. Copies of both statutes are included in the Appendix.

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176A.410 would be unconstitutionally vague and overbroad if it did not limit the scope of the polygraph examination.[26]

The parties obviously disagree as to what the Nevada Supreme Court's decision in Mangarella actually means, but before discussing the Mangarella case in detail, it is important to briefly review the history of NRS 176A.410 and NRS 213.1245.

Summary History of NRS 176A.410 and NRS 213.1245.

Prior to 2001	**Amendment of 2001 Chapter 415 of 2001; Senate Bill No. 412 - Committee on Judiciary**	**Amendment of 2007 Chapter 485 of 2007 Assembly Bill No. 579; Select Committee on Corrections, Parole, and Probation**
1. Except as otherwise provided in subsection 2, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant: . . . . (e) Submit to periodic tests, to determine whether the defendant is using a controlled substance and submit to periodic polygraphic examinations, as requested by the parole and probation officer assigned to the defendant;	1. Except as otherwise provided in subsection ***3***, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant: . . . . (e) Submit to periodic tests, ***as requested by the parole and probation officer assigned to the defendant,*** to determine whether the defendant is using a controlled substance; ***(f)*** Submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant; . . . . (Note: Changes are bolded and italicized for emphasis.)	1. Except as otherwise provided in subsection 3, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant: . . . . (f) Submit to periodic tests, as requested by the parole and probation officer assigned to the defendant, to determine whether the defendant is using a controlled substance; (g) Submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant; . . . . (Note: other than changes in paragraph letters, no changes to the above-referenced language pursuant to the 2007 amendment.)

[26] Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001).

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The history of NRS 176A.410 is important as we discuss the Nevada Supreme Court's decision in Mangarella v. State.[27]

The *Mangarella* Case Challenged the Constitutionality of the "Previous Version" of NRS 176A.410.

In the case of Mangarella v. State, the Nevada Supreme Court was presented with an issue regarding the constitutionality of a statute - NRS 176A.410. The Defendant in the underlying case, Mangarella, was convicted in the district court of lewdness with a minor, pursuant to an Alford Plea. The District Court sentenced him to serve a minimum of 36 months to a maximum of 120 months in the Nevada State Prison. His sentence was suspended and he was placed on probation for a term not to exceed five years. The district court, over Mangarella's objection, imposed the probation conditions required by NRS 176A.410, including the following:

> 1. Except as otherwise provided in subsection 2, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant:
> ....
> (e) Submit to periodic tests, to determine whether the defendant is using a controlled substance and submit to periodic polygraphic examinations, as requested by the parole and probation officer assigned to the defendant;
> ....

Mangarella challenged the constitutionality of NRS 176A.410 on three separate grounds. First, (and the only challenge relevant to the present case), Mangarella contended that the provision in the statute relating to polygraph examinations was overbroad because it would permit a probation officer to ask questions about topics unrelated to the defendant's parole. The Nevada Supreme Court's entire discussion regarding this subject, is as follows:

> I. Whether NRS 176A.410(1)(e) is unconstitutionally overbroad because the polygraph requirement does not specify the scope of questioning.
>
> NRS 176A.410(1)(e) states that, as a condition of probation, the defendant shall "[s]ubmit to periodic tests to determine whether the defendant is using a controlled

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[27] 117 Nev. 130, 17 P.3d 989 (2001).

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substance and submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant."

Statutes should be given their plain meaning and "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Charlie Brown Constr. Co. V. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990). In addition, there is a presumption that every word, phrase, and provision in the enactment has meaning. Id., at 502-03, 797 P.2d at 949.

The parties suggest three possible interpretations of the polygraph subsection. We address these interpretations from least to most expansive, starting with the State's interpretations.

First, the State asserts that the subsection authorizes polygraph testing to monitor controlled substance usage. In light of the placement of the polygraph testing condition in the same subsection as the requirement that the defendant submit to testing for drug use, it is plausible that the legislature intended for the probation officer to only use polygraph testing to monitor drug usage.

The State also argues that the subsection allows questioning regarding compliance with any condition of probation. The subsection is part of the required probation conditions for sex offenders. Therefore, it is reasonable to assume that the legislature intended that probation officers use polygraph testing to monitor the probationer's compliance with all of his or her conditions of probation.

Finally, Mangarella proposes a third interpretation. Mangarella argues that because NRS 176A.410(1)(e) sets forth no parameters to the polygraph questioning, a probation officer may ask questions on any subject that has no reasonable relation to the probationer's offense. Mangarella reads the subsection as authorizing two separate tests: controlled substance and polygraph. This interpretation is also reasonable.

Because NRS 176A.410(1)(e) is subject to more than one reasonable interpretation, the statute is ambiguous as to the scope of questioning permitted in polygraph examinations. McKay v. Bd. of Supervisors, 102 Nev. 644, 649, 730 P.2d 438, 442 (1986), citing Robert E. V. Justice Court, 99 Nev. 443, 664 P.2d 957 (1983). While we normally review ambiguous statutes in light of legislative intent and public policy, different rules of statutory construction apply to penal statutes.

Generally speaking, we narrowly construe ambiguous provisions of penal statutes. Carter v. State, 98 Nev. 331, 334-35, 647 P.2d 374, 376 (1982). Moreover, the rules of statutory interpretation that apply to penal statutes require that provisions with 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). Applying these rules to NRS 176A.410(1)(e), we hold that the scope of the polygraph examination must be limited to questions relating to the use of controlled substances by the defendant. Thus, the statute is not unconstitutionally overbroad, as it does not permit a probation officer to conduct a polygraph examination on any issue.[28]

. . . .

. . . .

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[28] Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001).

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Effect of the Legislative Changes After the *Mangarella* Decision.

Following the Mangarella decision by the Nevada Supreme Court, in 2001, the Legislature amended NRS 176A.410, and separated the controlled substance language from the polygraph language, as follows:

> 1. Except as otherwise provided in subsection *3*, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant:
> . . . .
> (e) Submit to periodic tests, ***as requested by the parole and probation officer assigned to the defendant***, to determine whether the defendant is using a controlled substance;
> ***(f)*** Submit to periodic polygraph examinations, as requested by the parole and probation officer assigned to the defendant;[29]
> . . . .

The Parole Board and the State, in the present case, argue that the statute should now be interpreted to allow probation officers to use polygraph testing "to monitor a probationer's compliance with all of his or her conditions of probation." After the Mangarella decision, if the Legislature had intended for the Division of Parole and Probation to be so limited, it clearly would have included such language in NRS 176A.410. Instead, the legislature amended NRS 176A.410 to allow unfettered discretion for the Division of Parole and Probation to ask any question, to address any issue, and to require and compel polygraph examinations in an arbitrary and discriminatory manner.

At the time of the Mangarella decision, since the controlled substance language and the polygraph language were contained in the same paragraph, the Nevada Supreme Court was able to hold that the statute was not unconstitutionally vague or overbroad. The Court was able to make such a ruling, because it held that, "the scope of the polygraph examination must be limited to questions relating to the use of controlled substances by the defendant."[30] Since the legislature

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[29] NRS 176A.410 (Note: Changes are bolded and italicized for emphasis.)

[30] Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001), see Appendix pgs. 76-82.

separated the controlled substance language from the polygraph language, there is absolutely no guidance with regard to what the limits are for the polygraph examinations. As the Court stated in Mangarella,

> Statutes should be given their plain meaning and "must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Charlie Brown Constr. Co. V. Boulder City, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990). In addition, there is a presumption that every word, phrase, and provision in the enactment has meaning. Id., at 502-03, 797 P.2d at 949.[31]

The plain language of the statute, as amended in 2001, gives the Division of Parole and Probation unfettered discretion to question a parolee on absolutely any issue, whether it relates to his parole, his underlying offense, or any other issue. Such a result is clearly unconstitutionally vague, ambiguous, and overbroad. Based upon the Supreme Court's decision in Mangarella, when the legislature amended NRS 176A.410 in 2001, it effectively created a subsection that was unconstitutionally vague, ambiguous, and overbroad. The statute, as modified, allows the Division of Parole and Probation to conduct polygraph examinations in an arbitrary and discriminatory manner. The Nevada Supreme Court has held that such a statute cannot stand, as it is unconstitutionally vague and overbroad.

Laws Which Allow Arbitrary and Discriminatory Enforcement are Unconstitutional Under the Due Process Clause.

In State v. Father Richard,[32] certain state and municipal loitering laws were challenged on the basis that they were unconstitutionally vague and overbroad. The Nevada Supreme Court indicated that "A vague law is one which fails to provide persons of ordinary intelligence with fair notice of what conduct is prohibited and also fails to provide law enforcement officials with

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[31] Mangarella v. State, 117 Nev. 130, 17 P.3d 989 (2001).

[32] 108 Nev. 626, 836 P.2d 622 (1992). A copy of this case is included in the Appendix at pgs. 161-164, for the Court's convenience.

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adequate guidelines to prevent discriminatory enforcement."[33] In reviewing the statutes and ordinances at issue, the Nevada Supreme Court determined that under these laws, an individual had to guess as to when an innocent stroll became criminal loitering. The Court further held that ***"these laws failed to provide law enforcement officials with proper guidelines to avoid arbitrary and discriminatory enforcement."*** Consequently, ***the Court concluded that the challenged provisions were "vague and therefore unconstitutional under the due process clauses of the federal and state constitutions."***[34]

Similarly, in the present case, NRS 176A.410(1)(f) provides no guidelines for the Division of Parole and Probation, and instead, allows for arbitrary and discriminatory enforcement. There are no guidelines which limit a parole officer's scope of questioning during a polygraph examination or interview. Since the 2001 Amendment to the statute, the Court can no longer look to the other language contained in the same paragraph (as it did in Mangarella), to infer that the scope of the polygraph examination must be limited to certain issues. There is no other language in the same paragraph. The statute, as currently written, is clearly unconstitutionally vague, ambiguous, and overbroad. Even if we were to assume that most good parole officers only interrogate parolees on issues dealing with parole compliance, or their underlying charges, or their likelihood to reoffend, there is absolutely no requirement or even guidance contained in the language of the statute which imposes any such limitation.

In its Motion to dismiss, the Parole Board cited the court to the California case of People v. Miller,[35] for the proposition that "the polygraph condition is valid," and that such condition "helps to monitor compliance and is therefore reasonably related to the defendant's criminal offense." What the Parole Board failed to inform the court, was that in the case of People v. Miller, there was

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[33] State v. Father Richard, 108 Nev. 626, 836 P.2d 622 (1992), citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Lanzetta v. New Jersey, 306 U.S. 451 (1938); Eaves v. Board of Clark Co. Comm'rs, 96 Nev. 921, 620 P.2d 1248 (1980).

[34] Id., (emphasis added).

[35] 208 Cal.App.3d 1311 (1989)

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no "statute" requiring polygraph examinations of a parolee, instead, it was a specific condition placed on Mr. Miller by the sentencing court. Pursuant to California Penal Code 1203.1, the sentencing court was given "broad discretion" in its sentencing parameters. The probation officer who requested the condition, indicated that it was "necessary to monitor defendant's compliance with the other conditions of probation, especially the condition forbidding unsupervised contact with young girls."[36] It was noted that "the ***results were not to be used as evidence of a probation violation*** but to determine whether changes would be necessary in the administration of defendant's case plan."[37] The California Court of Appeals found that the polygraph condition was valid, because its purpose was to monitor compliance related to the defendant's criminal offense. Mr. Miller complained that the polygraph condition was overbroad "because there [were] no restrictions on the questions the examiner [could] ask." The Court indicated that this was incorrect, because

> The polygraph condition was . . . imposed by the court to monitor defendant's compliance with the condition prohibiting unsupervised contact with young females. Thus any polygraph examination administered to defendant necessarily will be limited to questions relevant to compliance with that condition.[38]

Clearly the Miller case is distinguishable from Mr. Adams' case, as follows:

People v. Miller	Jesus Adams v. Nevada Parole Board
1) Polygraph condition imposed by judge as part of discretionary sentencing.	1) Polygraph condition imposed by statute.
2) Polygraph results not to be used as evidence of probation violation.	2) Polygraph results form the sole basis for probation violation.
3) Polygraph questions limited to questions relating to condition prohibiting unsupervised contact with young females.[39]	3) Polygraph questions not limited in any way.

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[36] People v. Miller, 208 Cal.App.3d 1311 (1989)

[37] Id.

[38] Id.

[39] Id.

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Detailed Analysis of the Legislative History of Senate Bill 412, as it Relates to NRS 176A.410 and NRS 213.1245.

If we look to the legislative history behind the changes to NRS 176A.410, and its mirror image, NRS 213.1245, the first and relevant changes to the statutes were made in 2001.[40] In 2001, the changes were introduced by Senate Bill 412.[41] On March 19, 2001, Senate Bill No. 412 was referred to the Committee on Judiciary. The Senate Committee on Judiciary met on April 11, 2001. There was only limited and general discussion with regard to Section 3 of the Bill, which included the changes to NRS 176A.410, as follows:

> Troy Dillard, Unit Manager, Parole and Probation, Division of Parole and Probation, Department of Motor Vehicles and Public Safety, pointed out section 3 and section 7 of S.B. 412 deal with conditions for supervision of sexual offenders on probation and parole. He pointed out the modification requests would clarify the working and make it more consistent with other existing conditions, as well as add some new conditions necessary to supervise sexual offenders in a manner to best protect the community. Mr. Dillard noted the conditions provide the supervising officer discretion as to the imposition, or nonimposition, based upon each individual case.

Additional discussion occurred with regard to the "reporting" of convicted sex-offenders, registration, fingerprinting, and photograph requirements, etc. There was no specific discussion relating to the "polygraph" language.[42]

The Senate Committee on Judiciary met again on April 12, 2001. There was apparently an amendment to S.B. 412, which was proposed during the hearing, and Ms. Combs (Committee Policy Analyst), commented as follows:

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40 It is curious to note that almost immediately after the polygraph language in NRS 176A.410 and NRS 213.1245 was determined by the Supreme Court, in Mangarella, to be valid and enforceable, the Division of Parole and Probation wanted to "modify" these statutes. Why would the amendments be desired, if not to extend the authority of the Division of Parole and Probation, to be able to ask any question, of any sex-offender parolee. P&P obviously wanted unfettered discretion to ask any question of the parolees, and without any serious consideration of the proposed changes, the Legislature approved.

41 A copy of the Legislative History Summary Page from the Nevada Legislature, is included in the Appendix at pgs. 97-98.

42 A copy of the Minutes of the Senate Committee on Judiciary, dated April 11, 2001, with regard to Senate Bill 412, is included in the Appendix at pgs. 99-103.

> The second amendment, she said, relates to polygraph examinations required. Currently, Ms. Combs explained, sex offenders must submit to such an examination. The amendment requests full cooperation with the polygraph examination. But, she added, ***there may be some constitutional questions about this amendment.***

Later in the hearing, the following transpired:

> ***Senator Washington asked about the second amendment requiring a polygraph examination and the possible constitutional issue, and wondered if it is likely to be a problem.*** Bradley A. Wilkinson, Committee Counsel, responded some of the language is unnecessary. Currently, he explained, the probationers or parolees comply by submitting to a polygraph examination, and if they are leaving without compliance, he said, he did not feel changing the language would change behaviors of offenders. Mr. Wilkinson said some of the polygraph questions are not constitutionally required under the Fifth Amendment rights. He said it is better to leave out the changes to section 3 of the bill as requested by the parole and probation division.

It was moved that S.B. 412 be passed, as it was, and the motion carried unanimously.[43]

On May 10, 2001, the Assembly Committee on Judiciary met and discussed Senate Bill 412. There was discussion regarding 1) sex offenders having internet access; 2) sex offenders obtaining permission from P&P to be in certain restricted areas; 3) address change notification; 4) classification of juvenile sex offenders; 5) reunification of sex-offenders with their families; etc. There was no discussion relating to the polygraph language of NRS 176A.410 or NRS 213.1245.[44]

On May 16, 2001, the Assembly Committee on Judiciary again met to discuss Senate Bill 412. Again, there was no discussion relating to the polygraph language included in the above-referenced statutes.[45]

On May 29, 2001, the Senate Committee on Judiciary met, to discuss Senate Bill 412. Ms.Combs explained the amendment which had been passed by the Assembly Committee on

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[43] A copy of the Minutes of the Senate Committee on Judiciary, dated April 12, 2001, with regard to Senate Bill 412, is included in the Appendix at pgs. 104-107. (Emphasis added).

[44] A copy of the Minutes of the Meeting of the Assembly Committee on Judiciary, dated May 10, 2001, with regard to Senate Bill 412, is included in the Appendix at pgs. 108-114.

[45] A copy of the Minutes of the Meeting of the Assembly Committee on Judiciary, dated May 16, 2001, relating to Senate Bill 412, is included in the Appendix at pgs. 115-117.

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Judiciary, which had been requested by Parole and Probation. The amendment involved registration provisions, exceptions to the general conditions on sex offenders (if approved by a P&P officer), sex offenders not allowed to go near playgrounds or movie theaters without permission from P&P, and allowed an offender to provide updates on his registration in person or in writing. The Senate Committee on Judiciary agreed with the Assembly's Amendment. Again, there was no discussion relating to the polygraph language.[46]

Senate Bill 412 passed the Senate on April 27, 2001, and it passed the Assembly on May 23, 2001.[47]

The only thing that can be discerned from the legislative history of Senate Bill 412, which made the change to polygraph language of NRS 176A.410 or NRS 213.1245, is that at least in the Senate, they saw potential "constitutional questions" and possible "constitutional issues," and they were concerned that the "constitutional issues" may cause problems.

Clearly, there are "constitutional issues" which arise when considering the language of NRS 176A.410 and NRS 213.1245, because the change to the polygraph language, which was effectuated by Senate Bill 412, created an unconstitutionally vague, ambiguous, and overbroad sub-section, which provides no guidance for Parole and Probation, and which allows for arbitrary and discriminatory enforcement.

CONCLUSION.

Plaintiff, Jesus Adams, asserts that NRS 176A.410 and NRS 213.1245, are unconstitutionally vague, ambiguous, and overbroad, as they allow polygraph examinations on any issues, and absolutely any question may be asked of the parolee. There is obviously a strong public-policy desire to maintain control over, to keep close track of, and to monitor the actions of parolees who have previously been convicted of sex-offenses. It is Plaintiff's position, however, that such public

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[46] A copy of the Minutes of the Senate Committee on Judiciary, dated May 29, 2001, relating to Senate Bill 412, is included in the Appendix at pgs. 118-119.

[47] A copy of Senate Bill 412, with regard to NRS 176A.410, and with regard to NRS 213.1245, (as introduced), as well as the first reprint, the second reprint, and the Bill, as enrolled, are included in the Appendix at pgs. 120-141.

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policy interests cannot outweigh the overriding constitutional issues of fairness and justice. Plaintiff suggests that the unconstitutionally vague, ambiguous, and overbroad language of NRS 176A.410 and NRS 213.1245, could be modified as follows:

> 1. Except as otherwise provided in subsection 3, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant:
> . . . .
> (f) Submit to periodic tests, as requested by the parole and probation officer assigned to the defendant, to determine whether the defendant is using a controlled substance;
> (g) Submit to periodic polygraph examinations, ***relating to the probationer's underlying offense, and/or his aptitude for similar reoffending,*** as requested by the parole and probation officer assigned to the defendant;

If the above-referenced language is "too restrictive," then the statute could be modified as follows:

> 1. Except as otherwise provided in subsection 3, if a defendant is convicted of a sexual offense and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension of sentence that the defendant:
> . . . .
> (f) Submit to periodic tests, as requested by the parole and probation officer assigned to the defendant, to determine whether the defendant is using a controlled substance;
> (g) Submit to periodic polygraph examinations, ***relating to any aspect of the probationer's conditions of probation,*** as requested by the parole and probation officer assigned to the defendant;[48]

It seems that there would be numerous ways to modify the statutory language or the specific parole conditions, to limit the questions posed to those which would be "relevant to a parolee's or a probationer's actual success on parole or probation." By allowing the Division of Parole and Probation to ask any question, on any issue (as the statutes currently allow), the above-referenced statutes are clearly unconstitutionally vague, ambiguous, and overbroad.

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[48] These are only examples of how the statute and the required parole conditions could be modified to provide guidance to the Division of Parole and Probation, and provide limitations with regard to the scope of questioning allowed. Obviously, the Court and the Legislature are in a better position to make such amendments, but it is clear that the language of the statutes, as currently written, imposes no limitations on the Division of Parole and Probation, and allows for arbitrary and/or discriminatory application.

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The Parole Board's Motion to Dismiss indicated that "Adams' entire Complaint was based upon one issue, i.e., whether NRS 213.1245(1)(f) is unconstitutionally vague and/or overbroad, pursuant to Mangarella."[49] In fact, the Plaintiff's argument is based primarily upon Mangarella, but not exclusively. Plaintiff's argument is based additionally on a "common sense reading" of the statutes at issue. It is telling that even the Parole Board, in its Motion to Dismiss, indicated that the statutes at issue (even after modification by the legislature) are subject to multiple interpretations.[50] If the statutes are subject to multiple interpretations, doesn't that mean that they are vague and ambiguous?

Adams challenged the lower court to find language contained in NRS 176A.410 or NRS 213.1245, which limits, in any way, the scope of a required polygraph examination. Although the lower court found no such language, the District Court dismissed the Plaintiff's Complaint. The fact is, that the statute, and the mandatory parole condition, as written, contain absolutely "no limitation" on the scope of questioning allowed. If the Supreme Court agrees that there is absolutely "no limitation" on the scope of questioning allowed, then the statutes and the mandatory parole conditions are unconstitutionally vague, ambiguous, and overbroad, and must consequently be deemed unenforceable. If this Court finds that the statutes and corresponding mandatory parole conditions are unconstitutionally vague, ambiguous and overbroad, and therefore unenforceable, then all evidence used to violate Jesus Adams' parole, was obtained as fruit of the poisonous tree, and inadmissible for purposes of violating his parole. This means that he should be immediately reinstated to Parole, given credit for the additional time that he has been wrongfully incarcerated, and the polygraph language contained in NRS 176A.410 and NRS 213.1245 be deemed

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[49] See Defendant's Motion to Dismiss, included in the Appendix at pgs. 11-19, specifically at pg. 18.

[50] See Defendant's Motion to Dismiss, included in the Appendix at pgs. 11-19, specifically at pg. 16.

unconstitutionally vague, ambiguous, and overbroad, and therefore unenforceable. This is the relief that Mr. Adams seeks from this Court.

DATED this 4th day of November, 2008.

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NRAP 28A CERTIFICATE OF COMPLIANCE

I, JERRY A. WIESE II, ESQ., hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in confirmity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of November, 2008.

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APPENDIX 1

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CERTIFICATE OF SERVICE

I certify that on the 5 day of ~~July~~ Nov. 2008, I served a copy of this complete APPELLANT'S OPENING BRIEF, upon all counsel of record:

☐ By personally serving it upon him/her; or

■ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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