IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-CV-1581-RPM

DALE GROSS and MAURICE HARRIS

Plaintiffs,

v.

DANA MADRID, Community Parole Officer, JENNIFER DUNCAN, Community Parole Officer; ARI ZAVARAS, the Executive Director of the Colorado Department of Corrections; DEBORA C. ALLEN, State Parole Board Member; CELESTE M. C. DE BACA aka CELESTE M. QUINONES, State Parole Board Member; MICHAEL ANDERSON, State Parole Board Member; MARGARET M. HECKENBACK, State Parole Board Member; JOHN O'DELL, State Parole Board Member; BECKY R. LUCERO, State Parole Board Member; REBECCA L. OAKES, State Parole Board Member; RSA INC; THOMAS PALS, therapist at RSA Inc; PROGRESSIVE THERAPY SYSTEMS, P.C., and PETER BRIGGS, therapist at Progressive Therapy Systems, P.C.

Defendants.

BRIEF IN SUPPORT OF PLAINTIFF DALE GROSS' MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER AGAINST JENNIFER DUNCAN, THE STATE PAROLE BOARD, THOMAS PALS AND RSA INC

Dale Gross, by and through his attorney, hereby submits his brief in support of his motion for a Temporary Restraining Order and a Preliminary Injunction against his parole officer Jennifer Duncan, the members of the state parole board, Thomas Pals (an evaluator at RSA Inc.) and RSA Inc.

INTRODUCTION

Mr. Gross was designated as an S-4[1] sex offender based on allegations that formed the basis for charges for which he was previously tried ***and acquitted***. Mr. Gross requests that this Court enjoin the Executive Director of the Department of Corrections (Ari Zavaras), the state parole board, his parole officer (Jennifer Duncan), Thomas Pals (an evaluator at RSA Inc) and RSA Inc. from requiring him to admit to, accept responsibility for and pass a polygraph admitting to alleged sexual misconduct that formed the basis for charges for which he was acquitted, and incarcerating him if he does not admit to, accept responsibility and pass a polygraph admitting to alleged sexual misconduct that formed the basis of charges for which he was previously tried and acquitted by a jury. Arresting Mr. Gross, revoking his parole and sending him back to prison if he does not admit to, accept

[1]Plaintiff's counsel erroneously referred to Mr. Gross and Mr. Harris as having been classified as S-4 sex offenders in the Amended Complaint. The DOC regulations have now changed and the correct classification is S-4, and the new S-4 classification is identical is all material respects to the old S-4 classification.

responsibility for and pass a polygraph admitting to alleged sexual misconduct that formed the basis for charges for which he was previously tried and acquitted by the jury violates the Double Jeopardy Clause of the Fifth Amendment.

Unlike the Plaintiff in *Chambers v. Colorado Department of Corrections*, 205 F.3d 1237 (10th Cir. 2000), Mr. Gross was tried and acquitted of the charges that were based on the allegations of alleged sexual misconduct that the Department of Corrections used to designate Mr. Gross as an S-4 sex offender. Mr. Chambers was convicted of aggravated robbery and attempted theft and, because of prior convictions, sentenced as a habitual criminal to thirty-nine years imprisonment. Mr. Chambers had been previously charged with first degree sexual assault in 1983. The case was dismissed without prejudice when the victim decided not to proceed. These dismissed charges were used to designate Mr. Chambers as an S-2[2] Sex Offender. *Chambers v. Colorado Department of Corrections,* 1999 U.S.App. LEXIS 94 (10th Cir. 1999). Unlike Mr. Gross, since Mr. Chambers was never tried for the alleged sex offenses, he had no Double Jeopardy argument. Therefore, *Chambers v. Colorado Departement of*

[2] Mr. Chambers was under the old classification system, and was thus classified as an S-2 offender; however, this classification was identical to the new S-4 classification in all material respects.

Corrections, 205 F.3d 1237 (10th Cir. 2000) presents a completely different situation from the case at bar, and is not controlling precedent.

FACTUAL BACKGROUND

The following is a summary of the factual allegations set forth in the Amended Complaint that are pertinent to this application for a TRO and a preliminary injunction. Mr. Gross will testify to these facts at the TRO hearing.

Mr. Gross is currently on parole, and was directed by his parole officer, Jennifer Duncan, to obtain an evaluation for sex offender treatment by RSA Inc. ("RSA"). Thomas Pals, a therapist or evaluator at RSA, is currently working on this evaluation. The state parole board considers Mr. Gross to be an S-4 sex offender, and has directed that he be evaluated and receive treatment as a sex offender as a condition of his parole. As set forth below, Mr. Gross is not a sex offender, and was acquitted by a jury of all offenses that relate to the allegations the Department of Corrections and the state parole board are using to label Mr. Gross as an "S-4 sex offender."

Unlike other sex offender treatment providers that have a contract with the state of Colorado to provide sex offender treatment to parolees in the community, RSA Inc. has been very activist in its "no cure" philosophy for adult clients. Its website advertises that their treatment "focuses on

techniques designed to assist offenders to control a potentially life-long tendency toward deviant behavior." The RSA Inc. website also states their "recognition that the criminal justice and social services systems play an indispensable role in getting offenders into treatment and keeping them there. Threat of system-imposed sanctions provide the motivation necessary for many sexual offenders to engage meaningfully in treatment. We recognize the importance of probation/parole officials and social service workers as co-equal partners in monitoring offenders residing in the community." There is no indication that RSA makes any distinction between convicted sex offenders and innocent men, such as Mr. Gross, who have been acquitted of all sex offense charges, but who have been arbitrarily ordered to submit to "treatment" as a condition of their parole under threat of returning to prison. Instead, RSA has a one-size fits all philosophy that all men and women who are referred to them by parole officers, whether or not they have been acquitted of being sex offenders, have a "life-long tendency toward deviant behavior," for which there is "no known cure," and they must be kept in line with the "threat of system-imposed sanctions."

Mr. Gross was charged in Adams County District Court with offenses that allegedly occurred on July 24 and 27, and September 9, 1998. The alleged victims were his girlfriend, S.K., and S.K.'s other boyfriend. Mr.

Gross was not aware that S.K. was playing the two men off against one another. Mr. Gross was charged with various crimes, but not sexual assault.

In Adams County Court case 1998CR1913, Mr. Gross was charged with two counts of burglary of S.K.'s residence (one each for July 24 and 27, 1998), two counts of trespass onto S.K.'s property (one each for July 24 and 27, 1998), misdemeanor assault of S.K. on July 27, 1998, domestic violence against S.K. on July 24, 1998 and Kidnapping of S.K. on July 27, 1998. In a nutshell, the allegations were that the Defendant burglarized S.K.'s house on July 24, 1998, kidnapped her, held her hostage and forced her to have sex with him and then returned her on July 27, 1998.

After S.K. testified at Mr. Gross's trial that she initiated sex with Mr. Gross, Mr. Gross was acquitted of all charges except for Trespass on July 27, 1998. The domestic violence charge did not go to the jury.

In Adams County Court case 1998CR2274 (later consolidated with 1998CR1913), Mr. Gross was charged with the Attempted Premeditated Murder of S.K. on September 9, 1998, Burglary of S.K.'s residence on September 9, 1998, retaliation against S.K. on September 9, 1998 and Second Degree Assault of S.K.'s other boyfriend on September 9, 1998. A charge of violation of bail bond conditions was dismissed. The same jury acquitted Mr. Gross of Attempted Premeditated Murder, and convicted him

of the remaining charges. Mr. Gross was sentenced to twelve years in the Department of Corrections plus mandatory parole. The conviction for Second Degree Assault of S.K.'s other boyfriend was vacated post trial pursuant to a partially successful post conviction motion, and the District Attorney elected to dismiss this count rather than retry Mr. Gross. Mr. Gross has continued to challenge the constitutional validity of his remaining convictions, and has filed a federal writ of habeas corpus pursuant to 28 USC §2254. *See, Gross v. Michaud* 09-cv-1267-BNB, which is currently pending in this Court. All the Adams County District Court case files have been transmitted to the U.S. District Court for use in *Gross v. Michaud* 09-cv-1267-BNB and are no longer available to Mr. Gross at the Adams County District Court.

The Department of Corrections defines S-4 (previously called S-2) sex offenders as having "committed a sex offense but was not convicted of a sex offense charge." *Chambers v. Colorado Department of Corrections*, 205 F.3d 1237, 1238 (10th Cir. 2000). Typically, these offenders are like Mr. Chambers: they were charged, but the charges were dismissed because the victim did not want to go forward, or the actual sex offense charges were dismissed as part of a plea bargain. Therefore, Mr. Chambers and others like him were never tried and acquitted of these charges. The Department of

Corrections makes no distinction between offenders who were charged but never tried of the sex offenses, and offenders (such as Mr. Gross) who were tried and acquitted of the sex offenses. Instead, it lumps them all together as "S-4 sex offenders."

The "due process" classification hearing that offenders are given before the classification is made is not designed to actually provide meaningful due process and sort out the offenders like Mr. Chambers who were charged of sex offenses but never tried, and offenders like Mr. Gross who actually went to trial and were acquitted of the charges. In Mr. Gross's case, the only meaningful "due process" he was given was that he was notified of the evidence against him. The sole "evidence" used by the classification hearing officers was the Presentence Investigation Report, based on the police reports, with in turn were based on S.K.'s false allegations that Mr. Gross kidnapped her and forced her to have sex with him. Therefore, this report was nothing more than third degree hearsay and did not even state that Mr. Gross had been acquitted of many of the charges, including all the charges based on S.K's allegations that Mr. Gross engaged in sexually inappropriate behavior. No attempt was made by the hearing officers to obtain and read the transcripts of S.K.'s trial testimony (wherein she admitted that she initiated the sex and was not "kidnapped.") No

attempt was made to obtain her initial report to the Denver Police that she had not been kidnapped. Instead, the determination was made solely on S.K.'s later allegation to the Aurora Police, that were contained in the Presentence Investigation Report, that Mr. Gross kidnapped her and forced her to have sexual intercourse. No attempt was made to assess the credibility of S.K.'s accusations, and instead, her accusations were taken as presumptively true.

The hearing officers at Mr. Gross's classification hearing were a DOC psychologist and two DOC Corrections Officers (prison guards). Mr. Gross was prohibited from having the assistance of an attorney, he was prohibited from subpoenaing witnesses, and he was not able to provide the transcripts of his trial at the "due process" classification hearing because the Department of Corrections is careful to hold these hearings before the court reporters have the opportunity to transcribe the trial transcripts. When Mr. Gross tried to explain to the hearing officers that he was innocent and was acquitted of the charges, the hearing officers dismissed his testimony as "not credible." Without his trial transcripts, Mr. Gross was unable convince the hearing officers that he had been acquitted of the charges. A C.R.C.P Rule 106 action would have been futile because this action is just a judicial review of the administrative record created at the hearing. Since the trial

transcripts were not available at the "due process" classification hearing, they were not part of the administrative record and would not have been considered by the District Court on appellate review.

Since Mr. Gross's classification hearing, section 16-22-103(d)(III)(B) of the Colorado Revised Statutes has been amended and gives offenders, such as Mr. Gross, the right to have an attorney present at the classification hearing -- if he can afford to retain and pay $200 an hour or more for such representation. That is a very hollow right, however, for indigent clients such as Mr. Gross who were represented by the public defender's office at trial. It is beyond the scope of the Charter for the Colorado Office of the Public Defender to represent indigent individuals at administrative hearings, and there is no right pursuant to CRS 16-22-103(d)(III)(B) to appointment of counsel. The amended statute also specifies that the hearing officer must be a licensed attorney. This has caused the Department of Corrections to suspend "due process" hearings altogether in violation of the statute because they cannot afford to hire licensed attorneys to conduct the classification hearings for the thousands of sex offenders in the Department of Corrections system.

When Mr. Gross was released on parole in late 2009, his parole officer, Ms. Duncan, first directed him to Sexual Offense Resource Services

LLC (SOARS) to obtain an evaluation and treatment. However Dr. Wendy Elliott, Ph.D., the evaluator at SOARS would not accept him into treatment without him first submitting to "an offense specific polygraph" about his case. Mr. Gross did so, but according to Dr. Elliott, Mr. Gross "produced overall deceptive results to questions related to his involvement in sexually assaulting his girlfriend." On March 10, 2010, Dr. Elliot reported to Ms. Duncan that Mr. Gross was not "appropriate for offense specific treatment" because he "continued to deny any sexually inappropriate behavior." Of course, Mr. Gross was unable to pass the polygraph that he accepted responsibility for assaulting his girlfriend and he continued to deny any sexually inappropriate behavior because he is innocent of the allegations, and the jury acquitted him of all charges relating to the allegations he engaged in any sexually inappropriate behavior.

Ms. Duncan then instructed the Defendant to obtain an evaluation at Defendant RSA Inc. Mr. Gross was evaluated at RSA Inc. by Thomas Pals. Mr. Pals has not finished his evaluation report. As part of the evaluation, Mr. Gross was once again required to submit to an "offense specific polygraph" administered by an RSA Inc. polygrapher in August 2010. The polygrapher scored Mr. Gross as "deceptive" to such questions as: "At what point did she [S.K.] indicate that she was not consenting to sex?" There is

no way to answer a question like this because the question assumes that S.K. did not consent to having sex. However, S.K.'s allegations were unfounded, she contradicted her allegations when she testified under oath at Mr. Gross's trial, and Mr. Gross was acquitted. Therefore, there was no way for Mr. Gross to truthfully answer the polygrapher's loaded questions.

As a result of "failing" the RSA polygraph, Ms. Duncan ordered Mr. Gross to immediately engage in treatment at RSA. She instructed Mr. Gross that if he did not call RSA and set up treatment by September 3, 2010, that she would arrest him and have him transported to the Washington County jail (a contract jail that is used by the Department of Corrections). On September 1, 2010, Mr. Gross called RSA Inc. and tried to set up treatment because he did not want to go to jail. He was informed that his call was premature because Thomas Pals had not yet finished his evaluation.

Because Mr. Gross has had difficulty finding employment, he decided to go back to school and obtain a college degree. He has obtained student loans to pay for his tuition and his basic food and shelter, but he is still struggling. In summer 2010, he enrolled in the Denver Community College and took a full load of classes. He obtained a 4.0 GPA and is a member of the academic honor society, Phi Beta Kappa. He enrolled full time for Fall Semester 2010 and is taking Introduction to Business, Music Appreciation,

College Algebra and English Composition. The last day to drop class and receive a refund is September 8, 2010. If he drops out of school, or is violated and returned to prison, he will have to repay his student loans.

The Community College of Denver requires its students to have access to the internet in order to complete course work. Research must be done online, and students take quizzes and tests online. Mr. Gross must also have a computer in order to complete his end of semester project, which includes a powerpoint presentation, for his Introduction to Business class.

Ms. Duncan informed Mr. Gross that since he failed the RSA polygraph, he will be required to engaged in sex offender "treatment." As a sex offender in treatment, Mr. Gross will not be permitted to go to school, go to the gym or go to any park without a "safety plan." He will also be prohibited from using the internet. Right now, Mr. Gross is prohibited from accessing any social network or chat site, and he has no desire to do so. He only wants to be able to stay in school and complete his course work. The prohibition against using the internet, attending school, going to the gym, being around children under eighteen, and going to parks are the standard requirements for "sex offenders;" however, Mr. Gross is not a sex offender, and poses no danger as a sex offender to the community.

ARGUMENT

In order to obtain emergency injunctive relief, Mr. Gross must show that: (1) he is likely to succeed on the merits; (2) he will suffer irreparable injury unless the requested order is entered; (3) the threatened injury to the Mr. Gross outweighs whatever damage the order may cause the Defendants; and (4) and the requested order will not be adverse to the public interest. *Lundgrin v. Claytor,* 619 F.2d 61, 63 (10th Cir. 1980). A temporary restraining order requires the same showing. *E.g., Wroncy v. Bureau of land management,* 777 F.Supp 1546 (D.Ore. 1991).

Mr. Gross is being threatened with immediate arrest and incarceration, in violation of his constitutional rights. He is simply attempting to maintain the status quo until a trial on the merits may be had. This is the traditional purpose for temporary restraining orders and preliminary injunctions. *Otero Savings and Loan Ass'n,* 665 F.2d 275, 277 (10th Cir. 1981).

A. The Defendants do not have absolute immunity from liability for prospective injunction relief on Mr. Gross's claims

Parole officers are entitled to absolute "quasi-judicial" immunity for actions taken in their adjudicatory capacities. This immunity does not, however, extend to actions taken in the officers' executive or administrative capacities. *Russ v. Uppah,* 972 F.2d 300, 303 (10th Cir. 1992); *Snell v. Tunnell*, 920 F.2d 673, 692 n.18 (10th Cir. 1990). Examples of executive or administrative actions, for which there is no absolute immunity, include: (1)

investigating allegations of parole violations; (2) typing a warrant application for the arrest of the parolee and signing the warrant; (3) assisting the police in initiating a criminal investigation against the parolee; (4) providing false information that a parolee violated the terms of parole in order to obtain a parole violation arrest warrant; (5) falsely informing the parole board that the parolee had been arrested on new criminal charges; (6) charging the parolee with wrongdoing and presenting evidence to that effect; (7) performing the "general responsibilities" of a parole or probation officer; (8) a parole board member's meeting with and interviewing a parolee concerning an alleged parole violation, and presenting information to the parole board which resulted in the board's decision to revoke parole based on a technical parole violation; and (9) conducting a warrantless search of a parolee's residence without probable cause. *Friedland v. Fauver*, 6 F.Supp 2d 292, 304-05 (D.N.J. 1998) (footnotes and citations omitted), disagreed with on other grounds by *Leamer v. Fauver*, 288 F.3d 532, 542 & n.7 (3d Cir. 2002).

Thus, the parole board and Ms. Duncan are not absolutely immune from prospective injunctive relief in the case at bar because the gravamen of Mr. Gross's complaint is that he is in imminent danger of Ms. Duncan typing a warrant for his arrest for violating the unconstitutional terms of his

parole, with the assistance of the bogus investigation of and false information provided by Thomas Pals and RSA Inc.

Mr. Gross also notes that whether or not the state Defendants have "qualified immunity" is not an issue in this lawsuit, since this issue only applies when government officials are sued in their personal capacities for damages. All the government officials in the case at bar are being sued for prospective injunctive relief in their official capacities only.

B. Mr. Gross's lawsuit does not amount to a collateral attack on criminal proceedings, and this Court should reach the merits of his claims

First of all, Mr. Gross is not challenging the validity of his conviction. Instead, he is challenging the invalidity of continuing to punish him, including the threat of incarceration, for the charges on which he *was acquitted.* He seeks to enjoin the Defendants from incarcerating him for charges on which the jury acquitted him, and seeks to enjoin the Defendants from revoking his parole and returning him to prison for failing to admit to and accept responsibility for the bogus charges for which he was acquitted. Any such incarceration violates the Double Jeopardy Clause of the Fifth Amendment, since Mr. Gross was already acquitted of these charges, and he seeks to prospectively enjoin this violation of his constitutional right to be free from being twice placed in jeopardy of the bogus charges.

Second, Mr. Gross is also not challenging the fact of or the duration of his parole. Accordingly, his claims are not barred under the principles set forth in *Wilkinson v. Dotson*, 544 U.S. 74, 81-2 (2005), stating that a federal civil rights action concerning the unconstitutionality of state parole procedures may not be pursued under 42 U.S.C. §1983 if "success in that action would necessarily demonstrate the invalidity of confinement or its duration." State parole procedures may be challenged through a federal civil rights lawsuit, instead of seeking habeas corpus relief, when success of the challenge would not directly result in release from custody. *Id*. Mr. Gross is not seeking a release from his mandatory parole, he is challenging the constitutionality of some of the terms and conditions of his parole. If he is successful, this will not impact the duration of his mandatory parole.

Mr. Gross concedes that he must serve a mandatory period of parole for the charges on which he was convicted. He concedes that if he violates a condition of his mandatory parole that is constitutionally imposed, then he can be revoked, and his judicial review options are limited. However, as set forth below, in this lawsuit, he is challenging the constitutionality of various terms and conditions of his parole that were imposed because he was arbitrarily designated as a "sex offender," despite the fact that a jury acquitted him of the sex offenses. He is also challenging the

constitutionality of revoking his mandatory parole and returning him to prison simply because he cannot admit to and accept responsibility for alleged crimes for which he was acquitted by a jury and cannot pass a polygraph admitting to the false allegations. This is punishing Mr. Gross and incarcerating him for crimes for which he was acquitted, and violates the Double Jeopardy Clause of the Fifth Amendment.

Third, Mr. Gross is not asking this Court to stay criminal proceedings in a state court. *See, Younger v. Harris*, 401 U.S. 37, 45 (1971) (noting that "it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin proceedings in state courts is not to issue such injunctions.") To the extent that parole revocation proceedings are analogous to state court criminal proceedings, Mr. Gross is also not asking this Court to stay ongoing parole revocation proceedings. Mr. Gross has not yet been arrested. Instead, Mr. Gross is asking this Court to enjoin his parole officer and the state parole board from continuing to impose unconstitutional terms and conditions of his parole.

Restraint and abstention is only appropriate if: (1) There is an ongoing criminal proceeding. *Steffel v. Thompson*, 415 U.S. 452, 454 (1974); and (2) the ongoing proceedings are judicial in nature, and the state proceedings afford an adequate opportunity to raise federal claims. *Lui v.*

Comm'n on Adult Entm't Establishments, 369 F.3d 319, 326 (3d Cir. 2004). In the case at bar, not only is there no ongoing state criminal or parole revocation proceeding, the procedures of the state parole board do not allow Mr. Gross to defend against an alleged parole violation on the grounds that the terms and conditions of his parole that he is alleged to have violated are unconstitutional. Instead, the parole board adopts a tunnel vision approach, and will only examine whether Mr. Gross did in fact violate the terms and conditions of his parole, not whether the parole board imposed unconstitutional conditions in the first place.

"[W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel, supra* 415 U.S. at 462. In the case at bar, Mr. Gross contends that he has a First and Fourteenth Amendment right to go to school and use the internet to accomplish his class assignments. He contends that he has a Fifth and Fourteenth Amendment right to refuse to admit to and accept responsibility for crimes for which he is innocent and for

which is has been acquitted by a jury. However, if he exercises those rights, then pursuant to the threats of his parole officer, he will be arrested and sent to jail, and he could be revoked and sent to prison. The only way to vindicate his constitutional rights is through this lawsuit, and this Court should grant this motion for emergency injunctive relief in order to maintain the status quo and prevent the Defendants from defeating the Plaintiff's ability to exercise his constitutional rights by incarcerating him.

C. Probability of Success on the Merits

Mr. Gross will prevail on his claims that Defendants are violating his constitutional rights. This is not a case where the Department of Corrections designated Mr. Gross as a sex offender based on dismissed charges, and this is not a case where Mr. Gross was convicted of the sex offenses but claims he is innocent. In the case at bar, Mr. Gross *was acquitted.* (The charges for which Mr. Gross was convicted and subsequently paroled are separate charges from a different case.) This means that the state of Colorado had the opportunity to meet its burden of proof that Mr. Gross is a sex offender and failed. The state does get a second opportunity to incarcerate Mr. Gross for the crimes for which he was acquitted without violating the Double Jeopardy Clause of the Fifth Amendment.

Mr. Gross's First Amendment right to free speech.

In *Warner v. Orange County Probation Dept.,* 173 F.3d 120, 121 (2d Cir. 1999), *Turner v. Hickman*, 342 F. Supp. 2d 887, 897 (E.D. Cal. 2004) and *Basch v. Sumiec,* 139 F.Supp.2d 1029, 1035-6 (E.D. Wisc. 2001), the courts held that a parolee may challenge terms and conditions of parole that infringe on the parolee's First Amendment rights. In the case at bar, Ms. Duncan and RSA Inc. are attempting to infringe upon Mr. Gross's right to free speech by arbitrarily and capriciously curtailing his access to the internet. Mr. Gross must use the internet to research his class projects, email his professors at Denver Community College and take his quizzes and tests online.

Mr. Gross has a constitutional right to free speech on the internet. In July 1996, a three-judge United States District Court panel in Pennsylvania unanimously declared the Communications Decency Act of 1996 unconstitutional. *ACLU v. Reno,* 929 F.Supp 824, 881 (E.D. Pa. 1996), *aff'd* 521 U.S. 874 (1997). Specifically, the Court held that this act of the federal government abridged citizens' free-speech rights as protected by the First Amendment. In his opinion, Judge Stewart Dalzell called the Internet "the most participatory form of mass speech yet developed." He also said the Internet is entitled to "the highest protection from government intrusion." *Id*. at 881.

Mr. Gross is aware that the Defendants might try to argue that his parole officer's directive that he not use the internet does not restrain his free speech, but is only a "time, place, and manner" restriction on his speech. Where government restrictions are not based on censorship of the viewpoint of the protestors, courts employ the First Amendment doctrine of time, place, and manner to balance the right to protest against competing governmental interests served by the enforcement of content-neutral restrictions. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech....").

However, in the case at bar, the Defendants' restrictions on Mr. Gross's use of the internet are completely unjustified. The sole reason for prohibiting Mr. Gross from using the internet is the Department of Corrections' arbitrary and capricious designation of Mr. Gross as an S-4 sex offender. Therefore, time place and manner restrictions on Mr. Gross's First Amendment right to free speech is as invalid and capricious as the designation of Mr. Gross as a "sex offender." Because Mr. Gross is not a sex offender, there is nothing to balance. The state has no legitimate interest in curtailing Mr. Gross's use of the internet. Parolees who are not sex

offenders are not prohibited from using the internet as a condition of their parole.

Mr. Gross's Fourteenth Amendment right to free association.

In *NAACA v. Alabama,* 357 U.S. 449, 466 (1958), the United States Supreme Court held that there is a Fourteenth Amendment right "to pursue lawful private interests privately and to associate freely with others in doing so," and, further, that freedom to associate with organizations dedicated to the "advancement of beliefs and ideas" is an inseparable part of the Due Process Clause of the Fourteenth Amendment. *Id.* at 466. Therefore, Mr. Gross has a Fourteenth Amendment right to go to school and freely associate with his classmates and professors. The only reason why the Defendants are restricting Mr. Gross's ability to attend Denver Community College is because he has been designated as a "sex offender." Other parolees are not prohibited from attending college, and do not require a "safety plan." As set forth above, Mr. Gross is not a sex offender, and his designation as a sex offender was arbitrarily and capriciously made based on false allegations that formed the basis for the charges for which he was acquitted by a jury. The government has no legitimate interest in restricting Mr. Gross from attending Denver Community College, especially given the fact that he has

successfully attended classes for the last four months without incident or complaint.

Mr. Gross's Fifth and Fourteenth right to be free from double jeopardy.

The Fifth Amendment states that no person shall be subject "for the same offence to be twice put in jeopardy of life or limb." The Double Jeopardy Clause protects an individual from being subjected to the hazards of trial and possible conviction more than once for the same offense. In *Breed v. Jones*, 421 U.S. 519, (1975), Mr. Jones was adjudicated guilty of robbery as a juvenile offender. After the trial court determined that Mr. Jones was unfit for treatment as a juvenile, he was prosecuted for robbery as an adult. The U.S. Supreme Court held that this violated the Double Jeopardy Clause.

The case at bar is not a case where Mr. Gross was convicted of a sex offense and sentenced to incarceration, then mandatory parole, and is claiming that revocation of the mandatory parole would violated the Double Jeopardy. Instead, the case at bar is analogous to the following: In the *Breed* case, what if Mr. Jones was first tried as an adult for robbery and acquitted? Could he then be tried as a juvenile and forced into "treatment" after adjudication as a juvenile offender for the same robbery charge? Based on the reasoning in *Breed v.*

Jones, it is clear that would violate the Double Jeopardy Clause. If it violated the Double Jeopardy Clause to try Mr. Jones a second time for the same offense after he was adjudicated guilty the first time, it would certainly offend double jeopardy if he were adjudicated not guilty the first time.

However, that is exactly what the Defendants are doing to Mr. Gross. He was tried and acquitted for the charges the Adams County District Attorney chose to bring based on S.K.'s allegations for what Mr. Gross allegedly did to her on July 24, 1998. Unhappy with this result, the Defendants are now trying to perform an end-run around the Double Jeopardy Clause of the Fifth Amendment by administratively adjudging Mr. Gross to be "guilty" of the conduct that S.K. alleged, and forcing him into treatment based on that determination. This directly puts him in jeopardy of life and limb, by the same sovereign, because if he fails at the "treatment," his will be parole revoked and sent to prison. He is not otherwise being threatened with revocation and prison. He is guaranteed to fail at sex offender "treatment" because he must admit to, accept "responsibility" for and pass a polygraph that he is being truthful in his admissions to the false allegations, or else he will be terminated from "treatment." There is no way for an innocent man to succeed at this "treatment." Therefore, unless the

Defendants are enjoined, Mr. Gross will be imprisoned for alleged offenses for which he was acquitted. This will violated Mr. Gross's Fifth Amendment rights.

RSA Inc., and their evaluator Thomas Pals are subject to 42 U.S.C. §1983

In case RSA Inc. and Thomas Pals argue that they are not state actors subject to 42 USC §1983, Mr. Gross makes the following argument:

To state a claim under §1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. In *Lugar v. Edmondson Oil Co*., 457 U.S. 922, 924 (1982), the Supreme Court made clear that if a private defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, "that conduct [is] also action under color of state law and will support a suit under §1983."

Thus, a physician who contracts with the state to provide medical care to inmates acts under the color of state law. *West v. Atkins*, 487 U.S. 42, 53-4 (1988); *Ort v. Pinchback*, 786 F.2d 1105, 1107 (11th Cir. 1986). RSA's and Mr. Pal's professional and ethical obligation to make "independent" professional judgments do not set them in conflict with parole officers and the parole board. Instead, their relationship with other state governmental

authorities is cooperative. *West v. Atkins*. at 51. *See also, Whitney v. New Mexico,* 113 F.3d 1170, 1174 (10th Cir. 1997) (a defendant acts "under color of state law" if the defendant's action is pursuant to "some state-derived authority" over the plaintiff.

RSA's website states: a "component of our treatment is our recognition that the criminal justice and social services systems play an indispensable role in getting offenders into treatment and keeping them there. Threat of system imposed sanctions provide the motivation necessary for many sexual offenders to engage meaningfully in treatment." Therefore, it is crystal clear that RSA Inc. acknowledges that it derives its authority from the state over the offenders sent to them for compulsory "treatment."

D. Mr. Gross will suffer irreparable harm if this motion is denied

A plaintiff satisfies the irreparable harm requirement if he or she can prove a significant risk of harm that will not be compensated after the fact by monetary damages. *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). The harm must be more than speculative. *Id.* The court must also assess whether the harm is likely to occur prior to the time the district court rules on the merits. *Id.* Delay in seeking preliminary injunctive relief indicates a lack of irreparable harm. *Id.* 552 F.3d at 1211.

Regarding Mr. Gross's claim that he needs emergency injunctive relief to protect his First Amendment rights, "it is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey,* 868 F.2d 69, 72-73 (3d Cir. 1989).

Regarding all of Mr. Gross's claims, the only remedy against the Defendants who are state employees (versus state contractors) is prospective injunctive relief. All other relief is likely barred by the Eleventh Amendment. *E.g. Kentucky v. Graham,* 473 U.S. 159, 166-7 (1985) ((suit for damages against state officer in official capacity is barred by the Eleventh Amendment); *Alabama v. Pugh,* 438 U.S. 781, 782 (1978) (suit against state agency is barred by the Eleventh Amendment).

This will not prevent Mr. Gross from seeking damages from Ms. Duncan in her personal capacity, if Ms. Duncan arrests him and files a complaint to revoke his parole for violating the unconstitutional conditions of his parole, but there is no amount of money that can redress a wrongful and unconstitutional incarceration. Mr. Gross will lose his apartment, his belongings, and be disenrolled from classes at Denver Community College. He will not be able to have his tuition refunded, his student loans will become due and he will default (thus making future student loans

impossible). His prospects upon release will be that much bleaker. He will be litigating this lawsuit as a homeless person standing in line at the soup kitchens.

Therefore, unless the state Defendants are prospectively enjoined, Mr. Gross will have no meaningful redress. Emergency injunctive relief is needed because of Ms. Duncan's recent threats that she is going to arrest Mr. Gross, incarcerate him in Washington County jail, and file a parole revocation complaint unless he immediately submits to the "treatment" at RSA Inc. Mr. Gross is guaranteed to fail at "treatment," due to the requirement that he must admit to, accept "responsibility" for and pass a polygraph that he is being truthful in his admissions to the false allegations, or else he will be terminated from "treatment." Preliminary injunctive relief is necessary against Thomas Pals and RSA as well, to enjoin Mr. Pals from determining that Mr. Gross requires "treatment," based on the false allegations of inappropriate sexual conduct for which Mr. Gross was acquitted. As soon as Ms. Duncan made the specific threats that Mr. Gross was subject to imminent arrest for violating unconstitutional conditions of his parole, and as soon as Ms. Duncan threatened Mr. Gross with arrest for attending classes at Denver Community College, Mr. Gross and his

undersigned attorney began work on the Amended Complaint and the Motion for a TRO and a Preliminary Injunction.

Additionally, if Mr. Gross's parole is revoked for violation of the unconstitutional terms, the state parole board may be entitled to absolute immunity. In the parole board context of hearing evidence; making recommendations as to whether to parole a prisoner; and making decisions to grant, revoke or deny parole are adjudicatory acts for which the actor is entitled to absolute immunity. *Russ v. Uppah,* 972 F.2d 300, 303 (10th Cir. 1992); *Knoll v. Webster,* 838 F.2d 450, 451 (10th Cir. 1988). Mr. Gross's only remedy will be to file a Colorado Crim. Rule 35(c)(2)(VII) petition with the Adams County Court, he will remain unlawfully incarcerated while this petition is litigated and appealed, and he will have no remedy for redress of this unconstitutional incarceration. Therefore, the parole board must be prospectively enjoined in order to protect Mr. Gross's constitutional rights.

E. The Balance of Harm

As set forth above, the threat injury to Mr. Gross is extreme: loss of his First Amendment rights and wrongful incarceration in violation of the Double Jeopardy Clause of the Fifth Amendment. In contrast, the threat to the Public is practically nonexistent. Mr. Gross cannot be legitimately labeled as a sex offender. He was duly acquitted by a jury of all crimes that

are based on the bogus allegations that the Defendants are now using as a basis to arbitrarily and capriciously label him as a sex offender.

The TRO and Preliminary Injunction will not adversely affect the public interest. *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1246 (10th Cir. 2001). Mr. Gross has been living in the community without incident or complaint. During his first period of parole, the only thing he did wrong (besides fail at the bogus sex offender "treatment") was miss two appointments for urinalysis testing. Once he realized he missed these appointments, he promptly came in and tested clean. There has been no allegation that Mr. Gross has been using or abusing drugs or alcohol, or has engaged in any sexually deviant or inappropriate conduct. The public has been perfectly safe in 2010 despite the fact that Mr. Gross has been living in the community without a "safety plan," and without engaging in any bogus "treatment" for a sex offense he never committed. There is no reason why the public will be any less safe if this Court grants this motion for a TRO and a Preliminary Injunction in order to maintain the status quo.

CONCLUSION

For the reasons set forth above, Mr. Gross respectfully requests that the Court enter an Order:

(1) Enjoining Jennifer Duncan, the Executive Director of the Department of Corrections, and the state parole board from prohibiting Mr. Gross from using the internet for academic reasons or from going to school; and

(2) Enjoining the Executive Director of the Department of Corrections, the state parole board, Jennifer Duncan, Thomas Pals and RSA Inc. from requiring Mr. Gross to admit to, accept responsibility for and pass a polygraph admitting to alleged sexual misconduct that formed the basis of charges for which he was acquitted, and incarcerating him if he does not admit to, accept responsibility and pass a polygraph admitting to the alleged sexual misconduct that formed the basis of charges for which he was previously tried and acquitted by the jury.

DATED this 8th day of September 2010.

Respectfully submitted,

/s/ Alison Ruttenberg

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September 2010, I emailed a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR TRO AND PRELIMINARY INJUNCTION** to the following:

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