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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3  
4 LUIS ANGEL CASTRO

5  
6 Appellant,

7 vs.

8 THE STATE OF NEVADA,

9  
10 Respondent.

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S.Ct. No. 78643  
D.C. No. C-16-314092-1

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12 **APPELLANT'S REPLY BRIEF**

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LUIS ANGEL CASTRO

S.Ct. No. 78643

D.C. No. C-16-314092-1

Respondent.

**I. CASTRO PROPERLY PRESERVED HIS CLAIM THAT HIS PSI IS INACCURATE**

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1 recognized the error and then stated that it did not think it rose to the level of a  
2 Stockmeier<sup>1</sup> issue despite both parties stipulating to the correction. Defense  
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4 counsel did ultimately acquiesce instead of continuing to raise the issue but never  
5 once did Castro or defense counsel withdraw the allegation or stipulation that there  
6 was an error in the PSI or withdraw the request to change the PSI. Therefore,  
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8 Castro properly preserved this issue for appeal. Pantano v. State, 122 Nev. 782,  
9 795, 138 P.3d 477, 486 (2006).

## 11       **II. THE STATE FAILED TO ADDRESS THE PREJUDICE OF** 12       **CASTRO’S INCORRECT PSI WITH RESPECT TO HIS** 13       **TREATMENT IN PRISON**

14       The State argues that even if Castro did raise the issue at sentencing, the  
15 error does not rise to the level of “impalpable or highly suspect evidence sufficient  
16 to taint the PSI,” citing to Blankenship v. State, 132 Nev. Adv. Rep. 50, 375 P.3d  
17 407, 412 (2016). **RAB 11.** The State cites to Blankenship again and argues that “a  
18 simple error in a [PSI] does not constitute palpable or highly suspect evidence.  
19 Rather, the error must be such that it taints the PSI sentencing recommendation.”  
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21 **RAB 9-10.** The State then argues that because the sentencing recommendation in  
22 Castro’s PSI is for the lowest sentence pursuant to statute, Blankenship is not  
23 applicable to Castro’s case. The State concludes by arguing that “[b]ecause the  
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27 <sup>1</sup> Stockmeier v. State, Bd. of Parole Com'rs, 255 P.3d 209, 127 Nev. Adv. Op. 19  
28 (2011).

1 error in [Castro's] PSI was extremely minor, in that it neither impacted the  
2 sentencing recommendation, nor the district court's sentencing determination, the  
3 State respectfully requests that this Court affirm Appellant's Judgment of  
4 Conviction." **RAB 13.**

6 First, Castro did not cite to Blankenship for the argument that his sentencing  
7 recommendation was affected by this error. Castro cited to Blankenship for the the  
8 assertion that "a defendant [has] the right to object to factual [or methodological]  
9 errors in [sentencing forms], so long as he or she objects before sentencing, and  
10 allows the district court to strike information that is based on 'impalpable or highly  
11 suspect evidence.'" **Appellant's Opening Brief ("AOB") 9-10.** There is no  
12 question that the information Castro asked be stricken was "impalpable or highly  
13 suspect." The age of first arrest was incorrectly listed and all parties stipulated to  
14 this correction.

15 Second, the State conflates the terms "PSI" and "PSP" and misapplies  
16 Blankenship. A PSI is a Presentence Investigation Report, which includes, among  
17 many other things, a sentencing recommendation. Id. at 409. A PSP is a Probation  
18 Success Probability form than scores 34 factors. Id. The total score places the  
19 defendant within a range of sentences on a Sentence Recommendation Scale and  
20 provides the basis for the sentencing recommendation that ends up in the PSI. Id.  
21 The PSI and PSP are two different documents.

1           The correct quote from Blankenship is as follows: “A simple error in a **PSP**  
2 [not PSI] does not constitute palpable or highly suspect evidence. Rather the  
3 error must be such that it taints the PSI sentencing recommendation considered by  
4 the district court.” 132 Nev. Adv. Rep. \_\_\_, 375 P.3d at 413. The reason this Court  
5 in Blankenship focused on the affect of inaccurate sentencing documents on  
6 sentencing recommendations and ultimate length of sentence (as opposed to  
7 treatment in prison) is because that was the issue raised—that the actual sentence  
8 recommendation contained in the PSI and ultimate length of sentence given was  
9 adversely affected by errors in the **PSP**. Id. at 409.

13           The number of years a defendant serves is but one aspect of his or her  
14 sentence that a PSI affects. In Stockmeier this Court was very clear on this point  
15 when it further emphasized that even if disputed factual statements contained in a  
16 defendant’s PSI do not affect a defendant's sentence, ***any significant inaccuracy***  
17 ***could follow a defendant into the prison system*** and be used to determine his  
18 classification, placement in certain programs, and eligibility for parole, and thus,  
19 the defendant must promptly seek to correct any alleged inaccuracies to prevent the  
20 Department of Corrections from relying on a PSI that could not later be changed.  
21 255 P.3d 209, 214; *see*, NRS 176.159(1); *see also* United States Dept. of Justice v.  
22 Julian, 486 U.S. 1, 5–6, 108 S.Ct. 1606, 100 L.Ed.2d 1 (1988) (noting that PSIs are  
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1 used for determining status of an inmate, choosing treatment programs, deciding  
2 eligibility for privileges, and making parole decisions).

3  
4 Even if the State is correct in that error contained in the PSI did not affect  
5 Castro's sentencing in so much as the district court stated that it recognized said  
6 error, this error can and will still affect him throughout his prison term. The State  
7 failed to address this issue of this error adversely affecting him throughout his  
8 prison term at all and only focused on length of sentence. This constitutes  
9 confession of error.<sup>2</sup> Additionally, the State failed to allege that this PSI error was  
10 harmless. Instead it simply respectfully asked that this Court affirm Castro's  
11 Judgment of Conviction. **RAB 12-13.** Therefore, with respect to this claim, the  
12 State has conceded that if the district court did err in failing to correct the error in  
13 Castro's PSI, the error was not harmless and Castro was prejudiced. Polk v. State,  
14 126 Nev. Adv. Op. 19, \_\_\_, 233 P.3d 357, 361 (2010); see also NRS 49.005(3).  
15 Therefore, the district court abused its discretion when it refused to correct  
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21 <sup>2</sup> See Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984)  
22 (treating the respondent's failure to respond to the appellant's argument as a  
23 confession of error); see also A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249,  
24 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the  
25 issue in question, resulting in a confession of error); see also Moore v. State, 93  
26 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State  
27 acknowledged the issue on appeal, it failed to supply any analysis, legal or  
28 otherwise, to support its position and "effect[ively] filed no brief at all," which  
constituted confession of error), overruled on other grounds by Miller v. State, 121  
Nev. 92, 95–96, 110 P.3d 53, 56 (2005).

1 Castro's PSI and Castro was, and will continue to be, prejudiced by this error.  
2 Stockmeier, 255 P.3d at 214.  
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4 **III. CASTRO IS STATUTORILY ENTITLED TO HIS CREDIT FOR**  
5 **TIME SERVED REGARDLESS OF THE FACTUAL**  
6 **CIRCUMSTANCES**

7 The State argues that the issue with respect to Castro's credit for time served  
8 was not preserved at the district court level because he failed to raise it; this issue  
9 should only be reviewable for plain error and only reversible if the error is readily  
10 apparent and appellant demonstrates that the error was prejudicial to his substantial  
11 rights<sup>3</sup>; and Castro failed to provide any documentation supporting his claim that  
12 he was entitled to 1112 days credit for time served. **RAB 14-16**. Last, the State  
13 argues that Johnson v. State, 120 Nev. 296, 298, 89 P.3d 669, 670 (2004) is  
14 factually distinguishable from Castro's case in that Johnson had concurrent  
15 sentences, only one of which the district court applied credit for time served,  
16 whereas Castro was sentenced to one term of life without the possibility of parole.  
17 **RAB 14-15**.  
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19 Castro cited to Johnson for a standard of appellate review and for the  
20 premise that a district court **must** give credit for time served in presentence  
21 confinement. In Johnson, this Court cites to NRS 176.055(1), which provides in  
22 part:  
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27 <sup>3</sup> Citing to Martimorellan v. State, 131 Nev. 43, 49, 343 P.3d 590, 594 (2015). **RAB**  
28 **14**.

1 1. Except as otherwise provided in subsection 2, whenever a sentence  
2 of imprisonment in the county jail or state prison is imposed, the court  
3 may order that credit be allowed against the duration of the sentence,  
4 including any minimum term or minimum aggregate term, as  
5 applicable, thereof prescribed by law, for the amount of time which  
6 the defendant has actually spent in confinement before conviction,  
7 unless the defendant's confinement was pursuant to a judgment of  
8 conviction for another offense. Credit allowed pursuant to this  
9 subsection does not alter the date from which the term of  
10 imprisonment is computed.

11 Nev. Rev. Stat. § 176.055 (2013).

12 “This Court has repeatedly held that pursuant to NRS 176.055(1), sentencing  
13 courts **must** award credit for time served in presentence confinement. See, e.g.,  
14 Haney v. State, 124 Nev. 408, 413, 185 P.3d 350, 354 (2008) (“[C]redit for time  
15 served . . . remains mandatory.”); Johnson, 120 Nev. at 299, 89 P.3d at 671 (2004)  
16 (citing Kuykendall <sup>4</sup> in holding “that credit for time served in presentence  
17 confinement may not be denied to a defendant by applying it to only one of  
18 multiple concurrent sentences”); Nieto v. State, 119 Nev. 229, 231, 70 P.3d 747,  
19 748 (2003) (“NRS 176.055(1) states that a defendant is entitled to credit against a  
20 sentence for time ‘actually spent in confinement before conviction . . . .’.” Poasa  
21 v. State, 453 P.3d 387, 398 (2019).

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28 <sup>4</sup> Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996).



1 Although in Poasa the State attempted to persuade this Court to change the  
2 mandatory construction of NRS 176.055(1), this Court disagreed and held as  
3 follows:  
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5 “Mandatory construction comports with notions of fundamental  
6 fairness, prevents arbitrary application of the statute, and avoids  
7 constitutional concerns with discrimination based on indigent status.  
8 See, e.g., Kuykendall, 112 Nev. at 1287, 926 P.2d at 783 (addressing  
9 caselaw regarding whether mandatory credit for presentence  
10 incarceration is predicated upon indigency); Merna v. State, 95 Nev.  
11 144, 145, 591 P.2d 252, 253 (1979) (addressing credit for time served  
12 as a condition of probation and concluding credit should be given as a  
13 matter of fundamental fairness); Anglin v. State, 90 Nev. 287, 292,  
14 525 P.2d 34, 37 (1974) (concluding that under the Fourteenth  
15 Amendment, a sentencing court must provide credit for presentence  
16 confinement where bail has been set but the defendant is unable to  
17 pay).”

18 Poasa, 453 P.3d at 389-90.

19 Regardless of the circumstances, a district court **must** give a defendant  
20 credit for time served. NRS 176.055(1); Poasa, 453 P.3d 387-90; Johnson, 120  
21 Nev. at 299, 89 P.3d at 671. Castro’s PSI clearly states that he was entitled to 1112  
22 days credit for time served.<sup>5</sup> The district court knew he was entitled to at least  
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24 <sup>5</sup> Page 7 of Castro’s PSI states that at the time of sentencing he was entitled to  
25 1112 days credit for time served. While Castro was unable to include this  
26 document in his Appendix pursuant to N.R.A.P. 30(b)(6), it was transmitted to this  
27 Court by the district court on January 29, 2020. However, in his Opening Brief  
28 Castro cited to page 7 of his PSI for the assertion that he was entitled to 1112 day  
credit for time served. **AOB 12.** The State is well aware that the PSI contained the  
1112 days credit for time served given that it was in possession of the PSI at the

1 some credit yet chose to ignore this by stating, “I don’t think credit time served  
2 matters.”<sup>6</sup> This amounts to an abuse of discretion and/or plain error in that it is  
3  
4 “readily apparent and was prejudicial to his substantial rights.” Martimorellan, 131  
5 Nev. at 49, 343 P.3d at 594; NRS 176.055(1); Poasa, 453 P.3d 387-90; Johnson,  
6 120 Nev. at 299, 89 P.3d at 671. Therefore, even if this Court applies the higher  
7 plain error standard to this issue, the district court erred and this error prejudiced  
8 Castro. Castro is entitled to his 1112 days credit for time served.  
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### 10 CONCLUSION

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12 Based upon the arguments herein, *supra*, LUIS ANGEL CASTRO sentence  
13 should be VACATED and he should be re-sentenced.  
14

15 Dated this 10th day of March, 2020.

16 Respectfully submitted,

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18  
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30 time of sentencing (**2 AA 236-37**), presumably still is, and the State references the  
31 PSI in other sections of its Answering Brief. **RAB 11-12.**

32 <sup>6</sup> **2 AA 258.**

1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the formatting requirements of  
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style  
4 requirements of NRAP 32(a)(6) because:  
5

6 **[X] This brief has been prepared in a proportionally spaced typeface**  
7 **using Microsoft Word 2010 Edition in Times New Roman 14 point font; or**  
8

9 [ ] This brief has been prepared in a monospaced typeface using [state name  
10 and version of word-processing program] with [state number of characters per inch  
11 and name of type style].  
12

13 2. This brief exceeds the with the page- or type-volume limitations of NRAP  
14 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C),  
15 it is either:  
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17 [ ] Proportionately spaced, has a typeface of 14 points or more, and contains  
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21 words or \_\_\_\_\_ lines of text; or  
22

23 **[X] Does not exceed 15 pages.**

24 3. Finally, I hereby certify that I have read this appellate brief, and to the best  
25 of my knowledge, information, and belief, it is not frivolous or interposed for any  
26 improper purpose. I further certify that this brief complies with all applicable  
27  
28

1 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
2 every assertion in the brief regarding matters in the record to be supported by a  
3 reference to the page and volume number, if any, of the transcript or appendix  
4 where the matter relied on is to be found. I understand that I may be subject to  
5 sanctions in the event that the accompanying brief is not in conformity with the  
6 requirements of the Nevada Rules of Appellate Procedure.  
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9  
10 DATED this 10th day of March, 2020.  
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