

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA BOARD
OF PAROLE COMMISSIONERS,
Appellant,

vs.

LAWRENCE RONALD
VALENTINE, Respondent

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Case No.: 83601

**BRIEF OF AMICI CURIAE ACLU OF NEVADA AND NACJ
IN SUPPORT OF RESPONDENT**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities as described in NRAP 26.1(a) must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Civil Liberties Union of Nevada Foundation, Inc. (ACLU of Nevada), is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Christopher Peterson, of ACLU of Nevada.

Nevada Attorneys for Criminal Justice, Inc. (NACJ), is a domestic nonprofit, non-stock corporation. It has no parent corporations, and no publicly held corporations have an ownership in it. This amicus curiae is represented by Randolph M. Fiedler of NACJ.

No other law firms have appeared for the amici in this case or are expected to appear for the amici in this Court.

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STATEMENT OF INTEREST

The American Civil Liberties Union (ACLU) of Nevada is a state affiliate of the national ACLU, a nonprofit, nonpartisan organization that has been our nation's guardian of liberty for over 100 years. The ACLU works to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country.

Nevada Attorneys for Criminal Justice is a state-wide non-profit organization of criminal defense attorneys in Nevada. Our members represent clients in all phases of criminal proceedings in municipal, state, and federal courts in Nevada.

SUMMARY OF THE ARGUMENT

Nevada law mandates that the Division of Parole and Probation recommend early discharge from parole if a supervised person meets the conditions laid out in NRS 213.1543. One of these conditions, NRS 213.1543(1)(c), which requires the supervised person be "current with any fee to defray the costs of his or her supervision charged by the Division pursuant to NRS 213.1076", is at issue here. The District Court below found that Respondent Valentine satisfied this obligation and was eligible for relief because he had made all payments as ordered by the Division and verified economic hardship.

The State claims that Respondent Valentine was ineligible for relief pursuant to NRS 213.1543 because he had not paid off the entire balance of supervision fees owed to the Division. No one disputes that Respondent Valentine paid all supervision payments ordered by the Division on time. But the Division diverted those payments upon receipt to cover Valentine's outstanding restitution balance, which the Division claims was required under Article 1, Section 8A(1)(p) of the Nevada Constitution. Having diverted Valentine's payments, the Division reasons, those payments could not satisfy his obligations under NRS 213.1543(1)(c). This position is erroneous for three reasons.

First, NRS 213.1543(1)(c) only required that Respondent Valentine be "current" on his supervision fee payments, not that he pay off his supervision fee balance "in full". As it is undisputed that Respondent Valentine made all payments ordered by the Division pursuant to the schedule imposed by NRS 213.1076(1)(b) in a timely manner, he was current on his payments and entitled to relief. What the Division did with those funds after receiving payment is irrelevant.

Second, the Division had no legal basis to transfer Respondent Valentine's supervision fees to restitution. Article 1, Section 8A(1)(p) of the Nevada Constitution is not self-executing. In turn, the Division has not identified any statute authorizing the Division to transfer funds nor was there a court order pursuant to Article 1, Section 8A(2) requiring the Division to transfer Valentine's supervision

fees to restitution. As such, the Division has no legal basis to claim that Respondent Valentine has an outstanding fee balance due to its decision to apply his payments to restitution rather than his supervision fee obligations.

Third, Respondent Valentine established that he suffered “economic hardship” rendering him unable to satisfy his financial obligations to the Division. While the Division has the authority under NRS 213.1076(2) to waive a supervised person’s fee obligations upon such a showing, it appears the agency choose not to do so. To the extent that NRS 213.1076(2) authorizes the Chief of the Division of Parole or Probation to deny a waiver to a supervised person with a verified economic hardship without justification, the provision violates the bar imposed by *Sheriff v. Luqman* on the Legislature in authorizing an executive official to engage in arbitrary or capricious actions. As such, Respondent Valentine was entitled to a waiver of supervision fees pursuant to NRS 213.1076(2) and have no outstanding balance with the Division.

ARGUMENT

- I. A supervised person is “current” on his supervision fees if he complies with the payment schedule imposed on him by the Division pursuant to NRS 213.1076(1)(b).**

A supervised person is entitled to a recommendation for early release from parole if they satisfy the conditions imposed by NRS 213.1543(1). In considering

whether Respondent Valentine satisfied those conditions, this Court must specifically interpret two statutory provisions: NRS 213.1543(1)(c) and NRS 213.1076, the first describing a condition related to supervision fees that a supervised person must meet to be eligible for relief, the second governing the imposition of supervision fees by the Division of Parole and Probation.

NRS 213.1543 was adopted by the Nevada Legislature in 2019, as part of a package of criminal justice reform; it, requires the Division to “recommend the early discharge of a person from parole,” if the person complied with a number of requirements. NRS 213.1543.¹ That a supervised person must be “current with any fee to defray the costs of his or her supervision charged by the Division pursuant to NRS 213.1076” is one of those requirements. NRS 213.1543(1)(c).

NRS 213.1076 governs the Division’s imposition of supervision fees on the people the agency supervises. NRS 213.1076(1)(a) requires that the Division charge each person a fee to defray the cost of supervision. NRS 213.1076(1)(b) requires that the Division adopt by regulation a fee payment schedule that a supervised person must follow. In total, NRS 213.1076(1) requires a person under supervision pay fees

¹ As Justice Hardesty, a member of the Advisory Commission on the Administration of Justice that originated the bill, explained, the commission “[poured] over an unprecedented amount of data analysis of our system, reviewed research on what works to reduce recidivism and examined what works in other states” in proposing A.B. 236. *See Minutes, Sen. Comm. on Judiciary, 80th Sess., at 4 (Nev. May 31, 2019).*

to offset the cost of supervision according to a schedule set by the Division's regulations. Mr. Valentine complied with the payment schedule imposed by the Division. See Findings of Fact and Conclusions of Law, AA103.

Reviewing NRS 213.1076 and NRS 213.1543 (1)(c) in concert, a supervised person who is up-to-date on his fee payments according to the Division's schedule imposed by NRS 213.1076(1)(b) is entitled to a recommendation from the Division for early discharge from supervision if they otherwise satisfy the conditions of NRS 213.1543 because he is "current" on the payments he owes the division; whether or not he has paid his outstanding balance is irrelevant. Under common usage a person is "current" with a payment plan when they have made all of their outstanding payments even if they have not paid off their entire balance. See, e.g., *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 212 (2012)(describing the appellant as "current" on his loan though there was an outstanding principal balance because he had consistently satisfied his monthly commitment to his lender). Indeed, NRS 213.1543 recognizes this distinction by using different terms to describe a supervised person's obligations to be "current" and to be paid "in full." Compare NRS 213.1543(1)(c) with NRS 213.1543(1)(d). "When [a] document has used a term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Lorton v. Jones*, 130 Nev. 51, 60 (2014) (quoting Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of*

Legal Texts 170 (2012)). Under NRS 213.1543(1)(d), a supervised person is required to have their restitution obligations “paid in full” to seek relief pursuant to NRS 213.1543 unless the person establishes that economic hardship bars the satisfaction of that obligation. By comparison, that same person must only be “current” on fees imposed by NRS 213.1076 to satisfy NRS 213.1543(1)(c).

This distinction makes sense. Turning back to NRS 213.1076, supervision fees are not imposed in a lump sum; rather, the Division establishes a monthly schedule fee schedule that a person on supervision must follow. NRS 213.1076(1)(b); see NAC 213.230 (“Each parolee or probationer shall, during the term of the parole or probation, pay a monthly fee of \$30 to the Division of Parole and Probation of the Department of Public Safety to help defray the cost of supervision unless he or she receives a waiver as provided in subsection 2 of NRS 213.1076.”). In contrast, restitution is imposed as a lump sum, and the Division’s obligation under NRS 213.1543 is simply to determine whether that lump sum is paid in full or whether an economic hardship exists. NRS 213.1543(1)(d).

To summarize: barring economic hardship, a supervised person must pay the complete balance of their restitution fee balance before seeking early discharge but need only show that they are current on the payments imposed by the Division regarding supervision fees before seeking relief pursuant to NRS 213.1543.

Under the proper interpretation of NRS 213.1543(1)(c), what the State does with the fee after it is collected has no bearing on whether a supervisee is “current.” Thus, the State errs in arguing that because Respondent Valentine has an outstanding balance of \$420 in supervision fees according to the Division, he does not satisfy the requirement imposed by NRS 213.1543(1)(c). Neither party disputes that Valentine made every monthly payment imposed by the Division while under supervision. See App. Opening Brief at 4¶4 (acknowledging that Valentine was “paying his supervision fees as ordered”). The State’s position necessarily conflates being “current” with supervision fees with having a fee balance “paid in full.” See App. Opening Brief at 10 (“However, because Marsy’s Law requires government officials to first apply any monetary payments toward restitution, offenders who owe restitution and who are also making supervision fee payments may continue to have outstanding supervision fee balances.”) (emphasis added).

Furthermore, the State’s interpretation that “current” is synonymous with “paid in full” under NRS 213.1543 frustrates the interests of both the supervised person and the community at-large. A supervised person has a clear interest in terminating parole as soon as practicable to have their liberty restored. On the other hand, the State has a financial interest in terminating supervision early for people who can be safely left unsupervised: as seen by NRS 213.1076(1)(a), which mandates that the Division collect fees to “defray the cost of a [supervised person’s]

supervision,” supervision expends resources that could be used on other government services. NRS 213.1543 satisfies both interests by identifying persons who can be released early, reducing supervision costs to the State without relying on the individual judgment of Division officers. The State’s interpretation necessarily thwarts these interests, forcing people to stay on supervision who, like Respondent Valentine, are required to continue on supervision solely because of an inability to pay. This is the worst-case scenario for the State, with the government expending resources supervising individuals who could be safely released from parole yet do not have the means to pay the State back for that resource expenditure.

The State’s interpretation has yet another problem. NRS 213.1543 explicitly contemplates that someone could owe restitution but still be eligible for early release. See NRS 213.1543(1)(d). Under NRS 213.1543(1)(d), a person will only be eligible for early release if they have “paid restitution in full or, because of economic hardship that is verified by the Division, has been unable to make restitution as ordered by the court” *Id.* The Division’s reading does an end run on (d), which could not be clearer that someone owing restitution can still qualify for early discharge.

Pursuant to its order, the District Court found that “[Respondent] Lawrence Valentine [had] continuously paid his continuously paid his supervision fees to the Division of Parole and Probation as required and [was] current on those payments,

in compliance with NRS 213.1543(1)(c)” at the order discharging Valentine from parole. Findings of Fact and Conclusions of Law, AA103. Respondent Valentine was “current” in regard to his supervision fees as required by NRS 213.1543(1)(c) and excused from the requirement that his restitution be “paid in full” prior to early discharge, and so entitled to early discharge pursuant to NRS 213.1543.

II. Even if Valentine was required to pay off his supervision fees in full to satisfy the condition imposed by NRS 213.1543 (1)(c), Article 1, Section 8A(1)(p) of the Nevada Constitution is not self-executing and the Division had no legal basis to redistribute Valentine’s supervision fees to restitution.

“A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.” *Wren v. Dixon*, 40 Nev. 170, 195-96, 161 P. 722, 729 (1916) (cited by *Mack v. Williams*, 138 Nev. Adv. Op. 86, *10, 522 P.3d 434, 441 (2022)). Whether or not a constitutional provision is self-executing is “determined from a consideration both of the language used and the intrinsic nature of the provision itself.” *Wilson v. Koontz*, 76 Nev. 33, 39, 348 P.2d 231, 234 (1960).

Article 1, Section 8A(1)(p) of the Nevada Constitution, a Marsy’s Law provision, states that a victim of a crime is entitled “[t]o have all monetary payments, money and property collected from any person who has been ordered to make

restitution be first applied to pay the amounts ordered as restitution to the victim.”

While this Court has not specifically addressed whether Marsy’s Law provisions in Nevada’s Constitution are self-executing, other state courts have found that they are not. See e.g., *People v. Ryan*, 203 Cal. App. 3d 189, 194, 249 Cal. Rptr. 750, 753 (Cal. App. 1st Dist. 1988) (“The provision of Proposition Eight [Marsy’s Law] providing for direct payment of restitution to the victim is not self-executing and requires action by the Legislature.”). The language of Article 1, Section 8A(1)(p) supports the same finding here. While the establishing the general principle that restitution should be prioritized over all other obligations, Article 1, Section 8A(1)(p) fails to explain (1) who is obligated to apply any “monetary payments, money, or property” collected to restitution, (2) when the obligation must be fulfilled, or (3) liability for failure to fulfill this obligation. If the provision is considered self-executing and its plain reading adopted, Article 1, Section 8A(1)(p) would prevent a person who owes restitution from participating in our economy in any form, and even if the provision was limited to “monetary payments, money, or property” collected by the government: a Nevadan who owes restitution would not

be able to register a vehicle,² order a driver's license,³ pay off outstanding library fees for overdue books, file a legal action,⁴ or engage in a host of other public services where a fee is charged prior to complete payment of restitution, functionally leaving them without government services indefinitely. In sum, Article 1, Section 8A(1)(p) fails to provide sufficient clarity regarding the duty it creates and who that duty is imposed upon and must not be considered self-executing.

The inclusion of Article 1, Section 8A(2) also suggests that the rights described in Article 1, Section 8A(1) are not self-executing. Article 1, Section 8A(2) states that, “[a] victim has standing to assert the rights enumerated in this section in any court with jurisdiction over the case.” First, Section 8A(2) would be superfluous if Article 1, Section 8A(1) was self-executing because a self-executing right does not need a separate provision explaining that the right can be asserted. See *Mack*, 138 Nev. Adv. Op. at *12, 522 P.3d at 442 (“As our caselaw suggests, [Article 1, Section 18 of the Nevada Constitution], because of its prohibitory nature, is self-executing and thus is not dependent on ‘Subsequent. legislation to carry [it] into

² Nevada Department of Motor Vehicles, Vehicle Registration Fees, *available at* <https://dmv.nv.gov/regfees.htm>.

³ Nevada Department of Motor Vehicles, Driver's License and ID Card Fees, *available at* <https://dmv.nv.gov/dlfees.htm>.

⁴ NRS 19.013.

effect.”); *Clark Cnty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012)(“Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory.”) compare Nev Const. art. 1, § 18 (self-executing provision where party may file suit for violation of the right without any supplementing provisions authorizing the party to assert the right) to Nev. Const. art. 1, § 8A (provisions in Nev. Const. art. ,1 § 8A(2)–(6) supplementing the rights articulated in Nev art. 1, § 8A(1)). As such, Article 1, Section 8A(2) infers that the rights described in Article 1, Section 8A(1) must be asserted by a victim in a court with jurisdiction in the case before they become operative unless the Legislature provides by law “other measure[s] necessary or useful to secure to victims of crime the rights set forth in this section.” Nev. Const. art. 1, § 8A(6).⁵ Second, such a requirement is practical: if a victim asserts their right under Article 1, Section 8A(1)(p) before a court, presumably their pleading would identify what entity or person are the victim is asserting their right against, notify that entity of the victim’s assertion, specify what money the victim seeks to apply to the outstanding restitution

⁵ Indeed, NRS 213.1543, which was adopted after Marsy’s Law, appears to be a law that “provide[s] any other measure necessary or useful to secure victims of crime the benefit of the right set forth in this section,” Nev. Const. art. 1, §8A(6), because it balances restitution, supervision fees, and economic hardship. *See* NRS 213.1543(1)(c), (d).

balance, and generally flesh out the victim’s claim beyond the principle stated in Article 1, Section 8A(1)(p).

If a constitutional provision is not self-executing, legislative action is necessary to put the provision into effect. See *Wilson*, 76 Nev. at 39 (indicating that the Legislature can render a constitutional provision “nugatory” if the provision is not self-executing and the Legislature decides not to act). The State has not identified any statutory provisions authorizing, let alone requiring, the Division to apply any payments made by a supervised person towards supervision fees imposed by NRS 213.1076 to restitution and then treat the fees as unpaid. And the State does not offer any court orders made pursuant to Article 1, Section 8A(2) ordering the Division to divert funds paid towards supervision fees to restitution. As such, the Division’s decision to treat Respondent Valentine’s fee payments as unpaid because they went to restitution was improper, and Valentine was eligible for relief under NRS 213.1543.

III. NRS 213.1076 violates the non-delegation doctrine because it grants the Chief Parole and Probation Officer unfettered discretion to deny a supervision fee waiver to a supervised person even if that person has established paying the fee would result in economic hardship, an act that would necessarily be arbitrary and capricious.

The legislature may delegate to an executive agency the authority “to determine the facts or state of things upon which the law makes its own operations depend.” *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985). However,

“[s]ufficient legislative standards are required in order to assure that the agency will neither act capriciously or arbitrarily.” *Id.*, 101 Nev. at 154, 697 P.2d at 110.

NRS 213.1076(2) delegates power to an executive branch official, stating that “[t]he Chief [of the Division of Parole and Probation] may waive the fee to defray the cost of supervision, in whole or in part, if the Chief determines that payment of the fee would create an economic hardship on the parolee, probationer or person supervised by the Division through residential confinement.” This delegation can be conceived as two separate authorizations, empowering the Chief Parole and Probation Officer to (1) determine whether a supervised person would suffer economic hardship if required to pay supervision fees and so eligible for a fee waiver, and (2) if economic hardship is found, use their discretion in granting or denying a request for waiver.

The first delegation, authorizing an executive official to determine whether a person qualifies for a fee waiver due to economic hardship, is valid as it calls for the official to make a factual determination independent from the official’s discretion. The second, however, gives the Chief unfettered discretion to deny a waiver to a supervised person, even one with an established economic hardship, and this standard is facially insufficient to prevent arbitrary or capricious rulings on the part of the Division in violation of *Luqman*.

The arbitrariness is demonstrated here. The District Court determined, and the Division did not dispute, that Valentine suffered economic hardship. Finding of Facts and Conclusion of Law, AA103; see Transcript of Hearing re: Motion to Dismiss Petition for Writ of Mandamus filed 04/08/2021, AA078 (State's acknowledgement that the Division determined that Valentine suffered from economic hardship). This economic hardship, however, has different consequences on Valentine's supervision fees and on his restitution due to the Division's authority to arbitrarily either grant or deny a supervision fee waiver. Under NRS 213.1543(1)(d), this economic hardship excuses the obligation to have paid restitution in full. In contrast, under NRS 213.1076(2), though economic hardship was enough to justify waive payment of his supervision fees, the Chief could deny waiving the fees without explanation. *See* Findings of Fact and Conclusion of Law, AA111 (District Court finding that the Chief reviewed Valentine's case). Such circumstances illustrate the arbitrary and capricious nature of the Chief's authority.

To the extent that NRS 213.1076 (2) authorizes the Division to deny a waiver of supervision fees without justification even after a determination that the supervised person suffers from economic hardship, the provision violates *Sheriff v. Luqman*. As such, Valentine was entitled to a fee waiver, and as he would no longer owe any balance to the Division, satisfied the condition imposed by NRS 213.1543 (1)(c).

CONCLUSION

Based on the foregoing, amicus curiae respectfully ask this Court to hold that if a parolee has made payments consistent with the monthly fee schedule, then the parolee is “current” under NRS 213.1543(1)(c). In the alternative, this Court should hold that Nev. Const. art. 1, § 8A(1)(p) is not self-executing, and thus the Division may not treat diverted funds as a basis to conclude someone is not “current” with their fee payments. Or this Court should hold that NRS 213.1076(2) is an unconstitutional delegation of legislative power.

DATED this ____ day of May 2023.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amici 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, including the requirement of Rule 28(e), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I further 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 for Office 365 in 14 point Century Schoolbook.

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Finally, I hereby certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,637 words.

DATED this 30th day of May 2023.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on May 30, 2023.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Christopher Peterson
An employee of ACLU of Nevada