

IN THE SUPREME COURT OF THE STATE OF NEVADA

<p>MICHAEL P. ANSELMO,</p> <p><i>Petitioner,</i></p> <p>vs.</p> <p>CONNIE BISBEE, CHAIRMAN; SUSAN JACKSON; TONY CORDA; MICHAEL KEELER, COMMISSIONERS; AND THE STATE OF NEVADA BOARD OF PAROLE,</p> <p><i>Respondent.</i></p>	<p>Supreme Court No. 67619</p> <p>Electronically Filed Apr 16 2019 09:53 a.m. Elizabeth A. Brown Clerk of Supreme Court</p>
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RECORD ON APPEAL

PETITIONER'S APPENDIX

VOLUME 1 OF 2

<p>MICHAEL P. ANSELMO #10999 BROWNSTEIN HYATT FARBER SCHRECK, LLP 100 NORTH CITY PARKWAY, SUITE 1600 LAS VEGAS, NEVADA 89106</p> <p>ATTORNEYS FOR PETITIONER</p>	<p>ADAM PAUL LAXALT ATTORNEY GENERAL 100 NORTH CARSON STREET CARSON CITY, NV 89701-4717</p> <p>ATTORNEYS FOR RESPONDENT</p>
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THE SUPREME COURT OF THE STATE OF NEVADA

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Michael P. Anselmo

NDOC # 10999

NORTHERN NEVADA CORRECTIONAL CENTER

CARSON CITY, NV 89706-7000

REC'D & FILED

2014 DEC 30 PM 4:29

ALAN GLOVER

CLERK

BY

DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR CARSON CITY

Michael P. Anselmo

PETITIONER

VS

CONNIE BISBEE Chairman

Susan Jackson, Tony Corda,

Adam Ende Commissioners.

Nevada Board of Parole

DEFENDANTS

RESPONDANTS

CASE NO 14FW0002913

DEPT NO

WRIT OF HABEAS CORPUS

Comes now, the petitioner, in proper
persona submits this writ of habeas corpus

Because of the question of time,
sentence, period of incarceration is in question
due to the petitioner 5th, 8th, 11th, 14th and
any other U.S. constitutional amendment that may
apply, the Habeas Corpus writ is the proper and
only true course of action.

Parole board is a Quasi Judicial body
and subject to constitutional violations.

HISTORY OF THE CASE

In 1972, the petitioner was convicted of murder in the first degree and sentenced to life without parole.

In 1976 the petitioner was twice convicted for escape and received two ten (10) year sentences running wild from the life and each other.

In 2005, the Nevada Board of Pardons reviewed the petitioners history, this includes case history which does include a look at victim and community impact and petitioner criminal history and it was determined petitioner did in fact earn a commutation of sentence so under NRS 213.010 to section 213.00 an order was issued, effective December 14, 2005 case # 271359 was commuted to a term of five years to life, case # 37373 was commuted to run concurrent to 271359 and case # 35024 remain consecutive.

Three times petitioner appeared before the Nevada Board of Parole and each time denied parole for three years due to impact on victim and/or community, nature of criminal record is increasingly more serious.

The nine years of denials were for the same reasons the pardons board deemed issues resolved or now mute.

In 2014 the petitioner again saw the parole board. The sitting panel all three members granted parole. The none sitting board over ruled the sitting board and gave another 3 year denial, for same old reasons that can never change. It should be noted during this whole period, petitioner NOOC record is close to perfect.

ARGUMENT

No inmate granted a commutation of sentence has ever been denied parole. 99% of those who are commuted are granted parole within 6 months. That has always been the idea and the history of the Nevada Board of Pardons. So, when one is granted a commutation of sentence it is reasonable to have an expectation of parole. History gives us that.

Connie Bisbee and her parole board has thrown out the whole pardons board action in the case at bar. To deny parole for 9 years for no reason shows a true prejudice against petitioner and a total disregard for the pardons board system.

Still, Connie Bisbee and her gang in Carson City has gone a step farther and in the case at bar thrown out any and all reason for inmates to see a parole board. When in 2014 they over ruled a sitting board and gave a maximum denial to petitioner with perfect conduct based on the same unchangeable reasons a clear demonstration was given, a clear history of prejudice, hate, vindictiveness and a clear history that petitioner rights do not matter to the Nevada Board of Parole members in Carson City exists.

To keep petitioner in prison and extend his sentence, Connie Bisbee and her Carson City parole board have voided the whole pardons board reasoning and process and voided the parole board process and the need for a sitting panel and inmates to see them.

There is little to no question that the defendants/ respondents grossly violated the petitioner's rights, but what has happened to petitioner at the hands of the defendants goes beyond just being cruel and vindictive, it is so far out there that it borders on a psychopathic, insane type hate towards petitioner.

Count - 1

The respondents have violated the petitioner's 8th Amendment right to be free of cruel and unusual punishment.

Supporting Facts

In 2005 petitioner received a commutation of sentence from the Nevada Board of Pardons. History of the pardons board is once favorable action is given a parole is granted within a short period. Until petitioner, never has one been denied parole for 3 years. In the case at bar the denials have been for 9 years and continue on. The reason cited for denial are unchangeable and made mute by sentence commutation.

This action alone is highly unusual, and due to the history of the pardons board, very cruel.

However

The defendants still go a step further to be cruel and act highly unusual towards petitioner. In 2014 the sitting parole board panel that saw petitioner all 3 granted parole. For the first time in known history, the now sitting parole board officials

threw out the sitting boards decision and denied parole to petitioner. Again, for the same 3 unchangable reasons.

During the whole process the petitioner NOOC record is very close to perfect.

Ground 2

Respondants violated petitioner 11th and 14th Amendment rights to equal protection and due process

Supporting Facts

A commutation of sentence was given and that action for the first time has been voided by parole boards action.

The parole board process has been voided, the whole purpose of seeing a sitting board has been voided by respondents action.

At 3 parole board hearings petitioner was denied parole the max of 3 years and told to do this or that to gain favorable action. Each time, petitioner did as requested to only earn a max denial.

A continued reliance on unchanging, unchangable factors runs contrary to the whole rehabilitation goals and exposes the parole system to a due process violation. See Biggs 334 F 3d 916.

The Nevada parole board is a Quasi Judicial body and subject to constitutional violations.

Ground 3

Respondents violated petitioner's 5th Amendment rights of double jeopardy.

Supporting Facts

In 2005 petitioner's sentence was changed to 5 years to life.

The Nevada Board of Parole has, through its action, stripped away the commutation of sentence and resentenced petitioner to the death penalty since it is clear that is the board's desire towards petitioner.

Conclusion

The parole board actions concerning petitioner are clearly personal opinions. Certain members of the board by a through their violation of petitioner's constitutional rights have made it clear they are prejudicial, hateful, vindictive towards petitioner. They've thrown out every favorable action petitioner has received, voided the Nevada parole board and Nevada Parole board system when it comes to petitioner.

Petitioner does have a liberty interest upon his incarceration see Biggs vs Cal A. TERKHAIE
339 F 3d 910 (2003)

In the case at bar, the parole board findings have no merit and are unfounded, this is not the case just once, twice, or three times, but now four (4).

No evidence no facts are in their findings, it is purely based on personal opinions that do seem to border on an almost psychopathic hate and vindictiveness towards petitioner.

SEE: Sandro Days LAWRENCE CAL H.C. 44 CAL
4th 1181, 190 P.3d 535 82 CAL
Rptr 3d 169 (2008)
SINGLER VS SCHWARZENEGGER 2006 U.S.
Dist Lexis 86336

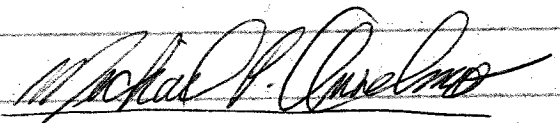
Action Requested

That all defendants / respondents be deemed barred from hearing / deciding any parole action pertaining to petitioner. That any and all decisions concerning petitioner and parole be left in the 3 members of the November 2014 Southern board who are not defendants in this action and that the 2014 over ride of sitting parole board members be stripped away and Southern boards member (sitting board) decision left to stand.

AND

Any future parole board decision be left
in the hands of those same 2014 (NOVEMBER)
Southern board member and or any new
commissioners not on the board in the
year 2014.

Respectfully submitted this 12-24 day of 2014


(Michael P. Anselmo)
Proper Persona Petitioner

CENTRAL OFFICE

1677 Old Hot Springs Rd., Ste. A
Carson City, Nevada 89706
<http://parole.nv.gov>
(775) 687-5049
Fax (775) 687-6736

CONNIE S. BISBEE, *Chairman*
TONY CORDA, *Member*
ADAM ENDEL, *Member*
SUSAN JACKSON, *Member*

DARLA FOLEY, *Executive Secretary*

STATE OF NEVADA
BRIAN SANDOVAL
Governor



LAS VEGAS OFFICE

4000 S. Eastern Ave., Ste. 130
Las Vegas, Nevada 89119
<http://parole.nv.gov>
(702) 486-4370
Fax (702) 486-4376

CONNIE S. BISBEE, *Chairman*
ED GRAY, JR., *Member*
MICHAEL KEELER, *Member*
LUCILLE MONTERDE, *Member*

NEVADA BOARD OF PAROLE COMMISSIONERS

December 16, 2014

Re: Your letter received December 15, 2014.

Michael Anselmo, NDOC #10999
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

Mr. Anselmo,

I have reviewed your letter requesting a reconsideration of your November 17, 2014, Parole Board hearing in accordance with NAC 213.526. Your request does not meet the criteria of an appeal and will not be considered by the Board. There will be no change to the order denying parole.

Sincerely,

A handwritten signature in cursive script that reads "Darla Foley".

Darla Foley
Executive Secretary

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

to be true.


Michael V. Owens
Petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing
PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 24 day of
December, 20 14, by placing same into the hands of prison law library
staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

Nevada Attorney General
100 N. CARSON
CARSON CITY, NV 89700

COONIE BISHOP CHIAMAN
NEVADA BOARD OF POND
1677 Old Hot Springs Road Suite A
CARSON CITY, NV 89706
, Nevada 89 702

02 _____


 Signature of Petitioner In Pro Se

/ / /

/ / /

/ / /

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Writ of Habeas Corpus

(Title of Document)

filed in case number: _____

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: 12-24-14

Michael P. Anselmo
(Signature)

Michael P. Anselmo
(Print Name)

(Attorney for)

Dept. No.

REC'D & FILED

2014 DEC 30 PM 4:29

IN THE First JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR THE COUNTY OF CLATSOP City

* * * * *

Michael P. Anselmo
Plaintiff/Petitioner,

v.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

CONNIE BISBEE, et al.
Defendant/Respondent. /

The petitioner, Michael P. Anselmo
in propria persona, and respectfully moves this Honorable Court
pursuant to N.R.S. 12.015, for an order granting leave to
proceed in the above-entitled action in forma pauperis, without
requiring petitioner to pay or provide security
for the payment of costs of prosecuting this action.

This motion is made based upon the attached affidavit of
Michael P. Anselmo.

Dated this 24 Day of December 2014

RESPECTFULLY SUBMITTED,
[Signature]

P.O. Box
Carson City, Nv. 89702
Petitioner in Proper Person

REC'D & FILED
2014 DEC 30 PM 4:29
ALAN GLOVER
CLERK
DEPUTY

IN THE First JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF Carson City

Michael P. Anselmo
Petitioner,

Vs.

Connie Bisbee #41,

Case No.: 14 P10002918

Dept. No.: IT

Respondent

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, Michael P. Anselmo, First being duly sworn, depose and say that I am Petitioner in the above-entitled case; that in support of my Motion to proceed without being required to prepay fees, costs or give security therefore; I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I am entitled to relief.

I do X Do not ___ request an attorney to be appointed for me.

I further swear that the responses, which I have made to question, and instructions below are true.

1. Are you presently employed: Yes X No ___

A. If the answer is yes, state the amount of your salary of wages per month, and give name and address of your employer.

\$40⁰⁰ per month NWCC Bio Portals

B. If the answer is no, state the date of last employment and the amount of salary and wages per month, which you received: _____

2. Have you received within the past twelve months any money from any of the following sources?

- a. Business, profession or form of self-employment? Yes ___ No X
b. Rent payments, interest or dividends? Yes ___ No X
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes X No ___
e. Any other sources? Yes ___ No X

If the answer to any of the above is "YES" describe each source of money and state the amount received from each during the past twelve months:

RECEIVE some funds from family for personal items.

3. Do you own cash or equivalent prison currency, or do you have money in a checking or savings account? Yes ✓ No ___

If the answer is "YES" state the total value of the items owned: ?

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)? Yes ___ No X

If your answer is "YES: describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support:

UNDER THE PENALTY OF PERJURY, Pursuant to NRS 208.165 the above affidavit is true and correct to the best of my personal knowledge.

DATED this 24 day of December, 2019.

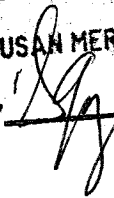
Michael D. Austino
Sign Your Name Here

Michael D. Austino 10999
Print Your Name Here DOCS

REC'D & FILED

2015 JAN -2 PM 2:26

SUSAN MERRIWETHER
CLERK

BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

-o0o-

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman; SUSAN
JACKSON, TOWY CORDA, ADAM
ENDEL, Commissioners; NEVADA
BOARD OF PAROLE,

Respondants.

CASE NO. 14 EW 00029 1B
Dept. 2

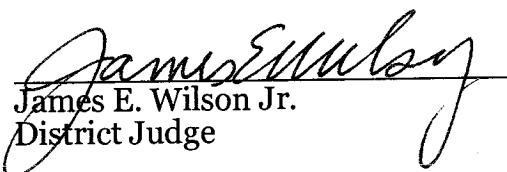
ORDER TRANSFERRING CASE TO DEPARTMENT 1

This case, upon filing, was assigned to Department 2 of the First Judicial District Court of the State of Nevada, in and for Carson City, in which said department the undersigned District Judge James E. Wilson Jr. presides.

The above-entitled matter is directly related to case no. 08 EW 00071 1B, which is assigned to Department 1 of the above-entitled Court. To ensure continuity in this matter and good cause appearing,

IT IS ORDERED that the above-entitled matter be transferred to the Honorable James T. Russell, District Judge, Department. 1, for all further proceedings.

DATED this 2 day of January 2014

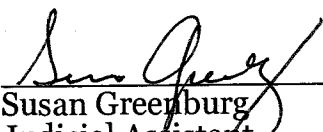

James E. Wilson Jr.
District Judge

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The Honorable James E. Wilson Jr. and I certify that on this 2 day of January 2014, I deposited for mailing at Carson City, Nevada, faxed or caused to be delivered by messenger service, a true and correct copy of the foregoing order and addressed to the following:

Michael Anselmo, #1099
NNCC
P.O. box 7000
Carson City, NV 89702



Susan Greenburg
Judicial Assistant

REC'D & FILED

2015 JAN -5 PM 1:10

SUSAN MERRIWETHER
CLERK

BY [Signature] DEPUTY

Case No.: 14 EW 00029 1B

Dept. No.: 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman; SUSAN
JACKSON, TOWY CORDA, ADAM ENDEL,
Commissioners; NEVADA BOARD OF
PAROLE,

Respondents.

**ORDER TO PROCEED IN
PROPRIA PERSONA**

**ORDER DENYING REQUEST FOR
ATTORNEY**

ORDER TO RESPOND

This matter comes before the Court pursuant to a Writ of Habeas Corpus, Motion for Leave to Proceed in Forma Pauperis, and Affidavit in Support of Request to Proceed in Forma Pauperis filed by Petitioner on December 30, 2014. The Affidavit in Support of Request to Proceed in Forma Pauperis includes averments regarding the Petitioner's income, property and resources. This Court, deeming itself fully advised of the matter, hereby enters its Judgment as follows:

NRS 34.750(2) provides that if the Court determines that the Petitioner is unable to pay all necessary costs and expenses, the costs must be paid from money appropriated to the Office

1 of the State Public Defender for that payment. Here, it is apparent from the Affidavit in Support
2 of Request to Proceed in Forma Pauperis that Petitioner has no monies.

3 In his Affidavit in Support of Request to Proceed in Forma Pauperis, Petitioner requested
4 that an attorney be appointed for him. NRS 34.750(1) gives this Court discretion to deny or
5 appoint counsel to an indigent in post-conviction proceedings. The Court is required to consider
6 the severity of the consequences facing the Petitioner, the difficulty of issues presented, the
7 ability of the Petitioner to comprehend the proceedings, and the necessity of counsel to proceed
8 with discovery. The issues presented are not difficult and it appears from his pleadings that
9 Petitioner is able to comprehend the proceedings. Only limited discovery is necessary.
10

11 Lastly, in reviewing the Petitioner's Writ of Habeas Corpus, the Court has concluded that
12 a response would assist this Court.
13

14 Therefore, good cause appearing,

15 IT IS HEREBY ORDERED that the Petitioner's Motion for Leave to Proceed in Forma
16 Pauperis is GRANTED.

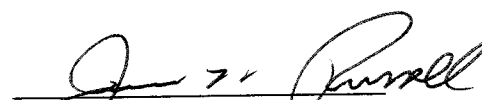
17 IT IS HEREBY FURTHER ORDERED that the Petitioner's request for appointment of
18 counsel is DENIED.
19

20 IT IS HEREBY FURTHER ORDERED that the Office of the Nevada Attorney General
21 shall, within forty-five (45) days after the date of this order, answer or otherwise respond to the
22 petition and file a response in accordance with the provisions of NRS 34.360 to 34.830,
23 inclusive. A copy of the Petition for Writ of Habeas Corpus Disciplinary shall be provided with
24 this Order to the Office of the Nevada Attorney General.
25

26 **IT IS SO ORDERED.**

27 //

Dated this 5th day of January, 2015.


JAMES T. RUSSELL
DISTRICT JUDGE

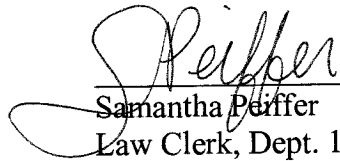
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b,) I hereby certify that I am an employee of the First Judicial District Court in and for Carson City, Department I, and that on the 5th day of January, 2015 I placed a copy of the foregoing in the United States Mail, postage prepaid, addressed as follows:

Office of the Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

Michael P. Anselmo, #10999
NNCC
P.O. Box 7000
Carson City, NV 89702


Samantha Peiffer
Law Clerk, Dept. 1

ORIGINAL

REC'D & FILED

2015 JAN -8 PM 3: 05

SUSAN MERRIWETHER
CLERK

BY  DEPUTY

1 ADAM PAUL LAXALT
Attorney General
2 DANIEL M. ROCHE
Deputy Attorney General
3 Nevada Bar No. 10732
100 North Carson Street
4 Carson City, Nevada 89701-4717
(775) 684-1273
5 DRoche@ag.nv.gov
Attorney for Respondent
6

7 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

8 IN AND FOR CARSON CITY

9 MICHAEL P. ANSELMO,

10 Petitioner,

11 vs.

12 CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
13 ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,
14

15 Respondents.

Case No. 14 EW 00029 1B

Dept. No. 1

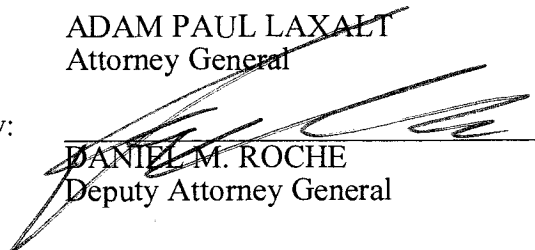
16 **NOTICE OF REPRESENTATION OF RESPONDENTS**

17 The State of Nevada, by and through counsel, ADAM PAUL LAXALT, Attorney General of the
18 State of Nevada, hereby notifies the Court and respective parties to this action that Deputy Attorney
19 General DANIEL M. ROCHE has assumed responsibility for representing the interests of the named
20 respondent, and the Attorney General of the State of Nevada, and the interests of the State of Nevada in the
21 above-entitled action.

22 RESPECTFULLY SUBMITTED this 8th day of January, 2015.

23 ADAM PAUL LAXALT
Attorney General

24 By:

25 
DANIEL M. ROCHE
Deputy Attorney General
26
27
28

///

///

///

AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document, NOTICE OF REPRESENTATION OF RESPONDENTS, filed in case number 14 EW 00029 1B, does not contain the social security number of any person. No additional affirmation will be provided unless the document contains personal information.

DATED this 8th day of January, 2015.

ADAM PAUL LAXALT
Attorney General

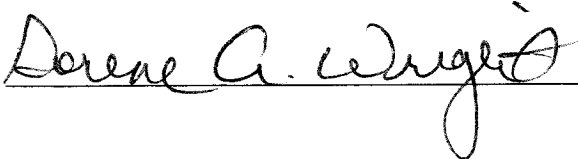
By:


DANIEL M. ROCHE
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 8th day of January, 2015, I served a copy of the foregoing NOTICE OF REPRESENTATION OF RESPONDENTS, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL P. ANSELMO
NDOC #10999
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702



ORIGINAL

REC'D & FILED

2015 FEB 13 PM 3:36

SUSAN TERRIWETHER

CLERK
DEPUTY

ADAM PAUL LAXALT
Attorney General
DANIEL M. ROCHE
Deputy Attorney General
Nevada Bar No. 10732
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Carson City, Nevada 89701-4717
(775) 684-1273
DRoche@ag.nv.gov
Attorney for Respondent

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

Case No. 14 EW 00029 1B

CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,

Respondents.

Dept. No. 1

MOTION TO DISMISS

Respondents, by and through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, move to dismiss Michael P. Anselmo's (hereinafter "Anselmo") petition for a writ of habeas corpus. This motion is based on the following points and authorities, together with all other pleadings, papers, and exhibits attached hereto.

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

On June 6, 1972,¹ Anselmo was convicted of first-degree murder in Washoe County case number 271359 and sentenced to life in prison without the possibility of parole. Exhibit 1. On January 3, 1977, he was convicted of escape in Clark County case number 35024 and sentenced to ten years in prison, consecutive to his sentence for murder. Exhibit 2. And on March 8, 1977, he was

///

¹ In this procedural history, respondents will refer to the date that the Judgments of Conviction were filed.

1 convicted of escape in Carson City case number 37373 and sentenced to ten more years, consecutive to
2 his prior two sentences. Exhibit 3.

3 On December 14, 2005, the State of Nevada's Board of Pardons commuted Anselmo's
4 sentences. Exhibit 4. His life sentence in case number 271359 was commuted to a sentence of
5 five years to life in the Nevada Department of Corrections. *Id.* His sentence for escape in case number
6 37373 was commuted to run concurrently with his life sentence. *Id.* His sentence for escape in case
7 number 35024 was not altered and remains pending. *See id.*

8 On February 13, 2006, the Nevada Board of Parole Commissioners (hereinafter "Parole Board")
9 voted unanimously to deny parole for three years. Exhibit 5.

10 On November 6, 2008, with no votes in favor of granting parole, the Parole Board denied
11 Anselmo parole for three more years. Exhibit 6.

12 On February 27, 2012, the Parole Board again unanimously voted to deny parole for three years.
13 Exhibit 8.

14 Finally, on November 17, 2014, the Parole Board voted 4-3 to deny parole for three more years.
15 Exhibit 9.

16 On December 30, 2014, Anselmo filed a petition for a writ of habeas corpus challenging the
17 Parole Board's most recent decision to deny parole. In his petition, Anselmo claims that the denial of
18 parole (1) amounts to cruel and unusual punishment, (2) violates due process, and (3) violates double
19 jeopardy. Petition at 4-6. Respondents now move to dismiss the petition.

20 II. ARGUMENT

21 In his petition, Anselmo does not challenge his underlying conviction or sentence. *See* Petition.
22 Rather, he challenges the Parole Board's decision to deny him parole. *Id.* Because Anselmo does not
23 challenge his judgment of conviction, sentence, or a related computation of time, his petition is outside
24 the scope of the post-conviction habeas corpus statutes. NRS 34.720.

25 As for the general habeas corpus statutes, *see* NRS 34.360-.680, those state that a writ of habeas
26 corpus issues only where there is "no legal cause" for the challenged "imprisonment or restraint, or for
27 the continuation thereof." NRS 34.360; NRS 34.480. Anselmo is lawfully confined pursuant to
28 multiple judgments of conviction, the validity of which he does not dispute. *See* Petition; Exhibits 1-4.

1 He fails to set forth a cognizable claim for habeas relief because parole is an act of grace of the State,
2 and there is no cause of action permitted when parole has been denied. See NRS 213.10705;
3 *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *State, ex rel. Bd. of Parole Comm'rs v.*
4 *Morrow*, ___ Nev. ___, ___, 255 P.3d 224, 227-28 (2011); *Niergarth v. Warden*, 105 Nev. 26, 28,
5 768 P.2d 882, 883 (1989); *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 687 P.2d 1158,
6 1160 (1984); *Severance v. Armstrong*, 96 Nev. 836, 620 P.2d 369 (1980).

7 Respondents assert that these cases preclude any constitutional challenges to the denial of parole
8 in Nevada. However, to the extent that these cases serve only to preclude Anselmo's due process
9 claims, respondents assert that his other two claims can nevertheless be dismissed as facially meritless.
10 Anselmo's double jeopardy claim is without merit because the denial of parole did not amount to
11 "resentenc[ing] petitioner to the death penalty." See Petition at 6. Likewise, denying parole from a life
12 sentence for first-degree murder does not amount to cruel and unusual punishment. "The Eighth
13 Amendment...forbids only extreme sentences that are 'grossly disproportionate' to the crime."
14 *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring). Anselmo does not allege
15 that his sentence is "grossly disproportionate" to the crime of first-degree murder or otherwise
16 unconstitutional or invalid, see Petition at 4-5, and he has no constitutional right to be released before
17 the expiration of his sentence. See *Greenholtz*, 442 U.S. at 7.

18 III. CONCLUSION

19 Anselmo fails to state a cognizable claim for habeas relief, and his claims are all facially
20 meritless. His petition should be dismissed.

21 RESPECTFULLY SUBMITTED this 13th day of February, 2015.

22 ADAM PAUL LAXALT
23 Attorney General

24 By:

25 
26 DANIEL M. ROCHE
27 Deputy Attorney General
28

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 13th day of February, 2015, I served a copy of the foregoing MOTION TO DISMISS, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL P. ANSELMO
NDOC #10999
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702

Dorene A. Wright

INDEX OF EXHIBITS

EXHIBIT No.	EXHIBIT DESCRIPTION	NUMBER OF PAGES
1.	Judgment filed 06/06/72	1
2.	Judgment of Conviction filed 01/03/77	1
3.	Judgment of Conviction filed 03/08/77	1
4.	Order Commuting Sentence dated 12/14/05	1
5.	Order Denying Parole Release dated 02/13/06	2
6.	Order Denying Parole Release dated 11/06/08	3
7.	Order Taking No Action dated 11/17/11	1
8.	Order Denying Parole dated 02/27/12	2
9.	Order Denying Parole dated 11/17/14	2

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE

FRIDAY, MAY 26, 1972 at 9:30 o'clock A. M.

PRESENT: HONORABLE JAMES J. GUINAN, DISTRICT JUDGE

H. K. BROWN, CLERK; R. J. GALLI, SHERIFF.

FILED

JUN 6 11:18 AM '72

H.K. BROWN, CLERK

* * * * *

STATE OF NEVADA, Plaintiff,)
vs.)

No. 271359

FILED

MICHAEL PHILIP ANSELMO)

Reported by Mildred Jenks
JUN 5 11:18 AM '72

)
)
)
Defendant)

H.K. BROWN, CLERK

By [Signature] DEPUTY

* * * * *

No sufficient cause being shown by Defendant as to why judgment should not be pronounced against him, the Court rendered judgment as follows:

That MICHAEL PHILIP ANSELMO is guilty of the crime of
MURDER

and that he be punished by imprisonment in the Nevada State Prison for the term of
LIFE WITHOUT POSSIBILITY OF PAROLE

* * * * *

WHEREUPON a recess was taken until TUESDAY, MAY 30, 1972

at 9:30 o'clock A. M.

By [Signature]
JAMES J. GUINAN
DISTRICT JUDGE
CLERK OF DISTRICT COURT
COUNTY OF WASHOE

STATE OF NEVADA,)
) SS.

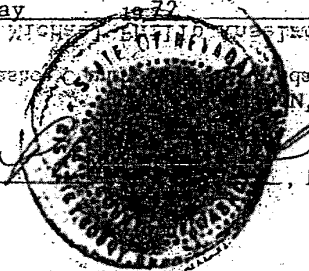
County of Washoe)
for the crime of MURDER

I, H. K. BROWN, County Clerk and ex-officio Clerk of the Second Judicial District Court, of the State of Nevada, in and for the County of Washoe, do hereby certify the foregoing to be a true and correct copy of the Judgment of Imprisonment as entered in the minutes of said District Court in the above entitled action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Reno, Nevada, this 26th day of May, 1972

STATE OF NEVADA)
COUNTY OF WASHOE)
SHERIFF & CLERK)

By [Signature], DEPUTY



1 CASE NO. 15024

2 DEPT. I

JAN 3 1 21 PM '77

Lageala
Shas

3 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
4
5
6 IN AND FOR THE COUNTY OF CLARK.

7 THE STATE OF NEVADA,

8 Plaintiff,

9
10 MICHAEL P. ANSELMO

11 Defendant.

JUDGMENT OF CONVICTION

12
13 WHEREAS, on the 30th day of November, 1976, Defendant
14 MICHAEL P. ANSELMO, entered a plea of guilty to the
15 crime of ESCAPE

16 _____, NRS 212.090
17 the above entitled Court thereafter, on the 29th day of December
18 1976, did adjudge the Defendant guilty by reason of his plea
19 of guilty and sentenced Defendant to serve a term of ten (10)
20 years in Nevada State Prison. Said sentence to run consecutive
21 to the sentences previously imposed.
22
23
24
25
26

27 THEREFORE, the Clerk of the above entitled Court is hereby
28 directed to enter this Judgment of Conviction as part of the
29 record in the above entitled matter.

30 DATED this 30 day of December, 1976, in the
31 City of Las Vegas, County of Clark, State of Nevada.

32 76-F-1939/dw
LVMPD DR#76-33687

AUG 5 2011

CERTIFIED COPY
DOCUMENT ATTACHED IS A
TRUE AND CORRECT COPY
OF THE ORIGINAL ON FILE

[Signature]
CLERK OF COURT

[Signature]
DISTRICT JUDGE

8

In The First Judicial District Court of the State of Nevada,
In and for Carson City

THE STATE OF NEVADA,

Plaintiff,

vs.

MICHAEL P. ANSELMO

Defendant.

No. 37373

FILED

1977 MAR -6 AM 9:40

VAUGHN L. SMITH

J. Williams

JUDGMENT OF CONVICTION

The defendant above-named, having been brought before the Court on an Information charging him with the crime of escape in violation of N. R. S. 212.090 and he having entered a plea of guilty thereto, (and the defendant thereafter having been tried, and the Jury having rendered a verdict of Guilty) (or, the Court having entered judgment of guilty)

The defendant offering no statement in mitigation, and no sufficient cause being shown by the defendant as to why judgment should not be pronounced against him, the Court entered judgment that the defendant was guilty of the crime of escape, a felony.

The Court then ordered that the defendant be punished by imprisonment in the Nevada State Prison for ~~the term of~~ a fixed term of ten (10) years in addition to and consecutive to any other sentence he may now be serving.

The defendant was then ordered remanded to the custody of the Sheriff of Carson City, to be by him delivered into the custody of the proper officers in obedience to the aforesaid sentence.

DATED: March 7, 1977

Frank B. Gregory
DISTRICT JUDGE

RECEIVED of _____, Sheriff of Carson

City, State of Nevada, on this _____ day of _____, 19 _____, one

_____ to be committed to the Nevada State Prison for the term of _____ for the crime of _____

CERTIFIED COPY

This document to which this certificate is attached is a full and correct copy of the original on file and of record in my office.

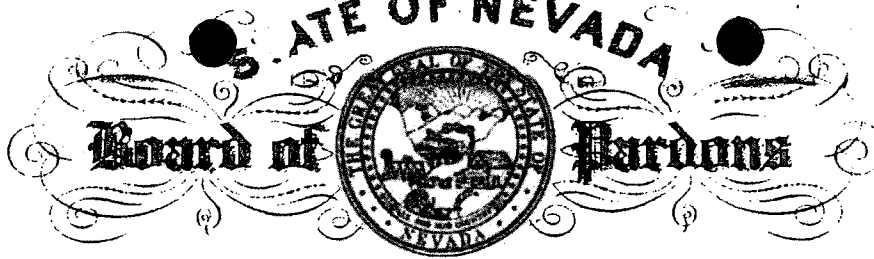
DATE: 3/8/77
VAUGHN L. SMITH, City Clerk and Clerk of the First Judicial District Court of the State of Nevada, in and for Carson City.

BY *J. Williams*, Deputy

WARDEN OF NEVADA STATE PRISON

By _____





Order Commuting Sentence

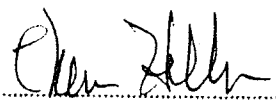
Pursuant to the authority of the Nevada Constitution and the Nevada Revised Statutes Section 213.010 to Section 213.100, vested in the Nevada Board of Pardons, the following ORDER is issued:

APPLICANT Michael P. Anselmo NDOC #10999 on May 26, 1972 was sentenced by the Honorable James J. Guinan, District Judge of the 8th Judicial District Court, in and for the County of Clark, State of Nevada, to imprisonment in the Nevada Department of Corrections for the crime of 1st Degree Murder (case #271359) for a term of Life without the Possibility of Parole; on March 7, 1977, was sentenced by the Honorable Frank B. Gregory, District Judge in the 1st Judicial District Court, in and for the County of Carson, State of Nevada, to imprisonment in the Nevada Department of Corrections for the crime of Escape (case #37373) for a consecutive term of 10 years, and having applied to this Board for commutation of sentence;

IT IS HEREBY ORDERED, that effective this date, applicant's sentence of Life without the Possibility of Parole (case #271359) is commuted to a term of five years to life, and applicant's sentence of 10 years (case #37373) is commuted to run concurrent with case #271359. Applicant's sentence of 10 years for Escape (case #35024) remains consecutive to case #271359.


IN TESTIMONY WHEREOF, We have severally signed and caused these presents to be attested with the Great Seal of the State of Nevada. Done at Carson City, Nevada, this 14th day of December 2005 A.D.



ATTEST 
Dean Heller, Secretary of State

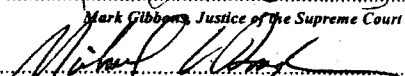

Kenny C. Guinn, Governor of Nevada


George Chanos, Attorney General

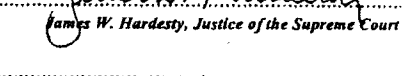

Nancy A. Becker, Chief Justice of the Supreme Court


Robert E. Rose, Justice of the Supreme Court


A. William Maupin, Justice of the Supreme Court


Mark Gibbons, Justice of the Supreme Court


Michael L. Douglas, Justice of the Supreme Court


James W. Hardesty, Justice of the Supreme Court


Ronald D. Parraguirre, Justice of the Supreme Court



CERTIFIED COPY:

The document to which this certificate is attached is a full, true and correct copy of the document(s) on file and of record in my office.

BY: 
David M. Smith, Pardons Board Executive Secretary

DATE: MAR 29 2006

STATE OF NEVADA

WHITE - Board File
CANARY - Inmate

PINK - "P" File
GOLDENROD - P&P

cd#: 271359

CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION

02-13-2006
ORDER DENYING PAROLE RELEASE

ANSELMO, MICHAEL

INMATE NAME

10999

NDOP NUMBER

Northern Nevada Correctional Center

LOCATION OF HEARING

It is the order of the Board that further consideration of parole is DENIED until ---: 02-13-2009

The Board has determined that the crime severity level and/or parole success factors do not adequately reflect the true nature of your case. Therefore, the Board has departed from the guideline recommendation. The reason(s) for departure are as follows:

- 1 Nature and severity of the crime.
- 2 In the opinion of the Board, continued confinement is needed to protect the public from further criminal activity.

Cornie S. Bisbee

FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

Recommendation of panel present:

Commissioner C. Bisbee: DENY
Commissioner J Morrow: DENY

Commissioner T. Goodson: DENY

The final action was ratified by the following parole commissioners:

Chairman D. Salling: DENY
Commissioner C. Bisbee: DENY

Commissioner T. Goodson: DENY
Commissioner J Morrow: DENY

02/14/2006 01:54 PM CSB

STATE OF NEVADA

WHITE - Board File
CANARY - Inmate

PINK - "I" File
GOLDENROD - P&P

Nevada Board of Parole Commissioners

Parole Success Likelihood Factors

<u>ANSELMO, MICHAEL</u>		<u>10999</u>		<u>Northern Nevada Correctional Center</u>		<u>02-13-2006</u>	
NAME		NDOP#		INSTITUTION		DATE	

Convictions/ Enhancements:	Misd. non-violent:	<input type="text" value="0"/>	X1	<input type="text" value="0"/>	Drug or Alcohol Conviction: <input type="text" value="0"/> <input type="text" value="0"/> 1 to 3 = 1 pt, 4 to 6 = 2 pts, 7+ = 3 pts.
	Misd. violent:	<input type="text" value="0"/>	X2	<input type="text" value="0"/>	
	Felony non-violent:	<input type="text" value="3"/>	X3	<input type="text" value="9"/>	
	Felony violent:	<input type="text" value="1"/>	X4	<input type="text" value="4"/>	
	Habitual:	<input type="text" value="0"/>	X6	<input type="text" value="0"/>	

Incarcerations:	Jail:	<input type="text" value="1"/>	X1	<input type="text" value="1"/>	Disciplinary Actions: Major: <input type="text" value="1"/> X2 <input type="text" value="2"/> Min/Gen: <input type="text" value="0"/> X1 <input type="text" value="0"/> (cap is +10 points)
	Prison:	<input type="text" value="1"/>	X2	<input type="text" value="2"/>	

Supervision Failures:	<input type="text" value="1"/>	X3	<input type="text" value="3"/>	SUB-TOTAL: <input type="text" value="33"/>
Supervision Successes:	<input type="text" value="0"/>	X-3	<input type="text" value="0"/>	

Drugs or Alcohol a Factor During I/O?:	<input type="text" value="N"/>	y = 2	<input type="text" value="0"/>	COURT ACTION: LIFE <input type="text" value="100%"/> <input type="text" value="33"/>
(y or n. Applies only if I/O is not a drug or alcohol offense).				

Weapons:	Possession:	<input type="text" value="N"/>	y = 2	<input type="text" value="0"/>	Disciplinary Credits (3 points max) <input type="text" value="1"/> <input type="text" value="-1"/>
	Threat/Display:	<input type="text" value="N"/>	y = 4	<input type="text" value="0"/>	
	Use:	<input type="text" value="Y"/>	y = 6	<input type="text" value="6"/>	

Victim Impact:	Property:	<input type="text" value="N"/>	y = 2	<input type="text" value="0"/>	Programming: GED, H-S diploma, college credits: <input type="text" value="3"/> X3 <input type="text" value="-9"/> Long term programs: <input type="text" value="3"/> X2 <input type="text" value="-6"/> Short term programs: <input type="text" value="3"/> X1 <input type="text" value="-3"/> (cap is -10 points) CAP -10 ONLY
	Physical/Mental:	<input type="text" value="N"/>	y = 4	<input type="text" value="0"/>	
	Sex crime or permanently disabled:	<input type="text" value="N"/>	y = 6	<input type="text" value="0"/>	
	Death:	<input type="text" value="Y"/>	y = 8	<input type="text" value="8"/>	

6 Months Employment or School:	<input type="text" value="Y"/>	N = 3	<input type="text" value="0"/>	Statistical Risk: MODERATE <input type="text" value="0"/>
--------------------------------	--------------------------------	-------	--------------------------------	---

CRIME SEVERITY LEVEL:	<input type="text" value="A4"/>	SCORE: <input type="text" value="24"/>
GRM: 108-132 MONTHS		

Prepared by: Commissioner Bisbee

02 03 2006 10:22 AM

CSB

STATE OF NEVADA

WHITE - Board File
CANARY - Inmate

PINK - "P" File
GOLDENROD - P&P

cd#: 271359 CT 1

CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION

11-06-2008

ORDER DENYING PAROLE RELEASE

ANSELMO, MICHAEL

INMATE NAME

10999

NDOP NUMBER

Northern Nevada Correctional Center

LOCATION OF HEARING

It is the order of the Board that further consideration of parole is DENIED until - - - : 02-13-2012


FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

Recommendation of panel present:

Commissioner C. Bisbee: DENY
Commissioner Jackson: DENY

Commissioner Baker: DENY

The final action was ratified by the following parole commissioners:

Commissioner C. Bisbee: DENY
Commissioner Jackson: DENY
Commissioner MX: GRANT DENY
Commissioner _____: GRANT DENY
Commissioner Baker: DENY
Commissioner _____: GRANT DENY
Commissioner _____: GRANT DENY

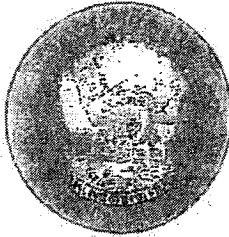
11 05 2008 10:43 AM OCM

CENTRAL OFFICE

1677 Old Hot Springs Road
Suite A
Carson City, Nevada 89706-0577
<http://parole.nv.gov>
(775) 687-5045
Fax (775) 687-3736

DORELL M. SALLING, Chairman
CONNIE S. HESBER, Member
THOMAS D. GOODSON, Member
MARY VIETH, Member

CHRIS MOLNAR, Executive Secretary

STATE OF NEVADA
JIM GIBBONS
GOVERNOR

LAS VEGAS OFFICE

4800 S. Eastern Avenue
Suite 180
Las Vegas, Nevada 89119-0540
<http://parole.nv.gov>
(702) 486-4870
Fax (702) 486-4876

DORELL M. SALLING, Chairman
EDDIE GRAY JR., Member
MICHAEL KEELER, Member
MAURICE SILVA, Member

NEVADA BOARD OF PAROLE COMMISSIONERS

Addendum to Order Denying Parole

Michael Angelmo 10999 NNCC 11-6-08
Name ID # Location Date

Pursuant to Nevada Law, the Parole Board is required to provide specific recommendations to improve the possibility of granting parole the next time you are considered for parole, if any.

The following recommendations do not create a liberty interest when you are considered for parole in the future. While the suggestions that are provided may improve the possibility of being granted parole in the future, they do not guarantee that you will be granted parole.

The specific recommendations pertaining to your case are indicated.

- ☐ 1. Do not engage in disciplinary misconduct during denial period.
- ☒ 2. Participate in programs that address the behaviors that led to your incarceration.
- ☒ 3. Participate in educational or vocational programs that will improve your marketability in the workplace upon released.
- ☒ 4. Participate in victim empathy programming.
- ☐ 5. Disassociate from involvement with a gang.
- ☐ 6. Other: _____
- ☐ 7. Other: _____

STATE OF NEVADA

WHITE - Board File CANARY - Inmate

PINK - "F" File
GOLDENROD - P&P

BOARD OF PAROLE COMMISSIONERS PAROLE RISK ASSESSMENT

ANSELMO, MICHAEL

NAME

10999

NDOP#

11-06-2008

DATE

Northern Nevada Correctional Center

INSTITUTION

Static Risk Factors

Age at First Arrest (juvenile or adult)
19 years or younger 2

Prior Probation/Parole Revocations
No Parole or Probation Revocations 0

Employment History
Employed < FT or FT < 1 year 1

Offense for Current or Prior Convictions
Auto Theft, Burglary, Forgery, Robbery 2

History of Drug/Alcohol Abuse
Frequent abuse, serious disruption of functioning 2

Gender
MALE 1

STATIC RISK SCORE 8

Crime Severity Level Highest

Dynamic Risk Factors

Current Age
41 and above -1

Active Gang Membership
No 0

Completed DOC certified educational, vocational or treatment program
Yes, or has GED/HS Diploma -1

Disciplinary Conduct - past year
No Majors or Single Minor -1

Current Custody Level
Medium 0

DYNAMIC RISK SCORE -3

TOTAL SCORE (static & dynamic) 5

Risk Level Moderate

Guideline Recommendation: Consider Factors

AGGRAVATING FACTORS - The Board determined the following aggravating factors are applicable in your case:

- 1 Impact on the victim(s) and/or community.
- 2
- 3

MITIGATING FACTORS - The Board determined the following mitigating factors are applicable in your case:

- 1
- 2 Participation in programs specific to addressing behavior that led to their incarceration.

STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER TAKING NO ACTION

ANSELMO, MICHAEL P	10999	010999	NNCC-U4-C-17-A	11/17/2011
Inmate Name	NDOC Number	Booking#	Location	Date

No Action was taken on the above referenced inmate at the parole hearing held on this date.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

*Controlling sentence denoted by *, Case #: Count: Offense Description:*

*271359;1;MURDER 1ST DEGREE

Reason(s) for action:

Reason for No Action: No action taken due to lack of information needed to make a recommendation.

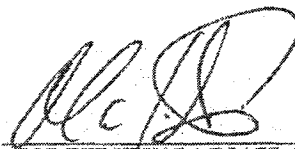
Recommendation of the panel who conducted the hearing: No Action

Commissioner Ed Gray, No Action

Commissioner Michael Keeler, No Action

Commissioner Maurice Silva, No Action

NOTE: A "No Action" order does not require ratification by a majority of the Board.



FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by BRUBALCABA at 11/17/2011 9:29 AM

STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER DENYING PAROLE

ANSELMO, MICHAEL P	10999	010999	NNCC-U4-C-17-A	02/27/2012
Inmate Name	NDOC Number	Booking #	Location	Date

It is the Order of the Board that further consideration of parole is **denied** until 02/01/2015.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

*Controlling sentence denoted by *, Case #: Count: Offense Description:*

*271359,1;MURDER 1ST DEGREE

Reason(s) for action:

Denial Reason: Nature of criminal record is increasingly more serious.

Denial Reason: Impact on victim(s) and/or community.

Specific Recommendation: Do not engage in disciplinary misconduct during denial period.

Recommendation of the panel who conducted the hearing: Deny Parole

Commissioner Susan Jackson; Deny Parole

Commissioner Adam Endel; Deny Parole

Commissioner Tony Corda; Deny Parole

The final action was ratified by the following Members of the Board of Parole Commissioners:

Commissioner Adam Endel; Deny Parole

Commissioner Tony Corda; Deny Parole

Commissioner Susan Jackson; Deny Parole

Commissioner Ed Gray; Deny Parole



FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by DFOLEY at 1/29/2012 1:30 PM

STATE OF NEVADA CERTIFICATION OF BOARD OF PAROLE COMMISSIONERS ACTION PAROLE RISK ASSESSMENT & GUIDELINE

ANSELMO, MICHAEL P	10999	010999	NNCC-U4-C-17-A	02/27/2012
INMATE NAME	NDOC#	BOOKING#	LOCATION	DATE

Parole Risk Assessment:

Questions	Responses / Scores
1. Age at 1st Arrest	19 years or younger (2): 2
2. Prior Revocations	(0) No Parole or Probation Revocations: 0
3. Employment History	(1) Employed less than full-time/full-time < one year: 1
4. Property Conviction	(2) Auto Theft, Burglary, Forgery, Robbery, Property Crime: 2
5. Drug/Alcohol Use/Abuse	(2) Frequent abuse, serious disruption of functioning: 2
6. Gender	(1) Male: 1
Static Risk Score	8
7. Current Age	(-1) 41 and Above: -1
8. Gang Membership	(0) No: 0
9. Programming	(-1) Completed an approved program or educational achievement during the current prison term: -1
10. Disciplinary Conduct	(-1) No Major Disciplinary Violations or Single Minor Violation: -1
11. Approved Custody Level	(0) Medium: 0
Dynamic Risk Score	-3
Total Score (Static+Dynamic)	5

Offense (used to determine crime severity for risk assessment)	Offense Category	Offense Severity
MURDER 1ST DEGREE	CAT A	Highest

Total Risk Score:	Guideline Risk	Guideline Recommendation
5	Mod Risk	Consider Factors

The Board determined the following Aggravating Factors are applicable in your case:

Impact on victim(s) and/or community: Death of victim

Commission of a crime while incarcerated, on bail, eluding, on escape status, or while under parole or probation supervision: Was on probation when convicted of I/O. Also, 2 escapes after conviction.

Nature of criminal record is increasingly more serious.

The Board determined the following Mitigating Factors are applicable in your case:

Infraction free for two years or more to hearing month and not in disciplinary segregation:

Community and/or family support: Mother in Oregon

Pending CS sentence or detainer lodged by other jurisdiction: Aggravated escape

Participation in programs specific to addressing the behavior that led to their incarceration:

This document was prepared by DFOLEY at 2/29/2012 1:30 PM

**STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER DENYING PAROLE**

ANSELMO, MICHAEL P	10999	010999	NNCC-U10-B-3-Q	11/17/2014
Inmate Name	NDOC Number	Booking #	Location	Date

It is the Order of the Board that further consideration of parole is denied until 02/01/2018.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

Controlling sentence denoted by *, Case #: Count: Offense Description:
271359;1;MURDER 1ST DEGREE

Reason(s) for action:

Denial Reason: Nature of criminal record is increasingly more serious.

Denial Reason: Impact on victim(s) and/or community.

Specific Recommendation: Do not engage in disciplinary misconduct during denial period.

Recommendation of the panel who conducted the hearing: Grant Parole

Commissioner Ed Gray, Grant Parole

Commissioner Lucille Monterde, Grant Parole

Commissioner Michael Keeler, Grant Parole

The final action was ratified by the following Members of the Board of Parole Commissioners:

Commissioner Ed Gray, Grant Parole

Commissioner Michael Keeler, Grant Parole

Commissioner Lucille Monterde, Grant Parole

Commissioner Adam Endel, Deny Parole

Commissioner Susan Jackson, Deny Parole

Chairman Connie Bisbee, Deny Parole

Commissioner Tony Corda, Deny Parole

Connie S. Bisbee
FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by DBARNARD at 12/2/2014 3:49 PM

STATE OF NEVADA CERTIFICATION OF BOARD OF PAROLE COMMISSIONERS ACTION PAROLE RISK ASSESSMENT & GUIDELINE

ANSELMO, MICHAEL P	10999	010999	NNCC-U10-B-3-Q	11/17/2014
INMATE NAME	NDOC#	BOOKING#	LOCATION	DATE

Parole Risk Assessment:

Questions	Responses / Scores
1. Age at 1st Arrest	19 years or younger (2): 2
2. Prior Revocations	(0) No Parole or Probation Revocations: 0
3. Employment History	(1) Employed less than full-time/full-time < one year: 1
4. Property Conviction	(2) Auto Theft, Burglary, Forgery, Robbery, Property Crime: 2
5. Drug/Alcohol Use/Abuse	(2) Frequent abuse, serious disruption of functioning: 2
6. Gender	(1) Male: 1
Static Risk Score	8
7. Current Age	(-1) 41 and above: -1
8. Gang Membership	(0) No or Suspect: 0
9. Programming	(-1) Yes (enter achievement name in comments): -1
10. Disciplinary Conduct	(-1) No disciplinaries: -1
11. Approved Custody Level	(0) Medium: 0
Dynamic Risk Score	-3
Total Score (Static+Dynamic)	5

Offense (used to determine crime severity for risk assessment)	Offense Category	Offense Severity
MURDER 1ST DEGREE	CAT A	Highest

Total Risk Score:	Guideline Risk	Guideline Recommendation
5	Low Risk	Consider Factors

The Board determined the following Aggravating Factors are applicable in your case:

Impact on victim(s) and/or community: 22 year old female died as result of being attacked

Commission of a crime while incarcerated, on bail, eluding, on escape status, or while under parole or probation supervision: Was on Probation when convicted of I/O. Received 2 escape convictions while incarcerated in prison.

Nature of criminal record is increasingly more serious: Previous offenses are property crimes

The Board determined the following Mitigating Factors are applicable in your case:

Infraction free for two years or more to hearing month and not in disciplinary segregation: No disciplinary since 1-21-07

Community and or family support: Received letter from family

Pending CS sentence or detainer lodged by other jurisdiction: Has pending sentence to serve for Escape

Participation in programs specific to addressing the behavior that led to their incarceration: Completed Animal Science 1989, HSD 1992, AA 1994, Culinary Arts Degree 1995, Anger Management 1996, BETA 1999, Certified in Bio Hazards

This document was prepared by DBARNARD at 12/2/2014 1:40 PM

Michael ANSELMO

PETITIONER

NDOC #10999

NORTHERN NEVADA CORRECTIONAL CENTER

P.O. Box 7000

CARSON CITY, NV 89701-7000

REC'D & FILED

2015 FEB 25 PM 4:04

SUSAN MERRIWETHER

CLERK

DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE

OF NEVADA IN AND FOR CARSON CITY

Michael P ANSELMO

PETITIONER

CASE NO 14EW 00029 LB

VS

DEPT NO 1

CONNIE BISBEE, CHAIRMAN

Susan Jackson, Tony Corda

Motion In Opposition to Dismiss

Adam ENDEL, COMMISSIONERS

Nevada Board of Parole

RESPONDENTS

Argument

For the state to claim Respondents have not violated the constitutional rights of petitioner is very close to insanity. It is so clear that the board is hateful, vindictive and prejudicial towards petitioner that any honest person would not create a false fight.

Every point filed by petitioner does have merit and should be heard.

SEC states exhibit 9. Anselmo was in fact granted parole by all three, Ed Gray, Lucille Montlake, Michael Keelke, sitting parole board commissioners after an extensive hearing.

But those sitting members were over ruled by people not present, people not involved in the hearing. In other words, their denial vote was decided even before the hearing.

The boards action throws out any reason for having sitting hearings and seeing inmates.

When the sitting commissioners voice has no meaning, the hearing has no meaning.

The whole reason for having a parole board was thrown out in Anselmo case.

The denial was not based on the hearing or the conduct of Anselmo. It was clearly based on hate and prejudice against petitioner.

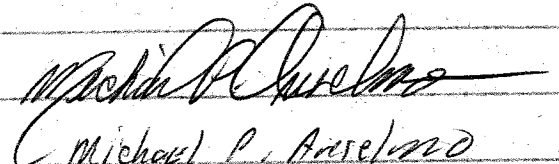
This whole case screams denial of due process, equal protection. This is a clear case of cruel and unusual punishment taken to the tenth degree.

The state claims the action did not change petitioner sentence. It keeps petitioner another 3 years behind bars. That in a very real way

is a sentence change.

To dismiss this case would be a
clear indication justice in Nevada is lost.

Respectfully submitted this 18 day of February 2015.


Michael P. Anselmo
Petitioner

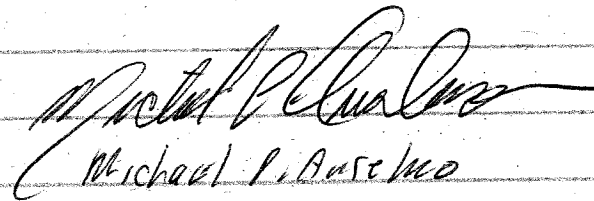
Certificate of Service by mail

I do certify that I mailed a true and
correct copy of the foregoing Motion in Opposition
to Dismiss addressed to the below addresses on February
18, 2015. by placing same into NDOC staff for
mailing pursuant to N.R.C.P. 5!

Nevada Attorney General

100 N. Carson

Carson City NV 89201-4717


Michael P. Anselmo
Petitioner

ORIGINAL

REC'D & FILED

2015 MAR -4 AM 11:09

SUSAN MERRIWETHER
CLERK
BY  DEPUTY

ADAM PAUL LAXALT
Attorney General
DANIEL M. ROCHE
Deputy Attorney General
Nevada Bar No. 10732
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1273
DRoche@ag.nv.gov
Attorney for Respondent

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,

Respondents.

Case No. 14 EW 00029 1B

Dept. No. 1

REPLY TO OPPOSITION TO MOTION TO DISMISS

Respondents, by and through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, hereby reply to Michael P. Anselmo's (hereinafter "Anselmo") opposition to their motion to dismiss his petition for a writ of habeas corpus. This reply is based on the following points and authorities, together with all other pleadings, papers, and exhibits on file herein.

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

On December 30, 2014, Anselmo filed a petition for a writ of habeas corpus challenging a decision of the Nevada Board of Parole Commissioners to deny parole, claiming that the denial (1) amounts to cruel and unusual punishment, (2) violates due process, and (3) violates double jeopardy. Petition at 4-6. Respondents have moved dismiss the petition, and Anselmo has filed an opposition. This reply follows.

///

II. ARGUMENT

In his opposition, Anselmo contends that it defeats the purpose of conducting a parole hearing before a three-member panel of the Parole Board if the other four parole commissioners have the power to overrule the panel's decision. Petition at 2. He also claims that the full Parole Board's decision to overrule the panel decision was based on hate and prejudice. *Id.* Then, he claims that the entire process violated his constitutional rights. *Id.*

Anselmo's claim that the Parole Board hates him is unsupported by any evidence. Moreover, his opposition is entirely devoid of citation to a single case or statute in support of his claims. It is clear that Anselmo is angry about the fact that he was denied parole, but he wholly fails to demonstrate that his constitutional rights were violated.

A denial of parole simply does not give rise to a cognizable claim for habeas relief. *See* NRS 213.10705; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *State, ex rel. Bd. of Parole Comm'rs v. Morrow*, ___ Nev. ___, ___, 255 P.3d 224, 227-28 (2011); *Niergarth v. Warden*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 687 P.2d 1158, 1160 (1984); *Severance v. Armstrong*, 96 Nev. 836, 620 P.2d 369 (1980). The petition should be denied.

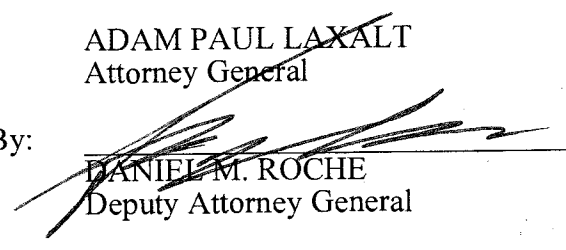
III. CONCLUSION

As explained in respondents' motion to dismiss, Anselmo's petition should be denied because he fails to state a cognizable claim for habeas relief and his claims are all facially meritless.

RESPECTFULLY SUBMITTED this 3rd day of March, 2015.

ADAM PAUL LAXALT
Attorney General

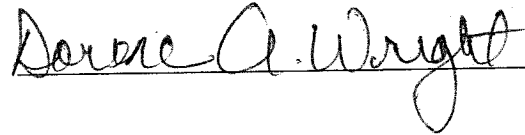
By:


DANIEL M. ROCHE
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 4th day of March, 2015, I served a copy of the foregoing REPLY TO OPPOSITION TO MOTION TO DISMISS, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL P. ANSELMO
NDOC #10999
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702



ORIGINAL

REC'D & FILED

2015 MAR -4 AM 11:09

SUSAN MERRIWETHER
CLERK

BY  DEPUTY

ADAM PAUL LAXALT
Attorney General
DANIEL M. ROCHE
Deputy Attorney General
Nevada Bar No. 10732
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1273
DRoche@ag.nv.gov
Attorney for Respondent

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,

Respondents.

Case No. 14 EW 00029 1B

Dept. No. 1

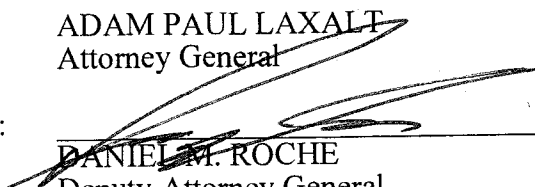
REQUEST FOR SUBMISSION

Respondents, by and through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, respectfully request that the above-referenced matter be submitted to the Court for decision upon Respondents' motion to dismiss. This request is based upon the provisions of Rule 13(f) of the Rules of Practice of the District Courts of the State of Nevada. Accordingly, the instant matter may be submitted upon the pleadings and other documents on file in this matter

RESPECTFULLY SUBMITTED this 3rd day of March, 2015.

ADAM PAUL LAXALT
Attorney General

By:


DANIEL M. ROCHE
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 4th day of March, 2015, I served a copy of the foregoing REQUEST FOR SUBMISSION, by placing said document in the U.S. Mail, postage prepaid, addressed to:

MICHAEL P. ANSELMO
NDOC #10999
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, Nevada 89702

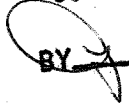
Dorene A. Wright

ORIGINAL

REC'D & FILED

2015 MAR -6 PM 5: 33

SUSAN HERRIWETHER
CLERK

BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,

Respondents.

Case No. 14 EW 00029 1B

Dept. No. 1

ORDER DISMISSING PETITION

Petitioner Michael P. Anselmo's petition for writ of habeas corpus having been filed on December 30, 2014, and the Attorney General for the State of Nevada having filed a motion to dismiss the petition; now, therefore, the Court, having considered the petition, motion to dismiss, and all other documents on file herein, hereby dismisses the petition based on the following findings of fact and conclusions of law:

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner is in the custody of the Nevada Department of Corrections pursuant to judgments of conviction for first-degree murder and escape, the validity of which he does not dispute.

On December 14, 2005, the State of Nevada's Board of Pardons commuted Petitioner's sentence of life without parole for first-degree murder to a sentence of life with parole eligibility beginning after five years. Since that time, the Nevada State Board of Parole Commissioners ("Parole Board") has voted to deny him parole on four occasions. In his petition filed on December 30, 2014, Petitioner

1 claims that the most recent denial of parole violated his constitutional rights to due process and to be
2 free from cruel and unusual punishment and double jeopardy.

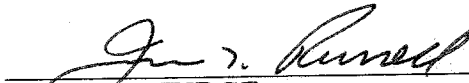
3 Petitioner does not challenge his underlying conviction or sentence or a related computation of
4 time, and therefore his petition is outside the scope of the post-conviction habeas corpus statutes.
5 NRS 34.720. Moreover, because he does not dispute the validity of the judgments for which he is
6 confined, he fails to allege that there is no legal cause for his imprisonment or restraint. See
7 NRS 34.360; NRS 34.480. Petitioner fails to set forth a cognizable claim for habeas relief because
8 parole is an act of grace of the State, and there is no cause of action permitted when parole has been
9 denied. See NRS 213.10705; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *State,*
10 *ex rel. Bd. of Parole Comm'rs v. Morrow*, ___ Nev. ___, ___, 255 P.3d 224, 227-28 (2011);
11 *Niergarth v. Warden*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); *Weakland v. Bd. of Parole Comm'rs*,
12 100 Nev. 218, 220, 687 P.2d 1158, 1160 (1984); *Severance v. Armstrong*, 96 Nev. 836, 620 P.2d 369
13 (1980).

14 To the extent that any of Petitioner's claims are cognizable in a petition for a writ of habeas
15 corpus, the Court finds that they are patently without merit.

16 **ORDER**

17 THEREFORE, IT IS HEREBY ORDERED that Michael P. Anselmo's petition for a writ of
18 habeas corpus is DISMISSED.

19 ORDERED this 6th day of March, 2015.

20
21 
22 DISTRICT JUDGE

23 SUBMITTED BY:

24 ADAM PAUL LAXALT
25 Attorney General
26 DANIEL M. ROCHE
27 Deputy Attorney General
28 100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1273
DRoche@ag.nv.gov

REC'D & FILED

2015 MAR -9 PM 1:06

SUSAN MERRIWETHER
CLERK

BY *[Signature]* Deputy

In The First Judicial District Court of the State of Nevada
In and for Carson City

MICHAEL P. ANSELMO,
Plaintiff

vs

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

Defendant.

) Case No.: 14 EW 00029 1B

) Dept. No.: I

) **NOTICE OF ENTRY OF DECISION OR**
) **ORDER**

PLEASE TAKE NOTICE that on the 6th day of March, 2015, the Court entered a decision or order in this matter, a true and correct copy of which is attached to this Notice.

You may appeal to the Supreme Court from the decision or order of this Court. If you wish to appeal, you must file a Notice of Appeal with the Clerk of this Court within 33 days after the date this Notice is mailed to you. This Notice was mailed on the 9th day of March, 2015.

DATED this 9th day of March, 2015.

SUSAN MERRIWETHER, Clerk

By *[Signature]* Deputy

cc: Michael P. Anselmo
Connie Bisbee
Susan Jackson
Tony Corda
Adam Endel
Adam Paul Laxalt, Attorney General
Christopher Hicks, District Attorney

ORIGINAL

REC'D & FILED

2015 MAR -6 PM 5:33

SUSAN HERRIWETHER
CLERK

BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE BISBEE, Chairman;
SUSAN JACKSON, TONY CORDA,
ADAM ENDEL, Commissioners;
NEVADA BOARD OF PAROLE,

Respondents.

Case No. 14 EW 00029 1B

Dept. No. 1

ORDER DISMISSING PETITION

Petitioner Michael P. Anselmo's petition for writ of habeas corpus having been filed on December 30, 2014, and the Attorney General for the State of Nevada having filed a motion to dismiss the petition; now, therefore, the Court, having considered the petition, motion to dismiss, and all other documents on file herein, hereby dismisses the petition based on the following findings of fact and conclusions of law:

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner is in the custody of the Nevada Department of Corrections pursuant to judgments of conviction for first-degree murder and escape, the validity of which he does not dispute.

On December 14, 2005, the State of Nevada's Board of Pardons commuted Petitioner's sentence of life without parole for first-degree murder to a sentence of life with parole eligibility beginning after five years. Since that time, the Nevada State Board of Parole Commissioners ("Parole Board") has voted to deny him parole on four occasions. In his petition filed on December 30, 2014, Petitioner

claims that the most recent denial of parole violated his constitutional rights to due process and to be free from cruel and unusual punishment and double jeopardy.

Petitioner does not challenge his underlying conviction or sentence or a related computation of time, and therefore his petition is outside the scope of the post-conviction habeas corpus statutes. NRS 34.720. Moreover, because he does not dispute the validity of the judgments for which he is confined, he fails to allege that there is no legal cause for his imprisonment or restraint. See NRS 34.360; NRS 34.480. Petitioner fails to set forth a cognizable claim for habeas relief because parole is an act of grace of the State, and there is no cause of action permitted when parole has been denied. See NRS 213.10705; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *State, ex rel. Bd. of Parole Comm'rs v. Morrow*, ___ Nev. ___, ___, 255 P.3d 224, 227-28 (2011); *Niergarth v. Warden*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 687 P.2d 1158, 1160 (1984); *Severance v. Armstrong*, 96 Nev. 836, 620 P.2d 369 (1980).

To the extent that any of Petitioner's claims are cognizable in a petition for a writ of habeas corpus, the Court finds that they are patently without merit.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Michael P. Anselmo's petition for a writ of habeas corpus is DISMISSED.

ORDERED this 6th day of March, 2015.

John R. Russell
DISTRICT JUDGE

SUBMITTED BY:

ADAM PAUL LAXALT
Attorney General
DANIEL M. ROCHE
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1273
DRoche@ag.nv.gov

REC'D & FILED

2015 MAR 16 PM 2:09

SUSAN MERRIWETHER
CLERK

BY 3 DEPUTY

Michael P. Anselmo

Petitioner

NDOC # 10999

Northern Nevada Correctional Center

P.O. Box 7000

Carson City, NV 89701-7000

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE
OF NEVADA IN AND FOR CARSON CITY

Michael P. Anselmo

Petitioner

vs

Connie Bisbee chairman

Susan Jackson, Tony

Corda, Adam Endel,

Commissioners, Nevada

Board of Parole,

Respondents

CASE NO: 14 EW 00029 1B

Dept No: 1

REPLY

REPLY TO OPPOSITION TO MOTION

TO DISMISS

Petitioner, in proper personia comes before this
honorable court with these facts.

The state claims petitioner has no right
to parole. This is true. However, the petitioner
does have a right to a fair hearing that is just
equal and does not violate the U.S. Constitution
and Nevada Constitution

The state also claims because I did not include case law to support claim, my claims should be dismissed.

It is true no case law was include in my reply as in this one. But it is impossible to obtain case law without the ability to do the research in a law library - NACC has a mode access law library. The clerks only provide copies of requested cases. without out the ability to research, I cannot provide the cases I need to be delivered.

Let us look openly honestly at the facts.

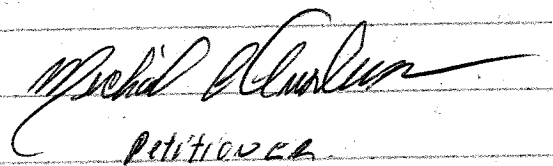
- 1) In 2005 the Nevada Board of pardons granted clemency after a review of the case. It did review criminal record, victim impact, and community impact. All were found to have no merit so clemency was granted.
- 2) In 2006 Nevada Board of parole denied parole for 3 years based on criminal record, victim, community impact. Petitioner had served 34 years.
- 3) In 2009 Nevada Board of parole saw petitioner and again denied petitioner for same reason. No NOCC violation occurred during this 3 year period. 37 years served.
- 4) In 2012 again, same as 2009. 40 years served.
- 5) In 2014 again seen. This time parole was GRANTED BY THE 3 sitting commissioners that talked to and questioned petitioner.

However, the 4 members who did not see, did not talk to, did not question petitioner over rode the sitting member and denied parole for 3 years, again for the reason the pardons board granted clemency for, the same reason that can never change. What these four members did was void the whole purpose of having a sitting board. Since they never saw me, their reasoning can only be based on hate, prejudice, and vindictiveness. Their action disallowed me a fair and just hearing.

These are the facts!!

What has happened to petitioner is a first in the state of Nevada. There is zero justification for it.

Respectfully submitted. this 11th day of
March 2015


Petitioner

Certificate of Service by mail

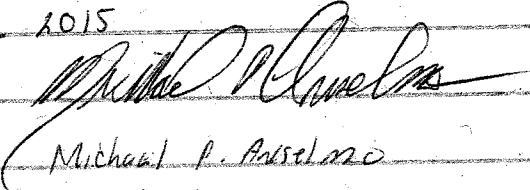
I do certify that I mailed a true and correct copy of the attached motion to the below addressee on March 11, 2015 by placing said motion into NDOC staff operated (mailbox) for mailing pursuant to N.R.C.P. 5.

Nevada Attorney General

100 N. Carson St

Carson City, NV 89702-4717

Noted this 11 day of March, 2015


Michael P. Anselmo
Petitioner

Case No: 142W0001913

Dept No: 1

REC'D & FILED

2015 MAR 18 PM 3:12

SUSAN HERRIWEATHER
CLERK

BY [Signature]
DEPUTY

IN THE First JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Carson City

Michael P. Anselmo
~~The State of Nevada~~

Plaintiff

-vs-

Connie Bisbee Chairwoman,
Susan Jackson, Tony Costa,
Adam Knidel COMMISSIONERS,
Patrick Baccal Defendant

DESIGNATION OF RECORD
On APPEAL

COMES NOW, Michael P. Anselmo ^{Plaintiff} Defendant in proper persona, and
herein designates the record on appeal to be certified by the Clerk of the Court and transcribed to the
Clerk of the Nevada Supreme Court.

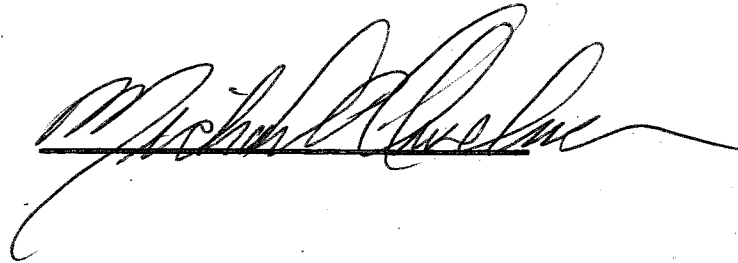
All Motions, Pleading, and Transcripts.

Dated this 12 day of March, 2015.

[Signature]
Defendant Signature
Plaintiff
Michael P. Anselmo
(Print Name) In Proper Persona

CERTIFICATE OF SERVICE BY MAIL

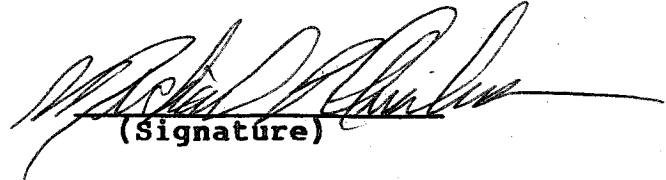
Pursuant to N.R.C.P. Rule 5 (b), I hereby certify that I am the petitioner\Defendant named herein and that on this 12 day of March - 2015 I deposited in the United States Mails in Carson City, Nevada a true a correct copy of the foregoing addressed to:

A handwritten signature in black ink, appearing to read "Michael D. Chelmer", is written over a horizontal line. The signature is fluid and cursive.

PURSUANT TO N.R.S. 208.165, I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF NEVADA THAT THE FOREGOING IS TRUE AND CORRECT. See N.R.S. 208.165.

Signed at NHCC
(Location)

3-12-75
(Date)


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10999
(Inmate number)

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In The First Judicial District Court of the State of Nevada
In and for Carson City

MICHAEL P. ANSELMO,

Petitioner(s),

vs.

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

Respondent(s).

) Case No.: 14 EW 00029 1B

) Dept. No.: I

) **CASE APPEAL STATEMENT**

1. Name of appellant filing this case appeal statement:
- MICHAEL P. ANSELMO
2. Identify the judge issuing the decision, judgment, or order appealed from:
- HONORABLE JAMES T. RUSSELL
3. Identify each appellant and the name and address of counsel for each appellant:
- MICHAEL P. ANSELMO #10999
P.O. BOX 7000
CARSON CITY, NV 89702-7000
4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):
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1 100 NORTH CARSON STREET
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- 3 5. Indicate whether any attorney identified above in response to question 3 or 4 is not
4 licensed to practice law in Nevada and, if so, whether the district court granted that
5 attorney permission to appear under SCR 42 (attach a copy of any district court order
6 granting such permission):

7 - NOT APPLICABLE

- 8 6. Indicate whether appellant was represented by appointed or retained counsel in the
9 district court:

10 - APPELLANT WAS IN PROPER PERSON IN DISTRICT COURT

- 11 7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

12 - APPELLANT IS IN PROPER PERSON ON APPEAL

- 13 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date
14 of entry of the district court order granting such leave:

15 - APPELLANT WAS GRANTED LEAVE TO PROCEED IN FORMA
16 PAUPERIS ON JANUARY 5, 2015

- 17 9. Indicate the date the proceedings commenced in the district court (e.g., date complaint,
18 indictment, information, or petition was filed):

19 - WRIT OF HABEAS CORPUS; FILED DECEMBER 30, 2014

- 20 10. Provide a brief description of the nature of the action and result in the district court,
21 including the type of judgment or order being appealed and the relief granted by the
22 district court:

23 - HABEAS CORPUS; ORDER DISMISSING PETITION

- 24 11. Indicate whether the case has previously been the subject of an appeal to or original writ
25 proceeding in the Supreme Court and, if so, the caption and Supreme Court docket
26 number of the prior proceeding:

27 - NOT APPLICABLE

- 28 12. Indicate whether this appeal involves child custody or visitation:

1 - NOT APPLICABLE

2 13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

3 - NOT APPLICABLE.

4 Dated this 19th day of March, 2015.

5 SUSAN MERRIWETHER, Carson City Clerk
6 885 E. Musser St., #3031
7 Carson City, NV 89701

8 By M. Muldrow, Deputy
9

08-20-15
Dept. I
19 2W 00029 1B

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.

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CLERK OF SUPREME COURT
BY *[Signature]* DEPUTY CLERK

ORDER DIRECTING TRANSMISSION OF RECORD

This court has concluded that its review of the complete record is warranted. See NRAP 10(a)(1). Accordingly, the clerk of the district court shall have 60 days from the date of this order to transmit to the clerk of this court a certified copy of the complete trial court record of this appeal. See NRAP 11(a)(2). The record shall include copies of documentary exhibits submitted in the district court proceedings, but shall not include any physical, non-documentary exhibits or the original documentary exhibits. The record shall also include any presentence investigation reports submitted in a sealed envelope identifying the contents and marked confidential. See NRS 176.156(5).

It is so ORDERED.

[Signature], C.J.

cc: Michael P. Anselmo
Attorney General/Carson City
Carson City Clerk

STATE OF NEVADA,

CARSON CITY.

} SS.

I, SUSAN MERRIWETHER, Carson City Clerk of Carson City, State of Nevada, and ex-officio Clerk of the District Court, in and for Carson City, do hereby certify that the foregoing is a full, true and correct copy of the original documents designated in the action entitled and numbered 14 EW 00029 1B:

MICHAEL P. ANSELMO,

Plaintiff,

vs.

CONNIE BISBEE, CHAIRMAN ET AL,

Defendant.

which now remains on file and of record in my office in said Carson City.

In testimony whereof, I have hereunto set my hand and
Affixed my official seal, at Carson City, in said State, this

26 day of May, 20 15

Susan Meriwether, Clerk

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

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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 20th day of June, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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I. JURISDICTIONAL STATEMENT

This is an appeal from a final Order Dismissing Appellant's Petition for Writ of Habeas Corpus by the First Judicial District Court of the State of Nevada in and for Carson City, entered on March 9, 2015. Pursuant to Nevada Rule of Appellate Procedure 22, the proper remedy to seek relief from such an order is by appeal to this Court. *See* NRAP 22 ("An application for an original writ of habeas corpus should be made to the appropriate district court. If an application is made to the district court and denied, the proper remedy is by appeal from the district court's order denying the writ.")

II. ROUTING STATEMENT

This case involves constitutional matters in which the corpus, upon information and belief, is presumptively retained by the Nevada Supreme Court. NRAP 17(a)(13). Under NRAP 17(b)(4), "administrative agency appeals except those involving tax, water, or public utilities commission determinations" are presumptively retained by the Court of Appeals. This appeal involves a challenge to the actions of the Nevada Board of Parole Commissioners, which is an administrative agency functioning within the Department of Public Safety, but outside the fields of tax, water, or public utilities. This appeal, however, is from the District Court's dismissal of a

petition for writ of habeas corpus, and not a direct appeal from a decision of the Nevada Board of Parole Commissioners. If NRAP 17(b)(4) is meant to encompass any appeal that involves the decision of an administrative agency, this case is presumptively before the Court of Appeals under NRAP 17(b)(4). This appeal should nonetheless be retained by the Supreme Court, because (1) this case involves, as a principal issue, a question of first impression involving Nevada constitutional law (e.g. whether judicial intervention is proper despite Nevada inmates' lack of protected liberty interest relating to parole), and (2) this case raises principal issues of statewide public importance (e.g. whether the Board failed to adhere to its own parole guidelines, thus permitting judicial review of its decision). NRAP 17(a)(13)-(14).

III. INTRODUCTION

In filing this appeal, Appellant Michael P. Anselmo ("Michael") is by no means asking this Court to ignore the facts or attempting to downplay the loss of a life. Michael was convicted in 1972 for murder and has served forty-four (44) years in prison, during which time he has matured into an educated, accomplished, and law abiding man.¹ Following his trial, the District Court determined his sentence – life without the possibility of parole – and considered the severity of the crime in doing so. The Nevada Parole

¹ Michael is currently incarcerated at the Northern Nevada Correctional Center.

Board ("Board") and, by way of this appeal, this Court, are not tasked with the same objective.

Rather, more than four decades after Michael's conviction, the Board was asked to consider whether anything in the record supported a finding that Michael posed a current threat to society. Regrettably, there is nothing Michael can do to change the past – it is immutable. Since his incarceration, however, he has participated in extensive rehabilitation and completely reformed himself, not only obtaining his high school diploma, but earning several degrees, participating in vocational training, and engaging in programs tailored to address the commitment offense. These significant strides did not go unnoticed, and the State of Nevada Board of Pardons commuted his life sentence without the possibility of parole to five years to life, which carries the possibility of parole. This commutation gave Michael the expectation he would be properly considered for parole, thus triggering his due process rights.

The Board prides itself on being just and issuing unbiased decisions:

The Board recognizes its responsibility, not only to the citizens of Nevada and the victims of crime, but also to the offenders who appear before it. With this in mind, the Board will render objective, just and informed decisions that are free of improper external

influences, while being mindful of the needs of the offender and the community.²

Michael is guaranteed nothing more than fair consideration, but, instead, he was arbitrarily denied parole four times. The Board's fourth and final denial relied solely on the irreversible fact that a 22-year old young woman, Trudy Ann Hiler, died as a result of being attacked. Relevant statutes governing parole dictate that inmates serving time for such crimes are nonetheless eligible for parole and must be properly considered. This due consideration includes weighing applicable mitigating and aggravating factors to determine whether an inmate is suitable for parole, *i.e.*, whether the inmate is likely to commit a felony upon release and is therefore a threat to society. There can be no doubt, therefore, that the Legislature did not intend for the Board to solely rely on one single, unchangeable factor in denying an inmate parole – especially when the factor is so far removed in time and no evidence in the record demonstrates that the factor even supports a finding that the inmate currently poses a risk to society. In Michael's case, however, this is exactly what the Board did.

² See the Board's "Vision" as set forth in the "Nevada Board Of Parole Commissioners – Operation Of The Board" <http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/OpsBoardOctober2012.pdf>, last visited on June 16, 2016.

According to the District Court, Michael has no recourse for this injustice. This determinate conclusion defies Legislative intent. Michael understands the reasoning behind NRS 213.10705's decree that inmates do not ordinarily have a cause of action for the denial of parole – permitting the same could flood the courts' systems with inmate petitions seeking judicial review of parole denials, wasting valuable judicial time, energy, and resources. Yet, when the Board was created under the same statutory scheme, the Legislature carefully identified certain criteria that must be considered and specifically required the Board to adhere to certain standards. The Board was not created for the purpose of rendering baseless and unsupported decisions, and then escaping scrutiny. Under such a narrow reading, the Board could deny parole to an otherwise eligible inmate based solely on a particular haircut, leaving the inmate without any means by which to challenge this decision. Such a result would be absurd.

While the Board is given great discretion in rendering its decisions, there is a point at which discretionary becomes arbitrary, and this Court must intervene. Michael is not asking this Court to take on a "superboard" role. However, if there were ever a case appropriate for this Court to intervene, this is the case. Michael is one of the longest-serving prisoners in Nevada's prison system. His record is void of any indication that he currently poses a threat to

society if released; rather, it is filled with a plethora of indicators that Michael has rehabilitated himself and would succeed on parole. For these reasons, and those set forth herein, the Court should reverse the District Court's dismissal of Michael's Petition, with instructions for the District Court to remand the matter 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*.

IV. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Is judicial review 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 essentially being denied the right to be properly considered for parole upon eligibility?

B. Did the District Court err 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*, 44 Cal. 4th 1181, 190 P.3d 535 (2008) ("*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?"

V. STATEMENT OF THE CASE/FACTS

As the Board's authority in determining whether to grant or deny parole is statutorily mandated, and it is the Board's deviation therefrom that pulls this case under the purview of *Lawrence*, it is necessary to first establish such statutory framework before outlining the substantive facts which led to the filing of this appeal.

A. NRS Chapter 213 Governs Parole Determinations.

Chapter 213 of the Nevada Revised Statutes sets forth each step of the parole process and mandates certain actions the Board is required to take, including formulating guidelines relating to granting or denying parole, and specific factors the Board *must* consider in establishing regulatory standards and in making parole determinations.

1. *Parole eligibility is determined by statute.*

Except as otherwise provided in NRS 213.1213³, a prisoner who is sentenced for a crime before July 1, 1995, becomes eligible for parole when

³ Pursuant to NRS 213.1213(1), "[i]f a prisoner is sentenced pursuant to NRS 176.035 to serve two or more concurrent sentences, whether or not the sentences are identical in length or other characteristics, eligibility for parole from any of the concurrent sentences must be based on the sentence which requires the longest period before the prisoner is eligible for parole."

the prisoner "has served one-third of the definite period of time for which the prisoner has been sentenced pursuant to NRS 176.033, less any credits earned to reduce his or her sentence pursuant to chapter 209 of NRS." NRS 213.120(1).⁴ The Department of Corrections ("Department") is required to determine when this eligibility occurs, to notify the Board so that it can initiate parole proceedings, and to compile and provide the Board with data to assist it in making parole determinations. NRS 213.131(1)(a)-(c). When a prisoner becomes eligible for parole, the "Board *shall* consider and may authorize the release of the prisoner on parole as provided in this chapter." NRS 213.140(1) (emphasis added).

For an inmate who committed a capital offense, who is serving a life sentence, or whose sentence was commuted by the State Board of Pardons Commissioners, the parole hearing "*must* be conducted by at least three members of the Board, and action may be taken only with the concurrence of at least four members." NRS 213.133(6)(a) and (e) (emphasis added). Upon making its final parole determination, the Board shall provide written notice to the prisoner of its decision not later than 10 working days after the meeting and, if parole is denied, specific recommendations of the Board to improve the

⁴ Pursuant to NRAP 28(f), all relevant statutes, rules, regulations, etc., cited herein are provided in full text as Addendum A.

possibility of granting parole the next time the prisoner is considered for parole, if any." NRS 213.131(11).

2. *The Board has authority to release inmates and must adopt and abide by certain criteria in carrying out its authority.*

As set forth above, the Board has the authority to release on parole a prisoner who is eligible pursuant to NRS 213.107-157. *See* NRS 213.1099. To ensure uniformity, under NRS 213.10885, the Board is required to "adopt by regulation specific standards for each type of convicted person to assist the Board in determining whether to grant or revoke parole," including those sentenced to serve a term of imprisonment for life and who committed a capital offense. NRS 213.10885(1)(a) and (b). Such standards "must be based upon objective criteria for determining the person's probability of success on parole." *Id.* In establishing the standards, the Board is *required* to consider all "factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued." NRS 213.10885(2). The statute specifically *mandates* that the Board consider: (a) The severity of the crime committed; (b) The criminal history of the person; (c) Any disciplinary action taken against the person while incarcerated; (d) Any previous parole violations or failures; (e)

Any potential threat to society or to the convicted person; and (f) The length of his or her incarceration. *Id.*

In actually making parole determinations, the chapter also requires the Board to consider "(a) Whether there is a reasonable probability that the prisoner will live and remain at liberty without violating the laws; (b) Whether the release is incompatible with the welfare of society; (c) The seriousness of the offense and the history of criminal conduct of the prisoner; (d) The standards adopted pursuant to NRS 213.10885 and the recommendation, if any, of the Chief; and (e) Any documents or testimony submitted by a victim notified pursuant to NRS 213.131 or 213.10915." NRS 213.1099. The focus in parole determinations, therefore, is the likelihood of recidivism and whether the inmate is a threat to society, *i.e.*, will a murderer kill again.

3. Through Chapter 213 of the Nevada Administrative Code, the Board has adopted standards relating to parole determinations.

In accordance with the directives in NRS 213.10885, the Board, through Chapter 213 of the Nevada Administrative Code ("NAC"), has adopted standards to assist it in determining whether to grant or revoke parole. *See generally*, NAC, Chapter 213. Pursuant to NAC 213.512, the Board begins the assessment of an inmate by assigning the inmate a crime severity

level of "highest," "high," "moderate," "low moderate" or "low", which is the same severity level assigned under NRS 209.341. After assigning this severity level, the Board will "assign to each prisoner who is being considered for parole a risk level of 'high,' 'moderate' or 'low' according to the level of risk that the prisoner will commit a felony if released on parole." NAC 213.514(1). "To establish the risk level, the Board will conduct an objective risk assessment using a combination of risk factors that predict recidivism." NAC 213.514(2). Both the "Severity Level" and "Risk Level" will then be considered together to "establish an initial assessment regarding whether to grant parole." NAC 213.516. The initial assessment will correspond to the following table:

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

4. *In certain circumstances, the Board is directed to consider a plethora of factors in making its parole determination.*

If appropriate, based on the foregoing "Severity Level" and "Risk Level" assigned to the inmate, the Board is then directed to consider the mitigating and aggravating factors set forth in NAC 213.518. *See* NAC 213.516. Aggravating factors include, but are not limited to: (a) Whether the nature of the crime committed by the prisoner was severe, extreme or abnormal;⁵ (b) Whether the prisoner has previously been convicted of a crime; (c) The number of occasions on which the prisoner has been incarcerated; (d) Whether the prisoner has committed a crime while incarcerated, during any period of release from confinement on bail, during any period of escape from an institution or facility or while on probation or

⁵ The Board makes available to the public on its website the Nevada Parole Guidelines - Aggravating and Mitigating Factors Definitions ("Nevada Parole Guidelines"), which is the list of mitigating and aggravating factors and the definitions of each factor. *See* http://parole.nv.gov/Information/Forms_Pages/Guideline_Related_Forms/Nevada_Parole_Guidelines_-_Aggravating_and_Mitigating_Factors_Definitions/, last visited on June 13, 2015. According to the Nevada Parole Guidelines, the Board is to indicate this factor "when the details of the crime indicate that the crime was conducted in such a manner that shows sophistication in planning or carrying out an offense, or the nature of the conduct is shocking to a normal person. Examples may include but are not limited to: Mutilation or abuse of a corpse following a murder; serial murder; serial sexual assault or numerous victims of a sex offender; the torture of a person or animal." *See* Addendum A, at Nevada Parole Guidelines, at A037.

parole; (e) The extent of the injury or loss suffered by the victim of the crime for which parole is being considered; (f) Whether the prisoner has committed increasingly serious crimes; and (g) Any other factor which indicates an increased risk that the release of the prisoner on parole would be dangerous to society or the prisoner." NAC 213.518(2).

According to the Board's own definitions and explanations of mitigating and aggravating factors found in the Nevada Parole Guidelines, the Board is directed not to use the aggravating factor of "[w]hether the prisoner has committed increasingly serious crimes" in certain circumstances: "If the person is now serving a sentence of life, or Murder/Sexual Assault, ***don't*** use this as the person has already committed the most serious of crimes." *See* Nevada Parole Guidelines, at A037 (emphasis added). To be clear, if the inmate is serving a life sentence, the Board's own directives forbid it to consider this factor.

The mitigating factors which the Board may consider to determine whether to grant parole to a prisoner include, without limitation:

- (a) Whether the prisoner has participated in programs which address the behaviors of the prisoner that led to the commission of the crime for which parole is being considered;
- (b) Whether the prisoner has no prior history, or a minimal history, of criminal convictions;

(c) Whether the prisoner has not had any infractions of the rules of the institution or facility in which he or she has been incarcerated during the most recent 2 years if the lack of infractions is not a result of the confinement of the prisoner in disciplinary segregation;

...

(g) Whether the prisoner has support available to him or her in the community or from his or her family;(h) Whether a stable release plan exists for the prisoner;

(i) Whether the release of the prisoner is not a significant risk to society because the prisoner will be paroled to another jurisdiction for prosecution or deportation; [and]

...

(m) Any other factor which indicates that the release of the prisoner on parole would benefit, or would not be dangerous to, society or the prisoner.

NAC 213.518(2).

In considering these factors, the Board has great discretion, and nothing in the foregoing sections 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." NAC 213.560. Nonetheless, as discussed below, the Board's decision must be supported by "some evidence" in the record that the factor which forms the

basis of its parole denial is predictive of a current risk to the safety of the community. It is with the foregoing in mind, that the Court should view the substantive facts herein.

B. Michael Is Convicted Of Murder And Begins To Serve His Life Sentence.

Forty-four (44) years ago, when Michael was twenty (20) years old, he was convicted of murdering a young woman by stabbing her multiple times.⁶ In May of 1972, he was sentenced to a term of life without the possibility of parole. (Appellate Record ("AR") 25). Four years later, in November of 1976, Michael plead guilty to the crime of escape and was sentenced to a ten (10) year term to run consecutive to his life sentence. (AR 27). Thereafter, in 1977, he entered a guilty plea to an escape charge and was sentenced to a fixed term of ten (10) years to run consecutive to his other sentences. (AR 29).

C. Over The Next Two Decades, Michael Dedicates Himself To Rehabilitation, In The Form Of Earning Multiple Degrees And Participating In Reformation Programs.

For the next twenty-eight (28) years of his life, Michael served his sentence without committing any crimes or garnering any additional convictions. Rather, he set out on a journey of rehabilitation, education, and

⁶ Undersigned counsel acknowledges the facts surrounding the murder are not contained within the record, but has included them herein in the interest of candor towards the Court.

reformation. That is, Michael began participating in programs offered through the Department of Corrections and earning degrees in various fields.

To begin, in 1989, Michael earned a degree in Animal Science. (AR 46). Michael continued moving in a positive direction during the following years, and, in 1992, he received his Adult Standard High School Diploma ("HSD"). (*Id.*) While Michael could have stopped with his HSD, he sought additional educational opportunities, and, in 1994, he received his Associate of the Arts Degree ("AA") from Western Nevada College. (*Id.*) In 1995, Michael once again strived for more, earning his Culinary Arts Degree through the Nevada prison system. (*Id.*) To further his journey of rehabilitation, Michael enrolled in anger management classes and completed the course in 1996. (*Id.*) Thereafter, in 1999, Michael enrolled in and completed a BETA program for drug and alcohol awareness. (*Id.*) Still yearning for more education and maintaining his path of reformation, thereafter, Michael received his certification in Bio Hazards. (*Id.*)

It is important to emphasize the fact that over the decade following his second escape conviction, Michael earned, participated in, and completed the foregoing programs, certifications and degrees while serving a life sentence *without* the possibility of parole. (*Id.*; *see also* AR 25). To be clear, at that time, he had zero expectation he would ever be considered for parole.

D. In Light Of Michael's Accomplishments And Rehabilitation, The Board Of Pardons Commutes His Life Sentence To Five Years To Life.

Michael's accomplishments and dedication to reforming his life behind bars did not go unnoticed. In fact, Michael's sentence of life without the possibility of parole was commuted to a lesser sentence due to his positive behavior. Specifically, on December 14, 2005, after Michael had served more than thirty-three (33) years and six (6) months in prison, the Board of Pardons issued an "Order Commuting Sentence" pursuant to NRS 213.010 – NRS 213.100 ("Commutation Order"). (AR31). The Commutation Order commuted Michael's life sentence to a "term of five years to life", and commuted Michael's ten year sentence for his 1977 escape conviction to run concurrent therewith. (*Id.*) The Commutation Order did not impact Michael's ten-year sentence for his 1976 conviction. (*Id.*) The Commutation Order was signed by the then Secretary of State, Dean Heller, the Governor of Nevada, Kenny C. Guinn, and six Supreme Court Justices, including the Honorable Justice Robert E. Rose—the very prosecutor who oversaw Michael's 1972 murder trial. (*Id.*) After thirty-three (33) years, the same individual that once plead with a jury to convict Michael, offered Michael his first chance at freedom.

E. As Michael's Commuted Sentence Provides For The Possibility Of Parole, Michael Applies For Parole Three Separate Times, But Is Routinely Denied The Same.

1. Michael applies for parole for the first time, but is denied due to the nature of his commitment offense.

Because Michael's life sentence was commuted, he became eligible for parole in 2006. *See* NRS 213.120(1). Therefore, Michael applied to be released on parole, and a hearing was held on February 13, 2006. (AR 33). After considering the "Parole Success Likelihood Factors", wherein (a) Michael's felony murder was considered and afforded the maximum number of points, and (b) Michael received eighteen (18) credits for the programs he participated in and his educational accomplishments, only ten (10) of which were allowed to be applied, Michael received a "Crime Severity Level" of A4, a score of 24, and a Guideline Recommended Minimum of 108-132 months. (AR 34). At that time, Michael had already served more than four-hundred (400) months in prison.

The Board departed, however, from the guideline recommendation based on a determination that "the crime severity level and/or parole success factors [did] not adequately reflect the true nature of [his] case." (AR 33). The Board further found that departure was appropriate based on the "[n]ature and severity of the crime" and the opinion that "continued confinement is needed to protect the public from further criminal activity."

(*Id.*) In light of this departure, the commissioners present at the hearing recommended to deny parole, and the recommendation was ratified by the remaining commissioners and the chairman. (*Id.*) Pursuant to the Order Denying Parole Release ("First Denial Order"), Michael could be considered for parole again on February 13, 2009. (*Id.*)

2. *Michael applies for parole a second time, is denied without the Board articulating the reasons for such denial, and appeals the denial.*

Thereafter, in 2008, Michael reapplied for parole. (AR 36-38). Once again, the Board considered several factors in determining whether to grant parole. (AR 38). This time, however, the Board utilized a "Parole Risk Assessment" form, wherein Michael received points for "Static Risk Factors", *i.e.*, factors that he cannot change, such as prior substance abuse and the nature of his underlying crime, and wherein points were subtracted for "Dynamic Risk Factors", such as his age (which was fifty-six (56) at the time), his degrees and participation in programs, and his clean prison record. (*Id.*) Upon consideration of these factors, Michael received an overall score of five (5) (Static Risk Score of eight (8) minus a Dynamic Risk Score of -3), and a "Moderate" risk level. (*Id.*) The Board also noted the "[i]mpact on the victim(s) and/or community" as an aggravating factor and Michael's

"[p]articipation in programs specific to addressing behavior that led to their incarceration" as a mitigating factor. (*Id.*)⁷

Ultimately, the Board unanimously denied parole, and, according to the Order Denying Parole Release ("Second Denial Order"), Michael would be eligible to reapply for parole on February 13, 2012. (AR 36). The Second Denial Order did not, however, indicate the reason(s) for its denial. (*Id.*) To be clear, Michael had not committed any additional crimes or engaged in any additional misconduct since the First Denial Order. (AR 38). Because of this, and the Board's denial of his application, Michael filed a petition for writ of habeas corpus challenging the Board's decision to deny him parole and asserting (i) a violation of Due Process, (2) that the Board arbitrarily and capriciously applied the parole guidelines, and (3) that the Board violated the Ex Post Facto Clause. *See Anselmo v. Nev. Bd. of Parole Comm'rs*, No. 53520, 2010 Nev. LEXIS 112, at *1 (Jan. 7, 2010). The petition was denied

⁷ The Board also provided Michael with a list of recommendations to "improve the possibility of granting parole," which included to (1) "[p]articipate in programs that address the behaviors that led to your incarceration", (2) "[p]articipate in educational or vocational programs that will improve your marketability in the workplace upon release," and (3) "[p]articipate in victim empathy programming." (AR 37). It is important to note that Michael had already participated in rehabilitative, educational and vocational programs (*see* Section V(C), *supra*), and that the Board expressly found as a mitigating factor his participation in such programs (AR 38). Michael did not participate in the victim empathy program because he did not meet the requirements.

by the District Court, and this Honorable Court affirmed the denial on appeal.
See id.

3. Michael applies for parole a third time, and is again denied because of the nature of his crime and the alleged impact on the community.

After waiting the requisite number of years, Michael again applied to the Board for parole. (AR 42-43).⁸ On February 27, 2012, after the Board considered several factors in determining whether to grant Michael parole, it completed a form entitled "Parole Risk Assessment & Guideline" ("PRAG"), in compliance with procedures outlined in NAC 213.512-213.518. (AR 43). The Board, once again, anchored its denial to factors Michael is unable to change, such as his gender, the age of his first arrest, his prior crimes, and prior drug abuse, and subtracted points for Michael's completion of approved programs and educational achievements (-1, the greatest amount possible) and lack of disciplinary issues (-1, the greatest amount possible). (*Id.*) Michael received a Total Risk Score of 5, with a "Moderate Risk" level that he will commit a felony if released. (*Id.*)

The Board also considered the following aggravating factors, none of which can be changed no matter the rehabilitation or programs Michael

⁸ On November 17, 2011, the Board issued an "Order of Taking No Action", providing that no action was taken on Michael's eligibility for parole "due to a lack of information needed to make a recommendation." (AR 40).

completes and all of which occurred more than forty (40) years prior: (i) death of victim, (ii) the fact that he was on probation when he committed a crime (iii) his two escape convictions, and (iv) the nature of his criminal record is increasingly more serious.⁹ (*Id.*) It is important to note, the Board considered this final factor despite its own specific directive *not* to utilize the same. That is, according to the Nevada Parole Guidelines,¹⁰ the Board is not to consider this factor because Michael is serving a life sentence for murder.

In addition to these aggravating factors, the Board considered several mitigating factors, including (i) that Michael was infraction free for two years or more, (ii) that he was not in disciplinary segregation, (iii) that he has family support from his mother in Oregon, (iv) that if he were paroled from his sentence of five (5) years to life, he would still serve time for his escape conviction, and (v) his participation in programs specific to addressing the behavior that led to his incarceration. (*Id.*) Despite these mitigating factors, the Board denied parole. (AR 42).

In the Board's Order Denying Parole ("Third Denial Order"), the Board indicated that it denied parole because of the "[n]ature of criminal

⁹ It is unclear as to what the Board actually considered relating to the "[n]ature of criminal record is increasingly more serious," as there are no notations explaining the application of this aggravating factor after this phrase, as is seen with the other factors. (AR 43).

¹⁰ *See* n.5 *supra*.

record is increasingly more serious" and the "[i]mpact on victim(s) and/or community." (*Id.*) The Board also recommended that Michael not "engage in disciplinary misconduct during the denial period." (*Id.*) As evidenced on the Board's PRAG form, Michael had remained infraction free for several years, and, in fact, his last discipline was in 2007. (*Id.*; *see also* AR 46). Nevertheless, after being denied a third time, Michael continued to live as a model prisoner without any disciplinary action. (AR 46).

4. *Michael applies for parole a fourth time, and, again, the Board fails to adhere to its own guidelines and improperly relies solely on immutable factors in denying him parole—factors that have no predictive quality to Michael's supposed threat to society.*

Michael was once again eligible for parole in 2014. He appeared before the Board on November 17, 2014. (AR 45). At that time, Michael was sixty-two (62) years old, having served more than forty-two (42) years and five (5) months in prison. (AR 25). During the hearing, the three Commissioners who conducted Michael's parole hearing ("Sitting Commissioners") asked Michael questions related to his parole application.(AR 61-62). In assessing whether Michael should be released on parole, the Board again utilized a PRAG form. (AR 46). Because Michael had not engaged in any misconduct, had not committed any additional crimes, and did not have any present substance abuse issues, his Static Risk Score

(comprised of factors he cannot change, *i.e.*, his past crime, his gender, etc.) remained unchanged. (*Id.*)

Michael's Dynamic Risk Score was also the same. (*Id.*) This time, however, the form instructed the Board to indicate what achievements Michael had received in the comments section of the form, which had not been provided in the past. (AR 43, 46). The Board listed these achievements in the "Mitigating Factors" section of the form (discussed below). (AR 46). Because Michael received the "Highest" offense "Severity Level" and a "Low Risk" level, in accordance with the directives in NAC 213.516, the Board considered mitigating and aggravating factors. (*Id.*) It is important to emphasize the significant difference in the Board's assessment of Michael in his 2014 application – finding Michael was "Low Risk", which, according to NAC 213.514(1), means the Board found there was a low risk Michael "will commit a felony if released on parole." (AR 46).

The Board identified the same immutable aggravating factors as it had in 2012, including that (i) his victim died, (ii) he was on probation when he committed the underlying crime, (iii) he has two escape convictions, and (iv) the "[n]ature of the criminal record is increasingly more serious: Previous

offenses are property crimes".¹¹ (AR 43, 46). As in 2012, the Board was expressly forbidden from considering the final factor pursuant to the Nevada Parole Guidelines. (*See* Section V(A), *supra*).

With regard to the mitigating factors, the Board recognized that (i) Michael had been infraction free since January 1, 2007, (ii) that he had family support and that the Board had received a letter from Michael's family, (iii) that he has a pending sentence for escape that he will begin to serve upon release, and (iv) that he participated in programs specific to addressing the behavior that led to his incarceration. (AR 46). With respect to the final mitigating factor, the Court elaborated on Michael's accomplishments during his 42 years of incarceration, including: (a) Animal Science in 1989; (b) Adult High School Diploma in 1992; (c) Associate of the Arts Degree in 1995; (d) Anger Management in 1996; (e) BETA in 1999; and (f) Certification in Bio Hazards. (*Id.*) In light of these mitigating factors, Michael's "Low Risk" ranking, and the Board's discussions with Michael, the Sitting Commissioners recommended *granting* Michael parole. (AR 45).

Despite the fact that each Sitting Commissioner, who was present during Michael's parole hearing and considered the evidence presented to

¹¹ In the Board's 2012 assessment, however, it did not identify that it considered that Michael's "[p]revious offenses are property crimes." (AR 43).

them, recommended granting Michael parole, the four *non-sitting* members ("Non-Sitting Commissioners"), who had no opportunity to even speak to Michael, voted to deny Michael's application for parole. (*Id.*) According to the "Order Denying Parole" issued on November 17, 2014, ("Final Denial Order"), the four Non-Sitting Commissioners refused to ratify the Sitting Commissioners' recommendation because the (i) "[n]ature of criminal record is increasingly more serious," which the Board is forbidden from considering, and (ii) "[i]mpact on victim(s) and/or community", which, as explained in the PRAG, relates to the immutable fact that a twenty-two (22) year old was murdered in 1971. (AR 45). Because of the Non-Sitting Commissioners' denial of parole, Michael will not be eligible for parole until 2018. In 2018, Michael will be sixty-six (66) years old, having served more than forty-six (46) of those years in a cell. (*Id.*) Despite the Board's recognition that Michael had not engaged in disciplinary misconduct since 2007, it (contradictorily) recommended that he "not engage in disciplinary misconduct during the denial period." (*Id.*)

Following the Final Denial Order¹² – and nearly a decade of denials from the Board – in an attempt to exhaust all available remedies before

¹² It is important to note that, to date, Michael has served 584 days incarcerated since the date of the Board's improper Final Denial Order

seeking the Court's intervention – Michael wrote a letter in December 2014, requesting reconsideration of his denial in accordance with NAC 213.526 ("Reconsideration Letter"). (AR 9). Pursuant to NAC 213.526, "[a] prisoner who wishes to request that the Board reconsider a denial of parole...must: (a) Mail the request to the State Board of Parole Commissioners...; and (b) Base the request on circumstances which existed at the time of the meeting at which the Board considered whether to grant parole." *See* NAC 213.526. Thereafter, on December 16, 2014, the Executive Secretary for the Board sent Michael a response letter asserting that the Reconsideration Letter "does not meet the criteria of an appeal and will not be considered by the Board." (AR 9).

F. Michael Files A Petition For Writ Of Habeas Corpus Challenging The Board's Final Denial Order.

After having exhausted all other possible remedies, on December 24, 2014, Michael filed a petition for a writ of habeas corpus against Chairman of the Board, Connie Bisbee, Commissioners Susan Jackson, Tony Corda, and Adam Endel, and the Nevada Board of Parole ("Respondents") in the First Judicial District Court of the State of Nevada in and for Carson City challenging the Board's Final Denial Order ("Petition"). (AR 1). In Michaels'

(November 17, 2014). If the Court reverses the District Court's Dismissal Order with instructions for the Board to reconsider Michael's parole application, the Court should also instruct the Board to give Michael 584 days credit towards his ten-year sentence for escape he will begin serving following his release.

Petition, he explained how through the nine (9) years of denials, the Board continued to focus on circumstances he cannot change, such as the nature of his crime. (AR 2). Michael also alleged the Board circumvented the commutation granted by the Pardons Board and violated its own parole process. (AR 3).

In light of the Board's misconduct, Michael advanced three (3) claims for relief: (1) violation of his Eighth Amendment to be free from cruel and unusual punishment, (2) violation of his Eleventh and Fourteenth Amendments guaranteeing equal protection and due process, and (3) violation of his Fifth Amendment right against double jeopardy. (AR 4-6). At its core, Michael's Petition alleged there is no evidence or facts supporting the Board's decision that Michael is unsuitable for release, and the only factors upon which the Board rests its denials are circumstances Michael can *never* change. (AR 7). As support for this position, Michael relied on the court's ruling in *Lawrence*. (*Id.*)

In conjunction with the Petition, Michael filed a Motion for Leave to Proceed *In Forma Pauperis* ("Motion for Leave"), wherein he requested an attorney to represent him in his Petition. (AR 12-14). Upon a review of the Petition and the Motion for Leave, the Court transferred the matter to Judge James T. Russel who had presided over Michael's previous petition relating to

the Second Denial Order. (AR 15). As discussed below, and not surprisingly, the outcome was the same. Thereafter, the Court granted the Motion for Leave, denied Michael's request for counsel, and ordered the Office of the Nevada Attorney General to respond to the Petition. (AR 17-18).

On February 13, 2015, Respondents filed a very brief motion seeking dismissal of the Petition ("Motion to Dismiss"). (AR 23-26). Respondents sought dismissal of the Petition based on (1) the relief therein being outside the scope of the post-conviction habeas corpus statutes, (2) the fact that Michael does not challenge that he is lawfully confined, and (3) that, under NRS 213.10705, there is no cause of action permitted when parole has been denied. (AR 24-25). In opposing the Motion to Dismiss, Michael argued that the Board essentially disregarded the Board's purpose, guidelines and procedures when it denied him parole – the Sitting Commissioners actually heard the evidence and considered it in making their recommendation to grant parole, and the Non-Sitting Commissioners had already made up their mind prior to the hearing, thereby failing to consider the relevant factors. (AR 47-49). In reply to Michael's opposition, Respondents again relied on NRS 213.10705 to argue Michael does not have a cognizable claim for habeas relief. (AR 51).

In rubber stamping the Respondents' arguments in their Motion to Dismiss, on March 6, 2015, the District Court signed the proposed order submitted by Respondents ("Dismissal Order"), granted the Motion to Dismiss, and found that Michael did not "set forth a cognizable claim for habeas relief because parole is an act of grace of the State, and there is no cause of action permitted when parole has been denied." (AR 55-56). The Notice of Entry of Order was filed on March 9, 2015. (AR 57). Thereafter, on March 11, 2015, prior to Michael receiving a copy of the Dismissal Order, he filed a "Reply to Opposition to Motion to Dismiss", addressing points raised in Respondents' reply brief and outlining the factual history for the Court. (AR 60-63).

After learning that the Court had already ruled on the Motion to Dismiss, on March 18, 2015, Michael filed a Designation of Records on Appeal, and on March 19, 2015, he filed his Case Appeal Statement, indicating that he was appealing the Dismissal Order dismissing the Petition. (AR 67-69). Upon review of the Case Appeal Statement and the record submitted by Michael, this Court determined that it was necessary for the Court to review the complete District Court record, and ordered the clerk of

the District Court to transmit the same, including any presentence investigation reports.¹³ (AR 70).

On May 27, 2015, the record on appeal was filed with this Court, and upon receipt of the same, the appeal was submitted for decision. (Docket No. 15-40341). Thereafter, on November 24, 2015, this Court issued an order seeking pro bono counsel be appointed for Michael. (Docket No. 15-35985). As no pro bono counsel had appeared on behalf of Michael, this Court again issued an order on February 22, 2015, seeking pro bono counsel "to provide briefing on the issue of whether the district court erred in dismissing appellant's petition for failure to state a cognizable claim in light of the California Supreme Court's decision in *In re Lawrence*." (Docket No. 16-05617).

Undersigned counsel filed a Notice of Appearance on behalf of Michael on March 16, 2016. (Docket No. 16-08347). As demonstrated herein, the facts and legal issues before this Court substantially mirror those in *Lawrence*. Consequently, the Court should find that Michael does have a cognizable claim and reverse the Dismissal Order. Further, the Court should

¹³ There is no indication on the docket that the presentence investigation report was submitted to the Court. If the presentence report was submitted and if the Court intends to rely upon the same in making its ruling, Michael hereby requests to receive a copy of his report.

also find the Board's reliance on immutable factors, which have no relation to whether Michael is a current risk to society, was improper, and that with such improper reliance, there is no support for the Board's denial of parole.

VI. SUMMARY OF ARGUMENT

In accordance with the directives in this Court's February 22, 2016, order, the crux of this appeal is the application of *Lawrence* to the Board's determination to deny Michael parole. However, as NRS 213.10705 expressly provides that inmates in Nevada have no protected liberty interest in parole and, therefore, no claim for relief challenging the denial of the same, it is necessary for Michael to first address the means by which this Court (and the District Court) can consider his petition.

The District Court's authority to review the Board's parole determination is clear. To begin, the Legislature mandated that the Board is to consider certain factors in making parole determinations. Due process requires the Board's decision, based on these factors, to be supported by some evidence in the record. As a result, the Board's parole determinations are not above scrutiny and the District Court can review them to ensure the same. Thus, the District Court erred in finding that Michael did not have a cognizable claim.

Further, when an administrative board, such as the Board here or the Nevada Gaming Control Board, makes determinations, absent the fact that

there is no right to parole or a right to be granted a gaming license, the Board must adhere to its obligations, whether contractual or statutory. The failure to do so opens the administrative board up to judicial review. Here, the Board clearly failed to adhere to its own directives as provided in the Nevada Parole Guidelines. According to the Nevada Parole Guidelines, the Board is not to consider whether the nature of an inmate's crimes are increasingly more serious if the inmate is serving a life sentence or if he/she committed a capital offense. Michael is serving a life sentence for murder. In the Final Denial Order, as well as in previous orders, the Board expressly relied on this aggravating factor *and* even went so far to expressly list this as its precise reason for Michael's denial of parole. Thus, the Board failed to adhere to its own guidelines and this Court can review its decision.

Moreover, this Court may engage in a review of the Board's denial because the Board's continued reliance on immutable, fixed factors essentially strips Michael of his right to be considered for parole. Michael became eligible for parole in 2006 and the Board was *required* by statute to consider him for parole. He, therefore, has an expectation that he will be justly considered. The Board's Final Denial Order, as well as the previous denial orders, relies on factors in denying Michael parole that can *never* be changed. The parole hearings are an exercise in futility. The Board's relentless parroting

of denials and continued reliance on improper factors deems Michael ineligible for parole consideration, and the challenge thereof is properly considered by the District Court.

Looking to *Lawrence*, the Board denied Michael parole based on the immutable fact that a twenty-two (22) year old woman was murdered. The Court must, therefore, determine whether the implications from the nature of this crime support a finding that Michael is a current threat to society and should therefore be denied parole. This question must be answered in the negative. As in *Lawrence*, Michael has completely rehabilitated himself during the forty-four (44) years he has spent in prison: he has earned several degrees, participated in self-help programs tailored to address his commitment offense, and enrolled in and completed vocational training, as well as remained disciplinary free for nearly ten (10) years. Further, Michael is sixty-four (64) years old and has family members eager to support him upon his release. There is no evidence in the record to connect the nature of Michael's crime to a conclusive finding that he is currently a threat to society if released. The exact opposite is true. Thus, the Board's denial is not supported by "some evidence" and cannot stand.

VII. ARGUMENT

A. The District Court's Order Cannot Withstand This Court's Rigorous Standard Of Review.

The Court applies a rigorous, *de novo* standard in reviewing a district court's order granting a motion to dismiss for failure to state a claim. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634–35, 137 P.3d 1171, 1180 (2006); *see also Marvin v. Fitch*, 126 Adv. Rep. 18, 232 P.3d 425, 428 (2010). Under this demanding standard, the Court must construe the pleading liberally, drawing every fair inference in favor of the non-moving party, Michael. *See Nevada Rule of Civil Procedure 12(b)(5); Vacation Village v. Hitachi America*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Thus, the Court will recognize Michael's factual allegations as true and draw all inferences in his favor. *Shoen*, 122 Nev. 621, 634–35; *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. Adv. Rep. 21, 181 P.3d 670, 672 (2008).

Furthermore, a complaint should only be dismissed if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438 (2002); *see also Stockmeier v. Nev. Dep't of Corr. Psych. Rev. Panel*, 135 P.3d 220, 223, 135 P.3d 220 (2006). Additionally, a district court's statutory interpretation, "including the meaning and scope of a statute, are questions of law, which this court reviews *de novo*." *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032,

1041 (2008); *see also City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

Under these guiding principles, and a review of the applicable law and the 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 the directives in *Lawrence*.

B. The Board Is Not Shielded From Judicial Review, And Dismissal Of The Petition Was Improper.

1. Because the Board is statutorily mandated to consider certain factors in making parole determinations, it's decisions are subject to judicial review.

Before addressing the crux of this appeal – the Board's improper reliance on an immutable, fixed factor with no evidence demonstrating that the factor is predictive of a current threat to society – the Court must first inquire whether the Board's decision is subject to judicial review. This question can be answered succinctly – yes. In *In re Rosenkrantz*, 29 Cal. 4th 616, 664, 146, 59 P.3d 174, 209 (2002), the court was "presented with the threshold question of whether courts are authorized to review the merits of a Governor's decision affirming, reversing, or modifying a parole decision of the Board." *Lawrence*, 44 Cal. 4th at 1203. The court began by noting that "the Board and the Governor must consider the statutory factors concerning

parole suitability set forth" in the regulations and by statute. (*Id.*) (citing *Rosenkrantz*, 29 Cal.4th at 664); *see also* Cal. Penal Code § 3041 (providing that the California Board "*shall* grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual.") (emphasis added). The court ultimately found "because due process of law requires that a decision considering such factors be supported by some evidence in the record, the Governor's decision is subject to judicial review to ensure compliance with this constitutional mandate." *Id.* (quoting *Rosenkrantz*, 29 Cal.4th at 664.) (internal quotations omitted).

Similarly, the Board here is required to consider certain factors set forth by statute in making parole determinations. *See* NRS 213.1099 ("In determining whether to release a prisoner on parole, the Board *shall* consider: (a) Whether there is a reasonable probability that the prisoner will live and remain at liberty without violating the laws; (b) Whether the release is incompatible with the welfare of society. . ." etc.) (emphasis added). Consequently, the Board's decision is subject to judicial review: As due process requires the Board's decision considering these factors to be

"supported by some evidence in the record," the District Court has the authority to review the Board's decision "to ensure compliance with this constitutional mandate." *Lawrence*, 44 Cal. 4th at 1203 (quoting *Rosenkrantz*, 29 Cal.4th at 664.) (internal quotations omitted). Thus, the District Court improperly dismissed Michael's Petition.

The District Court's ability to review the Board's decision does not impede the significant discretion afforded to the Board in NRS 213.10705. *See* NRS 213.10705. (providing that "it is not intended that the establishment of standards relating [to parole determinations]...establish a basis for any cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees.") The Board retains its discretion and remains the "sole authority" in rendering parole determinations. *See e.g., Cooper*, 377 S.C. at 499 ("Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole.") It could not have been the Legislature's intent, however, to have the Board issue decisions with *zero* means of accountability. *See id.* ("[T]he Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.") As such, when the Board's decision is

arbitrary, judicial review is the only means by which the Board can be held accountable, and, is therefore proper.

2. *While Chapter 213 expressly provides that inmates do not have a liberty interest or a right to parole, the Board is not completely exempt from judicial review.*

Michael acknowledges that NRS 213.10705 strips inmates of a right to parole and expressly provides that they do not possess a liberty interest relating thereto. *See* NRS 213.10705.¹⁴ He also acknowledges this Court previously held "because Nevada's parole release statute does not create a liberty interest,...inmates are not entitled to constitutional due process protections with respect to parole release hearings." *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 255 P.3d 224, 228 (Nev. 2011). Despite this language, the Board is not shielded from any and all judicial review of its parole decisions – such would provide the Board with an unfettered ability to issue arbitrary decisions and would also run contrary to the Legislature's intent, which created the Board with the requirement that it

¹⁴ "The Legislature finds and declares that the release or continuation of a person on parole or probation is an act of grace of the State. No person has a right to parole or probation, or to be placed in residential confinement, and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property or establish a basis for any cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees." NRS 213.10705.

adhere to certain guidelines. Rather, an administrative board's decision can be challenged even when there is no statutorily mandated right implicated.

- a. This Court previously held that an administrative board's decision can be collaterally challenged despite the applicant not having a "right".

This Court has previously held the same in the context of gaming licenses. As with parole, "[i]t is established beyond question that gaming is a matter of privilege conferred by the State rather than a matter of right" – [t]he legislature has so declared." *State v. Rosenthal*, 93 Nev. 36, 40, 559 P.2d 830, 833 (1977). This Court has found, however, that where an appellant is not "appealing the denial of a gaming license"; rather, [is] collaterally attacking the improper and oppressive manner in which his gaming application was treated by the State", judicial review was proper. *Cohen v. State*, 113 Nev. 180, 183, 930 P.2d 125, 127 (1997). In *Cohen*, the gaming board entered into an agreement with appellant that it would not consider certain "bad acts," in deciding whether to issue a gaming license. *Id.* at 181-82. The board breached that agreement in its determination of appellant's suitability for a gaming license. *Id.* The District Court determined the appellant did not have a right to challenge the gaming board's decision based upon (i) NRS 463.220(7), which provides that the "commission has full and absolute power and authority to deny any application for any cause it deems reasonable," and (ii) NRS

463.318(2), which declares "judicial review is not available for actions, decision and orders of the commission relating to the denial of a license..." *Id.* at 183.

This Court reversed the District Court, and held that "[i]n the face of such clear statutory language, one might wonder if judicial intervention is *ever* warranted in cases involving denial of a gaming license; still, there are cases in which judicial intervention in gaming matters is called for." *Id.* The Court found that the Board's failure to comply with its obligations under the agreement opened it up to a collateral attack of this nature. *Id.* at 184. Consistent with this reasoning, when a board fails to adhere to its own guidelines and makes determinations inconsistent with its obligations, such rulings cannot escape judicial scrutiny.

As is particularly relevant to this Court's inquiry, the South Carolina Supreme Court has also determined this precise issue: 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." *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496-99, 661 S.E.2d 106, 112 (2008). That is, the failure of a 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. Put another way, 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." *Id.*

- b. The Board failed to adhere to its own directives, thus subjecting its decision denying Michael parole to judicial review.

Here, that is exactly what occurred, and judicial intervention is appropriate. That is, (1) the Legislature mandated that the Board was required to establish criteria for parole determinations, *see* Section V(A), *supra*; (2) the Board is to consider several factors when determining whether to grant parole, *see id.*; (3) the Board adopted and published guidelines explaining each of the factors and when it is appropriate and inappropriate to consider such factors, *see id.*; (4) by its own directives set forth in the Nevada Parole Guidelines, the Board is forbidden from considering the factor that the "nature of the criminal record is increasingly more serious" when an inmate is serving a life sentence, *see id.*; and (5) the Board listed in its Final Denial Order that one of the reasons for Michael's denial was the "[n]ature of criminal record is increasingly more serious," *see* AR 45-46.¹⁵ Thus, the Board failed to adhere

¹⁵ The Board also listed as a reason for denial the "[i]mpact on victim(s) and/or community", and explained that this was based on the unchanging fact that a "22-year-old female died as [a] result of being attacked." (AR 45-46).

to its own guidelines and is subject to judicial review of its decision to deny Michael parole. *See Cooper*, 377 S.C. at 496-99.

- c. The Board essentially deemed Michael ineligible to be considered for parole by its continued reliance on immutable, fixed factors, thus violating his due process rights and subjecting the Board's decision to judicial review.

Additionally, there is an equally compelling reason for this Court to intervene and review the Board's denial. In finding that in certain circumstances an inmate had due process rights relating to the denial of parole, the court in *Cooper* also recognized its prior ruling that "the permanent denial of parole eligibility implicates a liberty interest sufficient to require at least minimal due process." *Id.* at 497 (quoting *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)). While the South Carolina court subsequently emphasized the finality of a *permanent* denial of parole eligibility and distinguished it from the *temporary* granting or denial of parole to an eligible inmate, in Michael's case, it is a distinction without a difference. *See Sullivan v. S.C. Dep't of Corr.*, 355 S.C. 437, 443, 586 S.E.2d 124, 127 (2003).

As discussed *infra*, the Board's reliance on this sole remaining factor was improper.

That is, Chapter 213 dictates when inmates are eligible for parole. NRS 213.120(1). The Department is required to determine when an inmate is eligible, and, at such time, the Board is *required* to consider the inmate for parole. NRS 213.140(1) ("Board *shall* consider and may authorize the release of the prisoner on parole as provided in this chapter.") (emphasis added). 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").

Michael became eligible for parole in 2006, and, over the next nine (9) years, consistently came before the Board for parole consideration and was denied each time due to the nature of his crime and other factors which occurred more than forty (40) years prior and cannot be changed. *See* Section V(E), *supra*. To continuously rely on immutable, fixed circumstances of an inmate's history in denying parole, *i.e.*, facts that the inmate can never change no matter what rehabilitation he engages in, is to essentially deem the inmate ineligible for parole. While this is not a *permanent* denial on its face, any subsequent parole hearing would be an exercise in futility, because the

Board's sole basis for denial – the nature of his crime – is constant and will forever result in a denial of parole.

In sum, as the District Court had the ability to review the Board's Final Denial Order, the Dismissal Order should be reversed. Further, upon a review of the facts (as discussed below), it is clear that in denying Michael parole, the Board improperly relied upon fixed, immutable factors which are not indicative of Michael's supposed current threat to society. Thus, this Court should also instruct the District Court to remand the matter to the Board for a reconsideration of Michael's parole (i) properly adhering to the Nevada Parole Guidelines, and (ii) following the court's directives in *Lawrence*.

Michael acknowledges, as did the court in *Cooper*, that this Court and the Board may be concerned that permitting such review would open the floodgates to litigation and an "overabundance" of appeals of parole denials. *Id.* at 499. This concern, however, can be alleviated if the Board simply adheres to its own guidelines and renders decisions based upon a proper inquiry into the relevant and applicable factors. *See id.* at 500 (holding "we believe this concern will be alleviated if the Parole Board issues orders that are sufficiently detailed for the [Administrative Law Court] to conduct appellate review, limited to the Board's adherence to section 24-21-640, of decisions denying parole.>").

C. Under *Lawrence*, The Board's Reliance On The Nature Of Michael's Crime Is Improper, And The Court Should Reverse The Dismissal Order.

As demonstrated above, the Board violated its own directives when it considered the factor that the "[n]ature of the criminal record is increasingly more serious" in denying Michael parole. *See* Section VII(C)(2)(c), *supra*. When the Court properly excludes that reason, all that is left supporting the Board's denial is the "[i]mpact on victim(s) and/or community," which the Board explains as the fact that a "22-year-old female died as result of being attacked." *See* Section VIIB(2)(b), *supra*. Under the directives in *Lawrence*, the Board cannot rely solely on the nature of an inmate's underlying crime as the basis for denying him parole; rather, there must be other evidence in the record to suggest the implications from his offense remain probative of the statutory determination of a continuing threat to society. Not only is this finding particularly applicable to the issues before this Court, but the facts in *Lawrence* closely mirror those herein. Therefore, a comprehensive discussion of the Court's ruling in *Lawrence* is appropriate. Upon this inquiry, there are no factors supporting the Board's denial of Michael's parole.

1. *In Lawrence, the inmate fully rehabilitated herself and in denying parole, the Governor improperly relied upon fixed, immutable facts that were not probative of a continuing threat to society.*

a. Sandra commits murder and flees the state for 11 years.

In 1971, Sandra Davis Lawrence ("Sandra") murdered her lover's wife by shooting her several times and repeatedly stabbing her with a potato peeler. *Lawrence*, 44 Cal. 4th at 1190-93. Following the murder, and after authorities issued a fugitive warrant for her arrest, Sandra fled California and spent the next eleven (11) years on the run, living in four different states. *Id.* at 1193. In 1982, Sandra returned to Los Angeles, hired legal counsel, and entered a not guilty plea, maintaining the false theory that her lover shot his wife. *Id.* Sandra's case went to trial in 1983, and a jury returned a verdict of first degree murder, resulting in Sandra receiving a sentence of life imprisonment with a minimum parole eligibility date of November 29, 1990. *Id.* at 1194.

b. Over the next two decades, Sandra dedicates herself to rehabilitation.

During the next twenty three (23) years, Sandra served her life sentence and remained "free of serious discipline." *Id.* Sandra also achieved several accomplishments, participated in inmate programs, and earned degrees, including (i) "work[ing] as a plumber for the prison," (ii)

"volunteer[ing] as a tennis coach for other inmates," (iii) being "a charter member of the Yes-I-Can tutorial program, a member of Toastmasters International and the Friends Outside parenting program," (iv) acting as "a physical trainer for other inmates," and earning a "bachelor's degree in computer science from the University of La Verne." *Id.* Although Sandra's initial psychological evaluations indicated she had some mental issues relating to the murder, including being "explosive", and subsequent psychological reports also indicated personality disorders linked to her crime, "five psychologists conducting 12 separate evaluations since 1993 concluded that petitioner no longer represented a significant danger to public safety." *Id.* at 1195.

- c. Sandra is eligible for parole, but is denied the same several times based on the nature of her crime.

In 1993, Sandra came before the parole board, who recommended she be released on parole in July, 1997. *Id.* at 1195-96. The former California Governor reversed this decision. *Id.* at 1196. Thereafter, Sandra was denied parole in split decisions in 2000 and 2001, and was once again recommended for parole in November 2002. *Id.* The November 2002 Board recommendation was to release Sandra after twelve (12) years and eight (8) months (Sandra had already served eighteen (18) years), based on her positive psychiatric

evaluations, remorse, educational accomplishments, and participation in prison programs. *Id.* at 1196-97. The former Governor again reversed this second parole recommendation. *Id.* at 1197.

In May 2004, the parole board again recommended parole for Sandra, relying on the facts outlined in the previous recommendations, as well as the facts that she had no serious disciplinary issues, no recent administrative rule violations, and had received a positive psychiatric evaluation in April 2004. *Id.* Despite these positive factors, the then Governor reversed this parole recommendation, basing his reversal on a finding that Sandra posed an "unreasonable risk of danger to public safety," as she committed a "vicious crime" for an "incredibly petty" reason. *Id.* The Governor also found that this constituted "reason enough to pose an unreasonable risk to public safety." *Id.*

- d. Sandra is again granted parole in 2005, but is ultimately denied parole because of immutable, fixed facts.

A year later, in August 2005, the parole Board again recommended that Sandra be paroled, and made this recommendation after considering extensive evidence and testimony. *Id.* at 1197-98. The parole board reasoned as follows:

[P]etitioner has no juvenile record of assaulting others, nor any adult record other than the underlying offense; her exemplary record

of participating in self-help, vocational, and educational programs while in prison, including her recent attainment of a master's degree in business administration; her leadership role among other inmates; and her realistic parole plans, which included a job offer and family support.

...

[T]he crime was committed as the result of stress, and that the possibility of recidivism was low because of petitioner's maturation, growth, greater understanding, and advancing age, and the absence of a history of significant violent crime.

Id. at 1198-99. The parole board also found that Sandra "understands the nature and magnitude of the offense, and accepts responsibility for her criminal behavior and has decided to change towards good citizenship," and cited favorably the most recent positive psychological report. *Id.* at 1199.

Despite this carefully considered and substantially supported recommendation of parole, and the fact that Sandra had served 24 years in prison and "made credible gains", the Governor again reversed the decision, relying on the circumstances of the murder, her subsequent flight, denial of involvement in the murder and placement of blame on the victim's husband, and early negative psychological evaluations. *Id.* at 1199-1201. With regard to his reliance on the nature of Sandra's crime, the Governor found that:

"[T]he murder perpetrated by [petitioner] demonstrated a shockingly vicious use of lethality and an exceptionally callous disregard for human suffering because after she shot Mrs. Williams—four times—causing her to collapse to the floor, [petitioner] stabbed her repeatedly. And the gravity alone of this murder is a sufficient basis on which to conclude presently that [petitioner's] release from prison would pose an unreasonable public-safety risk."

Id. at 1200.

- e. Sandra filed a writ regarding the denial of parole based on circumstances she can *never* change.

In light of this reversal, which focused on the nature of the crime and circumstances that Sandra is unable to change, she petitioned for a writ of habeas corpus in the Court of Appeals, challenging the Governor's denial of parole. *Id.* at 1201. The appellate court issued a writ vacating the Governor's reversal of the parole board's decision and reinstated the Board's grant of parole. *Id.* In doing so, the court found that the Governor's decision "is not supported by some evidence rationally indicating [petitioner] presently represents an unreasonable risk to public safety if released on parole," that "the commitment offense did not demonstrate a more 'shockingly vicious use of lethality' or a more 'exceptionally callous disregard for human suffering' than other premeditated first degree murders, or than the murders in other appellate cases in which courts had found no evidence supporting the Governor's decision," and that "even if some evidence supported his characterization of the seriousness of the murder, the gravity of the commitment offense did not supply some evidence 'rationally demonstrating [petitioner] represents an unreasonable danger to public safety at the present time.'" *Id.* Sandra was released on parole on July 11, 2007. *Id.* The Attorney

General sought review in the Supreme Court of California ("California Court"), and the court granted the same. *Id.*

Before the California Court addressed the specific merits of the appeal, it outlined the governing parole statutes and regulations, and the case law surrounding the same. With regard to the Board's parole considerations, Title 15, section 2281 of the California Code of Regulations ("Regs") sets forth factors designed to assist the parole board in assessing whether an inmate poses "an unreasonable risk of danger to society if released from prison," and thus whether he or she is suitable for parole. *Id.* at 1202-03 (citing Regs § 2281(a) and (d)). Suitability factors including items such as an inmate's rehabilitative efforts, demonstration of remorse, and the mitigating circumstances of the crime¹⁶, and the unsuitability factors include things such

¹⁶ Unsuitability factors are: (1) a commitment offense carried out in an "especially heinous, atrocious or cruel manner"; (2) a "[p]revious [r]ecord of [v]iolence"; (3) "a history of unstable or tumultuous relationships with others"; (4) "[s]adistic [s]exual [o]ffenses"; (5) "a lengthy history of severe mental problems related to the offense"; and (6) "[t]he prisoner has engaged in serious misconduct in prison or jail." (Regs., § 2281, subd. (c)(1)–(6).) This subdivision further provides that "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Regs., § 2281, subd. (c).)

Factors supporting a finding that the inmate committed the offense in an especially heinous, atrocious, or cruel manner include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused,

as the heinous, atrocious, or cruel nature of the crime, or an unstable social background¹⁷. *Id.* Even though the regulation includes these guidelines, the decision is ultimately left to the discretion of the board, and Regs § 2281 expressly provides that "the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel." (Regs., § 2281, subds. (c), (d).)

The California Court emphasized that this discretion is "great" and "almost unlimited", and that "[a]s long as the Governor's decision reflects *due consideration of the specified factors* as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." *Id.* at 1204 (quoting *In re Rosenkrantz*, 29 Cal. 4th 616, 677 (2002)). The California Court reasoned that "[r]equiring a modicum of

defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense. (Regs., § 2281, subd. (c)(1).)

¹⁷ Suitability factors are: (1) the absence of a juvenile record; (2) "reasonably stable relationships with others"; (3) signs of remorse; (4) a crime committed "as the result of significant stress in [the prisoner's] life"; (5) battered woman syndrome; (6) the lack of "any significant history of violent crime"; (7) "[t]he prisoner's present age reduces the probability of recidivism"; (8) "[t]he prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release"; and (9) the inmate's "[i]nstitutional activities indicate an enhanced ability to function within the law upon release." *Id.* (citing Regs., § 2281, subd. (d)(1)–(9).)

evidence to support a decision ... will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens." *Id.* (quoting *In re Rosenkrantz*, at 658) (internal quotations and citations omitted). The California Court concluded that "the judiciary is empowered to review a decision by the Board or the Governor to ensure that the decision reflects 'an individualized consideration of the specified criteria' and is not 'arbitrary and capricious.'" *Id.* at 1205 (quoting *In re Rosenkrantz* at 677.)

- f. The California Court held that the denial may only be based on the nature of the crime if some evidence supports the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety.

After discussing at great lengths a line of cases addressing the balance between the discretion afforded the board and Governor and a meaningful review of their decisions, the California Court found, "[i]n sum," that "the Board or the Governor may base a denial-of-parole decision 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." *Id.* at 1221 (citing Regs., § 2281, subd. (a).) The California Court clarified that "the relevant inquiry for a reviewing

court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." *Id.*

With this legal framework in mind, the California Court turned its attention to the facts of the case before it. To begin, the court noted the Governor's expressed reliance on the nature of Sandra's crime to justify denying parole, and the fact that he merely "alluded" to other possible justifications for the denial. *Id.* at 1222. Before delving into the heart of the issue – the improper reliance on the gravity of the crime – the court addressed the other possible justifications which are implied by the Governor, including (1) a lack of remorse, which was contradicted by the record, (2) serious psychiatric problems, which was not supported by evidence, and (3) counseling received for misconduct relating to being late to a class or other appointment, which is not at all linked to a finding that she poses a threat to public safety. *Id.* at 1222-24. Having disposed of these possible considerations, the court focused on the Governor's troubling reliance on the nature of Sandra's crime.

The California Court properly recognized that the task before it was to "determine whether some evidence in the record supports the Governor's

conclusion that petitioner poses an unreasonable public safety risk because of the gravity of her commitment offense." *Id.* at 1224. In doing so, the court examined that facts cited to by the Governor – "the use of multiple weapons, the premeditated nature of the offense, the cruelty attendant to the murder, as well as the petty motive attributed to petitioner" – and held that, although these facts evidence that the crime was carried out in an "especially heinous, atrocious or cruel manner," the truth is that "few murders do not involve attendant facts that support such a conclusion." *Id.* at 1224-25. The court concluded that even though "some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense," "there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." *Id.* at 1225.

As support for this conclusion, the court recounted the suitability factors considered by the board in each of its orders granting parole, including, but not limited to, her self-help, vocational and educational programs, family support and insight into the circumstances of her offense, as well as her clean prison record, positive psychology evaluations, and that the murder was committed under stress of an "emotional love triangle." *Id.* The court also emphasized that the offense occurred thirty-six (36) years prior when Sandra was twenty-four (24) years old, but, in recognizing the nature of

the murder, noted that "there is no doubt [Sandra] is culpable for the premeditated murder of [the victim], despite the emotional stress she was experiencing at the time." *Id.* The Governor was not making a guilty determination based on her crime after a trial; rather he was situated thirty-six (36) years after the crime, and tasked with reviewing Sandra's "twelfth parole suitability hearing and the fourth grant of parole by the Board." *Id.*

The court noted that the psychological evaluations conducted over the past fifteen (15) years determined she committed the crime while experiencing an "unusual amount of stress", and that this, coupled with her age, crime-free life, and rehabilitation, resulted in a low risk of recidivism. *Id.* at 1226. The court found, therefore, that the Governor's determination regarding culpability did "not negate this reasonable evaluation of the evidence, nor does it provide some evidence that petitioner remains a threat to public safety." *Id.* The court continued by finding that the other suitability factors, *i.e.*, Sandra's (i) "exemplary record of conduct" for 24 years of incarceration, (ii) participation in "rehabilitative programming specifically tailored to address the circumstances that led to her commission of the crime, including anger management programs", (iii) "extensive psychological counseling," (iv) remorse for the crime, (v) family support, and (vi) adjudication that she was not a threat to society, "strongly support our view

that the Governor's ultimate conclusion is not supported by some evidence."

Id.

Put another way, the court concluded that "the *unchanging* factor of the gravity of petitioner's commitment offense has no predictive value regarding her current threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." *Id.* (emphasis added). The court made its ruling, and later application thereof, very clear:

When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required "modicum of evidence" of unsuitability.

Id. at 1227.

The court concluded that Sandra's "due process and statutory rights were violated by the Governor's reliance upon the immutable and unchangeable circumstances of her commitment offense in reversing the Board's decision to grant parole," and affirmed the Court of Appeal's decision upholding Sandra's parole. *Id.* at 1227-29.

As discussed below, given the nature of Michael's commitment offense, his significant rehabilitation, family support, clean disciplinary record, length of incarceration, age at the time of the commitment offense, academic achievements, and participation in programs designed to address the offense behavior, *Lawrence* is particularly instructive and the reasoning and ruling therein should be followed by this Court.

2. *The Board's reliance on Michael's commitment offense is improper, as there is no evidence in the record that the offense, or the nature thereof, is predictive of his current threat to public safety or the likelihood of recidivism.*

As articulated in *Lawrence*, the decision to deny parole may only be based "upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history," if "some evidence" "support[s] the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety." *Id.* at 1221. There can be no serious debate that the facts of *Lawrence* are nearly identical to those before this Court – the nature of their crimes, the length of their sentences, rehabilitation efforts, educational and vocational accomplishments, the significant amount of time since the commission of the crimes, the underlying concern in parole determinations regarding the safety of the public, their many parole hearings and ultimate denials, and the denying authorities' improper focus on the nature of the

immutable commitment offense without any evidence that such is predictive of a current threat to society.

Therefore, the relevant inquiry for this Court "is not merely whether [Michael's] crime was especially callous, or shockingly vicious or lethal," which, according to the Board, it was not, "but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board." *Id.* The answer to this question is a resounding NO.¹⁸

a. Michael and Sandra's criminal and rehabilitative histories mirror each other.

To begin, in the early 1970's, Michael and Sandra were convicted of murder and sentenced to life. *See* Sections V(B), VII(C) *supra*. Both had resistance to incarceration – Sandra fled the state and was on the run for eleven (11) years, and Michael obtained two escape convictions. *See* Sections V(B), VII(C)(a) *supra*. After these indiscretions, both set out on a path of rehabilitation, education and reformation, including obtaining degrees,

¹⁸ Michael acknowledges that the parole statutes in *Lawrence* contain mandatory language requiring parole to be issued unless the parole board finds certain elements present, and that Chapter 213's language is permissive, *i.e.* may grant parole. *See* Sections V(A), *supra*. This has no bearing on the Court's analysis and application of *Lawrence*, however, because the Board's decision is still subject to judicial review despite Nevada inmate's not having a right to parole. *See* Section VII(B), *supra*.

participating in programs designed to address the commitment offense, and receiving vocational training. *See* Sections V(C), VII(B)(2) Neither of them had serious disciplinary issues while incarcerated and they both made every effort to better themselves. *See id.* Michael and Sandra spent a considerable numbers of years incarcerated – Michael has been imprisoned for forty-four (44) years and is sixty-four (64) years old. *See* Section III, *supra*.

- b. The statutory schemes under which the Board and Governor made their parole determinations are similar, and the board who considered factors found parole was appropriate.

Admittedly, both authorities, the Board and the Governor, have great discretion in determining whether to grant parole, and judicial review is limited. *See* Section VII(B), *supra*. Both statutory schemes provide mitigating and aggravating factors for consideration, and the ultimate concern is whether the inmate will likely commit another felony if released – *i.e.*, whether they pose a threat to society. *See* Section VII(C), *supra*. In making parole decisions, both the Board here and the Governor in *Lawrence* considered relevant mitigating and aggravating factors, and found that the inmate presented a low risk of committing crimes upon release. *See* Section VII, *supra*. Specifically, the Board found that Michael posed a "Low Risk" of

recidivism,¹⁹ considered all of Michael's accomplishments, including vocational and educational degrees and rehabilitation programs, his family support, lack of disciplinary issues, and the fact that he will begin serving another sentence upon release. *See id.* The Board also considered aggravating factors, *none* of which are close in time and/or can be changed. *See id.*

c. Both denials were based upon immutable, fixed facts.

Ultimately, in denying parole to Michael and Sandra, the Board and Governor relied solely (or in Sandra's case, heavily) on the fact that they were convicted of murder in the early 1970's. *See* Section VII(C)(1), *supra*. Specifically, the Governor relied on the circumstances of the murder, her subsequent flight, denial of involvement in the murder and placement of blame on the victim's husband, and early negative psychological evaluations. *Lawrence*, 44 Cal. 4th at 1199-1201. With regard to his reliance on the nature of Sandra's crime, the Governor outlined the "shockingly vicious use of lethality and an exceptionally callous disregard for human suffering". *Id.* The Governor concluded that "the gravity alone of this murder is a sufficient basis

¹⁹ *See generally* Nancy Mullane, *Life After Murder* (2012) (noting that, over a 20-year period examined, out of 988 convicted murderers released from California prisons, 1 percent were arrested for new crimes, none were rearrested for murder, and none went back to prison).

on which to conclude presently that [petitioner's] release from prison would pose an unreasonable public-safety risk." *Id.*

Here, in the Final Denial Order, the Board identified two reasons for denying parole: (1) "Nature of criminal record is increasingly more serious", and (2) "Impact on victim(s) and/or community." (AR 45). As discussed above, the Board is forbidden from considering the first factor, and the Court can essentially set that aside.²⁰ *See Lawrence*, 44 Cal. 4th at 1222-24 (addressing and setting aside other possible factors the Governor improperly relied upon, such as Sandra's nonexistent psychiatric problems). This leaves the Board with the sole remaining reason for parole as "Impact on victim(s) and/or community." (AR 45). The Board explains in the PRAG form that this relates to the fact that a "22 year old female died as [a] result of being attacked." (AR 46). Importantly, the Board did not find that Michael's crime was particularly extreme or abnormal²¹, as the Governor in *Lawrence* did;

²⁰ Even if the Court is not inclined to set aside this factor, this is also an immutable fixed factor that occurred nearly forty (40) years ago and, coupled with the fact that Michael has not had any disciplinary issues since then, let alone committed any crimes, it is in no way linked to a finding of recidivism.

²¹According to the Nevada Parole Guidelines, the Board is to consider the extreme or abnormal aspects of the crime "when the details of the crime indicate that the crime was conducted in such a manner that shows sophistication in planning or carrying out an offense, or the nature of the conduct is shocking to a normal person. Examples may include but are not limited to: Mutilation or abuse of a corpse following a murder; serial murder;

rather it simply pointed out that someone was murdered. *Id.* As the California Court found, and in no way to seem callous or attempting to lessen the impact of the loss of a life, the truth is that "few murders do not involve attendant facts that support such a conclusion." *Id.* at 1224-25. In light of the Board's reliance on Michael's crime – a single immutable, fixed factor – the case before this Court fits squarely within the purview of *Lawrence*.

d. The Board's denial is not supported by "some evidence" in the record.

The 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." *Id.* at 1224. Michael does not dispute that there is evidence in the record that he was convicted of murder and that a woman died.²² There is no rational nexus between this offense, which occurred forty-

serial sexual assault or numerous victims of a sex offender; the torture of a person or animal." *See Nevada Parole Guidelines*, at A037.

²² Under NRS 213.10885(1), to assist the Board in determining whether to grant or revoke parole, the Board is required to adopt by regulation specific standards for each type of convicted person, including those sentenced to serve a term of imprisonment for life and who committed a capital offense. NRS 213.10885(1)(a) and (b). Thus, the statutory scheme recognizes that inmates serving sentences for murder may be paroled and the Board needs to establish more to demonstrate a current threat. *See In re Lawrence*, 44 Cal. 4th at 1211 (discussing that because the statutory regime for parole provides certain fixed parole dates for inmates serving life sentences, "the underlying circumstances of the commitment offense alone

four (44) years ago, and a finding that Michael is currently a threat to society, especially in light of his extensive rehabilitation. That is, the "mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the [his] release unreasonably endangers public safety." *Id.* at 1225. Something more is needed. Here, as in *Lawrence*, that something more is non-existent.

That is, there is no evidence supporting the conclusion that Michael *continues* to pose a threat to public safety. *See id.* Michael has participated in extensive vocational, educational, and self-help programs tailored to address the commitment offense to rehabilitated himself. *See* Section V(C), *supra*; *see also Lawrence*, 44 Cal. 4th at 1225 (listing Sandra's suitability factors). Michael also has family support and has not had any disciplinary actions since 2007, and prior to that he had minor infractions, such as failing to stand up for headcount. *See* Section V, *supra*; *see also* 44 Cal. 4th at 1225 (discussing family support and clean prison record). As in *Lawrence*, it is worth emphasizing that the offense occurred more than 40 years ago and Michael was twenty (20) years old when he was convicted. *See id.*, *supra*; *see also* 44 Cal. 4th at 1225 (emphasizing that Sandra was 24 years old when she

rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness.")

committed the offense 36 years prior). The Board also found that Michael had a "Low Risk" of recidivism, bolstering a finding that there is no link between the nature of Michael's commitment offense and a likelihood that he will commit a felony and pose a risk to society if released. *See* Section V(E)(4), *supra*; *see also* 44 Cal. 4th at 1225 (finding Sandra had a low risk of recidivism). These factors strongly support the conclusion that the Board's denial is not supported by "some evidence."

While the Board also noted as aggravating factors that Michael received escape convictions and committed the offense while on probation, (i) neither of these were noted as a reason for denial nor do they relate to the nature of the commitment offense, (ii) both of these factors are immutable and took place nearly 40 years ago, and, importantly, (iii) the Board expressly found that Michael was a "Low Risk" for recidivism. *See id.*; *see also* 44 Cal. 4th at 1227-28 (discussing a situation where parole would be properly denied where the inmate *continued* to engage in criminal conduct and recognizing that Sandra fled a felony warrant for 11 years).

As "all of the information in [Michael's] post-conviction record supports the determination that [he] is rehabilitated and no longer poses a danger to public safety, and the [Board] has neither disputed [his] rehabilitative gains nor, importantly, related the commitment offense to

current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense[, *i.e.* the victim died,] absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." *Lawrence*, 44 Cal. 4th at 1227. Thus, Michael's due process and statutory rights were violated by the Board's reliance upon the immutable and unchangeable circumstances of his commitment offense. *Id.*

VIII. 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 essentially 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 20th day of June, 2016.

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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 Word, Version 2010, in 14-point Times New Roman font.

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Proportionately spaced, has a typeface of 14 points or more, and contains 13,646 words.

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 20th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on June 20, 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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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. 14P000251B
) Electronically Filed
) Jul 20 2016 02:51 p.m.
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) Clerk of Supreme Court

*Appeal from the First Judicial District Court
Of the State of Nevada*

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

The question upon which this Court requested briefing is “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 decision in *In re Lawrence*, 190 P.3d 535 (Cal. 2008).”

II. STATEMENT OF THE CASE

On June 6, 1972, Anselmo was convicted of first-degree murder and sentenced to life in prison without the possibility of parole. See Record on Appeal (ROA) 25. During his first decade in prison, Anselmo twice escaped from custody and received two additional, consecutive sentences of ten years in prison. ROA 27, 29.

Almost three decades later, on December 14, 2005, the State of Nevada’s Board of Pardons commuted Anselmo’s sentences. ROA 31. His sentence of life without parole for murder was commuted to a sentence of five years to life in the Nevada Department of Corrections, and one of his sentences for escape was commuted to run concurrently with his life sentence. *Id.*

On February 13, 2006, the Nevada Board of Parole Commissioners (hereinafter “Parole Board”) voted unanimously to deny parole for three years. ROA 33. The Parole Board twice more unanimously voted to deny parole on November 6, 2008, and February 27, 2012. ROA 36, 42.

On November 17, 2014, a panel of the Parole Board voted 3-0 to grant parole, but the panel's action was not ratified and parole was denied by a final vote of 4-3. ROA 45.

On December 30, 2014, Anselmo filed a proper person petition for a writ of habeas corpus challenging the Parole Board's most recent decision to deny parole. In his petition, Anselmo claimed that the denial of parole violated his rights under the United States Constitution. ROA 1-8. Respondents moved to dismiss the petition, and the district court granted the motion on the basis that (1) Anselmo's claims were outside of the scope of the post-conviction habeas statutes, and (2) Nevada law did not provide for a cause of action to challenge the denial of parole. ROA 58-59. The district court also made an alternative finding that to the extent that any of Anselmo's claims were cognizable, they were without merit. ROA 59. This appeal follows.

III. SUMMARY OF THE ARGUMENT

The district court did not err in dismissing Anselmo's post-conviction habeas petition for failure to state a cognizable claim for relief. This Court has long held that there is no due process liberty interest in the granting of parole in Nevada. *Severance v. Armstrong*, 96 Nev. 836, 837, 620 P.2d 369, 369 (1980). The case identified in this Court's order for briefing, *In re Lawrence*, 190 P.3d 535 (Cal. 2008), does not change that fact because the holding in *Lawrence* is premised

on mandatory language in the California statutes that does not exist in Nevada, and this Court has already held—after *Lawrence*—that there is no due process liberty interest in parole release in this state. *See State ex rel. Bd. of Parole Com'rs v. Morrow*, 127 Nev. 265, ___, 255 P.3d 224, 227 (2011).

The district court's decision was also correct because even if the Nevada statutes created a due process liberty interest in parole, the merits of a parole decision would still not be subject to review under the federal constitution. *See Swarthout v. Cooke*, 562 U.S. 216, 220-21 (2011). Because Anselmo raised federal constitutional challenges to the Parole Board's decision to deny parole, rather than any alleged procedural improprieties under state law, he failed to state a cognizable claim for relief.

Moreover, the district court correctly held that a post-conviction habeas corpus petition was not the appropriate remedy to challenge the denial of parole release. *See* NRS 34.720. Anselmo's argument—raised for the first time on appeal—that Parole Board decisions should be subject to some form of judicial review to ensure consideration of the statutorily mandated factors completely misses the mark. To the extent that Nevada law permits the review of a denial of parole, Anselmo should have sought such review by way of a petition for a writ of mandamus.

Finally, the district court below made an alternative ruling on the merits of Anselmo's claims. ROA 56. His claims based on the Eighth Amendment and the Double Jeopardy Clause were facially meritless, and his unsupported accusations that the Parole Board's decision was the result of "psychopathic, insane type hate," ROA 4; *see* ROA 48, did not set forth a meritorious due process claim. Thus, even if this Court somehow concludes that Anselmo presented a cognizable claim for habeas relief in the district court, the district court's merits determination should be affirmed.

To the extent that Anselmo raises new grounds for relief in this appeal, those grounds are waived and this Court need not address them. Furthermore, his new claims lack merit.

IV. ARGUMENT

A. Standards of Review

When this Court reviews the disposition of a post-conviction habeas petition, it grants deference to the lower court's factual findings, but reviews its legal conclusions de novo. *See Rippo v. State*, 132 Nev. ___, ___, 368 P.3d 729, 735 (2016). The district court's resolution of questions of statutory interpretation, like all questions of law, are likewise subject to de novo review. *See Davis v. Beling*, 128 Nev. ___, ___, 278 P.3d 501, 510 (2012).

B. The District Court Correctly Dismissed Anselmo's Petition for Failure to State a Cognizable Claim for Habeas Relief.

The question that the parties have been asked to address in this appeal is “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 decision in *In re Lawrence*, 190 P.3d 535 (Cal. 2008).” The answer is no. In his post-conviction petition for a writ of habeas corpus, Anselmo raised three claims asserting that the Parole Board’s most recent denial of parole had violated his rights under the United States Constitution. ROA 4-6. His claims were not cognizable because the Nevada statutes do not create a due process liberty interest in parole, and therefore Nevada prisoners do not have any protectable rights under the U.S. Constitution in the context of parole release proceedings. *In re Lawrence* does not alter that fact.

1. Nevada Prisoners Do Not Have a Due Process Liberty Interest In Parole Release.

More than three decades ago this Court was presented with a claim from a Nevada prisoner that the denial of his parole application violated the due process of law. *See Severance v. Armstrong*, 96 Nev. 836, 837, 620 P.2d 369, 369 (1980). This Court unequivocally held that, because the Nevada statutes were not phrased in a way “that created a real expectation of...parole,” Nevada prisoners do not have “a constitutionally protected liberty interest sufficient to invoke due process.” *Id.*

at 839, 620 P.2d at 370; *see also Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Since that time, this Court has repeatedly affirmed the holding of *Severance*. *State ex rel. Bd. of Parole Com'rs v. Morrow*, 127 Nev. 265, ___, 255 P.3d 224, 227 (2011); *Niergarth v. Warden*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989); *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 687 P.2d 1158, 1160 (1984).

The reasoning behind this line of cases is straightforward: the United States Supreme Court has held that a convict does not have a protectable liberty interest in parole release unless it is created by a state statute, and the determinative factor in deciding whether a state statute creates such an interest is the wording of the statute itself. *Severance*, 96 Nev. at 839, 620 P.2d at 370; *see Greenholtz*, 442 U.S. at 11-12. The Nevada Legislature has expressly decreed that:

[T]he release or continuation of a person on parole or probation is an act of grace of the State. No person has a right to parole or probation, or to be placed in residential confinement, and it is not intended that the establishment of standards relating thereto create any such right or interest in liberty or property or establish a basis for any cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees.

Nev. Rev. Stat. (NRS) § 213.10705.¹ In addition, NRS 213.1099 makes it clear that the Parole Board's decision whether to release a prisoner on parole is discretionary. That statute states that, subject to specific limitations "the Board

¹ The relevant statutes and codes have been provided in the addendum to Anselmo's opening brief.

may release on parole a prisoner who is otherwise eligible.” NRS 213.1099(1) (emphasis added). Because the Nevada parole statutes are discretionary and do not mandate parole release under any circumstances,² this Court has correctly held that Nevada’s parole statutes do not create a “legitimate expectation of parole release.” *Severance*, 96 Nev. at 839, 620 P.2d at 370; *see also Greenholtz*, 442 U.S. at 11 (reviewing claim that Nebraska statutes created “a protectible expectation of parole”). And because the Nevada statutes do not create a due process liberty interest in parole, the federal constitution does not provide a basis to challenge the actions of the Parole Board. *Morrow*, 127 Nev. at 270-72, 255 P.3d at 227-28.

The district court did not err in dismissing Anselmo’s claims because it was obligated to follow controlling Nevada authority. This Court is likewise constrained by the doctrine of *stare decisis*, and should refrain from altering Nevada law unless there are ““compelling reasons for so doing”” *Armento-Carpio v. State*, 129 Nev. ___, ___, 306 P.3d 395, 398 (2013) (quoting *Miller v. Burk*, 124 Nev. 579, 597, 199 P.3d 1112, 1124 (2008)). As explained in the next section, the California Supreme Court decision in *Lawrence* is not a compelling reason to change Nevada law.

² There is one exception for inmates who are one year away from expiring their final maximum sentence. *See* NRS 213.1215(1). This particular statute does not apply to Anselmo because he is serving a life sentence.

2. The California's Supreme Court's Decision in *In re Lawrence* is Plainly Distinguishable.

The decision of the California Supreme Court in *In re Lawrence*, 190 P.3d 535 (Cal. 2008), does not alter the analysis above in any respect. California prisoners have a due process liberty interest in parole release because the California statutes provide that they must be released on parole absent specific findings that would preclude their release. *Lawrence*, 190 P.3d at 546-47; *see* Cal. Penal Code § 3041(b)(1) (“The panel or the board, sitting en banc, *shall* grant parole to an inmate unless....” (emphasis added)). The California Supreme Court explicitly stated that it was the wording of the California statutes that granted the expectation of parole release to California applicants for parole. *Id.* at 547. And it is only because California prisoners have an expectation of release, and thus a recognizable due process liberty interest, that the courts in California are authorized to review parole decisions. *Id.* at 548.

Lawrence does not change the law in Nevada. In fact, almost three years after *Lawrence* was decided, this Court reaffirmed that there is no due process liberty interest in parole in this state. *Morrow*, 127 Nev. at 270-72, 255 P.3d at 227-28. *Lawrence* is plainly distinguishable based on the differences in wording between the Nevada and California statutes. The Ninth Circuit Court of Appeals, which reviews habeas petitions from both California and Nevada, has recognized that Nevada’s statutory scheme does not create a due process liberty interest.

Moor v. Palmer, 603 F.3d 658, 661-62 (9th Cir. 2010). The district court did not err by following controlling Nevada precedent rather than a plainly distinguishable case from another state.

3. Anselmo Failed to State a Cognizable Claim for Habeas Relief.

As explained above, because there is no due process liberty interest in parole release in Nevada, Anselmo does not have a cause of action to challenge the denial of parole. *Greenholtz*, 442 U.S. at 7; *Morrow*, 127 Nev. at ___, 255 P.3d at 227; *Niergarth*, 105 Nev. at 28, 768 P.2d at 883; *Weakland*, 100 Nev. at 220, 687 P.2d at 1160; *Severance*, 96 Nev. at 837, 620 P.2d at 369. But even if we assume, *arguendo*, that there was a due process liberty interest in parole in Nevada, Anselmo would still have failed to state a cognizable claim for relief. That is because (1) his claims were all based upon the U.S. Constitution, and (2) his claims challenged the result of the proceeding, rather than the process. *See* ROA 3-7.

When a state statute creates an expectation of release on parole, and therefore a due process liberty interest, the courts in that state can review parole decisions by the executive branch to ensure conformity with state law. However, whatever claims a prisoner might have remain purely matters of state law. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (“Whatever liberty interest exists is, of course, a *state* interest” (emphasis in original)). The only federal constitutional right that results is the right to minimal due process. *Id.* at 220-21; *see Greenholtz*,

442 U.S. at 16 (“The Nebraska procedure affords an opportunity to be heard, and when parole is denied it informs the inmate in what respects he falls short of qualifying for parole; this affords the process that is due under these circumstances. The Constitution does not require more.”). The federal constitution never requires any particular decision to grant or deny parole. *Swarthout*, 562 U.S. at 221.

Anselmo claimed in his petition that his rights under the U.S. Constitution were violated by the denial of parole. ROA 3-7. This is not a cognizable claim. In the context of parole release, the most that one can claim under the U.S. Constitution is that there was a denial of basic procedural due process such as, for example, a situation in which the parole applicant was not afforded a hearing or was not informed of the reasons for the denial of parole. *See Swarthout*, 562 U.S. at 220-21. Anselmo made no such claims. *See* ROA at 3-7. Nor did Anselmo cite any state law when he presented his claims to the district court; his state-law claims are presented for the first time on appeal. *Compare* ROA 3-7 and 47-49 *with* Opening Brief (OB) at 7-16, 37-46, and 60-68. Therefore, no matter whether or not there is a due process liberty interest in parole in Nevada, Anselmo failed to state a claim upon which relief could be granted and the district court properly dismissed his petition.

C. Anselmo's Petition Was Also Subject to Dismissal Because His Claims Were Outside the Scope of the Habeas Corpus Statutes.

In addition to the fact that Anselmo failed to state a cognizable claim for relief, the district court also properly dismissed the petition because Anselmo's claims were outside the scope of a post-conviction habeas corpus petition. ROA 56. Anselmo was convicted of murder in 1972, ROA 25, and his claims challenged the denial of parole on his sentence for that crime. ROA 3-7. Post-conviction habeas petitions are limited to (1) requests for relief from a judgment of conviction or sentence and (2) challenges to the computation of time that a petitioner has served. NRS 34.720. Anselmo asserted on the face of his petition that it was a challenge to his period of incarceration. ROA 1. It was not; it was a challenge to the denial of parole. ROA 1-8. His claims were outside the scope of the post-conviction habeas corpus statutes.

To the extent that the Nevada statutes still provide for a "general" habeas corpus petition, that category is limited to claims that a person is unlawfully "committed, detained, confined, or restrained of his or her liberty." NRS 34.360. Anselmo did not specify that his petition was filed pursuant to NRS 34.360. ROA 1. Furthermore, Anselmo is serving a life sentence for first-degree murder and two sentences for escape, the validity of which he did not dispute in his petition. ROA 25-30, 3-7. His challenge to the denial of parole did not implicate any liberty interest. *Morrow*, 127 Nev. at 270-72, 255 P.3d at 227-28. Therefore, even if his

petition was construed as having been filed pursuant to NRS 34.360, his claims were outside the scope of such a petition.

Anselmo argues in his opening brief that there must be some form of judicial review of Parole Board decisions to ensure that the Board applies the standards mandated by the Nevada legislature, as well as the standards it establishes for itself. OB 37-46; *see also* NRS 213.1099(2); NRS 213.10885. The Nevada Legislature has expressly stated that its creation of standards relating to parole was not intended to establish a basis for any cause of action. NRS 213.10705. But even if this Court concludes that some form of judicial review is appropriate, Anselmo's arguments would not justify relief in this case because Anselmo did not seek judicial review in an appropriate manner. Instead, he elected to file constitutional claims in a post-conviction petition for a writ of habeas corpus. ROA 1-8. Those claims, and his petition, were properly dismissed.

This Court's most recent opinion addressing claims similar to Anselmo's addressed (and denied) them in the context of a mandamus petition and a civil lawsuit. *See Morrow*, 127 Nev. at 268-29, 255 P.3d at 225-26. To the extent that Nevada law creates a duty on the part of the Parole Board to consider certain factors when rendering a parole decision, *see, e.g.*, NRS 213.1099(2), a petition for a writ of mandamus filed in a district court is an adequate remedy to compel consideration of those factors. *See* NRS 34.160. However, the scope of such a petition would be

limited. Because the ultimate decision to grant or deny parole is discretionary, *see* NRS 213.1099(1), mandamus will not lie to challenge the Parole Board's decision to grant or deny parole. It will only serve as a state-law remedy to compel *consideration* of the factors mandated by Nevada law.

Anselmo's argument that the Parole Board's compliance with Nevada law should be subject to judicial review only serves to highlight the fact that his habeas petition was an inappropriate vehicle for his claims. He fails to show that the district court erred by dismissing the non-cognizable federal constitutional claims that he raised in a post-conviction habeas petition.

D. The Claims In Anselmo's Petition Were Facially Meritless.

Even if Anselmo's petition raised cognizable habeas claims, the district court's decision should nevertheless be affirmed on its ruling that Anselmo's claims lacked merit. ROA 56 ("To the extent that any of Petitioner's claims are cognizable in a petition for a writ of habeas corpus, the Court finds that they are patently without merit."). The district court's ruling was correct.

The first claim in Anselmo's petition was that the Parole Board's denial of parole violated the Eighth Amendment prohibition on cruel and unusual punishment. ROA 4-5. This claim is facially meritless. Because a sentence of life in prison is not disproportionate to the crime of first-degree murder, requiring Anselmo to serve his

sentence in prison rather than on parole does not violate the Eighth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

Anselmo's second claim was that the denial of parole violated his 11th and 14th Amendment rights to equal protection and due process. ROA 5. Specifically, Anselmo argued that the Parole Board's reliance on an unchanging factor in its parole analysis violated his federal constitutional rights. *Id.* (citing *Biggs v. Terhune*, 334 F.3d 910, 916 (9th Cir. 2003), *overruled by Hayward v. Marshall*, 603 F.3d 546, 555 (9th Cir. 2010)). The Ninth Circuit case law upon which Anselmo relied is not binding in Nevada, and has been overruled. *Hayward*, 603 F.3d at 555. As explained above, there are no protectable federal constitutional rights in the context of parole release hearings in Nevada. *Supra*, § IV(B)(1). Even if there were, they would only be minimal procedural due process rights. *Supra*, § IV(B)(3). Anselmo's claim did not allege any specific violation of procedural due process; it argued that the repeated denial of parole was itself a violation of due process. ROA 5. This claim was facially meritless.

Finally, Anselmo presented a cursory claim that the repeated denial of parole was a violation of the Double Jeopardy Clause because it amounted to "resentenc[ing him] to the death penalty." ROA 6. This claim was facially meritless. He has not been sentenced to death in any manner whatsoever, and the denial of parole simply means he will remain in custody until his next parole hearing.

Even if Anselmo's claims were cognizable in a habeas petition, they were properly denied because they lacked merit.

E. Anselmo's New Claims Do Not Merit Relief.

In his opening brief, Anselmo raises several arguments for the first time on appeal. First, he contends that the decision to deny parole must be reversed because the Parole Board failed to adhere to its own criteria for making parole determinations. OB 43-47. He also argues that the Parole Board's consideration of the severity of his crime in making its parole decision amounts to a permanent denial of parole eligibility. *Id.* And finally, he contends that a substantive comparison between the Parole Board's decision in his case and the California Supreme Court's application of its parole standards to Sandra Lawrence in the *Lawrence* opinion demonstrate that he should have been released on parole. *Id.* at 47-68. His arguments are not a valid basis for relief because (1) they were not presented in the district court below, (2) they put the cart before the horse because they are premised on the demonstrably erroneous assumption that he has a protectable due process liberty interest, and (3) they lack merit.

1. Anselmo Failed to Raise His Claims in the District Court.

The arguments listed above were not presented to the district court. *See* ROA 1-8. Claims that are not raised in the district court should be deemed waived, and this Court generally declines to consider them. *State Dep't of Taxation v. Masco*

Builder, 129 Nev. ___, ___, 312 P.3d 475, 479 (2013); *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446-47, 488 P.2d 911, 915 (1971) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”). Anselmo’s new claims should not be considered by this Court.

2. Review of the Parole Board’s Actions Is Not Appropriate Absent a Protectable Liberty Interest.

Anselmo spends much of his brief arguing that he is entitled to the same considerations that were afforded to Sandra Lawrence by the California Supreme Court in the *Lawrence* case. OB 47-68. His arguments are premature because *Lawrence* was premised upon the holding that the California statutes created a protectable due process liberty interest in parole release. *Lawrence*, 190 P.3d at 547. Until this Court concludes that Anselmo has the same due process liberty interest in parole release that *Lawrence* had, he is not entitled to assert the same rights. Even if this Court changes the law in Nevada and concludes that the district court’s dismissal of Anselmo’s petition was erroneous, the appropriate remedy would be a remand to the district court to reconsider the merits of Anselmo’s claims in light of the change in the law. This Court has no reason to consider the merits of Anselmo’s new claims in the first instance.

3. Anselmo's New Claims Lack Merit.

In addition to the fact that Anselmo's claims have been waived and their very presentation is premised upon erroneous assumptions about the law, they also lack merit. Respondents do not wish to belabor the point because, to the extent that they are valid claims, they should be considered in the district court in the first instance. But a few examples are illustrative.

a. The Parole Board Has Not Ruled Anselmo Ineligible For Parole.

First, citing a series of South Carolina cases, Anselmo argues in his opening brief that the Parole Board's denial of parole was a de facto finding that he is not even eligible for parole. OB 44-46 (citing *Cooper v. S.C. Dep't of Prob., Parole & Pardons Servs.*, 661 S.E.2d 106 (S.C. 2008), *Sullivan v. S.C. Dep't of Corr.*, 586 S.E.2d 124, 127 (S.C. 2003), and *Furtick v. S.C. Dep't of Prob., Parole & Pardons Servs.*, 576 S.E.2d 146 (S.C. 2003)). His argument is frivolous. The South Carolina case law upon which he relies is not relevant because it involves the application of specific provisions of South Carolina law that do not exist in Nevada. *See Sullivan*, 586 S.E.2d at 124 n.4; *Furtick*, 576 S.E.2d at 149. Prior to holding any parole hearing, South Carolina law requires its parole department to determine whether a particular offender is eligible for parole before he can "gain access to the parole board." *Furtick*, 576 S.E.2d at 149; S.C. Code Ann. § 24-21-640 (2010). The South Carolina courts have held that this determination involves a liberty interest and that

minimal due process protections are required. *Furtick*, 576 S.E.2d at 149. Nevada law does not require such a determination and the Nevada Courts have expressly rejected the notion that a liberty interest is implicated by Nevada's statutes. *Morrow*, 127 Nev. at 270-72, 255 P.3d at 227-28.

Moreover, Anselmo's reliance on these cases is premised on a misrepresentation of the facts. He incorrectly asserts that the parole board relied on only two aggravating factors when it denied his parole on November 17, 2014. OB 43 n.15. In another section, Anselmo asserts that the Parole Board "relied solely" on his murder conviction. OB 63. These statements are false. The Parole Board listed three aggravating factors: (1) the impact of Anselmo's crime on the victims and/or the community (the original crime), (2) the fact that he had committed multiple crimes while incarcerated, on bail, on escape status, or while under parole or probation supervision (on probation when he committed the original murder plus two additional escape convictions), and (3) the fact that his crimes had grown increasingly more serious (his criminal history began with property crimes but moved to first-degree murder). ROA 46.

Anselmo also incorrectly argues that the Board's reliance on factors that cannot change over time, like the facts of his crime, amount to a finding of parole ineligibility. OB 45. His argument ignores the obvious fact that his criminal history is only a part of the determination. The Board considers mitigating factors as well,

which Anselmo can change. In the most recent hearing, it considered four of them. ROA 46. The misleading nature of his argument is demonstrated by the fact that although his criminal history has not changed, the record reflects shifting opinions on the propriety of a parole release among the members of the Parole Board. *Compare* ROA 45 (4-3 vote to deny parole in 2014) *with* ROA 42 (unanimous vote to deny parole in 2012). For example, Parole Commissioner Ed Gray voted to deny parole in 2012, but voted to grant parole in 2014. *Id.* Anselmo's frustration that he has been denied parole multiple times is perhaps understandable, but it does not justify the unsupported allegation that the Parole Board's past decisions amount to a de facto ruling that he is permanently ineligible for parole. That assertion is just unproductive hyperbole.

b. The Parole Board's Standards Are Not Mandatory.

As a second example, Anselmo claims that the Parole Board "failed to adhere to its own guidelines." OB 43-44. However, his arguments are misleading because (1) the "guidelines" that he refers to are part of a document on the Parole Board website providing the public with definitions for certain terms, and not an officially adopted standard, and (2) he conveniently omits the fact that the relevant provisions of the Nevada Administrative Code (NAC) expressly state that the Parole Board has an unrestricted right to deviate from its standards.

The guideline that Anselmo hangs his hat on is the definition for the aggravating factor “Nature of criminal record is increasingly more serious.” OB 43-44; *See* NAC 213.518(2)(k); Nevada Parole Guidelines, Aggravating and Mitigating Factors Definitions.³ The document in question suggests that this specific aggravating factor should not be applied to persons seeking parole from a murder conviction because they have already committed “the most serious of crimes.” *Id.* Whether or not one agrees with the stated definition of the aggravating circumstance is irrelevant, because the application of the Parole Board standards is permissive, and not mandatory. NAC 213.560(1) (“The standards contained in NAC 213.512 to 213.518, inclusive, and 213.550 *may* be considered by the Board in determining whether to grant, deny, continue, or revoke parole.” (emphasis added)). The same section provides that “nothing contained in these sections shall be construed to restrict the authority of the Board.” NAC 213.560(1). The Administrative Code also provides that the Parole Board may deviate from its standards based upon any factor “the Board deems relevant to the determination of whether to grant, deny, continue, or revoke parole.” NAC 213.560(2).

Even if the Parole Board misapplied one of its standards, that error does not violate a requirement of Nevada law, nor create a cause of action under the laws of

³Available at http://parole.nv.gov/Information/Forms_Pages/Guideline_Related_Forms/Nevada_Parole_Guidelines_-_Aggravating_and_Mitigating_Factors_Definitions/.

this state. NRS 213.10705. The Parole Board adopts its own standards, and has the power to change them. NRS 213.10885. It is notable that on one hand Anselmo complains that the Parole Board misapplied an aggravating factor that was created by the Parole Board itself and was not mandated by the Legislature, while on the other hand contending that the Parole Board should not consider aggravating factors that the Legislature specifically mandated by statute. *See* OB 60-68; NRS 213.10885(2)(a) and (b) (mandating that the Parole Board consider the severity of the crime committed and the person's criminal history).

Respondents have set forth a plethora of reasons why the district court did not err in dismissing Anselmo's petition. But even if this Court ultimately decides that Anselmo can properly raise the claims that he has presented on appeal, those claims lack merit.

V. CONCLUSION

It is well-established law that in the State of Nevada a prisoner does not have a due process liberty interest in release on parole. Therefore, the district court below correctly dismissed the federal constitutional claims in Anselmo's post-conviction habeas petition for failure to state a claim upon which relief can be granted, and its order should be affirmed. To the extent that Anselmo has any state-law right to challenge the decision of the Nevada Board of Parole Commissioners to deny his

release on parole, he failed to seek relief in an appropriate manner and his claims are ultimately without merit. No relief is warranted in this case.

RESPECTFULLY SUBMITTED this 20th day of July, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Daniel M. Roche
DANIEL M. ROCHE
Deputy Attorney General

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

2. I further certify that this answering brief complies with the page- or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because:

This answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,115 words.

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.

RESPECTFULLY SUBMITTED this 20th day of July, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Daniel M. Roche
DANIEL M. ROCHE
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 20th day of July, 2016, I filed and served the foregoing RESPONDENTS-APPELLEES' ANSWERING BRIEF with the Clerk of the Court of the Supreme Court of Nevada, by using the Court's Electronic Filing System, upon the following:

Kirk B. Lenhard, Esq.
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/s/ Rhonda Collins
An Employee of the Office
of the Attorney General

CLERK OF THE SUPREME COURT
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CARSON CITY, NEVADA 89701-4702
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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
District Court Case No. 14EW00029

NOTICE OF ORAL ARGUMENT SETTING

DATE: December 29, 2016

TO: Brownstein Hyatt Farber Schreck, LLP/Las Vegas \ Kirk B. Lenhard
Attorney General/Carson City \ Adam Paul Laxalt, Attorney General, Daniel M.
Roche

Pursuant to **NRAP 34**, the above-referenced matter is set for oral argument as follows:

Date: March 16, 2017
Time: 9:30 AM*
Length: 30 minutes
Location: Reed High School
1350 Baring Blvd.
Sparks, NV 89434

BEFORE: Northern Panel 17
Justices Hardesty, Parraguirre, Stiglich

*Start time for argument may be subject to adjustment to coincide with school
schedule.

16-40483

Notification List

Electronic

Attorney General/Carson City \ Daniel M. Roche

Attorney General/Carson City \ Adam Paul Laxalt, Attorney General

Brownstein Hyatt Farber Schreck, LLP/Las Vegas \ Kirk B. Lenhard

Anne R. Traum

Legal Aid Center of Southern Nevada, Inc. \ Barbara E. Buckley

Snell & Wilmer, LLP/Las Vegas \ Kelly H. Dove

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Appellant,
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JACKSON; TONY CORDA; ADAM
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STATE OF NEVADA BOARD OF
PAROLE,
Respondents.

No. 67619

FILED

JUN 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER

This is an appeal from a district court order dismissing a pro se postconviction petition for a writ of habeas corpus. In its order of dismissal, the district court concluded that appellant Michael Anselmo primarily challenged the denial of parole, and that such a claim is not cognizable in a postconviction petition for a writ of habeas corpus.

Generally, this was a correct legal conclusion, as parole is an act of grace in Nevada, and no cause of action exists when parole is denied. See NRS 213.10705; *Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 678 P.2d 1158, 1160 (1984). Further, these claims are not cognizable in a petition for a writ of habeas corpus because Anselmo is confined pursuant to a valid judgment conviction, and his claims related to parole do not demonstrate unlawful confinement. See NRS 34.360.

Anselmo filed a timely notice of appeal. This court entered an order referring Anselmo for the appointment of pro bono counsel. *Anselmo v. Bisbee*, Docket No. 67619 (Order Regarding Pro Bono Counsel, November 24, 2015). This court specifically requested briefing regarding the California case of *In re Lawrence*, 190 P.3d 535 (Cal. 2008).


Pro bono counsel filed an opening brief and, in addition to Anselmo's claims related to *Lawrence*, counsel also argued that Anselmo was entitled to a new parole hearing on the basis that the Parole Board violated its own internal guidelines in assessing Anselmo's suitability for parole. This claim was not raised in the district court. Further, for the reasons discussed above, this claim and any claims related to *Lawrence* would be more properly raised in a petition for a writ of mandamus, rather than a petition for a writ of habeas corpus. See NRS 34.160; NRS 34.170 (noting that extraordinary relief may be available where there is no "plain, speedy and adequate remedy in the ordinary course of law"); NRS 34.360; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.").

Therefore, given the late appointment of counsel, as well as the unique procedural posture of this case, and the nature of the relief requested, we direct the clerk of this court to convert Anselmo's appeal into an original petition for a writ of mandamus. Because the Parole Board is a named party to this appeal, no further service of the petition is required. NRS 34.200.

It is so ORDERED.

 J.
Hardesty

 J.
Parraguirre

 J.
Stiglich

cc: Hon. James Todd Russell, District Judge
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Attorney General/Carson City
Carson City Clerk

133 Nev., Advance Opinion 45
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Petitioner,
vs.
CONNIE BISBEE, CHAIRMAN; SUSAN
JACKSON, TONY CORDA, ADAM
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STATE OF NEVADA BOARD OF
PAROLE,
Real Parties in Interest.

No. 67619

FILED

JUN 29 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Original petition for extraordinary relief requesting the Parole Board to reconsider its decision to deny parole partially based on an inapplicable aggravating factor.

Petition granted.

Brownstein Hyatt Farber Schreck, LLP, and Kirk B. Lenhard and Emily A. Ellis, Las Vegas,
for Petitioner.

Adam Paul Laxalt, Attorney General, Jeffrey M. Conner, Assistant Solicitor General, and Daniel M. Roche, Deputy Attorney General, Carson City,
for Real Parties in Interest.

BEFORE HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

Generally, an inmate does not have any protectable due process or liberty interest in release on parole, unless that right is created by state statute. Given the clear discretionary language of Nevada's parole statute, this court has consistently held that Nevada inmates have no protectable liberty interest in release on parole. Accordingly, this court will not disturb a determination of the Nevada Parole Board (Board) to deny parole for any reason authorized by regulation or statute.

Nonetheless, eligible Nevada inmates do have a statutory right to be considered for parole by the Board. When the Board clearly misapplies its own internal guidelines in assessing whether to grant parole, this court cannot say that the inmate received the consideration to which they are statutorily entitled. Therefore, under the limited circumstances presented in this case, we conclude that a new parole hearing is warranted.

FACTS AND PROCEDURAL HISTORY

In 1972, appellant Michael P. Anselmo was convicted of murder and sentenced to life in prison without the possibility of parole. He sustained subsequent convictions for escape in 1976 and 1977, and was sentenced to a consecutive ten years for each conviction.

For the next twenty years, Anselmo largely became a model prisoner. In 2006, the Pardons Board commuted his sentences to life with the possibility of parole after five years, with one concurrent ten-year sentence, and one consecutive ten-year sentence.

Between 2006 and 2012, Anselmo appeared before the Parole Board on three separate occasions. Each time, the Board denied parole,

primarily citing to the seriousness of Anselmo's underlying offense and/or the impact of his offense on the victim.

Anselmo appeared before the Parole Board for the hearing at issue on November 17, 2014. Pursuant to the standards promulgated in the Nevada Administrative Code, the Board completed a Parole Risk Assessment, which assigned Anselmo's offense a "severity level" of "[h]ighest," and Anselmo a "[r]isk [s]core" of "[l]ow," indicating that the Board should consider certain aggravating and mitigating factors in determining whether parole was appropriate.

As mitigating factors, the Board noted that Anselmo had not committed a disciplinary infraction since 2007, had community or family support, would be paroled to his pending escape sentence, and had participated in extensive educational programming. As aggravating factors, the Board noted the impact on the victim and/or community, that Anselmo had sustained two convictions for escape while incarcerated, and that the "[n]ature of criminal record is increasingly more serious: Previous offenses are property crimes."

The three hearing members who conducted the parole hearing recommended granting parole. That recommendation was not, however, ratified by a majority of the Board, as the remaining four Board members voted to deny parole. The Board's written decision indicated that the "[n]ature of criminal record is increasingly more serious" and the "[i]mpact on victim(s) and/or community." Anselmo filed a request for reconsideration with the Board, which was denied.

Anselmo now argues that he is entitled to a new parole hearing because (1) the Board's denial of parole based on certain immutable characteristics, such as the seriousness of the underlying

offense, violates the Due Process Clause; and (2) the Board failed to follow its own internal guidelines in assessing the applicable aggravating and mitigating factors.

DISCUSSION

Standard of review

“A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); see NRS 34.160. “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 omitted) (internal quotation marks omitted). “[W]here there is [no] plain, speedy and adequate remedy in the ordinary course of law,” extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

In this case, there is no applicable statutory vehicle through which Anselmo may challenge the Board’s actions. Accordingly, we consider whether the actions of the Board were contrary to the established rules of law, warranting the issuance of a writ of mandamus.

The Board may deny parole for any reason authorized by statute

When an inmate becomes eligible for parole, “the [Parole] Board shall consider and may authorize the release of the prisoner on parole.” NRS 213.140(1). Despite this guarantee that an eligible inmate will be considered for parole, “the release . . . of a person on parole . . . is an act of grace of the State. No person has a right to parole . . .” NRS 213.10705.

The United States Supreme Court has determined that an inmate does not have any protectable due process or liberty interest in release on parole, unless that right is created by state statute. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). This court has consistently held that given its discretionary language, Nevada's parole statute creates no "protectable liberty interest sufficient to invoke the Due Process Clause." *State, Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 271, 255 P.3d 224, 228 (2011); *see also Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 678 P.2d 1158, 1160 (1984) (holding that because no due process right to parole exists, the Board is not constitutionally required to provide any reason for the denial of parole); *Severance v. Armstrong*, 96 Nev. 836, 839, 620 P.2d 369, 370 (1980).

Despite this firmly settled law, Anselmo urges this court to adopt the California approach taken in *In re Lawrence*, 190 P.3d 535 (Cal. 2008), with respect to the circumstances in which parole may be denied based on the egregiousness of the underlying offense. Under *Lawrence*, parole may be denied based on the egregiousness of the underlying offense only if the parole board also finds that the inmate continues to pose a current threat to public safety. *Id.* at 560. In other words, the court concluded that "[t]he relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current dangerousness*." *Id.* Accordingly, the California court determined that where the record was "devoid of any evidence" indicating that the inmate posed a current threat to public safety, the inmate's "due process and statutory rights were violated by the . . . reliance upon the immutable and unchangeable circumstances of her commitment offense." *Id.* at 564.

There is, however, a significant difference between the parole statutes at issue in *Lawrence* and those in Nevada that is central to the decision in *Lawrence*. Specifically, the California Parole Board “*must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction.” *Id.* at 547 (internal quotation marks omitted). Based on that language, the California Supreme Court has determined that eligible California inmates have a due process right in the grant of parole, such that a decision to deny parole is subject to judicial review. *See In re Rosenkrantz*, 59 P.3d 174, 205 (Cal. 2002). This fact is central to the conclusion in *Lawrence* that some evidence must support a finding of current dangerousness. *See* 190 P.3d at 560.

In contrast, as discussed above, the Nevada statutory scheme does not provide any due process right in the grant of parole. Therefore, unlike the California courts, this court generally will not review the evidence supporting a decision of the Board. *See Morrow*, 127 Nev. at 271-72, 255 P.3d at 228 (reiterating that no cause of action exists when parole is denied). Both NRS 213.1099(2)(c) and NRS 213.10885(2)(a) clearly provide that the Board “shall” consider the seriousness of the underlying offense in determining whether to grant or deny parole. Given that Nevada law clearly allows for the denial of parole based on the severity of the crime committed, it cannot be said that the Board acted contrary to established law in considering the seriousness of the underlying offense. As such, the Board’s actions in this respect would not warrant relief in mandamus. *See Armstrong*, 127 Nev. at 931-32, 267 P.3d at 780 (explaining that writ of mandamus may issue upon a showing that a state

agency acted "contrary to the...established rules of law" (internal quotation marks omitted)).

The Board must follow its internal guidelines

Anselmo also argues that he is entitled to a new parole hearing because the Board failed to follow its internal guidelines when it noted as a reason for denial that the "[n]ature of criminal record is increasingly more serious." This court agrees.

Pursuant to NRS 213.1099(2) and NRS 213.10885(1), the Board must promulgate detailed standards to determine whether the release of an inmate on parole is appropriate. These standards are codified in the Nevada Administrative Code. Under NAC 213.512(1), the Board must first assign "a severity level" to the crime for which parole is being considered. The Board must then assign "a risk level" "using a combination of risk factors that predict recidivism." NAC 213.514(1)-(2). Based on these scores, NAC 213.516 provides an assessment regarding whether to grant parole, deny parole, or consider the other aggravating and mitigating factors set forth in NAC 213.518.

In this case, the severity level of Anselmo's crime was rated "[h]ighest," while his risk level was considered "[l]ow." In these circumstances, NAC 213.516 indicates that the Board should consider aggravating and mitigating factors. The Board noted multiple mitigating factors in Anselmo's favor, including his favorable disciplinary record, his participating in programming, family support, and the fact that he would be paroled to a consecutive sentence. See NAC 213.518(3)(a), (c), (g), and (i). As aggravating factors, the Board noted the severe impact of the crime on the victim, as provided by NAC 213.518(2)(g), and also noted that the "[n]ature of criminal record is increasingly more serious," as provided by NAC 213.518(2)(k).

With respect to the aggravating factor under NAC 213.518(2)(k), the internal guidelines for the Division of Parole and Probation state:

Nature of criminal record is increasingly more serious.

Indicate this factor if criminal conduct of the person has escalated over time to include violence toward victims or others, or the scale of criminal activity has increased over time. If the person is now serving a sentence of life, or Murder/Sexual Assault, don't use this as the person has already committed the most serious of crimes. This factor is used as a possible indicator of more serious activity in the future.

Nevada Parole Guidelines Aggravating and Mitigating Factors Definitions, http://parole.nv.gov/uploadedFiles/parolenvgov/content/Information/Aggravating_and_Mitigating_Factors_Definitions.pdf (last visited March 21, 2017). Based on the plain language of the internal guidelines, this aggravator should not have been applied to Anselmo.

This court will not review the ultimate decision of the Board to grant or deny parole, as Anselmo has no liberty interest in release on parole. *Morrow*, 127 Nev. at 271-72, 255 P.3d at 228. Nonetheless, NRS 213.140(1) clearly provides that "the Board shall consider" eligible inmates for parole. Therefore, while Anselmo has no due process right in the grant of parole itself, Nevada law clearly confers a right to be "consider[ed]" for parole.

In evaluating whether the Board's error impacted Anselmo's right to be considered for parole, we find the South Carolina case of *Cooper v. South Carolina Department of Probation, Parole & Pardon Services*, 661 S.E.2d 106 (S.C. 2008), to be instructive. In *Cooper*, the South Carolina Supreme Court examined a case in which an inmate argued that the

South Carolina Parole Board's failure to consider all statutorily mandated criteria constituted an impermissible infringement on the inmate's statutory right to be reviewed by the Board. *Id.* at 110.¹

While noting that it appeared the Board had denied parole for entirely permissible reasons, the court observed:

If a Parole Board deviates from or 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.

Undoubtedly, the Parole Board is the sole authority with respect to decisions regarding the grant or denial of parole. However, the Legislature created this Board to operate within certain parameters. We do not believe the Legislature established the Board and intended for it to render decisions without any means of accountability.

Id. at 111. Accordingly, the court determined the inmate was entitled to relief in the form of a new parole hearing. *Id.* at 112.

While not factually identical, *Cooper* indicates that while the decision to grant or deny parole is not generally reviewable, the Board is still obligated to act within established parameters. Notably, the error in this case is not related to the weight or sufficiency of the evidence underlying any of the criteria relevant to the decision to deny parole. Rather, the Board's internal guidelines clearly indicated that the aggravator set forth in NAC 213.518(2)(k) should not be used in those

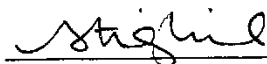
¹As in Nevada, parole in South Carolina is a privilege, not a right. *Cooper*, 661 S.E.2d at 110. However, inmates who are eligible for parole are entitled by statute to a yearly review by the parole board. S.C. Code Ann. § 24-21-620 (2007).

cases where the inmate is serving a life sentence for murder. Notably, the decision of the Board was extremely close, with the three members voting to grant parole. Under these limited circumstances, we conclude that the Board's consideration of the inapplicable aggravator in NAC 213.518(2)(k) infringed upon Anselmo's statutory right to receive proper consideration for parole. Given the Board's clear error, we conclude that extraordinary relief is necessary in this instance.

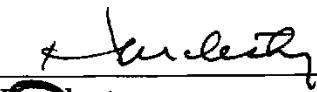

CONCLUSION

Parole is an act of grace in Nevada, and this court will not disturb a decision to deny parole for any reason authorized by statute. Nonetheless, eligible Nevada inmates have a statutory right to be considered for parole by the Board. This court cannot say that an inmate receives proper consideration when the Board's decision is based in part on an inapplicable aggravating factor.

Therefore, we grant Anselmo's petition for extraordinary relief, and direct the clerk of this court to issue a writ of mandamus instructing the Board to vacate its November 17, 2014, denial of parole and conduct a new parole hearing in which NAC 213.518(2)(k) is not applied.


Stiglich, J.

We concur:


Hardesty, J.

Parraguirre, J.



SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
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June 29, 2017

Kirk B. Lenhard
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
100 N. City Pkwy, Ste 1600
Las Vegas, NV 89106-4614

Re: Anselmo (Michael) vs. Bisbee
No. 67619, Dist. Ct. Case No. 14EW00029

Dear Mr. Lenhard:

Enclosed please find the original and one copy of the Writ of Mandamus and one copy of the opinion for service upon The State of Nevada Board of Parole. Please return the original writ with proof of service attached thereto.

Copies of the writ and order are enclosed for your files.

Sincerely,

Rory Wunsch
Deputy Clerk

NW:
Enclosures
cc w/enclosures (writ & order):
Attorney General/Carson City

17-21751

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Petitioner,

No. 67619

vs.

CONNIE BISBEE, CHAIRMAN; SUSAN
JACKSON; TONY CORDA; ADAM
ENDEL, COMMISSIONERS; AND THE
STATE OF NEVADA BOARD OF
PAROLE,
Real Parties in Interest.

WRIT OF MANDAMUS

TO: The State of Nevada Board of Parole:

WHEREAS, this Court having made and filed its written decision
that a writ of mandamus issue,

NOW, THEREFORE, you are instructed to vacate your November
14, 2014, denial of parole and conduct a new parole hearing in which NAC
213.518(2)(k) is not applied, in the case entitled Michael P. Anselmo vs.
Connie Bisbee, Chairman; Susan Jackson, Tony Corda, Adam Endel,
Commissioners; Nevada Board of Parole, case no. 14EW00029.

WITNESS The Honorables Lidia Stiglich, James W. Hardesty, and
Ron Parraguirre, Associate Justices of the Supreme Court of the State of
Nevada, and attested by my hand and seal this 29th day of June, 2017.



B. Mooneyhan
Assistant Clerk

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

RECEIPT OF COPY

RECEIPT OF COPY of (1) the Supreme Court of the State of Nevada's Writ of Mandamus to the State of Nevada Board of Parole issued on June 29, 2017; and (2) the Supreme Court of the State of Nevada's Opinion issued on June 29, 2017, in the above-referenced matter, is hereby acknowledged on this 5 day of July, 2017.

THE STATE OF NEVADA
BOARD OF PAROLE

BY: 

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. 14-0002518
Electronically Filed
Jul 17 2017 02:31 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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, 2016), 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.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jeffrey M. Conner
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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
Attorney General

By: /s/ Jeffrey M. Conner
JEFFREY M. CONNER
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:

Kirk B. Lenhard, Esq.
Emily A. Ellis, Esq.
Brownstein Hyatt Farber Schreck, LLP
50 W Liberty Street, #1030
Reno, Nevada 89501

/s/ Amanda White

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Petitioner,

vs.

CONNIE BISBEE, CHAIRMAN; SUSAN
JACKSON; TONY CORDA; ADAM
ENDEL, COMMISSIONERS; AND THE
STATE OF NEVADA BOARD OF
PAROLE,
Real Parties in Interest.

No. 67619

FILED

OCT 11 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING ANSWER

Real parties in interest have petitioned for rehearing of the opinion entered on June 29, 2017. Having reviewed the petition, it appears that an answer may assist the court in resolving the issues presented. Accordingly, petitioner shall have 15 days from the date of this order to file and serve an answer to the petition for rehearing. *See* NRAP 40.

It is so ORDERED.

J. J. Sanders, J.

cc: Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Attorney General/Carson City
Legal Aid Center of Southern Nevada, Inc.
Snell & Wilmer, LLP
Anne R. Traum

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

Electronically Filed
Oct 30 2017 08:19 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

ANSWER TO PETITION FOR PANEL REHEARING

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ANSWER TO PETITION FOR PANEL REHEARING

I. INTRODUCTION

This Court's Opinion is a vindication of due process rights for eligible inmates, such as Mr. Anselmo, to be properly considered for parole by the Board—and hardly a "Pyrrhic victory," as Respondents' Petition labels it. Still, the Opinion was *very* limited in scope and expressly held that, while "Nevada inmates have no protectable liberty interest in release on parole," "eligible Nevada inmates do have a statutory right to be considered for parole by the Board." (*See* Opinion at 2.) The Court further narrowed its Opinion by holding that "under the *limited* circumstances presented *in this case*," a new parole hearing is warranted. (*Id.*) (emphasis added). Despite Respondents' contention and attempt to muddy the water, the Opinion is clear and there is absolutely no "confusion" as to what the Court held.

It appears that the only parties unclear as to what this Court ordered are Respondents – in the face of this Court's mandate to hold a *re*-hearing of Mr. Anselmo's November 17, 2014, parole hearing, the Board sat on its hands for nearly four months without scheduling the *re*-hearing or taking any action at all, besides filing a meritless Petition for Panel Rehearing ("Petition").¹

¹ Respondents' intention to disregard this Court's mandate is obvious. Respondents tout that Mr. Anselmo will receive another parole hearing

Despite Respondents' attempt to paint it as such, this Court's Opinion is nothing close to an "advisory opinion"; rather, it is a well-reasoned, narrow ruling supported by case law, the statutory scheme governing parole hearings, and public policy, that directed the Board to simply follow its "own internal guidelines." (*Id.*) In fact, the Opinion could result in Mr. Anselmo being granted parole *and* being given credit for his time served since his November 2014 denial. An Opinion that could yield such an outcome can hardly be deemed advisory.

Further, Respondents' Petition baldly insinuates that the Opinion will stir up a hornet's nest, forecasting an onslaught of prisoner petitions challenging parole denials, which is not only unsupported and irrelevant to the Court's Opinion in the instant case, but makes light of a deeply concerning issue identified by the Court: the Board's improper consideration of factors that "infringed upon Anselmo's statutory right to receive proper consideration for parole." (*See* Opinion, p. 10.)

regardless of this Court's Opinion, *see* Petition at 1, and, without seeking a stay of the Court's mandate, they waited for just that. The only parole hearing that is currently scheduled (which was only recently put on calendar to occur November 16, 2017) is the statutorily required parole hearing Mr. Anselmo was set to receive three years following his 2014 parole denial. To be clear, a *re-hearing* of Mr. Anselmo's November 2014 parole hearing has not been scheduled.

In that same vein, Respondents' aspirational vision of the Board appears to be one free to *abandon* its own internal guidelines when considering the release of Nevada's incarcerated. Setting aside Respondents' fatal failure to adhere to the Nevada Rule of Appellate Procedure governing petitions for rehearing, Respondents' Petition makes conclusory arguments that the Court failed to reconcile statutory and regulatory authority, when in fact the Court noted its step-by-step analysis to illustrate how the Board's "clear error" resulted in an impermissible infringement of Mr. Anselmo's statutory right to be properly considered for parole. Nevada statutory law, codified by the Nevada Administrative Code, simply does not mandate the unfettered discretion for which Respondents advocate. As such, the Petition should be summarily denied.

II. ARGUMENT

A. The Petition Fails To Comply With NRAP 40, Warranting Its Denial.

Not surprisingly, Respondents pay mere lip service to the Rule governing petitions of this nature. Under this Court's long established practice, rehearings are not granted to review matters that are of no practical consequence. *In re Estate of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). Importantly, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when

otherwise necessary to promote substantial justice. *Herrmann*, 100 Nev. at 151; *see also* NRAP 40(c)(2). A petition for rehearing may not be utilized as "a vehicle to reargue matters" considered and decided in the court's initial opinion – nor may a litigant raise new legal points for the first time on rehearing. NRAP 40(c)(1); *see also* *Gershenhorn v. Stutz*, 72 Nev. 312, 306 P.2d 121 (1957); *Cannon v. Taylor*, 88 Nev. 89, 92, 493 P.2d 1313, 1314 (1972); *In re Lorrington*, 75 Nev. 330, 334, 349 P.2d 156 (1960). As discussed below, the Petition does just that – raises immaterial and/or new arguments and attempts to get a second bite at the apple by rearguing matters already fully briefed, considered, and decided by this Court.

As is particularly relevant here, Rule 40(a)(2) provides that "any claim that the court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority *shall be supported by a reference to the page of the brief where petitioner has raised the issue.*" (Emphasis added). Notably absent from the Petition is any such reference. (*See generally*, Petition.) Respondents' failure to comply with Rule 40(a)(2) is grounds to deny the Petition.

It is apparent that Respondents' Petition was not filed for any of the legitimate purposes outlined by our rules. Rather, the Petition appears to have been filed for purposes of delay, and with "the improper result, if not the

intent," of persuading the Board to ignore its own internal guidelines in direct defiance of this Court's Opinion and subjecting Mr. Anselmo to further deprivation of due process. *See Herrmann*, 100 Nev. at 151 (denying the petition and imposing sanctions because the petition was not "filed for any of the legitimate purposes countenanced by our rules. Instead,...it appears that said petition has been filed for purposes of delay, and with the improper result, if not the intent, of subjecting appellants to further public odium.") The Petition should, therefore, be denied.

B. The Petition Also Fails To Demonstrate That The Opinion Overlooked Or Misapplied Nevada Law.

1. Respondents' arguments addressing Morrow and Stockmeier fail.

a. Respondents improperly raise new arguments in the Petition.

Despite NRAP 40's distinct requirements that new legal arguments cannot be raised initially in a petition for rehearing, Respondents cite to the *Stockmeier* case for the first time in its Petition. (*See* Petition, p. 4; *see generally* Answering Brief ("AB").) The Court, therefore, should disregard Respondents' argument regarding *Stockmeier* in its entirety. *See* NRAP 40(c)(1).

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- b. The issue of *Morrow* has already been argued and extensively briefed by both parties, making it an improper argument to raise in the Petition.

Not only did Respondents raise *Stockmeier* for the first time in their Petition, in violation of NRAP 40(c)(1), but they also reargue the *Morrow* case, which both parties fully addressed in their respective briefs. That is, Mr. Anselmo did not hide from *Morrow* in his Opening Brief, and, in fact, acknowledged this case and specifically addressed its application here. (See Opening Brief ("OB"), p. 40.) Respondents then relied heavily on this case in their Answering Brief and argued that *Morrow* is the Nevada standard for the position that "there is no due process liberty interest in parole release." (See AB, p. 3, 6-9, 11-12, 18.) In turn, Mr. Anselmo's Reply Brief again addressed *Morrow* due to Respondents' reliance. (See Reply Brief ("RB"), p. 20, 24-25.) Thus, Respondents' *Morrow* argument has already been "presented in the briefs" and may not be reargued in this Petition. See NRAP 40(c)(1). The Petition should be denied in this respect.

- c. The Opinion not only reaffirms *Morrow*, but carefully explains the Court's ruling and reconciles it with *Morrow*.

Assuming *arguendo*, that this Court considers Respondents' contention that the Opinion is incongruent with *Morrow*, this argument fails because Respondents' black-and-white position ignores the contours of the Court's

Opinion.² To start, the Opinion not only cited to *Morrow* on numerous occasions, but it specifically reiterated – and does not disturb – the "firmly settled law" established by *Morrow* that "Nevada's statutory scheme does not provide any due process right in the grant of parole." (*See* Opinion, p. 5-6, 8.) The Court then carefully explained how our statutory scheme distinguishes Nevada from California, thereby making the holding in *In re Lawrence*, 190 P.3d 535 (Cal. 2008), inapplicable. (*See id.* at 6.)

The Court's explanation did not end there. That is, after discussing the "plain language of [the Board's] internal guidelines" and the statutes providing for consideration of certain factors, the Court expressly reiterated that under *Morrow* "[t]his court will not review the ultimate decision of the Board to grant or deny parole, as Anselmo has no liberty interest in release on parole." (*See id.* at 8.) This Court continued by finding that, "[n]onetheless, NRS 213.140(1) clearly provides that 'the Board shall consider' eligible inmates for parole," resulting in Anselmo having the right to be "consider[ed]" for parole, while still having "no due process right in the grant of parole itself." (*See id.*)

The Court then analyzed Nevada's plain statutory language providing that eligible inmates are entitled to parole consideration. The Court compared the

² Yet again, Respondents fail to provide the Court with a single "reference to the page of the brief" where they have raised this issue, in violation of NRAP 40(a)(2). (*See* Petition, p. 4.)

similarities of our scheme to that of South Carolina in the case of *Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 377 S.C. 489, 496-99, 661 S.E.2d 106, 112 (2008). (*See id.* at 8-9.) In doing so, the Court, once again, reiterated the law under *Morrow* and held that, nonetheless, the "Board is still obligated to act within established parameters." (*See id.* at 9.)

Thus, contrary to Respondents' argument, the Court expressly acknowledged and reaffirmed *Morrow*, explaining point by point how it reconciled this with its ultimate finding that the Board infringed upon Mr. Anselmo's statutory right to receive proper consideration for parole. Respondents have failed to demonstrate that the Opinion "overlooked" or "misapplied" Nevada law. The Petition, therefore, should be denied.

2. Respondents' arguments regarding NRS 213.10705 fail.

- a. The parties fully briefed NRS 213.10705 before the Court issued its Opinion, and arguments relating thereto are improperly raised in this Petition.

As with Respondents' arguments regarding *Morrow*, the issue of NRS 213.10705 has been exhaustively argued by both Mr. Anselmo and Respondents – Mr. Anselmo's Opening Brief acknowledged the statute's language, cited it in full text, and specifically addressed how it does not foreclose the relief he seeks, as evidenced by the Court's decision. (*See OB*,

p. 5, 30, 33, 39-40.) Just as with *Morrow*, Respondents regurgitated its position on NRS 213.10705's purpose and function in their Answering Brief. (See AB, p. 6, 12, 21.) The Reply Brief also fully addressed the impact, or lack thereof, of NRS 213.10705. (See RB, p. 8.) Therefore, arguments regarding NRS 213.10705 have already been presented in the briefs and may not be reargued here. See NRAP 40(c)(1).

b. NRS 213.10705 was properly considered by the Court.

If the Court is inclined to set aside Respondents' procedural failures, Respondents' arguments fail nonetheless, because the Court fully considered the perceived confines of NRS 213.10705.³ To begin, the Court expressly acknowledged that "there is no applicable statutory vehicle through which Anselmo may challenge the Board's actions," *i.e.*, no cause of action provided by statute – exactly what NRS 213.10705 states. (See Petition, p. 4.) The Court then considered whether the Board's actions were contrary to law, "warranting the issuance of a writ of mandamus," which it ultimately found. (See *id.* at 4-10.) In reaching this conclusion, the Court expressly relied upon and considered NRS 213.10705. (See *id.* at 4.)

³ Once again, Respondents fail to provide the Court with a single "reference to the page of the brief" where they have raised this issue, in violation of NRAP 40(a)(2). (See Petition, p. 4.)

As discussed above, the Court then clarified that despite the statutory scheme governing parole, the Board "shall consider" eligible inmates for parole under NRS 213.140(1), thus conferring a "right to be 'consider[ed]' for parole." (*See id.* at 8.)⁴ As demonstrated in Mr. Anselmo's Reply Brief, and ignored in the Petition, a finding to the contrary would "defeat" Chapter 213's purpose and be "substantially inequitable" – a statutory mandate providing an expectation of parole eligibility that can be violated without judicial review. (*See* RB, p. 19) (citing *Egan v. Chambers*, 299 P.3d 364-65, 367 (Nev. 2013) (holding that the Court can "reexamine" previously decided issues and overrule its prior rulings when adhering to the precedent would be "substantially inequitable."); *see also Adam v. State*, 127 Nev. 601, 605, 261 P.3d 1063, 1065 (2011) (holding that precedent should be respected until it is shown that the purpose of a statute would "be defeated" if the precedent is not overturned.)

Thus, if the Court finds that such are necessary, "compelling reasons" exist for this Court to "clarify" an inmate's right to parole eligibility, and that the

⁴ 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.)

Board's denial thereof implicates a liberty interest, subjecting its decision to judicial review. *See Adam*, 127 Nev. at 605. Moreover, 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. *See Egan*, 299 P.3d at 367. There can be no doubt that this Court appreciates the inequitable nature of Respondents' narrow view of NRS 213.10705. (*See Opinion*, p. 7-10.)

Beyond this, the Petition completely ignores *Cohen v. State*, 113 Nev. 180, 183, 930 P.2d 125, 127 (1997), which provides for judicial review when a party is collaterally attacking the manner in which an application to an administrative board was treated – even when no statutory right exists and where the statute *expressly* states that no judicial review is available. (*See generally*, Petition.) The Petition also turns a blind eye to *Cooper*, which held that although "[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." *Cooper*, 377 S.C. at 496-99. The Opinion, however, dedicated nearly an entire page to *Cooper* and explaining how it is instructive with respect to the finding that, although the "decision to grant or deny parole is not

generally reviewable, the Board is still obligated to act within established parameters." (*See* Opinion, p. 9.)

As such, this Court has provided substantial explanation as to its authority to grant equitable relief despite NRS 213.10705, and Respondents have failed to meet their burden that the Opinion "overlooked" or "misapplied" the applicable authority. The Petition should be denied.

3. *Respondents fail to establish that NRS 213.10885(7)(a) and/or NAC 213.560(2) were "overlooked".*

- a. Both the statute and code were addressed by Respondents and Mr. Anselmo on appeal.

Once again, Respondents have violated Rule 40(c)(1) by using this Petition as an improper vehicle to reargue points already raised and addressed in the appellate briefs. Mr. Anselmo addressed NRS 213.10885 numerous times throughout his Opening Brief, and recognized the discretion provided in NAC 213.560. (*See* OB, p. 9-10, 14, 65.) Respondents also addressed NRS 213.10885 in their Answering Brief, relying upon NAC 213.560 to argue that application of the Board's standards is "permissive" and that deviation therefrom is allowed. (*See* AB, p. 12, 20-21.) Mr. Anselmo's Reply Brief then countered Respondents' contentions. (*See* RB, p. 14-15.) Thus, these arguments have been clearly presented to the Court, and the Petition should be denied for failure to comply with NRAP 40(c)(1).

b. The Opinion is in harmony with NRS 213.10885(7)(a) and NAC 213.560(2).

A cursory review of the Opinion reveals that this Court expressly found that it "will not disturb a decision to deny parole for any reason authorized by statute." (*See* Opinion, pp. 2 & 10.) The Court did not, however, find that the Board simply "deviat[ed] from" its standards as permitted in NAC 213.560(2)⁵ and as argued by Respondents⁶; rather, the Court specifically held that (i) "the Board clearly *misapplie[d]* its own internal guidelines in assessing whether to grant parole," (ii) [b]ased upon the plain language of the internal guidelines, this aggravating factor [under NAC 213.518(2)(k)] *should not have been applied* to Anselmo," (iii) the "error in this case was not related to the weight or sufficiency of the evidence underlying any of the criteria relevant to the decision to deny parole," "[r]ather, the Board's internal guidelines clearly indicated that the aggravator set forth in NAC 213.518(2)(k) *should not be used* in those cases where the inmate is serving a life sentence for murder," like Mr. Anselmo, (iv) that the "Board's consideration of the *inapplicable*

⁵ NAC 213.560(2) provides that "[t]he Board may deviate from the standards contained in NAC 213.512 to 213.518, inclusive, and 213.550 based upon any factor, or combination of factors, set forth in NAC 213.518 or any other factor which the Board deems relevant to the determination of whether to grant, deny, continue or revoke parole."

⁶ Not surprisingly, yet again Respondents do not provide the Court with a single "reference to the page of the brief" where they have raised this issue, in violation of NRAP 40(a)(2). (*See* Petition, p. 6.)

aggravator in NAC 213.518(2)(k) infringed upon Anselmo's statutory right to receive proper consideration for parole," and that (v) "[t]his Court cannot say that an inmate received proper consideration when the Board's decision is based in part on an *inapplicable aggravating factor*." (*See id.* at 2, 8-10) (emphasis added). As such, Respondents' contention that this Court's Opinion is "internally inconsistent" conveniently and completely ignores the express finding of this Court.

Moreover, while NAC 213.518 provides which factors the Board *may* consider, the Nevada Parole Guidelines created by the Board *mandate* that the Board is *forbidden* from considering the aggravating factor in circumstances such as Mr. Anselmo'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). Thus, 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.⁷

⁷ In light of the outcome determinative nature of the Nevada Parole Guidelines, to permit the Board to disregard the mandates therein would result in inconsistent parole 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

Similarly, although NRS 213.10885(7) provides that "[t]he Board shall report to each regular session of the Legislature: (a) The number and percentage of the Board's decisions that conflicted with the standards," this is referring to those decisions that *deviate* from the standards as permitted in NAC 213.560(2), not those that *disregard* a mandate – such as is found here.

Consequently, this Court's Opinion is perfectly "squared" with both of these statutes and internally consistent with all relevant authority. Respondents have failed to demonstrate that the Court "overlooked" or "misapplied" these statutes. The Petition, therefore, should be denied.

C. This Court Properly Utilized Mandamus Relief And Respondents Misrepresent That Mandamus Relief Was Not Addressed In Their Answering Brief.

Respondents' final argument in their Petition begs the question as to whether they read their own Answering Brief and/or the text of the Opinion. That is, not only do Respondents fail to provide the Court with a single "reference to the page of the brief" where they have raised the issue of mandamus, in violation of NRAP 40(a)(2), but they also misrepresent to the Court that they "are left to address the availability of mandamus relief here in

principle" – *i.e.*, provides "compelling reasons," if the Court finds the same necessary. *See ASAP Storage, Inc.*, 123 Nev. at 653; *see also Cty. of Clark v. Sun City Summerlin Cmty. Ass'n*, No. 60776, 2014 Nev. Unpub. LEXIS 486, at *9 (Mar. 25, 2014) (precedents are respected until they are shown to be "unworkable or . . . badly reasoned").

the first instance..." (See Petition, p. 7.) In fact, Respondents expressly argued in their Answering Brief that "[t]o the extent that Nevada law permits the review of a denial of parole, Anselmo should have sought such review by way of a petition for a writ of mandamus."⁸ (See AB, p. 3.) Notably, Respondents further argued that mandamus is an "adequate remedy" on page 12 of the brief:

This Court's most recent opinion addressing claims similar to Anselmo's addressed (and denied) them in the context of a mandamus petition and a civil lawsuit. See *Morrow*, 127 Nev. at 268-29, 255 P.3d at 225-26. To the extent that Nevada law creates a duty on the part of the Parole Board to consider certain factors when rendering a parole decision, see, e.g., NRS 213.1099(2), a petition for a writ of mandamus filed in a district court is an adequate remedy to compel consideration of those factors. See NRS 34.160.

(See *id.* at 12.) Respondents then specifically argued that "[b]ecause the ultimate decision to grant or deny parole is discretionary, see NRS 213.1099(1), mandamus will not lie to challenge the Parole Board's decision to grant or deny parole. It will only serve as a state-law remedy to *compel*

⁸ As explained in Mr. Anselmo's Reply Brief, (i) Mr. Anselmo was *pro se* in District Court and filed this appeal *pro se*, resulting in his pleadings being 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"), and (ii) the remedy articulated in Mr. Anselmo'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.)

consideration of the factors mandated by Nevada law."⁹ (*See id.* at p. 13) (emphasis added). As such, the Petition should be denied because, despite Respondents' representation, the mandamus argument was actually raised in the Answering Brief and addressed in the Reply Brief. *See* NRAP 40(c)(1).

Seemingly dissatisfied with their previous arguments in the Answering Brief, Respondents decided to take a new position on mandamus relief for the first time in their Petition. (*See* Petition, p. 7; *see also generally*, AB) This new argument is not permitted under NRAP 40(c)(1). *See Cannon*, 88 Nev. at 92.

Assuming *arguendo* that the Court considers these new arguments (which it should not), they fail nonetheless. Mandamus relief is proper and this Court explained the same, in detail, in its Opinion. The Court clearly identified circumstances under which mandamus relief is proper and specifically cited to NRS 34.160. (*See* Opinion, p. 4.) In fact, the very first line of the Court's discussion provides that "[a] writ of mandamus is available to compel the performance of an act that the law requires ... or to control an arbitrary or capricious abuse of discretion" – one which is either "founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." (*See id.*) (citing *Int'l Game Tech, Inc. v. Second Judicial Dist.*

⁹ This is precisely what the Court has done here. (*See* Opinion, p. 10.)

Court, 124 Nev. 193, 179 P.3d 556, 558 (2008); NRS 34.160; *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011)).

The Opinion also expressly recognized that mandamus relief is an "extraordinary" remedy available when "there is [no] plain, speedy and adequate remedy in the ordinary course of law," such as here. (*See* Petition, p. 4) (citations omitted.) The Opinion then reasoned that because Mr. Anselmo has no "applicable statutory vehicle" to challenge the Board's decision, the Court considers "whether the actions of the Board were contrary to the established rules of law, warranting the issuance of a writ of mandamus." (*See id.*)

The Court then addressed the Board's actions, and expressly determined that the Board committed "clear error" and its actions were contrary to established rules of law because they "infringed upon Anselmo's statutory right to receive proper consideration for parole." (*See id.* at 10.) Contrary to Respondents' position, the Court specifically identified why the Board's disregard of its own internal guidelines amounted to an arbitrary and capricious exercise of discretion, thus warranting mandamus relief. (*See generally*, Opinion.)

Respondents' rebuttal is based upon its misguided contention that the Board "does not have a duty to follow all of its guidelines in every case" and that it has "express authority to depart from its guidelines." (*See* Petition, p. 8.) As discussed in detail herein, the Board does not have such unfettered discretion to disregard its own mandate prohibiting it from consideration of an aggravating factor. (*See* Section II(B)(3)(b), *supra*.)

Further, Respondents' assertion that "an act of discretion cannot be the subject of a writ of mandamus" is quite shocking, as this Court has specifically held that "[a] writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious *exercise of discretion*." *Int'l Game Tech., Inc.*, 124 Nev. at 197, 179 P.3d at 558 (emphasis added) (citations omitted).

Respondents have once again failed to establish that this Court's Opinion somehow overlooked relevant law regarding mandamus relief. The Petition should be denied.

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III. CONCLUSION

Based on the foregoing, Mr. Anselmo respectfully submits that this Court should deny the Petition for Rehearing in its entirety for Respondents' failure to comply with NRAP 40 and failure to demonstrate that the Opinion overlooked, misapprehended, misapplied or failed to consider controlling authority.

Dated this 26th day of October, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: /s/ Kirk B. Lenhard

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answer to Petition for Panel Rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2010, in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,426 words.

Dated this 26th day of October, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **ANSWER TO PETITION FOR PANEL REHEARING** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on October 26, 2017.

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:

ADAM PAUL LAXALT ATTORNEY GENERAL JEFFREY M. CONNER ASSISTANT SOLICITOR GENERAL 100 NORTH CARSON STREET CARSON CITY, NV 89701-4717	
---	--

/s/ Paula Kay
an employee of Brownstein Hyatt
Farber Schreck, LLP

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,
Petitioner,

vs.

CONNIE BISBEE, CHAIRMAN; SUSAN
JACKSON; TONY CORDA; ADAM
ENDEL, COMMISSIONERS; AND THE
STATE OF NEVADA BOARD OF
PAROLE,
Real Parties in Interest.

No. 67619

FILED

NOV 16 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER CORRECTING OPINION AND DENYING REHEARING

Rehearing denied.¹ NRAP 40(c).

It is so ORDERED.

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

¹The clerk of this court is directed to strike the words "Division of Parole and Probation" from lines 2-3 on page 8 of the Advance Opinion, and to replace them with the words "Board of Parole Commissioners," such that the first sentence on page 8 of the Advance Opinion reads as follows: "With respect to the aggravating factor under NAC 213.518(2)(k), the internal guidelines for the Board of Parole Commissioners state...."

cc: Hon. James Todd Russell, District Judge
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Attorney General/Carson City
Carson City Clerk

STATE OF NEVADA CERTIFICATION OF BOARD OF PAROLE COMMISSIONERS ACTION ORDER GRANTING PAROLE

ANSELMO, MICHAEL P
Inmate Name

10999

010999

NDOC Number Booking #

NNCC-U3-C-8-D

Location

11/16/2017

Date

It is the Order of the Board that Parole is GRANTED. The effective date of parole is 02/01/2018.

Release to the community or to a consecutive sentence is authorized on the above specified date. If "when eligible" is indicated, release is authorized on or after the date of this hearing upon attaining minimum eligibility, as determined by the Nevada Department of Corrections (NDOC). Release to the community may not occur until approval of release plans in accordance with NRS 213.140.

You are expected to program and/or work constructively regardless of institutional setting, and you are expected to abide by the rules of the NDOC. Failure to work and/or program constructively, or violation of the rules of the NDOC may result in the rescission of this order and denial of parole.

NOTE: A parolee who violates a condition of his or her parole forfeits all or part of the credits for good behavior earned by the parolee after release on parole at the discretion of the Board. A parolee whose parole is revoked for having violated a condition of parole forfeits all credits for good behavior previously earned to reduce his or her sentence pursuant to NRS 209. The Board may restore any forfeited credits at its discretion.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):

Controlling sentence denoted by *, Case #, Count, Offense Description:

271359, 1; MURDER, 1ST DEGREE

Reason(s) for action:

Grant Reason: The inmate has a positive institutional record.

Grant Reason: There is community and/or family support.

Grant Reason: The inmate must serve a consecutive sentence.

Grant Reason: The inmate has participated in programs specific to addressing behavior that led to incarceration.

Recommendation of the panel who conducted the hearing: Grant Parole

Commissioner Susan Jackson; Grant Parole

Commissioner Tony Corda; Grant Parole

Commissioner Christopher Dericco; Grant Parole

The final action was ratified by the following Members of the Board of Parole Commissioners:

Commissioner Christopher Dericco; Grant Parole

Commissioner Susan Jackson; Grant Parole

Commissioner Tony Corda; Grant Parole

Chairman Connie Bisbee; Grant Parole

FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by DBARNARD at 11/20/2017 1:24 PM

STATE OF NEVADA
BOARD OF PAROLE COMMISSIONERS
CONDITIONS OF PAROLE SUPERVISION

ANSELMO, MICHAEL P
Inmate Name

10999 010999
NDOC Number Booking #

NNCC-U3-C-8-D
Location

11/16/2017
Date

The following conditions apply to all active parole cases supervised in the community, including any previously granted sentences not specified on this Order of which these conditions replace and supersede.

* Participate in re-entry programming while serving consecutive sentence.

* Disciplinary Conduct: You shall comply with NDOC Administrative Regulation 707 (Inmate Disciplinary Process) and conduct yourself accordingly during the period of institutional parole.

* Intoxicants: You shall not possess or consume any alcohol beverages or other prison-made alcohol.

* Controlled substances: You shall not possess or consume any illegal drugs, or any prescription drugs, unless first prescribed by a licensed medical professional.

* Weapons: You shall not possess, have access to, or have under your control, any type of weapon, including any object that is determined to be a weapon by the NDOC.

* Directives: You shall follow the directives of the Division of Parole and Probation and the Department of Corrections.

* Laws: You shall comply with all institutional rules, municipal, county, state, and federal laws and ordinances.

* Release: If applicable, four months prior to release to the community, contact the Division of Parole and Probation, Pre-release, and establish a viable release plan. The Board will impose any special conditions regarding community release at that time. You may not be released to the community on parole until any proposed release plans are investigated and approved by the Division of Parole and Probation.

* Restitution: You shall make payments toward any restitution owed if it is determined that you have the ability to pay.

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STATE OF NEVADA CERTIFICATION OF BOARD OF PAROLE COMMISSIONERS ACTION PAROLE RISK ASSESSMENT & GUIDELINE

ANSELMO, MICHAEL P 10999 010999 NNCC-U3-C-8-D 11/16/2017
INMATE NAME NDOC Number BOOKING# LOCATION DATE

Parole Risk Assessment:

Questions	Responses / Scores
1. Age at 1st Arrest	19 years or younger (2): 2
2. Prior Revocations	(0) No Parole or Probation Revocations: 0
3. Employment History	(1) Employed less than full-time/full-time < one year: 1
4. Property Conviction	(2) Auto Theft, Burglary, Forgery, Robbery, Property Crime: 2
5. Drug/Alcohol Use/Abuse	(2) Frequent abuse, serious disruption of functioning: 2
6. Gender	(1) Male: 1
Static Risk Score	8
7. Current Age	(-1) 41 and above: -1
8. Gang Membership	(0) No or Suspect: 0
9. Programming (current term)	(-1) Yes (enter achievement name in comments): -1
10. Disciplinary Conduct	(-1) No disciplinarys: -1
11. Approved Custody Level	(0) Medium: 0
Dynamic Risk Score	-3
Total Score (Static+Dynamic)	5

Offense (used to determine crime severity for risk assessment)	Offense Category	Offense Severity
MURDER 1ST DEGREE	CAT A	Highest

Total Risk Score:	Guideline Risk	Guideline Recommendation
5	Low Risk	Consider Factors

The Board determined the following Aggravating Factors are applicable in your case:

Commission of a crime while incarcerated, on bail, eluding, on escape status, or while under parole or probation supervision;
Committed I/O while on probation. Committed 2 escapes while incarcerated.
Impact on victim(s) and/or community: Death of victim. Victim was strangled and stabbed.

The Board determined the following Mitigating Factors are applicable in your case:

Community and/or family support: Support letters have been received.
Pending CS sentence or detainer lodged by other jurisdiction: Has a CS sentence.
Infraction free for two years or more to hearing month and not in disciplinary segregation: Last OIC was in 2007.
Participation in programs specific to addressing the behavior that led to their incarceration: Has programmed well throughout the years to include HSD, AA degree (general studies), Culinary Arts, Anger Management, BETA, and First Aid.

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