From: Patricia Adkisson <faithandjoesmom@gmail.com>
Sent: Sunday, February 26, 2023 8:48 PM
To: General Parole Board email <info@parole.nv.gov>
Subject: Board of Parole Commissioner Meeting Public Comment 2/27/2023

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Good evening,
Please submit the following attachments for Public Comment for the Board of Parole Commissioners meeting tomorrow 2/27/2023. Please print the following attachments and give to the members of the board.
Thank you in advance,
Patricia Adkisson
faithandjoesmom@gmail.com

Board of Parole Commissioner Meeting -Public Comment 2/27/2023

Good afternoon, my name is Patricia Adkisson. My comments relate to each of the agenda items. As stated in the Board's December. 17, 2007 Statement of Emergency, related to LCB file RO18-18 NRS.213.10885 Requires the board to create an objective standard to use when making decisions to grant or deny parole. This distinguishes a difference between the deliberation of Parole, utilizing consideration of factors and the stated denial reasons utilizing objective Standards. The objective standards are separate and distinct from aggravating and mitigating factors. Only the objective standards may serve as a statement or basis to grant or deny parole. The public interest is served by this board in the application of the objective standards set forth in a risk assessment, in order to determine the likelihood of success on parole. The continuing bad practice by this board to utilize a statement of a factor, known as 'impact to victim' as the statement or basis to deny parole does not serve the interest of the public. Setting forth a clear violation of the statutory action to grant or deny parole based upon objective criteria. This Board's failure to apply objective standards when considering parole, related to NRS. 193.165, is now implicated in an investigation initiated by the Secretary of State related to an Election Integrity Violation Report filed by Michael Adkisson. Where institutional parole is not available without an undischarged felony conviction. I have submitted the supporting material for your review. This board's continuing bad practice and due deference to rely upon the Department of Corrections false representation that a consecutive sentence for 'Use of a Deadly Weapon' is to be treated as a separate felony conviction, stands in conflict with the statutory provisions of Nevada Revised Statutes chapter 179A. In order to determine the conviction record of an offender, the Board is to **first** inquire with the central repository for Nevada Records of Criminal History. This serves as a "check" on the Department's representations. A simple review of the relevant statute NRS. 193.165 reveals the legislative design, designating 'Use of a Deadly Weapon' as NOT a separate offense. Simply put this Board can NEVER consider parole for 'Use of a Deadly Weapon' and can NEVER direct Institutional Parole conditions pending a consideration of a sentence for 'Use of a Deadly Weapon'. The Board's actions, in this instant, implicate the false imprisonment of Michael Adkisson with institutional parole directed where NO CRIME or CONVICTION is under consideration.

Sorry I didn't have more time to prepare for this meeting. I will appearing at the BOPC meeting tomorrow to discuss their role in this fiasco and tragedy. I know it's a lot of material to digest, but I've gone to a great deal of personal effort and expense to provide the narrative and material needed to understand this.

STATE OF NEVADA
SECRETARY OF STATE
BARBARA K. CEGAVSKE

101 N. Carson St.
Carson City, NV 89701

Phone: 775-684-5705
Fax: 775-684-5718

nvelect@sos.nv.gov

www.nvsos.gov

For official use only:
Received by: _____
Date Received: _____
Complaint Type: _____
[Stamp here]

ELECTION INTEGRITY VIOLATION REPORT

The information you report on this form may be used to help us investigate violations of Nevada election laws. When completed, mail, email, or fax your form and supporting documents to the office listed above. Upon receipt, your complaint will be reviewed by a member of our staff. The length of this process can vary depending on the circumstances and information you provide with your complaint. The Office of the Secretary of State may contact you if additional information is needed.

INSTRUCTIONS: Please TYPE/PRINT your complaint in dark ink. You must write LEGIBLY. All fields MUST be completed.

SECTION 1.

COMPLAINANT INFORMATION Salutation: ☒ Mr. ☐ Mrs. ☐ Ms. ☐ Miss

Your Name: ADKISSON (Last) MICHAEL (First) D (MI)

Your Organization, if any: N/A (Citizen of Nevada)

Your Address: 7117 Longhorn Cattle Street (Address) N. Las Vegas (City) NV. (State) 89084 (Zip)

Your Phone Number : Message # (Home) 702-505-2861 (wife) (Cell) _____ (Work) _____ (Fax)

Email: MichaelDAdkisson@gmail.com Call me between 8am-5pm at: ☐ Home ☒ Cell ☐ Work

SECTION 2.

TYPE OF COMPLAINT *See Attachments in support.*

- ☐ Campaign Practices
- ☐ Contributions / Expenses
- ☒ Voter Registration
- ☒ Other
- ☐ Voter Fraud
- ☐ Initiative / Referendum Petition
- ☐ Financial Disclosure Statement

1.) The Nevada Department of Corrections (N.D.O.C.) failure to comply with the statutory provisions of N.R.S. 213.157 worked to unfairly deprive me of my Constitutional right to vote in this years elections

SECTION 3.

COMPLAINT IS AGAINST State of Nevada Ex Rel.; Nevada Dept. of Corrections; Board of Prison Commissioners

Please detail the nature of your complaint. Include the name and contact information (if known) of the individual, candidate, campaign, or group that is the subject of your complaint. Your complaint must also include a clear and concise statement of facts sufficient to establish that the alleged violation occurred. Any relevant documents or other evidence that support your complaint should be listed and attached. You may attach additional sheets if necessary.

Assembly Bill 431 passed in 2019 restored my right to vote (among other things) Immediately upon a grant of parole. (N.R.S. 213.157 attached for your convenience) See N.R.S. 213.157 (1)(a). I suffered one single conviction in 2004 and was granted parole effective Nov 1st 2016. (ORDER granting parole attached for your convenience) As of Nov. 1st 2016 there no longer exist any undischarged conviction my continuing confinement to a state prison is related to an improper, unilateral, administrative act by N.D.O.C. done without the benefit of any conviction what-so-ever. The consecutive sentence that the N.D.O.C. relies upon pursuant to N.R.S. 193.165 is admittedly no offense and does not result in a conviction. I have discharged my Sole Conviction and Sentence for Murder (see ORDER of AFFIRMANCE attached) The N.D.O.C. unilateral determination that I cannot register to vote or otherwise participate in the Voting process while I am imprisoned works to violate my rights as defined by N.R.S. 213.157 (see N.D.O.C. Griev. # 2006-31-45642 attached) Once my Grant of parole became effective admittedly No felony conviction(s) remain, NO legitimate basis exist in order to deny my right to vote pursuant to N.R.S. 213.157. (See Nevada Criminal Justice Information System ((N.C.J.I.S)) Record of Conviction detailing a single, unitary felony Conviction pursuant to N.R.S. 200.030 Second degree Murder attached). Any questions related to N.D.O.C.S' practice to confine me to a state prison pursuant to a Consecutive Sentence without a Conviction are Separate from the stated violation of my Voting rights

SECTION 4.

Sign and date this form. The Secretary of State's Office cannot process any unsigned, incomplete, or illegible complaints. In order to resolve your complaint, we may send a copy of this form to the person or group about whom you are complaining.

I am filing this complaint to notify the Office of the Secretary of State of the activities of a particular candidate, campaign, individual or group. I understand that the information contained in this complaint may be used to establish violations of Nevada law in both private and public enforcement actions. I authorize the Office of the Secretary of State to send my complaint and supporting documents to the individual or group identified in this complaint.

By signing my name below, I certify under penalty of perjury that the information provided in this complaint is true and correct to the best of my knowledge.

/s/ Michael Adkisson
Signature

Michael Adkisson
Print Name

12/20/2022
Date (mm/dd/yyyy)

PRINT

Michael Adkisson

ELECTION INTEGRITY VIOLATION REPORT

SUPPORTING DOCUMENTS

No. of pages	Description of Document
5 pgs	N.R.S. 213.157 with Editors Notes, Decisions, A.G.O.
2 pgs	ORDER GRANTING PAROLE effective Nov. 1st 2016
3 pgs.	Nevada Court of Appeals ORDER of Affirmance detailing, Conviction and Sentence for Murder is discharged.
7 pgs.	Nevada Dept. of Corrections Grievance # 2006:31-45642
2 pgs	Nevada Criminal Justice Information System BASE RECORD detailing one Unitary Conviction pursuant to N.R.S. 200.030

213.157. Restoration of right to vote when placed on probation, granted parole or granted pardon; restoration of civil rights after sentence served.

1. A person convicted of a felony:

(a) Who is placed on probation, granted parole or granted a pardon is immediately restored to the right to vote;

(b) Who has served his or her sentence and has been released from prison:

(1) Is immediately restored to the right to serve as a juror in a civil action.

(2) Is immediately restored to the right to vote.

(3) Four years after the date of his or her release from prison, is restored to the right to hold office.

(4) Six years after the date of his or her release from prison, is restored to the right to serve as a juror in a criminal action.

2. Upon his or her release from prison, a person so released must be given an official document which provides:

(a) That the person has been released from prison;

(b) That the person is restored to his or her civil right to serve as a juror in a civil action as of the date of his or her release from prison;

(c) The date on which his or her civil right to hold office will be restored to the person pursuant to subparagraph (3) of paragraph (b) of subsection 1; and

(d) The date on which his or her civil right to serve as a juror in a criminal action will be restored to the person pursuant to subparagraph (4) of paragraph (b) of subsection 1.

3. A person who has been released from prison in this State or elsewhere and whose official documentation of his or her release from prison is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his or her civil rights pursuant to this section. Upon verification that the person has been released from prison and is eligible to be restored to the civil rights set forth in subsection 1, the court shall issue an order restoring the person to the civil rights set forth in subsection 1. A person must not be required to pay a fee to

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receive such an order.

4. A person who has been released from prison in this State or elsewhere may present

(a) Official documentation of his or her release from prison, if it contains the provisions set forth in subsection 2; or

(b) A court order restoring his or her civil rights,

as proof that the person has been restored to the civil rights set forth in subsection 1.

HISTORY:

1973, p. 1844; 1977, p. 666; 1993, ch. 20, § 4, p. 39; 1993, ch. 466, § 158, p. 1529; 1995, ch. 293, § 1, p. 508; 2001, ch. 358, § 13, p. 1697; 2003, ch. 447, § 15, p. 2695; 2005, ch. 476, § 14, p. 2359; 2017, ch. 362, § 3, p. 2230, effective January 1, 2019; 2019, ch. 255, § 3, p. 1455, effective July 1, 2019; 2020, 32nd Sp. Sess. ch. 1, § 1, p. 2, effective August 2, 2020.

Editor's Notes

Acts 2001, ch. 358, § 14, directs that the amendatory provisions of the act apply: (1) to a petition for an order to seal records pursuant to NRS 179.245 or 179.255 filed on or after the effective date of the act (June 5, 2001), and (2) an application for restoration of civil rights pursuant to NRS 176A.860, 213.090, 213.155, or 213.157 filed on or after the effective date of the act.

Acts 2003, ch. 447, § 71, provides that:

1. Any person residing in this state who, before July 1, 2003, was:

(a) Honorably discharged from probation pursuant to NRS 176A.850;

(b) Pardoned pursuant to NRS 213.090;

(c) Honorably discharged from parole pursuant to NRS 213.154 and 213.155; or

(d) Released from prison pursuant to NRS 213.157,in this state or elsewhere, who is not on probation or parole or serving a sentence of imprisonment on July 1, 2003, and who has not

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had his civil rights restored is hereby restored to the civil rights set forth in subsection 2.

2. A person listed in subsection 1:

(a) Is immediately restored to the following civil rights:

(1) The right to vote; and

(2) The right to serve as a juror in a civil action.

(b) Four years after the date on which he is released from his sentence of imprisonment, is restored to the right to hold office.

(c) Six years after the date on which he is released from his sentence of imprisonment, is restored to the right to serve as a juror in a criminal action.

3. A person who is restored to his civil rights pursuant to this section and whose official documentation which demonstrates that the person qualifies to have his civil rights restored pursuant to subsection 1 is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his civil rights pursuant to this section. Upon verification that the person qualifies to have his civil rights restored pursuant to subsection 1, the court shall issue an order restoring the person to the civil rights set forth in subsection 2. A person must not be required to pay a fee to receive such an order.

4. A person who is restored to his civil rights pursuant to this section may present official documentation that he qualifies to have his civil rights restored pursuant to subsection 1 or a court order restoring his civil rights as proof that he has been restored to the civil rights set forth in subsection 2.

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In 2019, the Legislative Counsel made a stylistic change in (2)(b).

Acts 2019, ch. 255, § 7 provides (per subsequent amendment by Acts 2020, 32nd Sp. Sess., ch. 1, § 3):

Any person residing in this State who:

1. Before July 1, 2019, was placed on or discharged from probation, granted a pardon, granted or discharged from parole;

2. Is not incarcerated; and

3. Has not already had his or her right to vote restored, is immediately restored the right to vote."

Amendment Notes

The 2017 amendment by ch. 362, effective January 1, 2019, redesignated and rewrote former introductory language of (1)(a) and (1)(a)(2) as (1)(a) and deleted former (1)(a)(1), which read: "The right to vote; and"; added (1)(b) and (1)(c); redesignated former (1)(b) and (1)(c) as (1)(d) and (1)(e); in (3)(b), substituted "is" for "has been" and "applicable dates set forth in paragraphs (a), (b) and (c) of subsection 1" for "date of his or her release from prison"; substituted "paragraph (d)" for "paragraph (b)" in (3)(c); and substituted "paragraph (e)" for "paragraph (c)" in (3)(d).

The 2019 amendment by ch. 255, effective July 1, 2019, deleted "Except as otherwise provided in subsection 2" at the beginning of the introductory language of 1; deleted "Except as otherwise provided in paragraph (c)" at the beginning of 1(b); deleted former 1(c); redesignated former 1(d) and 1(e) as 1(c) and 1(d); deleted former 2; redesignated former 3 through 5 as 2 through 4; deleted "Except for a person subject to the limitations set forth in subsection 2" at the beginning of the introductory language of 2; substituted "date of his or her release from prison" for "applicable dates set forth in paragraphs (a), (b) and (c) of subsection 1" in 2(b); substituted "paragraph (c)" for "paragraph (d)" in 2(c); substituted "paragraph (d)" for "paragraph (e)" in 2(d); deleted "Subject to the limitations set forth in subsection 2" at the beginning of the first sentence of 3; and substituted "subsection 2" for "subsection 3" in 4.

The 2020 amendment by 32nd Sp. Sess. ch. 1, effective August 2, 2020, rewrote the section.

NOTES TO DECISIONS

Cited in:

Salisbury v. List, 501 F. Supp. 105, 1980 U.S. Dist. LEXIS 14887 (D. Nev. 1980).

OPINIONS OF ATTORNEY GENERAL

A pardon relieves a person from any further punishments for a crime, while a restoration of civil rights allows a convicted person to vote, hold office and avoid certain requirements to register as a convicted person. Such restoration does not allow a convicted person to carry a concealed firearm, enable the individual to avoid professional licensing restrictions, or relieve the individual of statutory enhancements based upon the underlying conviction. AGO 83-13 (9-14-1983).

Limitations on restoration of rights.

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Felons convicted in a Nevada district court may have their civil rights restored pursuant to NRS. Nevada can only restore the civil rights of Nevada felons. Federal felons may have their civil rights restored only by presidential pardon. Whether Nevada must afford full faith and credit to the restoration of civil rights by a foreign jurisdiction depends on the individual circumstances. AGO 96-27 (9-25-1996).

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STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION
ORDER GRANTING PAROLE

ADKISSON, MICHAEL	84280	084280	HDSP-U9-D-10-A	08/11/2016
Inmate Name	*NDOC Number*	*Booking #*	*Location*	*Date*

It is the Order of the Board that Parole is GRANTED. The effective date of parole is: 11/01/2016
Release to the community or to a consecutive sentence is authorized on the above specified date. If "when eligible" is indicated, release is authorized on or after the date of this hearing upon attaining minimum eligibility, as determined by the Nevada Department of Corrections (NDOC). Release to the community may not occur until approval of release plans in accordance with NRS 213.140.

You are expected to program and/or work constructively regardless of institutional setting, and you are expected to abide by the rules of the NDOC. Failure to work and/or program constructively, or violation of the rules of the NDOC may result in the rescission of this order and denial of parole.

THIS ACTION APPLIES TO THE FOLLOWING SENTENCE(S):
*Controlling sentence denoted by *; Class #; Count; Offense Description:*
*200178;1;MURDER 2ND DEGREE

Community supervision conditions apply to all active sentences, including any previously granted sentences not specified on this Order. *In addition to the standard conditions, the following special parole conditions apply:*

*If applicable, four months prior to release to the community, contact the Division of Parole and Probation, Pre-release, and establish a viable release plan. The Board will impose any special conditions regarding community release at that time. It is the Order of the Board that the inmate is not to be released to the community until any proposed release plans are investigated and approved by the Division of Parole and Probation.

Reason(s) for action:
Grant Reason: The inmate has participated in programs specific to addressing behavior that led to incarceration.
Grant Reason: There is community and/or family support.
Grant Reason: The inmate must serve a consecutive sentence.

Recommendation of the panel who conducted the hearing: Grant Parole
Commissioner Michael Keeler; Grant Parole
Commissioner Lucille Monterde; Grant Parole
Chairman Connie Bisbee; Grant Parole

The final action was ratified by the following Members of the Board of Parole Commissioners:
Commissioner Michael Keeler; Grant Parole
Commissioner Lucille Monterde; Grant Parole
Commissioner Susan Jackson; Grant Parole
Chairman Connie Bisbee; Grant Parole

Susan Jackson
FOR THE NEVADA BOARD OF PAROLE COMMISSIONERS

This document was prepared by DBARNARD *at* 8/17/2016 3:23 PM

STATE OF NEVADA
CERTIFICATION OF
BOARD OF PAROLE COMMISSIONERS ACTION

PAROLE RISK ASSESSMENT & GUIDELINE

ADKISSON, LUCHABEL	84280	084280	HDSP-U9-D-10-A	08/11/2016
INMATE NAME	NDOC Number	BOOKING#	LOCATION	DATE

Parole Risk Assessment:

Questions	Responses / Scores
1. Age at 1st Arrest:	19 years or younger (2): 2
2. Prior Revocations	(0)No Parole or Probation Revocations: 0
3. Employment History	(1)Employed less than full-time/full-time < one year: 1
4. Property Conviction	(0)All Others: 0
5. Drug/Alcohol Use/Abuse	(1)Some use, no severe disruption of functioning: 1
6. Gender	(1)Male: 1
Static Risk Score	5
7. Current Age	(-1) 41 and above: -1
8. Gang Membership	(0) No or Suspect: 0
9. Programming (current term)	(0) No: 0
10. Disciplinary Conduct	(-1) No disciplinaries: -1
11. Approved Custody Level	(0) Medium: 0
Dynamic Risk Score	-2
Total Score (Static+Dynamic)	3

Offense (used to determine crime severity for risk assessment)	Offense Category	Offense Severity
MURDER 2ND DEGREE	CAT A	Highest

Total Risk Score:	Guideline Risk:	Guideline Recommendation
3	Low Risk	Consider Factors

The Board determined the following Aggravating Factors are applicable in your case:
Prior violent conviction: Has 2 prior misdemeanor convictions.
Impact on victim(s) and/or community: Victim dies in this offense.

The Board determined the following Mitigating Factors are applicable in your case:
Pending CS sentence or detainer lodged by other jurisdiction: Has a pending sentence to serve.

This document was prepared by DBARNARD *at* 8/17/2016 7:23 PM

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHAEL DEAN ADKISSON,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 73807

FILED

JUN 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michael Dean Adkisson appeals from a district court order denying a postconviction petition for a writ of habeas filed on August 23, 2016.[1] Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Adkisson claims the credits he has earned pursuant to NRS 209.4465 must be applied to his parole eligibility as provided in NRS 209.4465(7)(b) (1997). The Nevada Supreme Court recently held in *Williams v. State Department of Corrections*, 133 Nev. ___, ___, 402 P.3d 1260, 1262 (2017), that credits earned under NRS 209.4465 apply to parole eligibility as provided in NRS 209.4465(7)(b) (1997) where the offender was sentenced pursuant to a statute that requires a minimum term of not less than a set number of years but does not expressly mention parole eligibility.

Adkisson was convicted of second-degree murder with the use of a deadly weapon for conduct that occurred in February 2004. He was

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

T OF APPEALS
OF
NEVADA

sentenced to a prison term of life with a minimum parole eligibility of ten years for the murder convictions and an equal and consecutive prison term of life with a minimum parole eligibility of ten years for the deadly weapon enhancement. He has discharged the sentence for his murder conviction and is now serving the sentence for the deadly weapon enhancement.[2]

The sentencing statutes expressly required Adkisson to serve the minimum term before he is eligible for parole. *See* NRS 193.165 (1995) (providing that sentence for weapon enhancement must be equal and consecutive to sentence imposed for primary offense); NRS 200.030(5) (providing that person convicted of second-degree murder shall be punished by imprisonment for "life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served" or "a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served"). Therefore, pursuant to the exception set forth in NRS 209.4465(7)(b) (1997), the credits Adkisson earns under NRS 209.4465 *cannot* be applied to his parole eligibility on the weapon enhancement sentence that he is serving. *See Williams*, 133 Nev. at ___, 402 P.3d at 1262.

Although the analysis in the district court's order conflicts with *Williams*, we nonetheless affirm the order because the district court reached the correct result in denying the petition. *See Wyatt v. State*, 86 Nev. 294,

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[2]To the extent Adkisson claims he is entitled to credit for the time he served between parole hearings, we conclude he is not entitled to relief. *See Niergarth v. Warden*, 105 Nev. 26, 28-29, 768 P.2d 882, 883-84 (1989) (holding no statutory authority or case law permits retroactive grant of parole).

298, 468 P.2d 338, 341 (1970) (stating that an order that reached the correct result will not be reversed simply because it is based on the wrong reason). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Silver, C.J.

Tao, J.

Gibbons, J.

cc: Hon. Linda Marie Bell, District Judge
Michael Dean Adkisson
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

Nevada Department of Corrections
Improper Grievance Memo

TO: Adkisson, Michael #84280 UNIT: 10A-4M

FROM: AWP Henley, NNCC

DATE: November 23, 2022

RE: Improper Grievance # 2006-31-45642 REJ 1st

The attached grievance is being returned to you for the following reason(s):

NOT ACCEPTED - If not accepted due to any of the reasons in this box, the grievance may NOT proceed to the next level Per AR 740.03,5 and 740.04,G.

☒ Non-grievable issues:

☒ Other specify: Under Assembly Bill 431, passed in 2019, any Nevada resident who is convicted of a felony is immediately restored the right to vote upon the individual's release from prison. There is no waiting period or action required by the individual. The restoration of voting rights is automatic and immediate upon the individual's release from prison, regardless of the category of felony committed or whether the individual is still on either parole or probation.

Individuals who have had their voting rights restored must meet all the other eligibility requirements in order to register to vote. In order to be eligible to register to vote in Nevada, an individual must:

- Be a U.S. citizen;
- Be at least 18 years old by the date of the next election (or at least 17 years old if preregistering to vote);
- Have continuously resided in Nevada and the county for at least 30 days before the next election; and
- Have continuously resided in the precinct for at least 10 days before the next election.

Any individual who has been convicted of a felony and is currently serving a term of imprisonment cannot register to vote or otherwise participate in the voting process while the individual is in prison.

You are currently incarcerated serving a prison term therefore you may not vote Per assembly bill 431.

Do not re-submit

CCS 12-19-22
Witness Signature Date

12-19-2022
Inmate Signature Date

cc: Original – Inmate
Copy - Grievance File

DOC-3098 (12/2021)

Log Number 2006-31-451042

NEVADA DEPARTMENT OF CORRECTIONS
INFORMAL GRIEVANCE

NAME: Michael AdKisson I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. (D.O.C 3095 attached) UNIT: 10 A 4M

GRIEVANT'S STATEMENT: I am grieving the N.D.O.C. for the violation of my rights related to N.R.S. 213.157 Restoration of right to Vote and related civil rights "A person convicted of a Felony who is granted parole is IMMEDIATELY restored the right to Vote." In this instance I was granted parole on My Sole Felony Conviction effective Nov. 1st 2016. Legislative Changes

SWORN DECLARATION UNDER PENALTY OF PERJURY

INMATE SIGNATURE: [signature] DATE: 11-17-22 TIME: 12:44

GRIEVANCE COORDINATOR SIGNATURE: C. Dutton DATE: 11-23-22 TIME: 12:39pm

---

GRIEVANCE RESPONSE: DOC-3098

CASEWORKER SIGNATURE: [signature] DATE: 12-19-2022

___ GRIEVANCE UPHELD ___ GRIEVANCE DENIED ___ ISSUE NOT GRIEVABLE PER AR 740

GRIEVANCE COORDINATOR APPROVAL: [signature] DATE: 12-5-2022

___ INMATE AGREES X INMATE DISAGREES

INMATE SIGNATURE: [signature] DATE: 12-19-22

FAILURE TO SIGN CONSTITUTES ABANDONMENT OF THE CLAIM. A FIRST LEVEL GRIEVANCE MAY BE PURSUED IN THE EVENT THE INMATE DISAGREES.

Original:	To inmate when complete, or attached to formal grievance
Canary:	To Grievance Coordinator
Pink:	Inmate's receipt when formal grievance filed
Gold:	Inmate's initial receipt

RECEIVED
NOV 23 2022
NNCC

DOC 3091 (12 / 01)

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Adkisson I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT #: 10A 4M

GRIEVANCE #: 2006-31-45642 GRIEVANCE LEVEL: Informal

GRIEVANT'S STATEMENT CONTINUATION: PG. Two OF Three

related to N.R.S. 213.157 during ~~the~~ the 2020 (2019) 32nd Special Session 2 Worked to restore My right to Vote immediately upon my grant of parole Because my Grant of parole is effective Nov. 1 2016 My Right to Vote Was intact and restored for the Current election Cycle. But for the N.D.O.C. Classification of my person as an "OFFENDER" (defined at "N.R.S. 209.081 "offender" means any person Convicted of a Crime under the laws of this State and sentenced to imprisonment in the State prison.") With a claim that I suffered a Category A felony Conviction for N.R.S. 193.165 USE of D/W I would have been permitted to Vote

To be clear, I have discharged the sentence and the Conviction pursuant to the Sole Criminal Count.

Despite the verbiage in My J.O.C. relied upon by N.D.O.C. related to a "Consecutive-Sentence of 10-Life" No Conviction is Stated for or pursuant to Either the relevant Statutory language or even the J.O.C. itself where only one Count is Charged and

Original: Attached to Grievance
Pink: Inmate's Copy

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Adkisson I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT #: 10 A 4 M

GRIEVANCE #: 2006-31-45642 GRIEVANCE LEVEL: INFORMAL

GRIEVANT'S STATEMENT CONTINUATION: PG. Three OF Three

only one conviction resulted and where that Sole Conviction is now discharged. The N.D.O.C. designation through Classification Claiming that I am to be treated as an Offender with a Current undischarged Conviction Worked to deprive me of my Constitutional and Statutory right to Vote where N.R.S. 213.157 does restore my related rights to Vote, Serve as a Juror, HOLD OFFICE as I have been paroled for 6 six years now, the Dept's Classification Worked to Violate my Rights related to each provision of N.R.S. 213.157 PROPOSED REMEDY: Immediately Conduct a Classification hearing in order to Correct the Unsupported determination that my Current legal Status is that of an Offender with a Current Conviction. Establish my Correct Custody status to reflect "PAROLEE." This Classification change will REQUIRE assignment to Casa Grande Transitional Center as a PAROLEE see N.R.S. 209.511(2) Duties and Auth. Actions of Director; N.R.S. 209.4889 Transitional Housing OR In the Alternative FIVE MILLION Dollars with additional injury incurring

Original: Attached to Grievance
Pink: Inmate's Copy

NEVADA DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE CLAIM FORM

THIS FORM MUST BE COMPLETED PER NRS 41.036, 41.0322, 209.243 AND ADMINISTRATIVE REGULATION 740

DO **NOT** SEND DIRECTLY TO ATTORNEY GENERAL'S OFFICE, BOARD OF EXAMINERS, OR DIRECTOR

This form is to be attached to your grievance form for any injuries or any other claim (except property) arising out of a tort alleged to have occurred during your incarceration as a result of an act or omission of the Department of Corrections or any of its agents, former officers, employees or contractors.

The following information is necessary to fairly evaluate your claim. Please provide complete information. If you need more space, attach a separate sheet of paper. You may submit additional evidence if available. Such additional evidence will be returned.

CLAIM IN THE AMOUNT OF $_____ is hereby made against the Department of Corrections, based upon the following facts:

1. NAME OF CLAIMANT (Please print full name)	2. I.D. #	3. INSTITUTION
Michael ADKISSON	84280	N.N.C.C.
4. AMOUNT OF CLAIM	**5. DATE AND DAY OF OCCURRENCE**	**6. TIME (a.m. or p.m.)**
As set forth in Grev.	Nov 1st 2016 - thru Current/ongoing	ONGOING
7. PLACE OF OCCURRENCE		
Nevada Dept of Corrections		

8. Describe here, in complete detail, exactly how your claim loss or damage occurred and why you believe the institution is responsible or liable:

I am denied my right to Vote, serve as juror and Ability to hold office as Contemplated by N.R.S. 213.157 Solely as a result of ABUSE of Authority by N.D.O.C. in the Illegal and unauthorized Classification designation by Claiming that my Status is that of an Offender when in fact I am a Parolee with No Current Conviction under Consideration where My Parole Grant became effective Nov 1 2016 See Below #10

9. Witnesses. Be sure to include any staff member who may have been involved in, or has any knowledge of, your alleged loss; also, list any inmate who has actual knowledge of facts pertinent to your claim:

Warden HENLEY (AWO)
Caseworkers Griffith, Vaccaro, BARAZA, Hughes, AGLE

10. Other pertinent information:

and where N.R.S. 213.157 Restoration of Right to Vote, Serve as juror and right to hold office when Granted Parole is being denied to me Solely as A result of the institutions Classification designation which works to deny my rights related to my Grant of Parole By Claiming that I am an "Offender" see N.R.S. 209.081 Offender defined means a person Convicted of a Crime and sentence to prison In this instance I do NOT HAVE ANY remaining Convictions

STATE OF Nevada)
) SS
COUNTY OF Carson)

I, Michael Adkisson, do hereby swear under penalty of perjury that I am the claimant named above, that I have read the foregoing claim and know the contents thereof, that the same is true of my own knowledge, except those matters stated upon information and belief, and as to those matters, I believe them to be true, and that THIS IS MY ENTIRE CLAIM AGAINST THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS.

I FULLY UNDERSTAND THAT I WILL HAVE TO SIGN A GENERAL RELEASE OF ALL CLAIMS IN THE PRESENCE OF A NOTARY PUBLIC FOR THE EXACT AMOUNT I AM CLAIMING BEFORE ANY PAYMENT WILL BE OFFERED TO ME. THIS GENERAL RELEASE WILL BECOME EFFECTIVE ONLY UPON ACTUAL PAYMENT OF THE CLAIM BY THE STATE OF NEVADA.

DATED this 17th day of November, 2022

Signature of Claimant

NOTICE

NEVADA REVISED STATUTE 197.160 provides that every person who knowingly presents a false or fraudulent claim is guilty of a gross misdemeanor, and is subject to criminal penalties of imprisonment of up to one year, and a fine of up to $2,000.00.

DOC 3095 (12.01)

****

THE FOLLOWING FROM NCJIS CRIMINAL JUSTICE IS A RESULT OF YOUR SQCH INQUIRY ON:
NAM/ ADKISSON, MICHAEL DOB/ 19650716

****

NCJIS BASE RECORD
NAME: ADKISSON, MICHAEL D
DOB: 07/16/1965
RACE: WHITE SEX: M HEIGHT: 509 WEIGHT: 210
HAIR: RED OR AUBURN EYES: BROWN

ALIAS NAMES:
ADKISSON, MICHAEL
ADKISSON, MICHAEL DEAN

POB: CA

ADDRESS:
4020 S ARVILLE
LV, NV

SID: NV02437476
FINGERPRINTS ARE AVAILABLE.

CRIMINAL HISTORY RECORD PCN/ 21221278
FINGERPRINT BASED RECORD

ARREST DATE: 2004-02-19
ARRESTING AGENCY: CLARK COUNTY DETENTION CENTER ORI: NV0020135
NAME USED: ADKISSON, MICHAEL DEAN
OCA: 0917293

BOOKING AGENCY: CLARK COUNTY DETENTION CENTER ORI: NV0020135

ARREST OFFENSE
1: MURDER WITH A DEADLY WEAPON FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00093 NCIC: 0912

COURT/FINAL CHARGE
1: MURDER IN THE SECOND DEGREE FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00094 NCIC: 0999
EIGHTH JUDICIAL DISTRICT COURT ORI: NV002015J

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-12-06
CASE #: 04F03106X
NAME USED: ADKISSON MICHAEL DEAN

SENTENCE DATE: 2004-12-06 FACILITY: NEVADA STATE PRISON
SENTENCE: LIFE WITH POSSIBILITY OF PAROLE

CREDIT TIME SERVED:
YEARS: MOS: DAYS: 252 HOURS:

SPECIAL CONDITIONS: YES

RECORD CREATED: 2004-02-19 07:02:46 LAST UPDATED: 2019-08-29 13:09:44

CRIMINAL HISTORY RECORD PCN/ 10948937
FINGERPRINT BASED RECORD

ARREST DATE: 2001-08-21
ARRESTING AGENCY: LAS VEGAS METROPOLITAN POLICE ORI: NV0020100
NAME USED: ADKISSON, MICHAEL DEAN
OCA: 0917293

ARREST OFFENSE
1: BATTERY/DOMESTIC VIOLENCE MISDEMEANOR
NEVADA STATUTE NRS 200.485 NV OFFENSE CODE: 02138 NCIC: 1399

COURT/FINAL CHARGE
1: BATTERY MISDEMEANOR
NEVADA STATUTE NRS 200.481 NV OFFENSE CODE: 00145 NCIC: 1399
LAS VEGAS MUNICIPAL COURT ORI: NV002051J

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-01-20
CASE #: C-0497567-A
NAME USED: ADKISSON MICHAEL DEAN

SENTENCE DATE: 2004-01-20
SPECIAL CONDITIONS: YES

RECORD CREATED: 2001-10-09 08:10:15 LAST UPDATED: 2018-04-08 15:54:46

WHEN AN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY.

IF FINGERPRINTS DID NOT ACCOMPANY THIS INQUIRY, THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY IS UNABLE TO GUARANTEE THAT THIS MATERIAL CONCERNS THE INDIVIDUAL IN WHOM YOU ARE INTERESTED.

IN REGARDS TO THE ABOVE NAMED SUBJECT, THIS DOES NOT PRECLUDE THE POSSIBLE EXISTENCE OF ADDITIONAL MATCHED RECORDS IN LOCAL OR FBI IDENTIFICATION DIVISION FILES WHICH ARE NOT INDEXED BY THE NEVADA STATE CRIMINAL HISTORY RECORDS REPOSITORY. THE USE OF THIS INFORMATION IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE AND MAY ONLY BE USED FOR THE PURPOSE REQUESTED.
NEVADA AGENCIES - REFER TO NRS CHAPTER 179A.
****** END OF CRIMINAL HISTORY RECORD ******

Michael Adkisson #84280
P.O. Box 7000 N.N.C.C.
Carson City NV. 89702

February 9 2023

Kristina Wildeveld & Associates
550 E Charleston Blvd Ste A
Las Vegas NV. 89104

RE.: Response to Kristina's Claim's with Supporting Documents and Proposal to Satisfy Wildeveld & Associates Fiduciary duty.

Kristina,

As much as you do not enjoy or appreciate long letters, Please believe I do not enjoy nor appreciate the fact that I'am now tasked with 'teaching' my attorney 'anything about anything'.... just because you are smart ... does not mean everybody else is stupid ... litigious ... argumentative ect...

I GUARANTEE, if you read this material and review the attached documents, YOU will agree that you have been operating on a BAD custom, usage and practice, you will feel Compelled to offer an apology. Although I'am not looking for one. I need, and the Community needs, INTEGRITY and Courage from our officials and the attorney's that have the PRIVILEGE to serve the 'interest of our State

1.) My Current custodial Confinement is predicated upon a Consecutive Sentence, Separate and distinct for all purposes', for which no separate offense or conviction is contemplated Statutorialy either by N.R.S. 193.165 nor N.R.S. 200.030 (NO ENHANCEMENT OF MAXIMUM SENT INFRA)

2.) The claim by your office that the Board of Pardons Commissioners has the power to commute a Consecutive sentence that does not Constitute a Crime and NEVER results in a Conviction is a LEGAL FICTION

3) The power to pardon or to have a punishment commuted is vested by the Constitution, in the Board of Pardons Comm. and limited to the crime of Conviction under Consideration.

4.) I Suffered a single unitary Conviction

5.) The Single Unitary Conviction is discharged through Parole, effective November 1, 2016

6.) There is no separate offense, and no conviction contemplated by N.R.S. 193.165

7.) The Board of Pardons Commissioners has no power or authority what-so-ever to even consider commutation of the "punishment" related to my current Confinement to prison for use of a deadly weapon

Kristina, the legal fiction presented by your representations served to work an injustice designed to deprive/solicit fee's for a promised function or service that is not even legally available. It is time to set the record straight. The following brief explaination and review of the attached documents will reveal the fallacy of the false contention that N.R.S. 193.165 "use of a deadly weapon" works to enhance the maximum of any sentence; or works to augment the severity of any crime; or ever results in any Conviction

HISTORY and BRIEF EXPLAINATION YOU DID NOT KNOW RELATED TO NRS 193.165

The legislative policy related to the extent of the reach of N.R.S 193.165 was meant to prevent probation for crimes committed with the use of a deadly weapon; 193.165 (1) "Any person who uses ... a deadly weapon ... shall be imprisoned," and to trigger an increase in the minimum sentence imposed, within the maximum range of the sentence described by the crime, up through Category B felonies

N.R.S. 193.165 (1)"... shall be punished... for a term equal to and in addition to the term... prescribed by statute..." . (criminal statute not 193.165)
N.R.S. 193.165 has never defined criminal Conduct and has never Contemplated a sentence, and still to this day DOES NOT Contemplate a sentence. The 1-20 range now included in the statute works to define the limit of the Range of felonies that are captured by N.R.S. 193.165, up to category B Felonies
The State Concedes this point. Keep reading Kristina you will benefit.!!

TAB # 1 PETITION FOR WRIT OF MANDAMUS (1974)

August 1974, David Eldon Dunckel pled guilty to two felony Counts: N.R.S. 200.380 Robbery; and N.R.S. 193.165 use of D.W. Trial Judge O'DONNELL refused to accept the plea of guilt to N.R.S. 193.165 because it is NOT a crime. District attorney WOOFTER Claimed that N.R.S. 193.165 does constitute a separate felony and Conviction and sentence.

TAB # 2 DOCKET SHEET NV. SP. Ct. WOOFTER V. ODONNELL

Significantly, and un-be-Knownst to present Counsel, the Court Consolidated Case No's: 7939 and 8074. Both of these Cases involve defendants that did receive a separate felony "Conviction" for use of a deadly Weapon pursuant to N.R.S. 193.165
The stage was set where, in Woofter V. ODONNELL, the underlying case involved a defendant that DID NOT receive any Conviction, and in Contrast the two Consolidated Cases both involved defendants that did receive a Conviction.
Also Significant to Notice is the fact that

* I have purchased all related briefing docs transcripts ect to each and every case described

the Woofter Petition for Mandamus must resolve in a MANDATE, unlike the two Consolidated cases, which unlike Woofter, were submitted as Habeas Corpus. No Matter how you slice it a MANDATE must issue and it did but not until the Supreme Court notified the 58th Session of the legislature (1975) related to Ambiguities related to N.R.S. 193.165 that resulted in Varied interpretations

TAB #3 SELECTED SIGNIFICANT LEGISLATION (1975)

After the NV. SP. Ct. Docket of WOOFTER V. ODONELL, but BEFORE oral arguments, the court asked the legislature to clear up ambiguities related to N.R.S. 193.165 in order to determine if N.R.S. 193.165 defines criminal Conduct. A.B. 502 Chapter 465 clarified perceived ambiguities, establishing that N.R.S. 193.165 is not a Separate offense and must not be treated as criminal conduct. The use of a deadly weapon statute instructs or informs the court to 'increase the term handed down by the Judges' discretion within the framework of the actual available SENTENCE (These statements are derived from the state's concessions INFRA)

TAB #4 1973 and 1975 version of N.R.S. 193.165 and TITLE

The ambiguity related to N.R.S. 193.165 was found in the TITLE of the ACT related to State Constitutional requirements. The TITLE of the ACT described "... Penalty for the use of a firearm..." (1973 Version.) In order to clarify the criminal RULE the 1975 Legislature Changed the Verbiage in the title of the ACT... "Clarifying.... additional penalty for the commisson of a crime..." and providing the express clarification of the Criminal RULE by provision #2 "This section does not create any separate offense but provides an additional

penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact."

Significantly, this established that the prescribed fact, triggering an increased sentence is NOT an offense. Equally significant there is not a sentence contained in the frame work of N.R.S. 193.165 and the prescribed fact is not an ELEMENT of any crime. This legislative clarification of the CRIMINAL RULE related to N.R.S. 193.165 Completely eviscerated District Attorney Woofters Petition for MANDAMUS even before the Oral arguments. Woofter postulated that N.R.S. 193.165 does constitute a Separate unitary felony Conviction and Sentence. The legislature expressly denied this posture.

Significantly, N.R.S. 193.165 (2) 1973 version prevents 'use of a deadly weapon' as a consideration in sentencing when any statutory crime contemplates "USE of A DEADLY WEAPON" as an ELEMENT of any crime. The importance is clear, N.R.S. 193.165 is not an ELEMENT of any crime and does not increase the maximum punishment. Simply put if use of a deadly weapon is not already an ELEMENT of the crime under consideration, any Subsequent Consideration of N.R.S. 193.165 Cannot be applied as an ELEMENT. MURDER does not become Murder with the Use of a deadly weapon. Supported INFRA TAB #5 TRANSCRIBED ORAL ARGUMENTS WOOFTER V O'DONNELL

As discussed Supra, the states position that N.R.S. 193.165 is a chargable offense with a Conviction and Sentence was ABANDONED at ORAL arguments following the legislative Clarification. The State Conceeds that only a Single

offense is involved further stating "...[t]he judge is not robbed of any discretion because two offenses are not involved, the judge is following a legislative edict ..., he shall impose a SECOND and CONSECUTIVE Sentence because of the use of a deadly weapon." Later the State argues "Well a Conviction is not independent for each crime, the conviction is Robbery with the use of a deadly weapon, true, two Sentences are imposed but the Conviction is Single"...

The confused posture of the State first claiming N.R.S. 193.165 is a crime, then conceeding it is not a crime was further countermanded by their claim that a UNITARY Conviction - Robbery with the use of a deadly weapon - can allow two separate and distinct punishments. Oddly pointing out that N.R.S. 176.033 limits any Sentence to the SINGLE Sentence within the Minimum Maximum limits provided by the applicable statute (see trans. pg 8. TAB 5)

The written decision emphasized the Single Sentence requirement INFRA

TAB # 6 WOOFTER - V - O'DONNELL written decision

Kristina, please follow me here, this material is crutial and has been over-looked. To be Fair, I think the explaination for this is tied to the stated; "DISPOSITION: Writ of Mandamus granted."

This statement does not reflect the truth of the matter or the written decision. The same applies to the stated "PROCEDURAL POSTURE" claiming that "Petitioner District attorney ... sought the issuance of a writ of Mandamus directing respondent district judge to sentence criminal defendant in accordance

with the enhancement punishment provisions of Nev. Rev. Stat. §193.165..."

As set forth Supra, the Writ of Mandamus did NOT seek any ENHANCEMENT pursuant to the provisions of N.R.S. 193.165 In fact the district attorney sought a Mandamus based upon the claim that N.R.S. 193.165 is a separate distinct Criminal statute, a Felony with a Separate Conviction and Sentence. (see TAB ONE pg 4) The Supreme Court rejected this argument after legislative Clarification and the district attorney did not argue for a Conviction The Mandamus was soundly defeated However as a result of the additional Consolidated Cases the written decision Set Forth the following guidance for sentencing purposes and issued a Mandamus related to the following findings and Opinion. #1. The SP.CT recognizing the legislative clarification that N.R.S. 193.165 is Not a Separate offense, and only provides for an increased sentence Set forth the following #2. "It is also a fundamental Concept expressed in Criminal statutes providing a Single sentence of imprisonment for each distinct Crime that a defendant may not be punished more than once for the same offense." The Court goes on to emphasize that N.R.S. 193.165 is NOT a PENAL statute. This is the basis of the Courts finding that N.R.S. 193.165 is a constitutional statute that does not offend the Double Jeopardy Clause - THE SINGLE SENTENCE REQUIREMENT CONFORMS WITH THE STATUTORY SCHEME IN NEVADA - Robbery Carries one Sent. Murder is limited to either 1st or 2nd and only Carries one Sentence.

Significantly, in the states briefing for oral arguments

Michael Addisson # 84280 February 9, 2023

the State addresses's Judge O'Donnells Claim that N.R.S. 193.165 works to deprive the judge of sentencing discretion by mandating an equal Consecutive sentence, the State replied and said that the sentencing judge is to lower the punishment for the Crime downward until an equal term would reach the desired total sentence with the maximum determined by the Min-Max set by the actual crime. Kristina, we know these things because we purchased every page of every brief related to N.R.S. 193.165 by All Attorney's - Bills ect

Ultimately the Woofter decision Clarified what the legislature set forth - N.R.S. 193.165 is NOT an offense and does not result in a Conviction - This means you can't "OBTAIN" a Conviction by aggravating Robbery into Robbery with the use of a deadly weapon. Further clarifying the Criminal Rule in Nevada "... It is also a fundamental Concept expressed in criminal statutes providing a SINGLE sentence of imprisonment for each distinct crime that a defendant may not be punished more than once for the same offense.

The NV. SP. Ct. issued a MANDATE that simply directs Judge O'DONNELL to sentence in accordance with the provision of N.R.S. 193.165 - DETAILing a Single Sentence -

TAB # 7 ORIGINAL J.D.C./Records Check confirming no Amended J.C.C. Related to DAVID ELDEN DUNKEL / Woofter v O'DONNELL

By this point we realized the magnitude of the problem, the state Squarely last the petition for Mandamus seeking two Convictions one for Robbery one for USE of

a deadly weapon. The "Disposition" and "Procedural Posture" Claims "Mandamus Granted" although this is not true. The written decision sets forth a Single-sentence requirement, the Petitioner district attorney was squarely defeated in pursuit of a separate conviction and sentence for use of a deadly weapon. The "Procedural Posture" claims that the district attorney in the Original Mandamus sought "ENHANCEMENT" pursuant to N.R.S. 193.165.... This is simply NOT TRUE!! The district attorney sought a separate felony conviction and sentence (see TAB 1 pg 4)

The written decision set forth the single sentence requirement detailing the legislative Clarification that N.R.S. 193.165 does not Create an offense - The problem was that other cases resulted in Conviction and or two-sentences. - N.R.S. 193.165 is Constitutional BECAUSE it is not an offense and does not provide a separate sentence.

To be positive we Conducted further records search seeking any Amended J.O.C. for DAVID EIDON DUNKEL district Court Case No.: 28424. There was never a new sentencing hearing District Court Judge O'DONNELL Won the day - the Mandamus was decided AGAINST the district attorney. A Single-Sentence for the Single Conviction of Robbery. There simply is no aggravated Crime of Robbery w/ the Use of a deadly Weapon.

The next year in Raby -v- State the Wheels fell off the whole thing.

TAB 8 RABY v STATE written decision

Despite the legislative clarification expressly declaring N.R.S 193.165

to be "Not a separate offense" (1975)(TAB 3-4) followed by the Woofter Court decision in support Prosecutors and judges Continued to treat N.R.S. 193.165 as a criminal statute. The Nevada Supreme Court reviewed Raby v State. Raby received 5 convictions for robbery and five Conviction for use of a deadly weapon by way of a jury verdict. The Court ruled that N.R.S. 193.165 is not a separate Criminal offense Citing Woofter and Ordered the five Convictions are hereby annulled. The court went on to say since Raby used a firearm "we shall treat the ten-year Consecutive sentence imposed... as the enhanced penalty Mandated by N.R.S. 193.165"

Kristina - THIS is where the wheels came off, First the decision in Woofter NEVER identified any ENHANCED penalty in fact the Woofter decision only lays out a Single-sentence principle set forth by which ever Criminal statute is the base's for the Conviction. Second, the Raby Court annulled the Convictions for use of a deadly weapon, directing that each remaining Robbery Conviction serve Concurrent terms of 10 years and a Consecutive term of 10 years for each Robbery as a result of using a firearm. This is a Judicial over-reach of a legislative function, each robbery is to be paroled or expired twice each with two 10 year terms. Notwithstanding what appears to be a Single 10 year Sentence for the use of a firearm.

No matter how you slice it the Convictions for use of a deadly Weapon were ANNULLED - But NO AMENDED J.O.C. was ever produced INERA

TAB 9 ORIGINAL J.O.C. / Records check Confirming NO AMENDED J.O.C. Resulted Related to RABY

Despite the NV. Sp. Ct. decision to ANNULL the five convictions for use of a deadly Weapon (citing Wheeler deciding N.R.S. 193.165 is NOT a separate offense) in RABY v. State, NO Amended J.O.C. ever took place. Raby was sent to Prison with a J.O.C. directing Imprisonment of 10 years to run Consecutive for Count VI USE of A DEADLY WEAPON Case no 27622 Raby had two cases both were Robbery w/ use but only case No 27577 was Amended. Interestingly - NO second sentence for 'USE of D/W was imposed. But see Raby case no 27622 which was the subject of the Sp Ct. decision.

What has become clear is that no court would actually issue a Judgment that reads ; Count 1 Robbery - ten years in prison, and when thats over do another ten years on the same Robbery, we will just call the Separate distinct Consecutive Sentence ENHANCED punishment for using a firearm.

Those of us that understand this MACHINATION are shocked that the System and players just turn a blind eye more on that INFRA

Once the first offender arrived at state prison with a J.O.C. that Commands imprisonment for "USE of a deadly Weapon" N.R.S. 193.165 The Director Created a Classification System with a Crime Severity Index Code that assigns use of a deadly weapon as a crime. The Dept. ignores

the statutory language: "NOT a separate offense" and unilaterally assigns a Conviction and represents a Category of Felony This Happens with All of YOUR CLIENTS ... Illegal Criminal more INFRA

TAB 10 MINUTES OF THE SENATE AND THE ASSEMBLY RE: N.R.S. 193.165

In 2000 Apprendi v. New Jersey was decided. Apprendi established that in order to increase the Maximum punishment for a Crime the enhancement must be the result of a Conviction of a greater or more severe offense, in other words it must be an ELEMENT of a Crime. This triggered review of the statutes listed on pg 2 including N.R.S. 193.165 - The Nevada legislature in 2007 realized the unintended Consequences of N.R.S. 193.165 that has Caused people to stay incarcerated beyond the Offense. The legislature recognized that the enhancement cannot increase the sentence for the Crime it is only meant to provide for the use of the full Range of the Sentence Not a single day more see pg 2, 4, 5, 6 and 7

Additionally the legislature recognized that Category A Felonies Do NOT have a discretionary RANGE and N.R.S. 193.165 CAN only be utilized to increase the Sentence pursuant to the Judges' discretion ONLY when the Crime provides a Range Declaring that these "enhancements" only apply to Category B through E Felonies see pg 4, 6

The 1-20 range that was added to N.R.S. 193.165

is NOT a Sentence range for the crime of use of a deadly weapon because it is NOT a crime. The 1-20 yr language expressly captures ONLY B-E felonies and describes the crimes or the RANGE of sent. for the underlying discretionary sentence. This EXPRESSLY EXCludes Crimes that CARRY life Sentences
The Funny thing is, A.B. 236 passed in 1973 Codifying N.R.S. 193.165. At that time we did NOT have Minimum-Maximum Sentencing schemes - But we did have a RANGE. The Judge picked a number of years based upon factors as a matter of EQUITY - and he was to double that number up to the Maximum range of the Crime if a Weapon was used.
Significantly many judges realized that this means if NO Gun is used ONLY 1/2 of the MAX Could issue!!
*I have plenty of J.O.C.'s and Records that demonstrate this.
In 1973 the Assembly voted "NOT ONLY NO BUT HELL NO"
"This is a do nothing bill" the Senate passed it Anyway

TAB II NEVADA CRIMINAL JUSTICE INFORMATION BASE RECORD re CONVICTION RECORD

Kristina, by this point we are both tired, please hang in there!
Also by now you must realize that you were wrong about N.R.S. 193.165 providing a Conviction.
Many attorney's do not realize the significance of a Conviction Record and who is responsible for it's production. Unlike a Judgement of Conviction

which is prepared by the prevailing attorney and does include a claim that Adjudication of guilt and a conviction and sentence are found for N.R.S. 193.165 - The Conviction record is prepared by the Court and must Conform with the UNIFORM CRIME REPORTING ACT. The State record is the Nevada Criminal Justice INFORMATION SYSTEM BASE RECORD - In my case the ONLY Conviction is pursuant to N.R.S. 200.030 SECOND DEGREE MURDER This is Significant - The Court does NOT claim a Conviction for N.R.S. 193.165. The fact that this is the record that is relied upon in order to report Conviction to be included in the Federal Conviction Data Base N.C.I.C.

Although the Conviction record claims that I pled Guilty, this springs from an Amended J.O.C. by - McCarthy he messed it up. Simply put - THE CONVICTION record maintained by the Criminal records repository DOES NOT reflect a Conviction or Sentence for N.R.S. 193.165

TAB 12 PETITION FOR WRIT OF CERTIORARI

Kristina, the attached writ by Kirshbaum Also sets forth the argument that I am NOT being held pursuant to a Constitutionally Viable Consecutive Sentence - After the discharge of the SOLE CONVICTION

TAB 13 NDOC POLICY STATEMENT

N.D.O.C. Grievance response establishing treatment of N.R.S. 193.165 as Category F Conviction

N.R.S. 193.165 as Continuation of discharged Murder Sent

N.R.S. 193.165 as Second Count when only one Count Stated

N.R.S. 193.165 as Not an Offense, but must still be punished with an Offense

TAB 14 PAROLE COMMISSIONERS STATEMENT

Despite the legislative command directing the Parole Board to identify the CRIME under consideration, the Board simply defers to the Dept's representation as to Crime and Category of Felony Conviction.

The result is that the Board considers parole for the use of a deadly Weapon with the claim of a Category F felony Conviction. Thats Right I said Category "F"

Conclusion

By now you must understand that my current Confinement to a State prison is without statutory authority.

If it still escapes you, think about those who have Expired their Sole Count of Conviction. Think about Foriegn Nationals and the implications. Think about Justice

The NV. SP. Ct has held that N.D.O.C. must rely on the Verbiage in the relevent Statute in this instance N.R.S. 193.165 "NOT A SEPARATE OFFENSE" and not to rely on the Verbiage in the J.O.C. (see Vonseydewitzs) Also see BOWEN- instructing N.D.O.C. to treat 193.165 Separate for All purposes!

Kristina, I could have already filed a False imprisonment Claim - There is No sufficient STATUTORY authority for Confinement to a Prison

I haven't because of how big this issue is, and quite frankly - there are TOO MANY of these GANG-BANGERS

and RACIST I would rather not help. The work I have done has been a CIVIC exercise - The Board Knows, the Dept too. If they had any Sense I would have been at the pardons Board.

Which brings me to another point, it was clear that you were caught flat-footed and not prepared, you waited until the DEADLINE and then made an effort when asked for the P.S.I you didnt HAVE a Complete file.... I'am surprised, disappointed, and WORRIED.

Frankly, I hope you are pissed off. You need a fire built under you. Considering that you didn't even Know that I have not been litigating or Suing Anybody - You didnt even try to ASK me - You only ACCUSED Me and my wife, which tells me You did not even try to defend me?

Whats worse is that your clients have had their hats handed to them because you thought (think) N.R.S. 193.165 results in a Conviction

Johnathan Kirshbaum refused to Amend my 2254 because he is a coward!! Despite his representations to the Court that No Conviction is present - He told me that he changed his mind, that N.R.S. 193.165 is a crime Separate and distinct.... He Also told me this is TOO BIG he is just a Coward!! I'am Confident that he was instructed or Compelled Not to Amend the 2254 with this issue.... Another thing that is disheartening...

michael ADKISSON * 84280 February 9 2023

[redacted]

NONE of you Knows the difference between any of us!! I stand up for what is right all the time Not Some of the time. You Remember Michael Lee Smith? He got out, he lives at his dads house and is doing well He changed his life - You did good helping him out.

I bet if you asked him, about me you would come to understand that I DESERVE your BEST Effort!!

PROPOSAL

I do not care about any litigation, my goal is to come home to my wife and children. It is clear to any reasonable person that the Board of Pardons Commissioners can only Consider a Current crime, I do not have ANY undischarged crime. NO Conviction remains - NOTWITHSTANDING this fact I would promise to never breech that subject IF I Could get relief - they CAN operate any way they chease OR I would Plead Guilty to even Second degree if the Sentence was 10-25 and CALL it Good

But Absent these outcomes, the only proposal left is for the Return of the "35,500" -

You were hired for your political ability - I Know You CAN Get it done if you really apply Your self

I need an Answer by MARCH 9 2023.

I have already initiated a voter Rights Violation

Michael Adkisson # 84280 February 9 2023

and exhausted a false imprisonment Grievance.

Kristina, I don't want to be forced into any litigation - But I'am right about every bit of this circumstance.

As far as the Voting Rights issue - N.R.S. 213.157 Restores my Civil-RIGHT to Vote immediately upon a Grant of Parole - So long AS NO Conviction Remains - I will Beat All of the Procedural B.S. with this Claim and will force an Answer on the Merits.

It's a short trip from that Point.

I PRAY you ARE pissed-off about being Fooled or tricked by the State, related to your understanding of N.R.S. 193.165

AND I HOPE You are NOT A COWARD like Jehnathan ~~MacArthur~~ RICHBAUM

I'am NOT AFRAID - The TRUTH is MY SHIELD

I will win if it must go that way.

Hope to hear from you.

Tired of writing, TAKE CARE Cordially,

IN THE SUPREME COURT OF THE STATE OF NEVADA.

ONE

ROY A. WOOFTER, DISTRICT ATTORNEY OF CLARK COUNTY, NEVADA;

Petitioner,

v.

THE HONORABLE THOMAS J. O'DONNELL, AS DISTRICT COURT JUDGE, EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA,

Respondent.

7939

PETITION FOR WRIT OF MANDAMUS OR IN THE ALTERNATE PETITION FOR WRIT OF CERTIORARI

FILED

NOV 13 1974

Judith McCulloch

TO: THE HONORABLE SUPREME COURT OF THE STATE OF NEVADA:

The Petitioner, ROY A. WOOFTER, respectfully represents:

I.

That he is a duly elected, qualified and acting District Attorney of Clark County, and by Statute NRS 252.080, 252.090 and 252.110 is charged with the duty of public prosecution. Pursuant to said duty this Petition is brought.

II.

The Respondent is now, and has been at all times, mentioned herein a District Court Judge in the Eighth

Judicial District Court, County of Clark, State of Nevada.

III.

That on the 12th day of August, 1974 a Defendant, DAVID ELDON DUNCKEL, entered a plea of guilty to the Information on file in District Court, Criminal Case No. 28424. The Information charged Defendant DUNKEL with Robbery - Felony - NRS 200.380, and Use of a Deadly Weapon During the Commission of a Crime - Felony - NRS193.165.

On September 19, 1974 the Respondent sentenced the Defendant, DAVID ELDON DUNCKEL, to eight (8) years in the Nevada State Prison. Said sentence was suspended and the Defendant was placed on five (5) years probation, the first nine (9) months to be served in the Clark County Jail. The Respondent took the position that the Information charged but one offense and it would be unconstitutional for the Court to impose two Judgments of Conviction. Further, the Respondent felt that to enhance the penalty wherein it becomes mandatory to impose two separate Judgments of Conviction for the commission of one offense is unconstitutional.

NRS 193.165 provides for an additional penalty when a firearm or deadly weapon is used in the commission of a crime. Section (1) provides:

"1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime."

Petitioner contends that Respondent acted without or in excess of his jurisdiction when he refused to sentence the Defendant to two consecutive sentences and declared NRS 193.165 unconstitutional.

That this Court has jurisdiction in this matter pursuant to NRS 34.010 to 34.310, as well as NRS 2.100, and the Nevada Constitution, Article VI, Section 4.

That the Petitioner herein has no plain, speedy and adequate remedy other than Mandamus or Certiorari.

Petitioner files this Writ, Affidavit and sentencing transcript. Petitioner further requests leave to file Opening Briefs and Points and Authorities at a later date.

WHEREFORE, Petitioner prays that a Writ of Mandamus be issued out of this Court compelling the Respondent to sentence the Defendant, DAVID ELDON DUNCKEL, in accordance to his plea of Guilty to Robbery - Felony - NRS 200.380 and Use of a Deadly Weapon During the Commission of a Crime - Felony - NRS 193.165.

DATED this 11th day of November, 1974.

ROY A. WOOFTER
DISTRICT ATTORNEY

By: Sherman H. Simmons
SHERMAN H. SIMMONS
Deputy District Attorney.

Consol w 8124
Consol w 8074

No. 7939 10-15-75, 9:30

ROY A. WOOFTER, DISTRICT ATTORNEY OF CLARK COUNTY, NEVADA,	George Holt, Roy A. Woofter, District Attorney, Sherman H. Simmons, Deputy, Fran Cremen, Deputy Please send a copy of receipts to Ogilvi and Seaton in this case. (No. 7939)
Petitioner,	Attorney for Dan M. Seaton, Deputy D. A.
vs.	
THE HONORABLE THOMAS J. O'DONNELL, AS DISTRICT COURT JUDGE, EIGHTH JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA,	Morgan D. Harris, Public Defender, Stephen Huffaker, Deputy
Respondent.	Attorney for Respondent.

TWO

Appeal from the EIGHTH *Judicial District Court,* CLARK *County, Nevada*

ORIGINAL PROCEEDINGS IN MANDAMUS/CERTIORARI

1974: November	13	Filing Petition for Writ of Mandamus Or In The Alternate Petition for Writ of Certiorari.
	15	Filing Affidavit of Service on David Eldon Dunckel.
	15	Filing Order respondent to file an answer, directed solely to issues of arguable cause against issuance of the writ, on or before December 4, 1974.
	21	Filing Affidavits of Service on David Eldon Dunckel, Judge O'Donnell and Morgan D. Harris, of Order dated November 15, 1974.
December	20	Filing Application and Order respondent may have to and including December 20, 1974, to file their answer in opposition to Petition for Writ of Mandamus/Certiorari.
	20	Filing Defendant/Respondent's Answer in Opposition to Petition for Writ of Mandamus Or In The Alternate Petition for Writ of Certiorari.
1975: January	29	Filing Order this matter set for oral argument November 11, 1975, at 11:30. Briefing schedules, as delineated in NRAP 31, are to be calculated from the date of this order. We further Order the clerk of the Eighth Judicial District Court to certify and transmit to the clerk of this court, forthwith, the original record of all proceedings.
February	5	Filing Original District Court File.
March	10	Filing Points and Authorities in Support of Petition for Writ of Mandamus Or In The Alternate Petition for Writ of Certiorari.
	18	Filing Order case Nos. 8124 and 7939 are consolidated for the purpose of oral argument and briefing.

1724 (Rev. 11-66)

No. 7939

975:		
larch	31	Filing Order appeal No. 8074 is concolidated for the purpose of oral argument with case No. 7939.
pril	4	Calendar: Ordered oral argument is set for October 15, 1975 at 9:30.
	22	Filing Application and Order respondent may have to and including May 21, 1975, to file his answering brief.
lay	22	Filing Points and Authbrities in Opposition to Petition for Writ of Mandamus Or, In the Alternate, Petition for Writ of Certiorari.
	27	Filing Appellant's Opening Brief.
me	23	Filing Respondent's Answering Brief. (Original in case No. 8124).
tober	15	Oral argument: Submitted.
cember	5	Filing Opinion-" . . . order that a writ of mandamus issue, directing the respondent district judge to resentence the defendant in the case before the court, in accordance with the provisions of NRS 193.165. Per Curiam.
	24	Issuing Writ of Mandate. Original and copy of writ and copy of Opinion sent to George Holt for service.
	30	Filing Writ of Mandate. Entg. return. Served on Judge O'Donnell December 29, 1975.

N E V A D A L E G I S L A T U R E

Fifty-Eighth Session

1975

THREE

SELECTED SIGNIFICANT LEGISLATION

Prepared by
Office of Research
Legislative Counsel Bureau

Andrew P. Grose
Director of Research

Mary Lou Love
Deputy Researcher

SELECTED SIGNIFICANT LEGISLATION BY CATEGORIES

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VII. Courts, Corrections and Criminal Law.

Extensive revision of the laws on rape was among the most significant legislation in this area. Several bills were aimed at clearing up ambiguities in the criminal code pointed out by the courts. (See next page)

A.B. 97 (chapter 740) clears up the ambiguity in NRS 200.020 in which the conditions for capital murder are defined. Specifically, a district court found the term "common plan" as the basis for a multiple murder to be ambiguous. This law clarifies that section.

A.B. 284 (chapter 256) broadens the conditions under which payment may be made to victims of crime. The law currently is interpreted to allow compensation only to victims of crimes in which the victim was seeking to aid another person. This law broadens the applicability so that an individual who is injured in self defense after trying to first help another is still covered.

A.B. 456 (chapter 363) provides for separate penalties for conspiracy to commit murder, robbery, forcible rape, kidnapping or arson as opposed to other crimes. Conspiracy to commit the former is punishable as a felony with a 1 to 6 year term. Conspiracy to commit other crimes is a gross misdemeanor. Previously, all conspiracy was treated as a gross misdemeanor without regard to the object of the conspiracy.

A.B. 461 (chapter 707) affects judicial districts. It creates an additional judgeship for the eighth district, bringing Clark County up to 11 judges. It also transfers Churchill County from the ninth to the third judicial district.

A.B. 462 (chapter 563) provides that under certain circumstances an alcoholic or drug addict accused of a crime may elect treatment for his condition under the supervision of a state approved alcohol or drug treatment facility rather than stand trial. This option does not apply if the person is accused of a crime against the person or if he is accused of dealing in a controlled substance or if he has two or more felony convictions on his record. Also, the criminal charge is not dropped but prosecution is postponed while the accused undergoes treatment.

A.B. 502 (chapter 465) is another case of clarifying ambiguities in the criminal code perceived by the supreme court. NRS 193.165 provides that the use of a gun or other deadly weapon in the commission of a crime will cause an increased sentence. The clarification states that the use of the weapon is not a separate offense but a part of the crime itself.

A.B. 664 (chapter 654) provides for counties to establish programs of medical care for rape victims and for counseling for victims or their spouses. There is a $1,000 limit on either service.

S.B. 52 (chapter 607) defines what constitutes the sexual abuse of a minor and also broadens the circumstances under which a husband is guilty of raping his wife.

S.B. 222 (chapter 600) primarily deals with the evidence in a trial for rape. Specifically, the conditions under which evidence of prior sexual conduct of the victim may be admissible are greatly restricted. No reference to the "unchaste character" of a victim may be made in any instruction to the jury. Finally, no medical costs incurred on behalf of a rape victim for initial emergency medical care or for examination for the purpose of gathering evidence are to be charged to the victim. Counties are to pay such costs.

Assembly Bill No. 234–Messrs. Dreyer, Dini, May, Banner, Schofield, Prince, Robinson, Demers, Bennett, Ullom, Craddock, Smalley, Mrs. Brookman, Messrs. Mello, Barengo, Ashworth, Hickey, Wittenberg, Vergiels and Bremner

CHAPTER 759

AN ACT relating to crimes and punishments; doubling the penalty for the use of a firearm or other deadly weapon in the commission of a crime; and providing other matters properly relating thereto.

[Approved May 3, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 193 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

2. The provisions of this section shall not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

FOUR

Assembly Bill No. 502--Assemblyman Dreyer

CHAPTER 465

AN ACT relating to crimes and punishments; clarifying the intent of the legislature in providing an additional penalty for the commission of a crime with the use of a deadly weapon.

[Approved May 15, 1975]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 193.165 is hereby amended to read as follows:

193.165 1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

2. *This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.*

3. The provisions of this section [shall] *do* not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

TRANSCRIPT- ORAL ARGUMENTS
WOOFTER V. O'DONNELL

TRANSCRIPT

Oral Arguments – For Cases #7939, #8124, and #8074 10/15/1975

JUDGE: "No.7939 Woofter v O'Donnell and 8074 Accairdi v Warden and 8124 Lamoreaux v the State of Nevada. Mr. Huffaker, you may proceed.

MR. HUFFAKER: May it please the court, my name is Stephen Huffaker, I'm a deputy public defender from Clark County, since these cases have been consolidated, I'm here on kind of an unusual assignment, I guess. Unique in the fact that I'm here as both appellant and responded. I'm respondent for Judge O'Donnell and what originally was the Dunkel case. The District Attorney has filed Petition on a Writ of Mandamus or in the alternative a Writ of Certiorari and I'm here as appellant in the Lamoureux case, which is our appeal, which was tried at trial by judge Babcock. I think your honors that our arguments will be somewhat the same, regardless of who I'm responding to, in judge Babcock's court, as far as Mr. Lamoreaux, our client, is concerned on this appeal. Mr. Lamoreaux was given sentences of 10 years consecutive, when the use of a deadly weapon statute was used and six years on another charge. In his honor judge O'Donnell's court, Mr. Dunkel was given probation and he is out on probation at this time, however I guess the point isn't entirely moot at this juncture, in as much as it would determine in case of a revocation, what sentence Mr. Dunkel would then be assigned. I think your honors, that my point of departure on this matter should be just explaining to this honorable court, Judge O'Donnell's position on this matter, and I think by explaining his position on this matter perhaps it will cover our appeal on Mr. Lamoreaux as well. We do not object to the principle of enhancement of penalty as far as NRS 193.165 is concerned, we feel that this is the right of the legislature to enhance any type penalty that they choose to do, but we do object to the manner in which the statute is being used by the state and we also submit your honors, that the statute is unconstitutional as written and it's unable actually, to be enforced, as it is written, and I would like to cover those two points. The statute in question of course is 193.165 the additional penalty on firearm deadly weapon or used in the Commission of a crime. The statute merely says that any person who uses a firearm or other deadly weapon in the Commission of a crime shall be punished by imprisonment in a state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crimes. Now I'd like to stop right there before I go on to the second sentence. This we feel, is unable to be accomplished, the terms of that statute are unable to be accomplished, because it says "shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such a crime. We submit your honors, that no term is prescribed by any statute in the Nevada statutory scheme, we give limits, we prescribe limits, that the court may determine to make a determinant sentence, but no term as prescribed by statute in our statutory scheme, and where this statute says "a term equal to and in addition to the term imprisonment prescribed by statute for such crime, it simply cannot be done. It should say "a term equal to in addition to the term of imprisonment the limits of which are prescribed by statute and term of which is determined by the court, after all these pre-sentence reports and circumstances of the case, and everything are taking into consideration. This specifically is not done and so, therefore this statue can't be carried out. The next sentence has the same fatal flaw, it says the sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crimes. That isn't what the statute meant to say either, we now know what the statute meant to say, because there's been an amendment to the statute in this last legislature. We know the statute meant to say that they meant to enhance the penalty by giving the term that the judge said in the sentencing with that the defendant was to have that term that he said would be added to the term of the basic crime, but that isn't what the statute says, and therefore we

FIVE

feel your honors, that the statute on its face, is unenforceable because the words simply do not say what the statute meant to say. Now there are lots of reasons for this and I guess the reason is because the legislature didn't anticipate that problem when they wrote it, and it was poorly drafted, but I think at this point your honors that it is our duty in the judiciary, the courts duty in the judiciary to send that back and have it drafted properly and have it drafted the way they mean to say it. We also think your honor that it is not, that this, the provisions of this statute cannot be carried out according to the statutory scheme of other statute, in the Nevada system, for instance NRS 176.033 says, is entitled sentence of imprisonment required or permitted by statute an indefinite period of time, this is the determinant sentence statute. It says where a sentence of imprisonment is required or permitted by statute the court shall sentence the defendant to imprisonment for a definite period of time within the maximum limit or the minimum-maximum limits provided by the applicable statute. This is where I gained my authority from your honors that this statute 193.165 cannot be carried out, because it says a term of years, provided by the statute and then you go right back to another statute 176.033 and it says the defendant shall be imprisoned for a definite period of time within the maximum limit, not a term, but the maximum limit or the minimum-maximum limits provided by the applicable statute. And then it says, take into the account of the gravity of the particular offense, and the character of the individual defendant. So, in this statue, it's giving the intent of what the legislatures meant when they said "we're not going to have indeterminant sentencing anymore, we're going to have determinant sentencing. We're not going to sentence the guy for 5 to 15 years or 1 to 15, we're going to give him 8 years" and the reason we want this to happen is that because we want the judge who has sat at trial who has, observed the demeanor and the character and the evidence that is all coming to say, this isn't in the hands of parole boards, it's in my hands and I determine this is an 8 year sentence. That's exactly what 193.165 on its face which that's exactly the thing that makes it unconstitutional we submit, is that it says that a definite limit and not, I mean an indeterminant limit and not a determinant sentence as 176.033 says that we must have, then we go down right to the next statute 176.035 and this is entitled conviction of two or more offenses concurrent and consecutive sentences and this says "except as provided in subsection 2 whenever a person is convicted of two or more offenses and sentence has been pronounced for one offense, the court and not by statute, the court in imposing any subsequent sentence may in its discretion provide that the sentence ***substantively pronounce*** shall run either concurrently or consecutively with the sentence first imposed. Now I submit your honors there is absolutely no way that Use of a Deadly Weapon statute can be, can be in concert with this statute, this statute specifically gives the judge, the trial court judge, the discretion of whether the sentences shall run concurrently or consecutively and 193.165 takes that discretion in the next breath right away from him and says the use of a deadly weapon, if found at trial or pled too, shall be a consecutive sentence and takes that discretion right away from him. We feel that this is a black and white contradiction taking a discretion that has been given in one statute away from him by taking it away in another statue and we feel that it is been done because of poor wording in the statute on one hand, but in this case, it's done because it's just a conflict in the statutes. Now once again this is probably done because of a press and rush of business in the legislature, but these statutes just weren't researched and found that there was a conflict in them. We feel then your honors in summary of this point we feel that number one, the statute is poorly written. The terms which it is used are legal terms they say certain legal things and they can't follow through on those things because it is poorly drafted. We feel as well that it wasn't researched for the conflict, and it is unable to be carried out because of conflict in the rest of the statutory scheme and we feel its vague, because it attempts to do too much. It attaches to each,

perhaps it should, each crime should list what it attaches to and not have one statue cover all crimes. For instance, in several other states, they say in the crimes of, and they list burglary, robbery, rape, arson, or whatever, and they say these are the things we want our deadly weapon statute to apply to. In our statute it just says "any felony where a deadly weapon is used" it probably won't, it probably is also vague for overdrafts, probably also unconstitutional for overdraft for that reason. For instance, if a deadly weapon was used in a trespass, would we apply the deadly weapon statute. If he was caught with a deadly weapon in a trespass or in any other crime that it, that usually aren't the crimes of violence that we attach deadly weapon statute to. I would like to quote now, if I can, from the brief of the state on page 4 of their brief, they quote State v Rose, and I would like to use the quote that they use, because I think it supports the position that I just outlined very well. It says from State v Rose, "the constitution does not require impossible standards as specificity in, in penal statutes the test of granting sufficient warning as to prescribe conduct will be met if there are well settled and ordinarily understood meanings of words employed when viewed in the context of the entire statutory provision" Now I submit your honor, that this hasn't been done in this case because the well settled and ordinary understanding of the meaning of the words is exactly what I'm talking about when I say the statute in question uses words that we all know what mean and by, and by using those words in the meaning that they are meant to be used that is a term as outlined by the statute, those words can't be applied, the ordinary meaning of the words can't be applied and then it says when viewed in the context of the entire statutory provision. Well, your honors when viewed in the context of the entire statutory provision 193.165 is in direct conflict with the rest of the statutory provision. So, by using the state's own justification, I feel that there's just no question that this statute violates the principle of vagueness and I'll show that it also violates the principle of due process. I'd like to bring up now if I may, for my own brief an example of how I feel it violates the principle of due process. The Dunkel case was pled, it didn't go to trial, and I will admit before I even read this, this repartee of the trial court in the pleading that this was early in the statute and so everyone didn't understand it, but I think it shows very clearly the pitfall, pitfalls that we can get ourselves into if we do not strike this statue down. This is from the transcripts of the Dunkel case, after the court told both council that it had in front of it, the companion case, not the case that was in front of it, the District Attorney said well it really doesn't matter which case you look at your honor, because they are both robbery's and they both amount to the same thing, so let's just go ahead with the case here, and then this following exchange took place, by the court. Then you're saying, and this is judge O'Donnell; "then you're saying your plea negotiation is that if he is willing to enter a plea to the charges contained on file in the information 28428.: Mr. Redmond the district attorney's office; "all of those charges, yes, your honor". By the court; "all of them, you talk like there is more than one count". By Mr. Redman: "well, the robbery with the use of a deadly weapon". By the court; "there is one crime on file here without any amendment to it, other than that, when you say; all the charges, that would indicate that there is more than one charge. There is only one charge here because he only had one count on the information". Mr. Redmond says; "I said that only your honor, so that it would be clear that the negotiation was a plea of the charge of robbery with the use of a deadly weapon". Then the court returns; "a plea of guilty to the charge on file here in a specified there is no amendment to it, it specifies the use of a deadly weapon because it has underneath the heading up there Use of Deadly Weapon NRS 193.165 although it had no count use of a deadly weapon down in the body of the information". Mr. Redmond says; "all right". Now by the above exchange, it appears everyone has reached an understanding of what this, what Mr. Dunkel is pleading to. The court has pointed out that the state has only charged one offense and the state has pointed out that although it's

not a penal statute

only charged one offense in the body that information it means that the enhancement penalty at 193.165 should be attached to it and they so indicated on the heading of their information, but then this next, this next exchange, I think is very important for the court to consider. By the court; "council have you informed the defendant of the penalty that can be imposed if I accept this plea of guilty?" Mr. Maynor; defense council says; "I have your honor, 1 to 15." By the court; "Is there any fine involved?" By Mr. Maynor; "no Sir, no fine." By the court: "Mr. Dunkel, are you aware if I accept your plea of guilty that you could be imprisoned in Nevada state prison for not less than one, nor more than 15 years?" By the defendant; "yes Sir." Now it's obvious you're honors that this statue is created some misunderstanding. We have a defendant standing here pleading to a charge that he thinks is going to be a maximum of 15 years, we have a judge sitting on our bench that thinks that, we have a defense counsel that thinks that, and we have a District Attorney standing there who lets it all happen, whether he thinks it or not. I have no idea but lets it all happen. Now it just so happens that Mr. Dunkel came back and was granted probation, but if he had been given 30 years, 15 and 15 there would be no question it's a violation of due process. If he had been given 8 years on the basic sentence, so that we had an 8 and 8, which totaled 16, there's no question, that would be a violation of due process, because he thought he was pleading to a maximum of 15 years. Now this is the misunderstanding that this statute is created, the District Attorney thinks it should be applied one way, trial, I mean defense counsel thinks it should be applied another way, and the trial court is up in the air and I submit that this isn't the first time, nor is it the last time that this sort of thing will happen, but it just happened, that on the very cases before us there is a definite violation of due process, had that sentence come back at more than 15 years, because no one understood it, and I think this happened your honors because the poor drafting of the statute itself. And if there are no questions on that, I would like to get on to my second argument and that concerns the manner in which the state is using this statue. First off, in summary, we think the statute is unconstitutional both on its face and as a violation of due process both for vagueness in violation of due process and secondly we think the manner in which the state is using it is also a violation to the defendants' rights and I don't know exactly where to put that violation of the defendants rights, but I'd like to show that it is a violation of them. The state insisted before this new clarification on the amendment came out that they only charge one offense on, when they use a deadly weapon statute, as it turns out, the new clarification of the statute says that they had been doing it right, they have only charged one offense. His honor Judge O'Donnell asked me to bring this argument before the court. Why is it a separate statute 193.165? And if it is a separate statute, how should it be pled? Now we have a defendant standing up here who has committed a robbery and the information says that he's used a deadly weapon. How are we to conduct a pleading? Are we to say, and he wants to plead to let's say the robbery, are we to say how do you plead to the robbery? And he says guilty or not guilty, or do we say; how do you plead to the robbery, and then say; how do you plead to the use of a deadly weapon? And let him make another response to that, or do we say; how do you plead to the robbery with the use of a deadly weapon? We have two statutes involved your honor. We don't only have one statue, so it creates a conflict in the trial judges mind to ask, to how to ask this defendant how he pleads. Whether he's to plea to one statute, to both statutes, or whether he pleads to robbery with the use of a deadly weapon, which is to combine the statutes. Now other states have solved this problem, as I said before, by putting the use of a deadly weapon in each one of the statues they meant to apply it to, like right in the robbery statue, at the end of the robbery statute they say "if a deadly weapon is used in the Commission of this crime then, and given an enhancement of penalty or they say it applies only to these certain specific crimes, but ours doesn't do that and therefore it creates a

problem, because of the way it's drafted. And then when you're asking the defendant, asking if he understands how, how, how the sentencing is to be, do you say; "do you understand that I could give you, now I'm the trial judge, do you understand that I could give you 1 to 30 years in Nevada state prison" is that what the trial judge is to say? Or is he to say; do you understand that I can give you two sentences... 1 to 15 years for the robbery and 1 to 15 years for the use of a deadly weapon? Or just how is he supposed to do it? It's not clear, because we don't have a definition of whether he's pleading to one sentence or whether he's pleading to two sentences at the time we take the pleading and we run into the same problem at sentencing whether when we go to trial. Judge O'Donnell also has the argument of this, and I brought this out in my brief. That if I was convicted of a crime, it's my first conviction, and under this statute I was given consecutive sentences and subsequently that's the only thing I've ever done wrong in my life and subsequently I go to another state and I get picked up for something that I got involved in, inadvertently, like I go to the aid of a young girl who's being raped and everyone takes off when the, when the police come and she thinks I'm part of it so she presses charges against me and I'm convicted inadvertent, on an inadvertent thing in another state and they see that I have a consecutive sentence back in Nevada, they see that I've been, I've been charged with a trespass with use of a deadly weapon, and I've been given a six month sentence for the trespassing, 6 month sentence for the use of deadly weapon, if that's possible, and I don't even know that it is and so they say that I have two convictions against me and their habitual criminal statute is the same as ours, that on three convictions you can have a habitual criminal charge placed against you, so they query Nevada and they just go through the NCIC or some other computer and they find that I do indeed do have consecutive sentences. How are they to take that, that I have one conviction or two? I think that anyone would assume that I have two convictions against me. I'm convicted under two statutes, but the statutory scheme says that I have only been convicted of one crime. I don't know that that's understandable by other states, and I think they might, just reading the printout on me, say that I have been convicted of two crimes, because I have a consecutive sentence on my record and thereby maybe put habitual criminal, habitual criminal charge against me. Now your honor, I think all of these things are made possible or impossible, as the case may be, because of the way this statute is worded, and I don't think that O'Donnell is the only one that's had problems with this statute. I know that judge Babcock did rule the other way on the statute after a hearing, but he had problems with it too and I think a lot of other judges have. We submit that the statute is unenforceable on its face, that it's in direct conflict with other statutes. And that the state perhaps in its use is made maybe the proper interpretation of it because that's the way the statutory, the new intent, the way it comes out now reads, that it is not a separate offense, but where you use two statues to complete one offense, it just creates doubt in the minds of everyone concerned, and I think that this statue, respectfully your honor, should be sent back to the legislature and have it written up the way they mean it, because it just creates doubt in the minds of all us and I think that, that's what we should do and I respectfully urge this court to do that.

JUDGE: Thank you, Mr. Huffaker. Mr. Cremen.

O.A.B.

MR. CREMEN: Thank you, your honor. Honorable members of the court, counsel, ladies, and gentlemen, before the court are 3 cases, that brought by the Clark County District Attorney against Judge O'Donnell asking him to apply the statute in question NRS 193.165 against Mr. Dunkel, that brought by Mr. Lamoreaux an appeal for his conviction of Robbery with Use of a Deadly Weapon, and that brought by Mr. Accairdi in his motion or the Nile of his motion for modification of sentence before Judge Christiansen. Mr. Accairdi had been convicted of robbery with the use of a deadly weapon, received

consecutive, consecutive sentences for those charges subsequently filed a post-conviction petition asking that his sentence be modified because the second sentence was unconstitutional. Judge Christianson denied that, that relief and he filed his appeal; his appellate brief was filed by the State public defender. The three cases involved, one similar issue, one is the first effect of NRS 193.165 which as counsel has stated provides for an additional punishment when a deadly weapon is used during the Commission of another crime. I think councils' argument is predicated on the assumption that the statute, as originally written, created another and different offense which the state had to plead separately in another count. If you read his argument, he finds fault with the fact in Lamoreaux, that the information which read robbery with use of a deadly weapon and in the second, resisting arrest and resisting a peace officer, resulted in three sentences, he says because there were three sentences imposed, 3 charges had to be brought because there were only two counts and each charge must be pled in a separate count he is alleged that the state is violated the terms of the statute and of the constitution of the United states. I think a reading of the statute in question, NRS 193.165, will readily convince the reader, that it does not create a separate offense, it reads very briefly, "any person who uses a firearm, and this is the reading of the statute before it was amended by the legislature last summer, any person who uses a firearm or other deadly weapon in the Commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of the imprisonment prescribed by statute for such crimes, sentence prescribed by this section should run consecutively for the sentence prescribed by statute for such crimes." Now, when it was written, it was placed not in the *subject Crimes chapter, but in the chapter of NRS entitled Preliminary Provisions and it was titled that it was a statute to prescribe additional penalty when a deadly weapon was used, from the placement of the statute and from its title the clear, the intent of the legislature is quite clear, it was intended to enhance punishment, not create addition, an additional offense, but to enhance punishment when a deadly weapon was used in the Commission of another crime. This intent of the legislature was made even more clear this last legislative session where the legislature did amend the statute by adding a second provision to the effect that, the intent of the statute is to provide additional penalty and not to create a separate offense. With that understanding of the purpose of the statute and the effect of the statute, let's examine the cases before us, council finds fault with the fact, that judge O'Donnell, when he examined the statute, the information, saw that only one count was alleged, robbery with the use of a deadly weapon, that is the only count that had to be alleged. The state need not have, need not have pled a second count charging use with a deadly weapon independent of the robbery with, with the use of a weapon. It is quite clear from the effect of the statute and the purpose of the statute that only one count is to be pled. **JUDGE**: Now you say that, why would the effect, of the *end hit of the statute not be carried out by pleading separately? **MR. CREMEN**: Well, I believe. **JUDGE**: Wouldn't the penalty be enhanced in exactly the same way? **MR. CREMEN**: I believe they would and when the, when the statute first was passed the state had some problem with that and originally was pleading the statute in a separate count. We've since changed our application of the statute to plead it only in a single count. **JUDGE**: Initially, initially you thought that the statute was susceptible of the interpretation then that it was to be creating a separate crime, that's what you believed. **MR.CREMEN**: Well, I don't, I don't know that we believe that, so much as we were concerned with the fact of giving notice to the defendant that he was being charged not only with robbery or whatever the crime may have been, but also with the Use of a Deadly Weapon, thereby notifying him by his, that by his Use of a Deadly Weapon he was very likely to be, if convicted to be given an additional penalty at first, perhaps mistakenly, we chose to give him that notice by pleading it in a separate count the Use of a Deadly

Weapon statute, but after further study of the statute its title and its placement, we believe that the intend of the legislature was to in effect enhanced the penalty only and not to create an independent offense. So, originally to affect the notice provisions of due process, we did plead it in a separate count, since then, we have not. I believe the count against Mr., the case against Mr. Accairdi, did involve 2 counts, but the effect of the second count was to provide the individual defendant with notice. The fact of the matter is that the statute requires the state to give notice for due process purposes, but it does not require the state to plead the violation in a separate count. Now Mr. Huffaker complains or suggests that due process was violated at the time that Mr. Dunkel entered his plea for the fact that his counsel had advised him only that the robbery charge would result in a possible sentence of 15 years. Well, if that was in fact what Mr. Maynor advised his client, then Mr. Maynor was ill advised. He had not realized that the subsequent legislation had been passed and provided for an additional penalty. If those are the circumstances under which Mr. Dunkel entered his plea, due process may have been violated, because the plea was not knowing it intelligence, it was not violated if it were, by the effect of this statute, the statute gave him notice, we pled it very specifically. Now when we plead robbery, we don't plead also the penalty that is involved when a robbery is committed. We, we plead robbery and it is up to council to inform his client that, that the penalty for robbery is 15 years possibly. In this instance, it was up to council to inform his client that the possible sentence was 1 to 15 for robbery and, and additionally, a consecutive sentence of 1 to 15 for the Use of the Deadly Weapon in the Commission of the robbery. I think the case law throughout the country is rather clear. There are other states which have legislation quite similar to that which we have; California, Washington, and New Jersey notably have found that their statues are constitutional, they do not involve constitutional problems. The Supreme Court of Alaska, however, found that its statute was unconstitutional, not for violation of the United States Constitution, but for violation of that state's interpretation of its constitutional provisions against double jeopardy. But I might point out to the state, to the court, the statute involved in in the Alaska case made it quite clear from its context that the Use of a Deadly Weapon charge was in fact another offense that statute read; "a person who uses a, uses or carries a firearm during the Commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years, that was the distinction in those two statutes, in the in the Alaskan statue and in our statute it's quite clear, that in our case that this does not create an independent offense, it creates really or actually only an enhancement provision for a crime committed with the Use of a Deadly Weapon. I might point out that the language in the Alaska case, which I think is crucial is that, which I quote now, "this might be construed as showing that the legislature intended only to modify the penalty provisions of robbery and other crimes," this is referring to a, a legislative comment and offer crimes, in other crimes to provide for mandatory minimum sentences which were, where such crimes were committed by a person using or carrying firearm, on the other hand the committee report used the word offense in relation to the bill and the statute states that one who commits designated offenses while using or carrying a firearm, is guilty of a felony. This is an indication that the legislature did not really intend to provide for more severe penalties, which is our case, but contemplated that when one committed eg; a robbery while using or carrying a firearm, he would have committed an offense different from the crime of robbery, not involving a firearm. Well, that is not the case here. Our legislation is quite clear and in the recent amendment of the statue by the last legislature makes clear that the legislative intent was only to provide an enhancement of penalty. Now, Mr. Huffaker draws the attention of the court to, 2 statutes and says that NRS 193.165 somehow conflicts with those statutes. I respectfully suggest that there is no

conflict, that if there is a conflict, it is one of which Mr. Huffaker wants to read into the statutes, not one which is there by the action of the legislature, the two statues which he says conflict with NRS 193.165 are 176.035, which states that except as provided in subsection 2 whenever a person is convicted of two or more offenses and sentence has been pronounced before one offense, the court in imposing any subsequent sentence may, in its discretion, provided the sentences subsequently pronounced shall run either concurrently or consecutively with the first sentence imposed. The key word to that statute is two or more offenses. It is the position of the state that when the court implements NRS 193.165 and provides another consecutive sentence it does so, it does so by virtue of an enhancement provision for a single offense, two offenses are not involved, so this statute does not come into play and the judge is not robbed of any discretion because two offenses are not involved, rather the judge is following a legislative edict, which requires him, that when a felony is committed or a crime is committed with the use of a deadly weapon that he shall impose a second and consecutive sentence because of the use of that deadly weapon. The second sentence statutes which he claims the statute conflicts with is NRS 176.033 which reads "where a sentence of imprisonment is required or permitted by statute, the court shall sentence the defendant to imprisonment for a definite term, definite period of time within the maximum limit or the minimum and maximum limits provided by the applicable statute." Now because NRS 193.165 states that the punishment to be imposed by virtue of that statute shall be that prescribed by the statute, he finds fault and conflict. It is not the statute which prescribes punishment, Mr. Huffaker claims, but rather the judge. Well, I submit that the statute does prescribe punishment, a judge merely implements punishment, he imposes punishment, he does not prescribe punishment. The legislature determines what is the appropriate punishment in each and individual case of the crime if the judge does not impose a punishment such as the legislature has prescribed then he punished, punished, imposes a punishment which is illegal. He must follow the edict of the legislature and the legislature prescribes the term of punishment, the judge Merely imposes a sentence, and he determines the length of the sentence, but he does not prescribe punishment. Mr. Huffaker looks at the provision of a crime, such as robbery, which says; "that this crime shall be punishable by not less than one nor more than 15 years" and chooses to call that 'limits of punishment', rather than 'term of punishment', while I submit that it, is as easily accessible to the reading 'term' as is 'limits' it is a term of punishment, the length of that term is to be decided by the judge in the individual case, but he is to follow the edict of legislature in prescribing punishment. There is no conflict, only which, only that conflict which Mr. Huffaker chooses to read into the statute, the legislation can be read most reasonably without conflict. Now if he wants to inject conflict that's his prerogative, but this court must take that reading of the statute which can be most reasonably assumed and if it is a constitutional reading must take that reading, because it must presume that the legislature acted to, to pass constitutional legislation. He envisions also, with the, the statute that a due-process problem may well arise if the defendant is convicted of both Robbery and Use of a Deadly Weapon. Well, a conviction is not independent for each crime, the conviction is robbery with the use of a deadly weapon, true, two sentences are imposed, but the conviction is single. Robbery with the Use of a Deadly Weapon. Now, if in his hypothetical example, the state in which the second crime is allegedly committed, chooses to, to treat that man as an habitual criminal, they cannot prove that charge, because if they went to the state and asked for a certified and exemplified copy of the conviction they would soon realize that there was only one crime committed, Robbery with the Use of a Deadly Weapon, despite the fact that two sentences are imposed.

JUDGE: Well now, I'm not sure they would, in those cases, where you were charged with separate counts. How would they know that? They'd get a, they'd get a certified copy of the, of the initial

information that charged two crimes and they'd get a judgment that would reflect that he was sentenced on two crimes.

MR. CREMEN: I can see, I can see very well your honor's point, and it is one well taken and if that is in fact the case and I'm sure that it is in some instances, because I have personal knowledge that some of these crimes or some of these cases where a deadly weapon was used, were pled in two counts. Then I would suggest... **JUDGE**: We just confirmed one the other day. **MR.CREMEN**: I would suggest that, the problem is really a matter of form, rather than substance, and can be easily corrected by amending those Judgments of Conviction, and perhaps that is something that should be done, but because the state mispleaded in the past those cases I do not believe that a *substantive err* was committed rather is one of a matter of form which in a hypothetical, such as Mr. Huffaker envisions can possibly have an ill affect, but I would suggest that the problem can be remedied, not by throwing out the conviction, because all due process requirements were complied with, but rather by amending the Judgment of Conviction itself. I think it's problem, really that can be cured in that matter, it's not one of substance. For these reasons.... **JUDGE**: Is the district attorney's office gonna go back in and, and move to amend all of those judgments? **MR. CREMEN**: Well, if we were directed to do that by the court, I'm sure we would, it is a problem which I could bring up quite certainly, to the powers to be within my office and perhaps they would take some independent action. I don't know that we've ever had this problem, as I stated, that we may have once misread the statute to, to believe that it required pleading it two counts. I do not believe the traction, it's subsequent proper application and that is what we are concerned with in this case. It's proper application by the state, in these cases. For these reasons, I feel that the statute is more than proper, it does not at all create the problems which Mr. Huffaker envisions. It is constitutional, it is quite clear that it is meant only to enhance punishment that it does not do so, that the legislature did not choose to do that by stating that when a burglary is committed it, with a weapon, that it shall be punished more severely or that when a robbery is committed it shall be punished more severely or that when a rape is committed with the use of deadly weapon it should be punished more severely, but rather chose to, to make that same effect by implementing a single statute rather than multiple statutes is a matter of legislation, legislative discretion I submit and has been found appropriate by other courts dealing with these, with this identical issue. For these reasons we asked the relief prayed for by Mr. Lamoreaux and Mr. Accairdi, the denial not really be affirmed and that the relief which the state seeks against Judge O'Donnell be granted and that he be ordered to implement the statute. **JUDGE**: Thank you Mr. Cremen. Mr. Huffaker. **MR. HUFFAKER**: If I may just have a couple of minutes on rebuttal your honor. I'd like to point out a couple of things which I, which I think that I should point out. The state, in its breaking down of these statutes, which I have claimed are in conflict with the statute in question, I think is overlooked some wording in those statutes 176.033 which talks about the maximum limits and minimum limits of sentences, which the court is, is to look to, I think your honors, when the state says that, the court, that is the statute which prescribes the punishment, well, that is so obvious that it's hardly worth mentioning. Every criminal statute we all know prescribes punishment, but I think this is a crass attitude for the state to take to, to infer that a punishment of one year is the same as a punishment of two years, or the punishment of one year is the same as a punishment of 15 years. Yes, the statute prescribes punishments, but this statute 176.033 specifically, is entitled 'definite period of time' and it says it is up to the court, to prescribe within the maximum limits and minimum limits of the statute, a definite period of time and to say that isn't in conflict with the statute that says; a term prescribed by the statute, I think is, is wholly unreasonable. And the other one where were talking about, were talking about 193.165 where the state says, that it says two or more offenses and so,

therefore this 176.035 doesn't apply because it's not talking about two or more offenses, it's only talking about one offense. Well then, why does 193.165 use the word consecutively? If we're not talking, you know, if were only talking about one offense? Now I will submit that in this, in the new intent that has been submitted by this past legislature, that, that I agree we're talking about one offense now, but all, I'm also the thrust of my argument is talking about the wording of the statute in question and the wording is faulty and they shouldn't use the word consecutive with them, when they're talking about one offense, it's just an enhancement of penalty, just enhance it. A better reading would be Robbery at 1 to 15, Robbery with the Use of a Deadly Weapon 5 to 25 or whatever they want to use, but by using words like consecutively and giving those sentences, another state has no idea what we're using. And then I bring up the question, your honors, of also what if the defendant chooses to plead guilty to Robbery but chooses to plead not guilty to the Use of a Deadly Weapon. What do we do? Do we go to trial? I guess we have to under this scheme, but if it was better written, then we wouldn't have to because then he could plead to either two offenses, as perhaps, is the better way to do it or he could have to go to trial on the whole thing. So, I submit your honors, that the, the problem lies, and I think the state is skirted the problem, the problem lies in the wording of the statute and it's vague and it is contradictory and that's where the problem lies and that's the thrust of our argument. I respectfully submit your honors, that this is the place to do something about that wording and send it back to the legislature and get it cleared up. Thank you very much. **JUDGE**: Thank you Mr. Huffaker. Justice Thompson is ill this morning he will participate in the decision of this case on the briefs and on the record of the oral argument, that which has been transcribed. The case will stand submitted. The court will be in recess until 25 minutes of the hour.

ROY A. WOOFTER, District Attorney of Clark County, Nevada, Petitioner, v. THE HONORABLE THOMAS J. O'DONNELL, as District Judge, Eighth Judicial District Court, County of Clark, State of Nevada, Respondent
Supreme Court of Nevada
91 Nev. 756; 542 P.2d 1396; 1975 Nev. LEXIS 767
No. 7939
December 5, 1975

Editorial Information: Prior History

Original proceeding in mandamus/certiorari.

Disposition:

Writ of mandamus granted.

Counsel *Robert List,* Attorney General, Carson City; *George Holt,* District Attorney, and *Frank Cremen, Dan M. Seaton,* and *Sherman H. Simmons,* Deputy District Attorneys, Clark County, for Petitioner.

Morgan D. Harris, Public Defender, and *Stephen L. Huffaker,* and *Joseph T. Bonaventure,* Deputy Public Defenders, Clark County, for Respondent.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner district attorney, in an original proceeding, sought the issuance of a writ of mandamus directing respondent district judge to sentence a criminal defendant in accordance with the enhancement punishment provisions of Nev. Rev. Stat. § 193.165. District judge was directed to resentence a criminal defendant in accordance with a statute enhancing a penalty if a deadly weapon was used in an offense where the statute did not violate double jeopardy and was not unconstitutionally vague.

OVERVIEW: The legislature amended § 193.165 to create an additional penalty for a primary offense if a deadly weapon was used in the offense. The district judge sentenced a defendant who had entered a guilty plea to the crime of robbery with the use of a firearm. However, the district judge refused to impose an additional sentence because the defendant had used a firearm in the commission of the crime. The district judge ruled that § 193.165 was unconstitutional, concluding that § 193.165 imposed two penalties for one crime and that it was vague and uncertain. The district attorney, in an original proceeding, filed a petition seeking the issuance of a writ of mandamus directing the district judge to sentence the defendant according to § 193.165. The court granted the petition. The court reasoned that § 193.165 did not violate double jeopardy because it clearly did not create a separate offense but provided an additional penalty for the primary offense. Further, the court concluded that § 193.165 was not unconstitutionally vague. The court explained that § 193.165 defined a proscribed course of conduct for which a perpetrator may be imprisoned.

OUTCOME: The court granted the district attorney's petition in his proceeding seeking the issuance of a writ of mandamus directing the district judge to sentence according to the enhancement punishment statute.

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LexisNexis Headnotes

Constitutional Law > Separation of Powers
Criminal Law & Procedure > Sentencing > Guidelines
Governments > Legislation > Enactment

The legislature has the power to declare certain conduct criminal and provide for its punishment. The power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Sentencing > Guidelines

Criminal statutes provide a single sentence of imprisonment for each distinct crime, and a defendant may not be punished more than once for the same offense.

Governments > Legislation > Interpretation
Governments > Legislation > Effect & Operation > Amendments

When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, such amendment is persuasive evidence of what the legislature intended by the first statute.

Criminal Law & Procedure > Sentencing > Adjustments
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Simple Use > Elements
Criminal Law & Procedure > Sentencing > Consecutive Sentences

Nev. Rev. Stat. § 193.165(1) reads thatany person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by Nev. Rev. Stat. § 193.165 shall run consecutively with the sentence prescribed by statute for such crime. Nev. Rev. Stat. § 193.165(2) reads that Nev. Rev. Stat. § 193.165 does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact. Nev. Rev. Stat. § 193.165(3) states that the provisions of Nev. Rev. Stat. § 193.165 does not apply where the use of a firearm or other deadly weapon is a necessary element of such crime.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
Criminal Law & Procedure > Criminal Offenses > Weapons > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Use > Commission of Another Crime > Penalties
Governments > Legislation > General Overview
Governments > Legislation > Vagueness

The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the Due Process

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Clause of the Fourteenth Amendment to the United States Constitution. The Constitution does not require impossible standards of specificity in penal statutes. The test of granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words employed when viewed in the context of the entire statutory provision.

Governments > Legislation > Interpretation

Where the intention of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose.

Opinion

Opinion by: PER CURIAM

Opinion

{91 Nev. 757}{542 P.2d 1397} Petitioner Woofter seeks in this original proceeding the issuance of a writ of mandamus directing the respondent district judge to sentence a defendant in accordance with NRS 193.165, commonly known as the enhanced punishment statute. 1 The district judge sentenced a defendant who had entered a plea of guilty to the crime of robbery with the use of a firearm to serve 8 years in the State prison, but suspended execution of the sentence for 5 years, during which period the defendant **{91 Nev. 758}** was placed on probation, serving the first 9 months in the county jail. The district judge refused, however, to impose an additional sentence because the defendant had used a firearm in the commission of the crime, declaring at the time of sentencing, ". . . [T]he other matter which called for the enhancement of the penalty under NRS 193.165, I am going to ignore it, as either unconstitutional or a Legislative encroachment on a judicial function." The district judge ruled that the statute was unconstitutional, "in that it calls for two penalties for one crime, and it is also vague and uncertain. . . ." 2

It is axiomatic that the Legislature has the power to declare certain conduct criminal and provide for its punishment. As early as 1820, in United States v. Wiltberger, 18 U.S. 76, 95 (5 Wheat.), Chief Justice Marshall declared: "[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."

It is also a fundamental concept expressed in criminal statutes providing a single sentence of imprisonment for each distinct crime that a defendant may not be punished more than once for the same offense.

Other jurisdictions having enhanced punishment statutes have considered and **{542 P.2d 1398}** ruled on the issue of whether such statutes **{91 Nev. 759}** place the defendant in double jeopardy. In People v. Henry, 91 Cal.Rptr. 841, 842-843 (Cal.App. 1970), the court resolved the question as follows:

". . . The fallacy of this contention is that section 12022.5 [of the California Penal Code] does not prescribe an offense. . . . Section 12022.5 merely provides additional punishment for an offense in which a firearm is used." 3

The California court further said, in People v. McDaniels, 102 Cal.Rptr. 444, 449 (Cal.App. 1972):

". . . That it [the Legislature] chose to accomplish its purpose through one rather than six amendments is not a valid reason for declining to carry out the legislative intent if that intent is clear, and if the

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amendment is not invalid for other reasons. . . .

". . .

"We hold that the concern of the Legislature over the use of firearms in the commission of crimes, and its desire to deter the use thereof by increasing the penalties attendant upon this use constituted reasonable grounds for increasing the penalties theretofore provided for the crimes enumerated. . . ."

The State of Washington has an enhanced punishment statute. Wash. Rev. Code Ann. § 9.41.025 (Supp. 1974). 4 In {542 P.2d 1399} State {91 Nev. 760} v. Rose, 498 P.2d 897 (1972), the Washington Supreme Court rejected the argument that the statute posed a double jeopardy problem. The court ruled that the imposition of consecutive sentences resulting from the "use of firearms" statute was not objectionable, on the ground that all sentences resulted from the commission of a single act. Further, the court stated in Rose, 498 P.2d at 903-904:

"Neither do we find any merit in the defendant's contention that consecutive sentences are prohibited because they all result from the commission of a single act. The thrust of defendant's contention is that all of the counts charged amount to the commission of only one *offense*. The test to be applied to determine whether or not there is only one offense, is whether each count requires proof of an additional fact which the other does not. Blockburger v. United States, 284 U.S. 299 [parallel cites omitted] (1932). *See also* Gore v. United States, 357 U.S. 386 [parallel cites omitted] (1958)."

A New Jersey court also considered the double jeopardy {91 Nev. 761} issue in State v. Buffa, 168 A.2d 49, 52 (N.J.App. 1961), where the court held:

"The present claim that the indictment was defective is based on the contention that there was an illegal joinder or consolidation of two separate and distinct statutory violations within the one count of the indictment, namely, robbery . . . and being an armed criminal . . .

"As this court had occasion to say again only a few weeks ago, it is well settled that an indictment like the one here under consideration does not allege two separate crimes, but a single crime (robbery . . .) under circumstances which permit greater punishment for that crime . . .

"The sentences imposed by the court, being well within the maxima allowed under the respective two statutes, were proper. Any suggestion that defendant has been subjected to double jeopardy is without validity. He was punished for only one crime, robbery, for which he received an enhanced punishment because he used a revolver. That a statutory provision for the imposition of a greater sentence because of particular circumstances -- in this case, being armed while committing robbery -- is constitutionally proper, is too well settled to require discussion."

Finally, the Nevada Legislature on May 15, 1975, passed Assembly Bill 502, amending NRS 193.165. 5 The amendment {91 Nev. 762} was a tool of emphasis to clarify the original intent of the Legislature when it passed NRS 193.165, in 1973. It clearly states {542 P.2d 1400} that the section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of a prescribed fact. When a former statute is amended, or a doubtful interpretation rendered certain by subsequent legislation, it has been held that such amendment is persuasive evidence of what the Legislature intended by the first statute. Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975).

In addition to his ruling that NRS 193.165 was unconstitutional because it placed the defendant in double jeopardy, the district judge held the statute void for vagueness. The doctrine that a statute is void for vagueness is predicated upon its repugnancy to the due process clause of the Fourteenth Amendment to the United States Constitution. The Constitution does not require impossible standards of specificity in penal statutes. The test of granting sufficient warning as to proscribed conduct will be met if there are well settled and ordinarily understood meanings for the words

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employed when viewed in the context of the entire statutory provision. United States v. Brown, 333 U.S. 18, 25-26 (1948); United States v. Sullivan, 332 U.S. 689, 693-694 (1947). Under such a test, we are satisfied that the words "[using] a firearm or other deadly weapon in the commission of any crime [is punishable by imprisonment] equal to and in addition to the term of imprisonment prescribed by statute for such crime" define a proscribed course of conduct for which a perpetrator may be imprisoned. We do not find unconstitutional vagueness in the statute.

Where the intention of the Legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute so as to give it force and not nullify its manifest purpose. State ex rel. Barrett v. Brodigan, 37 Nev. 245, 141 P. 988 (1914); State ex rel. Mighels v. Eggers, 36 Nev. 364, 136 P. 104 (1913); In re Prosole, 32 Nev. 378, 108 P. 630 (1910).

We conclude that NRS 193.165 is constitutional and that the word "shall" embodied within it operates to make its use mandatory. We therefore order that a writ of mandamus issue, **{91 Nev. 763}** directing the respondent district judge to resentence the defendant in the case before the court, in accordance with the provisions of NRS 193.165.

Footnotes

1

NRS 193.165, prior to the 1975 amendment:

"1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

"2. The provisions of this section shall not apply where the use of a firearm or other deadly weapon is a necessary element of such crime." Stats. Nev. 1973, ch. 759, at 1593.

2

The judge, in passing on the constitutionality of the statute, said in part:

"If they [the Legislature] don't give us a new crime, then they put the Court in the awkward position, if it [the Court] follows the statute, to impose two sentences for one crime, and thus an individual stands convicted twice for the commission of one offense.

"I feel that there is something inherently wrong with this method of enhancing the criminal penalty, and that there are many other ways in which the penalties could be enhanced: They could go through the statutes -- take Robbery, Burglary, Rape, and set up specific penalty sections for those crimes when they were shown to have been committed with the use of a deadly weapon, or they could simply say that if during the course of a trial it was clearly demonstrated to the Court that the deadly weapon was used in the commission of such crimes, which ordinarily do not necessarily -- as one of their elements -- include the use of a deadly weapon, and have another penalty provision, but only one penalty and not two penalties for one crime.

"I feel that it is unconstitutional and I am taking this time to declare it so, so that in the event someone wants to attempt to clarify this matter or our Supreme Court [does], then they can study the provisions of NRS 193.165."

3

Section 12022.5 of the California Penal Code (West 1970) provides as follows:

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Blacks law 2nd Ed. Prescribable adj. (of a right) than can be acquired by prescription
Merriam Web. Collegiate Dict. Prescribed v/b. 1. to lay down a rule; DICTATE 2 THE to something by right of prescription
merriam webster. Proscribe: To condemn Proscription: An imposed restraint

"Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnaping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. Such additional period of imprisonment shall commence upon expiration or other termination of the sentence imposed for the crime of which he is convicted and shall not run concurrently with such sentence.

"Upon a second conviction under like circumstances, the additional period of imprisonment shall be for a period of not less than 10 years, and upon a third conviction under like circumstances the additional period of imprisonment shall be for a period of not less than 15 years, such terms of additional imprisonment to run consecutively.

"Upon a fourth or subsequent conviction under like circumstances, the defendant may be imprisoned for life or a period not less than 25 years, in the discretion of the court.

"This section shall apply even in those cases where the use of a weapon is an element of the offense."
4

Wash. Rev. Code. Ann. § 9.41.025 (Supp. 1974):

"Any person who shall commit or attempt to commit any felony, or any misdemeanor or gross misdemeanor categorized herein as inherently dangerous, while armed with, or in the possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided:

"(1) For the first offense the offender shall be guilty of a felony and the court shall impose a sentence of not less than five years, which sentence shall not be suspended or deferred;

"(2) For a second offense, or if, in the case of a first conviction of violation of any provision of this section, the offender shall previously have been convicted of violation of the laws of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than seven and one-half years, which sentence shall not be suspended or deferred;

"(3) For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the law of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than fifteen years, which sentence shall not be suspended or deferred;

"(4) Misdemeanors or gross misdemeanors categorized as 'Inherently Dangerous' as the term is used in this statute means any of the following crimes or an attempt to commit any of the same: Assault in the third degree, provoking an assault, interfering with a public officer, disturbing a meeting, riot, remaining after warning, obstructing firemen, petit larceny, injury to property, intimidating a public officer, shoplifting, indecent liberties, and soliciting a minor for immoral purposes.

"(5) If any person shall resist apprehension or arrest by firing upon a law enforcement officer, such person shall in addition to the penalty provided by statute for resisting arrest, be guilty of a felony and punished by imprisonment for not less than ten years, which sentence shall not be suspended or deferred."
5

Stats. Nev. 1975, ch. 465, at 720:

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"Assembly Bill No. 502 -- Assemblyman Dreyer

"CHAPTER 465

"AN ACT relating to crimes and punishments; *clarifying the intent of the legislature in providing an additional penalty for the commission of a crime with the use of a deadly weapon.* [Emphasis added.]

"The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

"SECTION 1. NRS 193.165 is hereby amended to read as follows:

"193.165 1. Any person who uses a firearm or other deadly weapon in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for such crime. The sentence prescribed by this section shall run consecutively with the sentence prescribed by statute for such crime.

"2. *This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.* [Italicized material in this section was added by the 1975 amendment.]

"3. The provisions of this section [shall] *do* not apply where the use of a firearm or other deadly weapon is a necessary element of such crime." [In this section, the bracketed word "shall" was deleted, and the italicized material was added, by the 1975 amendment.]

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EIGHTH JUDICIAL DISTRICT COURT
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Steven D. Grierson
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Anntoinette Naumec-Miller
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September 1, 2021

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SEVEN

IR

IR, Deputy Clerk

FILED
Sep 27 11 44 AM '74
LORETTA BOWMAN
CLERK
BY Janet Reber

CASE NO. 28424

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
DAVID ELDON DUNCKEL
Defendant.

JUDGMENT OF CONVICTION

WHEREAS, on the 12th day of August, 19 74, Defendant DAVID ELDON DUNCKEL, entered a plea of guilty to the crime of ROBBERY, NRS 200.380, the above entitled Court thereafter, on the 19th day of September, 19 74, did adjudge the Defendant guilty by reason of his plea of guilty and sentenced Defendant to serve a term of eight (8) years in the Nevada State Prison, suspended, Defendant placed on probation for a period of five (5) years, to spend the first nine (9) months in the Clark County Jail, with no credit for time served.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 26th day of September, 19 74, in the City of Las Vegas, County of Clark, State of Nevada.

74-F-1234/sm
LVMPD DR#74-19157

DISTRICT JUDGE

P

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#84280 ADKISSON Exhibit

ALECK EUGENE RABY, Appellant, v. THE STATE OF NEVADA, Respondent
Supreme Court of Nevada
92 Nev. 30; 544 P.2d 895; 1976 Nev. LEXIS 507
No. 8184
January 23, 1976

Editorial Information: Prior History

Appeal from judgment entered upon jury verdict finding appellant guilty of five counts of robbery and five counts of use of a deadly weapon in commission of a crime; Eighth Judicial District Court, Clark County; Paul S. Goldman, Judge.

Disposition:

Robbery convictions affirmed; use of a deadly weapon in commission of a crime convictions annulled.

Counsel *Oshins, Brown & Singer, Chartered,* and *A. Bill Maupin,* of Las Vegas, for Appellant.

George E. Holt, District Attorney, *H. Leon Simon,* and *Rimantas A. Rukstele,* Deputy District Attorneys, Clark County, for Respondent.

Opinion

Opinion by: PER CURIAM

Opinion

{92 Nev. 31}{544 P.2d 896} The information charged Raby with the commission of ten separate crimes -- five robberies on the same day and at the same place, and the use of a firearm in the commission of each robbery. The jury found him guilty of ten separate offenses and returned ten verdicts. Judgment of conviction was entered upon each verdict. He was sentenced to serve concurrent terms of ten years on each robbery conviction, and concurrent terms of ten years on each "use of firearm in the commission of a crime" conviction, with the provision, however, that the first ten-year sentence for use of a firearm in the commission of a crime was to run consecutively to the first ten-year sentence for robbery.

{92 Nev. 32} Since the use of a firearm or other deadly weapon in the commission of a crime [NRS 193.165] is not a separate criminal offense [Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975)], the five convictions therefor must be and hereby are annulled. However, since the evidence is overwhelming that Raby did, indeed, commit the five robberies as charged, and that he used a firearm in the commission of each robbery, we shall treat the ten-year consecutive sentence imposed

EIGHT

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for using such firearm as the enhanced penalty mandated by NRS 193.165.

Consequently, Raby shall serve concurrent terms of ten years on each robbery conviction, and a consecutive term of ten years for using a firearm in the commission of the robberies.

Other assigned errors are without merit.

Kristina this appears to contemplate a single 10 years for using a firearm?

None of this matches the J.O.C.

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DO, Deputy Clerk

NINE

CASE NO. 27622

FILED
JAN 15 11 02 AM '75
LOLEY A. LOWMAN
CLERK
BY Jeanette Rose

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,

Plaintiff,

vs.

ALECK EUGENE RABY,

Defendant.

JUDGMENT OF CONVICTION

WHEREAS, on the 8th day of April, 1974, Defendant ALECK EUGENE RABY, entered a plea of not guilty to the crime of ROBBERY (five counts) and USE OF A DEADLY WEAPON IN COMMISSION OF A CRIME (five counts), NRS 200.380 and 193.165, and the matter having been tried before a jury and Defendant found guilty of the crime ROBBERY (five counts), and USE OF A DEADLY WEAPON IN COMMISSION OF A CRIME (five counts), the above entitled Court thereafter, on the 14th day of January, 1975, did adjudge Defendant guilty of said crime of ROBBERY (five counts), and USE OF A DEADLY WEAPON IN COMMISSION OF A CRIME (five counts), and sentenced Defendant to serve a term of ten (10) years in the Nevada State Prison, on Count I, with 329 days credit for time served in the Clark County Jail; ten (10) years in the Nevada State Prison, on Count VI, to run consecutively with Count I; ten (10) years each in the Nevada State Prison, on Counts II, III, IV & V, to run concurrently with sentence imposed in Count I, and each other; and ten (10) years each in the Nevada State Prison, on Counts VII, VIII, IX & X, to run concurrently with sentence imposed in Count VI, and each other.

THEREFORE, the Clerk of the above entitled Court is hereby

directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 16 day of January, 1975, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

74-F-476/sm
LVMPD DR#74-5530

CASE NO. 27877

DEPT. X

FILED

JAN 25 10 37 AM '77

LORETTA BOWMAN
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK.

THE STATE OF NEVADA,
Plaintiff,
-vs-
ALECK EUGENE RABY
Defendant.

AMENDED
JUDGMENT OF CONVICTION

WHEREAS, on the 23rd day of May, 1975, Defendant ALECK EUGENE RABY, entered a plea of guilty to the crime of ROBBERY, NRS 200.380, the above entitled Court thereafter, on the 23rd day of June, 1975, did adjudge the Defendant guilty by reason of his plea of guilty and sentenced Defendant to serve a term of fifteen (15) years in the Nevada State Prison, to run concurrently with second sentence imposed in Case No. 27622. Defendant is to receive credit for time served in the Clark County Jail.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 24 day of January, 1977, in the City of Las Vegas, County of Clark, State of Nevada.

74-F-564/dw
LVMPD DR#74-4875

DISTRICT JUDGE

)IV

PG 3-5 sentence cannot exceed statutory maximum of underlying crime
Min-max discretn sent only

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
May 31, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:16 a.m. on Thursday, May 31, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Valerie Wiener
Senator Steven A. Horsford

COMMITTEE MEMBERS ABSENT:

Senator Dennis Nolan (Excused)
Senator Terry Care (Excused)

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Gale Maynard, Committee Secretary

CHAIR AMODEI:
The work session is opened on Assembly Bill (A.B.) 510.

ASSEMBLY BILL 510 (2nd Reprint): Makes various changes concerning credits earned by offenders and the incarceration and supervision of offenders. (BDR 16-1377)

CHAIR AMODEI:
The Committee previously discussed the Open Meeting Law situation and in concept provided some charges to the Committee on criminal justice. The purpose of today's work session is to consider the enhancement language in

TEN

A.B. 416 that revises the enhancement and provides discretion to sentencing judges.

ASSEMBLY BILL 416 (1st Reprint): Makes various changes to provisions concerning the Department of Corrections. (BDR 16-190)

The staff prepared a mock-up amendment in the context of A.B. 63 which set a range of 1 to 20 years for the enhancement.

ASSEMBLY BILL 63 (2nd Reprint): Revises provisions governing the additional penalty for the use of certain weapons in the commission of crime. (BDR 15-151)

The mock-up amendment (Exhibit C) requires sentencing judges to be more communicative regarding their discretion and provides the following language:

> In determining the length of the additional penalty imposed, the court shall consider the following information:
> (a) The facts and circumstances of the crime;
> (b) The criminal history of the person;
> (c) The impact of the crime on any victim;
> (d) Any mitigating factors presented by the person; and
> (e) Any other relevant information.
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

There is also cleanup language that says the enhancement cannot exceed the term for the underlying crime.

Sections taken out of A.B. 416 (Exhibit D) talked about a one- to ten-year range as an enhancement of various incendiary crimes which are committed:

NRS. 193.165
- With a deadly weapon or tear gas;
- With a handgun containing a metal-penetrating bullet;
- By adult with assistance of a child;

NRS. 193.161
- On school property, at school-sponsored activity or on a school bus;
- In violation of an order for protection or to restrict conduct;
- Against older or vulnerable people;

MINUTES OF THE MEETING
OF THE
ASSEMBLY SELECT COMMITTEE ON CORRECTIONS, PAROLE, AND PROBATION

Seventy-Fourth Session
April 12, 2007

The Select Committee on Corrections, Parole, and Probation was called to order by Chair David R. Parks at 3:59 p.m., on Thursday, April 12, 2007, in Room 3161 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman David R. Parks, Chair
Assemblyman Bernie Anderson, Vice Chair
Assemblyman John C. Carpenter
Assemblyman William Horne
Assemblywoman Kathy McClain
Assemblywoman Valerie E. Weber

STAFF MEMBERS PRESENT:

Mark Stevens, Fiscal Analyst
Craig Hoffecker, Committee Policy Analyst
Matt Nichols, Committee Counsel
Deanna Duncan, Committee Manager
Brooke Bishop, Committee Secretary
Olivia Lloyd, Committee Assistant



- As hate crimes;
- To promote gang activities; and
- As an act of terrorism.

I informed Assemblyman David R. Parks the Committee has no objection to returning some discretion to sentencing judges in the context of the mock-up amendment. Rather than a 1- to 10-year range, we will do 1 to 20 years which covers all ranges up through Category B felonies, with underlying language the sentence cannot be enhanced more than the maximum. Therefore, judges' discretion will be the full range of the underlying sentence subject to the findings.

Even though it is 1 to 20 years, if the underlying crime has a maximum sentence of 10 years, then the maximum potential enhancement is 10 years. The 1- to 20-year range allows a range similar to the underlying crime.

What are the Committee members' thoughts on the discretionary piece or changing the A.B. 416 provisions from a range of 1 to 10 years to 1 to 20 years to cover Category B through Category E felonies?

SENATOR MCGINNESS:
I am comfortable the language will give judges more discretion. I was in the Legislature when the truth-in-sentencing law was passed and I do not want to see it unraveled. Part of the reason the truth-in-sentencing law passed was due to egregious cases that caused the public to demand it. I hope judges will use their discretion to help the correctional system make more realistic sentences for some offenders.

SENATOR WASHINGTON:
I support 1 to 20 years. We heard testimony on A.B. 416 and A.B. 510 from individuals whose loved ones have been incarcerated and subject to the State Board of Parole Commissioners. When we worked on truth in sentencing, we heard testimony from victims who were themselves violated or lost loved ones to heinous and devastating crimes. At that time, crime was the No. 1 issue. We created legislation that allowed judges discretion but never gave forthright answers to victims as to the length of time perpetrators would be incarcerated depending upon good time credits and time spent in local or county jail before transport to prison based on the judge's sentencing.

Amendment 26 deals with crime enhancement penalties. It amends Sections 26 through 34 to make sure the enhancement penalties do not exceed the penalty for the underlying crime.

Assemblyman Horne:
I am assuming those are when they are in aggregate. You can have an underlying crime and have multiple enhancements. Theoretically, if you had a two-to-five year penalty for an underlying crime, you could have a weapons enhancement and a gang enhancement, and then your enhancements would end up equaling more than the underlying penalty.

Matt Nichols:
This recommendation, from the way I read it, would require some language in each of these sections to specify that the maximum term of not more than ten years would not exceed the maximum term for the underlying offense. We can obviously change that to take into consideration Mr. Horne's concern about the aggregate amount of the enhanced penalties not exceeding the length of the underlying sentence if that is something you wish to do.

Assemblyman Horne:
My concern and, from my understanding, that of the Washoe County and the Clark County Public Defenders' offices, is in making the recommendation regarding enhancements so that an offender, for example, does not get a two-to-five year sentence and ends up, with enhancements, getting four-to-ten years instead.

Assemblyman Anderson:
I think Mr. Horne has clearly outlined what the choices are here. I would hate to endanger the bill by putting that particular element in there. While I think it is an important part of the overall bill, and I realize this is going to be an omnibus bill, are there not a couple of measures in Judiciary that we are trying to do this with?

Assemblyman Horne:
We have a bill in this committee tomorrow that deals with weapon enhancements.

Assemblyman Anderson:
I guess we can add that language here. I would support that because I think it is one of the overall issues that deal with the unintended consequences of the enhancements we passed. That has, in effect, ramped up the length of time people are staying incarcerated beyond what the primary offense was. If we had approached the primary offense with a realistic sentence, then these

enhancements would not be so prevalent in the current district attorneys' choices. They take every enhancement they can use. As a result, they have overused them. Our problem is that we have moved so far to one side, moving to the other and finding middle ground will be very, very difficult. There is a middle ground that needs to be located. Leave it in, and we will see what happens.

Matt Nichols:
I just wanted to clarify for drafting purposes that not only will there be new language in each of these sections but the consecutive additional sentence will not exceed the length of the sentence for the underlying crime, and the aggregate amount of the consecutive sentences cannot exceed the length of the sentence for the underlying crime. Is that the intent?

Assemblyman Anderson:
Let me make sure I understand. If the judge finds an offender guilty of a category B or C felony, and the minimum/maximum is 2 to 20 years, and for the crime itself he gives the offender a sentence of ten years, then for each of the underlying enhancements he cites, they would not be able to extend it beyond 20 years in the cumulative because that was the maximum which is allowed under that particular statute.

Matt Nichols:
That is how I understand Mr. Horne's request.

Assemblyman Anderson:
I just want to make sure we all understand what the cumulative effect is. It is not going to be able to push a sentence out to 30 years if the maximum for that particular crime was 2 to 20 years. The maximum you could possibly get would be the 20 years. As an offender paroles out of each of those along the way it is possible he will be there, depending on the number of enhancements, the entire 20 years.

Assemblyman Horne:
I want to make sure that when we are talking about penalties, we are talking about the underlying sentence imposed by the judge. We are not referring to the penalty a particular crime carries by statute. We are going by what sentence was imposed. There are sentences where you can get up to a life sentence because its statutorily permissible, but an offender only ends up getting two to ten years; however, the enhancements can go on forever because what is on the books says "life." I do not think that is the intent of what we want. It should be what is imposed by the judge.

NEVER MAX* Discretionary sent RANGE only

life Sentences ARE Category A And ARE Excluded because there is No RANGE

Matt Nichols:
Just to go over this one more time, to get it right. To go back to Mr. Anderson's example, if the defendant is sentenced to a term of 10 years for a crime where a sentence of 20 years could be imposed, the additional penalty would still be based on the ten years that was imposed by the judge. If you had two sentence enhancements, such as a firearm and a gang-related enhancement, those together could only equal ten years, which, in the aggregate, would match the sentence imposed for the underlying crime. If you only had a single enhancement it could be as long as ten years.

Chair Parks:
The next recommendation is Amendment 27, which deals with administrative regulations. It amends the bill to remove the exemption of the Department of Corrections for most provisions of the Administrative Procedures Act.

Matt Nichols:
Mr. Anderson touched on this briefly earlier when he mentioned that the regulations for Department of Corrections' facilities are not reviewed by the Legislative Commission. I think the intent here is to take the Department of Corrections out of that statute, which exempts them from the Administrative Procedures Act. There would be other ramifications as well, such as the Legislative Commission being in a position to approve the regulations adopted by the Department of Corrections. The reference is in NRS 233B.039 which reads in subsection 1, "The following agencies are entirely exempted from the requirements of this chapter," which is the Administrative Procedures Act. The entities involved would be the Governor, the Department of Corrections, the Nevada System of Higher Education, the Office of the Military, and the State Gaming Control Board. There are limited exceptions for other departments, as well.

Assemblyman Horne:
I think at this juncture it might be a bit overreaching. I do not think we are there yet. We are trying to make some moves but I do not think we are able to start having them report to the Legislative Commission.

Chair Parks:
We will pass on Amendment 27. We do not need to revisit Amendment 28. Amendment 29 deals with providing greater access to Casa Grande. As you are aware, we are only utilizing half of the housing facility at Casa Grande because of restrictions we imposed. This would remove those restrictions.

****

THE FOLLOWING FROM NCJIS CRIMINAL JUSTICE IS A RESULT OF YOUR SQCH INQUIRY ON:
NAM/ ADKISSON, MICHAEL DOB/ 19650716

****

EIEVEN

NCJIS BASE RECORD
NAME: ADKISSON, MICHAEL D
DOB: 07/16/1965
RACE: WHITE SEX: M HEIGHT: 509 WEIGHT: 210
HAIR: RED OR AUBURN EYES: BROWN

ALIAS NAMES:
ADKISSON, MICHAEL
ADKISSON, MICHAEL DEAN

POB: CA

ADDRESS:
4020 S ARVILLE
LV, NV

SID: NV02437476
FINGERPRINTS ARE AVAILABLE.

==========

CRIMINAL HISTORY RECORD PCN/ 21221278
FINGERPRINT BASED RECORD

ARREST DATE: 2004-02-19
ARRESTING AGENCY: CLARK COUNTY DETENTION CENTER ORI: NV0020135
NAME USED: ADKISSON, MICHAEL DEAN
OCA: 0917293

BOOKING AGENCY: CLARK COUNTY DETENTION CENTER ORI: NV0020135

ARREST OFFENSE
1: MURDER WITH A DEADLY WEAPON FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00093 NCIC: 0912

COURT/FINAL CHARGE
1: MURDER IN THE SECOND DEGREE FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00094 NCIC: 0999
EIGHTH JUDICIAL DISTRICT COURT ORI: NV002015J

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-12-06
CASE #: 04F03106X
NAME USED: ADKISSON MICHAEL DEAN

SENTENCE DATE: 2004-12-06 FACILITY: NEVADA STATE PRISON
SENTENCE: LIFE WITH POSSIBILITY OF PAROLE

CREDIT TIME SERVED:
YEARS: MOS: DAYS: 252 HOURS:

SPECIAL CONDITIONS: YES

RECORD CREATED: 2004-02-19 07:02:46 LAST UPDATED: 2019-08-29 13:09:44

CRIMINAL HISTORY RECORD PCN/ 10948937
FINGERPRINT BASED RECORD

ARREST DATE: 2001-08-21
ARRESTING AGENCY: LAS VEGAS METROPOLITAN POLICE ORI: NV0020100
NAME USED: ADKISSON, MICHAEL DEAN
OCA: 0917293

ARREST OFFENSE
1: BATTERY/DOMESTIC VIOLENCE MISDEMEANOR
NEVADA STATUTE NRS 200.485 NV OFFENSE CODE: 02138 NCIC: 1399

COURT/FINAL CHARGE
1: BATTERY MISDEMEANOR
NEVADA STATUTE NRS 200.481 NV OFFENSE CODE: 00145 NCIC: 1399
LAS VEGAS MUNICIPAL COURT ORI: NV002051J

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-01-20
CASE #: C-0497567-A
NAME USED: ADKISSON MICHAEL DEAN

SENTENCE DATE: 2004-01-20
SPECIAL CONDITIONS: YES

RECORD CREATED: 2001-10-09 08:10:15 LAST UPDATED: 2018-04-08 15:54:46

WHEN AN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY.

IF FINGERPRINTS DID NOT ACCOMPANY THIS INQUIRY, THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY IS UNABLE TO GUARANTEE THAT THIS MATERIAL CONCERNS THE INDIVIDUAL IN WHOM YOU ARE INTERESTED.

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No. 20-7299

COPY

In the
Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 26 2021
OFFICE OF THE CLERK

TWELVE

Michael Adkisson,

Petitioner,

v.

Nevada,

Respondent.

On Petition for Writ of Certiorari
to the Nevada Supreme Court

Petition for Writ of Certiorari

Rene Valladares
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District of Nevada
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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether state prison officials violate an inmate's due process and jury trial rights when they hold an inmate in custody pursuant to an additional consecutive sentence imposed not as a result of the underlying conviction but pursuant to an unilateral adjudication of guilt ~~separate statute~~ which, under the terms of that statute, does not create a separate offense?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Adkisson, No. C200178 (8JDC Nev.) (Amended Judgment of Conviction, entered April 30, 2008).

State v. Adkisson, No. 44581 (Nev. Sup. Ct.) (Order of Affirmance, issued May 17, 2006).

Adkisson v. State, No. 64382 (Nev. Sup. Ct.) (Order of Affirmance, issued April 15, 2015).

Adkisson v. Neven, No. 2:14-cv-01934-APG-CWH (Dist. Nev.) (pending).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Adkisson requests this Court grant his petition for writ of certiorari to review the order of affirmance of the Nevada Supreme Court. (*See* Appendix ("App.") B at 002.)

OPINIONS BELOW

The order of the Nevada Supreme Court, affirming the denial of Mr. Adkisson's state petition, is unreported and appears at App. B at 2.

JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on July 16, 2020. (*See* App. B at 002.) The Nevada Supreme Court's order denying Mr. Adkisson's petition for rehearing was issued on October 1, 2020. (*See* App. A at 001.) This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision. This petition presents a federal constitutional question for this Court's review as the Nevada Supreme Court's decision did not invoke any state-law grounds "independent of the merits" of Mr. Adkisson's federal constitutional challenge. *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.1 (2017); *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016). The Nevada Supreme Court's procedural default ruling analyzed whether Mr. Adkisson's constitutional rights had been violated as part of its good cause and actual prejudice analysis. (*See* App. B at 005-006.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; nor deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Michael Adkisson is currently being held in custody pursuant to a sentence for which there is no conviction. Adkisson was convicted of a single crime—second-degree murder pursuant to Nev. Rev. Stat. 200.030. Under that statute, he was sentenced to a term of 10 years to life.

However, the sentencing court imposed an additional consecutive sentence of 10 years to life under a separate statute, Nev. Rev. Stat. 193.165, based upon the use of a deadly weapon in the commission of the underlying crime. Both the Nevada Supreme Court and the statute itself state that this additional consecutive sentence under the weapon statute is not an offense. The Nevada Supreme Court's long-settled interpretation of the weapon statute makes clear that the additional consecutive sentence under the weapon statute is not the result of a separate conviction. The result of this interpretation of the statute is that the Nevada Department of

Corrections does not have the constitutional authority under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to hold an individual in custody on this type of additional consecutive sentence without an underlying conviction. To be constitutionally viable, the additional consecutive sentence must be the result of a conviction on every fact justifying the additional sentence. Because it is well-accepted that the additional sentence is not the result of a conviction under Nevada law, it is therefore unconstitutional as a matter of federal due process and the right to a jury trial for the Nevada Department of Corrections to continue to hold Mr. Adkisson in custody on a sentence without an underlying conviction.

Mr. Adkisson was charged in an information with murder and use of a deadly weapon under Nev. Rev. Stat. 200.010, 200.030, and 193.165 based on allegations he killed Steven Borgens on February 18, 2004 by shooting him with a firearm.

Nev. Rev. Stat. 200.010 provides the definition of murder. In relevant part, it states: "Murder is the unlawful killing of a human being [ ] with malice aforethought, either express or implied." Nev. Rev. Stat. 200.030 provides the different degrees of murder. This statute first provides the manners in which first-degree murder can be committed then states: "Murder of the second degree is all other kinds of murder." This statute also provides the penalties for murder. For second-degree murder, the penalty is either 10 years to life or 10 to 25 years.

Nev. Rev. Stat. 193.165 is entitled, "Additional penalty: Use of deadly weapon[.]" Subsection 1 of the version of the statute in existence at the time of Mr. Adkisson's criminal offense provided:

> [A]ny person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.

Nev. Rev. Stat. 193.165(1) (2004). More important, subsection 2 of the statute made clear that this additional consecutive sentence is not connected to a separate offense. It stated, "This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." Nev. Rev. Stat. 193.165(2) (2004).[1] The Nevada Supreme Court has held that this statute does not create its own offense, so it does not violate double jeopardy for two sentences to be imposed. *See, e.g., Raby v. State*, 544 P.2d 895, 896 (Nev. 1976); *Woofter v. O'Donnell*, 542 P.2d 1396, 1399-1400 (Nev. 1975).

After a five-day jury trial, on September 14, 2004, the jury found Mr. Adkisson guilty of second-degree murder and that he used a deadly weapon in the commission of the crime.

At sentencing Mr. Adkisson was sentenced to a term of 10 years to life on the second-degree murder conviction. The court imposed an additional consecutive sentence of 10 years to life under Nev. Rev. Stat. 193.165. Judgment was entered

[1] The current version of the statute has a reduced penalty. It is no longer an equal and consecutive punishment but is a determinate sentence with a 20-year maximum. Subsection 2 remains in the statute but now appears as subsection 3. *See* Nev. Rev. Stat. 193.165 (2021).

reflecting these two sentences on December 27, 2004. (*See* App. E at 018-019.) The court later amended the judgment to include omitted days of credit for time served. (*See* App. D at 016-017.)

On November 1, 2016, the Nevada Board of Parole Commissioners (hereinafter "Parole Board") granted Mr. Adkisson parole from his second-degree murder conviction.[2] Shortly thereafter, on January 20, 2017, Mr. Adkisson began administratively appealing his continued detention based on the theory that he cannot be held in custody after he was paroled from his only count of conviction.

On December 20, 2017, prison officials determined that Mr. Adkisson's grievance may not be taken to next administrative review level because it was intermixed with legal determinations that were outside the power of that agency to address.

Within a month of this final agency determination, on January 17, 2018, Adkisson filed a time calculation petition in the First Judicial District Court in Carson City, Nevada (the county in which Mr. Adkisson was being held) addressing his continued confinement after his parole grant. Under the relevant statute, Nev. Rev. Stat. 34.738, a petition raising a time computation challenge is filed in the county in which the petitioner is held. A petition challenging the underlying judgment

---

[2] Until recently, a Nevada inmate sentenced to an additional consecutive sentence under Nev. Rev. Stat. 193.165 would have to be paroled from the sentence on the underlying crime before beginning to serve the consecutive sentence. A 2019 change to the statute requires these sentences to be aggregated and allows inmates sentenced to a consecutive sentence under 193.165 prior to October 1, 2019, to choose whether to have them aggregated. *See* Nev. Rev. Stat. 176.035.

is filed in the county of conviction, here the Eighth Judicial District in Clark County, Nevada. This latter type of petition has strict procedural bars to prevent second petitions. However, a petitioner can overcome the bar through a showing of good cause and actual prejudice.

The First Judicial District Court did not decide the issue. Instead it determined that Mr. Adkisson's claim contains elements that attack both prison administration issues and the underlying legality of this judgment of conviction. Given its hybrid nature, the court transferred it to the court of conviction, the Eighth Judicial District.

On December 3, 2018, the district court held a hearing on the petition and denied it as being successive and untimely and hence procedurally defaulted. (*See* App. C at 008-013.)

Mr. Adkisson appealed to the Nevada Supreme Court. Adkisson argued that the petition was not a petition challenging the conviction but was a time-calculation petition for which the procedural bars do not apply. To the extent it was a petition challenging the judgment, Adkisson had good cause as the constitutional violation did not become ripe until the Nevada Department of Corrections paroled him onto the sentence related to the weapon.

The Nevada Supreme Court affirmed the denial of the petition. The court held that the petition was one challenging the judgment and was procedurally barred. It rejected Mr. Adkisson's cause argument, stating that the Nevada Department of Corrections had no discretion but to hold Adkisson on the equal and consecutive sentence. (App. B at 004-006.) In its discussion of actual prejudice, the panel

acknowledged that its review of prejudice would implicate a claim's merits. (App. B at 005-006.) The court acknowledged Adkisson had raised a constitutional violation under *Apprendi* and determined that *Apprendi* did not undermine that court's prior decisions finding the weapon statute did not violate double jeopardy. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. The Nevada Department of Corrections is violating Mr. Adkisson's rights to due process and a jury trial under the Fifth, Sixth and Fourteenth Amendments because they are holding him in custody pursuant to an additional consecutive sentence imposed not as a result of the underlying conviction but pursuant to a separate statute which, under the terms of that statute, does not create a separate offense

Adkisson is currently confined pursuant to an equal and consecutive sentence of 10 years to life that was imposed under the use of a deadly weapon statute, Nev. Rev. Stat. 193.165, in existence at the time of the crime. That statute specifically provided the additional penalty did not "create any separate offense but provides an additional penalty for the primary offense." Nev. Rev. Stat. § 193.165(2) (2006).

Under long-standing precedent, the Nevada Supreme Court held the deadly weapon statute did not create a separate conviction. First, in *Woofter v. O'Donnell*, 542 P.2d 1396, 1399-1400 (Nev. 1975), the Nevada Supreme Court addressed whether a sentence imposed under the deadly weapon statute violated the Double Jeopardy Clause. To avoid any double jeopardy implications under the *Blockberger* test, the court adopted the reasoning that the weapon penalty was not a separate conviction but represented just an additional punishment for a single crime. *Id.*

Then, in *Raby v. State*, the Nevada Supreme Court held in more explicit terms that "the use of a firearm or other deadly weapon in the commission of a crime (NRS 193.165) is not a separate criminal offense." 544 P.2d 895, 896 (Nev. 1976).

Raby and *Woofter* were then reaffirmed in *Nevada Dep't of Prisons v. Bowen*, 745 P.2d 697, 699 (Nev. 1987).

However, regardless of the validity of that court's prior analysis, the constitutional landscape has shifted significantly since those decisions. After *Bowen*, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490. The constitutional import of *Apprendi* was that it converted additional penalty provisions into elements of a crime. *See Alleyne v. United States*, 570 U.S. 99, 106 (2013). Put another way, any additional sentence beyond the prescribed statutory range must be imposed pursuant to the equivalent of a conviction that comports with due process and the right to a jury trial.

This intervening precedent establishes that Mr. Adkisson's current custody violates due process and the right to a jury trial. The Nevada Supreme Court adhered to its prior precedent in *Woofter* and *Raby* and maintained its holding that the deadly weapon statute did not create a separate offense. But this simply has no legal foundation after *Apprendi*. If the sentence is not imposed pursuant to a conviction, as the Nevada Supreme Court continues to hold, then Mr. Adkisson is not being held

pursuant to a sentence based on a conviction. In this way, the Nevada Department of Corrections is unlawfully detaining him.

This is a novel and important issue for this Court to address as the Nevada Supreme Court acknowledged it has been percolating in other state courts. *See* App. B at 006 (citing *State v. Stevens*, No. 1 CA-CR 14-0642, 2015 WL 8475986 (Ariz. Ct. App. Dec. 10, 2015), and *State v. Kelley*, 226 P.3d 773 (Wash. 2010). Fundamental principles of due process and the right to jury trial demand that imprisonment be predicated upon conviction for an actual offense. Under *Apprendi*'s due process jurisprudence, it is clear that Mr. Adkisson's sole conviction is that of having committed a second-degree murder. There is no, and can be no, second crime of conviction. Both the statute and this Court have made that abundantly clear.

It must be emphasized that Nev. Rev. Stat. 193.165 does not work as a typical sentencing enhancement. In general, such an enhancement would increase the sentence imposed on the underlying conviction. That is not what occurs under this statute. Rather, an *additional* consecutive sentence is being imposed. That is what creates the constitutional problem here. That additional sentence must be imposed pursuant to a conviction under *Apprendi*. But the statute itself says that it is not a separate offense. And the Nevada Supreme Court has repeatedly agreed that it is not.

As such, the Nevada Supreme Court's decision here upholding that prior precedent has exacerbated a constitutional tug of war between *Apprendi* and double jeopardy principles. Indeed, the lower court's adherence to its prior precedent in *Woofter*, *Raby*, and *Bowen* has now created an unavoidable conflict that needs to be

addressed by this Court. The weapon statute cannot be viewed as not a separate offense for double jeopardy purposes, but then also a conviction in order to satisfy *Apprendi*. It has to be one or the other. Either it is a conviction or it is not. The Nevada Supreme Court continues to maintain that the weapon statute does not establish a separate conviction. But without a conviction, then Mr. Adkisson is not being held pursuant to a constitutionally valid sentence. Continuing to hold Adkisson in custody means the Department of Corrections is unconstitutionally detaining him.

Put another way, the Nevada Supreme Court's conclusion that there is no conviction under Nev. Rev. Stat. 193.165 means that there is no constitutional justification for the additional consecutive sentence.

And, even if the Nevada Supreme Court is wrong in concluding that there is no conviction under the weapon statute, Mr. Adkisson's current custody remains unconstitutional. Once again, under *Apprendi*, the imposition of the additional consecutive sentence has to be the result of a conviction. However, this conviction creates a clear double jeopardy violation. Second-degree murder is obviously a lesser included offense of second-degree murder with the use of a deadly weapon. Indeed, any "conviction" under the weapon statute is nothing more than the underlying crime plus a finding a weapon was used. Under the *Blockburger*[3] test, the lesser included conviction has to be dismissed under the Double Jeopardy Clause. *See Kelley v. State*, 371 P.3d 1052, 1053-54 (Nev. 2016) (acknowledging that under the federal Double

[3] *Blockburger v. United States*, 284 U.S. 299 (1932).

Jeopardy Clause a conviction on a lesser included count must be dismissed). Because the underlying murder conviction has to be dismissed, the sentence imposed under Nev. Rev. Stat. 200.030 must be vacated. If Nev. Rev. Stat. 193.165 is a conviction, the only constitutional sentence that can stand is the one imposed under that statute, namely a single sentence of 10 to life.

Apprendi has brought into clear focus the constitutional problems with Nevada's weapon statute. No matter whether the weapon statute creates a conviction or is not considered a conviction enforcement of a sentence pursuant to the statute will run into constitutional problems.

At bottom, characterizing the deadly weapon statute as not a separate offense may have been necessary to spare it from constitutional problems under the Double Jeopardy Clause, but this characterization runs afoul of *Apprendi*. Mr. Adkisson should not be serving a sentence for which there is no underlying conviction. The Department of Corrections does not have the authority to hold him in custody.

This Court should review this important constitutional issue, which was squarely presented and decided in the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated February 25, 2021

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Jonathan M. Kirshbaum
Jonathan M. Kirshbaum
Assistant Federal Public Defender

State of Nevada
Department of Corrections

INMATE GRIEVANCE REPORT

ISSUE ID# 20063059385 **ISSUE DATE:** 01/03/2018

INMATE NAME	NDOC ID	TRANSACTION TYPE	ASSIGNED TO
GREEN, EDMOND W	56695	RTRN_INF	LWALSH

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
IF	03/14/2018	5	Denied	JBUCHANAN	INACTIVE

INMATE COMPLAINT

OFFICIAL RESPONSE

Inmate Green, your Judgment of Conviction was reviewed to ensure it is entered correctly and that you are lawfully being incarcerated. You were sentenced by the court to a life sentence with the possibility of parole after 10 years has been served. You were sentenced to an equal and consecutive sentence for the use of a deadly weapon. Records show you were granted parole by the parole board to your consecutive sentence for the deadly weapon enhancement. This is your current sentence in which you are being incarcerated for. There is no indication your liberty is being denied as you claim, as the NDOC is following the order from the court. The NDOC is not illegally creating a felony charge against you, it merely enters the F category into the system, as the system requires that field to be entered in order to calculate your sentence and credits correctly. It is not being done to confine you to prison as you claim nor is it the reason you have not been released to the community on parole. If you feel you were wrongfully given a consecutive sentence for the deadly weapon enhancement, you will have to address that directly with the court as that is outside of the authority and control of the NDOC. Grievance denied.

THIRTEEN

CC: J. Buchanan

GRIEVANCE RESPONDER

RECEIVED
FEB 14 2018

Report Name: NVRIGR
Reference Name: NOTIS-RPT-OR-0217.4
Run Date: MAR-14-18 10:50 AM

OFFENDER MANAGEMENT
NDOC

10AII

State of Nevada
Department of Corrections

INMATE GRIEVANCE REPORT

ISSUE ID# 20063053285 **ISSUE DATE:** 08/24/2017

INMATE NAME	NDOC ID	TRANSACTION TYPE	ASSIGNED TO
ADKISSON, MICHAEL	84280	RTRN_INF	BWARD

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
IF	10/12/2017	5	Denied	JBUCHANAN	INACTIVE

INMATE COMPLAINT

OFFICIAL RESPONSE

Inmate Adkisson, the NDOC is not arbitrarily assigning a category to your current sentence nor are they creating a felony charge where one does not exist. The UDWE is a continuation of your current charge and therefore you are correct in assuming the NDOC is mirroring your classification from your Murder charge to your Use of Deadly Weapon enhancement. This practice is currently under review by the Offender Management Division. However, this does not appear to have, in any way, impacted your ability to participate in any type of programming within the department, nor have you provided any evidence to support your claim. You have been on this sentence for 11 months and there is no indication you have applied for any specific programming resulting in any type of denial, related to your sentence status or otherwise. Your enhancement sentence was ordered by the court to be an equal and consecutive term, of which, is not grievable per AR 740. Grievance denied.

"Current Charge"
Sole Conviction Discharged through Parole
11-1-2016

CCS J. Buchanan
GRIEVANCE RESPONDER

Report Name: NVRIGR
Reference Name: NOTIS-RPT-OR-0217.4
Run Date: OCT-12-17 11:30 AM

10A-4

State of Nevada
Department of Corrections

INMATE GRIEVANCE REPORT

ISSUE ID# 20063136173 **ISSUE DATE:** 04/05/2022

INMATE NAME	NDOC ID	TRANSACTION TYPE	ASSIGNED TO
ADKISSON, MICHAEL	84280	RTRN_L1	KOLSEN

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
1	06/07/2022	4	Denied	SCONLIN	A

INMATE COMPLAINT

OFFICIAL RESPONSE

Inmate Adkisson
Iam in receipt of your first level grievance claiming you are not being considered for minimum custody is a direct violation of your rights and your remedy is to be immediately classified to minimum custody. You were answered appropriately in the informal response. You further claim that NDOC is displaying an Abuse of Authority by precluding you from minimum by basing the decision on a discharged conviction. There is no abuse of authority found in following AR521. Your conviction/case 200178 consists of 2 counts. Both are considered together as one incarceration or term. You have not presented any addition supporting documentation to support your claims.
Denied

Disagree

GRIEVANCE RESPONDER

State of Nevada
Department of Corrections

INMATE GRIEVANCE REPORT

ISSUE ID# 20063138349 **ISSUE DATE:** 06/13/2022

INMATE NAME	NDOC ID	TRANSACTION TYPE	ASSIGNED TO
ADKISSON, MICHAEL	84280	RTRN_INF	AVACCARO

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
IF	06/16/2022		Denied	AVACCARO	A

INMATE COMPLAINT

I am grieving the NDOC for the unlawful violation of my personal liberty by confinment to a state prison without sufficent legal authority by force and threat of death resulting in the act of forced imprisonment without suffiecent legal authority cont....

OFFICIAL RESPONSE

Mr. Adkisson, I am in receipt of your grievance #2006-31-38349 signed and dated 5-30-2022 at 10:50 AM regarding your complaint about the Nevada Department of Corrections being in unlawful violation of legal authority by force and threat of death, resulting in the act of forced imprisonment without sufficient legal authority. You claim that this is staff misconduct and should be handled in such way outlined in AR 740. You state in your grievance that NDOC must possess sufficient legal authority in order to incarcerate you. You also claim that the NDOC is concealing the false imprisonment by representing that you suffered a separate distinct second conviction of use of a deadly weapon in the commission of your second-degree murder conviction.

Mr. Adkisson, per your JOC for case# 04C200178 you were found guilty of "Murder in the Second Degree with Use of a Deadly Weapon," and you were sentenced to 10 years to life with a consecutive 10 years to life. With the evidence provided by you, in your grievance, and the documents we have in your file, it is evident that you are correctly incarcerated. NRS 193.165.2 states that you are to be incarcerated exactly the way you are. It's agreeable that the use of a deadly weapon in the commencement of a crime does not warrant a second offense, however you are to be additionally punished with an equal and consecutive sentence to the one you committed. Which is clearly outlined in NRS 193.165. This grievance is DENIED in its entirety as no staff misconduct was proven in your grievance. You are sentenced correctly.

Grievance DENIED.

Not A 2nd offense - But also two counts (see Grievance)

Additional punishment without offense

GRIEVANCE RESPONDER

CENTRAL OFFICE

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NEVADA BOARD OF PAROLE COMMISSIONERS

December 14, 2021

PUBLIC RECORDS REQUEST ACKNOWLEDGEMENT LETTER

Michael Adkisson, NDOC #84280
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

RE: PUBLIC RECORDS REQUEST dated December 8, 2021.

Mr. Adkisson,

On December 13, 2021 the Nevada Board of Parole Commissioners received your request for documents pursuant to Nevada's Public Records Law.

1. Please provide me with the official state record relied upon by the Board in order to determine the category of felony conviction to be assigned to each crime under consideration by the Board. **The Board does not determine the category of felony conviction. The category of felony conviction for each crime is determined by the Nevada Legislature and a person is then sentenced accordingly by the judge. The Nevada Department of Corrections enters the sentencing information from an inmate's Judgment of Conviction, along with the category of felony, for the Board's use.**

Fourteen

Signed,

Katie Fraker

Katie Fraker
Executive Secretary