IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MICHAEL P. ANSELMO,

Appellant,

vs.

CONNIE BISBEE, CHAIRMAN; SUSAN JACKSON; TONY CORDA; ADAM ENDEL, COMMISSIONERS; AND THE STATE OF NEVADA BOARD OF PAROLE,

Respondents.

Supreme Court No.: 67619

APPELLANT'S REPLY BRIEF

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SUPREME COURT OF NEVADA
***ANSELMO V. BRISBEE, ET AL.* (CASE NO.: 67619)**
NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. There are no corporations or entities subject to disclosure; and

2. The following law firms have represented Appellant:

   (a) Brownstein Hyatt Farber Schreck, LLP

Dated this 19th day of September, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ Kirk B. Lenhard*

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I. INTRODUCTION[1]

This Court was explicit in its directives: "[P]rovide briefing on the issue of whether the district court erred in dismissing Michael P. Anselmo's petition for failure to state a cognizable claim in light of the California Supreme Court's decision in *In re Lawrence,* 190 P.3d 535 (Cal. 2008)." Michael squarely addressed this issue throughout his Opening Brief, including engaging in a thorough analysis of the present facts and those in *Lawrence*, demonstrating the District Court clearly erred in dismissing Michael's Petition. In stark contrast, Respondents disregarded this Court's directives and–providing mere lip service to the Court–devoted a single page to an unsuccessful attempt to distinguish *Lawrence*, wrote off any *Lawrence* discussion as "premature," and rehashed old arguments raised in the District Court. Notably, Respondents do not even attempt to portray Michael as a *current* threat to society – because he is not.

Significantly, choosing to attack Michael's *pro se* status, Respondents fail to address several arguments raised in Michael's Opening Brief, thereby conceding them. These concessions include the applicability of *Lawrence* based on the substantive comparison, that no evidence in the record supported a finding that Michael is a current threat, that Board determinations are

[1] Unless otherwise defined, capitalized terms herein shall have the same meaning as provided in the Opening Brief.

subject to judicial review under *In re Rosenkrantz,* that this Court has held that administrative boards' determinations are subject to judicial review if the board fails to adhere to its directives, and that the Board here disregarded Nevada Parole Guidelines.

In an attempt to create a side-show, Respondents propose that this Court can only intervene and reverse the Dismissal Order if it overrules precedent upon a finding of "compelling reasons." This argument ignores that this Court has never addressed the issues raised by *Lawrence.* Respondents' tunnel-vision argument that the law must be changed is incorrect. Nevertheless, the law is not encased in a straight-jacket and this Court is free to find any one of the "compelling reasons" provided in the Opening Brief to clarify prior rulings, if necessary.

Nothing in Respondents' brief alters Michael's improper parole denial based on immutable factors which bear no nexus to his current societal threat. To remedy this injustice, this Court should (i) reverse the District Court's dismissal of Michael's Petition, and (ii) instruct the District Court to remand the matter to the Board to reconsider Michael's parole properly adhering to the Nevada Parole Guidelines and the directives in *Lawrence.*

II. STANDARD OF REVIEW

Critically, this Court's review of the Dismissal Order is, as Respondents admit, *de novo* review. (OB 35-37; AB 4.) Using this standard and a review of the applicable law and particular facts of this case, it is appropriate for this Court to reverse the District Court's dismissal of the Petition for Writ of Habeas Corpus with instructions to remand the matter to the Board for reconsideration properly following its own guidelines and *Lawrence.*

III. DISCUSSION[2]

A. Respondents Concede That Under *Lawrence*,[3] The Board's Reliance On The Nature Of Michael's Crime Is Improper.

Undisputed in the Answering Brief ("AB"), *In re Lawrence,* 44 Cal. 4th 1181, 190 P.3d 535 (2008), dictates that the Board's reliance on Michael's commitment offense is improper because the record is void of any evidence that the offense, or nature thereof, is predictive of a *current* threat to public safety or recidivism. (OB 60-68.) As such, the District Court erred in dismissing Michael's Petition, and the question this Court posed is answered in the affirmative.

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[2] As Respondents do not dispute any of the facts set forth in Michael's Opening Brief ("OB"), including the statutory scheme governing parole determinations and Michael's extensive rehabilitative and educational efforts, Michael will not restate them herein.

[3] Respondents attempt to distinguish *Lawrence* on other grounds. (AB 8-9, 16.) Each of these fails. (*See* Section II(B), *infra.*)

To be clear, Respondents do not refute that (i) the facts of this case mirror those in *Lawrence*, (ii) both the Board here and the Governor in *Lawrence* exercised their discretion, considering relevant mitigating and aggravating factors,[4] and found that the inmate posed a low risk of recidivism, (iii) both parole denials were based on immutable facts, *i.e.,* the inmates were convicted of murder,[5] (iv) the Board did not find that Michael's crime was particularly extreme or abnormal, or (v) that the proper inquiry before this Court, therefore, is to "determine whether some evidence in the record supports the [Board's] conclusion that [Michael] poses an unreasonable public safety risk because of the gravity of [his] commitment offense." (OB 61-65; *see also generally,* AB.)

Significantly, Respondents do not even mention, let alone dispute, that the Board's denial was not supported by "some evidence" in the record and, consequently, that Michael's due process and statutory rights were violated by

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[4] Contrary to Respondents' assertion (AB 18-19), Michael recognized that the Board considered more than his criminal history and specifically outlined the mitigating factors considered by the Board (OB 62-63).

[5] Respondents attempt to refute that the Board relied on immutable factors in its denial by arguing that the Board "listed three aggravating factors." (AB 18.) This argument ignores that while three aggravating factors were listed on the PRAG Form, the Board specifically articulated that the "Reason(s) for [its] action" of denial were the fact that a 22-year old died and that his crimes were "increasingly more serious." (AR 45-46.) Nonetheless, Respondents cannot refute that the three factors are immutable and that there is no nexus to a finding of a *current* risk to society. (*See generally,* AB.)

the Board's reliance upon the unchangeable circumstances of his commitment offense. (OB 65-68; *see also generally,* AB.) In fact, Respondents do not contend that Michael is a current threat to society. (*See generally,* AB.)

Thus, the Court should find the District Court erred in dismissing Michael's Petition in light of *Lawrence* and reverse the Dismissal Order. *See Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (respondents' failure to address an argument raised in the opening brief is a "confession of error".)

B. Respondents' Attempt To Distinguish *Lawrence* Fails.

In recognizing the Board's parole decision must be subject to judicial review before the Court can apply *Lawrence,* Michael dedicated ten (10) pages of his brief to discussing the same. (OB 37-46.) Respondents' response thereto, however, is thin and/or non-existent,[6] and, put frankly, disingenuous.

1. Respondents concede that the Board's decision is subject to judicial review under In re Rosenkrantz.

Respondents ignore that the Board's decisions are subject to judicial review under *In re Rosenkrantz,* 29 Cal. 4th 616, 664, 146, 59 P.3d 174, 209 (2002), because the Board is statutorily ***mandated*** to consider certain factors in

[6] Admittedly, Respondents only address "a few" of Michael's arguments. (AB 17-21.) This should not be rewarded, and should be treated as a concession. *See Ledesma v. State*, 2015 Nev. App. Unpub. LEXIS 418, *8 (Nev. Ct. App. Sept. 16, 2015) (treating respondents' failure to address certain arguments as a concession).

making parole determinations.[7] Under *In re Ronsenkrantz*, since due process requires the Board's consideration of these factors to be "supported by some evidence in the record," the District Court has authority to review Board decisions "to ensure compliance with this constitutional mandate." *Lawrence*, 44 Cal. 4th at 1203 (quoting *Rosenkrantz*, 29 Cal. 4th at 664) (internal quotations omitted). Consequently, the District Court erred in dismissing Michael's Petition and the inquiry ends. *See Bates*, 100 Nev. at 682.

If the Court is inclined, however, to consider Respondents' remaining arguments regarding judicial review, they fail nonetheless.

2. Respondents' judicial review arguments lack merit.

Notwithstanding Respondents' concession that Board decisions are judicially reviewable under *In re Rosenkrantz,* Respondents advance three arguments challenging review on other grounds: (i) Michael utilized the wrong procedural mechanism in seeking judicial review, (ii) that NRS 213.10705 precludes any claims, and (iii) that the Nevada Parole Guidelines are not "officially" adopted. (AB 12-13, 19-21.) These arguments fail at every turn.

[7] *See* NRS 213.1099.

a. Michael was *pro se* and sought the "appropriate" relief.

Respondents attack Michael for not seeking "judicial review in an appropriate manner," *i.e*., a mandamus petition and a civil law suit. (AB 12-13.) First, Michael was *pro se* in District Court and filed this appeal *pro se*. Therefore, his pleadings are held to a "less stringent standard." *See Haines* v. *Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596 (1972) (holding that a *pro se* pleading is held to a "less stringent standard"). Notably, the District Court denied Michael's request for counsel, yet this Court appointed counsel for Michael's appeal after reviewing the record. (*See* AR 17-20; *see also* Docket Nos. 15-35985 & 16-05617.)

Second, the remedy articulated in Michael's Opening Brief is precisely the remedy permitted in a mandamus petition: to "reverse the District Court's dismissal of Michael's Petition, with instructions for the District Court to remand to the Board to reconsider Michael's parole and follow: (i) its own guidelines and (ii) the California Court's directives outlined by *In re Lawrence*." (OB 6, 37; *see also* AB 13.)

To force Michael to file a mandamus petition (while he continues to sit in prison because of an improper parole denial) when the relief sought is admittedly proper, would be inequitable and further delay his parole. The Court should reject Respondents' meritless attacks.

b. Irrespective of NRS 213.10705, the Board's decision is subject to judicial review.

Despite Respondents' heavy reliance on NRS 213.10705 and its corresponding case law, neither of these avenues is definitive of the question before the Court. The Board is not shielded from judicial review of its parole decisions: (i) the Board's decision can be challenged even without a statutorily mandated right, because the Board failed to adhere to the Nevada Parole Guidelines,[8] and (ii) Michael has an expectation that he will be *eligible* for parole and properly considered, and the Board's automated rejection of Michael's parole, based on facts that Michael can never change, is to essentially deem him forever ineligible for parole — thus, triggering "a liberty interest sufficient to require at least minimal due process."[9]

Respondents' brief ignores this Court's ruling in *Cohen*,[10] half-heartedly attempts to distinguish the South Carolina cases, and improperly accuses

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[8] *See* OB 40-43 (citing *Cohen v. State*, 113 Nev. 180, 183, 930 P.2d 125, 127 (1997) and *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496-99, 661 S.E.2d 106, 112 (2008).)

[9] *See* OB 44-46 (citing *Cooper,* 377 S.C. at 496-99), *Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.,* 352 S.C. 594, 576 S.E.2d 146 (2003), *cert. denied,* 539 U.S. 932, 123 S. Ct. 2584, 156 L. Ed. 2d 612 (2003), and *Sullivan v. S.C. Dep't of Corr.,* 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).)

[10] Respondents' failure to address *Cohen* should be construed as a concession. *See Ledesma*, 2015 Nev. App. Unpub. LEXIS 418, at *8.

Michael of misrepresenting facts. (AB 17-19.) These arguments, while creative, fall flat.

i. The South Carolina cases demonstrate that the Board's decision is subject to judicial review.

A cursory review of the applicable Nevada statutes reveals that the South Carolina cases are not distinguishable. NRS 213.120(1) dictates when a prisoner becomes eligible for parole, and NRS 213.131(1)(a)[11] *requires* the Department[12] to "[d]etermine when a prisoner sentenced to imprisonment in the state prison is eligible to be considered for parole." After eligibility is determined, the Board is *required* to consider the inmate for parole. NRS 213.140(1). Because of this mandatory language, Michael has an expectation that he will be eligible for parole and properly considered. *See e.g.*, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12, 99 S. Ct. 2100, 2106 (1979) (holding that statutory language including the word "shall" can create an "expectancy of release" which "is entitled to some measure of constitutional protection").

[11] This is analogous to S.C. Code Ann. § 24-21-620, relied upon in *Furtick,* 352 S.C. at 598, requiring the board to review an inmate's case after serving a certain amount of his/her sentence.

[12] Respondents fail to articulate a difference between whether the Board or the Department makes parole eligibility determinations. (*See generally,* AB.)

Additionally, Respondents cite S.C. Code Ann. § 24-21-640,[13] which mirrors NRS 213.1099 and 213.140(1), in that the board "must" consider a parole eligible inmate and no inmate "may" be paroled without certain considerations present. *See* NRS 213.1099 and 213.140(1); *see also* S.C. Code Ann. § 24-21-640. Thus, Respondents' attempt to statutorily distinguish the South Carolina cases fails.

Moreover, the *Cooper* ruling parallels each issue here – (i) the inmate appealed a parole denial, (ii) the appeal was dismissed based on lack of jurisdiction, (iii) the inmate argued the board failed to apply the proper criteria in violation of his liberty interest and effectively rendered him ineligible for parole based on "immutable" factors, (iv) the statute provides that "[p]arole is a privilege, not a right" and the board has "sole authority," (v) the review and consideration for parole is a right created by statute, (vi) the inmate "clearly was not permanently denied parole eligibility," (vii) the Legislature created the board "to operate within certain parameters," (viii) the parole board failed

[13] S.C. Code Ann. § 24-21-640 provides as follows:

> The board must carefully consider the record of the prisoner…, and no such prisoner may be paroled until it appears to the satisfaction of the board: that the prisoner has shown a disposition to reform; that in the future he will probably obey the law and lead a correct life; that by his conduct he has merited a lessening of the rigors of his imprisonment; that the interest of society will not be impaired thereby; and that suitable employment has been secured for him.

to give credence to its "own criteria," and (ix) the reasons stated for the denial of parole were "fixed as of the date of the offense and can never…be changed..." *Cooper*, 377 S.C. at 492-99.

The *Cooper* court held that, although the inmate did not have a right to be paroled (identical to Nevada's statutory scheme), he "does have a right to require the Board to adhere to statutory requirements in rendering a decision." Furthermore, "the apparent failure by the Parole Board to consider the requisite statutory criteria in rendering its decision constitutes an infringement of a state-created liberty interest and, thus, warrants minimal due process procedures." *Id.* at 499. *Cooper* ultimately held when a board abandons its own criteria, "it has the effect of rendering an inmate parole ineligible," and that "[i]n the instant case, the Parole Board apparently failed to consider the requisite factors and, instead, based its decision on certain fixed factors that are unaffected by any rehabilitation efforts on the part of Cooper." *Id.* at 502. This is precisely what occurred in Michael's case. Consequently, the Board's decision is subject to judicial review.

ii. Michael did not misrepresent the facts.

Similarly, Respondents' assertions that Michael misrepresented facts and ignored the Board's consideration of mitigating factors, is false. Michael correctly represented that the PRAG form indicated the aggravating factors

the Board considered, but that the Final Denial Order specifically stated the **"Reason(s)"** for denial as (i) the impact on the victim, and (ii) the nature of his criminal record being "increasingly more serious," a factor the Board is forbidden to consider. (OB 25, 27, 64, 67; *see also* AR 45-46.)

Nevertheless, even *if* the Board's reasons for denial included all of the aggravating factors listed on the PRAG form, the factors are immutable, based on events that occurred nearly forty (40) years ago and have no nexus to Michael's *current* risk to society. (AR 46.) The Board's continued reliance on fixed factors subjects the Board's decision to judicial review.

Michael also recognized the Board's consideration of his achievements and other mitigating factors (OB 25-26) and outlined this in detail (OB 16-17, 61-62, 66).[14] Thus, Respondents' accusation that Michael misrepresented facts is unfounded and should be disregarded by this Court.

[14] In calling Michael's argument "unproductive hyperbole," Respondents merely highlight the arbitrary nature of the "discretionary" parole determinations. (AB 18-19.) In the two years between Michael's 2012 parole denial and 2014 denial, not a single mitigating factor changed, *i.e.,* family support, academic and rehabilitative achievements, his pending sentence, and his discipline free record remained the same. (AR 42-46.) Yet, Commissioner Gray voted to deny parole in 2012 and to grant parole in 2014. (*See id.*) Notably, Commissioner Gray voted to grant parole when he was present at the parole hearing and able to hear Michael's answers to questions relating to his record. (*See id.*)

c. The Board failed to adhere to its own directives, thus subjecting its decision to judicial review.

In an attempt to refute judicial review despite the Board's violation of its own directives (OB 40-43), Respondents[15] make the disingenuous arguments that (i) the guidelines are for the "public" and not an "officially adopted standard," (ii) under NAC, the Board has an "unrestricted right to deviate from its standards," (iii) the Board's standards are "permissive," and (iv) even if the Board "misapplied one of its standards," there is no cause of action, because the Board "adopts its own standards, and has the power to change them" (AB 19-21.) All of these arguments lack merit.

The Nevada Parole Guidelines are on the Board's official website under the heading "Forms and Other Documents *Used By the Board*."[16] The Board's official website also contains a document entitled, "Operation of the Board," which provides that a "sample copy of the standards adopted by the Board is available at…the Board's website."[17] Clearly, the Nevada Parole Guidelines are not purely a document for the "public," as Respondents represent.

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[15] Respondents do not contest that the Board failed to adhere to the Nevada Parole Guidelines. (*See generally,* AB.) This amounts to a concession. *See Ledesma*, 2015 Nev. App. Unpub. LEXIS 418, *8.

[16] *See* http://parole.nv.gov/Information/Forms/, last visited on August 25, 2016 (emphasis added).

[17] *See* http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/OpsBoardOctober2012.pdf, at p. 7, last visited on August 25, 2016.

Further, the Nevada Parole Guidelines do not "suggest" anything; rather they specifically mandate that "[i]f the person is now serving a sentence of life, or Murder/Sexual Assault, ***don't*** use this [aggravating factor] as the person has already committed the most serious of crimes." *See* Nevada Parole Guidelines, at A037 (emphasis added). While NAC 213.560(1) provides what the Board *may* consider, the Nevada Parole Guidelines *mandate* that the Board is forbidden from considering this factor in circumstances such as Michael's. *See Tarango v. SIIS*, 117 Nev. 444, 451 n.20, 25 P.3d 175, 186 n.20 (2001) ("'In statutes, "may" is permissive and "shall" is mandatory...'") (citation omitted).[18] Moreover, while the Board "may deviate" from NAC standards, *see* NAC 213.560(2), this language does not translate into unfettered Board power to violate its own directives and consider banned factors.

[18] Contrary to Respondents' representation, NAC 213.560(1) does *not* provide a blanket rule that *nothing* restricts Board authority; rather, it provides that nothing contained in *specific sections* of NAC "shall be construed to restrict the authority of the Board to: (a) Deny or revoke parole in any case in which application of the standards indicates that parole should be granted or continued; or (b) Grant or continue parole in any case in which application of the standards indicates that parole should be denied or revoked, if the decision of the Board is otherwise authorized by the provisions of chapter 213 of NRS." *See* NAC 213.560(1). This distinction is paramount here, as the Board presumably created the Nevada Parole Guidelines to expressly restrict its use of aggravating factors.

Finally, while the Board may amend its standards under NRS 213.10885, it must follow a statutorily mandated procedure, *i.e.*, "adopt[ing] revised standards" (which the Board has not done). The Board is not permitted to "amend" standards on a case-by-case basis.

In sum, none of Respondents' arguments refute the Board's failure to adhere to its own guidelines or that its denial of Michael's parole is subject to judicial review. Thus, the District Court erred and the Dismissal Order should be reversed.

C. Contrary To Respondents' Contention, This Court Is Not "Constrained" By Precedent.

Respondents argue the District Court did not err because it was obligated to follow "controlling Nevada authority" absent "compelling reasons" for altering such law. (AB 7.) Respondents resort to the circular argument that because Nevada's statutory scheme is different from California's, as discussed in *Lawrence*, no compelling reasons exist. (AB 7-9.) Contrary to Respondents' bold assertion, the Court need not overrule Nevada law to find the Board's determinations subject to judicial review. (OB 37-44.)

Assuming, *arguendo*, this Court agrees its judicial power is hamstringed by precedent, Michael's Opening Brief[19] articulates ample compelling reasons

[19] Michael did not address "compelling reasons" in his Opening Brief because no such reasons are required. (*See generally,* OB.) However,

for this Court to clarify any existing case law inconsistent with a finding that (i) Nevada inmates have an expectation of parole eligibility, (ii) that the Board essentially deems an inmate ineligible for parole when its parole determination is based on fixed, immutable factors, and (iii) that the Board's decisions are subject to judicial review if it fails to adhere to its own guidelines.

1. This Court may depart from or clarify precedent upon a finding of compelling reasons.

While it is true that this Court is "loath to depart from the doctrine of stare decisis," it will not, however, "adhere to the doctrine so stridently that the "'law is forever encased in a straight jacket.'" *Armenta-Carpio v. State*, 306 P.3d 395, 398 (Nev. 2013) (citations omitted). That is, upon a finding of "compelling reasons," a Court will "overrule prior caselaw." *City of Reno v. Howard*, 318 P.3d 1063, 1067 (Nev. 2014). Put differently, "[l]egal precedents of this Court should be respected until they are shown to be unsound in principle," *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 653, 173 P.3d 734, 743 (2007) (quotations omitted), "'unworkable or . . . badly reasoned,'" *Cty. of Clark v. Sun City Summerlin Cmty. Ass'n*, No. 60776, 2014 Nev. Unpub. LEXIS 486, at *9 (Mar. 25, 2014), or where the purpose of a

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consistent with NRAP 28(c), because Respondents raised the new issue of "compelling reasons" in their Answering Brief, Michael will address the same herein.

statute would "be defeated" if the precedent is not overturned, *Adam v. State,* 127 Nev. 601, 605, 261 P.3d 1063, 1065 (2011).

Moreover, this Court will "reexamine" previously decided issues and overrule its prior rulings when adhering to the precedent would be "substantially inequitable." *Egan v. Chambers*, 299 P.3d 364-65, 367 (Nev. 2013). Further, when prior rulings contain a "fundamental flaw," this Court will review and "retreat from [its] prior holdings and clarify [a statute's] scope." *ASAP Storage, Inc.*, 123 Nev. at 650-51.

In determining whether such "compelling reasons" exist, this Court will, among other things, elicit guidance from other courts that have addressed the issue (or similar issues), and reexamine applicable statutes and prior Nevada case law. *See Howard*, 318 P.3d at 1067; *see also Adam,* 127 Nev. at 605, 261 P.3d at 1065.

2. The requisite compelling reasons are present here.

Here, upon review of the applicable statutes, this Court's prior rulings, and rulings in other jurisdictions, "compelling reasons" empower this Court to (if necessary) overrule precedent relating to parole eligibility and the Board's failure to adhere to its directives.

a. The Court should clarify that inmates have an expectation of parole eligibility under Nevada law and a denial of eligibility is subject to judicial review.

While Nevada's statutory scheme explicitly states that parole is a privilege and not a right, a plain reading dictates that inmates have—at a minimum—a right to parole eligibility and an expectation of Board consideration after completing a certain portion of their sentence. *See* NRS 213.120(1), 213.131(1)(a)-(c), and NRS 213.140(1). Notably, although Nevada's Legislature was "under no constitutional obligation to create a parole system," it chose to do so and enacted these provisions which are "phrased in such a way that [they] create a real expectation of and not just a unilateral hope for" parole eligibility. *Severance v. Armstrong,* 96 Nev. 836, 839, 620 P.2d 369, 370 (1980) (citation omitted.)

Consistent with this statutory reading, this Court has addressed issues relating to parole eligibility while declining to address challenges to parole denials based on lack of jurisdiction.[20] This Court has not, however, squarely

[20] *See e.g. Ramirez v. McDaniel,* No. 56267, 2011 Nev. Unpub. LEXIS 419, at *1-2 (May 10, 2011) (holding that "any alleged due process violation by the Board was remedied, as the Board…credited appellant with an additional two years towards his next parole eligibility date," and that "[t]o the extent appellant challenged the denial of parole, parole is an act of grace of the State, and there is no cause of action permitted when parole has been denied."); *Parra v. Baker,* No. 65076, 2014 Nev. Unpub. LEXIS 964, at *1 (June 12, 2014) (considering the inmate's challenge to his parole eligibility

addressed whether Chapter 213 creates a right to parole eligibility because its inquiry stopped short of this analysis. Therefore, this Court should elicit guidance from the South Carolina Supreme Court that found, when addressing this identical issue with similar statutory language as Nevada, that "review or consideration for parole is a right granted by statute," *Steele v. Benjamin*, 362 S.C. 66, 72, 606 S.E.2d 499, 502 (Ct. App. 2004), and that, consequently, the "denial of parole *eligibility* implicates a liberty interest sufficient to require at least minimal due process," *Cooper*, 377 S.C. at 497.

A finding to the contrary would "defeat" Chapter 213's purpose and would be "substantially inequitable" – a statutory mandate providing an expectation of parole eligibility that can be violated without judicial review. *See Egan*, 299 P.3d at 367; *see also Adam,* 127 Nev. at 605. Thus, "compelling reasons" prompt this Court to "clarify" an inmate's right to parole eligibility, and that the Board's denial thereof implicates a liberty interest, subjecting its decision to judicial review. *See ASAP Storage, Inc.*, 123 Nev. at 650-51.

b. This Court should clarify that the denial of parole based on immutable factors constitutes denial of parole eligibility, triggering judicial review.

Upon further review of Nevada case law, and, in particular, the case law relied upon by Respondents, this Court has not had a meaningful opportunity,

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date, but holding that "there is no cause of action when parole has been denied.")

since the *Lawrence* decision, to specifically address whether a denial of parole based on immutable factors constitutes a denial of parole eligibility, consequently triggering judicial review.[21] Moreover, Michael's challenge is not to "a routine denial of parole"; rather, Michael's challenge is to the procedure employed. *See Cooper*, 377 S.C. at 496; *see also generally,* OB.

In considering a statutory scheme and facts similar to those here, the Supreme Court of South Carolina held when the parole board bases its decision on "certain fixed factors that are unaffected by any rehabilitation

[21] *See State ex rel. Bd. of Parole Comm'rs v. Morrow,* 127 Nev. 265, 269, 255 P.3d 224, 226 (2011) (addressing the parole board's challenge to the District Court's order that the inmate must "receive all the documents and the exact information that the Parole Board considered when it denied him parole," and an inmate's challenge to the District Court's dismissal of his complaint relating to the Open Meeting Law and the statutory due process protections of former NRS 213.130); *Severance,* 96 Nev. at 837 (stating "specific contentions raised in this appeal are that Nevada's statutes governing parole release are unconstitutionally vague and vest too much discretion with the board of parole commissioners, and that appellant was denied due process of law when the board, which allegedly acted arbitrarily and capriciously, denied him a parole release from prison."); *Niergarth v. State*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989) (an inmate advancing challenges relating to a retroactive institutional parole); *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 219, 678 P.2d 1158, 1159 (1984) (addressing the inmate's argument that the Board was required to provide a statement of reasons for his denial and the "statement of reasons given was constitutionally inadequate because it focused on the unchangeable circumstances of his offense," and holding "[b]ecause the Board is not constitutionally required to give any statement of reasons, appellant's argument that the reasons he did receive were constitutionally inadequate is without merit…").

efforts on the part of" the inmate, it has the effect of rendering an inmate parole ineligible and triggers judicial review." *Cooper*, 377 S.C. at 502.

To find otherwise would be "substantially inequitable," because a Nevada inmate has the right to parole eligibility and to be assessed based on factors relating to his current status. Under Respondents' unyielding interpretation, the Board could nonetheless base its denial on the fixed, immutable fact of Michael's decades-old crime—essentially robbing Michael of any parole eligibility and his right to be considered–without any judicial review. *See Egan*, 299 P.3d at 367.

Thus, "compelling reasons" exist for this Court to clarify that parole denial based on immutable factors deprives inmates of their parole eligibility, triggering judicial review.

c. This Court should clarify that the Board's failure to adhere to its own directives triggers judicial review.

This Court previously held that, even where no right exists, an administrative board's decision is subject to review when it fails to adhere to its own directives. (*See* OB 41-42 (citing *Cohen,* 113 Nev. at 181-82).) Thus, should this Court require a "compelling reasons" analysis, this Court has already recognized compelling reasons exist amid statutory constraints, such as those found here.

In looking at other jurisdictions, the South Carolina court held that despite the fact that "[p]arole is a privilege, not a right," an inmate does "have a right to require the Board to adhere to statutory requirements in rendering a decision," and if the parole board renders its decision "without consideration of the appropriate criteria, we believe it essentially abrogates an inmate's right to parole eligibility and, thus, infringes on a state-created liberty interest." *Cooper*, 377 S.C. at 496-99.

Further, it is "substantially inequitable" for the Board to create guidelines, such as the Nevada Parole Guidelines, which contain explicit directives *not* to consider certain factors in particular situations, and to be completely free to follow its directives therein in some instances and to disregard them in other instances –without *any* form of judicial review.

In fact, in reviewing the Nevada Parole Guidelines and the Discretionary Release Parole Guideline Worksheet,[22] which are both located on the Board's website and identified as Board-sanctioned and Board-utilized documents, it is no wonder why the Board found it necessary to define the aggravating and

[22] *See* http://parole.nv.gov/Information/Forms_Pages/Guideline_Related_Forms/Discretionary_Release_Parole_Guideline_Worksheet/, last visited on September 13, 2016; *see also* http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Discretionary_Release_Parole_Guideline_Worksheet.pdf, last visited on September 13, 2016.

mitigating factors: the Nevada Parole Guidelines are outcome determinative. For example, one of the available aggravating factors is "Repetitive similar criminal conduct." *See* Discretionary Release Parole Guideline Worksheet. The definition of "repetitive" is "happening again and again."[23] Thus, *without* referring to the Nevada Parole Guidelines, a Commissioner could find that a parole eligible inmate currently serving a sentence for burglary, with a prior burglary conviction, has "[r]epetitive similar criminal conduct" and, therefore, apply this aggravating factor in making the parole determination. Contrarily, if the Commissioner instead refers to the Nevada Parole Guidelines, which directs the Commissioner to "not count the instant offense as one of the prior convictions," the inmate would *not* be given that additional aggravating factor. (*See* A036.)

Under this scenario, and countless others,[24] inmates in similar situations would be treated differently by the Board – resulting in inconsistent parole

[23] *See http://www.merriam-webster.com/dictionary/repetitive,* last visited on August 31, 2016.

[24] Notably, the aggravating factor at issue here is not the only aggravating factor with Board mandated restrictions. *See generally,* Nevada Parole Guidelines. In fact, if the Board can disregard its own mandates provided in the Nevada Parole Guidelines, it could result in an inmate who was terminated from treatment because of an involuntary housing change receiving an additional aggravating factor, or an inmate receiving an additional aggravating factor because the Board improperly deemed the

determinations, disparate treatment of similarly situated inmates, and utter inequity. This could not have been the Legislature's intention when it directed the Board to create guidelines and standards governing parole. Such an outcome is "unworkable" and "unsound in principle." *See ASAP Storage, Inc.,*123 Nev. at 653; *see also Cty. of Clark*, 2014 Nev. Unpub. LEXIS 486, at *9.

Thus, requisite "compelling reasons" exist for this Court to overrule precedent, if any exists, and determine that the Board is not free to disregard its own directives and any such disregard triggers judicial intervention. Accordingly, this Court should find the District Court erred in dismissing Michael's Petition and remand with instructions for the Board to adhere to its own directives and reconsider Michael's parole in harmony with *Lawrence.*

3. Respondents' treatment of Lawrence *does not refute a finding of compelling reasons.*

In ignoring the "compelling reasons" articulated in the Opening Brief, Respondents make the unpersuasive argument that "*Lawrence* does not change the law in Nevada" because "three years after" it was decided, this Court issued its ruling in *Morrow* finding no right to parole or corresponding liberty interest. (AB 8-9.)

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inmate as having a "program failure" due to the fact that he was actually ineligible for the program. *See id.*

While it is true that *Lawrence* was decided when this Court (and the Ninth Circuit)[25] issued rulings relating to parole determinations, the opinions do not mention *Lawrence* in any manner and do not preclude this Court from reconsidering and/or clarifying its prior rulings. *See Armenta-Carpio*, 306 P.3d at 398 (holding that "[a]lthough the Supreme Court's decision in *Nixon* was available when we decided *Hernandez*, our opinion makes no mention of it and does not discuss the reasoning underlying *Perez* in any significant degree.") Further, the issues raised in *Morrow* are different than those raised here (*see* n. 21), and this Court specifically held therein that "we recognize that no statutory due process protections applied *in these particular cases*." *Morrow,* 127 Nev. at 267 (emphasis added). As such, Respondents' attempt to refute a finding of "compelling reasons" fails.

D. Respondents' Arguments Relating To Habeas Relief Ignore The Contents Of The Petition And Improperly Condemn Michael For Proceeding *Pro Se*.

In disregard of this Court's directive to address the Dismissal Order in light of *Lawrence*, Respondents (re)argue the position they took in the District Court–that Michael did not state a cognizable claim for habeas relief, that his

[25] Respondents' reliance upon *Moor v. Palmer*, 603 F.3d 658, 660 (9th Cir. 2010), is misplaced, as the inmate there filed a federal habeas petition and challenged (i) the state's failure to release him three years after his parole revocation, (ii) the Board's failure to adopt standards for granting parole after revocation, and (iii) the alleged fact that he was denied a parole hearing in 2005.

Petition was outside the scope of habeas relief, and that his claims lack merit. (AB 9-13.) These arguments prove futile for several reasons.

1. Michael presented a cognizable claim for habeas relief.

Respondents first contend that (i) Michael's claims based on the U.S. Constitution are not cognizable because the only valid Constitutional claim is "procedural due process," and (ii) Michael's state law claims were presented for the first time on appeal. (AB 9-10.) To begin, Michael was *pro se* and, therefore, his pleading is held to a less stringent standard. *See Haines*, 404 U.S. at 520. Further, Michael attacked the parole procedure and properly alleged due process violations in his Petition–"[t]he parole board process has been voided, the whole purpose of seeing a sitting board has been voided by respondents['] action," "[a] continued reliance on unchanging, unchangeable factors runs contrary to the whole rehabilitation goals and exposes the parole system to a due process violation," and the Board has "voided…Nevada Parole board system when it comes to petitioner." (AR 5-6.) Michael also argued in his Opposition to the Motion to Dismiss that the "whole reason for having a parole board was thrown out" in his case, that the "denial was not based on the hearing…" and that the "whole case screams denial of due process." (AR 48.)

Moreover, while Michael cited the U.S. Constitution, he relied on *Lawrence* in his Petition, which addressed state parole statutes. *See In re Lawrence,* 44 Cal. 4th at 1201-02. Additionally, as a *pro se* litigant, Michael advanced arguments akin to the arguments raised in the attorney-drafted Opening Brief confronting the Board's parole process and its unsupported denial amounting to a permanent denial of Michael's parole eligibility. (AR 3.)

2. Michael's claims are within the scope of habeas relief.

Respondents' contention that Michael's Petition was outside of the scope of habeas relief fails because (i) Michael argued that the denial of parole improperly resulted in an extension of his sentence, (ii) even without "specify[ing]" NRS 34.360[26] in his Petition, Michael contested his unlawful detainment despite his near-exemplary prison record and a commutation which entitled him to parole eligibility, and (iii) Michael seeks the relief Respondents deem "appropriate," *i.e.*, to "compel consideration" of the mandated factors. (AR 3, 6.)

[26] NRS 34.360 provides that "[e]very person unlawfully committed, detained, confined or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint."

3. Michael's claims are meritorious.

Similarly, Respondents' characterization of Michael's claims as meritless fail. Michael was proceeding *pro se* and, despite his Constitutional citations and inadvertent mention of overruled case law, Michael nonetheless attacked the Board's improper parole denial based on the unchangeable factors, *i.e.,* a denial of parole eligibility. (AR 1-8.) Further, Michael's *pro se* arguments, while not of lawyerly caliber, were logical–to deny parole based solely on his murder sentence is to punish him again for that same crime. (AR 6, 48-49.) Undisputedly, Nevada statute provides for the Board's consideration of several factors, in addition to the nature of the crime committed and whether the inmate poses a current threat to society. (*See* OB 7-13.) Moreover, this is the very concern the *Lawrence* court addressed and the precise issue this Court ordered the parties address on appeal. *See In re Lawrence,* 44 Cal. 4th at 1212. The District Court erred in dismissing the Petition.

E. Respondents Were Not Prejudiced Because of Michael's Alleged "New Claims."

This Court should disregard Respondents' argument that Michael presented "new claims." Michael specifically relied upon *Lawrence* in his Petition. (AR 7.) This Court also expressly requested the parties address the Dismissal Order in light of *Lawrence.* (*See* Docket Nos. 15-35985 & 16-05617.) Thus, contrary to Respondents' contention, the arguments addressing *Lawrence* are

by no means "new claims." With regard to the other "new claims," in order for Michael to follow this Court's order, it was necessary for him to outline the Board's abandonment of its own directives to demonstrate its decision is subject to judicial review, *i.e.*, that the District Court had jurisdiction to review the Board's decision.

Further, Michael's *pro se* pleading and brief in the lower court challenged the Board's denial and argued the denial voided the entire parole process (AR 1-8, 47-49). It was only after this Court's appointment of pro bono counsel that the Board's failure to adhere to its own guidelines published on its website was identified.[27] *See Allen v. Ornoski*, 435 F.3d 946, 960 (9th Cir. 2006) (holding that appellate courts "may exercise discretion to review newly presented issues if…there are exceptional circumstances why the issue was not raised in the trial court," or "when plain error has occurred and an injustice might otherwise result.") (internal quotations omitted).

Additionally, Respondents cannot reasonably assert prejudice from these purported "new claims," as Respondents had an opportunity to address the claims in their Answering Brief, but admittedly chose to address only "a few." *See id.* (review of newly presented issues where "the issue presented is purely

[27] Michael does not have access to the Internet, as no inmate housed at the Northern Nevada Correctional Center is afforded Internet privileges.

one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court.")

Michael's arguments are hardly "premature," because the Board's decision is subject to judicial review. Finally, Michael explicitly asked this Court to "reverse the District Court's dismissal of the Petition for Writ of Habeas Corpus with instructions to remand the matter to the Board for reconsideration properly following its own guidelines and the directives in *Lawrence*," which is the precise relief Respondents contend would be "appropriate" for Michael to seek. (OB 37.)

Accordingly, Respondents' attempt to discredit Michael's legitimate challenge to the Dismissal Order and the Board's parole determination fail, and this Court should grant Michael the relief requested herein.

IV. CONCLUSION

Based on the foregoing, Michael respectfully requests this Court (i) reverse the District Court's dismissal of Michael's Petition, (ii) instruct the District Court to remand the matter to the Board to reconsider Michael's parole properly adhering to the Nevada Parole Guidelines, and following the directives in *Lawrence,* and (iii) find as follows:

A. Judicial review is appropriate when a governing board is statutorily mandated to consider certain factors, yet fails to follow its own guidelines

and, instead, issues arbitrary decisions based on a sole immutable factor – thus resulting in the inmate being denied the right to be properly considered for parole upon eligibility.

B. The District Court erred in dismissing Michael's petition for writ of habeas corpus for failure to state a cognizable claim in light of the California Court's ruling in *In re Lawrence,* that a denial-of-parole decision may be based "upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance only if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk to public safety."

DATED this 19th day of September, 2016.

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This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2010, in 14-point Times New Roman font.

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on September 19, 2016.

I hereby certify that I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to the following:

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