THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,

Petitioner-Appellant,

vs.

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

Respondents-Appellees.

Supreme Court No. 67619
District Court Case No. 14EW000291B

PETITION FOR PANEL REHEARING

While this Court's opinion reverses the lower court's decision in Anselmo's favor, the opinion itself can hardly be considered a victory for either side. Indeed, it is a Pyrrhic victory for both Anselmo and the Nevada Board of Parole Commissioners (hereinafter Parole Board).[1] While Anselmo receives a new hearing, which he was soon to receive anyway, the Parole Board can deny his application for the same reason it always has—the severity of his offense—without any recourse for Anselmo, begging the question of whether this Court's opinion is anything more than a disfavored advisory opinion.

[1] Even if this Court declines to grant rehearing, it should at least change the reference to the Division of Parole and Probation to the Board of Parole Commissioners in the first paragraph of page 8 of the opinion.

Meanwhile, Respondents appreciate this Court's efforts to reaffirm *State, Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 255 P.3d 224 (2011), and all the other cases establishing that there is no liberty interest in parole in Nevada. But this Court's attempt to confine its opinion to the facts of this case does not leave Respondents with much hope that this decision will not trigger a cascade of handwritten mandamus petitions challenging parole denials from correctional facilities around the State. For Respondents, this opinion sounds like a bad remix of this Court's decision in *Stockmeier v. Nev. Dept. of Corr. Psych. Rev. Panel*, 122 Nev. 385, 135 P.3d 385 (2006), creating more confusion in the area of parole release that leads to unnecessary and time-consuming litigation. *Morrow*, 127 Nev. at 267, 255 P.3d at 225 ("We clarify that *Stockmeier* . . . does not create due process rights related to parole release hearings, and as a result of the confusion stemming from that case, we explicitly adopt and further explain the judicial function test for determining whether a proceedings is quasi-judicial.").[2]

[2] Notwithstanding the fact that the relevant statutes and regulations indicate the Parole Board does not have to follow its guidelines, *see* infra p. 5–6, Respondents find little refuge in this Court's reference to a South Carolina court's opinion that suggests the Parole Board can simply avoid problems by following its guidelines. *Anselmo v. Bisbee*, 133 Nev. Adv. Op. 45 at 8 (citing *Cooper v. South Carolina Dept. of Probation, Parole & Pardon Services*, 661 S.E.2d 106 (S.C. 2008). That Respondents can "simply" assert a defense that the Parole Board "followed its guidelines" will not prevent inmates from filing petitions relying on this case. Respondents will still be left to prepare responses with supporting documentation to prove up their defense, just as has been the case with this Court's attempt to narrow the impact of its unpublished decision in *VonSeydwitz v. LeGrand*, Case No. 66159,

Finally, and perhaps most importantly, the decision in this case overlooks the fact that the process of parole review and release is a discretionary executive function, which places it beyond the purview of this Court's mandamus powers in the absence of Anselmo establishing manifest abuse, or arbitrary and capricious exercise, of discretion. He has not made such a showing. Panel rehearing under NRAP 40 is warranted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. This Court's opinion cannot be reconciled with relevant Nevada law.

This Court may reconsider its decisions where it has overlooked a material question of law. NRAP 40(a)(2). Here, this Court's decision overlooks multiple sources of controlling authority that cannot be reconciled with this Court's opinion. And those authorities unquestionably demonstrate that this Court's mandamus powers do not extend to a discretionary matter like parole review and release. Panel rehearing is warranted.

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2015 WL 3936827 (Nev. 2015). Although a footnote in this Court's order denying *en banc* reconsideration in that matter sought to cabin the impact of the Court's decision, *see* Order Denying *En Banc* Reconsideration, *VonSeydewitz*, Case No. 66159, at 1 n.1 (Feb. 19, 2916), that footnote has not stopped the filing of perhaps hundreds of habeas petitions statewide that do not meet the limitations of the footnote, requiring the Attorney General's Office to prepare responses to each petition with supporting documentation to verify their defense that the petitioner's conviction does not fall within the parameters of this Court's footnote, followed by hours of court time resolving those petitions.

A. This Court's opinion overlooks the fact that its decision cannot be reconciled with distinctions between *Morrow* and *Stockmeier*.

In *Stockmeier*, this Court found that Stockmeier had standing to proceed based on allegations that he was deprived of his rights under the Nevada Open Meeting Law. *Stockmeier*, 122 Nev. 385, 392-95, 135 P.3d 220, 225–27 (2006). In particular, Stockmeier's ability to state a justiceable claim for relief was based upon the fact that he was asserting violations of his statutory rights as a "person" under Nevada Open Meeting Law. *Id*.

In contrast, this Court's decision in *Morrow* acknowledged that the petitioners in that case had no viable claim because they were not entitled to any "*statutory* due process protections," in a parole review hearing. *Morrow*, 126 Nev. 265, 267, 255 P.3d 224, 225 (2011) (emphasis added). And this Court then distinguished *Morrow* from *Stockmeier* by acknowledging *Stockmeier* merely established that Nevada's Psychological Review Panel was subject to the Nevada Open Meeting Law, which afforded Stockmeier protections that could be enforced by the Courts, whereas the absence of a liberty interest in parole release meant the petitioners in *Morrow* had no rights to be enforced. *Id*. at 272–73, 255 P.3d 228–29. But this Court now suggests that there are "statutory rights" under the parole statutes without any explanation as to how to reconcile that conclusion with *Morrow*'s holding indicating the contrary.

B. Even if it can be reconciled with *Morrow*, this Court's opinion overlooks relevant statutory and agency authority.

Even if this Court remains convinced it can reconcile this case with *Morrow*, the opinion overlooks relevant statutory and regulatory authority. In particular, NRS 213.10705 unquestionably establishes that the creation of parole guidelines does not create any statutory rights. And NRS 213.10885(7)(a) and NAC 213.560(2) establish that the Parole Board is free to depart from its guidelines.

1. This Court's opinion overlooks NRS 213.10705

Nevada statutory law expressly affirms "that the establishment of standards" for considering an application for parole does not "create any such *right* or interest in liberty or property or establish a basis for a cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees." NRS 213.10705 (emphasis added). This Court's opinion is based upon the conclusion that the creation of standards for considering parole release create statutory rights for parole consideration, which is contrary to the express legislative dictates of NRS 213.10705. This Court's opinion fails to explain how it has authority to grant equitable relief where the Legislature has expressly precluded the availability of relief in any form.

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2. This Court's opinion overlooks NRS 213.10885(7)(a) and NAC 213.560(2).

This Court's opinion indicates that it will not second-guess a Parole Board decision that is authorized by statute, but the Court then finds that relief is warranted here because the Parole Board failed to follow its internal guidelines. The opinion fails to address NRS 213.10885(7)(a) and NAC 213.560(2), which provide the Parole Board with authority to depart from its guidelines. This Court's decision to grant mandamus relief because the Parole Board considered an "inapplicable" guideline cannot be squared with the fact that the Parole Board has express statutory and regulatory authority to depart from its guidelines.

Indeed, NRS 213.10885(7)(a)'s recognition of the Parole Board's authority to depart from its guidelines renders this Court's opinion internally inconsistent. This Court rejected Anselmo's contention that the severity of his crime alone cannot be a basis for denying parole because a denial based on the severity of the offense is authorized by statute and "this Court will not disturb a decision to deny parole for any reason authorized by statute." *Anselmo*, 133 Nev. Adv. Op. 45 at 1, 4-7. But the statute also recognizes that the Board is authorized to depart from its guidelines, which means the Board's consideration of the increasing severity of Anselmo's crimes is authorized by statute.

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C. Because parole review and release is a discretionary act of grace under Nevada law, mandamus is not a proper remedy.[3]

Mandamus is an extraordinary remedy, and the decision to entertain a petition lies within the discretion of the court. *Hickey v. Eighth Judicial District Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). However, a court may only issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station," or to control a manifest abuse, or arbitrary and capricious exercise, of discretion. NRS 34.160; *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981).

To justify the issuance of a writ of mandamus to enforce the performance of an act by a public officer, the act must be one the performance of which the law requires as a duty resulting from the office, and there must be an actual omission on the part of the officer to perform it. *Mineral County v. Dep't of Conserv. & Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800 (2001); *Brewery Arts Center v. State Bd. Of Examiners*, 108 Nev. 1050, 1054, 843 P.2d 369 (1992); *Ex rel. Blake v. County Comm'rs*, 48 Nev. 299, 231 P. 384 (1924). An actual default or omission of duty is just as essential of a prerequisite to the issuance of a writ of mandamus

[3] Unlike issues regarding the Parole Board's discretion to depart from its guidelines, Respondents are left to address the availability of mandamus relief here in the first instance because Anselmo did not seek mandamus relief in this Court or the district court. Rather, this Court decided to treat Anselmo's habeas petition as a petition for writ of mandamus *sua sponte*.

as is the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Lawton v. Public Serv. Comm'n*, 44 Nev. 102, 108, 112, 190 P. 284 (1920).

The Parole Board does not have a duty to follow all of its guidelines in every case. The Parole Board has express authority to depart from its guidelines at the Board's discretion. NRS 210.10885(7)(a); NAC 213.560(2). Generally speaking, an act of discretion cannot be the subject of a writ of mandamus. That point is as certain as the United States Supreme Court's power of judicial review. *See*, *e.g.*, *Marbury v. Madison*, 5 U.S. 137, 166–69 (1803) (addressing the scope of the writ of mandamus and noting that discretionary acts of the executive branch "are only politically examinable"). And to the extent Nevada law extends the availability of mandamus as a remedy to challenge discretionary actions as a manifest abuse, or arbitrary and capricious exercise, of discretion, this Court and Anselmo have not identified anything suggesting that a departure from Parole Board guidelines in this case amounted to a manifest abuse, or arbitrary and capricious exercise, of discretion. Indeed, this Court acknowledged it is not in a position to second-guess the Parole Board's decisions on parole applications. *Anselmo*, 133 Nev. Adv. Op. 45 at 1, 4-7. Accordingly, this Court's opinion overlooks its own decisions firmly establishing that mandamus is not a proper remedy in this case.

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CONCLUSION

This Court's opinion in this case overlooks numerous material points of law. It is inconsistent with the holding from *Morrow*. It cannot be reconciled with clear statutory and regulatory authority. And mandamus is not a proper remedy. Panel rehearing is warranted.

RESPECTFULLY SUBMITTED this 17th day of July, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40(b)(3):

This answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,664 words.

RESPECTFULLY SUBMITTED this 17th day of July, 2017.

ADAM PAUL LAXALT
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Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 17th day of July, 2017, I served a copy of the foregoing **PETITION FOR PANEL REHEARING**, by electronic filing to:

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