

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, BOARD OF
PAROLE COMMISSIONERS,

Appellant,

vs.

THE SECOND JUDICIAL
DISTRICT COURT OF THE STATE
OF NEVADA, IN AND FOR THE
COUNTY OF WASHOE; AND THE
HONORABLE CONNIE
STEINHEIMER, DISTRICT COURT
JUDGE,

Respondents,

and

MARLIN THOMPSON,

Real Party in Interest.

CASE NO.: 76024

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**RESPONDENTS' ANSWER TO
PETITION FOR WRIT OF MANDAMUS**

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Respondents, Second Judicial District Court of the State of Nevada, in and for the County of Washoe and the Honorable Connie Steinheimer (collectively, District Court), by and through their counsel, Adam Paul Laxalt, Nevada Attorney General, and Tiffany E. Breinig, Deputy Attorney General, respectfully submit *Respondents' Answer to Petition for Writ of Mandamus*.

I. INTRODUCTION

The Court should deny Petitioner State of Nevada, Board of Parole Commissioners' (Parole Board) Petition for Writ of Mandamus (Petition) for four reasons: (1) the Parole Board lacks standing to argue the present matter because it fails to establish a beneficial interest in obtaining the requested relief; (2) the District Court's ruling was not arbitrary or capricious and did not constitute a manifest abuse of discretion; (3) the plain meaning of Nevada Revised Statute (NRS) 176.033 does not require clarification through a writ of mandamus; and (4) the Real Party in Interest has a plain, speedy and adequate remedy in the ordinary course of law through an application to the State Board of Pardons Commissioners.

II. ROUTING STATEMENT

This particular issue does not squarely fall under Nevada Rules of Appellate Procedure (NRAP) 17(a)(1) as contended by Petitioner because it is not a case involving the death penalty. However, the District Court agrees that this Court should retain this matter because it raises questions of statewide public importance and first impression concerning the modification of life sentences. *See* NRAP 17(a)(10)-(11). Additionally, the Court has jurisdiction to hear the Petition pursuant to NRAP 21.

III. STATEMENT OF THE PAROLE BOARD'S ALLEGATIONS

The Parole Board, which is created within the State's Department of Public Safety, is statutorily required to consider and potentially authorize the release of prisoners who become eligible for parole. The Parole Board may, under qualifying circumstances, petition the district court to request modifications of sentences. The Parole Board, in bypassing the unambiguous plain language of NRS 176.033 and relying on legislative history, argues that the District Court erred in determining that it could not modify a sentence of life with the possibility of parole, when the sentence does not include a minimum limit of imprisonment.

The Parole Board now seeks extraordinary relief from this Court, by and through a writ of mandamus, ordering that life sentences for first-degree murder convictions may be modified pursuant to NRS 176.033.

IV. PROCEDURAL HISTORY

In December 1978, Marlin Thompson (Mr. Thompson), the Real Party in Interest, was convicted of first-degree murder and attempted first-degree murder by jury verdict, as a result of events that took place on or about August 19, 1978. Petitioner's Appendix (Pet. App.) at 1, 63, 154. In January 1979, he was sentenced, pursuant to NRS 200.030, to life imprisonment with the possibility of parole for first-degree murder to run consecutively with a term of fifteen years for the crime of attempted first-degree murder. *Id.*

In January 1990, the Parole Board granted Mr. Thompson parole on the first-degree murder conviction. *Id.* at 2, 64. Subsequently, Mr. Thompson was granted parole on the attempted first-degree murder conviction in June 1992, and was released from custody on parole in July 1992. *Id.*

On September 11, 2017, the Parole Board filed a petition with the District Court seeking a modification of Mr. Thompson's sentence. *Id.* at

1-4. On March 22, 2018, the District Court denied the Parole Board's petition because Mr. Thompson's sentence cannot be modified to less than life imprisonment. *Id.* at 92-93.

On June 7, 2018, the Parole Board filed the instant Petition before this Court. *See* Docket Sheet; Petition, (Court Clerk Stamp). On October 12, 2018, this Court ordered the District Court to provide a response to assist this Court in resolving the Petition. *See Order Directing Answer.* This brief is provided to present information and argument in support of the District Court's decision denying the Parole Board's petition for modification of Mr. Thompson's sentence pursuant to NRS 176.033.

V. THE PAROLE BOARD'S PETITION FOR WRIT OF MANDAMUS MUST BE DENIED

A. The Petition Must Be Denied Because the Parole Board Lacks Standing

To establish standing in a mandamus proceeding, "the petitioner must demonstrate a 'beneficial interest' in obtaining writ relief." *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004); NRS 34.170. A party seeking a writ of mandamus must establish a "direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Id.* If a petitioner will gain no

direct benefit from the issuance of a writ of mandamus, and will suffer no direct detriment if it is denied, then the writ must be denied. *Id.*

The Parole Board is statutorily required to consider and possibly authorize the release of prisoners who become eligible for parole. NRS 213.140. The Parole Board also establishes and adopts standards for each type of convicted person to determine whether to grant or revoke parole and compiles and maintains information regarding its parole decisions. NRS 213.10885; NRS 213.10887. Under certain qualifying circumstances, the Parole Board may also petition district courts of original jurisdiction to request modifications of sentences. NRS 176.033.

Here, the Parole Board's Petition must be denied because it fails to establish standing by demonstrating a direct benefit from the issuance of a writ of mandamus. The Parole Board has no discernible beneficial interest in permitting the modification of life sentences. The Parole Board's only explicit duties, as laid out in statute and illustrated above, are to establish standards concerning parole and render decisions related to the consideration of parole.

The Parole Board fails to demonstrate a beneficial interest in obtaining the requested relief that the District Court be ordered to

consider modifying life sentences. While the Division of Parole and Probation, which supervises the parolees, may have beneficial interest in reducing the number of parolees it must supervise, the Parole Board, by its statutory duties, will gain no direct benefit from the issuance of the requested writ of mandamus, nor will it suffer a direct detriment if the writ of mandamus is denied.

B. The Petition Must Be Denied Because the District Court's Interpretation of NRS 176.033 Was Not Arbitrary or Capricious and Did Not Constitute a Manifest Abuse of Discretion

“[A] writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station or to control an arbitrary or capricious exercise of discretion.” *Salaiscooper v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 117 Nev. 892, 901, 34 P.3d 509 (2001).

“An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law.” *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931–32, 267 P.3d 777, 780 (2011) (citation and internal quotation marks omitted). A manifest abuse of discretion may also be controlled through a writ of mandamus. *Gonzalez v. Dist. Ct.*, 129

Nev. Adv. Op. 22, 298 P.3d 448, 450 (2013). “A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” (citation omitted). *Id.*

The District Court’s interpretation of NRS 176.033 in this matter was not arbitrary and capricious or a manifest abuse of discretion because the District Court ordered supplemental briefing on the matter and considered all of the information presented to it, ultimately recognizing and ascribing the plain and ordinary meaning of the statute’s language. The District Court’s decision was not based on prejudice or preference, but rather as demonstrated below, it was based upon the plain language of NRS 176.033, which prohibits the District Court from modifying Mr. Thompson’s sentence to less than life imprisonment.

C. The Petition Must Be Denied Because the Plain Meaning of NRS 176.033 Does Not Require Clarification

The Court may exercise its discretion to grant relief through a writ of mandamus when an important issue of law requires clarification. *State v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). However, “where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for

its meaning beyond the statute itself.” *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998).

The plain meaning of a statute is generally “ascertained by examining the context and language of the statute as a whole.” *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009). The Court is not empowered “to go beyond the face of the statute to lend it a construction contrary to its clear meaning...Nor is it within [the Court’s] province to question the wisdom of the statute...” *State Indus. Ins. Sys. v. Conner*, 102 Nev. 335, 338, 721 P.2d 384, 386 (1986) (internal quotation marks omitted).

Here, the Petition must be denied because the plain language of NRS 176.033 does not require the Court’s clarification. The District Court properly interpreted the plain and unambiguous, clear and unmistakable meaning of NRS 176.033, and this Court should not search for its meaning beyond the statute itself.

NRS 176.033 provides in its entirety that

1. Where a sentence of imprisonment is required or permitted by statute, the court shall sentence the defendant to imprisonment for a *definite period of time within the maximum limit or the minimum and maximum limits* prescribed

by the applicable statute, taking due account of the gravity of the particular offense and of the character of the individual defendant.

2. At any time after a prisoner has been release on parole and has served one-half of the period of his parole, the state board of parole commissioners, upon the recommendation of the department of parole and probation, may petition the court of original jurisdiction requesting a modification of sentence. The board shall give notice of the petition and hearing thereon to the attorney general or district attorney who had jurisdiction in the original proceedings. Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence by reducing the term of imprisonment but *shall not make the term less than the minimum limit* prescribed by the applicable penal statute.

NRS 176.033 (1977)¹ (emphasis added).

¹ In examining the plain meaning of NRS 176.033, this Court must consider the version of the statute applicable to Mr. Thompson's case. Petitioner correctly contended that the 1995 amendatory provisions, which comprise the most current version of NRS 176.033, do not apply to offenses committed before July 1, 1995. Petition at 6; *see also* 1995 Statutes of Nevada, 1248 (Chapter 443, SB 416) at Section 393. Since Mr. Thompson committed his offense in August 1978, the 1995 amendments to NRS 176.033 do not apply. As a result, Petitioner appears to argue that the 1977 version applies. Petition at 7. Notwithstanding, there is no substantive difference between the various versions of NRS 176.033 and the results remain the same – the plain language does not provide for a modification of Mr. Thompson's sentence to less than life imprisonment.

The Parole Board, presumably recognizing that the plain language of NRS 176.033 does not allow for the requested modification of sentence, attempts to persuade this Court with legislative history. However, a review of legislative history is not appropriate because the plain language of NRS 176.033 as a whole dictates that Mr. Thompson's sentence is not subject to modification less than life imprisonment.

NRS 176.033 requires a court to sentence a defendant to a "definite period of time within the maximum limit or the minimum and maximum limits prescribed by the applicable [penal] statute . . ." NRS 176.033(1). The plain language clearly indicates that penal statutes set forth minimum and maximum limits *or* simply maximum limits. Therefore, a court is statutorily authorized to sentence a defendant to a definite period of time within the maximum limit set forth in the applicable criminal statute. Such was the case with Mr. Thompson.

The penal statute in effect at the time of Mr. Thompson's crime,² NRS 200.030, allowed for only two sentences, both with only a maximum limit. *See* 1977 Statutes of Nevada at 864, 1541, 1627. At the time, the

² *State v. District Court (Pullin)*, 124 Nev. 564, 188 P.3d 1079 (2008) (The relevant sentencing statute is the statute in force at the time of the crime).

term of imprisonment for first-degree murder was set at the maximum limit of life imprisonment. *Id.* The maximum limit of life imprisonment for first-degree murder carried a “definite period of time” of either (1) the possibility of parole after ten years, or (2) no parole eligibility. *Id.* Mr. Thompson was sentenced to a term of life with the possibility of parole. Pet. App. at 1, 63, 154.

The possibility of parole after ten years is a “definite period of time” that falls within the “maximum limit” of life imprisonment. Parole eligibility cannot be considered a “minimum limit” or “minimum sentence” because a court could not have sentenced Mr. Thompson to only a ten year term of imprisonment for his first-degree murder conviction. The term of imprisonment for such offense required the maximum limit of *life* imprisonment, not simply ten years.

Accordingly, if a court is provided with discretion to modify a sentence pursuant to NRS 176.033(2), the term of imprisonment must not be reduced below the minimum allowed by statute for that crime. NRS 176.033(2). Mr. Thompson’s sentence only had a maximum limit, life imprisonment, and not also a minimum limit, therefore, his sentence cannot be modified under NRS 176.033.

Allowing courts to modify Mr. Thompson's sentence to ten years when the maximum *and only* limit set forth under the applicable penal statute is life imprisonment, would violate the plain language of NRS 176.033. This Court has made clear that "while it is the function of the Legislature to set criminal penalties, it is the function of the judiciary to decide what penalty, within the range set by the Legislature, *if any*, to impose on an individual defendant." *Mendoza-Lobos v. State*, 125 Nev. 634, 639-40, 218 P.3d 501, 504-05 (2009) (italics added) (citations omitted). While the District Court was not determining the initial penalty and sentence of Mr. Thompson, the modification of his sentence must also be within the same range of limits, if any, set by the Legislature.

The Legislature determined that a person who committed first-degree murder in 1978, like Mr. Thompson, must be sentenced to a maximum limit of life imprisonment, not simply ten years. Consequently, the District Court cannot invade the legislative function and modify Mr. Thompson's sentence to less than that authorized by the applicable penal statute, or less than life imprisonment.

D. The Petition Must Be Denied Because the Real Party In Interest Has a Plain, Speedy and Adequate Remedy

Writ relief is generally unavailable when an adequate and speedy legal remedy exists. NRS 34.170; *Salaiscooper*, 117 Nev. at 901. Mr. Thompson, the real party in interest, has a clear legal remedy available to him. Specifically, he can file an application for clemency with the State Board of Pardons Commissioners (Pardons Board). The Pardons Board will consider clemency applications from individuals on parole if the applicant has met the minimum requirements set forth in NRS 176.033(2) and a court has denied his or her petition for a modification of sentence. NAC 213.085(2).

Mr. Thompson has a clear legal right to file an application with the Pardons Board for clemency to have his sentence commuted. Consequently, this Court is precluded from issuing a writ of mandamus requiring the District Court to consider the petition to modify Mr. Thompson's sentence on the merits.

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VI. CONCLUSION

The District Court recognizes the importance of consistency in the modification of sentences pursuant to NRS 176.033. The District Court interpreted and ascribed plain meaning to NRS 176.033 in determining that a modification of sentence was not permissible in this matter and its decision was not arbitrary or capricious or a manifest abuse of discretion. Furthermore, Mr. Thompson has an adequate legal remedy available through application to the Pardons Board. Based on the foregoing, the District Court respectfully requests that this Court deny the requested relief requiring the District Court to consider petitions to modify life sentences on the merits.

Respectfully submitted this 1st day of November, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 pt. font and Century Schoolbook; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this this 1st day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 1st day of November, 2018, I electronically filed the foregoing **RESPONDENTS' ANSWER TO PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system.

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