NO. A – 22-719
IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

JUSTEEN WILLIAMS, #93559,
Appellant/Petitioner,

vs.

SCOTT FRAKES, in his official capacity as Director of the NDCS, **ANGELA FOLTS- OBERLE,** in her official capacity as the Warden of the NCCW, **MICKIE BAUM DIETZ,** in her official capacity as the Records Administrator for NDCS, and **NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES**, an agency of the State of Nebraska,

Appellees/Respondents.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Kevin McManaman, District Judge

BRIEF OF APPELLANT

Respectfully submitted:

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ATTORNEY FOR APPELLANT

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I. STATEMENT OF JURISDICTION

On February 1, 2022, Ms. Williams filed a Petition in Lancaster County district court seeking a declaratory judgment that she had completed her Douglas County sentence of 2 to 5 years with credit for 224 days imposed on July 1, 1994 and York County sentence of 1 to 1 year imposed on June 6, 1995 when she was sentenced in Douglas County on March 15, 2016 to not less than 60 years nor more than 80 years with credit for 8,147 days in custody. The valid March 16, 2016, Douglas County sentence would determine her tentative discharge date. Her Petition was filed pursuant to the Neb. Rev. Stat. § 84-911 *et. seq.*, and 42 U.S.C. § 1983. Included with the Petition were Attachments "A" thru "I" which were court records and other documents as undisputed factual support for her claims. (T1-50)

On March 9, 2022, , Respondents filed a 1 paragraph motion to dismiss and alleged that:

> The Respondents . . . .pursuant to Neb. Ct. R. Pldg. §§ 6-1112(b)(1) and 6-1112(b)(6), move to dismiss Petitioner's Complaint because, alternatively, this court lacks subject-matter jurisdiction because of sovereign immunity, the complaint fails to state a claim upon which relief can be granted. (T51-54)

A hearing was held on May 19, 2022, on Respondents' Motion to dismiss. On September 27, 2022, the Lancaster County District Court granted Respondents' motion in a 2-page order on the basis that she had failed to state a cause of action and, alternatively, that the State had not waiver "sovereign immunity". (T81-83) The order of dismissal was a final order as defined by Neb. Rev. Stat. § 25-1902 (2020 Supp Vol. 2).

On September 29, 2022, Ms. Williams filed timely notice of appeal with payment of all docket fees. Appellate jurisdiction is conferred on the appellate courts pursuant to Neb. Rev. Stat. § 25-1912 (2020 Supp. Vol 2).

II. STATEMENT OF THE CASE

A. Nature of the case

Ms. Williams' Petition alleged that she had exhausted the required procedures set forth in Neb. Admin. Code. Title 68, Chapters 1 & 2 and was seeking declaratory relief as the correct determination of his tentative discharge date pursuant to 42 U.S.C. § 1983 and Neb. Rev. Stat. § 84-911 *et. seq.*. Ms. Williams was not seeking money damages and sued the Respondents solely in their official capacities. (T1-50)

B. Issues tried before the court below

The issues before the trial court on the Respondents' motion to dismiss were whether she had stated a cause of action under 42 U.S.C. § 1983 and Neb. Rev. Stat. § 84-911 *et. seq.* The district court was to determine whether the state officials and state agency could not be sued under Neb. Rev. Stat. § 84-911 *et. seq.*, because of "sovereign immunity" on her claim that Respondents' determination of a tentative discharge date that she alleged was three years beyond her correct T.R.D.

C. How the issues were decided and the judgment entered

The district court granted the Appellees/Respondents motion to dismiss under both the claim that she had not stated a claim under 42 U.S.C. § 1983 and that the Appellees/Respondents could not be sued under Neb. Rev. Stat. § 84-911 *et. seq.*, under the principle of sovereign immunity.

D. The scope of appellate review

The appellate court's consideration on appeal is limited to errors assigned and discussed by the parties. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Thomas*, 303 Neb 964, 932 N.W.2d 713 (2019).

The appellate courts independently review questions of law decided by a lower court. *State v. Davis*, 310 Neb. 865 (2022); *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017). The appellate courts review a district court's order granting a motion to dismiss *de novo*, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Ogallala Livestock Auction Mkt. v. Leonard*, 30 Neb.App. 335 (Neb. App. 2021); *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016); *Rafert v. Meyer*, 290 Neb. 219, 859 N.W.2d 332 (2015).

In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Chaney v. Evnen*, 307 Neb. 512, 949 N.W.2d 761 (2020); *Neb. Ed. Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016).

Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Blake*, 310 Neb. 769 (2022); *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). The determination of constitutional requirements presents a question of law. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

III. PROPOSITIONS OF LAW

I.

The appellate courts review a district court's order granting a motion to dismiss *de novo*, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Ogallala Livestock Auction Mkt. v. Leonard*, 30 Neb.App. 335 (Neb. App. 2021); *Jacob v. Nebraska Dept. of Corr. Servs.*, 294 Neb. 735, 884 N.W.2d 687 (2016).

II.

Dismissal under Neb. Ct. R. Pldg. § 6-112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *In re Noah B.*, 295 Neb. 764, 891 N.W.2d 109 (2017); *DMK Biodiesel v. McCoy,* 285 Neb. 974, 830 N.W.2d 490 (2013).

III.

Because the Nebraska Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure, Nebraska has adopted from federal case law the standards for testing the sufficiency of a plaintiff's complaint. *McEwen v. Nebraska State College System*, 303 Neb. 552, 931 N.W.2d 120 (2019); *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

IV.

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016); *Doe v. Board of Regents of University of Nebraska*, 280 Neb. 492, 788 N.W.2d 264 (2010).

V.

In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Neb. Ed. Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016).

VI.

The appellate court independently reviews a question of law decided by a lower court. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

VII.

The determination of constitutional requirements presents a question of law. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017).

VIII.

Statutory interpretation presents a question of law. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017); *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

IX.

The states have concurrent jurisdiction to entertain actions under 42 U.S.C. § 1983; however, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983. *Kellogg v. Nebraska Dept. of Correctional Services*, 269 Neb. 40, 690 N.W.2d 574 (2005).

X.

Although the states have concurrent jurisdiction to entertain § 1983 actions, as a result of the Supremacy Clause found in U.S. Const. art. VI, federal law is controlling, and state courts are required to follow federal precedent when hearing actions brought under § 1983. *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000).

XI.

The Prison Litigation Reform Act of 1995 (PLRA) mandates that an inmate exhaust 'such administrative remedies as are available' before bringing suit to challenge prison conditions. 42 U.S.C. § 1997e(a)." *Ross v. Blake*, 578 U.S. ___, 136 S. Ct. 1850 (2016).

XII.

Pursuant to the PLRA, § 1997e(a), prisoners are required to exhaust administrative remedies before bringing an action under § 1983. *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) ("[A]prisoner's failure to exhaust administrative remedies is an affirmative defense which may be raised in a § 1983 action." abrogating *Pratt v. Clarke*, 258 Neb. 402, 604 N.W.2d 822 (1999).

XIII.

Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to Neb. Rev. Stat. § 84-906. Neb. Rev. Stat. § 84-906.05; *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989).

XIV.

Department Policy. The Department will apply good time to inmates' sentences in accordance with the Nebraska Statutes, the opinions of Nebraska courts, and the opinions of the Attorney General. Neb. Admin. Code Title 68, Chapter 1.002.

XV.

Computation Questions. An inmate's questions regarding the computation of the inmate's good time, parole eligibility date or tentative release date will be answered by the records office personnel in the facility where the inmate's institutional files are maintained. The questions should be submitted to the records office personnel on an Inmate Interview Request. Neb. Admin. Code Title 68, Chapter 1.004.

XVI.

Department Policy. The Department provides an inmate with a procedure for the administrative settlement of a legitimate grievance. Neb. Admin. Code Title 68, Cpt 2.002.

XVII.

The inmate may address only one issue on a formal grievance or it will be returned to the inmate. Neb. Admin. Code Title 68, Chapter 2.006.03.

XVIII.

The department shall discharge a committed offender from the custody of the department when the time served in the facility equals the maximum term less good time. Neb. Rev. Stat. § 83-1,118 (3).

XIX.

A sentence under Nebraska law begins on the date imposed by the sentencing court. *State v Adamson*, 194 Neb. 592, 233 N.W.2d 925 (1975); *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973); *Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930); *In re Thomas Jones*, 35 Neb. 499, 53 N.W. 468 (1892);*In re Fuller*, 34 Neb. 581, 52 N.W. 577 (1892).

XX.

The Department of Correctional Services had no authority to interrupt the first sentence for the purpose of serving the second. No such authority appears in the statutes and it is apparently not an inherent power. *Gochenour v. Bolin*, 208 Neb. 444, 449, 303 N.W.2d 775, 778-9 (1981) (citing *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966).

XXI.

When a "life" sentence for an offense committed while under the age of 18 is held unconstitutional, the process and sentencing range set forth in Neb. Rev. Stat. § 28-105.02 must be followed. *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

XXII.

A sentence that is within the period authorized by statute but may have awarded the incorrect amount of "credit for time served" may be erroneous, but is not a void sentence. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019) (Failure to give correct credit for time served does not void judgment.).

XXIII.

The State has waived "sovereign" immunity, certainly as to individual state employees acting in their official capacity. *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017) citing Neb. Rev. Stat. § 84-911 *et. seq.*,

XXIV.

The State's sovereign immunity does not bar compelling state employees to perform an act they are legally required to do unless the prospective relief would require them to expend public funds." *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810

N.W.2d 149 (2012); *Logan v. Department of Correctional Services*, 254 Neb. 646, 578 N.W.2d 44 (1998).

XXV.

It is a violation of the Eighth Amendment to the United States Constitution for state officials acting in their official capacity to continue to incarcerate an inmate after he or she has completed the lawful terms of her sentences. *Golson v. Dep't of Corrections*, 914 F.2d 1491 (4th Cir. 1990); *Moore v. Tartler*, 986 F.2d 682, 686 (3rd Cir.1993); *Sample v. Diecks*, 885 F.2d 1099, 1108 (3rd Cir.1989) ("We think there can be no doubt that imprisonment beyond one's term constitutes punishment within the meaning of the eighth amendment.").

XXVI.

It is a violation of a protected constitutional due process liberty interest under the Fourteenth Amendment to the United States Constitution for a person to be wrongful incarcerated past a mandatory discharge date. See, *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S.Ct. 864, 868-69 (1983) (Protected interest arises from the Due Process Clause itself and laws of the States), *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir.2001); *Slone v. Herman*, 983 F.2d 107 (8th Cir.1993); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir.1990).

IV. ASSIGNMENTS OF ERROR

GROUND ONE: The district court erred in holding that it lacked subject matter jurisdiction under 42 U.S.C. § 1983 as to Causes of Action I and II when Ms. Williams was seeking prospective declaratory relief that her tentative release date (T.R.D) should be 3 years less than claimed by Respondents based on Nebraska statutory and case law, citing solely to *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). (T82)

GROUND TWO: The district court erred in holding that it lacked subject matter jurisdiction under Neb. Rev. Stat. § 84-911 as to Cause of Action III because after Ms. Williams had exhausted the NDCS grievance process set forth in Neb. Admin. Code Title 68, Chapter 1 and 2, she could not seek judicial review through declaratory judgement as to whether Respondents threatened application of her three valid sentences would extend her discharge date by three years because of "sovereign immunity" in violation of state and federal constitutional law, citing to *Heist v. Nebraska Department of Correctional Services*, 312 Neb. 480, ___ N.W.2d ___ (September 23, 2022). (T81-2)

V. STATEMENT OF FACTS

Ms. Williams sought declaratory relief alleged that the Respondents were wrongfully setting her tentative release date (T.R.D.) for November 23, 2036, three years longer that permitted under Nebraska sentencing statutes and case law. Her first claim alleged this action would be an Eighth Amendment violation and relief was permitted under 42 U.S.C. § 1983. (T13-14) Her second claim alleged the same factual basis, but that Respondents' actions were a violation of due process under the Fourteenth Amendment and relief was permitted under 42 U.S.C. § 1983. (T14-16) Her third claim also relied on the same facts but sought declaratory relief under Neb. Rev. Stat. § 84-911 *et seq* because the "threatened application" would unlawfully extend her discharge date by a minimum of three years in violation of the Eighth and Fourteenth Amendments. (T16)

The facts upon which the three causes of action were based were set forth in detail in her verified Petition with official documents included as ATTACHMENTS A thru I. (T1-50). There does not appear to be any dispute as to the accuracy of these facts, either during the exhaustion of the grievance process, or in the answer filed by the Respondents. The dispute is how Respondents intend to implement the three valid sentences that commenced on three different dates, i.e., July 1, 1994, June 6, 1995, and March 16, 2016.

Respondents have not defended their interpretation of Ms. Williams' T.R.D. on the "merits" by citation to either statutory or case law in a responsive answer to the Petition. Rather they seek to invoke a procedural bar to consideration of the merits. Respondents' claim that Ms. Williams "could" seek redress under the Nebraska's Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 21,164 (UDJA) is incorrect as a matter of law. The State's statutory waiver of "sovereign immunity" is only set forth in Neb. Rev. Stat. § 84-911 *et seq*. Respondents could not "waive" sovereign immunity in a UDJA action because the appellate court could *sua sponte* determine it lacked "jurisdiction."

THE FACTS SET FORTH IN THE PETITION
(Accepted as true for purposes of appellate review of a motion to dismiss).

On July 1, 1994, Ms. Williams was sentenced in Douglas County District Court (DoCo # CR 10-9026232 - formerly 133-836) to "life" for a conviction of 1st degree murder in violation of Neb. Rev. Stat. § 28-303 in Count I and not less than two (2) years nor more than five (5) years with credit for 224 days for her conviction of use a weapon in violation of Neb. Rev. Stat. § 28-1205 in Count II. Ms. Williams has a date of birth of June 8, 1976, and was seventeen years of age when the homicide was committed on October 11, 1993. A copy of the July 1, 1994, sentencing order was included as ATTACHMENT "A." (T19)

On April 27, 1995, these two Douglas County convictions and sentences were affirmed by the Nebraska Supreme Court in *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). Under Neb. Rev. Stat. § 28-303 in effect at the time of offense, sentencing, and completion of direct appeal, the sentence on Count I (1st degree murder) was a mandatory "life" without parole with no credit for time served.

On June 6, 1995, Ms. Williams was sentenced by the York County District Court to a term of 1 to 1 years for an assault that took place at NCCW. The sentencing order stated that, "Said sentence shall be consecutive to the sentence the defendant is currently serving." A copy of the York County sentencing order was included as ATTACHMENT "B." (T20)

On May 28, 2013, Ms. Williams filed a Motion for Postconviction Relief in DoCo # CR 10-9026232 (formerly 133-836) alleging that her "life" sentence on Count I was unconstitutional under *Miller v. Alabama*, 132 S.Ct. 2455 (2012). A true and correct copy of the Petitioner's motion was included with her Petition as ATTACHMENT "C." (T21-22)

The district court and the appellate courts can take judicial notice that Neb. Laws 2013, LB 44 changed the sentencing range for juveniles convicted of 1st degree murder to 40 years to life, changed the

consideration for parole provisions, and changed the sentencing procedures to be followed by the district court for juveniles. LB 44 took effect on September 6, 2013. (Codified at Neb. Rev. Stat. § 28-105.02 and Neb. Rev. Stat. § 83-1,110.04)

On November 24, 2015, Ms. Williams' "life" sentence on Count I was declared void and unconstitutional by the Douglas County District Court. The sentence of 2 to 5 years imposed on Count II with credit for 224 days was NOT AFFECTED. A true and correct copy of the Order was submitted with her Petition as ATTACHMENT "D". (T23)

On December 28, 2015, the Order vacating the "life" sentence became "final" when the State did not appeal pursuant to Neb. Rev. Stat. § 29-3002.

On March 16, 2016, after an extended sentencing mitigation hearing pursuant to Neb. Rev. Stat. § 28-105.02 (effective Sept 6, 2013) and considering the Eighth Amendment requirements of *Miller v. Alabama, supra*, the Douglas County District Court imposed a sentence of not less than sixty (60) nor more than eighty (80) years with credit for 8,147 days in custody. A true and correct copy of this sentencing Order was included with the Petition as ATTACHMENT "E". (T25)

Neither the State nor Ms. Williams appealed the March 16, 2016, sentence. As a matter of law, the sentence became "final" after the expiration of 30 days on April 19, 2016 (Tuesday).

On March 3, 2017, the Nebraska Supreme Court held in *State v. (Brian D.) Smith*, 295 Neb. 957, 974-5, 892 N.W.2d 52, 63-4 (2017) as follows:

> In *State v. Schrein*, **we held that the good time law to be applied to a Respondent's sentences is the law in effect at the time the Respondent's convictions become final**. We explained that a Respondent's convictions and sentences become final on the date that the appellate court enters its mandate concerning the Respondent's appeal. . . . **With Smith's original kidnapping sentence being considered as having been no sentence imposed**,

> then, the rule in *Schrein* would apply to Smith's current kidnapping sentence of 90 years to life imprisonment. **This sentence will be final on the date this court enters its mandate concerning this appeal.** (Emphasis added).

On March 17, 2017, the Nebraska Supreme Court reaffirmed the application of LB 191 in *Miller* mandated re-sentencings in *State v. Nollen,* 296 Neb. 94, 118, 892 N.W.2d 81, 97 (2017) as follows:

> As we explained in *Smith*, **a void sentence is no sentence**. Because Nollen's 1983 sentence is "no sentence," it cannot be said that his sentence became final in 1983. Instead, **his sentence will become final on the date that this court enters its mandate concerning this appeal.** (Emphasis added).

FACTS REF: EXHAUSTION OF NDCS GRIEVANCE PROCEDURE

Ms. Williams alleged that Neb. Admin Code 68, Chapter 1 thru 9 have been approved by the Nebraska Attorney General and filed with the Nebraska Secretary of State's Office as provided in Neb. Rev. Stat. § 84-906. Neb. Rev. Stat. § 84-906.05 (1) provides that, "Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to section 84-906." See also, *Raben v. Dittenber*, 230 Neb. 822, 434 N.W.2d 11 (1989). (T9)

Ms. Williams accurately alleged that Neb. Admin. Code Title 68, Chapter 1 provides that:

> 001 Applicability. This rule applies to all facilities operated by the Department of Correctional Services. . . .
>
> 003.01 When an inmate's parole eligibility date or tentative release date is changed, the inmate will be given written notice of the new tentative release date or parole eligibility date.

003.02 An inmate's parole eligibility date or tentative release date can be changed as a result of a disciplinary action, a restoration of good time, a parole revocation, or a change in the law or the interpretation of the law.

004 Computation Questions. **An inmate's questions regarding the computation of the inmate's good time, parole eligibility date or tentative release date will be answered by the records office personnel in the facility where the inmate's institutional files are maintained. The questions should be submitted to the records office personnel on an Inmate Interview Request**. (Emphasis added) (T9-10)

Ms. Williams alleged that pursuant to Neb. Admin. Code Title 68 Chapter 1.004 she sent an "Inmate Interview Request" to "NDCS Records" to which Respondent Dietz replied by letter with a sentencing calculation dated 10-20-2021. (T10) This correspondence was included as APPENDIX "F". (T26-31) Respondent Dietz twice refers to *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981) in the sentencing calculation.

[**NOTE:** There is an obvious "math" problem in this response because NDCS' claim is that Count II (use) is to be consecutive to Count I (1st degree murder). Ms. Williams was awarded 224 days "credit" under Count II on July 1, 1994. She was awarded 8147 days "credit" on Count I when sentenced on March 15, 2016. As a matter of simple math, 224 + 8147 = **8371** days. However, the credit granted to Ms. Williams remained 8147 days. These 8147 days would be a correct award if the sentence on Count II was completed as alleged by Ms. Williams.]

On November 7, 2021, Ms. Williams filed an INFORMAL grievance pursuant to Neb. Admin Code 68 Chapter 2 that was responded to on November 24, 2021. This grievance and response were included as APPENDIX "G". The response that "NDCS Legal Counsel

has responded to your concerns" is not factually correct. (T32-36) She has never received any correspondence from NDCS Legal Counsel.

On December 1, 2021, Ms. Williams filed a STEP ONE grievance that Respondent Folts-Oberle denied on December 8, 2021. The STEP ONE appeal documentation was included as APPENDIX "H." (T 37-44) The Warden provided no explanation in her response dated 12-8-21 as to how NDCS was interpreting her three valid sentences except to say, "***Your release dates are accurate based on State Statue*** "sic"". (T44) The STATUTE controlling NDCS' interpretation has never been cited or provided to Ms. Williams.

On December 15, 2021, Ms. Williams filed a STEP TWO grievance to the Respondent Frakes that was denied on January 2, 2022 and included as APPENDIX "I." (T45-50). The Director's Designee simply stated that her "***sentence calculation have been addressed by NDCS Legal and Records Administrator Baum-Dietz. . . . Your sentence is correctly calculated***." (T50)

PROCEEDINGS BEFORE THE DISTRICT COURT

Ms. Williams' Petition was filed on February 1, 2022, and alleged that pursuant to the Prison Litigation Reform Act codified at 42 U.S.C. § 1997, she has exhausted NDCS administrative remedies set forth in Neb. Admin Reg. Title 68, Chapter 2. She was seeking declaratory relief under 42 U.S.C. § 1983 and Neb. Rev. Stat. § 84-911. (T10)

On March 9, 2022, Respondents file a motion to dismiss which alleged, in its entirety as follows:

> "The Respondents, Scott Frakes, Angela Folts-Oberle, Mickie Baum Dietz, in their official capacities, and the Nebraska Department of Correctional Services, pursuant to Neb. Ct. R. Pldg. §§ 6-1112(b)(1) and 6-1112(b)(6), move to dismiss Petitioner's Complaint because, alternatively, this court lacks subject-matter jurisdiction because of sovereign immunity and

because the complaint fails to state a claim upon which relief can be granted." (T51)

The hearing on the Respondent's motion was set for May 19, 2022. (T53) On May 16, 2022, Respondents/Appellees filed a brief in support of their motion to dismiss. (T55-62) Respondents' brief and argument on May 19, 2022, NEVER alleged or set forth the legal and statutory basis for their determination of Ms. Williams T.R.D. Their defense has SOLELY been procedural and that, "*Williams, however, cannot attain the relief she seeks because she had brought the wrong causes of action to make such a challenge*." (T55)

At the May 16, 2022, hearing on Respondents' Motion to Dismiss, the following discussion took place:

> THE COURT: Mr. Straus, are you arguing that there is no avenue for relief?
>
> MR. STRAUS: Absolutely not, Your Honor. We've maintained in this case, as well as several other cases, that the method to challenge her sentence calculation is under Nebraska's Uniform Declaratory Judgment Act, which would be 25-21,149, some relief like that, which is absolutely the proper way to challenge her sentence calculation and how the department is calculating her sentence.
>
> It's just simply under 1983 and then the EPA, they are not the correct causes of action. But the Uniform Declaratory Judgment Act is absolutely the proper vehicle here.
>
> MR. SOUCIE: Your Honor, if that's -- if that's the case, then I'd ask leave to amend to add it. I don't necessarily agree with it, but if that gets us to the merits, I'd be happy to amend to allege the actions under the Declaratory Judgment Act. And under a Motion to Dismiss if there appears to be something under this posture. The ability to amend is supposed to be liberally granted.
>
> MR. STRAUS: And, if I may, Your Honor?

> THE COURT: Yes.
> MR. STRAUS: We absolutely have no objection to Mr. Soucie amending the Complaint providing that it is brought specifically -- or under the UDJA but not also the EPA or 1983.
> THE COURT: Well, are you in a position, Mr. Soucie, at this point, is that what you're -- is that what you're asking?
> MR. SOUCIE: Well, if you would agree that I could file it, I mean I would -- I would then -- I would do a fourth count and deal with the other three on their merits. If the Court wants to -- I mean I think that has to be a judicial decision, not my decision. I think it -- I think the claim under 1983 is meritorious. I think the caselaw supports the ability to do it. I'm not challenging the validity of these convictions; I'm relying on them. (BOE 8:19-10:4).

On May 27, 2022, Ms. Williams filed her brief setting forth the authorities for an action under Neb. Rev. Stat. § 84-911 *et seq*. as well as for 42 U.S.C. 1983. (T63-80) She cited specifically to in *Richardson v. Clarke*, 2 Neb.App. 575, 512 N.W.2d 653 (1994) and *Logan v. Department of Correctional Services*, 254 Neb. 646, 578 N.W.2d 44 (1998) as controlling authority. (T76-77) Just as in Ms. Williams' case, the petitioners in *Richardson* and *Logan* were not disputing the validity of their respective sentences but the way the NDCS employees were interpreting and applying the law to said sentences.

On September 22, 2022, the district court entered an order granting the Respondents' motion to dismiss. (T81-82) Timely appeal was then filed by Ms. Williams on September 29, 2022.

VI. SUMMARY OF ARGUMENT

After having exhausted the NDCS administrative procedures Ms. Williams sought a judicial determination on the "merits" as to how her three valid sentences are to be implemented. She invoked the "procedural" remedies of declaratory judgment under 18 U.S.C. § 1983 and/or Neb. Rev. Stat. § 84-911 *et. seq*.

Ms. Williams has alleged that a century of Nebraska case law has consistently held that a sentence begins when final valid sentence is announced by the sentencing court. Respondents have never provided ANY authority on the "merits" that the consolidation of the three sentences into a single sentence is permitted under these circumstances in this case. As a matter of law, Respondents do not have express or inherent authority to suspend execution ANY sentences. *Gochenour v. Bolin*, 208 Neb. 444, 449, 303 N.W.2d 775, 778 (1981) as done in this case. The question on the "merits" is whether the sentence on Count II imposed on July 1, 1994, and sentence imposed on June 6, 1995 were completed when she was sentenced to 60 to 80 years with credit for 8,147 days in custody on March 16, 2016.

The authority cited by the district court to dismiss the 42 U.S.C. § 1983 in Counts I and II was based solely on *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242 (2005). The facts and holding in *Wilkinson* and subsequent federal authority actually support Ms. Williams' claims.

On the "procedural" issue of the availability of Neb. Rev. Stat. § 84-911 *et seq*., the Court of Appeals in *Richardson v. Clarke*, 2 Neb.App. 575, 512 N.W.2d 653 (1994) and Nebraska Supreme Court have in *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997) (grant of declaratory relief affirmed on appeal), *Logan v. Department of Correctional Services*, 254 Neb. 646, 578 N.W.2d 44 (1998) held "yes." The Nebraska Supreme Court in *Heist v. Neb. Dep't of Corr. Servs.*, 312 Neb. 480, 979 N.W.2d 772 (2022) referenced *Logan v. NDCS supra*, as authority for waiver of sovereign immunity under the UDJA in footnote 22. However, *Logan* actually held there was jurisdiction under Neb. Rev. Stat. § 84-911, just as alleged in Ms. Williams case.

VII. ARGUMENT

Dismissal under Neb. Ct. R. Pldg. § 6-112(b)(1) & (6) should only be granted in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *In re Noah B.*, 295 Neb. 764, 891 N.W.2d 109 (2017); *DMK Biodiesel v. McCoy,* 285 Neb. 974, 830 N.W.2d 490 (2013). Nebraska has adopted from federal case law the standards for testing the sufficiency of a plaintiff's complaint. *McEwen v. Nebraska State College System*, 303 Neb. 552, 931 N.W.2d 120 (2019); *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Credit Union v. U.S. Bancorp*, 293 Neb. 308, 877 N.W.2d 578 (2016).

A. Counts I and II of Ms. Williams Petition filed under 42 U.S.C. § 1983 seek prospective relief from the extension of her T.R.D. contrary the requirements of Nebraska sentencing statutes and case law. These causes of action do not violate the prohibition set forth in *Wilkinson v. Dotson*, 544 U.S. 74 (2005). She neither challenged the validity or length of her three sentences, but the administration of these three sentences by the individual Respondents acting in their official capacities. GROUND ONE:

Contrary to the district court's interpretation suggested by Respondents, the specific holding in *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242 (2005) permitted the use of 42 U.S.C. § 1983 to grant **prospective** relief that did not implicate the validity of the inmate's sentence. The United States Supreme Court found FOR the inmates (Dotson and Johnson). The procedural posture in *Wilkinson* is very similar to those in Mr. Williams' case.

Dotson began serving a "life" sentence in Ohio beginning in 1981. After an initial parole review was denied in 1995, a parole officer reviewed Dotson's records in 2000 and determined that Dotson should

not receive consideration for parole because of new guidelines adopted in 1998. Dotson claimed that the retroactive application of Ohio's new, harsher guidelines violated the Ex Post Facto and Due Process Clauses of the United States Constitution.

Johnson was serving a 10 to 30-year prison term beginning in 1992. The Ohio parole board considered and rejected his first parole request in 1999 under the new 1998 guidelines. Johnson also claimed that application of the new Ohio guidelines violated Ex Post Facto prohibitions of the United States Constitution.

Neither Dotson nor Johnson claimed that their convictions and sentences were invalid. It was the action of state parole officials in interpreting new Ohio parole guidelines that violated the United States Constitution. Both prisoners brought §1983 actions in federal court. In each case, the lower Federal District Court concluded that a §1983 action was not available, and Dotson and Johnson could only seek relief through habeas corpus.

The Sixth Circuit sitting *en banc* reversed the district court. The Sixth Circuit held that the prisoners could proceed under §1983 and noted the conflict in the circuits. *Wilkinson v. Dodson*, 329 F.3d 463, 468-9 (6th Cir. 2003).

The Ohio parole officials petition for certiorari was granted to resolve a conflict in the circuit. The Supreme Court affirmed the Sixth Circuit and held as follows:

> Applying these principles to the present case, we conclude that respondents' claims are cognizable under §1983, i.e., they do not fall within the implicit habeas exception. Dotson and Johnson seek relief that will **render invalid the state procedures used to deny parole eligibility** (Dotson) and **parole suitability** (Johnson). See *Wolff, supra*, at 554-555. **Neither respondent seeks an injunction ordering his immediate or speedier release into the community**. See *Preiser*, 411 U.S. at 500; *Wolff*, 418 U.S. at 554. And as in *Wolff*, a favorable judgment will not

"necessarily imply the invalidity of [their] conviction[s] or sentence[s]." *Heck, supra*, at 487. . . .

Finally, **the prisoners' claims for future relief** (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) **are yet more distant from that core**. See *Balisok*, supra, at 648. (Emphasis added.) *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, ___ (2005).

The Eighth Circuit has followed *Wilkinson v. Dotson, supra* and consistently allowed 42 U.S.C. § 1983 inmate suits to go forward that did not seek speedier release from incarceration and has reversed the federal district courts that have ruled to the contrary. E.g., *Bradley v. Looten*, 450 Fed.Appx. 558, (8th Cir. 2012) (unpublished) (District court's dismissal reversed because success on inmate's § 1983 First Amendment claims related to retaliation for complaining about his parole officer would not necessarily imply the invalidity of his confinement or its duration.); *Blackmon v. Lombardi*, 527 Fed.Appx. 583, (8th Cir. 2013) (unpublished (same); *Ponder v. Brownlee*, 227 Fed.Appx. 533 (8th Cir. Cir. 2007) (unpublished) (District court's dismissal reversed because inmate's § 1983 claim would not necessarily spell a speedier release and would at most speed consideration of his clemency application.); *Sams v. Crawford*, 197 Fed.Appx. 527 (8th Cir. 2006) (unpublished) (District court's dismissal reversed and 1983 allowed to go forward because, "Notably, no plaintiff seeks an injunction ordering his immediate or speedier release, only a new parole revocation hearing at which Missouri parole officials could exercise their discretion.")"

Other federal circuit courts have reached the same result allowing inmate § 1983 suits to go forward where the validity of the sentence is not an issue and release would not be a direct result. E.g., *Grennier v. Frank*, 453 F.3d 442 (7th Cir. 2006) ("Grennier's suit rests on 42 U.S.C. §1983, which is proper even though the end in view is release on parole."); *Whitfield v. Howard*, 852 F.3d 656 (7th Cir. 2017)

Ms. Williams has alleged that NDCS officials in interpreting the application of her March 16, 2016 sentence have violated the Eighth and Fourteenth Amendments. She is NOT seeking an immediate or speedier release from her March 16, 2016 sentence imposed under Neb. Rev. Stat. § 28-105.02 that went into effect AFTER her "life" sentence was declared unconstitutional. As a matter of fact and law, both prior sentences imposed on July 1, 1994 and June 6, 1995 began when imposed and had been completed when she was sentenced on March 16, 2016. Just as parole was not guaranteed in *Wilkinson*, Ms. Williams T.R.D. could be extended through the loss of "good time" for violation of prison disciplinary rules. Neb. Admin. Code Title 68, Chapter 5 and 6.

Ms. Williams relies on over a century of Nebraska case law holding that every sentence starts on the date imposed by the court. *State v Adamson*, 194 Neb. 592, 233 N.W.2d 925 (1975); *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973); *Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930); *In re Thomas Jones*, 35 Neb. 499, 53 N.W. 468 (1892);*In re Fuller*, 34 Neb. 581, 52 N.W. 577 (1892).

Ms. Williams in her IIR to Respondent Dietz cited and quoted *Gochenour v. Bolin*, 208 Neb. 444, 449, 303 N.W.2d 775, 778-9 (1981) (citing *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966). See ATTACHMENT "F," p. 3 para 17. I p. which specifically held that:

> The Department of Correctional Services had no authority to interrupt the first sentence for the purpose of serving the second. No such authority appears in the statutes and it is apparently not an inherent power.

The Respondents in their "official" capacity have no discretion to change the terms of a sentence after it becomes "final," even if some of the terms may be erroneous. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019) (Failure to give correct credit for time served does not void judgment.). Cf., *Evans v. Frakes*, 293 Neb. 253, 876 N.W.2d 626 (2016) (NDCS erroneous discharge of inmate prior to completion of

mandatory minimum portion of sentence invalid and inmate can be returned to custody. The terms of the sentencing order control the authority of NDCS.)

> [**NOTE:** The Nebraska Department of Correctional Services was named as party in this action because of the requirement of Neb. Rev. Stat. 84-911 (1) that, "*The agency shall be made a party to the proceeding*.". However, under *Logan v. Department of Correctional Services*, 254 Neb. 646, 651-654, 578 N.W.2d 44, ___ (1998) since a rule or regulation is not at issue (none having been alleged by the individual respondents) NDCS may be subject to dismissal and only the state officials remain parties to this lawsuit.]

A failure of state officials to discharge an inmate who has completed a sentence is a violation of the Eighth and Fourteenth Amendments. E.g., *Haywood v. Younger*, 769 F.2d 1350 (9th Cir. 1984) (*en banc*) (Money damages against prison officials for prolonging inmate's state prison detention by using an incorrect method to compute his release date affirmed.) *Walter v. Grossheim*, 990 F2d 381 (8th Cir. 1993), *Sloan v. Herman*, 983 F2d 107 (8th Cir. 1993). In *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) the Nebraska Supreme Court cited with approval to *Sample v. Diecks*, 885 F2d 1699 (3rd Cir. 1985) which affirmed the award of compensatory damages where the inmate was held for nine months and eight days beyond the maximum sentence of five years.

B. Respondents' erroneous determination of Ms. Williams' Tentative Release Date after her exhaustion of the procedures set forth in Neb. Admin. Code Title 68, Chapter 1 and 2 is reviewable pursuant to Neb. Rev. Stat. § 84-911 *et. seq*. See, *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997) (grant of declaratory relief affirmed on appeal), *Logan v. Department of Correctional Services*, 254 Neb. 646, 578 N.W.2d 44 (1998) *Richardson v. Clarke*, 2 Neb.App. 575, 512 N.W.2d 653 (1994) (applied to determination of T.R.D.); See also, *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017). The Legislature has "waived" sovereign immunity and authorized judicial review when the threatened application by state officials impairs the constitutional rights of the petitioner. As a matter of law, incarceration for three years beyond Ms. Williams' mandatory discharge date would violate her Eighth and Fourteenth Amendment constitutional rights. GROUND TWO.

Nebraska agencies have different administrative procedures that must be completed before seeing judicial review. See, Neb. Rev. Stat. § 84-917. E.g., *Acklie v. Neb. Dep't of Revenue*, 313 Neb. 28 (2022); *Omaha Exposition & Racing, Inc. v. Neb. State Racing Comm'n*, 307 Neb. 172, 949 N.W.2d 183 (2020); *Whittle v. State HHS*, 309 Neb. 695, 962 N.W.2d 339 (2021) (16 days of administrative hearings); *Swicord v. Police Standards Advisory Council*, 309 Neb. 43, 958 N.W.2d 388 (2021) (Rules set forth in Neb. Admin. Code Title 79).

The administrative procedures for the Nebraska Department of Correctional Services are set forth in Neb. Admin. Code Title 68, Chapter 1 & 2. They were created BY the Department of Correctional Services and APPROVED by the Nebraska Attorney General in 2008.

Ms. Williams followed these procedures by first contacting NDCS records through an IIR ("kite") and then formally "grieving" through STEP ONE (warden) and STEP TWO (director) that she believed her T.R.D. was incorrect. This internal administrative process placed NDCS officials on "notice" of the three-year dispute as the issue being raised by an inmate. Ms. Williams correctly alleged

that her incarceration beyond her mandatory discharge date would be in violation of her Eighth and Fourteenth Amendment rights.

The district court did not address the "merits" of her claims set forth in Cause of Action III. It held that "procedurally" this issue could not be raised under the authority of Neb. Rev. Stat. § 84-911.

The Court of Appeals decision in *Richardson v. Clarke*, 2 Neb.App. 575, 512 N.W.2d 653 (1994) expressly rejected the "sovereign immunity" defense in the determination of goodtime applicable to an inmate's sentence (which would have extended the inmate's sentence under the NDCS interpretation) and held:

> At oral argument, counsel for Clarke and the Department suggested that this court may lack subject matter jurisdiction because the State has not waived its sovereign immunity under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1989, Cum.Supp.1992 & Supp.1993). . . .
>
> Opposing counsel suggested that the only remedy available to a prisoner regarding the inappropriate determination of his or her parole eligibility and tentative release dates is to file a petition for a declaratory judgment and that this method has been accepted by the Nebraska Supreme Court in many prior cases. We **note that both prisoners have asserted that these cases contain a constitutional component**. The prisoners claim that their right to equal protection is violated if they are denied the application of the new liberal good time provisions merely because of their inability to post bond pending appeal, compared to wealthier defendants who are able to avoid incarceration during the pendency of their appeals. It is undisputed that the group not incarcerated pending appeal will enjoy the benefit of the liberalized good time law if their convictions are affirmed and their incarceration commences after July 15, 1992. The prisoners thus argue that the rules of

Clarke and the Department violated constitutional provisions guaranteeing equal protection.

When Clarke and the Department decided to determine the length of these sentences pursuant to § 83-1,107 (Reissue 1987) rather than the new law, the decision was a "standard issued by an agency ... designed to implement, interpret, or make specific the law" administered by it. Neb. Rev. Stat. § 84-901(2) (Reissue 1987). The **validity of this issuance may be determined by filing a properly framed petition for a declaratory judgment in Lancaster County. Neb. Rev. Stat. § 84-911 (Reissue 1987).** See, also, *Riley v. State, supra*; *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

The Administrative Procedure Act provides that "[t]he court shall declare the rule or regulation **invalid if it finds that it violates constitutional provisions**...." § 84-911(2). These cases raise equal protection issues which are claimed violations of constitutional provisions. Although we decide these cases based on statute and precedent, **the precedent relied upon is grounded in constitutional law**. After having reviewed the law in this area, **this court holds that these prisoners are entitled to bring a declaratory judgment action against Clarke and the Department in connection with the proper application of the good time statutes**. (Emphasis added.)

In *Logan v. Department of Correctional Services*, 254 Neb. 646, 578 N.W.2d 44 (1998), the inmate sought to challenge the way NDCS officials were attempting to interpret the execution of three different sentences. Logan filed for declaratory judgment is permitted by Neb. Rev. Stat. § 84-911. The Nebraska Supreme Court noted that there was an express statutory waiver in construing the validity of administrative rules and regulations (citing *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

As in Ms. Williams case, Logan did not point to a "rule or regulation" of the Department was in violation of any constitutional rights. Therefore, NDCS was to be dismissed as a party. However, that did NOT end the scope of judicial review when applied to the agency officers. The Nebraska Supreme Court held as follows:

> [W]e must determine whether the declaratory judgment action against the individual officers is in reality an action against the state and, therefore, barred by sovereign immunity. See *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).
>
> A declaratory or other equitable action against a state officer or agent attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity. [citations omitted] This is true **because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state**. *Id.* A declaratory judgment action seeking to compel affirmative action on the part of a state official is barred by the doctrine of sovereign immunity; **if such a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity**. *County of Lancaster v. State, supra*.
>
> Logan argues that he does not seek affirmative relief, but, instead, seeks to prevent the Department from misapplying the law. . . . His petition further alleges that **by misapplying state and federal law, the Department gave Logan a sentence greater than that actually imposed by Judge Garden**.
>
> . . .
>
> In summary, **Logan's petition sets forth the sentences he received and how the Department intends to interpret his terms of imprisonment.** Attached to the petition is the letter from the

> Department dated August 28, 1995, which sets forth the Department's interpretation of the sentences. It is clear from the letter that no action has yet been taken concerning whether the Knox County sentence will be served consecutively to the Madison County sentence. The petition ultimately requests that the officers of the Department be prevented from requiring that the sentences from Knox County and Madison County be served consecutively to each other. Thus, Logan's action seeks to restrain state officials from performing affirmative acts which he alleges would be invalid and an abuse of authority. Therefore, the action as against Clarke and Hopkins is not barred by sovereign immunity.
>
> . . . [A]t issue is the state officials' intended implementation of the sentences imposed on Logan. Logan seeks to restrain such officials from having him serve the Knox County and Madison County sentences consecutively to each other when the district court required that the Knox County and Madison County sentences be served concurrently with the Rock County sentence. We conclude that the district court has subject matter jurisdiction over Logan's declaratory judgment action against the named state officials. (Emphasis added.)

The statutory waiver of "sovereign immunity" does not extend to minor inmate disagreements with NDCS officials that do not involve a constitutionally protected right. E.g., *Meis v. Houston*, 19 Neb. App. 504, 808 N.W.2d 897 (2012) (Inmate does not enjoy a right to the possession of property while in prison.) However, in *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017), the right to marry (even if without "conjugal benefits" because of prison security concerns), was procedurally permitted under Neb. Rev. Stat. § 84-911. See also, *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997) (grant of declaratory relief regarding application of law to sentences affirmed on appeal).

In Ms. Williams' case there is a THREE-YEAR DIFFERENCE in her T.R.D. established by Respondents vs. what she has alleged was required as a matter of law. Incarceration by State officials beyond a person's mandatory discharge date is a classic example of the violation of a person's rights under the Eighth and Fourteenth Amendments.

While the district court briefly mentioned that the dispute was simply a question of "statutory interpretation" by NDCS, neither the district court nor NDCS have identified what statute they are interpreting. This would go to the "merits" of this action, but not the "procedure."

Respondents' claim in the internal grievance process (not repeated or argued by Respondents in their motion to dismiss) that it has the authority to suspend the two valid sentences until AFTER Ms. Williams was resentenced out of Douglas County on March 16, 2016 is without legal support. By some unexplained logic, they claim legal authority derives from *Gochenour v. Bolin,* 208 Neb. 444, 449, 303 N.W.2d 775, 778-9 (1981), in which the Nebraska Supreme Court expressly held that:

> The State argues that if the DCS cannot interrupt a sentence for the purpose of having a consecutive term served, it might result in some instances, where early parole is granted, in having to retrieve the person when parole has been served and then reincarcerating him for the purpose of serving the consecutive sentence. That would not appear to be true if the statutes on consolidation are followed.
>
> The **DCS had no authority to interrupt the first sentence for the purpose of serving the second**. No such authority appears in the statutes and it is apparently not an inherent power. See *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966). (Emphasis added.)

VIII. CONCLUSION

For the reasons stated and authorities cited, Ms. Williams respectfully requests that the order of the district court be reversed. Ms. Williams' Petition sets forth a "cause of action" available under 42 U.S.C. § 1983 and Neb. Rev. Stat. § 94-911. If the Respondents file a responsive Answer that the factual allegations are true, the Ms. Williams would be able to move for summary judgement on the pleading.

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CERTIFICATE OF WORD COUNT
(Neb. Ct. R. Pldg § 2-103(C)(4).

The undersigned attorney certifies that the word processing software used in the preparation of this brief was "WORD" contained in Windows 365, the typeface used was Century 12 pt, and there are 10,379 words in this brief, including this certification.

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CERTIFICATE OF SERVICE

The attached brief is being E-filed on December 18, 2022. Proof of service will be made as proved by E-Service on the appellees' attorney, AAG Smith c/o james.smith@nebraska.gov and AAG Scott Roman Straus at scott.straus@nebraska.gov pursuant to Neb. Ct. R. App. P. § 2-206(D). See, Neb. Ct. R. App. P. § 2-206(D).

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Certificate of Service

I hereby certify that on Sunday, December 18, 2022 I provided a true and correct copy of this *Brief of Appellant Williams* to the following:

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