

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE
APPLICATION OF BRECK
WARDEN SMITH FOR A WRIT OF
HABEAS CORPUS

No. 82696

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THE STATE OF NEVADA,
Appellant,

vs.

BRECK WARDEN SMITH,
Respondent.

APPELLANT'S OPENING BRIEF

**APPEAL FROM JUDGMENT GRANTING PETITION FOR WRIT OF
HABEAS CORPUS (POST-CONVICTION)
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY**

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JURISDICTIONAL STATEMENT

Jurisdiction was provided by filing a timely Notice of Appeal from order granting petition for writ of habeas corpus (post-conviction). NRS 34.575(2); NRS 34.830(3); NRAP 4(a)(1).

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals under NRAP 17(b) (4); but this appeal should be retained by the Supreme Court because the statutory interpretation and application of credits towards a petitioner's sentence based on the interpretation of NRS 213.1517 (4) has yet to be resolved. The State is appealing the district court's ruling to get more direction from the Nevada Supreme Court because the interpretation applied by the district court substantially differs from that usually applied by the Board and has the potential to impact other parole revocation habeas cases.

STATEMENT OF THE CASE

Whether the district court erroneously granted Smith's petition for writ of habeas corpus (post-conviction) based on its flawed statutory interpretation of NRS 213.1517(4) and improperly ordered the Nevada Department of Corrections to recalculate Smith's parole eligibility.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In 2008, Breck Smith (“Smith”) was adjudicated guilty in the district court for the following offenses: Grand Larceny Automobile (*Case No. 07C232109*), Receiving or Transferring Stolen Vehicle (*Case No. 07C232113*), Burglary (*Case No. 07C232319*), and Grand Larceny (*Case No. 08C240508*). Appellant’s Appendix (AA) 0139. The district court sentenced Smith under the habitual offender statute¹ to four concurrent terms of life in prison with the possibility of parole after ten years. *Id.*

After Smith served his minimum term, the Nevada Board of Parole Commissioners (“Board”) granted Smith parole on all four cases. AA 0008. A year later, on March 22, 2018, the Las Vegas Metropolitan Police Department arrested Smith on two felony charges: Attempt Burglary and Possession of Burglary Tools. AA 0051-0052. Smith was also booked on parole violations for each of the previously mentioned life sentences. AA 0019-0020, 0027-0028, 0035-0036, and 0043-0044. Smith was placed in custody in the Clark County Detention Center (“CCDC”) and the justice court set his bail at \$7,000. AA 0056.

Smith was still in custody at CCDC when he made his initial appearance for the new charges in the justice court on March 27, 2018. AA 0056. And the same

¹ NRS 207.010

remained true when he waived his right to a preliminary inquiry on his parole violations on March 30, 2018. AA 0023, 0031, 0039, and 0047.

The Board then issued a retake warrant for Smith to be remanded to the custody of the Nevada Department of Corrections (“NDOC”). AA 0026, 0034, 0042, and 0052. Smith arrived at NDOC on April 13, 2018. AA 0008-0009. The Board set a revocation hearing for May 2, 2018, but continued the hearing multiple times pending resolution of Smith’s new charges. AA 0009-0011.

In the interim, Smith’s new charges remained pending in the justice court until he was bound over to the district court on January 10, 2019. AA 0067 and 0070. The next day, the prosecutor filed an information charging Smith with a single felony arising from the same conduct that served as a basis to charge Smith with violating his parole (*Case No. C-19-337302-1*). AA 0071-0072. The district court set Smith’s initial arraignment on January 14, 2019, but Smith’s counsel requested multiple continuances. AA 0073-0082.

Five months after the arraignment, Smith entered an *Alford*² plea to Attempt Burglary. AA 0083-0093. And the next day, the Board held Smith’s parole violation hearing, revoking Smith’s parole until July 1, 2020. AA 0011. On August 12, 2019, the district court sentenced Smith to 24 to 60 months in prison, running

² *North Carolina v. Alford*, 400 U.S. 25 (1970).

consecutively to *Case Nos. 07C232109, 07C232113, 07C232319, and 08C240508*, as required by NRS 176.035(3). AA 0109.

On January 12, 2021, with the assistance of counsel, Smith filed a petition for writ of habeas corpus (post-conviction) (“petition”). AA 0110-0137. In his petition, for the first time, Smith challenged the timeliness of his parole revocation hearing and the calculation of his earned prison credits. *Id.* According to Smith, his parole revocation hearing was untimely under NRS 213.1517(4) and, as a result, the application of his earned credits from his subsequent parole revocation were miscalculated, resulting in a delayed parole eligibility date in *Case Nos. 07C232109, 07C232113, 07C232319, and 08C240508. Id.*

On February 17, 2021, the district court agreed with Smith and entered its findings of fact and conclusions of law and order granting his request for habeas relief, including that Smith’s parole eligibility be retroactively recalculated based upon the date of his transfer to NDOC custody. AA 0172-0177. The State timely appealed. AA 0187-0188.

SUMMARY OF THE ARGUMENT

In its order granting Smith’s petition, the district court held that the plain language of NRS 213.1517(3) and NRS 213.1517(4) required the Board to hold Smith’s parole revocation hearing within 60 days of Smith’s return to NDOC custody.

The district court concluded that once there has been a finding of probable cause that the parolee violated the terms of his parole and the parolee is returned to NDOC's custody, NRS 213.1517(3) and NRS 213.1517(4) requires the Board to hold the parolee's revocation hearing within 60 days regardless of when the courts resolve the parolee's pending criminal charges that are also the basis for the parole violation. AA 0172-0177. The district court also concluded that, on the other hand, if the parolee remains in the county jail until the final adjudication of the new charges, the Board must then hold the parole revocation hearing within 60 days of the parolee's return to NDOC custody. *Id.*

The district court's interpretation of NRS 213.1517 is erroneous. When the basis for the parole violation is a new criminal offense, NRS 213.1517(4) explicitly provides the Board with the authority to defer a parolee's parole revocation hearing up to 60 days after the final adjudication of the parolee's new criminal charge. But the district court's interpretation of the statute either improperly reads the words "following the final adjudication of the new criminal charge" right out of the statute, or it reads additional conditions into the statute that do not exist and create tension with other provisions of the statutory framework.

Because Smith had his parole revocation hearing the day after he entered an *Alford* plea on his new charge, the timing of the hearing complied with NRS

213.1517. Additionally, the district court erred in ordering recalculation of the expiration of Smith’s parole revocation. This Court should reverse.

ARGUMENT

I. LEGAL STANDARDS GOVERNING THE REVIEW OF THIS APPEAL.³

Whether NRS 213.1517(4) applies to the timeframe for holding a parole revocation hearing when an inmate’s new criminal case has yet to be adjudicated is a matter of statutory interpretation. The interpretation of a statutory provision is reviewed by this Court de novo. *Sportsco Enterprises v. Morris*, 112 Nev. 625, 629, 917 P.2d 934, 936 (1996). When this Court is interpreting statutes, it gives effect to legislative intent. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

³ A petitioner must either be in imprisoned or “under supervision as a probationer or parolee” to file a petition for writ of habeas corpus. *Coleman v. State*, 130 Nev. 190, 193-94, 321 P.3d 863, 865-66 (2014); *see also* NRS 34.724(1). When the petitioner files his petition while incarcerated and is subsequently released from physical custody and supervision, his petition does not necessarily become moot after the petitioner’s sentence has expired. *See Knight v. State*, 116 Nev. 140, 143-44, 933 P. 2d 67, 70 (2000) (“[S]atisfaction of a fine or completion of a sentence [does not] render[] a timely appeal from a criminal conviction moot.”); *Martinez-Hernandez v. State*, 132 Nev. 623, 626-28, 380 P. 3d 861, 864-65 (2016) (A habeas petition filed while the petitioner is imprisoned or under supervision “does not become moot when the petitioner is released if there are continuing collateral consequences stemming from that conviction.”); *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983 (1998) (“Once the petitioner’s sentence has expired...some concrete and continuing injury other than the now-ended incarceration or parole—some “collateral consequence” of the conviction —must exist if the suit is to be maintained.”).

Under de novo review, this Court will not set aside a district court's findings unless it is clearly erroneous. *Id.*

“When interpreting a statutory provision, this court will look first to the plain language of a statute and will enforce the statute as written if the statute's language is clear and the meaning plain.” *Coleman*, 130 Nev. at 193, 321 P.3d at 866 (citing *Hobbs v. State*, 127 Nev. 234, 237, 251 P. 3d 177, 179 (2011)); see also *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004) (“We must attribute the plain meaning to a statute that is not ambiguous.”). “When a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.” *Lucero*, 127 Nev. at 95, 249 P.3d at 1228 (citation and internal quotations omitted).

Additionally, this Court “construe[s] the words in a statute as a whole, such that no words or phrases become superfluous or nugatory.” *Harvey v. State*, 136 Nev. Adv. Op. 61, ___, 473 P.3d 1015, 1019 (2020). Finally, “[w]henver possible, this [C]ourt will interpret a rule or statute in harmony with other rules and statutes.” *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) (citation and internal quotations omitted).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT BASED ON THE PLAIN LANGUAGE OF NRS 213.1517(4), THE BOARD EXCEEDED ITS AUTHORITY BY DEFERRING SMITH'S PAROLE REVOCATION HEARING.

The Board did not exceed its authority by deferring Smith's parole revocation hearing. The district court's conclusion to the contrary is improper because it either

(1) renders part of NRS 213.1517(4) nugatory, or (2) unnecessarily reads requirements into the statute that do not exist and create tension with other provisions of the relevant statutory framework. Either way, the district court's order violates standard rules of statutory construction that this Court applies on a regular basis.

To start, when a determination of probable cause on a parole violation is made, the Chief of the Department of Parole and Probation *may suspend* parole and return the prisoner to confinement. NRS 213.1517(1)(c). Importantly, although *parole* is *suspended*, that does not mean the prisoner stops serving the sentence for which they had previously been paroled. When parole is suspended, the prisoner continues to serve the sentence for which they had previously been paroled. There is no “dead time,” as the district court suggested.

Then, with one exception, the Board is required to consider the prisoner's case within 60 days after his return to NDOC custody. “If probable cause for continued detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge,” NRS 213.1517(4) allows the Board to “consider the prisoner's case under the provision of subsection 3 *or* defer consideration until not more than 60 days after his or her return to NDOC *following the final adjudication of the new criminal charge.*” (emphasis added).

Thus, based on the plain language of NRS 213.1517(3) and (4), the Board is required to hold a parole revocation hearing within 60 days after a parolee has returned to custody following a determination of probable cause for the parolee's continued detention *unless* the probable cause determination for the parole violation is based on new criminal charges. In that case, 60 days after final adjudication of the new criminal charges serves as the outer limit of when the Board must hold the revocation hearing.

The obvious point of the exception is not to control the location of incarceration.⁴ The exception is intended to let the Board consider the results of the new criminal proceeding(s) when exercising its discretion on the revocation of parole.

In this case, Smith waived his preliminary inquiry on his parole violation and the Board issued a retake warrant for Smith to be remanded to the custody of NDOC. AA 0023, 0031, 0039, and 0047; AA 0026, 0034, 0042, and 0052. Smith was returned to NDOC on April 13, 2018. AA 0008-0009. In compliance with NRS 213.1517(3), the Board set Smith's initial parole revocation hearing for May 2, 2018, which was within 60 days of his return from NDOC. AA 0009. The Board then

⁴ As the language of NRS 213.15103(2) demonstrates, where the parolee is detained pending resolution of his new criminal charges depends on who is financially responsible for the inmate, not when his revocation hearing occurs.

repeatedly continued the hearing while awaiting resolution of Smith's new charges. AA 0009-0011.

The exception outlined in NRS 213.1517(4) states that if the parolee has new pending charges, "the Board may consider the prisoner's case under the provisions of subsection 3 *or* defer consideration until not more than 60 days after his or her return to the custody of the Department of Corrections *following adjudication of the new criminal charge.*" (emphasis added). In compliance with the exception outlined in NRS 213.1517(4), the Board deferred consideration pending the adjudication of Smith's new criminal charges. Because Smith's new charges were not finally adjudicated within 60 days of Smith's initial return to NDOC custody, NRS 213.1517(4) gave the Board the option of continuing Smith's parole revocation hearing. Smith was adjudicated guilty on his new charge when he was sentenced under the terms of his guilty plea agreement. AA 0109. Thus, by the time there was a final adjudication on Smith's new charge, the Board had already held Smith's parole violation hearing. AA 0011.

Nevertheless, the district court agreed with Smith and determined that NRS 213.1517(3) and (4) indicate a clear intent of the Legislature to allow the parolee to remain in the custody of the jurisdiction where the new charge occurred while the parolee is waiting on the final adjudication of their pending criminal case. AA 0159-0160 and 0167-0168. In agreeance with Smith, the district court concluded that the

Board exceeded its authority under the plain language of NRS 213.1517(4) because once Smith was returned to NDOC custody, he was required to have his parole revocation hearing within 60 days. AA 0158-0160 and 0167-0168

The district court reached this conclusion by purporting to apply the rule of construction that courts must give all parts of the statute meaning. But the district court's reading of the statute either (1) violates that rule by rendering part of the statute nugatory, or (2) it unnecessarily reads non-existent language into the statute, while also creating tension with other parts of the relevant statutory framework.

The statutory language of NRS 213.1517(4) expressly permits deferral of the parole hearing until 60 days after *two* conditions are met: (1) return of the parolee to NDOC custody, and (2) final adjudication of the new charge that is the basis for the parole revocation. To read the statute as the district court did—with the return to NDOC custody being the sole triggering event for timing of the revocation hearing—reads the words “following the final adjudication of the new criminal charge” right out of the statute. Indeed, if the date of Smith's return to NDOC custody alone is the triggering event for when the revocation hearing must occur, regardless of when the new criminal charges are finally adjudicated, then NRS 213.1517(4) is superfluous because the plain language of NRS 213.1517(3) by itself already makes that statement. But an outcome that leaves statutory language meaningless is disfavored. *Harvey*, 136 Nev. Adv. Op. at ___, 473 P.3d at 1019.

Alternatively, the district court read the Board's ability to defer the parole hearing under NRS 213.1517(4) to be dependent upon the prisoner remaining in the custody of local authorities pending resolution of his new crimes. But the plain language of NRS 213.1517(4) does not include such a requirement, nor is such a condition consistent with the relevant statutory framework. As NRS 213.15103 suggests, whether a prisoner remains in custody of local authorities or NDOC is a matter of who is financially responsible for the prisoner, not when his parole revocation hearing must occur. But giving NDOC the ability to await final adjudication of the new criminal charges before holding a revocation hearing serves the important purpose of giving the Board the opportunity to consider what happens during the new criminal proceeding(s) before conducting the revocation hearing.

Finally, the district court's conclusion regarding the scope of NRS 213.1517(4) appears to be driven by a concern that Smith earned no credit toward any of his sentences between his return to NDOC custody and the revocation hearing, characterizing that time as "dead time." AA 0173. But that characterization of the time between the suspension of Smith's parole and the revocation hearing is grounded upon a false premise. While time credits do not technically apply against Smith's maximum terms because they are indefinite life sentences, if Smith's original sentences had a defined maximum term, Smith would have continued

earning credit against that maximum term while he was in NDOC custody awaiting his revocation hearing.

For the foregoing reasons, the district court improperly interpreted NRS 213.1517(4) by either rendering part of the statute nugatory or reading non-existent conditions into the statute that are inconsistent with the purpose of the larger statutory framework.

III. THE DISTRICT COURT'S ORDER REQUIRING RECALCULATION OF THE EXPIRATION OF SMITH'S PAROLE REVOCATION IS UNSUPPORTED.

The district court erred in requiring that Smith's parole eligibility be recalculated for two reasons. First, for the reasons explained above, Smith's parole hearing complied with a proper reading of NRS 213.1517(4). Second, even assuming the Board was required to hold Smith's hearing by June 12, 2018, as suggested by the district court, the district court still erred in granting the relief that it did. Tellingly, the district court cited no authority establishing its power to override the date the Board set for expiration of the revocation of Smith's parole. And the Board's authority to revoke Smith's parole for his new offenses was unrestrained because Smith is serving life sentences.⁵ *See* NRS 213.1519(1)(b) (“[A] parolee whose

⁵ Recent legislative amendments to NRS 213.1519 impose limits on the Board's discretion for the timeframes for revocation of parole on a “technical” violation. *See* 2019 Nev. Stat., ch. 633, § 101, at 4459. But those limitations do not apply here. Smith's violation and revocation occurred prior to July 1, 2020, the effective date of the amendments. *Id.* at § 137, at 4488. And Smith's new felony conviction would not be a “technical” violation. NRS 213.1519(5). Even so, the new provisions in

parole is revoked by decision of the Board . . . [m]ust serve such part of the unexpired maximum term or the maximum aggregate term, as applicable, of his or her original sentence as may be determined by the Board”). Smith’s petition did not actually present a cognizable claim for habeas relief under NRS 34.720 *et seq.* Instead, the proper remedy for Smith’s purported denial of due process, if any at all, would have been a writ of mandamus directing the Board to fulfill its statutory mandate to hold a timely hearing. However, *that* issue is now moot. There is no requirement in statute or in habeas that the Board use a court-mandated date for the expiration of Smith’s parole revocation.

A. The Timing of Smith’s Parole Revocation Hearing Complied with NRS 213.1517(4).

In this case, Smith’s parole revocation hearing was held the day after Smith entered an *Alford* plea in his new criminal case, which was before the time for the Board to hold the hearing expired under a proper reading of NRS 213.1517(4). However, in its findings of fact and conclusions of law and order, the district court

NRS 213.1519(4) are consistent with the Board’s reading of the statutory framework. While NRS 213.1519(4) evinces the intent to shorten the revocation period for “technical” parole violations, it does not otherwise limit discretionary decisions made by the Chief of the Division of Parole and Probation and the Board under NRS 213.1517 prior to resolution of new criminal charges. And if a return to NDOC custody mandated resolution of the revocation proceeding prior to final adjudication of the new criminal charges, such a rule could prevent the prisoner from relying upon the actual resolution of the new criminal charges by the court that would impact the Board’s decision on revocation.

disagreed and ordered NDOC to recalculate Smith's parole eligibility and apply flat time to Smith's sentences from June 12, 2018, to June 17, 2019. AA 0176. According to the district court's order, it based this conclusion on the premise that NRS 213.1517(4) required the Board to hold Smith's revocation hearing on June 12, 2018, meaning the "one-year penalty" assessed by the Board on June 25, 2019, should have expired on June 17, 2019. *Id.*

Because NRS 213.1517(4) expressly provides the Board with the discretion to defer a parole revocation hearing pending the final adjudication of the new criminal charges, and the Board deferred its decision on whether Smith violated parole until the final adjudication of the new criminal charges that were determinative of the violation issue, the timing of Smith's revocation hearing complied with the statute. This Court should thus reverse the order of the district court in its entirety.

B. Regardless of Application of NRS 213.1517(4), the District Court Erred by Ordering Recalculation of the Expiration of Smith's Parole Revocation.

The Board exercised its discretion to order that Smith's parole be revoked to a date certain—July 1, 2020. AA 0011. To purportedly remedy a delay in the holding of Smith's Board hearing, the district court ordered retroactive recalculation of the expiration of Smith's parole revocation. But the court cited no authority that permitted it to award Smith such a remedy. Indeed, as is explained above, the district court's incorrect view on the statute was influenced by a false premise: that Smith

was serving “dead time” while he awaited his parole revocation hearing. And its remedy is based on a second false premise: that the Board only had the option of invoking a “one-year penalty” for revocation that would have expired on June 17, 2019.

Because Smith’s original sentences are life terms, the Board had unrestricted discretion to revoke Smith’s parole for as long as it deemed appropriate. *See* NRS 213.1519(1)(b) (“[A] parolee whose parole is revoked by decision of the Board . . . [m]ust serve such part of the unexpired maximum term or the maximum aggregate term, as applicable, of his or her original sentence as may be determined by the Board”). NRS 213.1517(4) certainly does not authorize a district court to second guess the date the Board set for expiration of the parole revocation.

Thus, Smith’s petition does not even present a cognizable habeas claim under NRS 34.720 *et seq.* It does not challenge the validity of Smith’s convictions, nor does it challenge the actual calculation of Smith’s sentences. Instead, the claim is that the Board failed to hold a timely revocation hearing under NRS 213.1517(4).

But the proper vehicle to remedy the Board’s purported failure to comply with the timing requirements of NRS 213.1517(4)—if such a failure occurred at all—was a petition for writ of mandamus requiring the Board to fulfill its statutory mandate to hold a timely revocation hearing. *See, e.g., Brewery Arts Center v. State Bd. Of Examiners*, 108 Nev. 1050, 1053-54, 843 P.2d 369, 372 (1992). That issue, however,

is moot because the Board held a hearing and exercised its discretion to revoke Smith's parole until July 1, 2020. The decision to revoke Smith's parole until that date was well within the Board's discretion under NRS 213.1519, even if the Board was required to hold the revocation hearing on June 12, 2018, as the district court suggests NRS 213.1517(4) required. And there is no authority the State is aware of that allows a district court to override the Board's exercise of discretion in deciding how long a revocation of parole should last. *See* NRS 213.1519.

For those reasons, this Court should reverse the district court's order requiring retroactive recalculation of the expiration for Smith's parole revocation.

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CONCLUSION

The district court's order granting relief in this case resulted in a statutory misinterpretation of NRS 213.1517(4). Additionally, the district court's order improperly required retroactive recalculation of the expiration of Smith's parole revocation. Accordingly, the State requests that this Court order the district court's judgment in this case be REVERSED.

Dated this 29th day of July 2021.

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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 in 14 font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32 (a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(C), it contains 4069 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 29th day of July 2021.

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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 by using the electronic filing system on the 29th day of July 2021.

The following participants in this case are registered electronic filing system users and will be served electronically:

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