IN THE SUPREME COURT OF THE STATE OF NEVADA

TYERRE LANELL WHITE-HUGHLEY, A/K/A TYERRE LANELL WHITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 80549

APPELLANT'S REPLY BRIEF

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TYERRE LANELL WHITE-HUGHLEY, A/K/A TYERRE LANELL WHITE, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 80549

NRAP 26.1 DISCLSOURE

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

(1) Attorney of Record for Appellant: Dewayne Nobles, Esq.

(2) Parent and/or Publicly-held Corporations: None.

(3) Law Firm(s) Appearing in the District Court: Nobles & Yanez Law Firm.

Dated this 24th day of July, 2020.

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ARGUMENT

I. The District Court Erred in Awarding Zero Days of Pre-Sentence Credit for Time Served.

The State argues in its Answering Brief that a district court has "wide discretion" in sentencing decisions. *See* Answering Brief (AB), pg. 4. While this broad proposition of the law is true, it doesn't include the right to not follow established law. Curiously, the State further argues that "it is not the district court's burden to justify anything – it is Appellant's burden to demonstrate an abuse of discretion." AB, pg. 5. However, Mr. White assumes that even the State would agree that not following established law—which is exactly what the district court

did in this case by not awarding him **any** credit for time served—constitutes an abuse of discretion.

The starting point as to whether a defendant is entitled to any credit is N.R.S. §176.055, as interpreted by this Court in Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996) (explaining that "the purpose of the statute is to ensure that all time served is credited towards a defendant's ultimate sentence."). Therefore, as recently and clearly explained by this Court, the district court should have given Mr. White all his "presentence confinement **absent an express statutory provision making the defendant ineligible for that credit**." Poasa v. State, 453 P.3d 387, 388, 2019 Nev. LEXIS 73 **, **1 (2019) (emphasis added).

Yet, not only did the district court fail to provide "an express statutory provision" giving it authority to deny Mr. White his presentence credit, but the State also failed to provide a single statutory provision in its Answering Brief. Indeed, at the time of sentencing, the district court—almost by judicial fiat—stated its reason for not granting Mr. White any credit:

> [W]e don't double dip, that basically even though you get picked up simultaneously, one case or the other, it gets credited to one. You don't get to split.

(AA. 042).

Not to be outdone by the district court's failure to provide "an express statutory provision," the State disingenuously misquotes a statute in an apparent

attempt to find any legal authority to deny Mr. White the presentence credit he is entitled to. In its Answering Brief, the State references N.R.S. § 176.055(2)(a). It seems reasonable to assume that the State cited this statute because it thinks it is relevant to Mr. White's case. However, the State misleadingly claims that the statute prescribes that "a defendant convicted of an offense subsequent to an earlier offense for which he was in custody 'is not eligible for any credit on the sentence for the subsequent offense. . . .'" AB, pg. 6.

However, the State left out of its paraphrase/quote of the statute the most relevant part. To be clear, N.R.S. § 176.055(2)(a) states that a defendant, who is convicted of two separate offenses, is not entitled to presentence credit on the subsequent offense **if** the subsequent offense was committed while the defendant was "[i]n custody on a prior charge," or "[i]mprisoned in a county jail or state prison or on probation or parole from a Nevada conviction." N.R.S. §176.055(2)(a) & (b). Neither of these two "express statutory provision[s]" apply to Mr. White. Therefore, the State's reference to N.R.S. § 176.055(2)(a) is completely irrelevant and without merit.

In its Answering Brief, the State also cites to Gaines v. State, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000), and puzzlingly argues that "relevant to the issue at hand is NRS 176.035 which, while authorizing district courts to run sentences concurrently, does not require that concurrent sentences be identical with respect to

time served." AB, pg. 6. The State's reference to Gaines is dumfounding because Gaines involved a defendant who was seeking presentence credit for two subsequent offenses that he **committed while on probation** for a Nevada conviction.

Thus, just like Mr. White argues here, the Court explained in Gaines that N.R.S. § 176.055(2)(b) explicitly denies credit to a defendant when he commits a subsequent offense while on probation for a Nevada conviction. Gaines, 116 Nev. at 364, 998 P.2d at 169 ("The plain and unequivocal language of NRS 176.055(2)(b) prohibits a district court from crediting a parolee or probationer for time served on a subsequent offense if such offense was committed while on probation or parole.").[1] Simply stated, the facts in Gaines and N.R.S. §176.035 are irrelevant to Mr. White's case.

In footnote #1 of its Answering Brief, the State goes out of its way to cite to numerous unpublished Nevada Supreme Court and Court of Appeal opinions. *See* AB, pg. 7. Interestingly, the State claims it cited the cases "not . . . for their persuasive value," but "to demonstrate their apparent similarity to the case at hand and, therefore, the district court's reasonable reliance thereon." *Id.* Putting aside the State's run around NRAP 36(c)(2)-(3), the unpublished cases cited by the State

[1] The defendant in Gaines tried to get around this "express statutory provision" denying presentence credit by arguing that "NRS 176.055 is ambiguous since it conflicts with NRS 176.035." *See* Gaines, 116 Nev. at 364, 998 P.2d at 169. The Court rejected this argument. *See id.*

do not support the State's position that Mr. White is not entitled to at least 70 days of presentence credit.

Truth be told, the underlying facts of **all** the unpublished decisions cited by the State **support** the argument that Mr. White is entitled to at least 70 days of credit. *See, e.g.*, Rowell v. State, 125 Nev. 1074, Docket No. 51789 (2009) (unpublished) (district court granted credit earned up until defendant was sentenced on another case. On appeal, defendant was denied "additional time served" for time after sentence imposed on first case. The district court did not deny all credit like the district court did in Mr. White's case); Downs v. State, 125 Nev. 1032, Docket No. 53290 (2009) (unpublished) (district court granted credit earned up until defendant was sentenced on another case. On appeal, defendant was denied "additional time served" for time after sentence imposed on first case. The district court did not deny all credit like the district court did in Mr. White's case.); Melton v. State, 127 Nev. 1159, Docket No. 56955 (2011) (unpublished) (district court denied credit earned for time served after sentence on one of three cases. On appeal, the State took opposite position as in Mr. White's case and agreed that defendant was entitled to 110 days of credit for presentence confinement up until defendant was sentenced on first case); Williams v. State, 2018 WL 1040118, Docket No. 72386 (Nev. Ct. App. 2018) (unpublished) (district court denied defendant credit for time served earned after being sentenced on first

of two cases. On appeal, the State took the opposite position as in Mr. White's case and agreed that defendant was entitled to 272 days of credit for presentence confinement up until sentenced on first case); Simpson v. State, 2018 WL 3217501, Docket No. 72865 (Nev. Ct. App. 2018) (unpublished) (district court denied defendant credit for time served after sentence on first of two cases. State took opposite position as in Mr.White's case and agreed that defendant was entitled to 200 days of credit for presentence confinement up until sentenced on first case).

Somewhat hypocritically, the State attacks Mr. White's argument for presentence credit by citing N.R.S. 176.055(1) and pointing out that this statute is "'an express statutory provision making the defendant ineligible for that credit.'" AB, pgs. 9-10. However, Mr. White acknowledged this statute in his Opening Brief when he explains on page 9:

> [I]t is arguable that Mr. White is not entitled to any credit he earned after December 9, 2019, the day Mr. White was sentenced to prison in his other case. This argument is based on the language in N.R.S. §176.055 (1) . . . . However, even assuming this argument, Mr. White would at a minimum be entitled to 70 days of credit for time served—the time he spent in custody from October 1, 2019 through December 9, 2019.

To be sure, it is the State who refuses to concede in its Answering Brief that Mr. White is entitled to at least 70 days of presentence confinement. To its credit, the State does begrudgingly admit in its Answering Brief that "in the event this

Court determines that Appellant is entitled to apply credit for time served in each of the two separate cases at issue, Appellant could only receive a maximum of seventy (70) days credit for time served in the instant case." AB, pg. 11.

As to the additional 29 days of credit Mr. White is requesting beyond the 70 days, his argument is limited to the concept of Due Process and its application to the specific facts of this case. Appellant is not requesting a broad expansion of the law, but rather that the Court limit its decision to the facts of this case only.

II. Due Process requires that Mr. White be Credited for all the Time he Spent in presentence confinement.

On Due Process fairness principles, Mr. White should not be denied 29 days of additional credit because he served a small portion of presentence confinement while also serving time for his other case. The State does not argue (and cannot argue), that if Mr. White hadn't started serving the sentence on his other case on December 9, 2019, he would have been out of custody on this case. Indeed, Mr. White remained at the Clark County Detention Center for 29 days as he waited for his sentencing date on this case.

The State argues that Mr. White's due process argument must fail because he "cannot demonstrate that he had any liberty interest that was denied him by the district court's denial of additional credit for time served . . . ." AB, pg. 10. In

support, the State cites to State, ex. Rel. Bd. Of Parole Com'ers v. Morrow, 127 Nev. 265, 255 P.3d 224 (2011).

However, Morrow is completely irrelevant to the facts of this case. The Morrow decision dealt with whether a prisoner has a due process right during parole hearings. *See* Morrow, 127 Nev. 265, 272, 255 P.3d 224, 228 (holding that "because Nevada's parole release statute does not create a liberty interest, we reiterate that inmates are not entitled to constitutional due process protections with respect to parole release hearings."). The case has nothing to do with whether Mr. White is entitled to presentence credit in this case.

Additionally, the State apparently ignored the plethora of cases cited by Mr. White in his Opening Brief where the Court has discussed a person's due process right as it relates to presentence credit for time served. *See, e.g.*, Mays v. Eighth Judicial Dist. Court, 111 Nev. 1172, 1178, 901 P.2d 639, 643 (1995) ("Under these circumstances, it is fundamentally unfair and a violation of petitioner's due process rights for the state to refuse him credit for his prior parole.").

In short, based on Due Process fairness principles, besides the 70 days of credit Mr. White earned between his arrest on October 1, 2019, and his sentencing on his other case on December 9, 2019, he is entitled to 29 days of additional credit, for a grand total of 99 days of credit.

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CONCLUSION

It is respectfully requested that the case be remanded to the district court with instructions to amend the judgement of conviction and grant Mr. White 99 days of credit for time served. Alternatively, at a minimum, Mr. White must be awarded 70 days of credit for the time he served from October 1, 2019, until December 9, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby 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 Times New Roman in 14 size font.

2. 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 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 1,890 words.

3. 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 NRAP 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 24th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on July 24th, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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