NO. A – 22-719
NEBRASKA SUPREME COURT

JUSTEEN WILLIAMS, #93559,

Appellant/Petitioner,

vs.

SCOTT FRAKES, in his official capacity as Director of the NDCS, et. al.,

Appellees/Respondents.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Kevin McManaman, District Judge

REPLY BRIEF OF APPELLANT

Respectfully submitted:

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I. STATEMENT OF JURISDICTION

Ms. Williams agrees with Appellees' Statement of Jurisdiction as set forth in paragraph one. However, Appellees suggest in paragraph two that this Court should *sua sponte* determine that relief is not "ripe" and dismiss the appeal. In the third paragraph, Appellees speculate that loss of good time, additional criminal convictions, or statutory changes "may" change the "*future tentative* mandatory release dates". Appellees' brief at p. 4-5.

This "ripeness" theory was not alleged nor presented to the district court. It was not raised as an assignment of error in a cross appeal. A cross-appeal must be properly designated pursuant to Neb. Ct. R. App. P. § 2-101(E) and Ct. R. App. P. § 2-109 if affirmative relief is to be obtained. See, *State v. Bishop*, 263 Neb. 266, 639 N.W.2d 409 (2002).

In addition to these "procedural" faults, there is no factual or legal basis on the "merits". First, Ms. Williams has repeatedly acknowledged that her MANDATORY discharge date is subject to change because of loss of "good time" as set forth in Neb. Admin. Code Title 68, Chapter 5 and 6. See Appellant's brief at p. 30.

Second, if Ms. Williams commits a crime WHILE serving her current sentence, existing law will address the issue. The record reflects that Ms. Williams has been crime free for the last 28 years.

Third, any FUTURE statutory changes would not be applicable to Ms. Williams. If the Legislature attempted to EXTEND the mandatory discharge date by reducing her "good time," it would be unconstitutional *ex post facto* legislation. *Shepard v. Houston*, 289 Neb. 399, 855 N.W.2d 559 (2014).

If the Legislature attempted to REDUCE her sentence by award of additional "good time", her current sentence is "final" and not subject to statutory reductions under principles of Nebraska constitutional separations of power. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997); *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995); *Duff v. Clarke*, 247 Neb. 345, 526 N.W.2d 664 (1995).

Only if Ms. Williams became "terminally ill" could she obtain release through medical parole. See, Neb. Rev. Stat. § 83-1,110.02.

Fourth, the Department of Correctional Services with the approval of the Attorney General's Office adopted Neb. Admin. Code Title 68, Chapter 1.004 in 2008. This Code REQUIRES certain steps be taken by the inmate and NDCS staff. An inmate's question regarding the computation of his or her "tentative release date" MUST be submitted to the records office personnel in the facility where the inmate's institutional files are maintained on an Inmate Interview Request. The records officer MUST answer the question and then the inmate MUST exhaust the STEP ONE and STEP TWO appeal procedures. There is no "time frame" as to when this inquiry can or must be made the inmate. Ms. Williams complied with this rule and is not contested by the Appellees or their counsel. See, T-9-10, 26-50, 51.

II. STATEMENT OF THE CASE

Ms. Williams accepts Appellee's Statement of the Case in subparagraph A and first paragraph of subparagraph B. She does not accept the second paragraph of subparagraph B because it misstates the law under the Nebraska Administrative Procedure Act (Neb. Rev. Stat. § 84-911 *et. seq.*,). The Legislature has specifically authorized declaratory judgment under the APA where the "threatened application" of an agency action "*interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner*". That is exactly what Ms. Williams has alleged in her Complaint. T9-10 (¶ 40-47), 25-50.

III. PROPOSITIONS OF LAW

I.

A sentence under Nebraska law begins on the date imposed by the sentencing court. *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978); *State v Adamson*, 194 Neb. 592, 233 N.W.2d 925 (1975); *In re Fuller*, 34 Neb. 581, 52 N.W. 577 (1892).

II.

A sentence validly imposed takes effect from the time it is pronounced and in the absence of a timely appeal, even an erroneous sentence cannot be corrected. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005); *State v. Reichstein*, 233 Neb. 715, 447 N.W.2d 635 (1989).

III.

When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise. *State v. Harms,* 304 Neb. 441, 934 N.W.2d 850 (2019); *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992); *State, ex rel. Allen, v. Ryder*, 119 Neb. 704, 230 N.W. 586 (1930).

IV.

A sentence outside of the period authorized for a valid crime is erroneous only; it is not a void sentence. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019).

V.

The authority of the Department of Correctional Services to independently determine the "credit for time served" for any sentence of imprisonment prior to 1972 authorized by Neb. Rev. Stat. § 83-1,106 (Cum.Supp.1969) was eliminated in 1972 pursuant to Neb. Laws 1972, LB 1499, § 6. Neb. Rev. Stat. § 83-1,106 (Reissue 1976); *State v. Al-Hafeez*, 208 Neb. 681, 305 N.W.2d 379 (1981).

VI.

The Department of Correctional Services has 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, 303 N.W.2d 775 (1981); *Perkins v. Peyton*, 369 F.2d 590 (4th Cir. 1966).

VII.

Credit for time served shall be given by the sentencing court. Neb. Rev. Stat. § 83-1,106 (5).

VIII.

Absent an explicit statutory or common-law procedure permitting otherwise, only a void judgment may be collaterally attacked. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019); *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

IX.

Failing to give credit for time served, while erroneous, does not render the sentence void. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019).

IV. STATEMENT OF FACTS

Appellees statement of facts incorporates the fact set forth in the Transcript filed with the Nebraska Supreme Court. Under established rules of appellate procedure, the facts as alleged in the Complaint must be accepted as true. Appellant accepts Appellees' admission.

V. REPLY TO APPELLEES' ARGUMENTS

A. Appellees' first paragraph of argument scrupulously avoids any discussion as to whether Ms. Williams T.R.D. of November 23, 2036 as claimed by Appellees is correct.

Neither the district court in the order of dismissal, nor Appellees in their brief, argue that Appellees' determination of Ms. Williams' T.R.D. is correct as a matter of law. This avoidance of merits is understandable, since they must first claim that a century of Nebraska law holding that a sentence begins on the date imposed is now invalid. *State v Adamson*, 194 Neb. 592, 233 N.W.2d 925 (1975); *In re Fuller*, 34 Neb. 581, 52 N.W. 577 (1892). Such a result would require a finding that Neb. Rev. Stat. § 83-1,118 (3) defining the conditions of discharge from NDCS custody is not mandatory.

In addition, Appellees must then claim that contrary to ninety years of Nebraska case law and absence of any statutory authority, NDCS can suspend execution of the two valid sentences imposed on July1, 1994 and June 6, 1995. Appellees neither discussed nor acknowledged that when a sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise. *State v. Harms*, 304 Neb. 441, 934 N.W.2d 850 (2019); *Harpster v. Benson*, 216 Neb. 776, 345 N.W.2d 335 (1984); *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973); *Brott v. Fenton*, 120 Neb. 792, 235 N.W. 449 (1931); *State, ex rel. Allen, v. Ryder*, 119

Neb. 704, 230 N.W. 586 (1930).See also *State v. Bree*, 285 Neb. 520, 827 N.W.2d 497 (2013) (The calculation and application of credit for time served is controlled by statute.)

The undisputed FACTUAL basis set forth in the Complaint that must be accepted as "true" for the purpose of this appeal are that Ms. Williams has been in the custody of NDCS since 1994 to serve three valid sentences as follows:

- **July 1, 1994** - Ms. Williams was sentenced in Douglas County District Court (DoCo # CR 10-9026232 - formerly 133-836) to 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. See, ATTACHMENT "A." (T19) This sentence became "final" upon completion of a direct appeal that affirmed the conviction and sentences in *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995) and the mandate issued on May 10, 1995. See, docket S-94-716.

- **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. See, ATTACHMENT "B." (T20) This sentence was not appealed and became "final" on July 7, 1995.

  [NOTE: Because the June 6, 1995, sentence was imposed while she was serving the two (2) to five (5) years sentence from Douglas County, NDCS may properly combined them into a single sentence of three (3) to six (6) years pursuant to Neb. Rev. Stat. § 83-1,110 (2). However, the credit for 224 days cannot be changed by NDCS. Ms. Williams alleged that this combined sentence was completed on or about **November 19, 1997**. (T14-16 at ¶ 64, 69. 73). As a matter of undisputable fact, Ms.

Williams was NOT serving this combined sentence of three to six years when sentenced on March 16, 2016.]

- **March 16, 2016** - 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)

As a matter of law, the sixty to eighty year sentence became "final" after the expiration of 30 days on **April 19, 2016** (Tuesday). Without consideration of the potential add'l 3 days/mo that might be available under LB 191, it is factually undisputed that the March 16, 2016, sentencing order granted credit for time served of 8,147 days. The Douglas County Court had not authority to make any changes to the valid "use of a firearm" sentence and credit for 224 days imposed July 1, 1994 nor the York County sentence imposed on June 6, 1995 and did not do so.

As a matter of judicially noted fact, there are 6,692 days between November 19, 1997 (when the two combined sentences were completed) and April 19, 2016 (when Ms. Williams was sentencing on 1st degree murder). However, the order awarded 8,147 days credit for time served. The Appellees' sole responsibility is to follow the law, even if the "math" regarding the credit might be in error.

Neither the State nor Ms. Williams appealed the March 16, 2016, sentence. As held *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005), if the State believed there was error in the sentencing order, the State "should have presented a timely appeal". On a direct appeal, the appellate courts can, and often do, note "plain error" as to the amount of credit awarded, sometimes at the urging of the Attorney General's Office. *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

Once a sentence becomes "final" through completion of a direct appeal or because of the failure of the parties to appeal, the credit set forth in the sentencing order cannot be changed in a collateral attack. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019). The authority of

NDCS officials to change the credit set forth in the district court sentence was eliminated by Neb. Laws 1972, LB 1499.

B. Ms. Williams grant of relief through declaratory judgment under 42 U.S.C. § 1983 is to PREVENT a constitutional violation by NDCS officials. The requested relief would be that her lawful T.R.D. is November 23, 2033 under the terms of the 3 valid sentences. It would NOT change the terms of ANY of her sentencing orders so as to expedite her release.

Ms. Williams is NOT challenging the "fact or duration" of confinement based on any constitutional defects in her three sentences. The issue is the interpretation of enforcing the three lawful sentences made by the NDCS officials. The Appellees do not have any authority to "suspend" the use and assault sentences, nor do they have authority or discretion to avoid giving 8,147 days credit for time served on the March 16, 2016 sentence.

Contrary to the representation by Appellees, *Wilkinson v. Dotson*, 544 U.S. 74, 76, 125 S. Ct. 1242 (2005) involved two prisoners who were seek injunctive and declaratory relief pursuant to § 1983 who challenged Ohio's state parole procedures and were successful in going forward. Rather than being guided by Appellees' spin, the actual language from the Supreme Court in *Wilkinson* regarding consideration of §§ 1983 and 2254 was as follows:

> Throughout the legal journey from *Preiser* to *Balisok*, the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement-either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody. Thus, *Preiser* found an implied exception to § 1983's coverage where the claim seeks-not where it simply "relates to"-"core" habeas corpus relief, i.e.,

> where a state prisoner requests present or future release. *Wolff* makes clear that § 1983 remains available for procedural challenges where success in the action would not necessarily spell immediate or speedier release for the prisoner. *Heck* specifies that a prisoner cannot use § 1983 to obtain damages where success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would necessarily demonstrate the invalidity of confinement or its duration. 544 U.S. at 81-82 (internal citation omitted).

The Supreme Court concluded in *Wilkinson* that the requests for declaratory relief WERE PERMITTED under § 1983 because:

> Success for Dotson does not mean immediate release or a shorter stay in prison; it means at most new eligibility review, which at most may speed consideration of a new parole application. Success for Johnson means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term. Because neither prisoner's claim would necessarily spell speedier release, neither lies at "the core of habeas corpus." *Id.* at 82 (internal citations omitted).

Success by Ms. Williams does not depend on the invalidity of any of her three sentences. In fact, she is relying on the terms of said

sentences in this action. Appellees actions in implementing and enforcing the district courts sentences is administrative only. NDCS has no discretion in their initial T.R.D. determination because it is controlled by Nebraska law. Ms. Williams acknowledges that her T.R.D. can be extended for forfeiture of "good time" up until the date she reaches her mandatory discharge date.

C. Appellees' reliance on *Heist v. Nebraska Department of Correctional Services*, 312 Neb. 480, 979 N.W.2d 772 (2022) is misplaced and not applicable in this case.

Heist v. Nebraska Department of Correctional Services, supra, has no relevance to the consideration in this case. Inmate *Heist* claimed that it was "unconstitutional" for NDCS to not give 3 days/mo under LB 191 in reducing his parole eligibility (P.E.) date. He alleged that it was "absurd" that an inmate serving a sentence with identical maximum and minimum sentences would be discharged before being parole eligible.

The issue of a parole eligibility date does not involve a constitutional protected liberty interest under either the 8th or 14th Amendments. There is no constitutional right to parole. However, mandatory discharge and the determination of a TRD involves both 8th and 14th Amendment rights. This Court has previously held that NDCS does not have the authority to discharge an inmate BEFORE his or her lawful discharge date. *Evans v. Frakes*, 293 Neb. 253, 258, 876 N.W.2d 626, ___ (2016).

The same principle of the limitation of NDCS officials applies with greater force in keeping an inmate in prison AFTER his or her mandatory discharge date. As a matter of law, the Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," including punishments that are "totally without penological justification." *Gregg v. Georgia*, 428 U.S. 153, 173, 183, 96 S. Ct. 2909 (1976). There is no penological justification for incarceration beyond a mandatory release date because "any deterrent and retributive purposes served by [the

inmate's] time in jail were fulfilled as of that date." See *Sample v. Diecks*, 885 F.2d 1099, 1108 (3rd Cir. 1989).

As a matter of law, freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780 (1992) (internal quotation marks and citations omitted); see also *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004).

VI. CONCLUSION

For the reasons stated in the original brief and this reply brief and the statutory and case law cited, the decision of the Lancaster County District Court be reversed and remanded. Ms. Williams initial T.R.D. under the facts should be November 23, 2033, subject to adjustments under the applicable good time law and any forfeitures under Neb. Admin. Code Title 68.

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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 reply brief was "WORD" contained in Windows 365, the typeface used was Century 12 pt, and there are 3,816 words in this reply brief. There were 10,379 words in the opening brief, including certification. The combined word count for Appellant's briefs is 14,195 words.

BY: */S/ Gerald L. Soucie*
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CERTIFICATE OF SERVICE

The attached reply brief is being E-filed on March 17, 2023. Proof of service will be made as proved by E-Service on the appellees' attorney, AAG Smith c/o james.smith@nebraska.gov pursuant to Neb. Ct. R. App. P. § 2-206(D). See, Neb. Ct. R. App. P. § 2-206(D).

BY: */S/ Gerald L. Soucie*

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Certificate of Service

I hereby certify that on Friday, March 17, 2023 I provided a true and correct copy of this *Reply Brief* to the following:

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