

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	Electronically Filed
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THE STATE OF NEVADA,	)	Dist. Ct. No. C-19-337302-1	
<i>Appellant,</i>	)		
	)		
Vs.	)		
	)		
BRECK WARDEN SMITH,	)		
<i>Respondent.</i>	)		
	)		
	)		
	)		
	)		

**APPELLEE'S OPENING BRIEF**

(Appeal from Judgment Granting Petition for Writ of Habeas Corpus  
Post-Conviction)

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### **NRAP 26.1 DISCLOSURE**

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 27th day of August, 2021.

/s/ Michael J. McAvoy-Amaya, Esq.

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## **STATEMENT OF JURISDICTION**

Respondent agrees with Appellant's jurisdictional statement.

## **ROUTING STATEMENT**

Respondent agrees with Appellant's routing statement only to the extent that this matter is properly before the Supreme Court as a matter of statutory interpretation that is an issue of first impression. See NRAP 17(a).

## **ISSUES PRESENTED FOR REVIEW**

- I. **WHETHER THE DISTRICT COURT COMMITTED CLEAR ERROR WHEN IT INTERPRETED NRS § 213.1517 *et al* TO REQUIRE THE PAROLE BOARD TO HOLD A PAROLE REVOCATION HEARING WITHIN SIXTY (60) DAYS OF A PAROLEE'S RETURN TO NEVADA DEPARTMENT OF CORRECTIONS CUSTODY.**

## **STATEMENT OF THE CASE**

The plain language of NRS § 213.1517, and related parole statutes, place and affirmative duty on the Nevada Board of Parole Commissioners (the "Board") to provide a parolee due process in relation to parole revocation within sixty (60) days after a parolee's remand into the custody of the Nevada Department of Corrections

(“NDOC”). This duty is triggered upon a parolee’s return to NDOC custody regardless of whether the parolee has new charges pending. While Breck Smith was on parole he picked up new charges of attempted burglary.

On April 11, 2018, the Board issued a retake warrant, directing that Breck be remanded to the custody of the NDOC. Thereafter, the Board repeatedly continued Breck’s parole revocation hearing, subjecting Breck to an indefinite period of incarceration in the Nevada prison system, without bail, and without due process. After fighting the new charges against him for over one year, Breck finally gave up and plead guilty to the new charge of attempted burglary on June 24, 2019, given he was being subjected to this indefinite term of imprisonment known in the prison industry as “dead time.” Only after Breck’s guilty plea did the Board finally schedule the parole revocation hearing and formally revoke his parole and impose a one year penalty for the parole violation.

Breck challenged the decision of the Board to imprison him without holding the requisite hearing, and requested the District Court backdate his sentence for the parole violation approximately one year to

sixty (60) days after his return to NDOC custody. The District Court agreed with Breck's interpretation of the plain language of the parole statutes finding that the Board exceeded its authority in delaying Breck's parole revocation hearing more than sixty (60) days after his return to NDOC custody. The District Court's interpretation of NRS § 213.1517 and related parole statutes was not clearly erroneous and the judgement should be affirmed.

### **STATEMENT OF RELEVANT FACTS**

Respondent was convicted of burglary in 2008 and charged as a habitual criminal. *See* Appdx. V1, at 003-7. Respondent was paroled in 2017. *Id.* at 008. Respondent was arrested on new charges of attempted burglary on March 22, 2018. *Id.* at 0017. Respondent was almost immediately remitted into NDOC custody for the suspected parole violation. *Id.* at 0059. After the Las Vegas Metropolitan Police Department ("LVMPD") issued an arrest report and submitted to the Nevada Department of Public Safety, Division of Parole and Probation ("NDPP"), the NDPP ordered an NDPP investigation into whether there was probable cause to believe that Respondent had violated the terms of his parole. *Id.* at 068.

On March 28, 2018, the investigating officers of the NDPP issued their parole violation report. *Id.* The report noted that “On March 22, 2018, Breck Smith was arrested by the Las Vegas Metropolitan Police Department and charged with Attempt Burglary and Possession of Burglary Tools in Case# 18FOS188X in addition to four counts of Violation of Parole. The subject was placed in custody in the Clark County Detention Center and bail was set at \$7,000.” *Id.* The report also noted Respondent was two months in arrears for his financial obligations to the NDPP and had not provided proof of required substance abuse evaluations. *Id.* The investigators reported the arrest was Respondent’s first major parole violation; that Respondent “has apparently fallen back into his old behavior,” and that the NDPP investigators felt “the subject is not an appropriate candidate for continued Community supervision.” *Id.* Respondent was in the custody of the Clark County Detention Center (“CCDC”) and the NDPP “recommended that a Retake Warrant be issued and the subject's parole be revoked.” *Id.* at 069.

In or around April 11, 2018, the Board accepted the advice of the NDPP and issued the retake warrant. *Id.* at 057. An NDPP “Notice of

Rights” form dated March 30, 2018, indicates Respondent was remanded back into the custody of NDOC sometime between March 30, 2018 and April 11, 2018, when the retake warrant was issued. *Id. see also* 00. The Notice states Respondent’s “return to The Nevada Department of Corrections to answer charges of parole violation before the Nevada Board of Parole Commissioners was determined at your Preliminary Inquiry Hearing.” *Id.* at 076. However, the form fails to indicate a date when the Preliminary Inquiry Hearing to determine probable cause to detain Respondent was held. *Id.*

Despite Respondent being remanded into NDOC custody and being housed at the High Desert State Prison, it appears neither the NDPP nor the Board gave Respondent his Preliminary Inquiry probable cause hearing, instead imprisoning Respondent until his parole revocation hearing. After Respondent’s return to NDOC custody the Board held numerous meetings on the revocation of Respondent’s parole and, at every hearing, the Board deferred issuing a decision on whether Respondent violated his parole. *Id.* at 055-67.

Respondent plead guilty to the new charge of attempted burglary on June 24, 2019. *Id.* at 3. On June 25, 2019, the Board revoked

Respondent's parole for one year to July 1, 2020, despite the fact that Respondent had been imprisoned in NDOC for over a year for his parole violation. *Id.* at 057. The Board's failure to hold the parole revocation hearing and enter a decision to revoke Respondent's parole within 60 days of Respondent's remand into NDOC custody caused Respondent to incur over one year of "dead time" wherein Respondent was imprisoned for a parole violation without due process and precluded from posting bail on the new alleged offenses despite being granted bail. *Id.* Respondent alleged the Board's conduct violated his rights pursuant to the Nevada Revised Statutes governing parole, and the Nevada and United States Constitutions. The District Court agreed, granted Respondent's petition, and the State now appeals. *Id.* at 079-84.

## **ARGUMENT**

**I. THE DISTRICT COURT'S INTERPRETATION OF NRS § 213.1517 *et al* TO REQUIRE THE PAROLE BOARD TO HOLD A PAROLE REVOCATION HEARING WITHIN SIXTY (60) DAYS OF A PAROLEE'S RETURN TO NEVADA DEPARTMENT OF CORRECTIONS CUSTODY WAS NOT CLEARLY ERRONEOUS AND SHOULD BE AFFIRMED.**

A challenge "to a district court's discretionary modification of a sentence after a probation revocation hearing are reviewed for an abuse of discretion." *State v. Lucero*, 127 Nev. 92, 95-96, 249 P.3d 1226, 1228

(2011) *citing Kirkpatrick v. State*, 122 Nev. 846, 848, 137 P.3d 1193, 1194 (2006). This Court “reviews questions of statutory interpretation de novo.” *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

This Court has repeatedly noted that “[w]hen interpreting a statute, legislative intent ‘is the controlling factor.’” *Id. citing Robert E. v. Justice Court*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). For this reason, the first step in reviewing a matter of statutory interpretation is to look at the “statute’s plain meaning; when a statute ‘is clear on its face, a court cannot go beyond the statute in determining legislative intent.’” *Id. quoting Catanio*, 120 Nev. at 1033, 102 P.3d at 590 (“We must attribute the plain meaning to a statute that is not ambiguous.”).

Only when a statute’s language “lends itself to two or more reasonable interpretations” can the statute be found to be ambiguous, and permits the Court to “look beyond the statute in determining legislative intent.” *Id. citing Catanio*, 120 Nev. at 1033, 102 P.3d at 590. When interpreting an ambiguous statute, this Court looks “to the legislative history and construe the statute in a manner that is consistent with reason and public policy.” *Id. citing Great Basin Water*

*Network v. State Eng'r*, 126 Nev. \_\_\_, 234 P.3d 912, 918 (2010); *see also Moore v. State*, 122 Nev. 27, 32, 126 P.3d 508, 511 (2006) (looking to legislative history to determine legislative intent behind ambiguous statute); *Robert E.*, 99 Nev. at 445-48, 664 P.2d at 959-61 (looking to legislative history, reason, and public policy to determine legislative intent behind ambiguous statute).

This Court does not “ignore as meaningless” words and clauses in a statute or law. *State ex rel. Thatcher v. Reno Brewing Co.*, 42 Nev. 397, 405, 178 P. 902, 903 (1919). Rather, there is a presumption that the framers of our laws intended “to give force and effect, not only to the main legislative intent of the act but also to its several parts, words, clauses, and sentences, and chose appropriate language to express their intention.” *Id.* That “presumption is removed only when it appears, from a construction of a statute as a whole, effect cannot be given to the paramount purpose unless particular words or clauses are rejected, or without limiting or expanding their literal import.” *Id.*

That is, 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]henever 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).

When criminal statutes are involved, the rule of lenity applies. *State*, 127 Nev. at 99. The Rule of Lenity is a rule of statutory construction that “demands that ambiguities in criminal statutes be interpreted in the favor of criminal defendants. *Id.* However, “[t]he rule of lenity has little independent force; it cannot substitute for common sense, legislative history, and the policy underlying a statute.” *Id.* The plain meaning of the words of a statute must be applied, because “to do otherwise would ignore obvious legislative intent and distort the meaning of the term beyond that of common sense.” *Id. citing State v. Nevada Northern Railway Co.*, 48 Nev. 436, 440, 233 P. 531, 532 (1925).

Here, the District Court found the plain meaning of NRS § 213.1517 and related parole statutes require the Board to hold a parole revocation hearing within sixty (60) days of a parolee’s return to the custody of the NDOC when granting Breck’s petition. *See Appdx. at 079-83.* This is a matter of statutory construction and an issue of first

impression. The District Court’s interpretation of the statutes is not clearly erroneous, and should not be overturned.<sup>1</sup>

“The State Board of Parole Commissioners may direct that any prisoner confined in the state prison, or confined in another jurisdiction as provided in NRS 176.045, shall be released on parole as provided in chapter 213 of NRS, if eligible for parole under the provisions of such chapter.” Nev. Rev. Stat. § 176.095. “If the parolee violates a condition of parole, *he may be imprisoned on the unexpired sentence.*” *Coleman v. State*, 130 Nev. 190, 194, 321 P.3d 863, 866 (2014) (emphasis added). A parolee is granted numerous rights under chapter 213 of the NRS even when arrested for a new offense. *Id.*

A condition of all probation in the State of Nevada requires parolees to refrain from violating state or federal laws other than minor traffic violations. *See* Nev. Rev. Stat. § 213.1511. When a parolee is arrested for a new offense or a parole violation while on parole, the arresting officer must:

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<sup>1</sup> It should be noted that the State does not argue that the statutes at issue are ambiguous, nor does it cite the legislative history as persuasive evidence of its requested interpretation.

- (a) Present to the detaining authorities, if any, a statement of the charges against the parolee; and
- (b) Notify the Board of the arrest and detention or residential confinement of the parolee and submit a written report showing in what manner the parolee violated a condition of his or her parole.

*See Nev. Rev. Stat. § 213.151.*

“Before a parolee who has been arrested and is in custody for a violation of his or her parole may be returned to the custody of the Department of Corrections for that violation, an inquiry must be conducted to determine whether there is probable cause to believe that the parolee has committed acts that would constitute such a violation.”

*See Nev. Rev. Stat. § 213.1511.* A parolee may not be returned to NDOC custody before there is a determination of probable cause. *Id.* The probable cause inquiry must be conducted by an officer who:

- (a) Is not directly involved in the case;
- (b) Has not made the report of the violation; and
- (c) Has not recommended revocation of the parole, but the inquiring officer need not be a judicial officer.

*Id.*

The inquiring officer shall allow the parolee to:

- (a) Appear and speak on his or her own behalf.
- (b) Obtain counsel.
- (c) Present any relevant letters or other documents and any person who can give relevant information.

(d) Confront and question any person who appears against the parolee unless, in the opinion of the inquiring officer, the informant would be subjected to a risk of harm by the disclosure of his or her identity.

*Id.*

The State asserts Respondent “waived his right to a preliminary inquiry on his parole violations on March 30, 2018.” *See* State Op. Brf., at 3. However, the State does not cite to any statute permitting such a waiver, nor any evidence Respondent was advised of the consequences of such a waiver by counsel. *Id.*

A conviction “for violating a federal or state law or a local ordinance, except a minor traffic offense, which is committed while the prisoner is on parole constitutes probable cause for the purposes of subsection 1 and the inquiry required therein need not be held.” *See* Nev. Rev. Stat. § 213.1511. After the Board has held the probable cause inquiry hearing, the Board Chief, after consideration of the case, may:

- (a) Release the arrested parolee again upon parole;
- (b) Order the parolee to be placed in residential confinement in accordance with the provisions of NRS 213.15193, 213.15195 and 213.15198; *or*
- (c) *Suspend his or her parole and return the parolee to confinement.*

*See* Nev. Rev. Stat. Ann. § 213.1517(1) (emphasis added).

The Chief must take one of the actions under subsection 1 within:

- (a) Fifteen days if the prisoner was paroled by the Board.
- (b) Thirty days if the prisoner was paroled by the authority of another state and is under supervision in this state pursuant to NRS 213.215. This paragraph does not apply to a parolee who is retaken by an officer of the sending state.

*Id.*

The arresting law enforcement agency in Respondent's case, the LVMPD, in accordance with NRS § 213.151 notified the NDPP that Respondent had been arrested and charged with new criminal offenses in or around March 22, 2018. *See* Appdx. V1 at 055; 068-69. The NDPP appointed officers to conduct the probable cause inquiry pursuant to NRS § 213.1511. *Id.* On March 28, 2018, while Respondent was in the custody of the CCDC, the inquiring officers concluded that there was probable cause to believe that Respondent had violated his parole and recommended that the Board issue a retake warrant, whether by a finding of probable cause, or the alleged waiver. *Id.* at 068-69.

The issuance of a retake warrant is a suspension of parole. *See* Nev. Rev. Stat. § 213.1517(1). After the Board suspended Respondent's parole, Respondent was remanded to NDOC custody and the Board

failed to give Respondent his statutorily mandated due process rights pursuant to NRS § 213.1517.

The due process clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property" without due process of law. *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Mullins v. Oregon*, 57 F.3d 789, 795 (9th Cir. 1995). A procedural due process violation has two elements. First, plaintiffs must show that the government has deprived them of life, liberty or property. *Mathews v. Eldridge*, 424 U.S. 319, 332-33, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Second, plaintiffs must show that the government deprived them of these constitutionally protected interests without due process of law. *Id.* Both the United States Constitution and the Nevada Constitutions "guarantee that a person must receive due process before the government may deprive him" life, liberty or property. *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). The Nevada Supreme Court "has recognized that procedural due process 'requires notice and an opportunity to be heard.'" *Id.*

When “a determination has been made that probable cause exists for the continued detention of a paroled prisoner, *the Board shall consider the prisoner's case within 60 days after his return to the custody of the Department of Corrections* or his or her placement in residential confinement pursuant to subsection 1.” See Nev. Rev. Stat. § 213.1517(3) (emphasis added). This sixty (60) day parole revocation hearing requirement is intended to ensure that a parolee believed to have violated the terms of his parole is not deprived of his constitutionally protected liberty interests without due process. *Id.* “Due process for parole revocation hearings requires, at a minimum, ‘that finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.’” *Ramirez v. State*, 2016 Nev. App. Unpub. LEXIS 553, \*2, 132 Nev. 1021 *quoting Morrissey v. Brewer*, 408 U.S. 471, 484, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *see also Anaya*, 96 Nev. at 122, 606 P.2d at 157-58 (citing *Morrissey* and setting out the minimum procedures necessary to revoke parole); NRS 213.1513; NRS 213.1517.

The due process requirement in NRS § 213.1517 includes one exception. When the “probable cause for continued detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge, 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 the final adjudication of the new criminal charge.” See Nev. Rev. Stat. § 213.1517(4) (emphasis added).

The sixty (60) day parole revocation hearing due process rule in NRS § 213.1517 subsection 3, and its exception in subsection 4, both state that the event that triggers the Board’s duty to hold the parole revocation hearing is a parolee’s return to NDOC custody. *Id.* This is because, while the NDPP and the Board have a duty to take custody of a parolee who is arrested for violating their parole within five (5) days of the probable cause inquiry hearing, that duty does not apply if there are new criminal charges pending in the jurisdiction where the parolee is currently detained. See Nev. Rev. Stat. § 213.15103. Indeed, if the NDPP and Board fails to issue a probable cause decision on whether continued detention is necessary within five (5) days of the probable



cause inquiry hearing, “the sheriff may, if there are no other criminal charges pending or warrants outstanding for the parolee, release the parolee from custody.” *Id.*

The exception to the sixty (60) day rule in NRS § 213.1517(4), when looked at in concert with NRS 213.15103, demonstrates legislative intent to permit the NDPP and Board the discretion to postpone remanding the parolee to NDOC custody, and permit the parolee to remain in the custody of the jurisdiction where the new offense was committed until the new charges have been adjudicated. A conviction for violation of federal or state law while on parole, other than minor traffic infractions, establishes probable cause that a violation has occurred and upon return of the parolee to NDOC custody the Board must hold the revocation hearing within sixty (60) days. Regardless of whether there are new charges or not, however, it is the return of the parolee to NDOC custody that trigger’s the Board’s duty to hear the parolee’s case within sixty (60) days. *See Nev. Rev. Stat. § 213.1517(3-4).*

This interpretation is supported by this Court’s statutory interpretation precedent. *Clay v. Eight Jud. Dist. Ct.*, 305 P.3d 898, 129

Nev. Adv. Op. 48 (2013). In *Clay*, this Court was asked to interpret Nevada’s felony child abuse statute. *Id.* The Defendant argued that the prosecutor was required to inform the grand jury of the elements of the offense to be charged upon a finding of probable cause and that failing to do so was a violation of NRS 172.095(2). *Clay*, 305 P.3d at 902. Specifically, the Defendant argued the grand jury indictment was flawed because the prosecutor failed to instruct the grand jury about the elements of “abuse and neglect” and “physical injury” as defined under NRS 200.508(4).

The *Clay* Court interpreted NRS 200.508(1) as containing two distinct theories of liability. *Id. see also* NRS 200.508(1). “The first requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect. The second requires the State to prove that (1) a person willfully caused (2) a child who is less than 18 years of age (3) to be placed in a situation where the child may suffer physical pain or mental suffering (4) as the result of abuse or neglect.” *Id.* The Court determined that because the fourth

element, “as the result of abuse or neglect,” appears under both theories of liability, the prosecution must prove “abuse or neglect” under either.

Second, “negligent maltreatment” is considered “abuse and neglect” under NRS 200.508(4)(a), and does not require proof of injury. The *Clay* Court determined that NRS 200.508(1) “criminalizes five different kinds of abuse or neglect: (1) nonaccidental physical injury, (2) nonaccidental mental injury, (3) sexual abuse, (4) sexual exploitation, and (5) negligent treatment or maltreatment.” Because the abuse or neglect at issue in *Clay* was “nonaccidental physical injury,” the prosecutor was required to present the element of “physical injury” to the jury, and failing to do so was a reversible error. *Id.* The State argued that the Court’s interpretation of the statute in this way would render the second theory of liability under NRS 200.508(1) superfluous, as the State would be required to prove “physical injury” no matter what theory they chose to prosecute the defendant. *Id.* The Court found this argument unpersuasive because the fifth kind of “abuse or neglect” under NRS 200.508(4), “negligent treatment or maltreatment,” could result without actual physical or mental injury. *Id.* Thus, because the prosecution is not required to prove actual injury if their theory rests on

“negligent treatment or maltreatment,” this Court’s interpretation of NRS 200.508(1) in *Clay* was not superfluous. That is, the State could avoid having to present evidence supporting the element of physical or mental injury if they chose to prove one of the other definitions of “abuse and neglect,” like “negligent treatment or maltreatment.”

The analysis used by this Court in the *Clay* case should be applied to this case, as the construction of the relevant statute is remarkably similar. See Nev. Rev. Stat. § 213.1517(3-4). In Nevada, if the NDPP determines (1) “that probable cause exists for the continued detention of a paroled prisoner;” (2) “the Board shall consider the prisoner's case within 60 days;” (3) “*after his return to the custody of the Department of Corrections* or his or her placement in residential confinement pursuant to subsection 1.” *Id.* “If probable cause for continued detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge, the Board may consider the prisoner's case under the provisions of subsection 3 or [1] defer consideration until [2] not more than 60 days [3] *after his or her return to the custody of the Department of Corrections* [4] following the final adjudication of the new criminal charge.” *Id.*

Under both subsections outlining the Board's duty to hold the parole revocation due process hearing require the Board to hold the hearing within 60 days of the parolee's return to NDOC custody. *Id.* If the parolee is already in NDOC custody, (s)he cannot be returned to NDOC custody. *Id.* For this reason, the State's interpretation of this statute as permitting the Board to order a parolee into NDOC custody and not hold the revocation hearing until after final adjudication of the new charges against him would render the statute's "return to the custody of the Department of Corrections" meaningless and nugatory. *Id.* A person cannot be returned to the custody of NDOC if they are presently in the custody of NDOC. *Id.*

Here, Respondent was remanded into NDOC custody by the NDPP and the Board between March 30, 2018 and April 11, 2018. Upon return of Respondent to NDOC custody the Board was required to hold Respondent's parole revocation hearing within sixty (60) days and issue its decision. *Id.* However, despite Respondent being remanded to NDOC custody upon probable cause that a parole violation had been committed, the Board chose to defer the final decision to revoke Respondent's parole for over a year until Respondent plead guilty to the

new charges. *See* Appdx. V1 at 055-67. In deferring the parole revocation hearing for over a year, the Board circumvented the procedure in NRS §§ 213.1513 and 213.1517 depriving Respondent of his liberty without due process and caused Respondent to be incarcerated in prison for over a year of “dead time” that did not count toward his prior offense nor the parole revocation penalty. *Id.*

This “dead time” also does not count towards the new offense because NRS § 176.055(2) precludes a parolee arrested for a new charge from getting credit for time served on the new offense for their time incarcerated while awaiting trial on the new offense. *See* Nev. Rev. Stat. § 176.055(2). NRS § 176.055(2) is the only statutorily authorized penalty imposed on parolees who commit crimes while on parole. *Id.* NRS § 176.055 contemplates, consistent with NRS chapter 213, that the Board and NDPP may decide defer the decision to revoke parole by not taking custody of a parolee from the jurisdiction where the new offense is committed until the charges are resolved. *Id.* Allowing the Board and NDPP to take custody of a parolee precluding the parolee from being able post bail, but deferring the decision to revoke parole until after the new charges are resolved permits the Board to impose penalties for

disputing charges that were not contemplated nor permitted by the NRS or the Nevada Legislature.

Here, the plain meaning of the words of NRS § 213.1517(4) are clear, and lenity requires that any ambiguity in the statute must be interpreted in the favor of Respondent. The exception in NRS § 213.1517(4) can only be applied when the Board does not direct the NDOC to retake custody of the parolee. This is because while NRS § 213.1513 imposes a duty on the Board to take custody of a parolee who is arrested for violating their parole, like NRS 213.1517, the statute also includes an exception when new criminal charges are pending in the jurisdiction where the parolee is currently detained. *See Nev. Rev. Stat. Ann. § 213.15103(1 and 2)*. When a new offense has been committed the NDOC is not required to retake custody of the parolee, and may defer taking custody of the parolee until those new charges are adjudicated. *Id.*

Upon adjudication of the new charges, the Board's duty to retake custody of the parolee is again mandated, and the Board must hold the parole revocation hearing "not more than 60 days after his or her return to the custody of the Department of Corrections following the final

adjudication of the new criminal charge.” Nev. Rev. Stat. Ann. § 213.1517(4). These statutes are clear, and together these statutes indicate clear legislative intent to require the parole revocation hearing within sixty (60) days of a parolee’s return to a Nevada prison.

If the Board had unfettered authority to indefinitely defer the parole revocation hearing until 60 days after adjudication of the new charges, there would be no need to include the language regarding “return to the custody of the Department of Corrections” in the statute. *Id.* If the State’s argument is correct and the 60 days does not begin until after Smith is convicted on the underlying new charge, one would expect the exception to read: “If probable cause for continued detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge, the Board may consider the prisoner's case under the provisions of subsection 3 or defer consideration until not more than 60 days after the final adjudication of the new criminal charge.” The State’s interpretation of this statute requires the Court to ignore the language regarding “return to the custody of the Department of Corrections,” which as this Court recognized in *Clay* is impermissible.



The State has failed to overcome the presumption that all the words in this statute must be given meaning and effect. The language regarding returning the parolee to the custody of NDOC in NRS 213.1517(4) would be rendered meaningless if the State's interpretation were accepted. The parole revocation statutes do not contemplate nor permit the Board to impose an indefinite terms of imprisonment that do not count towards the prior offense, or new offense, or the parole violation penalty simply because a parolee chooses to dispute the new charges. As such, the District Court did not commit clear error in interpreting NRS 213.1517 and the order should be affirmed.

**II. THE STATE'S REQUESTED INTERPRETATION OF THE PAROLE STATUTES IGNORES THE PLAIN LANGUAGE AND THE BOARD'S DEFERRAL OPTIONS UNDER NRS § 213.1513 and 1517.**

The State's requested interpretation of Nevada's parole statutes ignore the plain language of the statutes and the options provided to the Board pursuant to those statutes. The State bases its requested interpretation of the parole statutes on two theories: that the District Court's interpretation: "(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.” *See* State Op. Brf. at 7-8. The State established neither.

The State opens its argument with numerous requested presumptions that it neither argued before the District Court, nor supports with any evidence or declarations of Board or NDOC officials. First, the State assures this Court that after a probable cause determination and suspension of a parolee’s parole, “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.” *Id.* at 8. The State never argued this point before the District Court. *See* Appdx. V1 at 086-90. Indeed, the State never actually disputed that Nevada parolees are being subject to “dead time” that applies to neither sentence. *Id.* As an initial matter, because the State did not dispute the existence of “dead time” in the lower court it has been waived, and should not be considered by this Court. *See Old Brown*, 97 Nev. at 52; *see also Sotelo*, 488 P.3d 581 n.2.

However, even if the dispute over the existence of “dead time” were not waived, the State provides no evidentiary support for this position. *See* State Op. Brf., at 8. The State simply requests that this Court take its word for it that only prisoners with life in prison are being subjected to “dead time,” while others are having their time credited to their prior offenses. *Id.* at 12-13. When an appellant “fails to provide relevant authority or cogent argument,” or evidentiary support, this Court often declines to address the party’s arguments. *Theil v. State*, 480 P.3d 834 n.3 (Nev. 2021); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”). Here, the State has simply failed to support its position that “dead time” does not exist and this Court should not take its unsupported assertions as the truth.

The State makes this unsupported argument because its requested interpretation would lead to absurd and unconstitutional results. For the State’s interpretation not to result in unconstitutional deprivations of liberty the State is forced to argue, without supporting evidence, that there is no “dead time” and the only reason that

Respondent was not credited the time served after his parole was suspended was because he was serving a life sentence. *See State Op. Brf.*, at 12. This unsupported argument is advanced because the State's requested interpretation has unconstitutional results if a parolee is not serving a life sentence.

Specifically, at the hearing before the District Court Respondent requested that the Court:

imagine if, instead, our client is not a person who has life with the possibility of parole but, instead, is released with a year left on his sentence, gets arrested for a new offense, this procedure would allow the parole board to imprison that person for over a year while disputing the new charge; and then he would then have to serve the remainder of that yearlong left on the prior sentence before serving the new sentence.

Judge, it simply allows an indefinite term of imprisonment for charges that are, essentially, nonexistent. It doesn't apply to the prior charge; it doesn't apply to the new charge either. And we argue that that is unconstitutional. It's also not what the statutory scheme indicates, and we are asking you to order the parole board to recalculate the sentence from 60 days after his return to custody, when the hearing should have been held; the decision to revoke parole should have occurred.

*See State Appdx. at STATE 0160:14-161:7.*

The State's brief appears to try and address this matter of unconstitutional "dead time" by asserting, without evidence, that the

Board is ordering NDOC to retake custody of parolee's in Respondent's position that have definite maximum sentence terms and crediting the time served in NDOC custody against the parolee's prior sentence, even if they defer revoking parole until the new charges are adjudicated. *See* State Op. Brf., at 12. Again, this Court should not consider this argument because: (1) the State fails to support this representation with any evidence, and (2) the State did not argue the matter before the district court. *Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("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."); *see also Sotelo v. Bouchard*, 488 P.3d 581 n.2 (Nev. 2021).

However, should the Court consider the issue, the State's reasoning still fails to resolve the constitutional problem posed by the "dead time." If, as the State assures this Court, parolees remanded to NDOC custody after alleged parole violations stemming from new charges receive credit towards their maximum terms, parolees could run out the time on their prior sentences while disputing the new charges and would be imprisoned in a Nevada prison on the pending

charges until their adjudication, resulting in “dead time” that is not applied to the prior sentence or the new sentence.

This unconstitutional result is best illustrated with a hypothetical: Parolee A has eight (8) months left on his prior sentence he is currently paroled on. Parolee A is arrested on new charges. The Board orders Parolee A remanded to NDOC custody upon probable cause. The Board defers the revocation hearing decision until final adjudication of the new charges. Parolee A disputes the new charges for fourteen (14) months, and then finally relents and pleads guilty. Under this scenario, Parolee A would have exhausted the prior sentence six (6) months before final adjudication of the new charges. If the Board then imposes a year penalty, as they did in Respondent’s case, there is still six (6) months of “dead time” that Parolee A is imprisoned in an NDOC facility that does not count towards the prior sentence (because it expired) or the new sentence (because it had not begun).

Another scenario, with an even more significant constitutional violation, occurs if the parolee is acquitted. Parolee B has eight (8) months left on his prior sentence he is currently paroled on. Parolee B is arrested on new charges. The Board orders Parolee B remanded to

NDOC custody upon probable cause. The Board defers the revocation hearing decision until final adjudication of the new charges. Parolee B disputes the new charges for fourteen (14) months, takes the charges to trial and is acquitted. Under this scenario, Parolee B would have exhausted the prior sentence six (6) months before final adjudication of the new charges, and the Board would have no grounds to impose any penalty. Parolee B is unconstitutionally deprived of his liberty in an NDOC facility for six (6) months over the maximum term of the prior sentence.

Even if this Court were to disregard its own precedent and consider the State's unsupported argument for the first time on appeal that "dead time" does not exist, the State's own characterization of why "dead time" does not exist fails to actually establish that "dead time" does not exist. Rather, even assuming the State's characterization is true, parolees would be subject to dead time if they dispute the new charges past the expiration of the maximum term of their prior sentence.

Using this this flawed presumption the State argues that "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.” *See* State Op. Brf., at 11. The State argues that “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.” *Id.*

The State fails to acknowledge that the Board has the option to defer taking custody of the parolee when new charges are pending. *See* NRS 213.1513. The Board can allow the parolee to remain in the custody of the jurisdiction where the new charges are pending, wait for adjudication, and if the parolee is convicted and returned to NDOC, then hold the parole revocation hearing within 60 days. *Id. see also* NRS 213.1517(4). For this reason, the District Court’s interpretation does not read the words “following the final adjudication of the new criminal charge” out of the statute.

Rather, the District Court’s interpretation provides meaning to all the words in the statute, and related statutes. If a parolee is arrested on



a parole violation unrelated to new charges, the Board must make a probable cause determination. *See* Nev. Rev. Stat. § 213.1511. Within fifteen days of the probable cause determination, the Board's Chief must decide to return the parolee on parole, remand to residential confinement, or suspend parole and return the parolee to NDOC custody. *See* Nev. Rev. Stat. § 213.1517. The Board must also take custody of the parolee from the arresting jurisdiction within 5 days of the probable cause determination, or the jurisdiction may release the parolee if no other charges are pending. *See* Nev. Rev. Stat. § 213.15103. Upon return of the parolee to NDOC custody, the Board must hold the revocation hearing within sixty (60) days. *See* Nev. Rev. Stat. § 213.1517(3).

When new charges are pending, the arresting jurisdiction retains custody of the parolee unless the Board suspends parole and returns the parolee to NDOC custody. *See* Nev. Rev. Stat. § 213.1517(4); Nev. Rev. Stat. § 213.151; Nev. Rev. Stat. § 213.15103. The Board, however, is under no duty to suspend parole and may defer suspending parole and returning the parolee to NDOC custody until after adjudication of the new charges and the parolee's return to NDOC custody. *Id.* The State's

interpretation leaves the statutory language of NRS 213.1517(4) regard returning the parolee to NDOC custody meaningless, and is disfavored. *Harvey*, 136 Nev. Adv. Op. at \_\_\_, 473 P.3d at 1019. For all the language in the statute to have meaning, the event triggering the sixty (60) day period to hold the parole revocation hearing is the return of the parolee to NDOC custody, not simply the final adjudication of the new charges.

Further, the District Court's interpretation does not affect the Board's "ability to await final adjudication of the new criminal charges before holding a revocation hearing," and Respondent agrees that the statute clearly establishes an "important purpose of giving the Board the opportunity to consider what happens during the new criminal proceeding(s) before conducting the revocation hearing." *see* State Op. Brf., at 12. The State's argument relies on the presumption that the Board cannot await final adjudication of the new charges or have an opportunity to consider what happens in the new criminal proceedings unless it remands the parolee into NDOC custody. *Id.* The fact is, the Board can await the adjudication of the new charges and consider the criminal proceedings in the parole revocation hearing by simply opting not to order NDOC to take custody of the parolee.

**III. THE STATE WAIVED ITS ARGUMENT THAT THE DISTRICT COURT LACKED AUTHORITY TO ORDER THE BOARD TO RECALCULATE HIS SENTENCE AND THE ARGUMENT IS CONTRARY TO PRECEDENT.**

The State next argues that the District Court cited no authority that would permit it to order the Board to retroactively recalculate Respondent's sentences. *See* State Op. Brf. at 15. The State did not dispute the District Court's authority to grant the remedy Respondent requested before the lower court. *See* Appdx. V1 at 086-90. The State has, therefore, waived this argument. Further, the State cites to no authority for its position that the District Court did not have authority to order the remedy, instead relying on its incorrect interpretation of the parole statutes. *See* State Op. Brf. at 15-17. Because the State has failed to make any cogent legal argument or cite authority regarding the District Court's authority to direct a state body to recalculate a prisoner's sentence, this Court need not address the argument.

In any event, "NRS 176.033(2) specifically authorizes the Parole Board to petition the district court to modify a parolee's sentence and thereby reduce the time that the parolee will be supervised." *State Bd. of Parole Comm'rs v. Second Judicial Dist. Court*, 451 P.3d 73, 76 (Nev. 2019). This statute makes clear that a district court does, indeed, have

authority to entertain request to modify a parolee's sentence, and that the Board does not have the power to do so without a district court's approval making clear that the district court is the proper authority to request review, and order modifying a sentence. *Id. see also State v. Eighth Judicial Dist. Court*, 85 Nev. 485, 487, 457 P.2d 217, 218 (1969).

The State has failed to establish the District Court's interpretation of Nevada's parole statutes is clearly erroneous, nor that district courts lack authority to order the Board to recalculate sentences. For these reasons, this Court should affirm the District Court's order.

Finally, the State's appeal may be moot. *Martinez-Hernandez v. State*, 132 Nev. 623, 627, 380 P.3d 861, 864 (2016). The State addresses mootness in a footnote of their brief. *See State Op. Brf.*, at 6 n3. The State cites numerous cases relating to habeas petitions challenging a judgment of conviction, and collateral consequences affecting the petitioner after expiration of their sentence. *Id.* Here, however, Respondent's petition did not challenge a judgment of conviction. There are no collateral consequences of the petition because Respondent has been released, the penalty for the probation violation has expired, and

no collateral issues remain relating to the issue of the State's failure to hold a timely parole revocation hearing. For these reasons, it is not clear that the State's cited authority applies, and this matter may be moot.

### **CONCLUSION**

For the reasons set forth above, Appellee Breck Smith respectfully requests this Honorable Court affirm the order entered by the District Court.

Dated this 21st day of August 2021.

**CERTIFICATE PURSUANT TO NRAP 28.2**

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 Century Schoolbook; or

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 7,765 words; or

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☐ Does not exceed 30 pages.

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.

Dated this 27th day of August 2021.

MCAVOY AMAYA & REVERO ATTORNEYS  
Respectfully submitted,

/s/ Michael J. McAvoy-Amaya, Esq.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Nevada by using the efilings system located at [efile.nevadasupremecourt.us](http://efile.nevadasupremecourt.us).

I further certify that all participants in this case are registered users of Nevada Supreme Court's efilings system, and that service will be accomplished in accordance with 9(c) of the Nevada Electronic Filing Rules.

Dated this 27th day of August 2021.

MCAVOY AMAYA & REVERO ATTORNEYS  
Respectfully submitted,

/s/ Michael J. McAvoy-Amaya, Esq.

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