

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL P. ANSELMO,

Petitioner,

vs.

CONNIE S. BISBEE, CHAIRMAN;
SUSAN JACKSON; TONY CORDA;
MICHAEL KEELER,
COMMISSIONERS; AND THE
NEVADA BOARD OF PAROLE
COMMISSIONERS,

Respondents.

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ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

Michael Anselmo seeks emergency, extraordinary relief from this Court because he believes that the Nevada Board of Parole Commissioners (hereinafter the Board¹) did not comply with the writ this Court issued in *Anselmo v. Bisbee*, 133 Nev. 317, 396 P.3d 848 (2017). Notwithstanding the fact that Mr. Anselmo fails to establish that there is an emergency and that he lacks available remedies, he concedes that he is not seeking a particular result from a parole hearing and that the Board conducted the rehearing required by this Court's writ after the writ became effective. Emergency Petition for Writ of Mandamus Ordering Respondents to Comply with the Nevada Supreme Court's Writ to Vacate 2014 Parole Denial (hereinafter Pet.) at 15, 23. Those two points definitively undercut his ability to prevail in this case.

Nevertheless, Mr. Anselmo has not shown that the Board's decision to make his parole effective February 1, 2018, is inconsistent with this Court's opinion and writ. Reduced to its core, Mr. Anselmo's argument is that the Board failed to use the word "vacate" with respect to its 2014 order denying parole before holding a hearing to reconsider the denial of parole while excluding NAC 213.518(2)(k) from its consideration. In Mr. Anselmo's view, because the Board granted parole at Mr.

¹ For the sake of consistency, this brief refers to all of the Respondents collectively as "the Board."

Anselmo's regularly scheduled hearing in November 2017, where the Board also did not consider NAC 213.518(2)(k), the Board needed to reach the same conclusion with respect to its reconsideration of the November 2014 hearing. Pet. at 15-18, 22-23. He is incorrect. This Court's opinion in *Anselmo* unequivocally established that the Board could have properly denied parole in 2014 by relying on the severity of Mr. Anselmo's offense alone. 133 Nev. at 319-21, 396 P.3d at 850-51.

As a result, Mr. Anselmo's position boils down to a complaint about the terminology the Board used when conducting the rehearing required by this Court. This Court should decline to engage in such a hyper-technical critique of the Board's conduct. Instead, this Court should focus on the substance of the Board's actions, which accomplished exactly what this Court directed: *consideration* of Mr. Anselmo for parole in a manner that is consistent with the Board's relevant guidelines.

Mr. Anselmo received the consideration this Court required, and the Board exercised its discretion to make the grant of parole effective on February 1, 2018. Mr. Anselmo has not explained how the Board's decision to grant parole effective February 1, 2018, is inconsistent with the result of the prior writ proceeding other than to complain that the Board did not say that it vacated the 2014 decision before reconsidering the result of the 2014 hearing. But the Board's actions in evaluating whether to grant Mr. Anselmo parole retroactively had the same practical effect and comported with this Court's mandate.

Mr. Anselmo has not shown that he has suffered any harm, let alone irreparable harm warranting extraordinary relief. This Court should deny the petition.

II. FACTUAL BACKGROUND

A. This Court directs the Board to vacate its 2014 denial and consider Mr. Anselmo for parole release while excluding NAC 213.518(2)(k) from consideration.

After the First Judicial District Court denied Mr. Anselmo's petition for writ of habeas corpus challenging the November 2014 denial of his application for parole, this Court transformed Mr. Anselmo's appeal into a writ proceeding and issued a writ of mandamus to the Board. 1 App. 185-86. This Court's opinion was very careful to acknowledge that Nevada courts are not to second-guess a Board decision granting or denying parole where the Board has followed its internal guidelines. *Anselmo*, 133 Nev. at 319-21, 396 P.3d at 850-51. Instead, this Court only granted a writ because it determined that the Board denied parole while considering a factor it should not have considered under the guidelines, which necessitated a new hearing because Mr. Anselmo's case "was extremely close." *Id.* at 322-23, 396 P.3d at 853. However, the opinion did not direct a certain result for the new hearing, let alone order that the Board must retroactively grant parole effective February 1, 2015. *Id.*

B. After this Court's denial of the Board's petitions for panel rehearing and *en banc* reconsideration made the decision from the appeal effective, the Board conducts a hearing to decide whether it should grant parole retroactively while excluding NAC 213.518(2)(k) from consideration.

The same day this Court denied panel rehearing, the Board conducted a hearing to consider Mr. Anselmo for parole, in light of the original 2014 parole denial, and granted Mr. Anselmo parole on his murder sentence, effective February 1, 2018. 1 App. 236, 238-40.

The Board sought *en banc* reconsideration of this Court's opinion on December 1, 2017, which this Court denied and issued a notice in lieu of remittitur that made this Court's writ effective on February 13, 2018. 2 App. 241-62. And in accordance with this Court's decision, the Board conducted a hearing on April 18, 2018, which it called a review previous order (RPO) hearing. 2 App. 265-79. The Board explained to Mr. Anselmo that the reason for the RPO hearing was to address this Court's writ and decide whether the Board should make the recent grant of parole retroactive to February 1, 2015, based upon the exclusion of NAC 213.518(2)(k) from its reconsideration of the November 2014 denial. 2 App. at 268-69.

In explaining the purpose of the April 2018 RPO hearing to Mr. Anselmo, the Board indicated that it had two options at its disposal: (1) reinstating the recent decision to grant parole effective February 1, 2018, or (2) retroactively granting Mr.

Anselmo parole with an effective date of February 1, 2015. *Id.* The Board elected to reinstate the recent grant of parole effective February 1, 2018, rather than making the parole grant retroactively effective February 1, 2015. 2 App. 305-07.

Mr. Anselmo twice sought reconsideration of the Board's decision not to retroactively grant parole effective February 1, 2015. 2 App. 308-15. But the Board denied reconsideration in writing both times. 2 App. 309, 313. In the first written denial, the Board recounted that it had explained "the different actions that the Board could take" during the RPO hearing and then noted that the Board "determined that there would be no change to the denial period determined at your 11-17-2014 hearing and your subsequent grant effective date." 2 App. 309. And in response to the second appeal, the Board reiterated that "the Boards [sic] decision was to maintain the denial period of three years." 2 App. 313.

C. The district court denies a petition for writ of mandamus challenging the Board's decision to grant parole effective February 1, 2018.

After the Board denied his second request for reconsideration, Mr. Anselmo filed a petition with the First Judicial District Court challenging the Board's decision to make his parole effective February 1, 2018. 2 App. 316-19. In particular, he complained that the Board, by refusing to retroactively grant parole to February 1, 2015, "did in fact keep in place the 2014 3 year [sic] denial." 2 App. 318.

In an answer ordered by the district court, the Board argued that Mr. Anselmo had failed to show that he was entitled to any relief. 2 App. 284-89. In particular, the

Board argued that this Court's prior opinion only addressed Mr. Anselmo's right to be *considered* for parole, and did not address *if* or *when* the Board should grant Mr. Anselmo parole. 2 App. 286-89.

The district court denied the petition in an order dated November 16, 2018. 2 App. 352-57. The certificate of mailing on the order shows that the Court served the order on counsel for Mr. Anselmo and counsel for the Board. 2 App. 357.

III. SUMMARY OF THE ARGUMENT

Mr. Anselmo fails to establish that this case warrants treatment as an emergency, nor has he shown the absence of available remedies. He admits he has known about the actions he challenges through his petition for at least a year. Pet. at 15-18. Additionally, the district court mailed Mr. Anselmo's attorneys a copy of the order denying his petition for writ of mandamus challenging the same conduct that is the subject of the current petition in November of last year. 2 App. 357. And even assuming the existence of an emergency, Mr. Anselmo could have sought an expedited appeal. Due to a delay in mailing the notice of entry of order, the window for Mr. Anselmo to appeal the district court's order denying his mandamus petition remains open. 2 App. 406-13.

Procedural arguments aside, Mr. Anselmo fails to establish that he has suffered any harm. This Court has long recognized that the substance of what an order accomplishes defines the nature of the order, not what title the court gave the

order. *See, e.g., Lee v. GNLV Corp.*, 116 Nev. 424, 427, 996 P.2d 416, 418 (2000). That principle is instructive in this situation: this Court should look to the practical effect of the Board's actions, rather than critique the Board's use of terminology when it acted to comply with this Court's directive.

It is true that the Board did not expressly state that it "vacated" the 2014 parole denial before it conducted the new hearing ordered by this Court. But the Board's conduct had the same effect. As directed, the Board conducted a new hearing where it excluded NAC 213.518(2)(k) from its consideration, and it did so while evaluating whether it should grant Mr. Anselmo parole *retroactively* to the date Mr. Anselmo would have been eligible for parole if the Board granted his application in 2014. 2 App. 241-62.

The Board declined to grant parole retroactively. 2 App. 305-07. This Court's opinion and the writ in *Anselmo* did not mandate a different result. To begin with, this Court's writ did not, and could not have, required the Board to *consider* a retroactive grant of parole, let alone require the Board to *grant* parole retroactively—this Court has repeatedly recognized that Nevada's statutes and case law do not provide authority to require retroactive consideration of parole. *See, e.g., Williams v. Dep't of Corr.*, 133 Nev. 594, 600 n.7, 402 P.3d 1260, 1265 n.7 (2017) (citing *Niergarth v. Warden*, 105 Nev. 26, 29, 768 P.2d 882, 883-84 (1989)). As a result, the Board did what this Court required of it and more by considering whether to

retroactively grant parole while excluding NAC 213.518(2)(k) from its consideration.

More importantly, even assuming this Court intended for a retroactive review of the 2014 hearing, the Board conducted such a review and exercised its discretion to deny a retroactive grant of parole. 2 App. 241-62, 305-07. This Court's opinion in *Anselmo* only required the Board to *consider* Mr. Anselmo for parole and unequivocally established that the Board was free to exercise its discretion to *deny* parole based solely on the seriousness of Mr. Anselmo's crime. 133 Nev. at 319-23, 396 P.3d at 850-53. The Board considered granting parole effective February 1, 2015, while excluding NAC 213.518(2)(k) from its consideration, and declined to backdate Mr. Anselmo's parole, which the Board was free to do under *Anselmo*. 2 App. 241-62, 305-07.

Mr. Anselmo has not suffered any harm. Extraordinary relief is not warranted. This Court should deny the petition.

IV. ARGUMENT

Mr. Anselmo fails to pass the procedural hurdles necessary for emergency writ relief: he created the perceived emergency by waiting until weeks before he believes he is entitled to release to file a petition with this Court, and he has an available remedy. But this Court need not resolve this case on procedural grounds

because Mr. Anselmo has not suffered any harm, let alone irreparable harm warranting extraordinary relief. This Court should deny the petition.

A. The mandamus standard.

A petition for writ of mandamus is governed by NRS 34.150 to NRS 34.310, inclusive. A court may 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 of or arbitrary or capricious exercise of discretion. NRS 34.160; *Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. 424, 430, 305 P.3d 887, 892 (2013) (citing *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). The writ may not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170. Mandamus is an extraordinary remedy, and the decision to entertain a petition lies within the discretion of the court. *Hickey v. Eighth Judicial Dist. Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

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). Mandamus will not issue unless the petitioner shows a clear legal right to the relief demanded. *Ex rel. Blake*, 48 Nev. at 304, 231 P. at 384. Mandamus will lie to compel an officer or tribunal exercising judicial functions to act, but never to review or correct such judicial acts, however, erroneous they may be. *State v. Eighth Judicial Dist. Court*, 116 Nev. 127, 133, 994 P.2d 692 (2000); *York v. Board of County Comm'rs*, 89 Nev. 173, 174, 509 P.2d 967 (1973); *Hardin v. Guthrie*, 26 Nev. 246, 66 P.2d 744 (1901).

B. Mr. Anselmo fails to show that there is an emergency and that he lacks an available remedy.

Mr. Anselmo acknowledges that he has known about the conduct he challenges through this emergency writ since April of last year. *See, e.g.*, Pet. at 15-18. And the district court served his attorneys with the order denying a mandamus petition Mr. Anselmo filed in the district court challenging that conduct in November of 2018. 2 App. 357. As a result, the need for this Court to act at what Mr. Anselmo perceives to be the eleventh-hour is his own doing. This Court should not permit parties to create their own emergencies by waiting until the last minute to seek relief.

Additionally, Mr. Anselmo concedes that an appeal is an adequate legal remedy that generally precludes writ relief. Pet. at 20. Here, the district court issued a decision denying Mr. Anselmo's writ petition in November of 2018. 2 App. at 352-57. Due to a delay in mailing the notice of entry of order, Mr. Anselmo still has the right to appeal that decision. 2 App. 406-13. And this Court's rules allow for

expedited treatment of an appeal. *See, e.g.*, NRAP 14(a)(3). Thus, this Court’s intervention by way of an extraordinary writ is improper because Mr. Anselmo has available remedies.

C. Mr. Anselmo fails to establish that he suffered any harm.

Mr. Anselmo challenges the Board’s conduct when it revisited the issue of his parole consideration in light of this Court’s opinion and writ from *Anselmo*, but his position in the petition takes form over substance. This Court has long recognized that substance controls. *Cf. Lee*, 116 Nev. at 427, 996 P.2d at 418. Review of the Board’s conduct in this case shows that it gave Mr. Anselmo the consideration required by the writ and reached an outcome consistent with *Anselmo*.

1. This Court’s opinion in *Anselmo* only required that the Board consider Mr. Anselmo for parole in a manner consistent with the Board’s guidelines.

This Court granted a writ in *Anselmo* to ensure that the Board gave Mr. Anselmo’s application for parole proper *consideration* because the decision to deny parole in 2014, which improperly relied upon NAC 213.518(2)(k), “was extremely close.” 133 Nev. at 323, 396 P.3d at 853. Nevertheless, the opinion is unequivocal on two relevant points. First, because parole is an act of grace under Nevada law, the Board’s decisions to grant or deny an application for parole are not subject to judicial review, provided the Board follows its internal guidelines. *Id.* at 319-23, 350-53. Second, the severity of an offense—a factor the Board had identified as a reason for

denying Mr. Anselmo's application for parole in 2014—can serve as an independent basis to deny parole. *Id.* As a result, this Court unequivocally recognized that the Board could still deny Mr. Anselmo parole without relying on NAC 213.518(2)(k).

2. The Board's decision to grant parole effective February 1, 2018, is consistent with *Anselmo*.

In the petition, Mr. Anselmo concedes two important points that undercut his ability to prevail in this case. He acknowledges that he is not asking this Court to mandate the specific outcome of a parole hearing, and he concedes that the Board conducted the rehearing this Court required once remittitur issued and the writ became effective. Pet. at 15, 23. That should be the end of this case.

Nevertheless, even without his concessions, Mr. Anselmo fails to show that the Board's actions in this case do not fulfill the requirements of the writ from *Anselmo*. To begin with, this Court's opinion in *Anselmo* should not be read to require retroactive consideration of parole. This Court has long recognized that there is no legal authority for this Court to require retroactive consideration of parole. *Niergarth*, 105 Nev. at 29, 768 P.2d at 883-84. But even assuming this Court contemplated such a review, the Board conducted a hearing to consider that point. 2 App. 241-62. While the Board did not specifically state that it vacated the 2014 order and then indicate that it decided to deny parole again based on the severity of Mr. Anselmo's offense, that is the practical effect of the Board's decision to "maintain"

the decision to grant Mr. Anselmo parole effective February 1, 2018. And that result is consistent with this Court's opinion in *Anselmo*.

Although this Court recognized that Mr. Anselmo's case "was extremely close," it nevertheless recognized that the Board could still deny parole due to the severity of Mr. Anselmo's offense. 133 Nev. at 319-23, 396 P.3d at 850-53. The Board then conducted a hearing to assess whether, when excluding NAC 213.518(2)(k) from its consideration, it should grant Mr. Anselmo parole effective February 1, 2015. 2 App. 241-62. It declined to do so. 2 App. at 305-07. Nothing about that decision is inconsistent with this Court's opinion from *Anselmo* save for the fact that the Board did not use specific terminology that Mr. Anselmo believes this Court's writ required. Such a hyper-technical critique of the Board's conduct—conduct that resulted in the parole consideration this Court contemplated in *Anselmo*—does not warrant emergency extraordinary relief.

V. CONCLUSION

This Court directed the Board to reconsider its denial of parole without consideration of an improper factor as a basis for its decision. Mr. Anselmo concedes that the Board conducted the necessary rehearing. And he fails to show that the result of the rehearing is inconsistent with this Court's opinion and writ from *Anselmo*. Mr. Anselmo has not suffered any harm, let alone irreparable harm warranting extraordinary relief. This Court should deny the petition.

RESPECTFULLY SUBMITTED this 2nd day of May, 2019.

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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 2010 in 14 point, Times New Roman.

2. I hereby certify that I have read this 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 2nd day of May, 2019.

AARON D. FORD
Attorney General

By: /s/ Jeffrey M. Conner
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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 2nd day of May, 2019, I served a copy of the foregoing **ANSWER TO EMERGENCY PETITION FOR WRIT OF MANDAMUS**, by electronic filing to:

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