IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY PAUL BROWN-WHEATON, Appellant, v. THE STATE OF NEVADA, Respondent.	)	No. 83896 **E-File**

FAST TRACK STATEMENT

1. **Name of party:** Jeremy Paul Brown-Wheaton

2. **Name of attorney submitting this fast track statement:**

ALEXANDER B. BASSETT, #14344
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309 S. Third St., Ste. 226
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3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C-20-352265-1.

5. **Name of judge issuing order appealed from:** Judge Jaqueline M. Bluth.

6. **Length of trial.** N/A. (Plea of Guilt).

7. **Conviction(s) appealed from:** Harboring Fugitive.

8. **Sentence for each count:** Probation previously granted to the Defendant is revoked, in addition to the original fees, fines and assessments. It is further ordered and the underlying sentence is imposed as follows: 24-60 months in prison with 35 days CTS.

9. **Date district court announced decision:** 11/04/2021.

10. **Date of entry of written judgment:** 11/10/2021.

11. **Habeas corpus:** N/A.

12. **Post-judgment motion:** N/A.

13. **Notice of appeal filed:** 12/02/21.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon entry of plea, probation revoked and underlying sentence imposed.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Fast Track Statement.** No objection to assignment to the Court of Appeals.

21. **Procedural history.**

An indictment was originally filed against Jeremy Brown-Wheaton (hereinafter "Appellant") on November 18, 2020; he was charged with three felonies. (Appellant's Appendix ("App.") at 1-3). The Public Defender's Office was appointed, and Appellant was arraigned on November 24, 2020. (App. 195-196.) A trial date was set for January 25, 2021 (App. 197.) The trial date was continued due both to Covid-19 restrictions and due to the fact that Appellant's counsel filed a writ of habeas corpus; the trial was reset to April 5, 2021. (App. 198-201.) The petition for habeas corpus was denied by the District Court on February 4, 2021. (App. 201.) On February 22,

2021, an amended indictment was filed charging Appellant with a single felony charge of Harboring a Fugitive, a category C felony. (App. 172-173.)

In the interim during this period, negotiations remained ongoing between Appellant and the State. Per those negotiations, Appellant pled guilty to one charge of felony Harboring a Fugitive on February 23, 2021. (App. 203.)

On April 13, 2021, Appellant appeared in District Court Department 18, at which time he was sentenced to a term of probation not to exceed 24 months, with a suspended sentence of 24-60 months in the Nevada Department of Corrections and standard terms of probation. (App. 205.) As part of the sentencing, it was also ordered that if the Appellant were to be successful and receive an honorable discharge from his felony probation, he would be eligible to have his felony adjudication reduced to a gross misdemeanor. (App. 206.) The probationary term was to run concurrent to Appellant's probation sentence in case C-20-352037-1, a case preceding the instant one, and to which Appellant was also sentenced on April 13, 2021. (App. 205-206.)

Appellant continued probation for several months. On October 28, 2021, Appellant was in custody at Clark County Detention Center and had a revocation hearing scheduled. (App. 207.) After a slight delay so counsel

could be present in the jurisdiction, the revocation hearing occurred on November 4, 2021. (App. 208.) At that time, Appellant's probation was revoked by District Court Department 18 Judge Jacqueline Bluth. Appellant's 24-60 month suspended sentence was imposed, with 35 days credit towards that sentence; this sentence was imposed concurrent to to the also-imposed sentence in case C-20-352265-1. (App. 208.)

This appeal of Appellant's revocation was timely filed on December 2, 2021. (App. 191-194.) This Fast Track Application was duly filed.

22. **Statement of facts.**

On November 18, 2020, Appellant appeared in front of a Grand Jury, during which time the State presented its evidence. (App. 209-266.) As a result of that Grand Jury appearance, Appellant was initially charged with one Category B felony count of Escape, one Category B felony count of Battery by a Prisoner, and one Category C felony count of Break, Injure, or Tamper with a Motor Vehicle. The alleged events all occurred on August 29, 2020. (App. 1-3.) At that time Appellant was indicted and arraigned, Appellant was also in custody in CCDC on other, less serious charges as part of what would become (after its bind over) case C-20-352037-1. (App. 4-10.) Appellant's other case, C-20-352037-1, dealt with allegations of Gross Misdemeanors that had allegedly occurred in July of 2020. (App. 5-6.)

During the intervening weeks following the indictment, there were various motions filed, court appearances made, and arguments proffered by both Appellant and the State mostly dealing with Appellant's bail setting and custody status. (App. 4-10; 15-49; 161-168; 196-199.) In the meantime, negotiations were ongoing in the instant case. As part of those negotiations, an amended indictment was filed on February 22, 2021 charging Appellant with a single count of Harboring a Fugitive, a Category C felony. (App. 170-172.) That same day, Appellant filed a signed Guilty Plea Agreement agreeing to plead guilty to the same charge. (App. 173-178.) The plea negotiations in the instant case called for Appellant to plead guilty to one count of Harboring a Fugitive, a Category C felony; the State would have no opposition to probation not to exceed 24 months, with a suspended sentence of 24-60 months, and the otherwise-standard terms of probation. That sentence was intended by both parties to run concurrent to case C-20-352037-1, in which Appellant had agreed to plead guilty to a gross misdemeanor with probation and a shorter suspended sentence. (App. 173-178.) Both parties further agreed that, should Appellant complete his felony probation with an honorable discharge, he would be eligible for a "dropdown"—a reduction in his conviction from a felony to a gross misdemeanor. (App. 173.)

After several procedural delays, Appellant was sentenced in the instant case on April 13, 2021. (App. 205-206.) The District Court followed the negotiations outlined above, and a Judgement of Conviction to that effect was filed on May 3, 2021. (App. 183-186.) Appellant proceeded on probation for several months without incident.

On September 26th, 2021, Appellant was arrested by police officers and booked under a charge of misdemeanor Battery Domestic Violence in Las Vegas Municipal Court. (App. 315.) It is unclear whether formal charges were ever filed in Municipal Court, or if he was merely booked on the charge; no evidence or testimony on this point was ever provided by the State or made available in court. (App. 313-318.) By the end of October, all new charges—if they ever formally existed—had been dropped against Appellant, and his two District Court cases were placed on calendar for a revocation hearing in District Court Department 18. (App. 207.) After a brief delay so Appellant's counsel could be in the jurisdiction, the simultaneous revocation hearing for both the instant case and case C-20-352037-1 were heard on November 4, 2021. (App. 208.)

At the revocation hearing, Appellant stipulated to the mere fact of his arrest on September 26th, 2021, but did *not* stipulate to the alleged underlying charge associated with the arrest or any of the alleged facts

associated with the arrest. (App. 315.) Appellant also stipulated to various technical violations of his probation, such as being behind in payments to the Department of Parole and Probation, being served with a week-long temporary protective order, and being behind on completing some domestic violence classes. (App. 314-316.)[1] None of those violations are revokable or non-technical violations. NRS 176A.630.

When it came time for arguments, the State requested revocation of Appellant and the imposition of his suspended sentences in both cases. The State argued that "it's been over a year since [Appellant] was first arrested. And in that time, he has done nothing but pick up new cases, continue to harass Alexis Simpson, continue to engage in violent behavior and be unsupervisable for both house arrest officers and P&P officers." (App. 316.) The State then declined to offer any evidence beyond the arrest Appellant had stipulated to in order to support its claims that the Appellant had "done nothing but pick up new cases"—in fact, Appellant had zero new cases—that Appellant had engaged in violent behavior, or that he had proven to be

[1] The Court Minutes for the revocation proceeding claim that "Mr. Bassett stated the Deft. will stipulate to the violations and will argue for reinstatement. Deft stipulated to the facts and circumstances contained in the violation report." (App. 208.) This is a significant mischaracterization of what Appellant stipulated to. A reading of the actual transcript of the revocation hearing shows that the details outlined in this Statement of Facts are a much more accurate representation of what occurred. (App. 45-48.)

unsupervisable. Though a temporary protective order had been served against Appellant, it was not violated. (App. 322-323.)

The State then further argued that Appellant deserved to be revoked from probation because "he's not keeping up with his counselling…he's not doing his classes." (App. 317.) Those are not revocable offenses, and the State declined to offer an argument or evidence as to why they should be considered as part of a reason to revoke Appellant. The State concluded its argument by saying, "Frankly, Your Honor, the defendant is out of control…the only option is to send him to prison." (App. 317-318.)

Appellant's probation officer briefly testified, and made two main arguments: that Appellant had a criminal history prior to being placed on probation, and that Appellant "does not take accountability for his actions…what concerns me the most is that he makes these decisions and then he's not taking accountability for it. And we're just not getting anywhere with him." (App. 318.) The probation officer declined to offer any explanation or evidence as to why Appellant's criminal history prior to probation was relevant to him getting revoked. (App. 318.) The probation officer also failed to offer any explanation or evidence about how having an alleged bad attitude towards probation is a revocable issue under current

law, or why it should have any sway in deciding the fate of Appellant's probationary status. (App. 318.)

Appellant's counsel then pointed out that Appellant had been out of custody since July of 2020 and had remained entirely out of trouble until his arrest on September 26, 2021. (App. 319.) Appellant's counsel then pointed out that "arguments…about Mr. Brown-Wheaton's behavior" missed the point, because NRS 176A.630 clearly defines what is a revocable and what is a non-revocable probation violation. (App. 318-319.) He argued that none of the violations stipulated to by Appellant rose to the level of a revocable, non-technical violation. (App. 319-320.)

Appellant's counsel argued that a mere arrest, absent any additional evidence or testimony, is not enough to prove that the commission of a crime occurred. (App. 320.) At no point during the revocation hearing or associated actions did the State "prov[e] anything occurred other than the fact that the police arrested" Appellant. (App. 320.) An arrest is, legally speaking, nothing more than an accusation, but "an accusation does not a commission make." (App. 320.) Appellant's counsel then concluded by arguing that the State did not fairly characterize Appellant's character, the technical vs. non-technical nature of Appellant's probation violations, or

properly address the lack of evidence in arguing that Appellant had committed a new crime. (App. 321-322.)

The Court disagreed with Appellant. The Court summarized Appellant's prior criminal history—which all occurred prior to being placed on probation in the instant case—and concluded that "the fact of the matter is…I do not believe that Mr. Brown-Wheaton is supervisable in any shape or form" without immediately explaining how that tied into Appellant having a technical or non-technical violation. (App. 323.) The Court eventually clarified that it believed a mere arrest—without any supporting evidence or testimony of the alleged underlying crime—can be enough to constitute a revocable, non-technical probation violation. (App. 326.)

The Court revoked Appellant's probation in both cases. In the instant case, Appellant had a 24-60 month suspended sentence imposed, to run concurrent with the imposed 364-day sentence in case C-20-352037-1. 35 days credit was applied to both cases. (App. 327.)

A notice of appeal was then timely filed on December 2, 2021. (App. 191-194.)

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23. **Issues on appeal.**

1.) Whether the District Court's imposition of Mr. Brown-Wheaton's suspended sentence was a misapplication of NRS 176A.630, the law governing technical and non-technical probation violations.

2.) Whether, by not allowing Appellant a meaningful opportunity to challenge the alleged factual basis of his arrest, Appellant was deprived of due process.

24. **Legal argument, including authorities:**

I. <u>The District Court's imposition of Mr. Brown-Wheaton's suspended sentence was a misapplication of NRS 176A.630, the law governing technical and non-technical probation violations</u>

Nevada State Assembly Bill 236 made various changes to criminal law and criminal procedure, and was signed into law on June 14, 2019. Nevada Assembly Bill 236, 80th Session (2019). It contained among its many other provisions a statutory overhaul of the procedures governing revocation hearings of criminal defendants who are on probation.[2] Violations of probation were divided into two types: technical violations and non-technical violations. NRS 176A.630(5)(b) specifically details as to what constitutes a technical or non-technical violation:

[2] The law went into effect on July 1, 2020. The underlying incident to which Appellant pled guilty in the instant case occurred on July 11, 2020. (App. 1.) NRS 176A.630 therefore governs this case.

> "Technical violation" means any alleged violation of the conditions of probation that does not constitute absconding[3] 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 [driving under the influence];
> (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 […]; or
> (7) Violation of a stay away order involving a natural person who is the victim of the crime for which the probationer is being supervised.

All violations of the terms of probation not specifically outlined above are classified as technical violations. Technical violations are dealt with on a graduated scale. For a probationer's first technical violation, the Court may temporarily revoke probation and impose a maximum term of imprisonment of 30 days; 90 days may be imposed for a second technical violation, 180 days for a third, and probation may be fully revoked for a fourth or subsequent finding of a technical violation. NRS 176A.630(2)(c-

[3] "Absconding" is defined by NRS 176A.630(5)(a) as "a person is actively avoiding supervision by making his or her whereabouts unknown to the Division for a continuous period of 60 days or more."

d). The court may also, upon the finding of a technical violation, reinstate the probationer to probation immediately, order some form of electronic monitoring, or impose additional non-confinement conditions. NRS 176A.630(2)(a-b).

In contrast, non-technical violations of probation are *not* treated on a graduated scale. A probationer who is found to have committed a non-technical violation faces the possibility of full revocation and the imposition of their suspended sentence at their first revocation hearing, if the Court so chooses. NRS 176A.630(1).[4]

Such was the situation with Appellant at his revocation hearing. Much of the argument made at the hearing hinged on the determination of whether or not Appellant's probationary violations constituted a technical violation—as Appellant argued—or non-technical violation, as the State argued. (App. 313-323.)

At primary issue is the definition of what it means for there to be "the commission of" a new crime while on probation, as is required in NRS 176A.630(5)(b) for a non-technical violation to have occurred. Unfortunately, given the relatively recent implementation of NRS 176A.630,

[4] A court may also opt to reinstate a probationer to probation after the finding of a non-technical violation, or to impose a modified sentence. NRS 176A.630(1)(a,e).

there is no case law or binding precedent defining the matter, rendering this a legal issue of first impression. Black's Law Dictionary defines "commission" in relevant part as "[t]he act of doing or perpetrating (as a crime)." Black's Law Dictionary (11th ed. 2019). This does nothing to set the burden of proof that must be proven by the State to demonstrate that Appellant had done or perpetrated a criminal act for the purposes of a revocation hearing—but also does not absolve the State of meeting *any* burden of proof.

As this Court has previously ruled, an order revoking probation does not need to be supported by evidence beyond a reasonable doubt. *Lewis v. State*, 90 Nev. 436, 438 (1974). Yet some evidence is required; in the instant case, no established burden of proof was met by the State to demonstrate that Appellant had committed a new crime. At the revocation hearing, Appellant and Appellant's counsel made clear in arguments that Appellant stipulated and admitted to being arrested on September 26, 2021 and being charged by Las Vegas Metro Police—but not the State—with domestic violence. (App. 315.)[5] At no point did Appellant or Appellant's

[5] Appellant also stipulated to several other minor violations, including missing three domestic violence classes, being served with a temporary protective order (TPO), and being behind in his payments to the Department of Probation. (App. 46-48.) Under NRS 176A.630, none of those violations

counsel stipulate to the alleged facts underlying the arrest or to the merits of the arrest itself. (App. 315-316.) The Court noted that Appellant had "stipulated to the specific violations that he has alluded to on the record"—namely, the fact that the arrest had occurred, and nothing more. (App. 316.)

The State presented no evidence beyond the mere fact that an arrest occurred to support the assertion that Appellant had committed a new crime. (App. 316-318.)[6] Other than brief remarks by Appellant's probation officer, the State did not present witnesses or proffer any evidence whatsoever to support its assertion that Appellant had committed a new crime. Neither the arresting police officers nor any eyewitnesses to the alleged domestic violence charge were present or offered testimony. The police report detailing Appellant's new arrest was not presented into evidence. The State failed to offer any evidence—even testimonial evidence—that formal charges had ever even been brought against Appellant as a result of his arrest on September 26, 2021. (App. 316-318.) The State did not dispute

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would amount to a non-technical violation or be grounds for revocation from probation. The District Court did not at any point claim that those technical violations were part of the grounds for its decision to revoke Appellant, so they are not relevant here. (App. 55-58.)

[6] The State did claim during its argument that Appellant had violated the terms of a TPO while on probation, which would qualify as a non-technical violation. (App. 48-49.) However, this claim by the State was false; the District Court noted its inaccuracy later in the revocation hearing. (App. 55-56.)

Appellant's characterization that the State had "not proven *anything* occurred other than the fact that the police arrested" Appellant. (App. 320, emphasis added.)

The District Court itself agreed that there was no evidence that a crime occurred other than the mere fact of an arrest. (App. 326.) However, the District Court still found that to be enough to rise to the level of the commission of a crime, and thus merit classification of the violation as non-technical. This is plain error on behalf of the District Court. The District Court, in issuing its ruling of revocation against Appellant, noted that different judges view the classification of an arrest differently in a probationary context:

> THE COURT: So we have received no clarity in regards to [NRS 176A.630]. There are individuals that believe that it has to be an adjudication and conviction. And there are individuals that only believe it needs to be an arrest. There is no clarity in the statute and so different judges see it differently.
> […]
> So I'm sticking with my original sentencing…Mr. Brown-Wheaton…is revoked.
> MR. BASSETT: What—I'm sorry, Your Honor, I thought you said that you found that this was a technical violation.
> THE COURT: No, sorry.
> MR. BASSETT: Because there was no adjudication.
> THE COURT: I apologize. I originally started reading 176A.630 as a technical. In regards to the technical violations, I said it excludes

> absconding the new felony or gross misdemeanors, and certain misdemeanors, battery domestic violence. And that's why I was saying it doesn't say an adjudication. It talks about just a commission. So I don't agree with you. I do believe that you can be violated for an arrest.
>
> MR. BASSETT: Even though no independent magistrate found that he committed a crime?
>
> THE COURT: Right. Yeah, if you're arrested…if you disagree with that that's why this needs to be sent up, because people are getting revoked every day for simply being arrested.
>
> (App. 322, 325-326.)

The District Court made plain in its ruling that Appellant was revoked "for simply being arrested." The District Court further acknowledged that no judicial magistrate at any level—municipal, justice, or district court—had held that Appellant had committed a new crime while on probation. (App. 325-326.) That admission directly undercuts the District Court's ruling, and highlights that the Court's finding that Appellant committed a non-technical violation is improper.

A person arrested for murder who subsequently does not have charges filed against them or who has all charges dropped has not, in any legal or practical sense, been found to have "committed" a murder. The same analogy applies in Appellant's case. There is currently no binding precedent from the Nevada Supreme Court on the standard of proof required for a defendant to be found to have committed a new crime while on probation.

While the language of the statute does not specifically require "adjudication of guilt" to be found, it similarly makes no mention that a mere arrest with no supporting evidence is enough to find that the commission of a crime occurred.

The State provided no evidence other than the fact that an arrest occurred to assert a new crime had been committed. The District Court's acknowledgment of this lack of outside evidence demonstrates that the Court misapplied the standards of NRS 176.630. Appellant's violation should have been deemed to be his first *technical* violation, and therefore not one for which he could be revoked.

II. Even if Appellant's revocation was rightly treated as a non-technical violation, by not allowing Appellant a meaningful opportunity to challenge the alleged factual basis of his arrest, Appellant was deprived of due process.

No State shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV § 1. When governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that

it is untrue. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). The protections are "even more important when the evidence consists of the testimony of individuals whose memory might be faulty or who may be perjurers, or motivated by malice, vindictiveness, intolerance, prejudice or jealousy." *Id*.

In Appellant's situation, the alleged victim in the case for which he was arrested was his wife, Alexis. (App. 321.) The entire basis for Appellant's arrest was based on what his wife had told police on the phone—that he had pushed her out of their bed with his feet. (App. 317.) No additional evidence was provided or offered by the State during Appellant's revocation hearing—not even the minimum level of detail as to what Appellant had allegedly done to *get* arrested. (App. 311-326.) This is a serious violation of Appellant's due process rights. Using the *Greene* standard, governmental action in Appellant's case—revocation—seriously injured Appellant by leading to the imposition of his suspended prison sentence. Yet the State failed to disclose or offer any evidence to prove that Appellant had committed a crime, other than Appellant's admission that he had been arrested. They failed to offer any verifiable fact findings at all. The State even failed to introduce the police report that led to Appellant's arrest on September 26th, 2021, either as part of the revocation proceeding or

as part of the probation violation report. (App. 311-326.) Being unable to confront his accuser—or any other potentially relevant witnesses or evidence—at any point after his arrest or during his revocation hearing fatally undermined Appellant's ability to demonstrate the crime he was arrested for had not occurred.

Though the State is not required to prove facts beyond a reasonable doubt at a revocation hearing, the Nevada Supreme Court has recognized that Constitutional due process rights do come into play in a probation revocation hearing. As this court has ruled, "due process requires, at a minimum, that a revocation be based upon 'verified facts.'" *Anaya v. State*, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980). As noted numerous times, no facts—verified or otherwise—were submitted by the State at the revocation proceeding to demonstrate that Appellant committed a new crime. In *Anaya*, there was no police report submitted to support the allegation that Mr. Anaya had committed a new offense, the police report was not provided to the probationer, and arresting officers did not testify at the revocation hearing. The Nevada Supreme Court highlighted all three facts as evidentiary failures on behalf of the State. *Id.* at 124-125 (159). The same issues are present in Appellant's case.

In *Anaya*, there was a probation officer who testified to the hearsay matters contained in the police report at Mr. Anaya's revocation hearing, specifically with regard to the reported BAC for the new DUI arrest. In that case the Supreme Court held: "Neither the district court, the probationer, nor this Court on review could have any means of testing the accuracy or reliability of the facts recited in the report itself or of the probation officer's recollection of them." *Id.* at 125 (159). The probation officer in Appellant's case—the only person to testify other than counsel and Appellant—did not speak to any details of Appellant's arrest.[7] (App. 318.) Even if the probation officer had, *Anaya* tells us that such testimony alone would not be a sufficient level of evidence for the revocation proceeding.

While the "full panoply of constitutional protections afforded a criminal defendant [in a criminal prosecution] does not apply" to revocation proceedings, due process requires much more than was been afforded to Appellant in District Court. *Id.* at 122 (157). Specifically, defendants should have the right to face and cross-examine any witnesses against them. *Id.* at 123 (158). There are often no witnesses presented to support an

[7] The only things the probation officer did speak about was to recite Appellant's criminal history before being placed on probation, and to complain that Appellant did not take enough accountability. (App. 50.) Neither of those topics are revocable, or relevant to Appellant's due process rights.

alleged violation at a revocation proceeding, as was the situation in the instant case. The Court in *Anaya* recognized that, in revocation proceedings, there must be a due process balancing test in determining whether witnesses are required to testify to the new offenses alleged. Specificslly, "where the probationer's liberty interest is substantial and the State's interest in admitting…hearsay testimony rather than more reliable evidence is slight, we must conclude that the probationer's due process right to confront and question his accusers was violated." *Id.* at 125 (160). People are presumed to be innocent of charges—particularly when charges are not actually filed or outstanding. Probation cannot be revoked without a hearing that comports with due process.

In *Spence v. Superintendent*, 219 F.3d 162 (NY 2000), Mr. Spence was placed on a diversionary program and advised that if he completed it, he would receive probation. Mr. Spence was then arrested on a new robbery charge. A hearing was held for Mr. Spence, at which time it was determined that he had been arrested so he had violated the "no arrest" clause and he was sentenced to a lengthy prison term. The appellate court reasoned that the "no arrest" provision had to mean that the defendant had actually done something wrong, not merely that a police office had made an allegation: "such arrest unilaterally initiated by the police could certainly not be said to

be conduct resting solely with the defendant." *Id.* at 167. Only if it is shown that the person has done something to validate the arrest can a person be held responsible. The *Spence* Court interpreted the "no arrest" clause to require that the violator had committed a new criminal act, not just that he/she had been charged: "Where a defendant agrees to avoid committing misconduct, it is manifestly wrong to void his side of the plea bargain based only upon the legitimacy of an arrest, absent proof that he most likely committed the act charged." *Id.* at 169. The Court held that the new offense must be established by a preponderance of the evidence. *Id*. The relevance and analogy between *Spence* and Appellant is manifest.

In *Holmes v. State*, Docket 82452 (Order of Affirmance, Filed November 10, 2021) (unpublished opinion), the Nevada Supreme Court offered nonbinding guidance on dealing with probation revocation proceedings in a post-AB236 legal landscape. Appellant Holmes argued that either formal charges or a conviction are required in order for probation to be revoked; the Court disagreed, ruling that if sufficient evidence is admitted at the revocation hearing to support the fact that the defendant committed an alleged crime, that is adequate for a ruling on a probation violation. *Holmes* at 2. However, even in that instance, the Court noted that additional evidence beyond a mere arrest was required. For one of Holmes' alleged

violations—a DUI—the probation officer was an eyewitness to the arrest and was able to testify as a direct witness to the alleged crime, with Holmes being given the opportunity to cross-examine him. *Id.* No such witnesses, testimony, or ability of Appellant to question an accuser exist in the present case.

For another of Holmes' alleged violations—possession of a firearm—the State introduced recorded jail calls in which Holmes admitted to having a gun in his home and describing its location, where it was subsequently located by officers. *Id.* at 3. Again, no such circumstances exist for Appellant, as no outside evidence of any kind was introduced by the State at Appellant's revocation hearing. In both cases cited in the *Holmes* Order, the Court emphasized that "the testimony and evidence [presented] at the hearing" were what persuaded the Court that Holmes' due process rights had been met. *Id*. Appellant's case is distinguishable given the lack of evidence and witness testimony proffered by the State, resulting in a violation of Appellant's due process rights.

25. **Preservation of issues:** Appellant preserved this issue by duly filing an appeal on December 2, 2021, within the governing time limit outlined by NRAP4(b).

26. **Issues of first impression or of public interest:** This issue of what defines the "commission" of a crime under NRS 176.630 is one without binding precedent, as is the burden of proof required by the State to prove such a commission occurred.

Respectfully submitted,

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By *__/s/ Alexander B. Bassett_____*
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VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

[XX] Proportionately spaced, has a typeface of 14 points or more, and contains 5,327 words which does not exceed the 7,267 word limit.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 7th day of March, 2022.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By */s/ Alexander B. Bassett*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD ALEXANDER B. BASSETT
ALEXANDER CHEN

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JEREMY PAUL BROWN-WHEATON
NDOC No. 1250673
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office