IN THE SUPREME COURT OF THE STATE OF NEVADA

Dorian Cullen, Appellant vs. The State of Nevada, Respondent,	)))))))))	Supreme Court Case No.: 83208 Electronically Filed Dec 29 2021 03:23 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S REPLY BRIEF**

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The State's Answering Brief relies largely on two factual premises: Mr. Cullen stipulated to a non-technical violation on the record, and that that Mr. Cullen failed to preserve the issue regarding his revocation for a technical violation. Both premises are incorrect.

Mr. Cullen stipulated to an *arrest only* that was listed as a non-technical violation; in fact, the stipulation was specific that he was conceding just to the arrest, but not the underlying facts. AA 45 ("MS. MINICHINI: We were going to stipulate and argue. And as to the non-technical violation stipulate as to the arrest, but not to the underlying [indiscernible][1] THE COURT: Understood. Thank you"). The stipulation on record from the non-technical violation report was the arrest alone; the Court further indicated this when questioning Mr. Cullen on the stipulated violation:

> THE COURT: Okay. And on May 7th you were arrested for several new charges, including probation -- possession of a control substance less than 14 grams, DUI of alcohol and/or controlled or prohibited substance, and violation of

[1] It is noteworthy that because all parties were appearing via BlueJeans video conference, there are several moments in the transcripts that are indiscernible or unusually transcribed due to brief internet connectivity lapses.

> instructional drivers permit. Don't talk about the underlying offenses, just the fact that you were arrested. Is that correct?
>
> THE DEFENDANT: Yes (AA 46).

Secondly, the issue was properly preserved because Defense Counsel did ask to reinstate Mr. Cullen on probation because the DUI arrest alone, without a complaint filed, was a technical violation:

> He did complete, or represents that, he had completed his DV counseling. So really what we have left is an arrest for an alleged DUI, and the $120 in arrears, which are both technical[][2] violations. That haven't even filed a complaint for the DUI and that status check is not until September. I would ask Your Honor to reinstate Mr. Cullen onto probation and to release him to the sober living house with the contact information that he provided to me.

Relying on the erroneous fact that Mr. Cullen stipulated to a non-technical violation, the State simply responds that "unrefuted facts and violations are sufficient for the court to determine that the probationer violated probation" (State's Answering Brief, 9). However, since Mr. Cullen explicitly only stipulated to the arrest, and *not* the basis for the arrest, there still remains the ultimate

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[2] The original transcription mistakenly wrote "technically violations" as opposed to "technical violations" as actually stated, which is further contextually indicated by Defense Counsel's immediately subsequent statement that no complaint had yet been filed.

question of whether an arrest alone for a misdemeanor DUI is a technical or non-technical violation. Additionally, the District Court noted that it was basing revocation on two things: drug relapse,[3] and the DUI arrest. "Relapse is one thing. Relapse and getting in your car and getting arrested for a DUI and putting other people in harm's way is completely something else. So at this point in time the defendant's probation is revoked" (AA 50).

On this point, the State only claims that "[a]ll Driving Under the Influence offenses are a violation of NRS 484C.110, with graduated penalties as dictated by NRS 484C.410. Violation of NRS 484C.110 is not a technical violation" (State's Answer Brief, 9-10). The State's pleading is devoid of any substantive response to Appellant's argument that an arrest alone is not the "commission" of a new offense in order to be considered a non-technical violation. Nowhere

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[3] Use of controlled substances is also a technical violation requiring graduated sanctions, *see* NRS 176A.510(1) (emphasis added):

1. The Division shall adopt a written system of graduated sanctions for parole and probation officers to use when responding to a technical violation of the conditions of probation or parole. The system must:

(a) Set forth a menu of presumptive sanctions for the most common violations, including, without limitation, failure to report, willful failure to pay fines and fees, failure to participate in a required program or service, failure to complete community service and **failure to refrain from the use of alcohol or controlled substances**.

in the State's brief does it address Appellant's argument of whether stipulation to an arrest alone satisfies the burden in NRS 176A.510 requiring the "commission of" that offense. For the reasons set forth in Appellant's Opening Brief, Appellant maintains that an arrest alone, without even a complaint having been filed, does not satisfy the statute requiring the "commission of" an offense in order to be considered a non-technical violation.

The State further fails to address the "Star List" argument as it pertains to a pre-disposition prior to the presentation of evidence; instead, the State relies on the District Court's lawful ability to generally warn defendants regarding probation compliance during his or her sentencing. Aside from a bare conclusory statement that nothing in the record indicates a pre-disposition, the State seemingly relies on public policy considerations, such as judicial economy and discretion, to validate the District Court's "Star List."

However, while a general warning at sentencing can be effective to ensure future compliance and deter improper conduct, the existence of an *actual list* starts off the revocation proceedings with an initial disposition to revoke simply by virtue of the defendant being present for revocation proceedings, without any substantiation of the underlying facts or basis and prior to any stipulations or argument. This is indicated in the District Court's

statement after argument: "one thing I am, is I am true to my word. And when I tell someone they get one chance, they do get one chance" (AA 50).

A statement on the record that the District Court is "true to my word" after revealing that a probationer was on a written list to be revoked if he appeared for revocation proceedings – without regard for the basis of the revocation – is an indication of pre-disposition prior to the presentation of evidence. The defendant is entitled to a "neutral and detached decisionmaker" who will hear and weigh the evidence presented to determine whether there is legal "good cause" and a sufficient basis to revoke probation. *Matter of Ross*, 99 Nev. 1, 13, 656 P.2d 832, 839 (1983); *Anaya v. State*, 96 Nev. 119, 606 P.2d 156 (1980).

In this case, the District Court's pre-disposition to revoke Appellant is further exacerbated by the Court's own statement that it relied on technical violations to improperly revoke his probation. Appellant's "relapse," presumably meaning the failure to refrain from controlled substances, is itself a technical violation requiring graduated sanctions. See, NRS 176A.510(1). A misdemeanor arrest itself is also a technical violation until there has been a showing that the probationer "committed" the offense. See, NRS 176A.510(7).

Reliance on two technical violations to revoke Appellant because he was on the District Court's "Star List" is an improper violation of Appellant's due process rights under state and federal law.

CONCLUSION

For these reasons, Appellant respectfully requests the matter remanded with his probation reinstated or, in the alternative, remanded for a new revocation hearing before a different Judge.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Reply Brief are true and correct to the best of my knowledge.

Dated this 29 day of December, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein
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CERTIFICATE OF COMPLIANCE

1. I 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 2007 with 14 point, double spaced Cambria font.

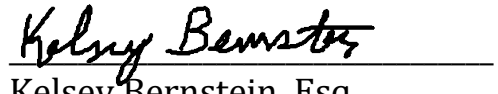
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 1,423 words.

3. 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(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 29 day of December, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 29 day of December, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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