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RE: Nov. 29, 2021, NAC 213.514, .516 & .518 Workshop Comments

Nevada Board of Parole Commissioners:

Thank you for holding this third NAC 213.518 Workshop and expanding it to include NAC 213.514 and 213.516 in response to my NRS 233B.100 Petitions and previous comments. I have reviewed the proposed language for NAC 213.514, .516 & .518 and once again would like to convey my appreciation to the Board for taking steps towards bringing the Board's parole consideration NACs closer to being in compliance with NRS 213.10885 and, now, NRS 213.1214 as well.

It is my hope, that the few remaining steps between where these NAC Amendment Proposals are, and where they need to be per Nevada law, will soon be taken resulting in a new and fair parole consideration process. A process that strikes a balance between the desire of the people of Nevada to feel safe and their desire for Nevada's prisoners to go home to their families and friends.

A balance encapsulated in NRS 213.10885(2)'s language calling for the Board to determine "[T]he probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued." The idea, presented in these words, is that a convicted person, who has followed the rules while incarcerated and bettered himself or herself through educational and rehabilitative programs, has indicated that he or she is ready

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to live within society's laws. These-are-the-people who have not only EARNED an opportunity to be welcomed back to society, but, per Nevada's Legislature, should be graced with it as well.

It is for all of the incarcerated who have made that positive effort to be reunited with those who love them, that I have dedicated nearly two years of my life to bring us to this point. While it took me becoming one of the incarcerated to gain awareness of the issues this Board now seeks to amend, I view this undertaking as my civic duty and will see it through on behalf of all those affected.

As there are now three NACs under amendment consideration, the remainder of these comments will be divided into four sections. One for each NAC followed by a brief conclusion.

NAC 213.514

Concerning NAC 213.514's proposed language, I whole heartedly endorse the Board's decision to recognize that the NRS 213.1214 risk assessment should be considered in conjunction with the Nevada Parole Risk Assessment. This not only protects the Board from tainting the ENTIRE parole consideration process if the Department of Corrections (DOC) fails in its execution of NRS 213.1214, but, additionally, distinguishes consideration of those convicted of a sexual offense from those who have not.

This is significant as the Revalidation of the Nevada Parole Risk Assessment Instrument (2017) states average recidivism across all offenses in Nevada is 34%. While the current NRS 213.1214 risk assessment, the STATIC-99R, states that average sex offender recidivism is 5.3% per the STATIC-99R & STATIC-2002R Evaluators' Workbook (October 19, 2016).

Therefore, those convicted of a sexual offense are 6.4 times LESS likely to reoffend compared to those not convicted of a sexual offense. While these individuals should be considered per the Nevada Parole Risk Assessment as they have offended in Nevada, they should also be considered, via the NRS 213.1214 assessment, separately, as they, on average, are far less likely to reoffend.

With this in mind, I see one issue with the proposed NAC 213.514(4) & (5) language. NRS 213.1214(4) mandates that "The Board shall consider an assessment prepared pursuant to this section" NRS 213.1214(6)(d)(20) requires the DOC to conduct an NRS 213.1214 assessment for "An offense of a sexual nature committed in another jurisdiction" unless, certain conditions are met. Therefore, regardless of the offense under consideration by the Board for parole, if the DOC conducts and submits to the Board an NRS 213.1214 assessment in accordance with the provisions of NRS 213.1214, the Board is required to consider it.

For these reasons, NAC 213.514(5) stating the Board "[M]ay also consider the risk assessment . . ." is in violation of NRS 213.1214(4) which states "The Board shall consider an assessment" Therefore, I recommend striking NAC 213.514(5) and amending NAC 213.514(4) to state "4. If a prisoner is being heard for parole for a sexual offense, or has ever been convicted of a sexual offense, as defined by NRS 213.1214, the Board shall consider the risk assessment" This language would protect the Board from accidentally NOT considering an NRS 213.1214 assessment that Nevada law requires to be considered.

NAC 213.516

Concerning NAC 213.516, I see two issues. FIRST, added to the bottom of NAC 213.516 is the language "This initial assessment shall be considered in accordance with NAC 213.518(1)." While I applaud the Board for recognizing that it cannot arbitrarily grant or deny parole without considering factors referenced in NRS 213.10885 and 213.1099, everytime, before making a grant or denial determination, the added .518(1) language to .516 is currently meaningless. Nowhere in NAC 213.518(1) does it state HOW the Board will consider the initial assessment result.

What does a result of "Deny parole" or "Grant parole at initial parole eligibility" mean in relation to NAC 213.518? How does the Board know what to do if the initial assessment result is "Grant parole at first or second meeting to consider prisoner for parole"? Under what conditions is the grant at the first meeting appropriate or inappropriate?

These are questions that must be answered in the NAC's language pursuant to NRS 213.10885(1) which states, "[S]tandards must be based upon objective criteria" In Anselmo v. Bisbee, 396 P.3d 848 (Nev. 2017), the Nevada Supreme Court stated that the Board's "standards" are their NACs. For a standard to be objective, it must state a step-by-step process that any person can easily follow and replicate. As every person will "consider" the initial assessment result differently, it is critical that the Board state HOW it will consider that result.

Therefore, HOW the NAC 213.516 Initial Assessment will be considered in the context of NAC 213.518(1) must be stated in NAC 213.516 or NAC 213.518(1). Doing so will protect the Board from

challenges to the initial assessment result's consideration as the Board could defend itself by pointing to a tangible standard and definitively state that consideration was done correctly.

SECOND, NAC 213.516 utilizes NAC 213.512 crime severity levels as assigned pursuant to NAC 213.512 by the DOC per NRS 209.341. There are two issues here.

First, NRS 209.341 does not grant the DOC authority to assign a severity level to a crime. In fact, the words "severity", "level" nor "crime" appear a single time in NRS 209.341. Second, the crime severity levels of "Highest," "High," "Moderate," "Low Moderate" and "Low" do not exist in Nevada law.

How then is the severity of a crime actually assigned per Nevada law?

According to the Nevada Supreme Court, only the Legislature has the power to determine what is or is not a crime and the appropriate penalty for those who violate a criminal statute. see Anderson v. Eighth Judicial District Court, 448 P.3d 1120 (Nev. 2019). Additionally, the Supreme Court ruled that an enhancement from a misdemeanor to a Category C felony constituted an increase in offense severity. English v. State, 116 Nev. 828 (2000).

Therefore, as the Board is only considering those persons convicted of a felony, they must look to NRS 193.130 and 193.330, which provide the Categories of Nevada's felonies, to discover the severity level of crimes as assigned by the Legislature.

Interestingly, the Board used this exact method in 2004. Per the PBFORM-PS (REV. 12/10/04), attached to these comments as EXHIBIT 1, the Board stated in its own words:

The Board has adopted crime severity levels A, B, C, D & E based on the statutory definitions set forth in NRS 193.130, 193.330 and as provided by specific criminal statute.

As you can see, the Board in 2004, after English was decided in 2000, clearly understood its statutory duty and was in compliance with Nevada law. However, in 2008, when the Board adopted NAC 213.512 and 213.516, it deviated dramatically from its understood statutory duty. The current NAC 213.512 and NAC 213.516 crime severity levels of "Highest," "High," "Moderate," "Low Moderate" and "Low" DO NOT EXIST in NRS 193.130, 193.330, 209.341 nor any other NRS.

To this day, as it was in 2004, the A, B, C, D & E Categories of felony are the Legislature's assignment of crime severity level per NRS 193.130, 193.330 and as provided by specific criminal statute. Never, in the history of Nevada, has the Legislature authorized the DOC to determine the severity level of actions that the Legislature identifies as crimes. The Legislature speaks for the State of Nevada, NOT the DOC.

For these reasons, I recommend that NAC 213.512 be REPEALED, and NAC 213.516 be AMENDED to remove all mention of the "Highest," "High," "Moderate," "Low Moderate" and "Low" crime severity levels and replace them with the A, B, C, D & E crime severity levels as assigned by Nevada's Legislature. This is an easy replacement as both sets of severity have 5 levels.

NAC 213.518

Concerning NAC 213.518, I see two issues. FIRST, NAC 213.518(1) states, "[T]he Board will consider the initial assessment, the factors contained in NRS 213.10885 and NRS 213.1099 . . .," but does not state HOW this consideration will

take place. As previously stated, the Board's NACs mark step-by-step HOW consideration is to take place per NRS 213.10885(1).

Again, as every person, regardless of who they are, will "consider" that information differently, the Board has a duty, and is required by Nevada law, to codify in the NACs HOW it will "consider" that information.

This codified process of consideration is ultimately to carry out NRS 213.10885(2) which provides, in pertinent part:

In establishing the standards, the Board shall consider ... all other factors which are relevant in determining the probability that a convicted person will live and remain at liberty without violating the law if parole is granted or continued.

"Determining the probability" is the HOW that must be defined in the Board's consideration standards.

Does this mean: that if a convicted person has more mitigating factors than aggravating, parole should be granted?; That regardless of the ratio of mitigating to aggravating factors, if a certain aggravating factor is relevant, parole should be denied?; If the initial assessment result is "Grant parole at initial parole eligibility", then provided aggravating factors does not exceed mitigating factors by 3, parole should be granted?; Or, for example, if a convicted person has the initial assessment result of "Grant parole at first or second meeting" and has an equal number of aggravating and mitigating factors, then parole should be denied, a new hearing scheduled in one year, and parole should be granted at that time unless that person has an increase in his or her NAC 213.516 initial assessment risk level?

Ultimately, what does "consider" mean to the Board?

The Board must define consideration in its NACs if it wishes to defend itself in Court against litigation brought by inmates alleging that they were not properly considered. The Nevada Supreme Court has determined that inmates have a right to "proper" consideration per NRS 213.140(1) and, as shown in Anselmo v. Bisbee, will order the Board to vacate and redo improper considerations. If the Board does not state HOW it will "consider", then the Court will have no choice but to side with the inmate as the Board will have nothing tangible with which to defend itself.

SECOND, NAC 213.518(1) still says the Board "[M]ay consider relevant aggravating and mitigating factors" Once again, NRS 213.10885(2) states, "In establishing the standards, the Board shall consider ... all other factors which are relevant" The Board does not get to choose which "other factors", aggravating or mitigating, it considers. The word "may" in NAC 213.518(1) gives the Board the power of choice as to which factors it considers in violation of NRS 213.10885(2).

As the Board has a legal duty to consider "all other factors which are relevant", imagine the liability if the Board granted parole to a dangerous prisoner because it chose not to consider relevant aggravating factors the language of NRS 213.10885(2) requires. Immunity is not available if the Board knew that it was violating the law. Do not give this scenario the possibility of occurring.

To correct this, the words "may consider" in NAC 213.518(1) must be struck so that NAC 213.518(1) reads "[T]he Board will consider the initial assessment, the factors contained in NRS 213.10885 and NRS 213.1099 and relevant aggravating and

mitigating factors" Furthermore, as the Board is looking to change every NAC 213.518(2) & (3) aggravating and mitigating factor, the Board must amend its Aggravating and Mitigating Factors Definitions for each NAC 213.518(2) & (3) factor to reflect their new meanings.

CONCLUSION

As stated in my opening comments, I appreciate the progress the Nevada Board of Parole Commissioners has made thus far and am optimistic that the Board will take those final steps towards NRS parole consideration compliance. I meant what I wrote about undertaking these efforts on behalf of everyone affected. This is why I am not pursuing monetary relief in any of my ongoing litigation in regards to these matters.

Following the law as passed by the Legislature is to the benefit of all Nevadans and to those who visit this State. Please remember that judging law breakers through a process, which itself, breaks laws, does not bring justice to Nevada's victims, it only creates more.

Thank you for your time and consideration,


Evan Grant

EXHIBIT

1

Nevada Board of

Parole

Commissioners'

PBFORM-PS

(REV. 12/10/04)

PAROLE STANDARDS

Offenders will appear before or be considered in absentia by a panel of the Parole Board for parole consideration when they have served the minimum time required to attain parole eligibility as provided by Nevada law. If the offender is serving concurrent sentences for multiple offenses, the most severe offense will determine the crime severity level.

Pursuant to NRS 213.10885, the Board has adopted by regulation standards for release on or revocation of parole. The regulations are set forth in Chapter 213 of the Nevada Administrative Code (NAC) at sections 213.510 through 213.560. The Guideline Recommended Months (GRM) to serve calculated under the Board's parole standards is a suggested range of months to be served and is based on a combination of offense and offender characteristics.

Pursuant to NRS 213.10705, the release or continuation on parole is an act of grace of the State. In addition, pursuant to NRS 213.10705 and NAC 213.560, the Parole Board is not required to grant or deny parole based on the guideline-recommended time to serve, and the establishment of parole standards does not create any right or interest in liberty or property, does not give rise to any reasonable expectation of parole, and does not establish any basis for a cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees. See *Greenholtz v. Inmates of Nebraska Penal & Cor.*, 442 U.S. 1, 99 S.Ct 2100, 60 L.Ed2d 668 (1979).

These parole standards are designed to aid the Board in making consistent decisions. The Board will also consider any recommendations from the Court, law enforcement agencies, prosecutors, prison personnel, and victims as provided in NRS 213.130. Further, the Board will take into account the considerations set forth in NRS 213.1099. In exercising its unlimited discretion to deviate from the time periods recommended under its guidelines, the Board will consider the factors set forth in NAC 213.560, and any other mitigating or aggravating factors which the Board deems relevant. The Board is not required to provide an offender with any reasons concerning a decision to deny parole. *Weakland v. Board of Parole Comm'rs*, 100 Nev. 218, 678 P.2d 1158 (1984), but may elect to do so in those cases where its decision deviates from the guideline-recommended time to serve.

The Board's current standards were adopted effective August 11, 1998. All offenders being considered for parole release, except those being considered pursuant to the provisions of NRS 213.1215, will be evaluated under the Board's current guidelines, regardless of offense date, date of conviction, or any standards previously utilized in considering the offender for parole release. These standards serve as guidelines only, the Board is not required to adhere to the guidelines, and they are not laws for purposes of ex post facto analysis. Offenders do not have a right to be considered for parole under any previously existing set of parole standards. *Smith v. U.S. Parole Com'n*, 875 F.2d 1361 (9th Cir. 1989); *Vermouth v. Corrothers*, 827 F.2d 599 (9th Cir. 1987); *Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986).

The Board has adopted crime severity levels A, B, C, D & E based on the statutory definitions set forth in NRS 193.130, 193.330 and as provided by specific criminal statute. The Board has expanded levels A and B to A1, A2, A3, A4, B1, B2, B3 & B4 to reflect the diverse minimum and maximum sentencing ranges provided for by statute for level A and B felonies.

The Board will review an offender's disciplinary and programming scores at the time of each hearing. Any change from a previous score will be noted and may result in a change to the offender's net parole success likelihood score and guideline-recommended time to serve.

SCORE	0-10	11-20	21-30	31-40	41-UP	LEVEL	SENTENCE STRUCTURE BY STATUTE
A1	240-276	276-312	312-348	348-384	384-420	"A" CRIME	20 YEAR OR MORE MINIMUM
A2	180-216	216-252	252-288	288-324	324-360	"A" CRIME	15 YEAR MINIMUM
A3	120-150	150-180	180-210	210-240	240-270	"A" CRIME	10 YEAR MINIMUM
A4	60-84	84-108	108-132	132-156	156-180	"A" CRIME	5 YEAR MINIMUM
B1	24-48	48-72	72-108	108-144	EXPIRE	"B" CRIME	20 YEAR MAXIMUM
B2	18-30	30-48	48-66	66-84	EXPIRE	"B" CRIME	15 YEAR MAXIMUM
B3	12-24	24-36	36-48	48-60	EXPIRE	"B" CRIME:	10 YEAR MAXIMUM
B4	12-18	18-24	24-30	30-36	EXPIRE	"B" CRIME:	6 YEAR MAXIMUM
C	12-16	16-20	20-24	24-28	EXPIRE	"C" CRIME	5 YEAR MAXIMUM
D/E	12-15	15-18	18-21	21-24	EXPIRE	"D/E" CRIME:	4 YEAR MAXIMUM

CONVICTIONS/ENHANCEMENTS: All adult including instant offense and consecutive sentences.

INCARCERATIONS: All adult including instant offense and previous CS terms.

WEAPONS: Instant offense only, actual, highest level, even if plead out.

VICTIMS: Instant offense only, actual, highest level, even if plead out.

EMPLOYMENT: Any full time job, school, SIIS or SSI for 6 months during year prior to instant offense.

DISCIPLINARY: Based on previous three years. 10 points maximum. Credit limit is 3. +2 points for each major violation. +1 points for each minor/general violation. -1 for none at 1st hearing or none during the previous year. -2 for none in the last two years. -3 for none in the last three years.

STATISTICAL RISK ASSESSMENT: The risk assessment is based on a study of factors applied to inmates who were released on parole or discharged their prison sentence in 1999 and returned with a new felony conviction within 3 years. The risk assessment does not provide the risk of failure or probability of success on parole. It does not take into consideration other factors the Board considers when evaluating inmates for release on parole. The risk assessment is one component used to assist the Board in making decisions. The risk assessment is not compiled by the Board but is based on data existing in the Nevada Criminal Information System which is maintained by the Nevada Department of Corrections (NDOC). The Board will not entertain claims of errors in the risk assessment. Any errors must be corrected by the NDOC. The Board will only consider a request for re-hearing based on an error in the computation of the risk assessment if the correction made by the NDOC results in a change to a lower risk category and the request is made in writing by a representative of the NDOC and routed to the Board through the Chief of the Offender Management Division. The factors used on the risk assessment are as follows:

STATIC FACTORS

Age at First Arrest (juvenile or adult): 25 years or older = 0 points, 20-24 years = 1 point, 19 years or younger = 2 points.

Prior Probation/Parole Revocations: No parole or probation revocations = 0 points, One or more = 2 points.

Employment History (prior to incarceration): Satisfactory full-time employment for 1-2 years = 0 points, Employed less than full time or full time employment for less than one year = 1 point, Unsatisfactory employment / unemployed / unemployable = 2 points.

Current or prior convictions: Property crime, forgery, robbery = 2 points, all others = 0 points.

History of drug alcohol abuse: None = 0 points, some use, not severe disruption of functioning = 1 points, frequent abuse, serious disruption of functioning = 2 points.

Gender: Male = 1 point, female = 0 points.

DYNAMIC FACTORS

DRUGS/ALCOHOL: All convictions, including instant offense.

COURT ACTION: % of maximum sentence ordered.

PROGRAMMING: [10 is maximum] Inmate must provide case worker with original for verification and copies of each certificate and diploma to the Board. Programming counts only on current sentence (programming on prior sentences will not be counted on the guideline).

-3 points for either GED, high school diploma, or 12 college credits.

-2 points for long term substance abuse program, behavior modification, or literacy program. -1 for short term counseling, street readiness, job workshop, parenting, weekly AA/NA's, full time job (½ day or more), or other program deemed appropriate by the Board.

Current Age: 41 and above = -1 point, 31-40 = 0 points, 21-30 = 1 point, under 21 = 2 points.

Gang Membership: No = 0 points, Yes = 2 points.

Completed DOC certified education/vocational/treatment program: Yes or has existing GED/high school/college degree = -1 point, No = 0 points.

Disciplinary Conduct - Past year: No violations or single minor violation = -1 points, Multiple minor violations = 0 points, Major violation = 1, multiple major violations = 2 points

Current custody level: Minimum = -1 point, Medium = 0 points, Maximum or Administrative Segregation = 2 points.

TOTAL POINTS SCORE: 0-4=Low Risk, 5-10=Moderate Risk, 11-15=High Risk, 16+ points total or 8points on dynamic factors=Highest Risk.

PBFORM-PS (REV. 12/10/04)