PAROLE CONSIDERATION AND YOUR RIGHTS

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1. In my opinion, the Parole Board should be abolished. Until then the Board should be held to certain statutory and regulatory requirements.

2. Pursuant to NRS 213.1099(2)(d), the Parole "Board *shall* consider… [t]he standards adopted pursuant to NRS 213.10885" when "determining whether to release a prisoner on parole." (emphasis added). The word "shall" is a term of command; it is imperative or mandatory, not permissive or directory. *Blaine Equip. Co. v. State Purchasing Div.*, 122 Nev. 860, 867 (2006). Standards are required to be codified by regulations adopted by the State Board of Parole Commissioners pursuant to NRS 213.10885. The Board codifies its regulations in NAC Chapter 213. Furthermore, those standards/regulations "must be based upon *objective* criteria for determining the person's probability of success on parole." Id. at (1) (emphasis added).

3. Generally, a parole board is not required to adhere to their own regulations/guidelines with respect to granting/denying parole. *Inglese v. United States Parole Commission*, 768 F.2d 932, 936 (7th Cir. 1985). However, the Court in *Inglese* concluded that laws may not be disregarded. *Id.* Through the operation of NRS 213.1099(2)(d), the board's regulations can reasonably be construed as laws since there is no discretion to disregard them.

4. The Board's enactment of NAC 213.560 §§ (1) and (2) nullifies the provisions of NRS 213.1099(2)(d) by allowing the Board to disregard their own regulations. The board may not enact regulations that construe or otherwise nullify statutory provisions. See *Mangarella v. State*, 17 P.3d 989, 991 (Nev. 2001) (statutes should not be construed to "make a provision nugatory."). It would be fundamentally absurd under NRS 213.1099(2)(d) to require the Board to follow its own regulations until they see fit to disregard or otherwise nullify this statutory provision at the whim of arbitrary and capricious discretion. If the legislature intended such a result, they would have used the term "may" rather than "shall" in NRS 213.1099(2). To hold otherwise would make the term "shall" synonymous with "may" in bold violation of *Mangarella.*

5. NRS 213.10705 declares that the establishment of parole standards is not *intended* to create a liberty or property interest in the release of a prisoner on parole or as a basis for any cause of action. This disclaimer of intent should not, and probably cannot, be used to emasculate legitimate rights created through the operation of NRS §§ 213.1099(2)(d) and 213.10885 where the Board's standards under NAC Chapter 213 *must* be considered or otherwise *heeded* as the common dictionary defines "consider." See, e.g., *Gotcher v. Wood*, 66 F.3d 1097, 1100 (9th Cir.

1999) (holding that a state cannot emasculate a right of "real substance" by asserting that it did not *intend* to create a liberty interest).

6. Parole standards, guidelines, and laws where enacted with the fundamental objective to protect public safety. If the Board has discretion to disregard standards, guidelines, and laws, then they inherently have discretion to disregard or otherwise compromise their own public safety objective as a means or pretext to pursue personal, political, and/or other impermissible objectives. It can be a double-edge sword.

7. The standards established in the table under NAC 213.516 *requires* that parole be granted at the initial parole hearing if certain crime severity and risk level thresholds are met. Disregarding the standards of this table expressly violates NRS 213.1099(2)(d) and therefore violates due process to a liberty interest in parole release. Furthermore, paragraph (2)(d) of NRS 213.1099 would be negated in violation of *Mangarella*, 17 P.3d at 991.

8. If the table in NAC 213.516 mandates release on parole based on the severity/risk level assessed, you may likely have a due process/liberty interest issue challengeable under habeas corpus since the standards of that table are required to be followed pursuant to NRS 213.1099(2)(d). Release from your sentence should be retroactively ordered to the parole eligibility date (PED) that the defective hearing was based.

9. Paragraphs (2) and (3) of NAC 213.518 set out standards "the Board *may* consider in determining whether to grant parole." (emphasis added). Since the term "may" is used, these specific standards are discretionary. However, when using the table in NAC 213.516, a prisoner, for example, whose crime severity level ranks "Highest" with a risk assessment of "Moderate" or "Low," the table *restricts* the Board's discretion to "Consider factors set forth in NAC 213.518." Those sections of the table *mandate* the factors in NAC 213.518 be considered.

10. Since the mandatory language in NRS 213.1099(2)(d) *requires* the Board to follow its own standards codified in NAC Chapter 213, it may likely be safer to *timely* file a state civil rights action in state court to enforce this statutory mandate. An injunction should be requested ordering the Board to hold another parole hearing based on the standards they failed to follow. Any decision should be retroactively applied to the parole eligibility date (PED) that the defective hearing was based.

11. There is also a due process right to apply for parole. *Kelso v. Armstrong*, 616 F.Supp. 367, 369 (D. Nev. 1985). The right to apply for parole begins or is based on when you are eligible for parole. Your parole eligibility date (PED) begins when the minimum term of a sentence will be served. The right to apply for parole inherently implies the right to be "duly considered." *In re Strum*, 521 P.2d 97, 103 (Cal. 1974). Without the right to be considered for parole, the right to apply would be meaningless.

12. If the due process right to *apply* for parole is to be meaningful in any sense, then it would appear that there must likewise be a due process right to be *considered* for parole based on the *requirement* for the Board to follow the law and its own standards/regulations to that end. However, many courts have criticized any due process right in mandatory parole procedures standing alone. See *Corsetti v. McKee*, 2014 U.S. Dist. LEXIS 27928 (E.D. Mich. Mar. 5, 2014) (observing that there can be no protected due process interest in parole procedures alone despite the mandatory requirement to follow them). The *Corsetti* opinion never took into account the due process right to apply for parole in its analysis. This subject may require additional research on

your part if you intend to pursue a due process right to parole procedures based on your due process right to apply for parole.

13. If denied parole and the Board failed to provide "specific recommendations… to improve the possibility of granting parole" for your next parole hearing, if not denied to expiration, request an injunction from the court ordering the Board to provide those "specific recommendations" as required under NRS 213.131(11) and NAC 213.536. A recommendation, for example, requiring participation in a program that addresses the behavior of the prisoner which led to their incarceration is too general and violates NRS 213.131(11). In this context, a *specific* program must be identified to satisfy this statutory mandate. If it is later discovered that a specific recommendation cannot be followed through or is otherwise not available to you, promptly write the Board and explain your situation. Ask them to amend their order denying parole to include other specific recommendations as required by NRS 213.131(11).

14. Just because the prison or the NDOC does not provide what was recommended or is otherwise not possible for you to comply with does not excuse the Board from upholding their legal obligation to provide specific recommendations that can be *meaningfully* executed. To hold otherwise would nullify the substance and intent of paragraph (11) in NRS 213.131 in violation of *Mangarella*, 17 P.3d at 991. The legislature did not enact this provision for the Board to disregard or to provide recommendations that cannot be meaningfully followed through.

15. If parole is granted to the next sentence, there appears to be no legal obligation for the Board to provide specific recommendations to improve the possibility of granting parole at the next parole hearing. It still would not hurt to request such recommendations be provided and amended into their order granting parole as a legitimate means to advance their public safety objective.

16. Pushing the Board to uphold their legal obligation under NRS 213.131(11) to provide specific recommendations in their orders denying parole may force them to use their resources to influence the Department of Corrections to implement programs, inmate employment opportunities, and other recommendations so that this statutory provision can be meaningfully executed. A program of idleness offends any public safety objective by promoting a culture of mischief and other antisocial behaviors.

17. Pursuant to NRS 213.131(3), the Board functions in a quasi-judicial capacity when considering prisoners for parole. It logically follows that orders issued by them denying/granting parole containing any recommendations carry the force and effect of law as if issued by any other competent court of law. Write and ask the Board for assistance with enforcing their lawful orders. You could also do the Board a favor by grieving and suing prison officials as a means to enforce those lawful orders/recommendations with an injunction in a state court civil rights action as a means to give full force and effect to NRS 213.131(11).

18. Before pursuing any court action against members of the State Board of Parole Commissioners, the doctrine of administrative exhaustion requires you give them an opportunity to address your issues. This can be accomplished by writing them. Explain your situation and provide recommendations to abate those issues. Give them a fair chance to respond and to address your issues. If you are appealing a parole denial or seek to have your crime severity level or risk level reassessed, you must follow the procedures in NAC §§ 213.522, 213.524, and 213.526 within 45 days after you were considered for parole. If seeking court action against prison officials, you must first use available grievance procedures pursuant to AR 740 and OP 740.

19. NAC Chapter 213, through the operation of NRS 213.1099(2)(d), provides at least a state law right to numerous procedures and standards the Board must follow when considering a prisoner for parole. Check them out from your law library and educate yourself. If refused a current copy of NAC Chapter 213 or any copy at all, grieve the matter since your fundamental rights are directly impacted.

EX POST FACTO VIOLATIONS

20. The Legislature clearly intended that you be *properly* considered for parole when the minimum term of your sentence is reached and when scheduled for a rehearing under NRS 213.142 if denied parole. When parole is not properly considered, the mandatory minimum term for parole eligibility or the measure/quantum of incarceration is impermissibly extended in violation of what the legislature intended and possibly in violation of the Ex Post Facto clause of the U.S. Constitution.

21. The Ex Post Facto clause applies to retroactive changes in laws as well as policies and regulations that have the effect of prolonging incarceration. *Garner v. Jones*, 529 U.S. 244, 251 (2000). That change is measured from the law, regulation, or policy that was in effect at the time your crime was committed. *Id.* at 249-50. The Board's discretion does not displace the protections of the Ex Post Facto clause. *Id.* at 253.

22. If litigating an Ex Post Facto claim based on a parole denial, the court is obligated to presume the Board follows the law and its own regulations. *Id.* at 256. When the Board denies parole in violation of the requirement to follow its own standards/regulations as directed under NRS 213.1099(2)(d), it may be presumed under *Garner* that they are retroactively enacting a new unwritten regulation/policy to disregard the governing law/regulations impermissibly prolonging the measure/quantum of incarceration in violation of the Ex Post Facto clause. Furthermore, it may be possible to apply a departure from ameliorated amendments to laws, regulations, and policies enacted after your crime was committed in this analysis. Further research in this area should be pursued before litigating ameliorated amendments that have been disregarded.

23. Under Nevada law, a convicted person's eligibility for parole consideration is part of the law annexed to the crime when committed within the meaning of *Calder v. Bull,* 3 U.S. (3 Dall) 386, 390 (1798). See, e.g., *Love v. Fitzharris,* 460 F.2d 382, 384 (9th Cir. 1972), *vacated on other grounds,* 409 U.S. 1100, 93 S.Ct. 896 (1973). This same analysis may likely extend to rehearings under NRS 213.142 where parole eligibility is extended and reconsidered.

24. If parole eligibility is part of the law annexed to the crime when committed, an impermissible parole denial implicating an Ex Post Facto violation could be a basis to invalidate a plea agreement. Even if not stated in express terms in the plea agreement, you have the right to depend upon the laws, regulations, and policies as they existed at the time your crime was committed and that they will be faithfully executed/followed without retroactive changes that prolong the measure/quantum of incarceration.

25. Habeas Corpus should first be pursued if you intend to challenge a violation of your plea agreement or your due process right to be paroled. Otherwise, any federal Ex Post Facto and/or Due Process claims are cognizable in a federal civil rights action under 42 U.S.C. § 1983 or a state civil rights action under Chapter 41 of the Nevada Revised Statutes. Absent an Ex Post Facto or Due Process violation, all other challenges based on statutory violations and the Board's statutory requirement to follow its standards/regulations discussed in this article can be litigated under NRS Chapter 41 in state court.

26. Those that vehemently believe there is no basis for any cause of action just because there is no right to parole release or otherwise choose not to challenge a violation of their rights cut themselves short. They deserve exactly what they get and have no legitimate basis to complain.

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