

ORIGINAL

In The Supreme Court of the State of Nevada

Brent A. Coles

Petitioner,

and

Connie S. Bisbee , Chairman;

The Nevada Board of Parole Commissioner's;

The Nevada Department of Corrections;

and

The State of Nevada

(Real Party in interest)

Respondents

Supreme Court No.: 74707

District Court Case No.: 170C00051 1B

FILED

JAN 29 2018

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CLERK OF SUPREME COURT  
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On Appeal from the First Judicial District Court

Appellant's Opening Brief

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"Appellant's Opening Brief"

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30	//	

Statement of Issues Presented for Review:

The following issues are respectfully submitted for review.

1. Did Appellant present a Justiciable Controversy to the District Court upon which to support having Declaratory Relief granted?

2. Does the "Static-99R" meet the Statutory Requirement to be a "Currently Accepted Standard of Assessment" for Determining an Inmate's Risk to Re-offend in a Sexual Manner?

3. Because Appellant was convicted in 1994 under different requirements and standards of assessment, was the change to now use the "Static-99R" including the automatic provisions to deny Parole to anyone labeled as "High Risk", a violation of Ex Post Facto prohibitions?

4. Because the "Static-99R" is not performed as a Face-to-Face interview and the Inmate is never made a part of or included in any "Assessment" performed, is Due Process violated by not advising the Inmate of His "Score" or "Label" until it is already being used in the Parole Hearing Proceedings?

Statement of the Case:

This Case comes before the Court as Appellant has been attempting to go through the Parole Consideration Process. Appellant is Labeled as a Sex Offender following a 1994 conviction for Statutory Sexual Seduction, Kidnapping, and Attempted Sexual Assault with use of a Deadly Weapon. In 1994 the parole consideration requirement was to be certified not to be a menace to the Health, Safety and Morals of others. (see NRS 200.375 in effect at the time.) In 1997 the Nevada Legislature repealed NRS 200.375 (Repealed by Acts 1997, ch524 \ 22 effective Oct. 1, 1997), and enacted NRS 213.1214 in which it created the "Psychological Review Panel" and a more formalized

1 Certification Process. In order to be Paroled, a person had to be "Certified" not to  
2 be at High Risk to Re-Offend. The "Psychological Review Panel" was subsequently found  
3 to be notoriously inaccurate and skewed as it rated vast numbers of Inmates as "High  
4 Risk". That Label to be "High Risk" then prevented the Nevada Board of Parole  
5 Commissioners from Paroling a person so Labeled.

6 In 2013 the Nevada Legislature again amended NRS 213.1214 and eliminated the  
7 "Psychological Review Panel" and instead now required the Nevada Department of  
8 Corrections to perform an "Assessment" on anyone convicted of a Sexual Offense "Using  
9 a Currently Accepted Standard of Assessment". The completed assessment must include,  
10 without limitation, a determination of the Prisoner's Level of Risk to Re-Offend in a  
11 Sexual Manner.

12 **NRS 213.1214 Evaluation of certain prisoners by Department of Corrections before**  
13 **parole hearing; Director of Department to establish procedure for assessment of**  
14 **prisoners; immunity; regulations.**

15 1. The Department of Corrections shall assess each prisoner who has been  
16 convicted of a sexual offense to determine the prisoner's risk to re-offend in a  
17 sexual manner using currently accepted standard of assessment. The completed  
18 assessment must include, without limitation, a determination of the prisoner's level  
19 of risk to re-offend in a sexual manner for the purposes of subsection 3 of NRS  
20 213.1215. The Director shall ensure a completed assessment is provided to the Board  
21 before, but not sooner than 120 days before, a scheduled parole hearing.

22 2. The Director shall:

23 A) Ensure that any employee of the Department who completes an assessment  
24 pursuant to subsection 1 is properly trained to assess the risk of an  
25 offender to re-offend in a sexual manner.

26 B) Establish a procedure to:

27 (1) Ensure the accuracy of each completed assessment provided to  
28 the Board, and

(2) Correct any error occurring in a completed assessment provided  
to the Board.

The Respondents subsequently opted to use something called the "Static-99R" to fulfill  
the new requirement. The "Static-99R" is actually a ten item "Actuarial Risk  
Assessment" ("ARA") that derived its name because it uses entirely static or  
unchanging information to answer the 10 item questions. Likewise, it was developed and  
introduced in 1999. (see also Exhibit # 3 attached to this brief for a more  
comprehensive understanding of what the "Static-99R" is and what it is not.)

1 What is clear is that the "Static-99R" was never intended to be used as a stand alone  
2 assessment tool and that it has no predictive value for an individual. The Respondents  
3 chose to use the "Static-99R" because it was quick, simple and cheap, but it is being  
4 used for a purpose it was never intended to be used for. While the Respondents were  
5 given the flexibility to use whatever assessment they deemed appropriate within the  
6 parameter to be a "Currently Accepted Standard of Assessment", the "Static-99R" does  
7 not meet the requirement to determine a person's current risk to re-offend in a sexual  
8 manner.

9 Respondents must carry out provisions of the statute and meet those requirements set  
10 forth by the Nevada Legislature. "An administrative agency that administers a statute  
11 does not have the power to make law; rather, its authority is to adopt regulations to  
12 carry into effect the will of the Legislature as expressed by the statute. Thus, an  
13 administrative agency acts without authority when it promulgates a rule or regulation  
14 in contravention to the will of the Legislature as expressed in the statute, or a rule  
15 or regulation that exceeds the scope of the statutory grant of authority". Scott v.  
16 Angelone, 771 F. Supp. 1064 (1991). "All State and local officials are limited to the  
17 exercise of expressly delegated authority". Andrews v. Nevada State Board of  
18 Cosmetology, 86 Nev. 207, 208, 467 P2d 96, 96-97 (1970).

19 Appellant filed his Petition for Declaratory Judgment to have the Court determine  
20 those rights, status and other legal relations to how Respondents carry out provisions  
21 of NRS 213.1214 (1) and (2). Appellant believes that Respondents are not properly  
22 carrying out these requirements and that the "Static-99R" does not fulfill what the  
23 Legislature expected from NRS 213.1214.

24 While initially presented to the District Court, the District Court eventually granted  
25 a Motion to Dismiss from the Respondents and refused to consider arguments presented  
26 by Appellant.

1 Appellant believes that this Court has a responsibility to insure requirements of  
2 Statutes are properly carried out and asks this Court to review arguments and  
3 statutory language as presented herein.  
4

5 Nature of the Case:

6 Appellant in this appeal is an incarcerated inmate within the Nevada Department of  
7 Corrections. As an inmate, He is subject to the Parole process established by the  
8 State of Nevada. Pursuant to NRS 213.10705, Appellant acknowledges that he has no  
9 right to parole. Appellant does however have a right to a fair Parole consideration in  
10 coming before the Board of Parole Commissioners and in navigating that parole process.  
11 As Parole standards and criteria are set forth in NRS Chapter 213 and NAC Chapter 213,  
12 Respondents must carry out requirements applying the plain language contained in those  
13 statutes or regulations. "When the language of a statute is plain and unambiguous, a  
14 Court should give that language its ordinary meaning and not go beyond it." City of  
15 Reno v. Reno Gazette Journal, 119 Nev. 55; 63 p. 3d 1147; 2003 Nev. Lexis 6. "An  
16 administrative agency that administers a statute does not have the power to make law;  
17 rather, its authority is to adopt regulations to carry into effect the will of the  
18 Legislature as expressed by the statute. Thus, an administrative agency acts without  
19 authority when it promulgates a rule or regulation in contravention to the will of the  
20 Legislature as expressed in the statute, or a rule or regulation that exceeds the  
21 scope of the statutory grant of authority". Scott v. Angelone, 771 F. Supp. 1064  
22 (1991).

23 Here, we have a requirement that Appellant must be assessed to determine His current  
24 risk to re-offend in a sexual manner. In fact, the assessment must be performed within  
25 120 days prior to the inmates appearance before the Board of Parole Commissioners.  
26 Except that the assessment in using the "Static-99R" will use static, unchanging  
27 factors of Appellants past and draw that information from Appellant's Pre-sentence  
28 Investigation Report ("PSI"). That information is in most cases, many years old and



1 does not factor or consider current, up-to-date information which may be important to  
2 Appellants current state of mind.

3 As such, Respondents are not performing an assessment that meets the requirements of  
4 statute to determine Appellants risk to re-offend in a sexual manner.

5  
6 Course of the Proceedings:

7 Appellant filed His "Petition for Declaratory Judgment pursuant to the Uniform  
8 Declaratory Judgments Act" on 5-18-2017. Appellant exhausted the NDOC Administrative  
9 Grievance Process, but has never received a response at the Second Level. NDOC  
10 Respondents routinely fail to follow or adhere to their own Administrative Regulations  
11 related to the internal Grievance process. All named Respondents and their Counsel as  
12 the Nevada Attorney General were properly served a copy of the Petition and Summons.  
13 Notice to the Court of the completion of service was filed on 6-29-2017. As the State  
14 of Nevada is the real Party in interest and per NRCP Rule 12(a), (1), Respondents had  
15 45 days upon which to file their answer or other responsive pleading. That answer or  
16 other pleading was due no later than July 15, 2017. On 7-24-2017 Respondent's Counsel  
17 filed His "Motion to Dismiss Petition for Declaratory Judgment", after requesting an  
18 Enlargement of Time. Petitioner filed His "Opposition Response to Respondents Motion  
19 to Dismiss" on 8-29-2017.

20 On 9-5-2017 Petitioner filed a "Motion for Oral Arguments Hearing for Motion to  
21 Dismiss" due to issues Petitioner felt were important for the Court to consider.

22 On 9-8-2017 Respondent's Counsel filed their "Opposition Response to Petitioners  
23 Motion Requesting Oral Arguments".

24 On 9-8-2017 Respondent's Counsel filed their, "Reply in support of Respondents Motion  
25 to Dismiss Petition for Declaratory Judgment". A Request for Submission on the Motion  
26 to Dismiss was also filed on 9-8-2017. On 11-20-2017 the District Court issued its  
27 Order Granting the Respondents Motion to Dismiss. Notice of Entry of Order on the  
28 District Court's Order was filed on 11-29-2017.

Appellant filed His Notice of Appeal and Case Appeal Statement with the District Court on 12-13-2017. Appellant's Appeal to the Nevada State Court was Docketed on December 21<sup>st</sup>, 2017.

Statement of Facts:

In 2013 the Nevada State Legislature amended NRS 213.1214 to eliminate the use of the "Psychological Review Panel" ("Panel") for those convicted of committing a sexual offense. In eliminating the Panel, the Nevada State Legislature opted to instead have a "Currently Accepted Standard of Assessment" performed on those previously convicted of a sexual offense.

The Nevada Department of Corrections was given the responsibility to insure that a "currently accepted standard of assessment" was done and they were given the discretion to choose the "assessment" tool that met the requirement to be a "currently accepted standard of assessment". The "assessment" chosen was the "Static-99R". The "Static-99R" is a ten item "Actuarial Risk Assessment" or "ARA" created by R. Earl Hanson, Ph.D. and David Thornton, Ph.D. (see Exhibit # 2 as the questions and score sheet used and Exhibit # 3 as the comprehensive details on what the "Static-99R" is and isn't).

In the case of Stockmeier v. Psychological Review Panel, 122 Nev. 534, 135 P. 3d 807 (2006), it ruled that "certification by the Psychological Review Panel was necessary only when Parole would lead to release from prison". This ruling was based upon interpreting the language within NRS 213.1214 at the time (2006). As NRS 213.1214 was later amended to eliminate the "Panel" in favor of using a "currently accepted standard of assessment", the language within NRS 213.1214 also changed. The new language in NRS 213.1214 states a requirement that a completed assessment was to be done within 120 days of a person's appearance before the Board of Parole Commissioners.

Conversely, the Nevada Administrative Code regulation ("NAC") in NAC 213.514(3) states:

3. If a prisoner has ever been convicted of a sexual offense and has been evaluated using a currently accepted standard of assessment to determine the risk that the prisoner will commit another sexual offense if "released on parole", the Board will assign a risk level to the prisoner which is the higher of the risk level assigned pursuant to this section and the risk level determined by such an evaluation.

As applied to Appellant nearly all if not all of the "assessments" previously performed on him by the "Psychological Review Panel" rated him "Low Risk" to re-offend. Only as the "Static-99R" started being used has he now been rated as "High Risk". Likewise, NAC 213.514(3) only requires Appellant to have an assessment done/used if it would lead to a parole release. Appellant has only sought to parole to a pending consecutive sentence he must still serve. Because NRS 213.1214 specifies an assessment be done within 120 days of a parole hearing, but the Administrative regulation (NAC 213.514(3)) only requires an assessment be done when a parole grant would lead to an actual release, there is an obvious conflict. Because of that conflict and the fact that these issues directly surround statutes/regulations that have changed multiple times extending back to his 1994 conviction, the Rule of Lenity provides that these discrepancies must work to Appellant's favor. "The Rule of Lenity calls for the Liberal Interpretation of Criminal Statutes to favor the accused in resolving ambiguities". Hernandez v. The State of Nevada, 118 Nev. 513; 50 P.3d 1100; 2002 Lexis 69. "When the scope of a Criminal Statute is at issue, ambiguity should be resolved in favor of the Defendant, and when a specific statute is in conflict with a General one, the specific statute will take precedence". Lader v. Meligan, 121 Nev. 682; 120 P.3d 1164 (2005).

As noted in Exhibit # 3, this exhibit contains excerpts of a New York case in which the "Static-99R" was reviewed extensively. That review and this exhibit shows clearly that the "Static-99R" has no predictive value for an individual. The "Static-99R" does not and cannot measure an individual's risk of re-offending. In spite of issues raised in the New York case, it was still chosen by Respondents as the replacement "Assessment" for the previous "Panel". This is also in spite of the requirements of statute and actions to use the "static-99R" for a purpose contrary to which it was designed to be used.

Great Value has been placed upon the 10 item questionnaire. Indeed, the Board of Parole Commissioners regulation NAC 213.514 within paragraph 3 (Shown Below) it states:

NAC 213.514: Determination of whether to grant parole: Assignment of risk level to prisoner. (NRS 213.10885, 213.110, 213.140)

1. The Board will assign to each prisoner who is being considered for parole a risk level of "high", "moderate" or "low" according to the level of risk that the prisoner will commit a felony if released on parole.

2. To establish the risk level, the Board will conduct an objective risk assessment using a combination of risk factors that predict recidivism.

3. If a prisoner has ever been convicted of a sexual offense and has been evaluated using a currently accepted standard of assessment to determine the risk that the prisoner will commit another sexual offense "if released on parole", the Board will assign a risk level to the prisoner which is the higher of the risk level assigned pursuant to this section and the risk level determined by such an evaluation.

4. The Board will apply the risk level assigned to a prisoner who is being considered for parole to establish an initial assessment regarding whether to grant parole in the manner set forth in NAC 213.516.

5. As used in this section, "sexual offense" means offense listed in subsection 3 of NRS 176.133 or an offense committed in another jurisdiction that, if committed in this State, would be an offense listed in subsection 3 of NRS 176.133

As shown in Exhibit # 2, as the "Static-99R" score sheet (or "Coding Form"), by labeling the inmate as "High Risk" when the Board of Parole Commissioner's completes the "Parole Risk Assessment", the inmate is also given a "High Risk" on that assessment. NAC 213.516 shown below factors out that with a "High Risk" label, the decision of the Board will always be automatically DENY PAROLE.

NAC 213.516 Determination of whether to grant parole: Initial assessment. (NRS 213.10885, 213.110, 213.140) In determining whether to grant parole to a prisoner, the Board will apply the severity level of the crime for which parole is being considered as assigned pursuant to NAC 213.512 and the risk level assigned to the prisoner pursuant to NAC 213.514 to establish an initial assessment regarding whether to grant parole. The initial assessment will correspond to the following table:

Severity Level	Risk Level		
	High	Moderate	Low
Highest	Deny Parole	Consider Factors set forth in NAC 213.518	Consider Factors set forth in NAC 213.518
High	Deny Parole	Consider Factors set forth in NAC 213.518	Grant Parole at first or second meeting to consider prisoner for parole
Moderate	Deny Parole	Grant Parole at first or second meeting to consider prisoner for parole	Grant parole at initial parole eligibility
Low	Consider Factors	Grant Parole at first or	Grant parole at initial parole

Moderate	set forth in NAC 213.518	second meeting to consider prisoner for parole	eligibility
Low	Consider Factors set forth in NAC 213.518	Grant parole at initial parole eligibility	Grant parole at initial parole eligibility

In relation to Appellant, he was convicted in 1994 of the offenses of First Degree Kidnapping, Attempted Sexual Assault with use of a Deadly Weapon, and Statutory Sexual Seduction in case number C123054. All the Sentences imposed were deemed to be served concurrent to each other.

On January 25, 2010 Appellant was paroled on the above case. The only remaining sentence for Appellant is the "Life" sentence. Prior to being paroled Appellant appeared before the "Psychological Review Panel" in 2009 and was "certified" to be "Low Risk". In fact in 2003, 2006, and 2013 Appellant also appeared before the Psychological Review Panel and in each of those instances Appellant was also "certified" to be "Low Risk" to re-offend. On July 8, 2011 Appellant was arrested on a Parole violation and His Parole was subsequently revoked. Appellant was returned to the custody of the Nevada Department of Corrections. Appellant was also charged and convicted on a "Coercion" charge and given a new 26-72 month sentence. Appellant's sentence structure required him to serve time on and be paroled on the "Life" sentence before he could begin serving the new Coercion sentence.

As Appellant had His 2010 parole revoked, he was given an initial 2-year revocation. Then, as He next appeared before the Board of Parole Commissioners, He was handed a 3-year parole deferral. In the initial revocation Appellant did not appear before the "Psychological Review Panel". Appellant did appear before the "Panel" in 2013 and received a "Low Risk" label during that appearance. In 2016 Appellant appeared before the Board of Parole Commissioners for his latest discretionary parole hearing. This hearing was seeking to have Appellant paroled on his "Life" sentence so He could then start serving the 26-72 month term for Coercion.

1 As Appellant appeared before the Board of Parole Commissioner's in June 2016, he found  
2 he had automatically been denied parole consideration because he had been labeled  
3 "High Risk" because of the use of the "Static-99R" as an exclusive stand alone so-  
4 called assessment to determine his risk to re-offend in a sexual manner as is now used  
5 by the Respondents.

6  
7 Arguments:

8 **1. Did Appellant present a Justiciable Controversy to the District Court upon which to**  
9 **support having Declaratory Relief granted?**

10  
11 "A petition for Declaratory Judgment pursuant to the Uniform Declaratory Judgment Act  
12 must be sought in the District Court". Beko v. Kelly, 78 Nev. 489, 376 P3d. 429  
13 (1967). "The conditions precedent for Declaratory Relief are: (1) A Justiciable  
14 Controversy must exist in which a claim of right is asserted against one who has an  
15 interest in contesting it; (2) The controversy must be between persons whose interests  
16 are adverse; (3) The party seeking the Declaratory Relief must have a Legally  
17 Protectable interest in the controversy; and (4) The issue must be ripe for Judicial  
18 Determination". Heller v. Legislature, 120 Nev. 456 at 473, 93 P.3d 746 (2004).  
19 Pursuant to NRS 30.030 titled "Scope", Courts of Record within their respective  
20 jurisdictions shall have power to declare rights, status and other legal relations  
21 whether or not further relief is or could be claimed. No action or proceeding shall be  
22 open to objection on the ground that a Declaratory Judgment is prayed for..." As an  
23 inmate incarcerated within the Nevada Department of Corrections("NDOC"), Appellant is  
24 subject to appearing before the Nevada Board of Parole Commissioner's as he becomes  
25 parole eligible. Actions by the Board of Parole Commissioner's are governed by  
26 provisions within NRS Chapter 213 and carried out by regulations set forth in Nevada  
27 Administrative Code ("NAC") Chapter 213. "The subject of Parole in Nevada is within  
28 the Legislative Authority given by the Nevada Constitution to the Legislature. Nevada

1 Constitution Article 4-1, Parole is not a Constitutional Right, it is a right bestowed  
2 by Legislative Grace. Nevertheless, if the Legislature under takes to enact Laws  
3 governing parole when it need not Constitutionally have done so, the rights granted as  
4 acts of clemency or grace must be administered in accordance with concepts of Due  
5 Process and may not arbitrarily increase the punishment imposed in an unequal and  
6 illogical manner". Goldsworthy v. Hannifan, 86 Nev. 252, 468 p.2d 350 (1970), citing  
7 from the case of Anselmo v. Bisbee, 2017 Nev. Lexis 60; 133 Nev. Adv. Rep. 45 No.  
8 67619, " ... NRS 213.140(1) clearly provides that "The Board shall consider" eligible  
9 inmates for parole. Therefore, while Anselmo has no due process right in the grant of  
10 parole itself, Nevada Law clearly confers a right to be considered for parole".  
11 Through Appellants Petition to the District Court, He detailed how changes in statutes  
12 and subsequent application of these various changes since Appellant was convicted have  
13 now been applied artificially to extend his sentence to now effectively make him  
14 ineligible for Parole. "One function of the Ex Post Facto clause is to bar enactments  
15 which, in retroactive operation, increase the punishment for a crime after it's  
16 commission, and retroactive changes in Laws governing Parole of Prisoner's, in some  
17 instances may be violative of this precept". Garner v. Jones, 120 S.CT. 362, 529 U.S.  
18 244 (U.S. GA. 2000). "Parole eligibility was considered part of the sentence". Love v.  
19 Fitzharris, Supre, 460 F.2d at 384, 385. Appellant's Petition seeks to have the Court  
20 address whether changes made by the Respondent State of Nevada are applicable, but  
21 also to determine if changes to NRS 213.1214 are being carried out as the amended  
22 language of the statute requires. Appellant does not believe the actions of the  
23 Respondent Nevada Department of Corrections is in conformance to requirements of the  
24 statute. Pursuant to provisions within NRS 30.040 a Declaratory Judgment is  
25 appropriate to have the Court determine issues as presented.

1 2. Does the "Static-99R" meet the statutory requirement to be a "currently accepted  
2 standard of assessment" for determining an inmate's risk to re-offend in a sexual  
3 manner?

4  
5 NRS 213.1214 (1) details what appears to be the requirements of an "assessment" and  
6 the standard to that requirement as it states:

7 NRS 213.1214 Evaluation of certain prisoners by Department of Corrections  
8 before parole hearing; Director of Department to establish procedure for assessment of  
9 prisoners; immunity; regulations.

10 1. The Department of Corrections shall assess each prisoner who has been  
11 convicted of a sexual offense to "determine the prisoner's risk to re-offend in a  
12 sexual manner using currently accepted standard of assessment". The completed  
13 assessment must include, without limitation, a determination of the prisoner's level  
14 of risk to re-offend in a sexual manner for the purposes of subsection 3 of NRS  
15 213.1215. The Director shall ensure a completed assessment is provided to the Board  
16 before, but not sooner than 120 days before, a scheduled parole hearing.

17 "When the language of a statute is plain and unambiguous, a Court should give that  
18 language its ordinary meaning and not go beyond it." City of Reno v. Reno Gazette-  
19 Journal, 119 Nev. 55, 63 P.3d 1147 (2003) Nev. Lexis 6. It is long standing rule of  
20 statutory construction that every word or clause should be given effect and none  
21 rendered meaningless". State Ex Rel City of Las Vegas v. County of Clark, 58 Nev. 469,  
22 481, 83 P.2d 1050, 1054 (1983).

23 By the statute provisions cited above, the Nevada Department of Corrections was given  
24 the authority and responsibility to conduct an assessment and presumably to choose a  
25 "currently" accepted standard of assessment". "All State and local officials are  
26 limited to the exercise of expressly delegated authority". Andrews v. Nevada State  
27 Board of Cosmetology, 86 Nev. 207, 208, 467 P2d 96, 96-97 (1970).

28 The question presented here however is basic. "Accepted by whom and in what manner?"  
The statutory requirement is to conduct an assessment to determine the inmate's risk  
to re-offend in a sexual manner. "An administrative agency that administers a statute  
does not have the power to make law; rather, its authority is to adopt regulations to  
carry into effect the will of the legislature as expressed by the statute. Thus, an  
administrative agency acts without authority when it promulgates a rule or regulation  
in contravention to the will of the Legislature as expressed in the statute, or a rule



1 or regulation that exceeds the scope of the statutory grant of authority." Scott v.  
2 Angelone, 771 F. supp. 1064 (1991). Here however, the Nevada Department of Corrections  
3 has never implemented any regulation or procedure to carry out the requirements of NRS  
4 213.1214. It was simply someone's apparent decision individually within the Nevada  
5 Department of Corrections to use the "Static-99R". As included within this brief as  
6 Exhibit # 3, are excerpts of a New York Case wherein the "Static-99R" was reviewed in  
7 great detail by those Courts.

8 The "Static-99R" is in all actuality a simple 10 item "Actuarial Risk Assessment",  
9 (see questions and score sheet copy included as exhibit # 2), that uses unchangeable  
10 historical events from the inmate's past to answer its questions. Once answered, the  
11 questions are converted to a "score". That score is then broken down to place the  
12 inmate into one of four levels of so-called "risk". Excerpts of this New York case  
13 submitted as Exhibit # 3, shows that based upon hearing testimony, that the "Static-  
14 99R" is improper and does not meet the requirement to determine an inmate's risk to  
15 re-offend in a sexual manner. Because the Department of Corrections has failed to  
16 promulgate any actual regulation or procedure in its decision to use or apply the  
17 "Static-99R", the so-called assessment being done is further flawed. Specifically, the  
18 "Static-99R" is done using information taken from the inmate's Pre-Sentence  
19 Investigation Report("PSI"). In most cases this information is many years old and does  
20 not contain or reflect current, accurate information reflective of the inmate's  
21 current risk to re-offend in a sexual manner.

22 The lack of any input to Dynamic (Changing) current factors mean that the so-called  
23 "score" derived from the "Static-99R" is significantly slanted against the inmate, but  
24 it is not an accurate reflection of the inmate's current risk to re-offend in a sexual  
25 manner. Indeed, the inmate is not even included in the process of assessment and is  
26 never given a copy or even shown the completed assessment. The inmate only learns of  
27 the "score" as he appears before the Respondents Board of Parole Commissioners and  
28 then only if He happens to know what to look for.

1 By Statutory requirements and then simply based upon good common sense, if an  
2 assessment is required, necessary or to be considered, it should be done using  
3 current, up-to-date information and done in a manner to consider the appellant's  
4 present state of mind.

5  
6 **3. Because Appellant was convicted in 1994 under different requirements and standards**  
7 **of assessment, was the change to now use the "Static-99R" including the automatic**  
8 **provision to deny parole to anyone labeled as "High Risk", a violation of Ex Post**  
9 **Facto prohibitions?**

10  
11 As previously noted, Appellant is currently serving His sentence for First Degree  
12 Kidnapping. Pursuant to NRS 175.547 (referenced in NRS 213.1214 (6)(d)(18), actions  
13 would have had to have been taken before the Sentencing Court that imposed His  
14 sentence for Kidnapping to label it as "Sexually Motivated" to have it applicable to  
15 requirements of NRS 213.1214. Likewise, NRS 207.193 as it applies to Coercion for  
16 Appellant's new (yet to be served) sentence has the same requirement. No such hearings  
17 were ever held so it is Appellants contention that provisions of NRS 213.1214 is  
18 inapplicable to Appellant in applying it to Appellant now. In fact the Sentencing  
19 Judge deemed the basis of the First Degree Kidnapping was for "Robbery". While  
20 Appellant was convicted for Attempted Sexual Assault with use of a Deadly Weapon, at  
21 the time he was serving those sentences, the Psychological Review Panel rated Him "Low  
22 Risk". These sentences have long ago expired however. "One function of the Ex Post  
23 Facto clause is to bar enactments which, by retroactive operation, increase the  
24 punishment for a crime after its commission and retroactive changes in Laws governing  
25 Parole of Prisoners, in some instances, may be violative of this precept". Garner v.  
26 Jones, 120 S. CT. 1362, 529 U.S. 244 (U.S. GA. 2000). "A mere procedural change will  
27 not suffice, unless the Petitioner is in some way disadvantaged". Miller v. Flores,  
28 Supre. 482 U.S. at 433, 107 S.CT. at 2452 (quoting Hyde v. Utah, 110 U.S. 574, 590 4

1 S.C.T. 202, 28 L. Ed. 262 (1984)). Since Appellant was convicted in 1994 a great many  
2 changes have occurred in the parole process. Most notably, NRS 213.1214 was enacted in  
3 1997 and then amended (8) times since then. "A State cannot continuously make minor  
4 changes in the parole process that, taken together create a significant risk of  
5 increased penalty; but, when looked at alone would not violate the Ex Post Facto  
6 clause. For example, a State makes changes to the parole process after an inmate is  
7 convicted. Inmate brings a suit challenging (A), but Court finds that it does not  
8 create an Ex Post Facto Law. The State subsequently makes changes (B), (C) and (D).  
9 Inmate is not precluded from bringing a Constitutional challenge. Importantly, the  
10 Court must be able to compare the original parole policy with the new policy. (which  
11 includes changes (A) as well as (B), (C) and (D) to see if there is a sufficient risk  
12 of increasing the measure". Foster-Bey v. Babitschur, No. 05-71318 (2005) U.S. Dist.  
13 Lexis 40869, 2005 WL 2070181 5 A 10 E.D. Mich., August 18, 2005. The regulations to  
14 carry out provisions of NRS 213.1214 were not added to the Nevada Administrative Code  
15 until 2008.

16 NAC 213.514: Determination of whether to grant parole: Assignment of risk level  
17 to prisoner. (NRS 213.10885, 213.110, 213.140)

- 18 1. The Board will assign to each prisoner who is being considered for parole a risk  
19 level of "high", "moderate" or "low" according to the level of risk that the prisoner  
20 will commit a felony if released on parole.
- 21 2. To establish the risk level, the Board will conduct an objective risk assessment  
22 using a combination of risk factors that predict recidivism.
- 23 3. If a prisoner has ever been convicted of a sexual offense and has been evaluated  
24 using a currently accepted standard of assessment to determine the risk that the  
25 prisoner will commit another sexual offense if released on parole, the Board will  
26 assign a risk level to the prisoner which is the higher of the risk level assigned  
27 pursuant to this section and the risk level determined by such an evaluation.
- 28 4. The Board will apply the risk level assigned to a prisoner who is being considered  
for parole to establish an initial assessment regarding whether to grant parole in the  
manner set forth in NAC 213.516.
5. As used in this section, "sexual offense" means offense listed in subsection 3 of  
NRS 176.133 or an offense committed in another jurisdiction that, if committed in this  
State, would be an offense listed in subsection 3 of NRS 176.133

25 NAC 213.516 Determination of whether to grant parole: Initial assessment. (NRS  
26 213.10885, 213.110, 213.140)

26 In determining whether to grant parole to a prisoner, the Board will apply the  
27 severity level of the crime for which parole is being considered as assigned pursuant  
28 to NAC 213.512 and the risk level assigned to the prisoner pursuant to NAC 213.514 to  
establish an initial assessment regarding whether to grant parole. The initial  
assessment will correspond to the following table:

Severity Level	Risk Level		
	High	Moderate	Low
Highest	Deny Parole	Consider Factors set forth in NAC 213.518	Consider Factors set forth in NAC 213.518
High	Deny Parole	Consider Factors set forth in NAC 213.518	Grant Parole at first or second meeting to consider prisoner for parole
Moderate	Deny Parole	Grant Parole at first or second meeting to consider prisoner for parole	Grant parole at initial parole eligibility
Low Moderate	Consider Factors set forth in NAC 213.518	Grant Parole at first or second meeting to consider prisoner for parole	Grant parole at initial parole eligibility
Low	Consider Factors set forth in NAC 213.518	Grant parole at initial parole eligibility	Grant parole at initial parole eligibility

Of particular note is that the current NRS 213.1214 defines a requirement for assessment and for who it is required from. A review of NRS 213.1214 (6), (d) shows that no such assessment is due for someone serving a sentence for Kidnapping given that it was never deemed to have been "Sexually Motivated". Applied to Appellant "parole eligibility was considered part of the sentence". Love v. Fitzharris, 460 F. 2d 382 (9<sup>th</sup> Cir. 1972). Since the previous "assessments" done on Appellant as He served the sentence for Attempted Sexual Assault all deemed Him to be "Low Risk" and now NRS 213.1214 seeks to continue having assessments done on a expired sentence while using a new and skewed so-called "assessment" (the "Static-99R"), it is arguable that this is a classic Ex Post Facto violation. "One Function of the Ex Post Facto clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission, and retroactive changes in Laws governing Parole of Prisoners, in some instances, may be violative of this precept". Garner v. Jones, 120 S.CT. 1362, 529 US. 244 (U.S. GA. 2000). " \_ \_ . It has been held that a parole Law, which at the time of a

1 person's conviction of a specified crime did not apply to him, Governs". People v.  
2 Siracusa, 114 N.E. 133, 275 Ill. 457.

3  
4 4. Because the "Static-99R" is not performed as a face-to-face interview and the  
5 inmate is never made a part of or included in any "assessment" performed, is due  
6 process violated by not advising the inmate of his "score" or "label" until it is  
7 already being used in parole hearing proceedings?

8  
9 As it is generally done now, when an "assessment" is ordered, the inmate (Appellant)  
10 is excluded from the entire process. Here, Appellant had a "Static-99R" apparently  
11 done on Him by someone prior to His June 2016 Parole Board appearance. Appellant has  
12 never been told by whom. Appellant went to His Parole hearing on 6-8-2016 and in spite  
13 of a "parole risk assessment" score of "4" (Low Risk). Appellant was given a "High  
14 Risk" risk label because of how the "Static-99R" was scored. This is provided for in  
15 NAC 213.514(3) (shown below), but Appellant was never given or actually allowed to  
16 review the actual score sheet of His "Static-99R" nor has he been allowed to review  
17 how the questions on the "Static-99R" were individually scored. NAC 213.514(3) states:

18 3. If a prisoner has ever been convicted of a sexual offense and has been evaluated  
19 using a currently accepted standard of assessment to determine the risk that the  
20 prisoner will commit another sexual offense if released on parole, the Board will  
assign a risk level to the prisoner which is the higher of the risk level assigned  
pursuant to this section and the risk level determined by such an evaluation.

21 Indeed, had Appellant not carefully reviewed His parole board results, he would have  
22 never known a "Static-99R" was even done. NRS 213.1214(2) requires the director of the  
23 Nevada Department of Corrections to:

24 **The Director shall:**

- 25 A) Ensure that any employee of the Department who completes an assessment  
pursuant to subsection 1 is properly trained to assess the risk of an  
offender to re-offend in a sexual manner.  
26 B) Establish a procedure to:  
(1) Ensure the accuracy of each completed assessment provided to  
the Board; and  
27 (2) Correct any error occurring in a completed assessment provided  
to the Board.  
28

1 Except no procedure has ever been promulgated or disseminated. Without a process or  
2 procedure to review the assessment performed, Appellant cannot know if an error  
3 occurred upon which to affect the "Static-99R" assessment as it was done. By excluding  
4 the inmate from the process to complete a "Static-99R", the Respondent Department of  
5 Corrections simply uses the "Pre-sentence Investigation Report" as the basis upon  
6 which to complete the "Static-99R", but "Pre-investigation Sentence Reports" are  
7 routinely incomplete or inaccurate.

8 The Department of Corrections has a position that the inmate can file an  
9 administrative grievance if he believes an error has occurred. That circular reasoning  
10 ignores that you cannot file an administrative grievance over something you haven't  
11 been able to actually review. It should also be noted that the administrative  
12 grievance process is a 5 month process to go through (if NDOC meets its time frames  
13 which it routinely does not). This process does not allow for the timely ability to  
14 address this issue and it is well beyond when the damage of using an improper "Static-  
15 99R" will have occurred as part of the parole process.

16 Appellant argues that due process is violated by excluding Him from the assessment  
17 process in using the "Static-99R". "The subject of Parole in Nevada is within the  
18 Legislature Authority given by the Nevada Constitution to the Legislature. Nevada  
19 Constitution Article 4-1, Parole is not a Constitutional Right; it is a right bestowed  
20 by the Legislative Grace. Nevertheless, if the Legislature undertakes to enact laws  
21 granting parole when it need not constitutionally have done so, the rights granted as  
22 acts of clemency or grace must be administered in accordance with concepts of due  
23 process and may not arbitrarily increase the punishment imposed in an unequal and  
24 illogical manner". Goldsworthy v. Hannifin 86 Nev. 252; 468 p. 2d 350(1970).

25 Appellant argues that due process is indeed violated by the manner in which the  
26 "Static-99R" is conducted, used and applied without His involvement or review until it  
27 is being used as part of the actual parole hearing.

1 Conclusions:

2  
3 The provisions and requirement to perform an "assessment" on those previously  
4 convicted of sexual offenses is an important one. It is suppose to be a screening tool  
5 to determine the inmate's risk to re-offend in a sexual manner. The Respondent Nevada  
6 Department of Corrections does a disservice to the State of Nevada and to the inmates  
7 coming before the Parole Board by using the "Static-99R" to respond to that  
8 requirement. To use old, static, unchanging information that may be upwards of 20  
9 years old does not provide a current up-to-date relevant portrayal of Appellant for  
10 the Board's consideration. While Appellant admits He has no right to release before  
11 expiration of a valid sentence, he does have the right to have a fair parole  
12 consideration. If an assessment is to be done it should factor and consider current  
13 relevant information upon which a determination of Appellants current risk to re-  
14 offend is made.

15  
16 Requested Relief:

17  
18 Appellant respectfully asks this Court to review His issues as presented in seeking  
19 to establish rights, status and other legal relations with the following findings to  
20 these issues:

- 21 1. That the "Static-99R" be ruled to have no predictive value for an individual. That  
22 the "Static-99R" does not and cannot measure an individual's risk to re-offend.  
23 Because of that, the "Static-99R" does not meet the requirement within NRS 213.1214(1)  
24 to be a "currently accepted standard of assessment" for determining an inmate's risk  
25 to re-offend in a sexual manner.  
26 2. That for any assessment performed, the inmate (Appellant) should receive a copy and  
27 be allowed to review it prior to it being forwarded to the Board Respondents. That the  
28

1 inmate should be allowed such a review to insure any assessment done is done  
2 accurately prior to its consideration by the Board.

3 3. That because Appellant was convicted in 1994 under different statutory requirements  
4 in place then, the change to use a "currently accepted standard of assessment" cannot  
5 allow for a harsher standard without violating Ex Post Facto provisions. As such, Ex  
6 Post Facto provisions have been violated in how these changes have been applied to  
7 Appellant.

8 4. That the premise of "certifying" or "assessing" the inmate within 120 days prior to  
9 any scheduled parole hearing is to insure it is a current reflection of the inmate's  
10 attitude, focus and thinking in real time rather than based on information many years  
11 old. That any assessment done should include the consideration of current ("Dynamic")  
12 factors, an assessment should be done and updated each time the inmate appears before  
13 the Board of Parole Commissioners as required by NRS 213.1214(1).

14 That upon the above findings in full or in part, Appellant respectfully asks for  
15 Declaratory and Prospective Relief as follows to correct the actions of the  
16 Respondents:

- 17 1. That the Respondent Department of Corrections establishes a written  
18 procedure in the form of an Administrative Regulation that  
19 establishes the process of using the "currently accepted standard of  
20 assessment" to include who will perform these "assessments". How they  
21 will be done, the manner in which the inmate will be involved in that  
22 process, how the inmate will be allowed to review the completed  
23 "assessment" and a procedure to challenge the accuracy of any  
24 assessment done prior to it being forwarded to the Respondent Board  
25 for their use.
- 26 2. That the Respondents implement and use a "currently accepted standard  
27 of assessment" which includes static and dynamic factors to support  
28 any "risk" label imposed.



- 1 3. That Appellant be given a new "assessment" that includes "static" and  
2 "dynamic" factors and upon completion of that assessment Appellant be  
3 reviewed in a new Parole Hearing to replace the June 2016 Parole  
4 Hearing.
- 5 4. That clear guidance is set forth in any new administrative regulation  
6 on who is required to have an assessment done; when it will be  
7 performed in relation to an upcoming Parole hearing, and when/if a  
8 new "assessment" will be necessary.

9  
10 Dated this 5<sup>th</sup> Day of January, 2018

11  
12 By: Brent A. Coles

13 Brent A. Coles  
14 Appellant, In Proper  
15 Person  
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1 **Attorney's Certificate:**

2 I hereby certify that I have read this Appellate brief, and to the best of my  
3 knowledge, information and belief, it is not frivolous or interposed for any improper  
4 purpose. I further certify that this brief complies with all applicable Nevada Rules  
5 of Appellate procedure, in particular NRAP 28(e), which requires every assertion of  
6 the brief regarding matters in the record to be supported by reference to the page of  
7 the transcript or appendix where the matter relied on is to be found. I understand  
8 that I may be subject to sanctions in the event that the accompanying Brief is not in  
9 conformity with the requirements of the Nevada Rules of Appellate procedure.

10  
11 Dated this 5<sup>th</sup> Day of January, 2018

12  
13 By: Brent A. Coles

14 Brent A. Coles

15 Appellant, In Proper Person  
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**Certification of Service by Mailing**

I, Brent A. Coles, do hereby certify that pursuant to the provisions of NRAP rule 31(b) and on this date, I did serve the foregoing, "Appellant's Opening Brief", upon Respondents Counsel, by placing same in the United States Postal Service, postage being fully pre-paid and addressed as follows:

Ms. Kathleen Brady  
Deputy Attorney General  
Office of the Attorney General  
535 Wright Way  
Carson City, Nevada 89711

Dated this 5<sup>th</sup> day of January, 2018

By : Brent A. Coles  
Brent A. Coles  
Petitioner, In Proper Person