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

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5 LUIS ANGEL CASTRO

6 Appellant,

7  
8 vs.

9 THE STATE OF NEVADA,

10 Respondent.  
11

S.Ct. No. 78643

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

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12 **APPELLANT'S PETITION FOR REHEARING**

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1                   **IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

2  
3           LUIS ANGEL CASTRO

S.Ct. No. 78643

4                   Appellant,

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

5  
6                   vs.

7           THE STATE OF NEVADA,

8                   Respondent.

9  
10                   **ARGUMENT**

11       **I. THE NEVADA RULES OF APPELLATE PROCEDURE PROVIDE**  
12       **FOR REHEARING OF A COURT OF APPEALS ORDER WHEN**  
13       **THE COURT HAS OVERLOOKED OR MISAPPREHENDED**  
14       **MATERIAL FACTS OR LEGAL AUTHORITY**

15           Rule 40 of the Nevada Rules of Appellate Procedure provides that a party in  
16       an appellate case before the Court of Appeals may move for rehearing if the Court  
17       has overlooked or misapprehended a material fact or matter of law. In the  
18       discussion that follows, Castro argues the Court has misapprehended both matters  
19       of fact and law. Castro submits that these misapprehensions are material, and that  
20       a correction of the factual and legal errors that follow compels remanding his case  
21       to district court to give him his credit for time served.

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1 **II. THE COURT MISAPPREHENDED A MATTER OF LAW AND**  
2 **MATERIAL FACT WHEN IT CONCLUDED THAT CASTRO DID**  
3 **NOT ARGUE PLAIN ERROR WITH RESPECT TO THE FACT**  
4 **THAT THE COURT FAILED TO GIVE HIM CREDIT FOR TIME**  
5 **SERVED**

6 With respect to the argument that the district court erred in failing to give  
7 Castro his credit for time served, this Court held that Castro forfeited this claim by  
8 failing to object in the court below, that he did not argue plain error in this court,  
9 and therefore, this court refused to review this claim under the plain error analysis.

10 **Order of Affirmance “OA” 2-3.** Respectfully, this is inaccurate. **Castro argued**  
11 **plain error in his Reply Brief (“RB”) on page 8-9 as follows:**

13 “Regardless of the circumstances, a district court **must** give a  
14 defendant credit for time served. NRS 176.055(1); Poasa v. State, 453  
15 P.3d 387, 387-90 (2019); Johnson v. State, 120 Nev. 296, 299, 89  
16 P.3d 669, 671 (2004) Castro’s PSI clearly states that he was entitled to  
17 1112 days credit for time served. The district court knew he was  
18 entitled to at least some credit yet chose to ignore this by stating, “I  
19 don’t think credit time served matters.”<sup>1</sup> **This amounts to an abuse**  
20 **of discretion and/or PLAIN ERROR in that it is “readily**  
21 **apparent and was prejudicial to his substantial rights.”**  
22 **Martinorellan**, 131 Nev. at 49, 343 P.3d at 594; NRS 176.055(1);  
23 **Poasa**, 453 P.3d 387-90; **Johnson**, 120 Nev. at 299, 89 P.3d at 671.  
24 Therefore, **even if this Court applies the higher PLAIN ERROR**  
25 **standard to this issue, the district court erred and this error**  
26 **prejudiced Castro.** Castro is entitled to his 1112 days credit for time  
27 served.”

28 **RB 8-9 (emphasis added)(footnote removed)(abbreviated citations**  
**expanded to full citations).**

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<sup>1</sup> 2 AA 258.

1 Therefore, respectfully, this Court misapprehended a matter of law and fact  
2 when it concluded that Castro did not argue plain error on appeal with respect to  
3 the district court's error in failing to give him his credit for time served. When it  
4 enacted NRS 176.055(1), the Nevada Legislature determined that the district court  
5 must award credit for time served. This mandate has repeatedly been upheld by the  
6 Supreme Court of Nevada as mandatory, an aspect of fundamental fairness and  
7 required by the Fourteenth Amendment to the Constitution of the United States  
8 of America.<sup>2</sup> **RB 7-8.** The PSI stated that Castro was entitled to 1112 days credit  
9 for time served. **PSI at 7; Opening Brief 4; RB 8.** Despite what Nevada statutory  
10 law and case law mandates with respect to giving all defendants their credit for  
11 time served, the district court knowingly and intentionally failed to give said days  
12 to Castro. **2 AA 258.** This error does not get any more "readily apparent and  
13 prejudicial to [Castro's] rights," in other words, this error does not get any more  
14 plain. The error rises to the level of plain error and **this was argued in Castro's**  
15 **Reply brief. RB 8-9.**

16 Therefore, this Court's ruling that Castro failed to apply the plain error  
17 standard to his argument re credit for time served is a misapprehension of fact and  
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19 <sup>2</sup> Johnson, 120 Nev. at 299, 89 P.3d at 671; Nieto v. State, 119 Nev. 229, 231, 70  
20 P.3d 747, 748 (2003); Kuykendall v. State, 112 Nev. 1285, 926 P.2d 781 (1996);  
21 Poasa, 453 P.3d at 398; Merna v. State, 95 Nev. 144, 145, 591 P.2d 252, 253  
22 (1979); Anglin v. State, 90 Nev. 287, 292, 525 P.2d 34, 37 (1974). **All of these**  
23 **cases were cited to in Castro's Reply Brief. RB 7-8.**

1 law. Castro requests that this Court reconsider its affirmance and remand his case  
2 to district court so that he may be given his credit for time served and judgment of  
3 conviction corrected accordingly.  
4

5 **CONCLUSION**

6 Based upon the arguments contained herein, Castro respectfully requests that  
7 this Court rehear his appeal, reconsider its previous affirmance of Castro's  
8 sentence and remand the case to district court so as to correct his Judgment of  
9 Conviction to reflect his credit for time served.  
10  
11

12 Dated this 2<sup>nd</sup> day of September, 2020.

13 Respectfully submitted,  
14

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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this brief complies with the requirements of NRAP  
3 NRAP 32(a)(4)-(6) and NRAP 32(a)(7)(C). because:  
4

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

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

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

22 **[ X] Does not exceed 10 pages.**

23 3. Finally, I hereby certify that I have read this appellate brief, and to the best  
24 of my knowledge, information, and belief, it is not frivolous or interposed for any  
25 improper purpose. I further certify that this brief complies with all applicable  
26 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires  
27  
28



1 every assertion in the brief regarding matters in the record to be supported by a  
2 reference to the page and volume number, if any, of the transcript or appendix  
3 where the matter relied on is to be found. I understand that I may be subject to  
4 sanctions in the event that the accompanying brief is not in conformity with the  
5 requirements of the Nevada Rules of Appellate Procedure.  
6  
7

8 DATED this 2<sup>nd</sup> day of September, 2020.  
9  
10

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