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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY OF NEVADA

* * * *

In the Matter of the Application of,
BRECK SMITH, #
For a Writ of Habeas Corpus.

CASE NO.: C-19-337302-1

Dept. XXV

FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
ORDER

DATE OF HEARING: JANUARY 27, 2021
TIME OF HEARING: 3:00 PM

THIS CAUSE having come up for hearing before the Honorable KATHLEEN DELANEY,
District Judge, on the 27th day of January, 2021, the Petitioner being represented by MICHAEL
J. MCAVOYAMAYA, ESQ, of MCAVOY AMAYA & REVERO ATTORNEYS, the Respondent
being represented by KATRINA A. SAMUELS, of the Office of the Nevada Attorney General,
and the Court having considered the matter, including the briefs, arguments of counsel, and
documents on file herein, now therefore, the Court makes the following findings of fact and
conclusions of law:

FINDINGS OF FACT

1. Petitioner was arrested, convicted, and sentenced under the habitual offender statute
in 2008.
2. Petitioner was granted parole for the 2008 convictions on March 7, 2017.
3. On March 22, 2018, Petitioner was arrested on new charges of attempted burglary,
possession of burglary tools, and parole violation.



1 4. On April 11, 2018, the Nevada Board of Parole Commissioners (“Parole Board”)
2 issued a retake warrant in order for Smith to be retaken and returned into the custody of the Nevada
3 Department of Corrections (“NDOC”).

4 5. On April 13, 2018, Petitioner was transferred to the custody of NDOC where he
5 remained during the pendency of the new charges without receiving a parole revocation hearing.

6 6. On June 24, 2019, Petitioner entered an *Alford* plea to Attempted Burglary¹.

7 7. On June 25, 2019, the Parole Board held the parole revocation hearing and revoked
8 Petitioner’s parole on the prior offense.

9 8. The Parole Board issued a one (1) year penalty for Petitioner’s parole violation,
10 revoking Petitioner’s parole until July 1, 2020.

11 9. Petitioner began serving the sentence on the 2019 conviction on July 2, 2020.

12 10. Because of the Parole Board’s decision to defer revoking Petitioner’s parole,
13 Petitioner incurred over one year of unauthorized “dead time,” a term of imprisonment that did not
14 count towards the prior or new offense.

CONCLUSIONS OF LAW

15 11. Chapter 213 of the Nevada Revised Statutes governs parole, and the procedure for
16 revoking parole when there is probable cause to believe a parole violation has occurred.

17 12. When a parolee has been arrested for a suspected violation of the terms of their
18 parole, the Division of Parole and Probation must order NDOC to retake custody of the parolee
19 within five days of the probable cause determination by the Division of Parole and Probation,
20 unless the probable cause determination is based on new criminal charges. *See Nev. Rev. Stat. §*
21 *213.15103.*

22 13. When a parolee is arrested on new criminal charges, the Division of Parole and
23 Probation may defer the probable cause hearing and allow the parolee to remain in the custody of
24 the jurisdiction where the new charges were committed until adjudication of the new charges. *Id.*

25 14. After it has been determined that there is probable cause to believe a parolee has
26 violated their parole, the Division of Parole and Probation must either release the parolee again on
27 parole, order residential confinement, or suspend parole and return the parolee to confinement
28 within fifteen days. *See Nev. Rev. Stat. § 213.1517(1).*

¹ Petitioner was sentenced to 24-60 months in NDOC running consecutively to his other cases with zero days credit for time served.



1 15. When “a determination has been made that probable cause exists for the continued
2 detention of a paroled prisoner, the Board shall consider the prisoner's case within 60 days after
3 his return to the custody of the Department of Corrections or his or her placement in residential
4 confinement pursuant to subsection 1.” *See Nev. Rev. Stat. § 213.1517(3).*

5 16. The sixty (60) day parole revocation hearing requirement is intended to ensure that
6 a parolee believed to have violated the terms of his parole is not deprived of his constitutionally
7 protected liberty interests without due process.

8 17. There is an exception to NRS § 213.1517(3) when “probable cause for continued
9 detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge,”
10 which permits the Parole Board to either “consider the prisoner's case under the provisions of
11 subsection 3 or defer consideration until not more than 60 days after his or her return to the custody
12 of the Department of Corrections following the final adjudication of the new criminal charge.” *See*
13 *Nev. Rev. Stat. § 213.1517(4).*

14 18. Petitioner argued in his briefs and at the hearing that the plain language of both the
15 sixty (60) day parole revocation hearing requirement in NRS § 213.1517 Subsection 3, and its
16 exception in Subsection 4, impose a duty on the Parole Board to hold the parole revocation hearing
17 within sixty (60) days of the parolee’s return to NDOC custody.

18 19. The State argued in its response brief and the hearing that the exception in NRS §
19 213.1517 Subsection 4 permits the Parole Board to defer the parole revocation hearing until sixty
20 (60) days after the adjudication of the parolee’s new charges.

21 20. The Court finds, based on the plain language of NRS § 213.1517, that Petitioner’s
22 interpretation of the statute is correct. NRS § 213.1517(4) does not grant the Parole Board the
23 authority to impose indefinite terms of imprisonment in the custody of NDOC by taking custody
24 of a parolee, and then deferring the parole revocation hearing until after the parolee is convicted
25 on the new charges.

26 21. The Court holds that the plain language of NRS §§ 213.1517 Subsections 3 and 4
27 impose a duty on the Parole Board to hold the parole revocation hearing within sixty (60) days of
28 a parolee’s return to the custody of NDOC upon a finding a probable cause that the terms of parole
have been violated, regardless of whether there are new charges pending. The Parole Board may
only defer the parole revocation hearing if the parolee remains in the custody of the jurisdiction
where the new charges have been committed until final adjudication of the new charges. *See Nev.*

1 Rev. Stat. § 213.1517(4). Upon conviction on the new charges, the Parole Board must then hold
2 the parole revocation hearing within sixty (60) days of the parolee’s return to NDOC custody. *Id.*

3 22. The Court acknowledges and understands the State’s argument and requested
4 interpretation of the statute that the sixty (60) day time period to hold the parole revocation hearing
5 run from the date of conviction, but finds that the only way that the State’s interpretation
6 withstands scrutiny is by ignoring the plain language in NRS § 213.1517 subsection 3 and 4 stating
7 that the sixty (60) day period to hold the parole revocation hearing begins to run upon the parolee’s
8 return to NDOC custody, or imposition of residential confinement.

9 23. This Court is not permitted to “ignore as meaningless” words and clauses in a
10 statute or law. *State ex rel. Thatcher v. Reno Brewing Co.*, 42 Nev. 397, 405, 178 P. 902, 903
11 (1919). There is a presumption that the framers of our laws intended “to give force and effect, not
12 only to the main legislative intent of the act but also to its several parts, words, clauses, and
13 sentences, and chose appropriate language to express their intention.” *Id.* That “presumption is
14 removed only when it appears, from a construction of a statute as a whole, effect cannot be given
15 to the paramount purpose unless particular words or clauses are rejected, or without limiting or
16 expanding their literal import.” *Id.*

17 24. The State has failed to overcome the presumption that the plain language in NRS §
18 213.1517 Subsections 3 and 4 means that the Parole Board must hold the parole revocation hearing
19 ~~be held~~ within sixty (60) days of the parolee’s return to NDOC custody. *Id.*

20 25. For these reasons, this Court holds that the Parole Board exceeded its authority
21 pursuant to NRS § 213.1517, deferring the parole revocation well beyond sixty (60) days after
22 Petitioner’s return to NDOC custody.

23 26. Petitioner also raised the issue of the Parole Board’s procedure of taking custody
24 of Petitioner and deferring the parole revocation also resulted in a violation of Petitioner’s
25 constitutional right to bail on the new charges. The State opposed, arguing that NRS § 178.484(2)
26 prevents a parolee from receiving bail unless ordered by the court, the Parole Board, or the Division
27 of Parole and Probation, and that no such order was issued.

28 27. The Court does not believe Petitioner’s constitutional right to bail was violated by
the Parole Board, but because the Court finds the Parole Board exceeded its authority under NRS
§ 213.1517, the Court will not decide on the merits of that issue at this time.



ORDER

1 28. THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction
2 Relief shall be, and it is, hereby GRANTED. The Court orders that based on its findings and
3 conclusions the Petitioner is entitled to recalculation of his time served for the parole violation and
4 sentence entered in this case as follows:

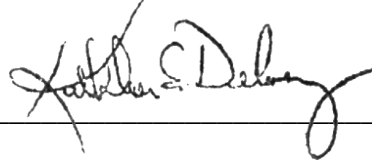
- 5 a. Petitioner’s parole revocation hearing should have been held on June 12, 2018, which
6 is 60 days from April 13, 2018, the date he returned to the custody of NDOC.
- 7 b. The period of Petitioner’s parole revocation penalty should have run from June 12,
8 2018, the date his parole revocation hearing should have been held, to June 17, 2019,
9 the date his one-year penalty would have expired.
- 10 c. NDOC shall ensure that in Case Nos. 07C232109, 07C232113, 07C232319 and
11 08C240508 Petitioner has been awarded flat time and statutory credit from June 12,
12 2018, the date his parole revocation hearing should have been held, to June 17, 2019,
13 the date his one-year penalty would have expired.

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1 d. NDOC shall also ensure that in Case No. 19C337302, Petitioner has been awarded flat
2 time and statutory credit from June 24, 2019, the date he entered his plea, to the present
3 date.

Dated this 17th day of February, 2021

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5

6 OBB 329 BD7D 12F3
7 Kathleen E. Delaney
8 District Court Judge

9 **MCAVOY AMAYA & REVERO ATTORNEYS**
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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 State of Nevada

CASE NO: C-19-337302-1

7 vs

DEPT. NO. Department 25

8 Breck Smith
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

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