

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.

AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION
(In Support of Respondent)

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NRAP 26.1 CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

The Nevada Justice Association (“NJA”), an amicus curiae, is a non-profit organization of independent lawyers in the State of Nevada. The amicus curiae is represented in this matter by Micah Echols, Esq., of Claggett & Sykes Law Firm and A. J. Sharp of Sharp Law Center.

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NJA and its counsel did not appear in the District Court in this matter. NJA submits this brief along with its Motion for Leave, pursuant to an Order of the Nevada Supreme Court filed on September 27, 2021.

DATED this 5th day of October 2021.

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AMICUS INTEREST AND AUTHORITY TO FILE

NJA is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and share the common goal of improving the civil justice system. NJA seeks to ensure that access to the courts by Nevadans is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA files this brief with an accompanying motion pursuant to NRAP 29(c). Through this proposed brief, NJA seeks to provide this Court with the broader statewide implication of this matter, including the necessity of proper interpretation of NRS 213.1517(4) in order to preserve any notion of “due process,” not only for the parolee here, but for parolees in Nevada Department of Corrections custody statewide.

Amicus intervention is appropriate where “the amicus has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) (indicating that the classic role of an amicus curiae is to assist in cases of general public interest and to supplement the efforts of counsel by drawing the Court’s attention to law that may have escaped consideration).

Thus, amici curiae are regularly allowed to appear when they seek to inform the deciding court regarding the broader implications of issues before this Court, rather than the interests of the actual parties. *See, e.g., Bradford v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 128 Nev. 884 (2012) (considering amicus curiae arguments regarding tensions between procedural protections and a party’s rights); *see also Ballard v. Eighth Judicial Dist. Court*, 106 Nev. 83, 85, 787 P.2d 406, (1990) (acknowledging efforts of NJA — then called Nevada Trial Lawyers Association — as amicus curiae).

This Appeal addresses the 60-day limit imposed by statute on the Parole Board for conducting a revocation hearing, which, in the State’s reading, is eliminated if the revocation hearing stems from a new criminal charge. The State’s reading would enable the State to hold a parolee in NDOC custody indefinitely before conducting a revocation hearing — until the new criminal charge reaches “final adjudication.”

That reading, in addition to directly contradicting the actual language of the statute (as this Court recently held) also carries grave implications for the due process rights of parolees, by freeing the State from the statutory time limit and instead requiring the parolee to show that the delay is “unreasonable” and has inflicted prejudice[]” on the parolee.

Obviously, such a reading of a crystal-clear statute would carry consequences extending far beyond the parties in this matter. Accordingly, NJA has respectfully requested leave to appear as amicus curiae in this matter.

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I. LEGAL ARGUMENT

A. THIS COURT HAS EXPRESSLY AGREED WITH SMITH'S READING OF THE STATUTE AT ISSUE.

As noted in both the Opening Brief and the Answering Brief, the sole issue here is whether the State was entitled to defer Smith's parole revocation hearing until 60 days after the new criminal charge was adjudicated, or was required to hold that hearing within 60 days of Smith's being returned to NDOC custody. Appellant's Opening Brief ("AOB") 1, 4-5, 7-8; Respondent's Answering Brief ("RAB") 2-3.

As this Court held less than three weeks ago, Smith's reading of the applicable statute is correct (as was the District Judge's), and the State's reading is incorrect.

The key consideration is that "[e]ach of the conditions set forth in NRS 213.1517(4) must be met to defer consideration beyond 60 days from the date the parolee is returned to NDOC's custody." *See Reed v. Williams*, 82059, 2021 WL 4237751, at *1 (Nev. Sept. 16, 2021) (unpublished decision).

In *Reed*, as here, "the circumstances here did not satisfy NRS 213.1517(4) given that appellant was returned to NDOC's custody before a final adjudication of the new charges." *See id.* (citing *Moody v. Baggett*, 429 U.S. 78, 86-87 (1976)) (emphasis added).

Further, the *Reed* court noted that the default limitation (60 days) is imposed by subsection 3 of the statute, and subsection 3 governs unless all of the conditions of subsection 4 are met. *See id.* As the Court further noted, "[t]he Parole Board

could have deferred a final revocation hearing until adjudication of the criminal charges if the parole violation warrant had not been executed and appellant returned to NDOC's custody. Once appellant was returned to NDOC's custody, a prompt parole revocation hearing was required.” *See id.* at *1, n.2 (emphases added).

The District Judge's ruling exactly comported with this Court's reading of the statute:

The Court holds that the plain language of NRS §§ 213.1517 Subsections 3 and 4 impose a duty on the Parole Board to hold the parole revocation hearing within sixty (60) days of a parolee's return to the custody of NDOC upon a finding a probable cause that the terms of parole have been violated, regardless of whether there are new charges pending. The Parole Board may only defer the parole revocation hearing if the parolee remains in the custody of the jurisdiction where the new charges have been committed until final adjudication of the new charges.

1 Appellant's Appendix (“AA”) STATE 0174 (emphasis added).

Thus, when a parolee faces a new criminal charge, the Parole Board has two options: (1) leave the parolee in the custody of the other jurisdiction until the new charge is adjudicated, in which case the Board may defer the revocation hearing until 60 days after the parolee is “return[ed] to the custody of [NDOC] following the final adjudication of the new criminal charge[]”; or (2) take the parolee into NDOC custody (if possible) and hold the revocation hearing within 60 days. *See Nev. Rev. Stats. § 213.1517(3), (4); see also Reed*, 2021 WL at *1, n.2.

Here, there is no dispute that Smith was returned to NDOC custody long before his new criminal charge was adjudicated. AOB 3 (“Smith arrived at NDOC on April 13, 2018.”); RAB 2–3 (“On April 11, 2018, the Board issued a retake warrant, directing that [Smith] be remanded to the custody of the NDOC.”).

As this Court noted in *Reed*, because Smith was returned to NDOC custody before the new charge had been adjudicated, “NRS 213.1517(3) governs, and the Board should have held a final parole revocation within 60 days after [Smith]’s return to NDOC’s custody.” *See Reed*, 2021 WL at *1.

B. READING THE STATUTE AS THE STATE PREFERS WOULD ALLOW THE STATE TO INCARCERATE A PERSON INDEFINITELY, PROTECTED ONLY BY SUBJECTIVE CONSIDERATIONS OF “UNREASON-ABLE[NESS]” AND “PREJUDICE” TO THE PERSON.

As explained above, this Court has agreed with the District Judge’s reading of the plain language of the statute, applying subsection 3 of the statute where the parolee was returned to NDOC custody before the new criminal charge had been adjudicated. *See* Section A, *supra*. In addition, the *Reed* case also provides insight into the public policy reasons behind the statutory language and this reading of it.

Simply put, if the State’s proposed reading of the statute were implemented (which would require disregarding the actual language of subsection 4), the Parole Board would essentially have unlimited power to detain a parolee arrested on a new

charge in NDOC custody until 60 days after that charge had been finally adjudicated — no matter how long such “final adjudication” might take.

As the State openly argues:

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.

AOB 5 (emphasis added).¹

The State offers no limiting principle whatsoever for its proposed interpretation, and in fact states that “60 days after final adjudication of the new

¹ Of course, contrary to the State’s assertion, the District Court’s interpretation of the statute does not “read” any words “right out of the statute.”

To the contrary, it is the *State’s* proposed interpretation that ignores the statutory word “following,” attempting to treat the “final adjudication” as the triggering event, irrespective of whether that “adjudication” occurred before or after Smith’s return to NDOC — in direct contradiction of the plain language of the statute, which explicitly provides that subsection 4 applies only where the return to NDOC occurs “following the final adjudication of the new criminal charge.” See Nev. Rev. Stats. § 213.1517(3), (4) (emphasis added); see also *Reed*, 2021 WL at *1 (“[T]he circumstances here did not satisfy NRS 213.1517(4) given that appellant was returned to NDOC’s custody before a final adjudication of the new charge.”) (emphasis added) (citing *Moody*, 429 U.S. at 86-87).

criminal charges serves as the outer limit of when the Board must hold the revocation hearing.” *Id.* at 9.

Thus, under the State’s proposed reading, the Board could keep a parolee in NDOC custody indefinitely — the sole limitation is that, once the new criminal charge is “final[ly] adjudicate[ed][,]” the revocation hearing must occur within 60 days. Of course, “final adjudication” of a new criminal charge could take literally years or even decades, especially if appeals are included.

As this Court noted in *Reed*, no such unlimited detention in the custody of NDOC prior to the revocation hearing can occur. First and foremost, the 60-day clock for the revocation hearing begins running when the parolee is returned to the custody of NDOC — whether or not the new charge has reached “final adjudication[]” *See Reed*, 2021 WL at *1.

In addition, “[m]inimal due process requires that a final revocation hearing ‘must be tendered within a reasonable time after the parolee is taken into custody.’” *See id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972)). Thus, as the *Reed* court held, “even if NRS 213.1517(4) allowed the Board to defer a final parole revocation hearing until adjudication of new criminal charges for a parolee who already has been taken into NDOC’s custody,” which the statute does not, the delay cannot be “unreasonable” and must “comport with minimal due process.” *See id.*

A person challenging a delay in holding of a parole revocation hearing bears the burden of showing both that the delay was “unreasonable” and that “he was prejudiced.” *See id.* (citing *Hopper v. United States Parole Comm’n*, 702 F.2d. 842, 845 (9th Cir. 1983)).

Thus, proper interpretation and application of NRS 213.1517(4) is crucial, as the statute, by its plain language, requires the Parole Board to hold a revocation hearing within 60 days of the return of the parolee to NDOC custody — irrespective of the status of the new criminal charge. *See id.*

Allowing the Parole Board to defer the hearing until after the “final adjudication” of the new charge while the parolee is in NDOC custody would improperly shift the burden to the parolee, who could challenge that improper delay only by showing “unreasonableness” and “prejudice.” *See id.* (citing *Hopper*, 702 F.2d. at 845).

Instead, the statute places the burden where the Legislature intended — on the State. Once the parolee is in NDCO custody, the Parole Board has 60 days to conduct the revocation hearing, with no statutory exception. *See Nev. Rev. Stats. § 213.1517 (4); see also Reed*, 2021 WL at *1, n.2.

The sole alternative, under the statute, is to delay taking the parolee into custody of NDOC. If that occurs, then the 60-day clock does not start running until the parolee enters NDOC custody or the “final adjudication” of the new criminal

charge is completed, whichever occurs first. *See Nev. Rev. Stats. § 213.1517 (4); see also Reed*, 2021 WL at *1, n.2.

Thus, as the District Court correctly ruled, the State could not have it both ways — holding Smith in NDOC custody while also delaying the revocation hearing beyond the 60 days prescribed by statute. To apply the statute otherwise would create an opportunity for the State, at its sole discretion, to indefinitely detain a parolee in NDOC custody — a blatant violation of notions of “due process.”

II. CONCLUSION

As this Court recently held, the District Court properly interpreted and applied NRS 213.1517(4) — ruling that the revocation hearing had to be held within 60 days of Smith’s return to NDOC custody, without regard to the status of the adjudication of the new criminal charge. By its plain language, subsection 4 of the statute applies only where “return to the custody of [NDOC]” occurs “following the final adjudication of the new criminal charge.”

In addition, reading the statute as the State proposes would enable to State to indefinitely detain a parolee in NDOC custody, which would plainly violate any definition of “due process.”

NJA therefore respectfully requests that this Court affirm the District Court’s correct reading and application of the statute, as such reading is necessary both to

protect Smith's rights under the statute, and to preserve parolee's rights and "due process" in Nevada as a whole.

DATED this 5th day of October 2021.

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CERTIFICATION OF COMPLIANCE

I hereby certify that this amicus curiae 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 2016 in 14-point font and Times New Roman type.

I further certify that this amicus curiae brief complies with the page or type-volume limitations of NRAP 29 and 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 2,288 words: or

☐ does not exceed _____ pages.

Finally, I hereby certify that I have read this amicus curiae 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 5th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AMICUS CURIAE BRIEF OF THE NEVADA JUSTICE ASSOCIATION (In Support of Respondent)** was filed electronically with the Supreme Court of Nevada on the 5th day of October 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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