IN THE SUPREME COURT OF THE STATE OF NEVADA

Dorian Cullen, Appellant	)	Supreme Court Case No.: 83208
vs.	)	
The State of Nevada, Respondent,	)	**APPELLANT'S OPENING BRIEF**

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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 5 day of November, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a judgment in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on July 8, 2021, within 30 days after the Amended Judgment of Conviction was filed on June 10, 2021.

NRAP 17 ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Did the District Court improperly consider a misdemeanor DUI arrest (without charges having been filed) a non-technical probation violation sufficient to warrant revocation without the use of graduated sanctions?
2. Did the District Court indicate a predisposition to revoke Appellant when the Court noted on the record that Appellant was on a "list" of individuals that would be revoked if they appear for revocation proceedings?

II. Statement of the Facts

On or about October 19, 2020, Appellant entered a Guilty Plea Agreement whereby Appellant pled guilty to one count Battery by Strangulation (Category C felony) and one misdemeanor count Battery Domestic Violence (Bates 01; 13).

Sentencing occurred on March 3, 2021 (Bates 25; 26). At that time, the Court indicated that given Appellant's efforts and steps taken to better his situation, she was going to give him probation, but warned him that he would be revoked if there is any type of violence, mistreatment of his family, or contact

in violation of the no contact order (Bates 29-30). Appellant was ultimately sentenced to 19-60 months in the Nevada Department of Corrections, suspended and placed on probation for a period not to exceed three years (Bates 25). A Judgment of Conviction was filed on April 6, 2021 (Bates 36).

On June 7, 2021, Appellant appeared in front of the Court for revocation proceedings as a result of an arrest for Driving Under the Influence and Possession of a Controlled Substance on May 7, 2021 (Bates 46); however, the Possession of a Controlled Substance charge had been denied, leaving only the misdemeanor DUI (Bates 56). The revocation violation also included technical violations, including testing positive for marijuana (Appellant acknowledged the positive test but the Court also recognized that he provided proof of a medical marijuana card) and failing to provide proof of classes to his probation officer (however, Appellant argued that he completed the classes and was on track with his counseling, and only had not provided proof of such) (Bates 46).

Prior to argument by the parties, the Court stated the following:

> THE COURT: -- in the beginning, and if you were, I had told Mr. Cullen that he was on my star list and that I was giving him one chance. And the -- I will -- actually thought he should go to prison, but he talked to me about taking domestic violence classes, and that he was on the right track to creating a better environment for his kids. So I told him I would give him one chance and I told him if he came back in front of me I was

> sending him to prison. So I want you to make sure that you have that understanding of what was happening -- in case you weren't here when I sentenced him (Bates 45).

Appellant stipulated to the arrest but not the underlying facts, and argued for reinstatement while the State argued for revocation. After argument, the Court indicated that it was "true to its word" and revoked him as a result of the DUI arrest.

> I do appreciate your advocacy on Mr. Cullen's behalf Ms. Minichini, but 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.
> I agree that recovery is a journey 100% and we often work with people throughout that journey. 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. The underlying 19 to 60 months is imposed. And the credit for time served is what at this point? (Bates 50)

An Amended Judgment of Conviction was filed on June 10, 2021; this appeal follows.

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III. Summary of the Argument

Appellant's arrest for a misdemeanor offense of Driving Under the Influence, without any charges having been filed, is not a technical violation for purposes of probation revocation proceedings under NRS 176A.510(7)(c). Specifically, to be considered a non-technical violation, the statute requires the "commission of" a new offense. Although the "commission of" driving under the influence would be a non-technical violation, an arrest alone does not equate to the "commission of" prohibited conduct.

Additionally, the Court stated on the record that Appellant was on a "star list" wherein the defendant would be sentenced to prison if submitted for revocation. This indicates a pre-disposition to revoke Appellant prior to the presentation of any evidence, which is in violation of United States Supreme Court precedent requiring minimum due process considerations at probation revocation hearings. Even though the Court listened to argument, when revoking Appellant, the Court stated that it was "true to its word," thereby reinforcing its predisposition to revoke Appellant before the presentation of any evidence or argument.

Appellant respectfully requests this Court remand the matter to reinstate Appellant on probation, as the violation constitutes a technical violation

requiring the use of graduated sanctions before Appellant could be submitted for revocation.

ARGUMENT

A. A Misdemeanor DUI Arrest, Standing Alone, is a Technical Violation Requiring Use of Graduated Sanctions Prior to Revocation

On July 1, 2020, the Nevada Legislature revised several Nevada Revised Statutes as they pertain to probation and probation revocation proceedings; specifically, violations became classified as either technical or non-technical, with the definition being found under NRS 176A.510(7). The statute states:

> 7. As used in this section:
> …
> (c) "Technical violation" means any alleged violation of the conditions of probation or parole that does not constitute absconding **and is not the commission of** a:
> (1) New felony or gross misdemeanor;
> (2) Battery which constitutes domestic violence pursuant to NRS 200.485;
> (3) Violation of NRS 484C.110 or 484C.120;
> (4) Crime of violence as defined in NRS 200.408 that is punishable as a misdemeanor;
> (5) Harassment pursuant to NRS 200.571 or stalking or aggravated stalking pursuant to NRS 200.575;
> (6) Violation of a temporary or extended order for protection against domestic violence issued pursuant to NRS 33.017 to 33.100, inclusive, a restraining order or injunction that is in the nature of a temporary or extended order for protection against domestic violence issued in an action or

> proceeding brought pursuant to title 11 of NRS, a temporary or extended order for protection against stalking, aggravated stalking or harassment issued pursuant to NRS 200.591 or a temporary or extended order for protection against sexual assault pursuant to NRS 200.378; or
>
> (7) Violation of a stay away order involving a natural person who is the victim of the crime for which the supervised person is being supervised.
>
> → The term does not include termination from a specialty court program.

The statute itself is phrased in the negative, defining a technical violation as one that is not the "commission of" an enumerated offense; this inverse wording necessarily implies the converse as well, that a non-technical violation would require the "commission of" an enumerated offense.

The amended statutes also set forth different penalties in the event of a technical or non-technical violation. Specifically, a technical violation *cannot* result in revocation without the use of graduated sanctions.

> 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.[1]
> …
> 3. Notwithstanding any rule or law to the contrary, a parole and probation officer shall use graduated sanctions established pursuant to this section when responding to a technical violation.
> …
> 6. **The Division may not seek revocation of probation or parole for a technical violation of the conditions of probation or parole until all graduated sanctions have been exhausted.** If the Division determines that all graduated sanctions have been exhausted, the Division shall submit a report to the court or Board outlining the reasons for the recommendation of revocation and the steps taken by the Division to change the supervised person's behavior while in the community, including, without limitation, any graduated sanctions imposed before recommending revocation (emphasis added).

No graduated sanctions were used in Appellant's case. The only purportedly non-technical violation, which ultimately resulted in Appellant's revocation, is the arrest for misdemeanor driving under the influence as a violation of NRS 176A.510(7)(c)(3). However, there was never any testimony or indication regarding the required "commission of" the DUI offense, aside from the arrest. Because an arrest alone provides no indication as to the actual

[1] Appellant's revocation also included a number of technical violations, including failure to provide proof of completion of required programs (domestic violence and family counseling), refraining from the use of controlled substances (testing positive for marijuana), and failure to pay supervision fees (being $120 in arrears).

commission of any unlawful conduct (as further indicated by the denial of felony charges for which Appellant was also arrested), the misdemeanor arrest alone cannot be a non-technical violation. For this reason, revoking Appellant's probation for the arrest alone was improper in violation of the graduated sanctions requirement.

As a legal matter, the question presented is whether an arrest alone can satisfy the requirement of the "commission" of an offense to constitute a non-technical violation. However, the statutory analysis need not go beyond the plain language. "The starting point in statutory interpretation is 'the language [of the statute] itself.' We assume that the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. James*, 478 U.S. 597, 604, 106 S. Ct. 3116, 3120 (1986) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)).

"It is well established that, when interpreting a statute, the language of a statute should be given its plain meaning." *We the People Nevada v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166 (2008). Thus, when a statute is facially clear, a court should not go beyond its language in determining its meaning. *Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 5 (2011) (quoting *McKay*

v. Bd. of Supervisors, 102 Nev. 644, 648, 730 P.2d 438 (1986)); *Las Vegas Taxpayer Comm. v. City Council*, 125 Nev. 165, 177, 208 P.3d 429 (2009) (explaining that a statute's meaning is plain when it is "facially clear").

Although it is not clear what burden of proof is required to establish the "commission of" an offense, an arrest alone does not even satisfy a burden of proof by slight or marginal evidence, the lowest known burden in criminal proceedings that can only be established through the presentation of evidence at a preliminary hearing or grand jury proceedings.

Traditionally, revocation proceedings have utilized a standard between slight or marginal evidence and a preponderance, recognizing that the full spectrum of constitutional protections do not apply, but that minimum due process considerations are still in effect. In *Anaya v. State*, 96 Nev. 119, 606 P.2d 156 (1980), the Nevada Supreme Court cited to two United States Supreme Court cases, *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Morrissey and Gagnon require that a revocation be based upon "verified facts" so that "the exercise of discretion will be informed by an accurate knowledge of the probationer's behavior." Indeed, *Anaya* specifically held that "*Morrissey* and *Gagnon* mandate that the due process protections

available at the preliminary hearing apply to the less summary final revocation hearing with equal, if not greater, force." *Id.*

An arrest alone is not sufficient to meet the burden of proof at preliminary hearing, and therefore cannot be sufficient to meet the burden of proof at a probation revocation, as both State and Federal law "mandate the due process protections at preliminary hearing apply…. with equal, if not greater, force" at revocation proceedings.

By its plain language, NRS 176A.510 requires the "commission of" an enumerated offense to constitute a non-technical violation that may result in revocation. Because an arrest alone is not the "commission of" an offense, let alone a finding of "verified facts," both a plain language and due process analysis would conclude that an arrest alone, without further substantiation, cannot be the basis for revocation as a non-technical violation.

For these reasons, Appellant's revocation based on his misdemeanor DUI arrest, without any substantiation or without even charges having been filed, was improper.

B. The District Court's Reliance on a "Star List" to Revoke Appellant Indicates a Pre-Disposition Prior to the Presentation of Evidence

In the instant matter, the District Court thoroughly warned Appellant at sentencing that if he committed any acts of violence, mistreated his family, or violated the no contact order, then he would be sent to prison. These generalized warnings at sentencing are entirely lawful and proper, as it both affirms the serious nature of the offense, the significance of complying with probation, and does not indicate that the District Court would "close its mind" to revocation or reinstatement prior to the substantiation of any alleged violation.

However, the District Court in this case went far beyond a stern warning of compliance; specifically, the District Court indicates it keeps an actual "list" of individuals that will be automatically revoked if they appear for revocation proceedings. This is the essence of a pre-disposition.

"[A defendant] is entitled to a neutral and detached judge in the first instance." *Matter of Ross*, 99 Nev. 1, 13, 656 P.2d 832, 839 (1983); see also, *Ward v. Vill. Of Monroeville, Ohio*, 409 U.S. 57, 59, 93 S.Ct. 80, 82 (1972). The concept of a neutral and unbiased decisionmaker has been a cornerstone of American law since its inception.

Comments made by the Court which show bias, prejudice or any similar concept of pre-disposition which call into question the neutrality of a trial may be grounds for reversal. *Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 963 P.2d 459 (1998). In *Rudin v. State*, 120 Nev. 121, 86 P.3d 572 (2004), the Nevada Supreme Court also held that comments which "reflect any animus" towards one party are problematic. *See also, Leonard v. State*, 114 Nev. 1196, 1211, 969 P.2d 288, 298 (1998) ("While the court may have displayed some irritation with defense counsel, the clear intent of its remarks was to save time; it was not directing animus towards defense counsel").

Statements which "express an opinion as to the merits or the outcome of any ongoing proceedings" is similarly problematic. *Goldman v. Bryan*, 104 Nev. 644, 651, 764 P.2d 1296, 1300 (1988). "Remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev. 1281, 1282, 968 P.2d 1169, 1170 (1998). A judge must remain "open-minded enough to refrain from finally deciding a case until all of the evidence has been presented" in order to remain impartial. *Id.* at 1283.

The concept of a neutral and detached decisionmaker applies at probation revocation proceedings as well, particularly given that the probationer is at risk of a substantial deprivation of liberty through the imposition of a suspended sentence for at least one year.

Both "[t]he United States and Nevada Constitutions provide that no person shall be deprived of liberty without due process of law." *Scarbo v. Dist. Ct.,* 125 Nev. 118, 124, 206 P.3d 975, 979 (2009); *see also* Nev. Const. Art. 1, § 8. Due process protections apply only "when government action deprives a person of liberty or property." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S. Ct. 2100 (1979); *State ex rel. Bd. of Parole Comm'rs v. Morrow*, 255 P.3d 224, 127 Nev. Adv. Rep. 21 (2011). As this Court imposed the 19-month suspended sentence, there is little question that Mr. Cullen's liberties were deprived as a result of "government action."

A probationer is still entitled to due process protections during a revocation hearing to ensure that revocation is based on substantiated grounds as determined by a "neutral and detached hearing body." Returning to *Morrissey* and *Gagnon*:

> Parole and probation revocations are not criminal prosecutions; the full panoply of constitutional protections afforded a criminal defendant does not apply. Revocation

> proceedings, however, may very well result in a loss of liberty, thereby triggering the flexible but fundamental protections of the due process clause of the Fourteenth Amendment. **Due process requires, at a minimum, that a revocation be based upon "verified facts" so that "the exercise of discretion will be informed by an accurate knowledge of the probationer's behavior."** In order to insure that this constitutional standard is achieved and to offer guidance to the states in structuring their respective revocation procedures, the United States Supreme Court, in *Morrissey* and *Gagnon*, outlined the minimal procedures necessary to revoke probation or parole. A preliminary inquiry, to determine whether there is probable cause to believe that the probationer violated the conditions of his or her probation, is required, at which the probationer must be given notice of the alleged probation violations, an opportunity to appear and speak on his own behalf and to bring in relevant information, an opportunity to question persons giving adverse information, and written findings by the hearing officer, who must be "someone not directly involved in the case**." If probable cause is found, the probationer is entitled to a formal revocation hearing, less summary than the preliminary inquiry, at which the same rights attach <u>before a "neutral and detached" hearing body</u>.** The function of the final hearing is to determine not only whether the alleged violations actually occurred, but whether "the facts as determined warrant revocation." *Anaya v. State*, 96 Nev. 119, 606 P.2d 156 (1980) (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)) (emphasis added).

Although the full gamut of Due Process protections may not apply to probationary proceedings, case law from the Nevada Supreme Court and United States Supreme Court clearly mandate at least some level of constitutional protection to ensure a defendant's liberty is not forfeited without

a fair finding of substantiation or good cause. Furthermore, the revocation hearing requires the presentation of evidence "before a 'neutral and detached' hearing body."

In this case, the District Court's use of a "star list" is particularly problematic. Previously unknown to Counsel, this "list" appears to contain the names of individuals that are going to be revoked if they appear before the Court for probation revocation. Even if it does not indicate an automatic revocation per se, this "list" is, at a minimum, a strong predisposition towards revocation prior to the presentation of any evidence, argument or substantiation whatsoever. This predisposition can further be gleaned from the District Court's statement – after the argument of counsel – that it was going to stay "true to its word" that Appellant's inclusion on this list means he will be revoked.

The District Court's statements express that it is pre-disposed to revoke Appellant, and places the burden on Defense Counsel to convince the District Court to deviate from this pre-disposition. When the arguments by Defense Counsel are not sufficient, the District Court will "stay true" to its original position that Appellant be revoked.

The mere existence of this list is troublesome, let alone the Court's statements that Appellant's inclusion on this list mean that he will be revoked if he is before the Court on revocation proceedings. This does not comply with State and Federal law requiring a probation revocation hearing before a "neutral and detached" hearing body. A pre-disposed inclination to revoke before the presentation of any evidence whatsoever by including Appellant on the District Court's "list" is not a hearing before a "neutral and detached" decisionmaker.

For these reasons, Appellant did not receive a fair revocation hearing because the District Court was strongly inclined to revoke Appellant's probation before the presentation of any evidence or substantiation of wrongdoing; in conjunction with Appellant's revocation being based on an arrest alone, there is no indication in the record that Appellant's revocation was based on "verified facts of wrongdoing" before a "neutral and detached hearing body" as required by 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 Opening Brief are true and correct to the best of my knowledge.

Dated this 5 day of November, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein
KELSEY BERNSTEIN, ESQ.
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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.

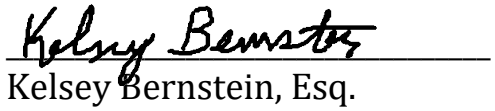
2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 4,201 words.

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 5 day of November, 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 5 day of November, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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Employee of Nevada Appeal Group