

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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GERARDO PEREZ,

Appellant,

Vs.

BRIAN WILLIAMS, WARDEN,

Respondent

Case No. 75001

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following persons are entities as described in NRAP 16.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. All law firms that have appeared for the party: JUSTICE LAW CENTER, LLC, a Nevada Corporation, comprised of attorneys BRET O. WHIPPLE, ESQ.

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ROUTING STATEMENT

NRAP 17 assigns only cases to the Court of Appeals defined in Rule 17. Rule 17(b)(1) assigns direct appeals from judgments of conviction to the Court of Appeals that involve a challenge to the computation of time served under a judgment of conviction, a motion to correct an illegal sentence, or a motion to modify a sentence. Therefore, this appeal may be assigned to the Court of Appeals.

Dated this 3rd day of August, 2018.

/s/ Bret O. Whipple, Esq.
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JURISDICTIONAL STATEMENT

The basis for this appeal is NRAP 4(b) and NRS 34.575(1). A Judgment of conviction was entered against Appellant on April 13, 2005, however this appeal direct arises out of the District Court's Decision and Order filed January 4 2018. AA 0062.

STATEMENT OF THE ISSUES

I. Whether the District Court erred in denying Appellant's Post Conviction of Habeas Corpus, where Appellant had challenged the Warden's refusal to apply good time credit to a Weapon Enhancement sentence being served under NRS 193.165.

STATEMENT OF THE CASE

On April 12, 2017 Petitioner Gerardo Perez (“Perez”) filed a Petition for Writ of Habeas Corpus (Post-conviction) regarding the computation of “good time” as it applies to his underlying prison sentence in Case No. C200133. AA 0001-0015. Specifically, Mr. Perez argued that he had been denied approximately twenty (20) days of good time credit which he should have received. AA 0006-0009.

The District Court issued an Order for Petition for Writ of Habeas Corpus on August 4, 2017. AA 0016-0017. The State filed a Response to Petition for Writ of Habeas Corpus on September 26, 2017. AA 0019-0029.

The District Court issued a Decision and Order on January 4, 2018. AA 0056-0066. Therein, the District Court found and held that “Mr. Perez is active on a sentence which specified a parole eligibility date, and therefore is excluded from receiving good time credits.” AA 0063. Mr. Perez, through undersigned counsel, filed a timely Notice of Appeal on January 25, 2018. AA 0067. This Opening Brief now follows.

STATEMENT OF THE FACTS

Petitioner Gerardo Perez is currently incarcerated in High Desert State Prison. Perez is serving a sentence arising out of criminal acts he committed on November 30, 2003. On April 13, 2005, the Court adjudicated Perez Guilty of Second Degree Murder with Use of a Deadly Weapon, a category A felony.

LEGAL ARGUMENT

A. MR. PEREZ IS ENTITLED TO GOOD TIME CREDIT.

Mr. Perez is serving a sentence for Second Degree Murder, combined with a sentence for a Deadly Weapon Enhancement. AA 0037. As such, there are two immediate questions: whether Mr. Perez was entitled to good time off the minimum sentence calculated under NRS 200.030 (murder), and second, whether Mr. Perez is entitled to good time off the minimum sentence calculated under NRS 193.165 (weapon enhancement). As Mr. Perez has been paroled off of the first sentence (murder), he is currently now serving the deadly weapon enhancement sentence, and it is on that latter sentence that he seeks good time credit.

In *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1262 (Nev. 2017), this Court analyzed NRS 209.4465(7). That statute provides that credits earned pursuant to NRS 209.4465: (a) "[m]ust be deducted from [a prisoner's] maximum term" of imprisonment and (b) "[a]pply to eligibility for parole unless the offender was sentenced pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole." The first part of subsection 7(b) establishes a general rule—that credits earned pursuant to NRS 209.4465 apply to eligibility for parole. The second part of subsection 7(b) sets forth a limitation—the general rule does not apply if the offender "was sentenced pursuant to a statute

which specifies a minimum sentence that must be served before a person becomes eligible for parole."

This Court held that: "if the sentencing statute did not specify a minimum sentence that had to be served before parole eligibility, credits should be deducted from a prisoner's minimum sentence, making an inmate eligible for parole sooner than he or she would have been without the credits." *Id.*

Applying *Williams*, it is clear that Mr. Perez is not entitled to good time off his "primary" sentence, as that statute does mention a minimum term prior to parole eligibility: "(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served." NRS 200.030(5)(b).

However, Mr. Perez is subject to a consecutive term of a minimum of ten years to a maximum of twenty-five years under NRS 193.165 as a deadly weapon enhancement. This sentence was imposed consecutively to Mr. Perez's Second Degree Murder sentence. Unlike the statute governing punishment for second degree murder, the weapon enhancement statute *does not* set the earliest parole eligibility at a certain number of years, rather it is silent on parole: "[a defendant punished under the weapon enhancement statute is to] be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years." NRS § 193.165. Even if the prior meaning of NRS 193.165 is applied, which imposed a sentence consecutive and "equal to" the primary sentence,

this does not logically suggest that the term imposed under the consecutive sentence must automatically incorporate the parole-limiting language of the underlying crime's statute. In either case, the Court should not read into NRS 193.165 a limitation on parole eligibility from the "primary" offense.

This Court has already held that, despite punishment under NRS 193.165 being a continuation of the sentence for the primary offense, "the penalty for a primary offense and the enhancement penalty imposed pursuant to NRS 193.165 are separate and distinct, and the consecutive sentences imposed must be treated as separate sentences for all purposes." *Nev. Dep't of Prisons v. Bowen*, 103 Nev. 477, 481, 745 P.2d 697, 699 (1987).

Furthermore, in an unpublished opinion issuing after *Williams*, this Court held that good time must be awarded to a defendant serving a weapon enhancement sentence, where the underlying offense as committed between 1995 and 2007, i.e. in the same situation as exists here: "Garcia is serving a sentence pursuant to such a statute for a weapon enhancement related to an attempted sexual assault committed on or between July 17, 1997, and June 30, 2007. *See* NRS 193.165 (1995). [...] Consistent with *Williams*, the credits that Garcia has earned pursuant to NRS 209.4465 should be applied to his parole eligibility on the sentence he is serving. The district court erred in ruling to the contrary." *Garcia v. Baca*, 404 P.3d 408 (Nev. 2017).

While the State may attempt to distinguish *Garcia* from Perez's case by pointing out that the primary sentence in *Garcia* was eligible for good time reduction, whereas Perez's primary sentence is not eligible, this argument should be rejected. However, excluding good time off the sentence for the weapon enhancement, based on the eligibility of the "primary sentence," contradicts this Court's direction that the sentences imposed be treated separately for all purposes. If the sentences are treated separately here, the language of NRS 193.165 controls, and under *Williams*, the language of that statute allows for the reduction of good time.

CONCLUSION

Therefore, Appellant respectfully asks this Court to remand to district court so that can calculate Mr. Perez's good time on his deadly weapon enhancement sentence under NRS 193.165, under *Williams* and *Garcia*

Dated this 3rd day of August, 2018.

/s/ Bret O. Whipple, Esq

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

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and providing a copy to the following by virtue of e-filing with the Supreme Court:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(7)(a)(ii) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in proportionally spaced typeface using MS Word Font size 14, Times New Roman. I further certify that this brief complies with the page- or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP(a)(7)(C), does not exceed 14,000 words, having **1,353 words**.

Finally, I hereby certify that I have read this appellate 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, in particular NAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or 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.

Dated this 3rd day of August, 2018.

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