# IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84234



ERIC DEAN WERRE

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Appeal From Order Denying Petition for
Writ of Habeas Corpus (Post-Conviction)
Third Judicial District, Lyon County
The Honorable Leon A. Aberasturi

## APPELLANT'S REPLY BRIEF

**MICHAEL LASHER, ESQ.**
**827 Kenny Way**
**Las Vegas, Nevada 89107**
**(510) 507-2869**
Michaellasher2@gmail.com

Counsel for Appellant Eric Dean Werre

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ERIC DEAN WERRE

Appellant,

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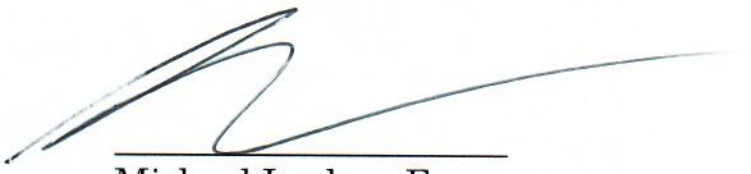
## NRAP 26.1 DISCLOSURE

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

1. Michael Lasher



Michael Lasher, Esq.
Attorney for ERIC WERRE

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## ARGUMENT

### Argument I

### WERRE'S THIRTY-YEAR SENTENCE VIOLATES THE EIGHTH AMENDMENT IN LIGHT OF THE OVERHAUL OF NEVADA'S CRIMINAL CODES

Respondent variously misconstrues or ignores Werre's arguments. Regarding Werre's Eighth Amendment challenge to his sentence, Respondent conveniently fails to address *any* of the United Supreme Court cases cited by Werre, including *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Weems v. United States,* 217 U.S. 349, 367 (1910); *Atkins v. Virginia*, 536 U.S. 304, 311, fn.7 (2002); and *Trop v. Dulles,* 356 U.S. 86, 101 (1958).

The foregoing cases show that Werre's punishment violates the Eighth Amendment's requirement that a punishment be in line with society's evolving standards of decency, as expressed in its own legislative enactments. Werre was arrested a mere six months before July 1, 2020, at which date he could not have been charged with trafficking, as alleged in Count 1. After July 1, he would have only been facing mere possession, with 14 to 28 grams amounting to a Category C felony carrying an exposure of one to five years with the possibility of

probation. Yet Werre was sentenced to 6 to 15 years on Count I alone. As such, his minimum sentence is even more than the maximum under the current schema. His entire sentence amounted to 12 to 30 years; six months later, he would have faced only three to ten years. Such a sentence violates the Eighth Amendment.

Contrary to Respondent, Werre was and is clearly challenging his sentence as unconstitutional under the Eighth Amendment, rendering Respondent's citations to *Culverson v. State*, 95 Nev. 433, 435 (1979) and *Blume v. State*, 112 Nev. 472 (1996) inapt. Answering Brief at 5. It is irrelevant that Werre is not challenging the statute itself because the United States Supreme Court jurisprudence cited above trumps state law under the Supremacy Clause. Article VI, Paragraph 2 of the U.S. Constitution. Furthermore, that AB 236 is not retroactive is irrelevant to Werre's argument. What is relevant is that Nevada's overhauled of crime and punishment indicates that under Eighth Amendment jurisprudence concerning evolving standards of decency, Werre's thirty-year sentence is unconstitutional when his sentence would now be ten years at most. Respondent's anemic response, without citation to authority, is merely that Werre's argument "would

result in essentially retroactive application, thereby ignoring precedent and legislative history." Answering Brief at 9. Yet it is Respondent that ignores federal precedent, not Werre.

Werre's thirty-year sentence also shocks the conscience given his criminal history (six prior convictions with only one sixteen-month prior prison term) and his culpability relative to the mastermind, who was merely sentenced to probation. Respondent's arguments to the contrary miss the point. Answering Brief at 6-7. It is irrelevant that the sentence was as a result of a plea because the judge still had discretion in imposing the sentence. It also does not matter that Werre was originally facing 35 counts. On Respondent's logic, overcharging a case would insulate a sentence from constitutional challenge. Such is not the law. Finally, Respondent's discourse on the non-retroactivity of AB 236 misses Werre's main point: the massive changes wrought by AB 236 indicate that Werre's sentence violates the Eight Amendment's evolving standards of decency.[1]

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[1] Respondent says that the legislative history is "void of any mention of serious comments or serious contemplation of AB 236 applying retroactively." Answering Brief at 9. In fact, the State's extensive quotation in the proceedings below of the legislative debate proves Werre's point. "**Assemblyman Yeager**: We would not be going back and

Finally, it is irrelevant that Werre's sentence was less than that authorized by statute or what was requested by the State. Answering Brief at 9. In the circumstances of this particular case, Werre's sentence shocks the conscience because of his relative culpability compared to that of the mastermind, Chandy Dorlynn Sabin (aka Chandy Atkins), who was granted probation. Ms. Sabin lived very close to gun storage facility and her home was the repository for all of the stolen weapons and the methamphetamine. As well, police recovered a sheet of paper in her handwriting indicating the stolen guns which she had already sold and at which price. Plus, she had thousands of dollars of cash and numerous firearms on her person when arrested. AA 60 et seq. As such, there was little evidence of Werre's criminality and significant evidence of Sabin's culpability.[2] Were was only at Sabin's home for a brief visit during a job interview. Specifically, Respondent entirely fails to address the testimony at the evidentiary hearing that

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looking at prior sentences. Although, *from a fairness perspective*, we may want to do that as a Legislature (emphasis added)." District Court Answer at page 9.

[2] Respondent protests that the evidence indicated Werre's significant involvement in the drug sales and gun activity in this case. Respondent cites RA 109-111. Answering Brief at 15-16. Yet Respondent's citations are to the State's argument at sentencing, not actual evidence.

Werre is factually innocent of trafficking. Ms. Sabin testified that Werre came to briefly stay with her 2920 West Fir Street in Silver Spring because he had a job interview. He did not have a car and was dependent on her for rides. He did not have access to any of the locked boxes in her home, in which the methamphetamine was stored. Ms. Sabin also never personally saw Werre sell any firearms. 2 AA 124. As such, Werre is factually innocent of trafficking. His sentence shocks the conscience, as well as the Eighth Amendment.

## ARGUMENT II

## THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING TRIAL COUNSEL RENDERED EFFECTIVE ASSISTANCE

Ineffective Assistance for Failure to Investigate

Had defense counsel hired an investigator, he would have learned that Werre was innocent of the trafficking charge, which carried a significant sentence. Ms. Sabin testified at the evidentiary hearing that Werre did not have access to any of the locked boxes in her home, in which the methamphetamine was stored. Nor did she see Werre personally sell any firearms. 2 AA 124. Clearly, Werre was prejudiced by the failure to investigate, because this information could have been

used to negotiate with the prosecutor a lesser sentence or to argue at sentencing for something less than was imposed.

Respondent conveniently fails to address the foregoing, instead dismissing Werre's testimony that the methamphetamine in Ms. Sabin's house was not his as "self-serving." Answering Brief at 15; 2 AA 131. Yet Werre's testimony was supported by that of Ms. Sabin.[3] Had the sentencing court been presented with the true facts, it is reasonably probable that Werre would have received a lesser sentence.

Ineffective Assistance at Sentencing

The undisputed fact is that trial counsel did not argue at sentencing for leniency in light of the far-ranging and ameliorative effects of AB 236. There could have been no strategic reason to fail to do so. Any statement to the contrary is a post hoc rationalization not worthy of credit. This Court can make its own determination as to the meaning of defense counsel's testimony concerning what he thought

[3] Respondent complains that Werre never pursued a claim of factual innocence under NRS 34.900. Answering Brief at 15. Again, this argument misses Werre's point that defense counsel's wholesale failure to hire an investigator amounted to ineffective assistance under the Sixth Amendment and that Werre was prejudiced by this failure.

would have been an absurd argument to make at sentencing. 3 AA 166, 177, 181. Reversal of the sentence is required.

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting and type style requirements of NRAP 32 and 40B because:

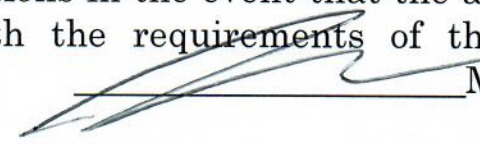
[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century, 14-point font: or

[ ] This brief has been prepared in a monospaced typeface using Word Perfect with Times New Roman, 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32 and 40B because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is:

[X ] Not in excess of 15 pages.

3. Finally, I hereby certify that I have read this Appellant's Reply 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.



Michael Lasher, Esq.

**CERTIFICATE OF ELECTRONIC SERVICE AND MAILING**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on April 7, 2022.

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**APPELLANT'S REPLY BRIEF**

as follows:

Eric Werre, 1233467
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89070

Michael Lasher, Esq.
Attorney for ERIC WERRE