bopc - Board of Prison Commissioner Meeting 7/27/2021- PUBLIC COMMENT

From:	Patricia Adkisson <faithandjoesmom@gmail.com>
To:	<bopc@doc.nv.gov>
Date:	7/26/2021 2:45 PM
Subject:	Board of Prison Commissioner Meeting 7/27/2021- PUBLIC COMMENT
Attachments:	Adkisson-Grievance #20063105130-supporting documents20210605_15372331.pdf; Adkisson- Director Daniels NDOC Grievance 20063105130.pdf; Adkisson- Dir. Daniels Response to Grievance 20063105130 (7-2-21).pdf; Adkisson- Raby v State-Supreme Court Opinion case#8184 (1).pdf; RABY v STATE TRANSCRIPTION OF ORAL ARGUMENTS.docx

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Re: Request for Review of Director's Malfeasance Related to Classification

Dear Board Members,
Your constitutional duty pursuant to the Nevada Constitution article 5, requires you to supervise the Director's activities. I am requesting a review of the attached Grievance and determination made by the NDOC in error. Assigning a felony conviction where none exists, implicating violations of law and malfeasance. Please review the attached files as they are supporting material.

1) Supreme Court audio of Oral arguments- Raby v State- please listen at 15:15 TO 26:40 AND 42:45 TO 56:40
2) Grievance #20063105130 and supporting documents
3) Email- Grievance send to Director Daniels
4) Response from Director Daniels
5) RABY v STATE - SUPREME COURT DECISION/OPINION
6) Raby v State- transcription of audio Oral Arguments- SEE highlighted areas starting on pages 4-6 and pages 9-12

Please confirm receipt of this email, and print out the files below for the Board Members.
Thank you in advance, Patricia Adkisson 702-505-2861

8184RA~1.MP3

1

Log Number 2006310530

NEVADA DEPARTMENT OF CORRECTIONS
INFORMAL GRIEVANCE

NAME: MICHAEL ADKISSON I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT: 10-A 4B

GRIEVANT'S STATEMENT: I'am Grieving the N.D.O.C.'s FAILURE to Comply with the applicable Administrative Regulations, OPERATIONAL Procedures, and Legislative Command when Conducting my most recent (6) six month Review for classification purpose's, Compliance with the relevant authorities Supra WARRANTS a change in custody that would

SWORN DECLARATION UNDER PENALTY OF PERJURY

INMATE SIGNATURE: [signature] DATE: 7-15-20 TIME: 12:00 pm

GRIEVANCE COORDINATOR SIGNATURE: [signature] DATE: 7/20/20 TIME: 1130

GRIEVANCE RESPONSE:

CASEWORKER SIGNATURE: DATE:

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

GRIEVANCE COORDINATOR APPROVAL: R Walsh DATE: 9/3/21

___ INMATE AGREES X INMATE DISAGREES

INMATE SIGNATURE: [signature] DATE: 9-4-2020

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
JUL 20 2020
NNCC

TH 7-17-2020

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 #: 10-A-4G

GRIEVANCE #: GRIEVANCE LEVEL: INFORMAL

GRIEVANT'S STATEMENT CONTINUATION: PG. TWO OF THREE

provide LESS RESTRICTIVE CUSTODY STATUS. Pursuant to A.R.503 "CONDUCT of OBJECTIVE Classification" A.R.503.01(2) "IN ORDER TO Determine if the Inmate case factors WARRANT A change in custody or housing, a Complete review of the objective classification assessment instrument should be Conducted at every reclassification hearing." A.R.503.03(2) Requires reclassification at least once every (6) six months. A.R.503.08(1) Requires Institutions to Develop OPERATIONAL Procedures to implement the classification system at their location N.N.C.C. Developed O.P.#510 "DOCUMENTS REQUIRED FOR RECEPTION of NEW INMATES" O.P.510.01 PROVIDES MANDATORY language: "THE ASS. WARDEN OF PROGRAMS SHALL ENSURE THAT THE N.N.C.C. STAFF HAS THE TRAINING AND KNOWLEDGE NECESSARY TO EVALUATE COMMITMENT DOCUMENTS FOR INMATES NEWLY RECEIVED" A.R.510.02 "TRAINING SHALL INCLUDE THE FOLLOWING": ~~510.02 (1) LAWFUL RECEPTION~~ A.R.510.03(1) ... "THE JUDGMENT MUST BE FOR A FELONY ...." A.R.504 "RECEPTION AND INITIAL CLASSIFICATION PROCESS" 504.01(2)(A) ENSURE INMATE IS properly committed to the Dept, with appropriate Commitment Documents. A.R.504.03(2)(A)(4) Requires

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 G

GRIEVANCE #: ____________ GRIEVANCE LEVEL: INFORMAL

GRIEVANT'S STATEMENT CONTINUATION: PG. THREE OF Three

Identification of AN ACTUAL CRIME. 504.03 (2)(B)(1) Requires Information regarding OFFENSE. 504.04(3)(B)(1)(2) Requires OFFENSE to be present when establishing levels of CUSTODY. THE legislative Authority Relied on is limited, PERMITTING N.D.O.C. TO ONLY MAINTAIN CUSTODY when A CONVICTION Amounting to a Felony is PRESENT See N.R.S. 193.120

A Complete REVIEW of THE OBJECTIVE CLASSIFICATION ASSESSMENT INSTRUMENT Required for my 6 mo. Review REVEALS THAT THERE IS NO JUDGMENT FOR A FELONY when CONSIDERING "USE OF A DEADLY WEAPON" ANY claimed CONVICTION FOR "USE OF A DEADLY WEAPON" "MUST BE AND HEREBY ARE ANNULLED" AS STATED BY NV.SP.CT in RABY V. STATE 92 Nev. 30; 544 P.2d 895 (1976) THE NV. LEGISLATURE DECLARED N.R.S. 193.165 "USE OF A DEADLY WEAPON" to Be NO OFFENSE. N.D.O.C.'S A.W.P. WALSH HAS FAILED TO provide N.N.C.C. STAFF with the KNOWLEDGE Necessary TO EVALUATE Commitment Documents A SENTENCE FOR USE OF A DEADLY WEAPON IS A JUDGMENT without A FELONY (A.R. 510.03(1)) O.P. 510.06(1) Sets Forth The Rejection of the Inmate when Documents Determined to Be Invalid by Failure to provide felony. REMEDY: The CORRECT PARTY for My CUSTODY PURPOSE IS THE Dept. of PAROLE AND Probation

Original: Attached to Grievance
Pink: Inmate's Copy

10A 4G (4)

State of Nevada
Department of Corrections

INMATE GRIEVANCE REPORT

ISSUE ID# 20063105130 **ISSUE DATE:** 07/20/2020

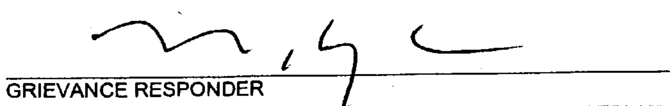
INMATE NAME	NDOC ID	TRANSACTION TYPE	ASSIGNED TO
ADKISSON, MICHAEL	84280	RTRN_INF	NHUGHES

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
IF	09/01/2020	4	Denied	TCTHOMPSON	A

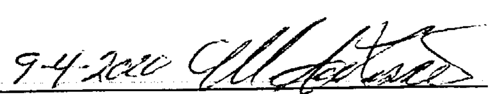
INMATE COMPLAINT

OFFICIAL RESPONSE

9/1/20 Response to LWalsh. TT
Mr. Adkisson, you appear to be grieving your periodic review stating that there was a "failure to comply with the applicable Administrative Regulations, Operational Procedures and Legislative Command......" You state that your situation warrants a change in custody because the Use of a Deadly Weapon Enhancement is not a Felony. While you are correct that NRS 193.165-3 states that "This section does not create any separate offense but provides an additional penalty for the primary offense.....", NRS 193.165-2b states that, "The sentence prescribed by this section: Runs consecutively with the sentence prescribed by statute for the crime" which in this case was a violent Felony--Second Degree Murder. Per the Second Amended Judgment of Conviction (Jury Trial) for Case O4C200178, you were found guilty of Murder in the Second Degree with Use of a Deadly Weapon (Category A Felony) and sentenced on December 6, 2004, for "LIFE with a MINIMUM parole eligibility of TEN (10) YEARS plus and EQUAL and CONSECUTIVE term of LIFE with a MINIMUM parole eligibility of TEN (10) YEARS for the Use of a Deadly Weapon. In addition you have had two 6 month reviews in the last year dated December 30, 2019 and June 17, 2020 where you have been classified correctly. Grievance denied.



GRIEVANCE RESPONDER



9-4-2020

Report Name: NVRIGR
Reference Name: NOTIS-RPT-OR-0217.4
Run Date: SEP-02-20 08:33 AM

6 Month Review: Adkisson 84280 10A4G

Yard points: 4

PPED- 11/01/2026

Employment: U10 Porter

-Due to Social distancing restrictions 6months reviews will be completed in a non-face to face format.

-Please send a kite if you have any questions or need to update next of kin.

Thank you CCS Harvey.

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 $ T.B.D 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.)
T.B.D	7-2020 ONGOING		
7. PLACE OF OCCURRENCE			
N.N.C.C. N.D.O.C.			

DOC 3095 (12/01)

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

THE FAILURE OF A.W.P. WALSH TO PROVIDE AND ENSURE THAT N.N.C.C. STAFF HAS TRAINING AND Knowledge to EVALUATE Commitment Doc's IN ORDER TO PROPERLY IDENTIFY THE NEEDED FELONY FOR CLASSIFICATION AND CUSTODY PURPOSE'S HAS NOW Resulted ~~IN DAMAGE TO ME. BECAUSE The PROPER Authority for Custody~~ purpose is the Dept of P&P. I AM A Parolee AND Do NOT STATUTORILY QUALIFY AS A PRISONER - NO FELONY IS PRESENT NO OFFENSE

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:

N.N.C.C. CASEWORKER UNIT 10 MR. HARVEY
N.N.C.C. Assistant WARDEN of PROGRAMS: WALSH

10. Other pertinent information:

THE JUDGMENT RELIED ON FOR MY (6) six month classification DOES NOT SET FORTH A FELONY. I AM A PAROLEE ON MY Sole felony Conviction set forth in My Judgment
N.D.O.C. CANNOT accept ANY INDIVIDUAL without A JUDGMENT FOR A FELONY. NO CLASSIFICATION for ANY purpose MAY take place without A Judgment for A Felony

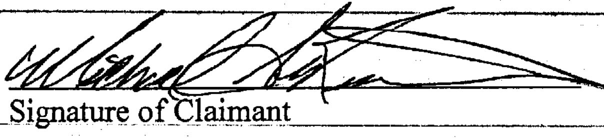
(98)

STATE OF NEVADA)
) SS
COUNTY OF CARSON)

I, Michael Atkisson, 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 maters, 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 15th day of July, 2020



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)

Log Number 05130 (159)

NEVADA DEPARTMENT OF CORRECTIONS
FIRST LEVEL GRIEVANCE

NAME: MICHAEL ADKISSON I.D. NUMBER: 84280

INSTITUTION: N N CC UNIT: 10 A 4 G

I REQUEST THE REVIEW OF THE GRIEVANCE, LOG NUMBER 20063105130, IN A FORMAL MANNER. THE ORIGINAL COPY OF MY GRIEVANCE AND ALL SUPPORTING DOCUMENTATION IS ATTACHED FOR REVIEW.

SWORN DECLARATION UNDER PENALTY OF PERJURY

INMATE SIGNATURE: [signature] ON CAMERA DATE: 9-4-2020

WHY DISAGREE: N.D.O.C. GRIEVANCE Responder admits that the Consecutive sentence pursuant to N.R.S. 193.165 is NO OFFENSE This admittedly Requires immediate discharge. Because as set forth in the Classification Process Supra - N.D.O.C. MUST HAVE a FelonY Judgment See A.R. 304 AND OP 510. It is NOT IN DISPUTE

GRIEVANCE COORDINATOR SIGNATURE: [signature] DATE: 9/9/20

1ST LEVEL RESPONSE:

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

WARDEN'S SIGNATURE: [signature] TITLE: Warden DATE: 10/2/2020

GRIEVANCE COORDINATOR SIGNATURE: R Walsh DATE: 10/7/20

_____ INMATE AGREES X INMATE DISAGREES

INMATE SIGNATURE: [signature] DATE: 10-16-2020

FAILURE TO SIGN CONSTITUTES ABANDONMENT OF THE CLAIM. A SECOND 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
SEP 09 2020
NNCC

TH
9-8-2020

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Adkisson I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT #: 10-A-46

GRIEVANCE #: 20063105130 GRIEVANCE LEVEL: ONE

GRIEVANT'S STATEMENT CONTINUATION: PG. TWO OF THREE

That I did NOT Recieve any Conviction for N.R.S. 193.165 USE of A Deadly weapon This is well Settled law in Nevada See Raby v. State. I have only ONE Conviction for one Sole felony and it has been discharged through Parole. The REVISED position stated by N.D.O.C. in this Grievance is not Consistant with previous claims where N.D.O.C. Claimed N.R.S. 193.165 Constitutes an "F" felony in EDMOND Green's Grievance and Previously in a Grievance related to Me N.D.O.C. Claimed USE of A Deadly weapon is A Category A felony in My CASE

Its time to just do the Right thing - there is NO dispute in the Courts - N.R.S. 193.165 USE of A Deadly Weapon is No OFFense AND No Conviction ever Results - This Means You (N.D.O.C) ARE Either Over-Riding SafeGaurds AND Breaking the law in the process - BY ASSIGNING a felony Conviction to my Sentence pursuant to N.R.S. 193.165 or this is A tragic Over Sight Where No felony Judgment is present you must Discharge

Original: Attached to Grievance
Pink: Inmate's Copy

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Atkisson I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT #: 10-A-4G

GRIEVANCE #: 20063105130 GRIEVANCE LEVEL: First

GRIEVANT'S STATEMENT CONTINUATION: PG. Three OF Three

N.D.O.C. Grievance Coordinator Correctly Identifies
The Murder Conviction as a Category A Felony
while also acknowledging the Consecutive
sentence for use of a Deadly weapon is No OFFENSE
It is important to Note that BECAUSE it is Consecutive
it does not increase the Severity of the Sentence for
the Crime - No ENHANCED Sentence for Murder is
present by your own acknowledgment
By your own acknowledgment the Sentence
for USE of A DEADLY WEAPON is A Sentence without
A Felony Judgment, and is not tethered to the
Crime. N.D.O.C. Admits the sentence does not set
forth any Felony Judgment. N.D.O.C. STANDARDS
Described Supra DEMAND Immediate
Discharge under this Condition -

Original: Attached to Grievance
Pink: Inmate's Copy

State of Nevada
Department of Corrections

(PS 12)

10A 4G

INMATE GRIEVANCE REPORT

ISSUE ID# 20063105130 **ISSUE DATE:** 07/20/2020

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

LEVEL	TRANSACTION DATE	DAYS LEFT	FINDING	USER ID	STATUS
1	10/01/2020	4	Denied	TCTHOMPSON	A

INMATE COMPLAINT

OFFICIAL RESPONSE

Inmate Adkisson, In review of the 2nd Amended Judgment of Conviction, which is the most up-to-date Judgment that NDOC is in receipt, you were found guilty of Murder with a Use of a Deadly Weapon and sentenced with Life with a Minimum parole eligibility of Ten (10) Years plus an Equal and Consecutive term of Life with a Minimum parole eligibility of Ten (10) years for the Use of a Deadly Weapon. As explained in the informal response, in accordance with NRS 193.165-3, the Judge ordered the additional penalty as part of the Judgment of Conviction as noted above. You were appropriately seen for a periodic review and correctly classified. Grievance Denied.

GRIEVANCE RESPONDER

10-16-2020

Report Name: NVRIGR
Reference Name: NOTIS-RPT-OR-0217.4
Run Date: OCT-01-20 01:41 PM

LOG NUMBER: ____________

NEVADA DEPARTMENT OF CORRECTIONS
SECOND LEVEL GRIEVANCE

NAME: MICHAEL ADKISSON I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT: 10 A 4 G

I REQUEST THE REVIEW OF THE GRIEVANCE, LOG NUMBER 20063105130, ON THE SECOND LEVEL. THE ORIGINAL COPY OF MY GRIEVANCE AND ALL SUPPORTING DOCUMENTATION IS ATTACHED FOR REVIEW.

SWORN DECLARATION UNDER PENALTY OF PERJURY

INMATE SIGNATURE: [signature] DATE: 10-17-2020

WHY DISAGREE: The relevant NV. Stat. scheme, A.R. 504 and the U.S. & NV Const. Require a felony Judgment (conviction) in order for N.D.O.C. to maintain any person as an Inmate offender at any N.D.O.C facility. N.D.O.C does not possess discretionary authority in order to make legal determinations as to what constitutes a felony conviction. The acknowledgment that use of a deadly weapon is not a felony, TRIGGERS Your MINISTERIAL

GRIEVANCE COORDINATOR SIGNATURE: ____________ DATE: ____________

SECOND LEVEL RESPONSE: ____________

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

SIGNATURE: ____________ TITLE: ____________ DATE: ____________

GRIEVANCE COORDINATOR SIGNATURE: ____________ DATE: ____________

INMATE SIGNATURE: ____________ DATE: ____________

THIS ENDS THE FORMAL GRIEVANCE PROCESS

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

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Adkisson I.D. NUMBER: 84280

INSTITUTION: NNCC UNIT #: 10 A 4 G

GRIEVANCE #: 20063105130 GRIEVANCE LEVEL: SECOND

GRIEVANT'S STATEMENT CONTINUATION: PG. TWO OF THREE

duty to discharge me immediately from N.D.O.C. custody. The relevance of the applicable N.D.O.C. Regulations is to ENSURE that I am properly Committed to the Dept, with appropriate Commitment documents, that set forth a felony Conviction. This creates an Afficmitive Ministerial Duty to identify the felony conviction required for N.D.O.C. custody and Classification determinations. Because of your acknowledgment that USE of A Deadly weapon is not a felony the existance of the fact that my Classification, as relied upon for custody, states that N.D.O.C. is treating use of a deadly weapon as a category 'A' felony demonstrates that I have not been classified correctly. The stated reliance on a claim that "the judge ordered the additional penalty as part of the Judgment of Conviction" (see RTRN L.I. PRUSSEL) does not establish the additional penalty as a felony conviction. The shifting Response by NDOC establishes the Arbitrary and Capricious nature of unilateral standards created and implemented by N.D.O.C, Contrary to the Standards lawfully approved by the Board of Prison Commissioners. The Malfeasance involved results in violation of my Rights related to a fair Classification, but also implicated Nevada's Kidnapp, false-imprisonment and oppression Statutes but also implicates Ethics questions related to the public trust. The shifting Response as set forth in the following GRIEVANCES: 1.) ADKISSON #20063053285-N.D.O.C. states that USE of A Deadly weapon is a continuing Sentence of my Murder Conviction, Despite a Grant of Parole in 2006 stating: "This PRACTICE

Original: Attached to Grievance
Pink: Inmate's Copy

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: Michael Atkisson I.D. NUMBER: 84280

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

GRIEVANCE #: 2006305130 GRIEVANCE LEVEL: SECOND

GRIEVANT'S STATEMENT CONTINUATION: PG: THREE OF THREE

is under Review by OFFENDER Management." 2) Green #2006305B144 N.D.O.C states that Because use of a deadly weapon is no felony N.D.O.C unilaterally makes up a category 'F' felony for custody classification in order to prevent release - later shifting again claiming use of a deadly weapon is a category A felony resulting in Conviction. 3) CAREY #2006310540S N.D.O.C. States that because verbiage in Carey's J.O.C. describes Sentence for USE of A Deadly Weapon as a "like Sentence" N.D.O.C treats it as category 'A' felony, where Carey's underlying Conviction for Murder is Expired, is a category 'A'. N.D.O.C's shifting standards are not Codified and reflect an ABUSE of POWER, Treating use of a deadly weapon as a category 'A' or any felony Conviction works to deprive me of a fair classification Hearing. N.D.O.C's spin-Doctoring in order to Rationalize their fraudulent representation of the existance of a felony conviction for USE OF A DEADLY WEAPON in my classification status for custody purposes is indirect conflict, factually and procedurally with Clearly established law. I have discharged my sole felony Conviction through a Grant of parole effective Nov. 1, 2016. I have not recieved a fair consideration for classification at any time since that date, for the reasons stated Supra. Because of the facts Supra, N.D.O.C. can NEVER IDENTIFY A felony Judgment in my J.O.C. for Use of a deadly weapon. N.DOC does not have lawful custody of my person and must comply with their limited Ministerial duty, immediately returning me to the County Jail I came from for further proceedings inc Bail, or immediately turn me over to Parole & Probation. A. GO opinion Report

Original: Attached to Grievance
Pink: Inmate's Copy

A.W.O. HARTMAN

(PG 16.)

INMATE REQUEST FORM A PHOTOCOPY of this file Retained by Adkisson

1.) INMATE NAME	DOC #	2.) HOUSING UNIT	3.) DATE
MICHAEL ADKISSON	84280	10-B/3-I	3-8-2021

4.) REQUEST FORM TO: (CHECK BOX)

___MENTAL HEALTH ___CANTEEN

___CASEWORKER ___MEDICAL ___LAW LIBRARY ___DENTAL

___EDUCATION ___VISITING _X_SHIFT COMMAND

___LAUNDRY ___PROPERTY ROOM _X_OTHER A.W.O. HARTMAN

5.) NAME OF INDIVIDUAL TO CONTACT: A.W.O. HARTMAN RE.: STAFF MISCONDUCT RELATED TO CLASSIFICATION 68 pgs TOTAL

6.) REQUEST: (PRINT BELOW) A.W.O. HARTMAN, Greetings As you are identified by A.A.W. HENLEY, and CCS HARVEY as the GRIEVANCE RESPONDER related to Grievance No.: 20063105130, Second level! I'am providing you with the relevant portion of the record relied upon by my Attorney related to a writ of Certiorari currently filed with the U.S. SUPREME COURT and the initial DRAFT for your review! in order to ENSURE that your anticipated RESPONSE to my OVER-DUE Second-level Grievance does not run Afoul of clearly established law where "use of A Deadly Weapon" is No offense, No Conviction Ever results, (see related Grievance) N.D.O.C. Classification practice is limited by Ministerial Duty, No right Exist empowering N.D.O.C. official to "Classify" use of A Deadly Weapon as a Felony Conviction See Cont. Attached

7.) INMATE SIGNATURE [signature] DOC # 84280

8.) RECEIVING STAFF SIGNATURE [signature] DATE 3/9/21

9.) RESPONSE TO INMATE

10.) RESPONDING STAFF SIGNATURE ______ DATE ______

DOC - 3012 (REV. 7/01)

NEVADA DEPARTMENT OF CORRECTIONS
GRIEVANT'S STATEMENT CONTINUATION FORM

NAME: MICHAEL ADKISSON I.D. NUMBER: 84280

INSTITUTION: N.N.C.C. UNIT #: 10 B 3 I

GRIEVANCE #: UTILIZED AS Continuation to DOC 3012 to A.W. B HARTMAN ~~GRIEVANCE LEVEL~~:

GRIEVANT'S STATEMENT CONTINUATION: PG. Two OF 65 Total

The Certiorari deals with Nevadas Sentencing practices. My efforts related to Grievance No.; 20063105130 deals with FAIR classification Hearing issues related to my personal liberty and implicating N.D.O.C. STAFF Mis-Conduct resulting in Feloniaus ACTS that Are the basis of my unlawful Confinement. I Know my Presentation is long but I CAN ASSURE you upon a CAREful Review of the FACTS and Information provided You will possess a new understanding of the issues. It is Equally significant to Note that the Act of Commission by N.D.O.C. to Assert a Fraudulent representation that a Current Felony Conviction is under Consideration for Classification purpose related to my Sentence for the use of a Deadly weapon is AN ACT of Commission amounting to A Felony And as such Each N.D.O.C. OFFICIAL tied to this ACT, upon this Notification setting forth the ACT (criminal) No Longer ENJoys Qualified Immunity Implicating False Imprisonment.

Improper Governmental Action, Defined at N.R.S. 281.611 means Any action taken by a state officer or employee or local government officer or employee, whether or not the action is within the scope of employment of the

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: NNCC UNIT #: 10 B 3 I

UTILIZED A CONTINUATION TO
GRIEVANCE #: DOC 3012 to AWO HARTMAN ~~GRIEVANCE LEVEL~~:

GRIEVANT'S STATEMENT CONTINUATION: PG. THREE OF 63 TOTAL

officer or employee, which is: (a) in violation of any state law or REGULATION; AN Abuse of authority; A Gross waste of public money 4)(a) Actions in official capacity which involve Substantial and material exercise of Administrative discretion of a local gov. power, trust or duty inc.: (c) The enforcement of laws AND REGULATIONS of the state or a local gov. N.R.S. 281.621 describes the Public Policy, that (you) a state officer are... [] to disclose improper gov. Action. N.R.S. 281.671 "Effect of provisions upon Criminal law" this section intended to be directory & preventive rather than punitive, but does Not decrease the effect of any related Crime or Punishment related to Improper Gov. Action

It is my Hope to FIND ONE OFFICIAL that possesses the Integrity to take action in order to Remedy the Illegal N.D.O.C. Practice. The facts ARE NOT EVEN IN Dispute

The Director does have the discretion and Authority to take mutually agreeable steps in order to Mitigate this Condition while a permanent resolution is sought out. I am willing to Cooperate. REQUEST MEETING. As my SECOND level Grievance is Approaching 3 months OVER-DUE I am Submitting this Request Seeking a Return and answer after you have Reviewed the Entire Contents of this Record. Without a FINAL AGENCY ORDER from you, I will proceed Pro-se with state ct. proc. & a Fed. 1983 claim. Thank you in adv.

Original: Attached to Grievance
Pink: Inmate's Copy

INDEX ATTACHED
With Supporting Documents

Michael ADKISSON #84280

~~[struck out]~~ RE: UNILATERAL N.D.O.C. CLASSIFICATION CONSTITUTING FELONIOUS ACT

Michael Adkisson is currently being held in custody pursuant to a sentence for which there is no conviction, it is therefore unconstitutional as a matter of Cruel and unusual punishment. Adkisson was convicted of a single crime, SECOND DEGREE MURDER. Both the Nev. SP. CT. and the statute itself state that the additional Consecutive penalty is not an offense. At sentencing the court imposed a maximum Sentence on the sole conviction plus, in addition an equal and Consecutive sentence for the use of A Firearm, NOT contemplated by the provisions of the crime resulting in Conviction. However, the Nev. SP. CT's long settled interpretation of the additional Consecutive sentence does not create a separate conviction. The Nev. Dept. of Corrections does not have the Constitutional Authority under Apprendi v. New Jersey 530 U.S. 466 (2000) to hold an individual 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 all of the elements and facts justifying the additional Consecutive sentence. The use of a firearm is not an element of the crime of murder, and no increase in Either the severity of the crime or punishment is contemplated by the Murder statute by provision for the use of a firearm. Because it is well accepted that the additional Consecutive Sentence (PENALTY) is not the result of a Conviction, NOR is it TETHERED to a conviction for custody purposes under NEVADA LAW, it is therefore unconstitutional as a matter of Federal due process for the Nev. Dept. of Corrections to Continue to hold Mr. Adkisson in Custody without a REMAINING or underlying Conviction.

Despite AFFIRMITIVE internal Safeguards pursuant to A.R. 504 and O.P. 504; OP 510, directing the NV. DEPT. of CORR. to EXAMINE the Commitment documents and to ENSURE that a Felony Judgment is present pursuant to EVERY sentence for imprisonment, or to REJECT MR. ADKISSON. The NV. DEPT of Corrections ignores these safeguards and UNILATERALLY asserts that a Conviction does result for MR. Adkisson's

M. Adkisson #84280

Sentence for using a deadly weapon.

Notwithstanding the fact that N.R.S. 193.165 is no OFFENSE, Mr. Adkisson was Charged in an information with "MURDER With the use of A DEADLY WEAPON" under N.R.S. 200.010; 200.030; and 193.165 based on allegations he Killed Steven Borgens on feb 18, 2004 by shooting with a firearm.

N.R.S. 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." N.R.S. 200.030 provides the ~~different~~ different degrees of Murder. The statute first provides the manner in which first degree Murder Can be Committed then states; "Murder of the second degree is all other Kinds of murder. In Nevada by statute, Conviction of Murder is expressly limited and may only result in a Conviction limited to either first degree or Second degree murder. No AGGRAVATED crime of "Murder with the USE of A DEADLY WEAPON" is Statutorially Available. N.R.S. 193.165 is entitled; "ADDITIONAL PENALTY" and does not Contemplate an additional *sentence STRUCTURE. (Discussed in detail to follow) *SENT. STRUCTURE OR FRAMEWORK

Nevada's efforts in 1973 related to A.B. 234 and the creation of N.R.S. 193.165, Nevada's use of a firearm or deadly weapon Statute, was intended to trigger Consideration of the prescribed fact for the purpose of preventing probation and mandatory increase in the sentence to be imposed only when a discretionary sentence is Contemplated by the underlying crime. No increase in either the severity of the Crime Nor the available maximum sentence ever took place. Subsequently, because of ambiguities percieved by the Nevada Supreme Court related to CRIMINAL-Liability for using a firearm, In 1975 the Nev. Legislature passed A.B. 509 related to N.R.S. 193.165 declaring the legislative intent in the title of the ACT as follows; "An ACT relating to crimes and Punishment; Clarifying the intent of the legislature in providing an additional Penalty for the Commission of a Crime with the use of a deadly weapon." The Clarification by the

M. Atkinson #84280

legislature states that the use of a weapon is not a separate offense, but a part of the crime itself. Subsection 2 of the statute made clear that this additional penalty is not a separate offense and did not create any criminal liability for the prescribed fact stating; ..." 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."

Because use of a firearm is merely a prescribed fact of the underlying crime and not a criminal element, the maximum sentence of the crime cannot be exceeded.

This legislative clarification has NOT been adhered to.

The Nevada Supreme Court has held that this statute does not create its own offense and does not violate double jeopardy 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) The ruling in Raby reveals problems implicating the jury verdict form contemplating a Jury's verdict finding "GUILT" for the USE of a firearm or other deadly weapon in the commission of a crime, and any sentence to be issued for or pursuant to a finding of guilt for use of a deadly weapon, where N.R.S. 193.165 is not an offense [Woofter v. O'Donnell 91 Nev 756 542 P2d 1396] "The five convictions therefore must be and hereby are annulled" (Raby Ct. Holding) The Raby court, effectively (erroneou[illegible] concluding instead that the statutory language otherwise limiting the additional penalty available by the framework of the sentence defined by the crime, was to now be considered an additional sentence and not simply an increased sentence.

To "ENHANCE" in this manner increases the sentence beyond the statutory construction of the offense, despite no statutory increase in the severity of the offense or available discretion for sentencing or sentence.

Because of double-jeopardy implications the RABY Court could not issue two consecutive sentences for each robbery, nor sentence in excess of the maximum sentence contemplated by the framework of the offence

Mr. Adkisson #84280

The Raby Court instead, ERRONEOUSLY adopted a practice that BELIED the Courts underlying Holding Related to N.R.S. 193.165 and Dicta, Where the Court determined NO conviction CAN EVER Result Because 193.165 is NO OFFENSE, NO CRIMINAL-Liability Can be found for USE of A Firearm or other Deadly weapon pursuant to N.R.S. 193.165. Any Penalty (liability or Guilt) MUST BE FOR THE NAMED OFFENSE

NO AMENDED J.O.C. Reflects this STATEMENT The Raby Court ERRONEOUSLY adopted and Represented "USE of A Deadly weapon" as "Robbery with the use of a Deadly weapon" in an attempt to treat as one aggravated Count. The absurd result of the adjudication of Guilt in this way has become the GENESIS of the problem now faced in Nevada and is further compounded when this claimed single Count is bi-furcated by the Sentencing Court into Separate Components, each with a separate and distinct Consecutive Sentence, Creating a claim that criminal liability is attached to each Sentence, One for the Robbery 10 yrs, and a Consecutive Sentence of 10 yrs. for the Use of a deadly weapon. ERRONEOUSLY imposing a loss of liberty and the STIGMA of Conviction for "USE of A DEADLY WEAPON", Where any sentence within a Judgment of Conviction presupposes a Valid Conviction.

Mr. Adkisson's use of a deadly weapon is ERRONEOUSLY represented as an aggravated Crime of SECOND DEGREE MURDER WITH THE USE OF A DEADLY WEAPON within his J.O.C. and for purposes of adjudication was considered as ONE Count. However for sentencing purposes the sentencing Court bi-furcated the claimed Single-Count, Sentencing Adkisson to the Maximum Sentence for Second degree Murder, plus a Separate and distinct Sentence EQUAL to AND Consecutive to the First Sentence, to be For the USE OF A DEADLY WEAPON. Inclusion of a sentence for use of a deadly weapon in this manner works to impose a loss of liberty and the STIGMA of Conviction erroneously, precisely in the Manner the U.S. Sup. Court warned against in APPRENDI, and

M. Adkisson

became the basis relied upon by the NV. SP. CT's Erroneous determination that Adkisson's TIME Computation WRIT Amounts to a Challenge to a Conviction related to N.R.S. 193.165, Effectively and ERRONEOUSLY affirming the Dist. CT. decision that any Challenge to any sentence inclusive in a J.O.C. is to be treated as A Challenge to A Conviction, Where any Sentence inclusive in a J.O.C. presupposes a Valid Conviction. Not only is this BELIED by RABY & Woofter but N.R.S. 176.105 & 176.125 Requires Two Essentials to be present in a valid J.O.C. #1) The Punishment Must be stated; and #2) The OFFENSE Must be STATED as Relied upon in order to inflict the Punishment.

THE FACT that Adkisson's Sole Count of Conviction for Second degree Murder is discharged through a grant of parole effective NOV. 1 2016 is DETERMINATE regarding the N.D.O.C.'s ERRONEOUS treatment of Adkissons Sentence for use of a deadly weapon as Either a Conviction or as an ENHANCED Sentence.

The N.D.O.C. properly Calculated Adkissons Sentence for Second degree Murder, However, once discharged through PAROLE, N.D.O.C. Claims that Adkissons Sentence for the use of a deadly weapon is the result of a Conviction For USE of a deadly weapon, relying upon a Claim that the Judge's adjudication of guilt for Second degree Murder with the use of a deadly weapon somehow Confers the discretion to N.D.O.C. in order to represent USE of A DEADLY weapon as a separate distinct Conviction, a Category A Felony Conviction, when Considered pursuant to the Bi-furcated Sentencing practice described. Addmittedly (N.D.O.C.) transferring the Category "A" felony from the discharged Second degree Murder, utilizing it a Second time for Custody purposes related to the use of a deadly weapon.

N.D.O.C.'s use of Adkissons murder Conviction a Second time in this manner related to ~~the use of a deadly weapon~~ Custody Raises

M. Adkisson

novel questions related to double jeopardy ~~related to~~ AND Adkisson's continued imprisonment after discharged on Parole

As a result of the U.S. SUPREME COURT decision in Apprendi, In 2007 OMNIBUS bill A.B. 510 was passed affecting Changes to N.R.S. 193.165. It No longer Contemplates Equal and Consecutive term of imprisonment, increasing the penalty for the Crime, as this was not fully understood, but now establishes Clarity in the ORIGINAL Intent. The Sentence now spells out a Full RAnge of Sentencing Related to the offense when a weapon is used of From 1-20 yrs.

Significantly in recognition of Apprendi's requirements the NV. Leg. added provision 2(a) "The sentence prescribed by this section: (a) must not exceed the sentence imposed for the crime;"

Because this provision contemplates the IMPOSED sentence, the Command has not been Fully understood. The Legislature established the maximum sentence to be imposed for any crime, and the specific sentencing Range Now spelled out by N.R.S. 193.165 (Nevada's use of a deadly weapon statute) Emphasis is ~~___~~ (clarification) that the underlying applicable OFFENSES ARE those limited by a minimum-maximum Sentencing Framework of 1-20 yrs. However because this provision Has been applied Considering the Imposed sentence as Handed down by the sentencing Court, Rather than the LEGISLATIVE COMMAND DEFINING THE MAXIMUM SENTENCE TO BE IMPOSED For the underlying OFFENSE(S) it works to EXCEED the 1-20 yrs. AND HENCE THE MAXIMUM OF THE OFFENSE

The language for provision 2(a) is ambiguous and OVERBROAD, Contemplating a Sentence that Can be percieved to be Equal to the Sentence imposed by the Sentencing Judge for the offense. This Absurd Result stands in Conflict with the discretionary Sentence Framework of 1-20 yrs MAX, Where; when Considering a Category A felony, a Sentence of 25-50 yrs; 10-Life; life without;

and death are regularly handed out. Nevada regularly imposes sentence for Category A Felonies that by definition ARE THE MAXIMUM Imposed for the Crime, where there simply is no discretionary "RANGE" for the sentencing court. The additional Sentence for USE of A Deadly weapon in this instance is a Sentence in EXCESS of the Legislative MAXIMUM Sentence available for Adkisson's OFFENSE. In order to understand this apparent Conflict and to read this in a Manner that does not render the statute nugatory we look at the legislative intent for clarity and the Plain language of the Statute.

The 2007 Nev. Legislature made clear on May 31 2007 that the purpose of Spelling out a RANGE of 1-20 yrs was to clarify that N.R.S. 193.165 is to ..."COVER all RANGES up through Category B Felony" EMPHASIZING that; "The sentence cannot be enhanced more than the Maximum. Therefore, the Judges discretion will be the full Range of the underlying Sentence Subject to the FINDING." Ongoing discussions providing further Clarity regarding N.R.S. 193.165 provision 2(a) April 12 2007, after much discussion Matt Nichols, Committee Counsel summarizes; "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 10 yrs. 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."

Where upon discussions Continued with Concerns related to the un-intended Consequences in Nevadas enhancement Keeping people ~~incarcerated beyond~~ what the primary offense was. After much discussion the clarification limited the question to 'B' felonies with a maximum sentencing Range of 20 yrs, Concluding that ANY sentence and enhancement when Considered Cumulatively Could not exceed 20 yrs Stating; "... They would not be able to extend it

M. Adkisson # 84280

beyond 20 yrs. in the cumulative because that was the Maximum which is allowed under that particular Statute." Matt Nichols committee Counsel Concludes; "Just to go over this one more time, to get it right, to go back to Mr. Andersons example, If the defendant is sentenced to a term of 10 yrs. for a crime where a sentence of 20 yrs. could be imposed, the additional penalty would still be based on the 10 yrs that was imposed by the Judge, If you had two sentence Enhancements such as firearm and a gang-related enhancement, these together Could only equal 10 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"

After a five day Jury trial, the Jury found Mr. Adkisson guilty of Second degree Murder. However, Because the EIGHTH JD. Dt. Ct utilized a jury Verdict Form that Contemplates a finding of Guilt for Second degree Murder with the Use of a Deadly weapon, the Jury Checked the Box "Guilty of Murder in the Second Degree with use of a Deadly Weapon" As discussed Supra there simply CAN NEVER be A FINDING of Guilt pursuant to N.R.S. 193.165. This practice by the EIGHTH Judicial Dist. Ct. Violates NV. Const. ART 4 § 20 & 21 The uniform OPERATION & APPLICATION of GENERAL LAWS, discussed in Related matters in upcoming detail to follow.

At Sentencing Mr. Adkisson was Adjudicated guilty of Second degree Murder with the use of A Deadly weapon. After Bi-furcation of the adjudicated Single Count, Adkisson was sentenced to the MAXIMUM Allowed sentence of life with the possibility of parole after 10 yrs. for the Conviction of the Sole Offense of Second degree Murder. The Court imposed an additional Consecutive Sentence of life with parole after 10 yrs Ordered to be Served for the Use of a deadly weapon, utterly Failing to identify the underlying offense, or any offense. The Constitutional Violation

M. Adkisson # 84280

did not become ripe until Mr. Adkisson was Granted Parole on his Sole Felony Judgment, and the Nevada Dept. of Corrections Failed to Release Adkisson to the Community, Instead, claiming that Adkissons Sentence for USE of A Deadly weapon operates as a Conviction and the N.D.O.C. application of a Category A Felony for the use of A Deadly weapon became the Basis for N.D.O.C. Continued Imprisonment. N.D.O.C Classification in this manner is not within the Ministerial Duty of OR the Power of The N.D.O.C. and does Constitute a Felonious Act, not protected by Qualified Immunity where Adkisson has provided Adequate Notice of this ONGOING N.D.O.C. PRACTICE. Where Adkisson's J.O.C. does not provide a Felony Judgment for the sentence of USE of A DEADLY weapon the N.D.O.C. Does not possess the Discretionary Power to Assign a Felony Conviction as a Category A felony to a NON-OFFENSE. Because N.D.O.C. has UNILATERALLY determined and applied a Felony Conviction for USE of A Deadly weapon where No Conviction MAY EVER Result, The N.D.O.C. is violating Adkissons Right to Due Process and a Jury Trial under the 5th 6th & 14th Amendment by Keeping Adkisson in prison without Statutory Authority when he has Been Paroled from the Sentence on his only Conviction AND where NO Conviction Results for 193.165

Mr. Adkisson is currently Confined pursuant to an equal & Consecutive Sentence imposed under N.R.S. 193.165. That Statute provides the additional Penalty did not Create any separate offense but provides an additional penalty for the primary offense. This "ADDITIONAL PENALTY" Provision does not Contemplate any Additional Sentence FRAMEWORK, only AN "Additional Penalty" within the FRAMEWORK of the Primary OFFENSE. The NV. SP. CT Holding in Woofter v. O'Donnell 542 P.2d (1975) Addressed whether a sentence imposed under the Deadly Weapon Statute violated the Double Jeopardy Clause. In order to avoid any Double Jeopardy implications the Court adopted the reasoning that the

M. Adkisson #84280

Weapon penalty is not a separate conviction, and NOT an aggravated crime but represented A PROSCRIBED FACT FOR additional penalty to be utilized to Increase the term of Imprisonment. (Without a separate conviction there CAN NEVER EXIST A SEPARATE SENTENCING FRAMEWORK)

Then in Raby v. State the court held that "use of a firearm or other deadly weapon in the commission of a crime is not a separate criminal offense" 544 P.2d (NV 1976). In 2000, the U.S. Sup Court Held that any FACT (other than a prior conviction, like Nevadas HABitual Statute) that increases the penalty for a Crime beyond the prescribed statutory MAXIMUM must be submitted to a jury and proved beyond a Reasonable doubt, which means Apprendi Converted ADDITIONAL PENALTY PROVISIONS into elements of the crime. In Nevada, statutes like ASSAULT or BATTERY, 200.471; 200.481 USE of A Deadly weapon is INCORPORATED by provision within the statute and does Result in a Conviction for an AGGRAVATED Crime example; Assault - Becomes Assault w/a deadly weapon - This is the only manner by which any additional penalty beyond the prescribed statutory Range may be imposed. There must be a Conviction that Comports with Due-process & the Right to a jury Trial

Nevadas N.R.S. 193.165 does not provide any Conviction, and has simply Been misunderstood and MisApplied. However the Concern Relates more to the N.D.O.C. application and operation, where it is NOT EVEN in dispute that Adkissons sole Conviction is Discharged - and 193165 is No offense, without Conviction, The N.D.O.C.s unilateral action to treat 193.165 as a Felony Conviction Results in violation of Nevadas FALSE Imprisonment Statute. The precedent established by APPRENDI clarifies that Adkisson's CURRENT Custody Status Violates due-process and the Right to a Jury trial. MR ADKisson is NOT Being held pursuant to a sentence Based upon a Conviction It is in This WAY the Nevada Department of Corrections is unlawfully detaining Him

M. Adkisson #84280

Simply put, the weapons statute cannot be viewed as NOT an offense that does not result in a second Conviction for double jeopardy purpose by the Nevada Legislature and The Nevada Supreme Court, But then also treated as an actual Second Conviction, or any Conviction by The Nevada dept. of Corrections. The Nevada Supreme Court maintains it is not a Separate Conviction, But without a current Conviction under Consideration Adkisson is NOT being held pursuant to a Constitutionally valid sentence.

The Nevada Dept. of Corrections Continued Imprisonment utilizing the N.D.O.C. SYSTEM of Classification of OFFENDERS To unlawfully Detain Adkisson by Intentionally OVER-Riding safeguards ASSERTING ADKISSON Suffered a Felony Separate or Any Felony Conviction for a sentence for USE of A Deadly weapon is an unlawful ACT and does Result in Adkisson's unlawful Detainment By N.D.O.C. (Johnathan I think it may be time to Consider a Complaint to the F.B.I. ?? These Facts Not in Dispute)

Please Refer to my ORIGINAL writ Related to the ORIGINAL legislation: where it was declared this is a "Do Nothing Bill" Because "THERE is NO Relationship between the use of a Firearm and the (CONSECUTIVE) penalty Imposed."

The first real Challenge to N.R.S. 193.165 came the following year of adoption in 1974 when 8th JD. Dt. Ct. Judge O'Donnell refused to adjudicate Guilt or Sentence defendant David ElDON DUNKEL pursuant to the information charging N.R.S. 193.165 as a felony despite the entry of a Guilty Plea. O'Donnell Correctly took the position that the information charged but one offense and it would be Un Constitutional for the Court to impose two Convictions. The INFORMATION Charged Dunkel with Robbery-felony-N.R.S. 200.380 and Use of A Deadly weapon during the Commission of a Crime-Felony N.R.S. 193.165

A Petition for writ of Mandamus followed in Nov 1974

M. Adkisson #84280

A Mandate was issued by the NV.SP.CT Dec. 30 1975. During the intervening period the NV. Legislature Convened. The Legislature took action related to the Conflict presented in Dunkels Case Concerning Nevada's use of A DEADLY weapon Statute. The legislative action is attributed to AMBIGuities Identified by the NV. SP.CT setting forth the following; "A.B. 502 ch. 465 is another case of clarifying ambiguities in the criminal code perceived by the NV. SP.CT, N.R.S. 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"

Whether described as a clarification or NOT, Changes by the 1975 NV. Leg. related to N.R.S. 193.165 REMEDIED deficiencies in the statute in an effort to provide a Full understanding Clarifying that there is no ~~penalty~~ SENTENCE for using a firearm, setting forth;" any additional penalty must be for the offense". This was done specifically to Remove any Notion of Criminal Liability related to the use of a firearm, spelling out in plain language 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."

This limits any sentence Considerations to the FRAMEWORK of The Primary offense, where otherwise there is No Criminal-liability pursuant to N.R.S. 193.165.

The only FRAMEWORK for sentencing in Nevada that provides the Judge with the Discretion to Increase the term of Imprisonment utilizing the Full-RANGE of A sentence contemplated is limited to Minimum-MAXIMUM sentencing schemes Captured By B Felonies or less with a Sentencing Range of 1-20 yrs.

The additional Penalty Provision pursuant to NRS 193.165

M. Adkisson #84280

was not expanded to include a Sentence Structure beyond the available sentence Structure of the Primary Offense, and is only a Command to utilize the Full-Range of the available Sentence structure defined by the offense for the purpose of triggering an increase in Sentencing only when the use of a firearm or other deadly weapon is found, distinguishing a difference for Sentencing purposes

The reconition by state legislatures that in Cases where the offense under Consideration limits the judge as to the available Sentence, N.R.S. 193.165 was intended to do nothing more than to prevent probation, when a firearm or other deadly weapon is used in the Commission of a crime, The public Outrage over ARMED Robbers recieving probation was primary as a basis of the legislative Design see March 1 1973 A.B.254 notes. Assemblyman Teruinen emphasised this point in the following record;

"Mr. Teruinen stated that as long as we have determinate sentencing this bill accomplishes absolutely nothing except to ~~prevent~~ Deny probation."

Reflected pursuant to N.R.S. 193.165 (1) in Pertinent part;

"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..."

Assemblyman Teruinen is right because in offenses with determinate Sentencing ~~sche~~ schemes there is no discretion to Increase the term of Imprisonment imposed. The importance of this Critical Point by Assemblyman Teruinen (Now a District Ct. Judge) is that there is No Increase in Any Circumstance to the Sentencing possibilities. The Sentencing Judge otherwise already possess the Statutory Sentencing discretion of the Full Range of the available discretionary Sentencing Range in those implicated offenses where a minimum-maximum Sentencing scheme is otherwise Already Contemplated, However Not So with Nevada's Parole-eligibility or Determinate Sentencing scheme Such as in Mr. Adkisson's Instance

N.R.S. 193.165; Second Part, to trigger A Harsher

M. Adkisson # 84280

Sentence to be imposed when a firearm or other deadly weapon is used, IS NOT Contemplated as the Result of AN AGGRAVATED CRIME (like NEVADA's Assault Stat.) but only as Consideration utilizing the full range of the existing Framework of the Primary offense under Consideration, only when and if an upward departure is Available by the existing Framework of the Sentence structure Contemplated by the Crime, This upward sentence increasing the TERM of Imprisonment is done in order to make a distinction and difference when considering the use of a deadly weapon, in the Primary offense, AND not as a Result of an Authorized aggravated Criminal offense. (when [illegible] N.R.S. 193.165

The significance of the statutory Construction of N.R.S. 193.165 as related to NV. Const. Requirements to the TITLE of each act in order to initiate, and later to provisionally amend N.R.S. 193.165 are in many instances incongruous and ambiguous implicating Violations related to both the NV. Const. and the U.S.C.

Nevada Const ART 4 § 17; 21; "ACT to EMBRACE ONLY ONE SUBJECT"; and "GENERAL LAWS TO HAVE uniform application and Uniform OPERATION." The percieved erroneous "CONVICTION" for the use of a deadly weapon and the actual ERRONEOUS APPLICATION of a "Conviction" by the N.D.O.C., Coupled with the Courts Use of a Jury Verdict Form that contemplates "Guilt" upon which the ADJUDICATION Relies upon, and the Command to impose a Sentence not set forth in the Framework of the underlying Crime is a clear Violation of the uniform application and Uniform operation of GENERAL LAWS related to Both the NV. Const & the U.S.C.

The fact that TITLES of the ACT(s) related to Amendments to N.R.S. 193.165 the claim of TWO SUBJECTS, one relating to a claimed "Conviction" the other declaring "NO OFFENSE" is presented, Countermand each other and rendering the Statute incomprehensible where 193.165 (4) provides in pertinent part ..." upon Conviction of use of a deadly weapon... (results) in Prohibition of Probation..." 193.165 (2)

M. Adkisson #84280

states in pertinent part; "... This section does not create a separate offense..."

Ultimately each Amendment to NRS.193.165 is designed to correct its ~~deficiencies~~ defects and Remedy its deficiencies without changing it's general framework, then in ORDER that the ACT may be Readialy and FULLY understood, and the Force and effect of changes appreciated, the Original act or section as amended must be set out at length and its TITLE referred to.

The ability to be Fully understood is clearly the problem, specificially and significantly, N.D.O.C.'s utter Failure to Fully UNDERSTAND - NO CONVICTION is present when considering Any sentence to be for "use of A DEADLY weapon" But Equally important is the BAD ACTS IDENTIFIED by Adkisson Where N.D.O.C. officials Violate Adkissons personal liberty by Committing a Felonious act to Intentionally Represent A conviction amounting to a category A felony utilizing the N.D.O.C. Classification of "OFFENDER"

The problems related to N.R.S.193.165 due to countermanding provisions, are related to the EXPRESS declaration that use of a deadly weapon is NO OFFENSE and does not result in any Conviction, and another provision related to a claimed "Conviction" for USE of A Deadly weapon becoming the BASIS for a PROHIBITION of probation, where another provision contemplates ONLY a Consecutive PENALTY, somehow resulting in a Consecutive Sentence with an Additional PAROLE DATE, Notwithstanding the absence of any available clear sentence framework for any Contemplated Consecutive sentence defined by N.R.S. 193.165 or Conviction. These Countermanding and Confusing provisions Cannot be Fully understood by Nevada Courts as Evidenced by the Courts practice to adJudicate "Guilt" for an AGGRAVATED Crime pursuant to N.R.S. 193.165 and to issue forth a sentence of Imprisonment to be executed For USE of A Deadly weapon, Where the EXPRESS provisional language requires that Any Additional Penalty must be Attributed to BE FOR the

underlying offense. The N.D.O.C. Confusion results in the treatment of N.R.S. 193.165 as the operation of a Conviction without any offense under Consideration where the Constitutionally Required uniform application of the Affected laws are ABROGATED and Nevada Citizens ARE Confined to A Prison without a Conviction solely as A Result of A UNILATERAL Excesses and FRAUDulent Representation by the N.D.O.C Related to the Claimed Classification of Offenders. Although at this Stage of the proceedings Review by the U.S. Sup. Ct. is discretionary, and a long Shot, FOREIGN Nationals imprisoned in this way does Constitute a Violation of the TREATY Between the Implicated Governments and Does, as such, TRIGGER A mandatory Consideration by the U.S. Supreme Ct. (Johnathon I have spoke w/ the Consulate General for the UNITED KINGDOM, BARBARA MORGAN, SHE Expressed Interest & Concern with a promise to send my anticipated BRIEFING to LONDON For REVIEW & Possible action as A TREATY violation issue)

Conflicts in Leg. Action Concerning the Prohibition of Probation upon "Conviction" for USE of A Deadly Weapon provision (4) of 193.165 see Senate Bill 192 (1979) states "The Court shall not grant probation to or suspend the Sentence of any person who is Convicted of using A Deadly weapon in any of the following crimes; a) Murder b) Kidnapping 1ST c) Sexual assault or d) Robbery. ~~The f~~ To MR. Adkisson's case where a Conviction for Second degree Murder is Considered probation is prohibited by the Frame-Work of the underlying Offense. With this understanding the language related to provision 4; Prohibition clearly envisions a Separate Conviction for using a Firearm and a PROHIBITION for such a Conviction

The inclusion of Murder for any purpose Related to N.R.S. 193.165 Stands in Conflict with the Provisions set Forth, where Murder

M. Adkisson # 84280

is the PRIMARY OFFENSE No Discretionary sentencing Range, or minimum-maximum Sentence FRAMEWORK is even available in order to Increase the term of Imprisonment, and No FRAMEWORK for sentencing purposes is Available pursuant to N.R.S. 193.165

N.R.S. 193.165 (3) Contemplates Nevada Statutes that do Incorporate USE of A Deadly weapon as an Element of the crime and in these Instances A FRAMEWORK providing an Increase in the Severity of the Crime and punishment are provided for 193.165 (3) in Relevant part ;

"when the use of a firearm or other deadly weapon is an element of the crime provisions 1 and 2 ~~that~~ do not apply"

The point of Relevance is clear, Nevada did NOT Intend to UTILIZE N.R.S. 193.165 to Create an additional sentence, only to Increase the Available TERM of Imprisonment utilizing the Full RANGE of the Available Sentence The distinction related to the Inclusion of USE of A Deadly weapon, provisionally in other Statutes, and providing a Greater punishment simply was Not done (by choice) in offenses where N.R.S. 193.165 is Contemplated.

The available sentencing scheme for the offense of Murder does not provide a discretionary sentencing RANGE in order to trigger AN increased term of imprisonment and is AS such EXCluded by the Authority Contemplated by N.R.S. 193.165 see NEVADA LEGISLATURE 58th Session 1975 SELECTED SIGNIFICANT LeGISLATION " in Relevant part ; A.B 502 " USE of A Gun ... in the Commission of a Crime will Cause an increased sentence."

Further Stating :

" The clarification states that the use of the weapon is not a Separate offense but a part of the Crime it-Self "

M. Adkisson #84280

Once the use of a gun as contemplated by N.R.S. 193.165 was declared as a part of the crime itself, for clarification purposes by the Legislature, thus limits the sentence to the crime itself

Questions related to Ex Post Facto are tied to this problematic Statute, where the OPERATION of a sentence is treated as a Conviction for Custody by N.D.O.C. is MORE Restrictive than Due-Process Contemplates where No Conviction EVER Results

Finally in Response to the U.S. Sup. Ct. Holding & Dicta in Apprendi, the 2007 NV Legislature reviewed N.R.S 193.165 for Compliance.

Discussion by the Legislature provides Clarification and Restores Continuity of existing from the Original Legislative Intent and works as the Clarification of a criminal Rule as related to the & OPERATION application of N.R.S 193.165 Setting forth Standards always contemplated and implicated but not sufficiently spelled - out by provisional language that could be fully understood

The 2007 NV. Legislature established provisions in order to correct deficiencies Related to N.R.S. 193.165. A.B. 510 2007, discussions by the legislature Set forth Clarity related to the Corrected deficiencies as related to the possible Category of felony crimes subject to the authority contemplated by N.R.S. 193.165 AND defined by the Discretionary sentence availability, providing that the full RANGE of the underlying Primary offence should be considered for the purpose of an Increased Sentence when the prescribed fact of use of a Deadly weapon is found. Significantly, spelling out by provision a RANGE of 1-20 yrs Capturing or Contemplating up to Category B Felonies with additional provisional language designed with the intent to limit any Additional Penalty Not to Exceed the Maximum of the Sentence for the Offense Even when Considered in AGGREGATE, and limiting the sentencing Judges' discretion NOT to provide a harsher ~~sentence~~ PENALTY ~~when~~ FOR the additional Penalty than the ~~sentence~~ term of Imprisonment imposed for

M. Adkisson #84280

the Crime. (Because use of a weapon pursuant to N.R.S. 193.165 is an Aggravating Factor As a part of the crime itself, limiting the available sentence to the sentence described by the Crime under Consideration (See A.B. 502 (1975))) not an Element of AN AGGRAVATED CRIME

A.B. 510 2007 Amending 193.165(1) provides clarity by defining the available discretionary sentencing range Related to the Crimes Contemplated and not excluded As Contemplated by N.R.S. 193.165 (3) (where certain crimes declare use of a weapon as an Element of the crime) Not A Sentence Related to use of a deadly weapon, because it is not A Crime only a prescribed fact. But Rather does describe the absolute limit of the authority Contemplated for the purpose of the application of the provisions of N.R.S. 193.165 in order to Cause an Increased term of Imprisonment when the use of a deadly weapon is used to make a Distinction and difference in sentencing limited by the framework of the Crime

Amended for clarity in order to correct deficiencies and to provide a Full understanding - AND NOT AS A Result of A Change in Law or FRAMEWORK as Related to Apprendi Standards. N.R.S. 193.165(1) EQUAL And Consecutive language is Removed simply because of unintended consequences where people were incarcerated longer than the crime allowed, amended AS Follows in Pertinent Part ;

193.165 (1) "... A minimum term of not less than 1 yr. and a maximum of not more than 20 yr."

THERE simply has NEVER been a period of time that N.R.S. 193.165 could be utilized in order to Cause an Increase in the sentence when the crime under Consideration did not fit within a sentencing range of 1-20 yrs, Nor A Consecutive sentence to be for use of A Deadly Weapon, the absurd result Causes People to be held by N.D.O.C. without a Conviction, and Considered for PAROLE when No CRIME is under Consideration

In MANY instances the CRIME HAS EXPIRED.

N.R.S. 193.165 (2)(a) AMENDED to provide Clarity as follows ; (LEGISLATIVELY)

"The sentence prescribed by this section must not Exceed the sentence imposed for the crime"

It Goes without Saying - THE Punishment CANNOT Exceed the

Sentence for the crime, the command to limit the additional penalty, not to Exceed the penalty IMPOSED FOR the Crime, does not somehow Create a Sentence framework that results in imprisonment beyond the maximum of the crime. The limit of ANY TOTAL Sentence in the cumulative is defined by the max. sent. of the crime, The Absurd Result to Cause a Sentence for the crime to be a maximum sentence, and then to impose an additional sentence beyond that, to be for USE of A Deadly Weapon Automatically works to Exceed the Maximum Sentence for the Crime, if the Sentence FOR USE of A Deadly weapon is not Really for USE of A Deadly weapon but Rather for the crime.

The Provisions contemplated by the limited Construction of N.R.S. 193.165 ARE TO be Applied ONLY to (Primary) underlying offenses whose Sentence FRAMEWORK is Captured by the 1-20 yr Range, Min-MAX only.

THE QUESTION RELATED TO A CONSECUTIVE SENTENCE with a Separate and distinct parole date pursuant to N.R.S. 193.165 whether issued for the underlying Offense or for USE of A Deadly weapon does not serve to Increase the Sentence of the Offense, and causes me to become imprisoned without a Conviction where Neither Custody NOR PAROLE MAY Be lawfully Considered. RAISING NOVEL Constitutional Questions not yet ANSWERED on the Merits by any Court in Nevada. N.R.S. 193.165 does not create an Enhanced Sentence, because it is Consecutive. Nor does it create an ENHANCEMENT SENTENCE, Neither Constructively Nor Operationally Because there is NO Conviction, But does provide that if a firearm is used in a crime, then the Full Range of the Sentence for that crime should be utilized.

The Nevada Legislature Knows how to Create an ENHANCEMENT Sentence Framework and has already done so with N.R.S. 207.010 Habitual offender statute, Reviewed for Apprendi Compliance see

M. Adkisson

ONEILL v. State 153 P3d Nev. 2007. The Nevada Legislature also knows how to Enhance a Crime in order to Increase the SEVERITY of the Offense and to Increase the SEVERITY of the punishment for that Offense and has done so by provision within the Offenses Affected in the following crimes See; N.R.S. 199.100; 200.460; 200.450; 200.471; 200.481; 200.485

Although Not an Exhaustive list, the legislature HAS incorporated "USE of A Deadly weapon" by provision as an Element into the Body of the Named Statutes, AND EVERY OTHER CRIMINAL STATUTE that the legislature intended, Causing Misdemeanors to become felonies and AGGRAVATING Crimes by provision.

There CAN be no question as to NV. Legislatures Comprehension NOR The Legislative INTENT in this regard. The fact that the Nevada Legislature HAS CHOSEN NOT TO DO SO WITH SOME CRIMES IS DETERMINATE, AND DEMONSTRATES A LEGISLATIVE INTENT NOT TO INCREASE THE SENTENCE OF THOSE UNAFFECTED CRIMINAL STATUTES WHERE "USE OF A DEADLY WEAPON" IS NOT AN ELEMENT OF THE CRIME BY PROVISION (see N.R.S. 193.165)

~~The adoption of N.R.S. 193.165 was done in order to trigger [illegible] [illegible] deadly weapon is used in the Commission that is not an element of the crime,~~

The adoption of N.R.S. 193.165 was done in order to trigger Consideration for the imposition of HARSHER sentencing within the Framework of the crime Contemplated, and to prevent probation by mandating prison when a deadly weapon is used in the Commission of a crime, only when Use of a deadly weapon is not otherwise an Element of the Crime. The legislative Command HAS NEVER provided for an additional Consecutive sentence, (ONLY to Consider the Use of D.W. in Sentencing to cause Consecutive Considerations for over sent.) The Only Sentencing FRAMEWORK EVER AVAILABLE IS The sentence Framework limited by the OFFENSE under Consideration and NOT A SINGLE DAY MORE

*1 Because of the ABUSE of Power tolerated by the Judiciary, The Prosecution for the state has Incorporated N.R.S. 193.165

*1) SEE RABY V. STATE

M. Adkisson #84280

"use of a deadly weapon" into the "Charging" Information, where the described ABUSE is Compounded by the production of A Jury Verdict Form that provides the Jury with the OPTION of "FINDING" "GUILT" for use of A Deadly weapon, where "Adjudication of "Guilt" by the sentencing Judge is predicated upon, This ABSURD RESULT is BELIED by the UNDISPUTABLE Fact that N.R.S. 193.165 is No OFFENSE, Chargable or otherwise. The Resulting Sentence that springs forth from the described ABuse is A Sentence NOT CONTEMPLATED for or provided for by the State Legislature In ANY provision Neither the crime NOR N.R.S 193.165 use of a deadly weapon

If this ABSURD RESULT was the BASIS of A LEGAL SENTENCE the N.D.O.C. would HAVE A Conviction of A Felony in order to predicate Imprisonment upon. Despite the Statutory Command pursuant to N.R.S. 193.165 to Sentence only For the "PRIMARY OFFENSE", NEVADA Courts have NEVER issued a Consecutive "ADDITIONAL PENALTY" For the "PRIMARY OFFENSE" AND HAS ALWAYS caused a sentence for "use of a deadly weapon" to issue, utterly Failing to identify Any OFFENSE "PRIMARY" or otherwise where it is Not in Dispute that "USE OF A DEADLY WEAPON" does not form the basis of any conviction, and is Not a Separate offense. The Adjudication of A NON-EXISTANT AGGRAVATED crime utilizing "use of a deadly weapon" and the subsequent Bi-furcation for sentencing results in a Sentence to be for USE OF A Deadly Weapon that does NOT Provide a Felony Judgment No Conviction is presented. The ABSOLUTE OUTRAGE over the Realization that N.D.O.C. officials have set into motion an unlawful scheme to imprison people Since 1973 and to Fraudulently Represent "USE of A Deadly weapon" as A Felony Conviction Both for Classification of OFFENDERS, and as Relied upon by the parole Board is CAUSE TO SEEK FEDERAL Intervention Not only for oversight, but AS there is a CRIMINAL Component Related to the INTENTIONAL Knowing Efforts Deliberately committed AS

M. Adkisson #84280

Acts of Commission. Historically when any Government agency is confronted with a legal Question, the appropriate action is to seek an Attorney General Opinion.

In the Question confronted by N.D.O.C, where USE of A DEADLY weapon is Concerned, the Board of Prison Commissioners has set forth Constitutional Standards Enshrined in A.R. 504 That AFFIRMATIVELY Command the N.D.O.C. to IDENTIFY the FELONY Judgment in order to ENSURE proper Commitment to the Dept. THE EFFORT TO Represent 193.165 use of a deadly weapon as a felony Conviction is AN ACT of Commission Amounting to criminal Conduct and NOT Protected by Qualified Immunity and resulting in FALSE-Imprisonment.

The DELEGATION doctrine is one of Constitutional ORIGIN, limiting the authority of one branch of Government from delegating its duties to another branch of Government. In this instance the Legislature Conferred limited authority to N.D.O.C. in order to Establish a SYSTEM of Classification of OFFENDERS, Defining "OFFENDER" statutorialy to mean a person who stands currently Convicted of a crime further providing in N.R.S. 193.120 that the Conviction MUST be for a Felony in order to be properly housed within the Dept. (N.D.O.C)

ATTORNEY GENERAL OPINION No. 97-07 ANSWERS some of these Questions stating "The ATTORNEY GENERAL and his duly appointed deputies shall be the legal advisers on All state matters arising in the executive department" N.R.S. 228.110(1)

Because it is clearly set Forth by the BD. of Prison Commissioners that a felony Conviction Must Be present for the Dept to Recieve or Maintain Custody, Combined with the legislative Command Expressly limiting the N.D.O.C. to ONLY Consider OFFENDERS IN Classification, There simply HAS NEVER Been A Delegation, proper or improper, that provides the N.D.O.C. the discretionary authority to UNILATERALLY INTERPRET N.R.S. 193.165 as a Conviction ~~related to N.R.S. 193.165~~

The Nevada legislature has set numerous statutory standards regarding

M. Adkisson # 84280

Liability of the State and its officers and employees see N.R.S. CH. 41. [illegible] - [illegible]

The NATURE of the N.D.O.C.'s action in this "Classification" matter is clearly NOT within its lawfully reconised Statutory authority NOR The Authority contemplated by Internal Guidelines pursuant to the 'lawfully' adopted Administrative Regulations (MORE... THAT [illegible])

Despite the Dept's clear need for an attorney General opinion specifically Contemplating the Dept's lack of Discretionary authority concerning the conflict that exist when a Judgment of Conviction Commands a Sentence of imprisonment but utterly Fails to IDENTIFY an actual OFFENSE that results in a Felony Conviction when Considering the USE of A Deadly weapon, NO SUCH REQUEST HAS EVER been presented by N.D.O.C.

However A.G.O. NO 97-23 Aug 28 1997 provides some guidance as follows:

"A JUDGEMENT OF CONVICTION AND SENTENCE MUST CONFORM TO THE PUNISHMENT Prescribed by Statute and when a Sentence does not conform it is ERRONEOUS and MUST be CORRECTED..."

The questions related to the Duty of the N.D.O.C. is not a question related to the "Correction" or any such Challenge, Rather the N.D.O.C has a Duty to ENSURE that I am properly Committed with the PROPER Documents that Affirmitively establish a Conviction for EACH Sentence

In a Related A.G.O. (attorney Gen opinion) No 2002-42 Nov 7 2002 Holds;

"The depriving of a person of his rights and privileges as an elector is not to be lightly accomplished and, we think, it MUST AFFIRMITIVELY appear BEYOND question that a Conviction of a Felony is in Fact shown by the record of the Court in which such Conviction is alleged to have been had."

Although the question IS NOT related to eligibility of My Status as an "ELECTOR", (I am not yet running for an elected office) It can be no less Significant to satisfy that it MUST AFFIRMITIVELY appear Beyond question that a Conviction of a Felony is in Fact shown by the record of

M. Adkisson # 84280

the Court before the N.D.O.C. can deprive Adkisson of his Personal liberty
THE ACTION by N.D.O.C. officials depriving a person of his rights and privileges related
to liberty is NOT to be lightly accomplished. And CANNOT be done UNILATERALLY by NDOC officials
The Questions related to whether or not a Conviction exist for use of a murder with the use ect...
deadly weapon are difinitively Resolved, see e.g., Raby v. State, 544 P.2d 895, 896
Nev. 1976 The Nevada supreme court Held; "SINCE the use of a firearm or other deadly
Weapon in the Commission of a Crime [N.R.S. 193.165] is not a separate criminal offense the
Five Convictions therefor must be and hereby are annulled." JURY VERDICT And "ADJUDICATION" Found defective
The Court went on to say that the Consecutive Sentence imposed for using a such a
firearm will be treated as an enhanced penalty mandated by 193.165 Concluding
Raby shall serve 10 yrs on Each Robbery Conviction plus a Consecutive 10 yrs for each
Robbery as a consequence of using a deadly weapon in the Robbery
The Duty of the N.D.O.C. does not concern itself with matters not
within its discretion, The Duty of the N.D.O.C. is to ENSURE A CURRENT Conviction
is under Consideration for N.D.O.C. purposes Related to Custody and Classification
The Clear point of Relevence is that there is NO Conviction for Use of A
Deadly weapon, and Adkisson's J.O.C does not provide two Sentences
For the Murder Conviction, NOR is the Sentence for Murder Increased or
ENHANCED in any Fashion. Questions Related to whether or Not a
Conviction has taken place are questions tied to due-process
IN Re Lockett, 179 CAl 583 the Court Said;
"So important is the liberty of the individual that it may not be taken away even
from the most debased wretch in the land EXCEPT upon Conviction of a Crime
which has been so clearly defined that all might Know in what act or omission
the violation of the law should Consist"
Cited in A.G.O. Feb ~~[illegible]~~ Feb 17, 1923 No. 17

M. Adkisson # 84280

Nevada Attorney General Opinion A.G.O No. 162 Sept. 21, 1944

The Question as to the meaning of the term "Conviction" is discussed in GREAT detail in responce to Nevada Governor questions as to the Governors authority to grant a REPRIVE to Floyd Loveless. In the Loveless case, the charging information Alleged Loveless used a weapon to shoot and Kill one A.H. BERNING.

Resulting in a Conviction for Murder. A.G.O. 162 Sets Forth the Standard in Nevada that establishes the Conclusion that the term "CONVICTION" should be given the ORDINARY legal Meaning for purposes of the Related legal actions.

The ordinary legal meaning is described as being found in the act of Convicting or overcoming one in A CRIMINAL PRocedure by the establishment of Guilt AND NOT A RESULT of the Judgment of the Court, AS Detailed in Relevant PART ; "In the argument for the defendant it has been assumed that 'Conviction' of a crime includes and is the result of the judgment of sentence of the Court imposing the punishment prescribed therefor. BUT THIS IS ALTOGETHER A MISTAKE. The term conviction, as it's composition (convinco, convicto) sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his Guilt according to some legal mode. These modes are, (1) by the plea of guilty and (2) by the Verdict of a jury."

What is clear by this statement is that to be convicted for Legal purposes of Custody A person must FIRST be TRIED. Because N.R.S. 193.165 is NO OFFENSE NO SUCH TRIAL EVER TAKES place. A.G.O 162 Continues as Follows in Relevant part ;

"... Interpreting the word "Conviction" used in the Constitution of California, the Court in the case of In re Anderson, 92 P.(2) 1020, used the following language: "The ordinary legal Meaning of Conviction, when used to designate a particular Stage of a criminal prosecution TRIABLE by a Jury, is the Confession of the accused in open Court, or a Verdict returned against him by a jury, which

which ascertains and publishes the fact of his guilt; while 'Judgment' or 'Sentence' is the appropriate word to denote the action of the Court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. A Conviction then within the meaning of these constitutional provisions is a stage of the proceedings which precedes the judgment or sentence of the court, which later serves merely as the Basis of an appeal or execution, and not to ENLARGE the Verdict or aid in the determination of the guilt of the accused."

The N.D.O.C. Response to Adkisson's Grievances sets forth the claim that N.D.O.C. RELIES upon the Judgment declaring Guilt for SECOND DEGREE MURDER WITH THE USE OF A DEADLY WEAPON in order to ASSUME that a Conviction of A CRIME of USE of A DEADLY WEAPON HAS ACTUALLY TAKEN Place. The Attorney General is clear on this as adopted by A.G.O. 162 sep 21 1944 EXPRESSLY REITERATING "BUT THIS IS ALTOGATHER A MISTAKE" Continuing with; "The ORDINARY legal Meaning of Conviction...(IS) a criminal prosecution triable by a Jury." " "Judgment' or 'Sentence' is the appropriate word to denote the action of the court."

When the N.D.O.C. has an Affirmitive Duty to ENSURE that Adkisson is lawfully Confined to the dept. with a current Conviction, this triggers a duty to HAVE the TRAINING & Knowledge to Identify a Felony Judgment resulting in Conviction. The FACT that USE of A DEADLY Weapon N.R.S. 193.165 is NOT A Chargable offense No TRIAL is Possible and No Conviction Results. The Attorney General Opinion STRESSES This Construction and Serves to underscore the UNLAWFUL Nature of N.D.O.C's Classification Related to Adkisson's Continued Confinement for "use of A Deadly weapon"

Simply put Adkisson CANNOT APPEAL "USE of A DEADLY WEAPON" Therefore N.D.O.C. CANNOT UNILATTERALLY determine a Conviction for use of A Deadly weapon EXIST for Classification of

Offender" The A.W.P. is the named PARTY with regaurds to the Duty to ENSURE TRAINING & Knowledge for staff in order to ENSURE Proper Classification. However my Grievance Related to the unlawful classification Claiming "USE of A DEADLY weapon" Resulted in an additional Category A Felony Conviction Has Been ASSIGNED TO A.W.P HARTMAN. The purpose of this Extensive Informational Brief is to ENSURE NOTICE IS PROVIDED TO A.W.P. HARTMAN, ACTION Related to Any claimed Conviction for USE of A Deadly weapon is NOT within the lawful description of the Powers of the Office of ANY N.D.O.C. OFFICIAL AND AS such would Constitute a BREECH of Duty AND A violation of the Public Trust Effectively BARRING any Qualified Immunity Because NO N.D.O.C. official Possesses the Needed lawmaking Authority in order to declare N.R.S. 193.165 as a criminal offense that resulted in A Category "A" Conviction or to INTERPRET A 'Judgment' and apply A legal Conclusion that a Conviction exist for USE of A Deadly weapon

The unlawful TACTIC Employed by the N.D.O.C. to classify Adkisson AS suffering a category A felony Conviction for USE of A Deadly weapon is described as a "PRACTICE" under Review in one Grievance. In a Grievance for EDWARD GREEN N.D.O.C claims that because USE OF A DEADLY weapon is Not A Crime or Conviction, N.D.O.C makes up a Category "F" felony for custody. In Gordon CAREY'S Grievance His "PRIMARY offense" is Expired, N.D.O.C Claims the Authority to Interpret the verbiage in the JOC stating; "use of A Deadly weapon is A like sentence" when Murder is CAREY'S Primary offense N.D.O.C Claims this Means USE of Deadly weapon becomes A Category A felony Conviction by this Judgment Verbiage

The fact is plain, N.D.O.C. CANNOT lawfully Conduct Classification Hearings in this manner as it results in Imprisonment without A Conviction. This Has Been PREPARED In ANTICIPATION of

M. Adkisson

Litigation related to my OVER-Due N.D.O.C. Grievance No.: 20063105130 and related Grievance No.: 20063098027 ; 20063053285

Green No.: 20063058144 ; Carey No.: 20063105408

The NOTICE REQUIREMENTS in order to overcome any Qualified Immunity Issues Have Now Been Satisfied. This Condition is a Condition of Confinement issue SQUARELY WITHIN THE DISCRETION of the N.D.O.C. To CORRECT AND ~~ARE~~ INEXTRICABLY TETHERED To and Resulting from an Administrative Practice AND NOT AS A Result of A legitimate Conviction. The ABSURD Result of the Sentencing Court to include a Sentence of Imprisonment without an available ~~[illegible]~~ Conviction of A Felony Offense should Have Prevented N.D.O.C. From Recieving Adkisson beyond the Front Gate.

Limited Issues Related to this Condition Have Now been presented on a WRIT of CERTIORARI to the U.S. Supreme Ct. by the Federal P.D. Issues Related to Further state actions Challenging the Judgment will follow PROSE. (see Adkisson v. State of Nev, Case No: 20-7299 U.S. Sup. Ct. CERTIORARI)

It is important to Note that I am the Party Responsible for the Identification of this Issue, All Briefing by the Fed P.D. Springs from my Contributions. I presented Edmond Green on this Issue to the Courts, Resulting in Reverse & Remand.

I think it should also be Noted that the Conduct described does Constitute a BREECH of the Relevant treaty Between the U.S. Government and Several foriegn Governments. BARBARA MORGAN, Consulate General for the UNITED KinGdom is Interested in presenting this MATTER TO BRITISH OFFICIALS for Review by their Legal Counsel for the purpose of A Claim to Be Presented to the U.S. officials incl the U.S. Supreme Court

In ORDER TO RECIEVE A Compulsory Review on the MERITS.

No person CAN be TRIED or Imprisoned where No Offense of Conviction EXISTS, AND NO APPEAL TAKEN FOR "USE of A DEADLY WEAPON"

I Have diligently attempted to Resolve or Come to a Negotiated Outcome, Even Potentially Considering A Guilty Plea and to Keep this Matter within my State. I AND my family Have Given More than the Proverbial Pound of Flesh, THIS is OUR STATE and I Love Nevada, I am not interested in triggering A Wholesale Release and liability for my state

However this has NOT been up to me it has been up to you. Not Even Consideration for Pardons Board Has been Realized, So I must push Forward

I pray we find ONE Official INTERESTED IN The application of the lawful standards that Do Control AND to Become EVEN BETTER INFORMED on This ISSUE

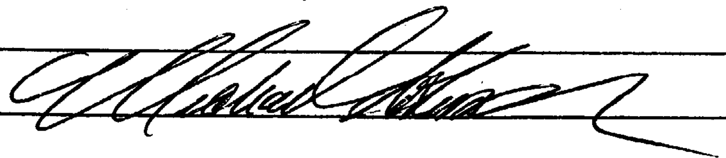
This is the Nature of Civic-Responcibility and is not A Challenge to A Conviction.

I AM AS Always Available for Discussion and Available to ASSIST IN ANY MANNER THAT I AM ABLE

THANK-you In Advance for Your Consideration

Cordially

C.C. TO File
FED. P.D.



Portions of this document originally prepared and submitted to Johnathan Kirshbaum Fed. P.D. for the preparation of the Certiorari

Gmail **Patricia Adkisson <faithandjoesmom@gmail.com>**

Grievance #20063105130 Michael Adkison

4 messages

Patricia Adkisson <faithandjoesmom@gmail.com> Sat, Jun 5, 2021 at 3:43 PM
To: cadaniels@doc.nv.gov

Re; NDOC Grievance #20063105130 Setting Forth Malfeasance/Malpractice Related to Abuse of Classification

June.5, 2021

Dear Director Daniels,

My name is Patricia Adkisson, my husband is Michael Adkisson, and he is currently confined to a state prison under your control. My husband, Michael, filed a grievance on 7-15-2020 with the expectation of a formal response to the second level, by approximately 12-17-2020. However, as of today, no second level response has been issued. This grievance is now nearly seven (7) months overdue.

I am now asking for your review and direct involvement, because of the extraordinary nature of the novel issues confronted, and to ensure that you receive proper notice. Please find a copy of NDOC Grievance #20063105130 and the supporting supplemental kite (48pgs total) dated 3-8-2021. I would like to thank you for keeping my husband safe and I would like to acknowledge the fact that you have effectively inherited many problems overlooked by previous administrations. I look forward to your actions, related to the issue identified in the grievance, as this matter is of great public interest. Both my husband and I are available to assist in any manner. Because this is a time sensitive matter, we look forward to a timely reply. Please confirm that you can open the file and receipt of this email.

Thank you in advance,

Patricia Adkisson

702-505-2861

faithandjoesmom@gmail.com

Adkisson-Grievance #20063105130-supporting documents20210605_15372331.pdf
3936K

Patricia Adkisson <faithandjoesmom@gmail.com> Tue, Jun 29, 2021 at 11:11 AM
To: "dmantelli@doc.nv.gov" <dmantelli@doc.nv.gov>

Thank you Dina Please see below.
[Quoted text hidden]

Adkisson-Grievance #20063105130-supporting documents20210605_15372331.pdf
3936K

Dena Mantelli <dmantelli@doc.nv.gov> Tue, Jun 29, 2021 at 11:19 AM
To: faithandjoesmom@gmail.com

Received - I will contact Ronda Larson and let Director Daniels know. I would expect that you will receive some form of communication from Ms. Larson on the matter.

This message, including any attachments, is the property of the Nevada Department of Corrections and is solely for the use of the individual or entity intended to receive it. It may contain confidential and proprietary information and any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient(s) or if you have received this message in error, please contact the sender by reply email and permanently delete it.

From: Patricia Adkisson <faithandjoesmom@gmail.com>
To: "dmantelli@doc.nv.gov" <dmantelli@doc.nv.gov>
Date: 6/29/2021 11:14 AM
Subject: Fwd: Grievance #20063105130 Michael Adkison
[Quoted text hidden]

Patricia Adkisson <faithandjoesmom@gmail.com> Tue, Jun 29, 2021 at 11:22 AM
To: Dena Mantelli <dmantelli@doc.nv.gov>

Thank you again. Patricia Adkisson
[Quoted text hidden]

Steve Sisolak
Governor

Charles Daniels
Director

STATE OF NEVADA
Department of Corrections

Northern Administration
5500 Snyder Ave.
Carson City, NV 89701
(775) 977-5500

Southern Administration
3955 W. Russell Rd.
Las Vegas, NV 89118
(725) 216-6000

July 1, 2021

Patricia Adkisson
faithandjoesmom@gmail.com

RE: Nevada Department of Corrections Grievance No. 20063105130 – Setting Forth Malfeasance/Malpractice Related to Abuse of Classification – Michael Adkisson #84280

Dear Ms. Adkisson:

This is in response to your correspondence (via email) dated June 5, 2021, in which you state your husband, Michael Adkisson, #84280, an inmate currently incarcerated in the Nevada Department of Corrections (NDOC), filed a Grievance in July of last year and has yet to receive a response. You state that the response is 7 months overdue, and ask that the Director of NDOC, look into the matter.

Due to the nature of the Grievance, NDOC's subject matter experts in classification issues, NDOC's Chief Offender Management Administrator, and Offender Management staff have been asked to research this matter and provide the most accurate response to the Grievance.

A response was sent to your husband yesterday, and I trust your husband will discuss the matter with you when possible. Following is the gist of the response sent to Michael Adkisson:

> "…failure to comply with the applicable Administrative Regulations, Operational Procedures, and Legislative Command." You state that your situation warrants a change in custody because the Use of a Deadly Weapon Enhancement is not a Felony. You were answered correctly at the Informal and First Levels. While you are correct that NRS 193.165-3 states that "This section does not create any separate offense but provides an additional penalty for the primary offense," NRS 193.165-2b states, "The sentence prescribed by this section: Runs consecutively with the sentence prescribed by statute for the crime," which in this case was a violent Felony--Second Degree Murder.
> Per the Second Amended Judgment of Conviction (Jury Trial) for Case O4C200178, you were found guilty of Murder in the Second Degree with Use of a Deadly Weapon (Category A Felony) and sentenced on December 6, 2004, to "Life with a minimum parole eligibility

of 10 Years plus and Equal and Consecutive term of Life with a minimum parole eligibility of 10 Years for Use of a Deadly Weapon." You have been classified correctly; therefore, your Grievance is Denied.

While I am sure, this is not the answer you were hoping for, it is based on the Nevada Revised Statute and reviewed by NDOC's subject matter experts. I trust this letter has addressed your concerns and fulfilled your request in procuring receipt of a timely response.

Charles Daniels, Director
Nevada Department of Corrections

7

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 8184

ALECK EUGENE RABY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED
JAN 23 1976
C. R. DAVENPORT
CLERK OF SUPREME COURT
BY [illegible]
DEPUTY CLERK

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.

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

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

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

OPINION

PER CURIAM:

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

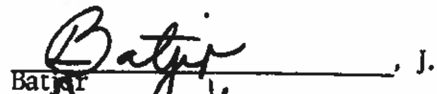
of a firearm in the commission of each robbery. The jury found him guilty of ten separate offenses and returned ten verdicts. Judgment of conviction was entered upon each verdict. He was sentenced to serve concurrent terms of ten years on each robbery conviction, and concurrent terms of ten years on 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.

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. ______, ______ P.2d _____(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 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.

_______________, C.J.
Gunderson



_______________, J.
Batjer

_______________, J.
Zenoff

_______________, J.
Mowbray

_______________, J.
Thompson

Transcription of Oral Arguments for RABY v STATE

NEVADA SUPREME COURT

Case #8184 Dated 12/11/1975

Judge: PAUL S. GOLDMAN

Public Defender: MR. BILL MAUPIN

Appellant: ALECK EUGENE RABY

Attorney General: ROBERT LIST

District Attorney: GEORGE E. HOLT

Deputy/District Attorney: RIMANTES A. RUKSTELE

NRS 193.165 "USE OF A DEADLY WEAPON"

*Public Defender, Mr. Maupin starts at minute 15:15 on audio and ends at 26:40. Page 4-6 of transcription.

*District Attorney, Mr. Rukstele starts at minute 42:45 on audio and ends at 53:59 Page 9-11 of transcription.

*Public Defender, Mr. Maupin's rebuttal starts at minute 54:10 on audio and ends at 56:40 Page 11-12 of transcription.

*Judge Goldman speaks throughout minutes.

PLEASE START LISTENING TO AUDIO AT 15:15 AND FOLLOW ALONG WITH THE TRANSCRIPTION AT THE HIGHLIGHTED PORTIONS

Transcription of Oral Arguments for Raby v State

12-11-1975 Case #8184

The Supreme Court of the State of Nevada is now in session.

Judge: Raby v State #8184. Mr. Maupin, you may proceed.

Mr. MAUPIN: Thank you, your honor. If it pleases the court, the case at bar involves a conviction of the appellant for five counts of robbery and five counts of using a deadly weapon in the commission, of a robbery, of the robberies that were alleged counts 1 through 5 in information. Briefly by way of history of this case on April the 18th 1974 the appellant pled not guilty on all ten counts, counts 1 through 5 being robbery, counts 6 through 10 being use of a deadly weapon during the Commission of a crime to with the robberies referred to is counts 1 through 5. The trial of this matter began on December. 9, 1974 with jury selection. Evidence was taken starting on December the 10th 1974 and the trial was taken to a conclusion on December the 12th 1974. Again, the jury rendering guilty verdicts on all ten counts. Prior to the trial on November the 26th, 1974 the council for the appellant filed a motion to suppress, uh in court and out of court identifications based upon a confrontation that occurred approximately a week after the alleged robberies, that is a policeman apprehended the appellant brought him back to the location of the robberies which was the Cherry Patch bar in Las Vegas and exhibited him to two of the alleged victims that were at the bar at that time. The motion to suppress dealt with the effect that, that particular two-man, one man show up had upon the inquiry of identifications at trial. On December 6th, 1974 **** the Friday before the trial December 9th started on Monday the points and authorities were filed, now the motion to suppress was not filed more than 15 days before the trial and compliance with 174 NRS 174.125 which has become known and common parlance in our district as the 15-day rule. This was done pursuant to an agreement between the deputy District Attorney that was handling this case and defense counsel that the deputy District Attorney would not be asserting the 15-day rule and in fact would agree to waive the 15-day rule and have an evidentiary hearing on this motion to suppress prior to the trial. On the morning of trial part of jury selection, the trial court noted that this motion had been filed and as will become more apparent later in the argument, noted that no points and authorities had been filed, this evidently was a mistake. Any event, the trial court refused to hear this issue notwithstanding its constitutional ramifications or that jury selection proceed and the trial was then commenced on the 10th. There are five alleged victims of this robbery or of these robberies; Earl James Graham, James Ray Splawn, Susan Espiritu, Ronald Roy Jans, and David Victor Union. Briefly, the testimony adduced at the trial indicated the following; that Mr. Graham's testimony indicated that on February the 7th about 5:00 AM he went into the Cherry Patch Bar, and he had been there about an hour and 20 minutes, when it's 6:20, he and four other persons in the bar were robbed at gunpoint and forced to disrobe. He described his assailant as being 6 feet tall, 170 pounds, 28 years of age with brown hair. He attended a line up on February the 14th, that is about seven days after the alleged robberies and this was one day after the alleged, the show up at the bar with the two other victims, he was not at the bar at the time of this this show-up. James Ray Splawn was also one of the victims, he had indicated that

he was at the Cherry Patch Bar that night as a, as an employee of a custodial service that was cleaning up in the bar. He said he was, as with Mr. Graham, said he was robbed at gunpoint, forced to disrobe. He said his assailant wore glasses, had no mustache, the appellant at trial, he noted in terms of his testimony that the appellant did not have glasses on, he wore a mustache and he appeared thinner than the assailant. He also testified that he could not be sure that the appellant was actually the assailant, because the appellant was much smaller than, a much smaller man than the assailant. He did not attend the line-up; he was not present at the show up. During the trial and during Mr. Spawns testimony the appellant was asked to stand up and Mr. Spawn gave the following testimony "considering that the man is smaller, that the man had on his glasses, and without the mustache, I would say that it was him". Susan Espiritu and Ronald Roy Jans both testified to the robbery, they both said they were present in the bar when the police officers brought the appellant over. Those were the two, those were the two alleged victims that were in the bar the day before the lineup. This is where the defendant was at this show up, again the defendant below was singly brought to the bar by police officers. **JUDGE:** Wasn't that at his request? Didn't he insist on being taken there? (Both attorney & judge talking at the same time) he says, I want to go over there, I want to go over there and, and see these people and clear this thing up. **MR. MAUPIN:** Well, your honor, the record is, is somewhat unclear about that, in terms of the testimony from the police officers, the police officers indicated they saw him driving down the street in an automobile that matched the description, given by the victims. He advised the appellant at that time that they were going to go back to the bar. It was after that statement by the police officers, as the testimony goes, that he advised him, that he had the right to an attorney and that he did not have to go over there and that was taken from the context of the... **JUDGE:** and after the warning and after the advice that he didn't have to go over there he still insisted on going, isn't that what the record shows? **Mr. MAUPIN:** that's well it's I don't know whether you can say he insisted on going. I would say that he cooperated with that, the issue as to the subjectivity of this show up uh I think was in terms of whether or not the identification should have been suppressed is one of, when you have to take all these all this testimony together and see whether this issue did arise. Now allegedly he has agreed to go over and wave his rights to an attorney at that time. I still don't think that, that gets around the issue of whether or not this particular show-up was unduly suggestive and unduly tainted, subsequent identifications at the line-up, your honor will note that the testimony of Ronald Roy Jans, as to the description at trial indicates that the assailant was 6ft tall, 170 pounds, 28 years of age, this is word for word identical to the testimony of Mr. Graham, now Mr. Graham's testimony is good, in terms of the identification, he gives exactly the same description, very specifically. Mr. Jans was at the show-up the very next day Mr. Graham was at a, was at the lineup and I think that in terms of an evidentiary hearing uh there might have been, there would have been an opportunity to further delve into this point to see whether or not there was a taint on this identification, as to whether or not this identification was in fact proper. **JUDGE:** Well, hindsight's really great all the time, we'd like to use it ourselves sometimes, but what is wrong with what happened in the procedure as it was done, going to the bar, the procedure that the officers used, a one plains clothes man went into the bar and asked if there was anyone there who had been there the night of the robbery and he found out there were two people there, then two other people came into the bar and sat down. One of them was the defended or the appellant here and one another one plain clothed man. What, what was suggestive about that? I mean sure you can go back from here into any case and pick it apart and, and nitpick the thing, but tell me what was really wrong with this uh procedure, that the officers followed after he at least indicated your...he had indicated that he wanted to go back and clear things up. **MR.MAUPIN:** You see that's just the, what you're saying is

just the point, we can't, it's hard for us to come back and, and discuss this case in terms of, all we're talking about is hindsight, we weren't there, the problem is... normally when we come up here and argue on motions to suppress, the motion was heard, and we can take a look at the evidence and how it was adduced at the evidentiary hearing, and then we have, and then we can, and then when in the event that the motion is that is that the conviction would be affirmed in these instances where that does happen, you take a look back and say well the judge, the trial judge had an opportunity to take a look at the demeanor of the witnesses, now the purpose of this motion, was stated at uh page 238 of the uh record on appeal and council brought this up at the trial and we would have shown to the court that the defendant was improperly brought to the Cherry Patch Bar for an identification and the matter that was both unnecessary and suggestive, and we would have also tried to show that at the hearing that perhaps the taint of this showing extended beyond the two victims that were present at the time in might have extended to the other three victims who weren't present at the bar at the time the defendant was brought in. **JUDGE:** Don't we know what happened by reason of the testimony at the trial? **MR. MAUPIN**: Well, I... **JUDGE:** I would assume it would have been the same on the motion to suppress. **MR. MAUPIN:** I don't know if we can assume that, because in a motion to suppress outside the presence of the jury... **JUDGE**: Do you think it would be different? **MR. MAUPIN**: Well, the problem is we don't know that, because he never got an opportunity to have the hearing. **JUDGE**: They had an opportunity to testify in court. **MR. MAUPIN**: that's right, but still, at an evident... **JUDGE**: They won't listen to the motion to suppress, because of the 15-day rule. I don't know if you knew about the agreement that had been made, but in any event, all of the evidence came in during the trial, it was suppressible at that time. **MR. MAUPIN**: Yes, it was your honor, but I would submit that in terms of the motion itself, constitutional ramifications, that a hearing should have been had, because the, when you, when you're cross examining in a jury trial, your approach is going to be a little bit different than a motion to suppress. You don't have the jury there listening to your testimony and I submit that, that a different mode of cross examination would be used at the hearing and the problem is, is that there are certain issues that would have been developed as to whether or not there was a, an improper or an improper identification at the preliminary hearing, and at the trial they could have with a short evidentiary hearing before hand, with a different approach across examination there would have been at least an opportunity to air this issue. What I'm saying is that the merits of this in terms of the demeanor of the witnesses at the evidentiary hearing before the trial was never had, now, the 15-day rule, which is an administrative rule for the operation of the court system that is for, to speed cases through, and make it more efficient. If that, that should not be a bar to the airing of constitutional issues, it's a, if there is not a waiver of those issues and I don't think there was a waiver here, in terms of the council's activities in this case, the motion was filed, the judge mistakenly thought that it was not filed, but the record of the of the appeal here and the representations made before the court which I've cited in my brief. I indicate that in fact those points, and authorities were filed, and the District Attorney had received a copy of those points and authorities and was ready to proceed prior to the trial with an evidentiary hearing. I grant you that as we look at the testimony in the trial, it is not as strong as it should be in terms of a motion to suppress, but again the approach taken at trial has got to be different than the approach that you take cross examining in their emotion to suppress. It's a practical consideration, but the problem is here, we have nothing to go on other than the evidence at the trial. I don't think that's enough. We don't have the litigation of these issues pursuant to the motion to suppress. I'm uh, and (STARTS AT MINUTE 15:15 ON AUDIO) the other issue that I think is very important in this case, is the issue of sentencing. The defendant was convicted 10 times in this case. Ten counts, counts 1 through 5 for

robberies of the individuals I've mentioned, counts 6 through 10 he was convicted of something that isn't a crime. There are, there is a judgment of conviction on those counts in the information. Now I am not unmindful at this point of the decision in Woofter v O'Donnell, uh the District Attorney was kind enough to supply me with his copy of the memorandum decision and it is not, I have not had a chance to read it until yesterday. Now as I understand from reading this case, uh, it is finally the rule of law in the State of Nevada that NRS, I want to make sure that I am citing the right statute 193.165 does not state a new and separate offense. The purpose of this is to enhance penalty. For your honor, your honors, to the verdicts in this case on counts 6 through 10, we the jury in the above entitled cause find the defendant Aleck Eugene Raby, guilty of use of a deadly weapon in Commission of a crime, counts and then in each particular verdict the particular count is set forth, these verdicts were rendered pursuant to the accounts and the information is that the, the appellant did willfully, unlawfully, and feloniously, use a deadly weapon to with a firearm during the Commission of the crime of robbery of each victim's name at the Cherry Patch Bar 2327 South Eastern Ave, Las Vegas, Clark County, Nevada. Now this information is set forth in terms of a crime, now pursuant to your ruling in Woofter v O'Donnell he was convicted of something that is not a crime under the law of the State of Nevada, and when it comes in and it shows up on his record, it's going to show that he was convicted 10 times and the court was without jurisdiction, in my view, to send these, this form of verdict to the jury and rendered a judgment of conviction on those forms of verdict. **JUDGE**: So, if we say in our decision that indeed they are not separate crimes we point that out in our decision here in this appeal so that it will reflective of record and he can establish that uh he hasn't been indeed properly convicted of these crimes, uh, you would concede would you not that he has been properly sentenced? **MR. MAUPIN**: Well. **JUDGE:** he's received, he's received the proper amount of time, the judges sentence correctly assesses the penalties does it not? **MR. MAUPIN**: Well, assuming the constitutional, constitutionality of the statute which you have held is constitutional. He has been given, he has been sentenced properly, except for the fact that his record does show this. Now I don't think that and of course I've seen a lot of rap sheets and if this is going to show up, I think unless there is some sort of remand and special instructions given uh that he was convicted the 5 times on these extra charges now uh the problem is, is this case went to a jury. **JUDGE**: Well, what do you want us to do to make sure that his rap sheet doesn't uh prejudice him? **MR.MAUPIN**: I want you to dismiss all 5 of those, and the reason that you should dismiss them is because he went to a jury on this, this was, jeopardy had attached at the time of jury selection and he was tried, they've submitted verdicts on this, and they improperly prosecuted him under this statute... and it shows, it and...without any question in my mind anyway, the uh, the fact remains that, that's what his record would show, and even if you were to put a uh a caveat in this particular opinion that you wrote, uh when that rap sheet came out of a computer, over in California someplace, it would show that in fact he had been convicted 10 times instead of just five and further...uh **JUDGE**: It's not gonna happen unless he gets arrested and charged again, is it? **MR. MAUPIN**: Well, that's a danger that everyone in the world faces. I mean uh, there's nothing to stop any of us from being arrested at some time in our life, and if he, when he eventually is released from prison. **JUDGE**: Do you think it, do you think it’s our functions as long as he’s properly uh sentenced to uh uh be concerned with straightening out the FBI’s uh rap sheets? **MR. MAUPIN**: Well, I think it has, I think we have to be concerned with practical, practical problems. Your uh your opinion can, can, can state what you want it to state, but as a practical problem your going to see this come up on someone's rap sheet later on and he's going, uh for example they, they pull his rap sheet and there he is with several felonies and they're going to the, the, the problems of an habitual criminal type situation arise and he would be charged. Now ultimately it could

be straightened, maybe it could be straightened out, maybe it wouldn't be. I mean I've seen it it's quite possible and sometimes even probable in some other jurisdiction that a judge wouldn't think to call over here or read the appellate opinion of his case, of this of this particular appellants case and the fact that he could even be charged, additionally, under under in some future time under an habitual criminal habitual criminal situation indicates to me that his, his right to due process are being violated and the fact remains is that this went to a jury, and went to a jury in this form, and I think jeopardy attached and he was convicted without jurisdiction. Now the alternative in this case and I happen to be involved in a trial of had had this particular issue in it where they had plead it in one count and they came back with a special finding, not a spec, not another adjudication of guilt as to the robbery count, but a special finding and assuming that the, the statute is constitutional that is the method by which this statute should be applied, not by prosecuting him on another count... for each robbery where the weapon was used. I also submit that the uh that the application of the statute against him in this manner would violate his rights to double jeopardy. Now as I understand the opinion in Woofter v O'Donnell it does not address itself to the question of whether or not a conviction on the, on a robbery in the corresponding use of a deadly weapon in that robbery would be violative of double jeopardy, it it addresses itself to the constitutionality of the statute per say, but not to this particular application. In this situation, again, he was convicted twice for each robbery and the Nevada Constitution, and the United States Constitution provides that a person shall not be subject for the same offense to be twice put in jeopardy of life and limb and I think that in this situation, that's exactly what happened. (Judge & Attorney- talking over each other) **JUDGE**: It seems to me that he got something more than he really may be entitled to because in this situation the jury had to find beyond a reasonable doubt one, that he was guilty robbery and two, that he was guilty of use of a deadly weapon in the posture of this at the trial of this case, but I'm not too certain that if you find the, if the jury finds the uh the defendant guilty of robbery beyond a reasonable doubt that they have to reach that (stutter) same uh plateau and finding the use of the deadly weapon, so at least in this case, he got the benefit of that of having them to go to uh the full extent not only of finding him guilty of robbery of beyond a reasonable doubt, but guilty of using a deadly weapon in connection with his robbery beyond the reasonable doubt so... **MR.MAUPIN**: that's, that's, that's an interesting proposition, however, I would respectfully submit to the court that, and that doesn't bear to the issue of his, of the process of prosecution in this matter, that is, again, it doesn't bear to issue to whether or not he was convicted twice of the same act of robbery. Now in the situation where you don't have two separate counts, and where it's plead in one count, for example, and a special finding is made, he's not convicted twice, he's only convicted once. And if the statute, again, statute being constitutional and it's only an enhancement of penalty, then what is happened is, is he's had the enhancement of penalty attached to, to the one conviction, that would be constitutional, but the fact that he was tried and convicted twice for each robbery and that's the way the, that's the way each of those that each of the counts in the information read, they bear they, they talk in terms of felony language unlawfully, willfully, and feloniously, use a deadly weapon in the robberies OF these victims and as such, again, he was convicted twice whether the, the I, I, I don't think that the burden of proof on, on each of these counts bears to the issue of whether or not he was prosecuted twice for each offence. There being, if there are no other questions your honor, I'll preserve the rest of my time for rebuttal. **JUDGE**: Thank you Mr. Maupin. (ENDS AT MINUTE 26:40 ON AUDIO)

JUDGE: Mr. Rukstele, do I pronounce that correctly? **MR. RUKSTELE**: Uh, Well that's close. **JUDGE**: Well, how should it be? **MR. RUKSTELE**: It's Rukstele. **JUDGE**: Rukstele. OK. **MR. RUKSTELE**: Thank you very much your honor. Good morning, uh for the record my name is Rimantes A. Rukstele and I'm appearing

on behalf of Mr. George Holt and the Clark County District Attorney's Office. May it please the court, it's the state's position that in this matter of State v Raby, as far as the first issue is concerned, the defendant bears a heavy burden, and I submit that it is incumbent upon the defendant to show one of two things, first of all an abuse of discretion on part of the trial judge or prejudice to the defendant and it's our position that the record in this matter, shows neither one of those elements. As far as the abuse of discretion is concerned, uh the statue that being 174.125 the 15-day rule, I submit is quite clear.

It's a procedural matter, but it's a statue that is necessary for the, for the proper flow of paperwork and cases in the Eighth Judicial District Court. Uh, that statute was not met. Now the thing that I'd like to point out to this court is that I'm trying to speculate why the judge did what he did why the trial judge will not allow this motion and I think there are several things happening in this case which perhaps would give us an insight into Judge Goldman's decision not to grant this motion. First of all, there was a long delay here between the date**** the defendant was ordered to stand trial when he was bound over from justice court and the trial date. He was bound over in March; the trial date was in December. During that interim there were numerous adjournments my record indicates 5 defense requests for adjournments, which were all granted. On December 5th, the defendant again requested another adjournment. This time what he believed to be a constitutional issue on the identification. I think the trial court rejected that and I think the record reflects that the court was rather upset with the long delay in this case the fact that this man was in custody all this time, perhaps that's one of the reasons why it was not granted. At any rate, the defendant admits that the statute 174.125 was not met. Uh, he was not timely in his motion, granted that the state did stipulate the such continuance but I don't believe that defense counsel and deputy District Attorney whatever their stipulation might be that stipulation I submit, is not binding under the court, especially in the interpretation of this statute. Now obviously we believe this is a discretionary matter, uh, the trial court could have granted it, could not, in this case did not grant this request. I don't believe there is any abuse of discretion on part of the trial judge, as far as the... **JUDGE**: What about Mr. Maupin's argument that that uh although there's these same question and they seem same questions uh constitutional questions about suppression came up at the trial that he would have a wider range of cross examination and a better opportunity to put on his case for suppression at a motion hearing than he would at trial. **MR. RUKSTELE**: I've been, for me to strategic, from a trial tactics point of view, I think his position has some merit to it. I will, you're asking me your honor, to put myself in the defense attorneys' position and I'm asking myself, would I have tried this case any differently, had this motion been granted? Uh... **JUDGE**: You mean heard. **MR. RUKSTELE:** Had this motion been heard... that's correct your honor. Uh, I can only speculate your honor, we can only speculate in whether or not the motion would have been granted. Were the motion granted, obviously, the trial strategies and what would have been presented by the state and by the defendant may have been different. If the motion were denied, not the hearing in the motion, after the motion were heard and were that motion denied then I can see, I cannot see, how it would affect the trial. I can only guess, I really, that's not a very good answer your honor, but I think we're only, we can only speculate. Looking back and I can only speculate, but I think the council's position I think has some merit to it that, but again it would of course depend on how the trial court would have ruled on that motion. As to the prejudice *** again it's our position there but prejudice has not been shown and if I may briefly go over the testimony and facts as were elicited. There were five victims to this robbery and these five victims all testified to being robbed. That Mr. Raby pointed a handgun at him, that monies were given to him, that they were forced to disrobe, etc. Let me call these victims, victims 1 through 5 and if I may run through the facts. I, I believe I can indicate to this court that there was absolutely no

prejudice whatever in this case. Victims #1 and #2 were present on this, for this, on the scene confrontation. This happened approximately a week or so after the, this crime occurred. What transpired here is that the police officers had a general description of the suspect, and they had a description of the car were, the getaway car used during this crime. A week after this crime, they saw this car, they saw a man fit the description driving this car. A stop was made, there was a discussion with the defendant, he was taken back to this scene. I think the record reflects, and council's brief reflects, that immediately when this defendant entered that bar room, victims 1 and 2 said "that's him". I think one of the witnesses said, "it took me 2 seconds to realize that that was the man". Victim 3 and 4, those two parties, were at the line-up. This was a corporal line-up, after this gentleman was arrested. He was arrested, taken to jail, a line-up was held. These 2 victims identify this man in the line-up. They were not present for the on-the-scene confrontation. Victim #5, I believe was Mr. Splawn, Mr. Splawn was not present for the on-the-scene confrontation, and he was, he did not come down and view this gentleman at the line-up. In court, he identified the man with this caveat, and he stated, and I'm reading from page 309 of the transcript, "considering that the man is smaller, if the man had on his glasses, and without his mustache, I would say that it was him". Now the testimony indicated that during this interim from the robbery to the trial date, Mr. Raby grew a mustache and at the trial, he wore glasses and if memory serves me right, during the perpetration of this robbery, he neither wore glasses and didn't have a mustache, so... if we look at this gentleman Mr. Splawn's testimony, and that's the only person who showed some hesitancy in identifying this man. He said; if the man, if you take his glasses off and take his mustache off, that's him. **JUDGE**: Except, except uh, he's not the right size. **MR. RUKSTELE**: Except he's smaller, and if I may add your honor, one, the arresting officer who arrested this man and who testified at trial, indicated that it appeared to him that the defendant had lost some weight, that he looks a little thinner now. There is one other piece of evidence which I think negates any inference or any possibility of any prejudice to this defendant and that evidence is this, the testimony indicated that Mr. Raby sat in this bar for quite some time. He sat at the bar, and he had a bottle of Budweiser, and he drank a bottle of Budweiser, and all the witnesses recall this gentleman being there, and having a beer and when the officers arrived, they were taken to the bar and there sat a bottle of Budweiser, and that bottle was recovered and a lass* a very nice set of fingerprints were recovered from this bottle of Budweiser. I submit that there can be no doubt that this is the gentleman who was in the bar. I think the fingerprints only reflect the fact that this is the right person. If I may comment on one other issue here, and that is the on-the-scene confrontation. Uh this confrontation, may it please the court, took place one week after the incident. Uh, we district attorneys we read the same cases and we try to do what is right, and the police officers, I'm sure, try to do what is right. Uh, Stovall, Simmons, (names of officers?) I think speak negatively against this sort of procedure, an on-the-scene confrontation a week after the crime, but I wonder, and I ask myself, and I'm sure this court will, will consider what else could the officer of done. Were all concerned with, with protecting the defendant's rights, and district attorneys and police officers have that concern as well. Nobody wants to arrest the wrong man. Now what else could this officer have done? He stops the car that fits the description and there drives a man who fits the description of the perpetrator. Well, he could have released him, and say well I have a general description that could fit a thousand young black males in the city of Las Vegas. He could have released him. Had he done that, I don't think he's doing a very good job. He could have taken him into custody and taken him down to jail, booked him, mugged him, and had a line-up, however, what are the dangers of that, what if this man were innocent? What if this were not the man who perpetrated the robbery? He's gone through the humiliation of being arrested, booked, mugged, thrown in jail. And that leaves

the third possibility and that is the on-the-scene confrontation. It's dangerous if an officer called me and asked me should I do this? I would have to tell him “No”, because I think the U.S. Supreme Court and other cases indicate that you shouldn’t do this sort of thing, not a week after the incident occurred. However, I wonder what are the alternatives? What could he have done? Uh, it would disturb me to know that an innocent man were taken to jail, spent several days in jail and it was the wrong person. Uh, what happened here, carries a great possibility of prejudice to every defendant, but quite frankly, I don’t know how we can get around it. Uh, it’s a problem that district attorneys encounter throughout the United States. What do you do when you have a man a week later, and perhaps you lacked enough probable cause to arrest that person, because you only have a general description of him? Uh, wouldn’t it be a lot easier to take him to the scene? Uh, again, I don’t encourage that sort of activity, but in this instance here, I don’t think there was any prejudice. **JUDGE**: Did or didn’t he at least indicate that he wanted to go down there and clear things up? **MR. RUKSTELE:** That's correct your honor. Uh, Uh My memory of the record reflects that the officer made some attempt to warn this man of his constitutional rights. The transcript says, “I gave him his rights”, I told him he had a right to an attorney, that he didn't have to go. Apparently, Mr. Raby waived his rights in some matter, I guess he waived his rights by telling the officer that he wanted to go. Whether or not that's a proper waiver, that issue is not before this court. However, I might add that The United States Supreme Court takes a softer view on waiver these days especially since the decision of Schneckloth v Bustamonte. That was a waiver of a search, where the officer searched the trunk of a car, and in that case, the U S Supreme Court says “let's look at the whole incident, let's see if there was any force used. Whether there was any coercion. If there wasn't perhaps there was a waiver of rights”. That urged trial courts to look at the whole, at all of the surrounding facts and circumstances. The interesting thing that The U S Supreme Court noted is that you do not have to advise the defendant of the entire gavet of his rights, of his Miranda rights, etc. I think we have a very similar situation here it's not the search of a trunk of a car, but it's the seizure or view of a person, I think the same standards could be applied for a fact situation here.

(MR.RUKSTELE-MINUTE 42:45 ON AUDIO) If I may further address myself to the next issue that the brother counsel spoke of and that is the issue on the NRS 193.196, excuse me, 193.165 the Use of Deadly Weapon statue. I must confess to you gentlemen that the Clark County district attorney's office has not been very consistent in their pleadings on this matter. I think this court should expect and should demand consistency from our office. We have not been consistent. There have been instances where we have pled this count or this charge “the use of the deadly weapon” in one count, there have been other instances where we have plead it in two counts. There are positions I submit to support either theory. Perhaps, uh hopefully this honorable court's decision in Woofter would straighten this out once and for all. Perhaps this case here, this case at the bar can straighten that issue out once and for all. However... **JUDGE**: Have you contacted the Washoe County District Attorney’s office to see how they charged it? Do you have any communication with your fellow district attorneys? **MR. RUKSTELLE**: I'm sure there is such communication your honor. **JUDGE**: I've seen some of their pleadings, and they, when they had one of these situations, where there had been a robbery with a firearm, set up in regular pleadings though state of Nevada, County of Washoe District Attorney being informed that so and so committed the crime of robbery in such and such a manner by the use of a firearm and they set forth both the statutes, the robbery statute and the enhanced punishment statute, so he's on notice that he's subject to punishment under both of those statutes, just one count and then when he is uh tried and it goes to the jury. The jury is given two verdicts. Only one of which they can return, one they can find the defendant guilty of robbery or one guilty robbery by the use of a firearm. **MR. RUKSTELE**: If I, may I

inquire. **JUDGE**: That's something that you have to get into in your own operation of your office, but uh. **MR. RUKSTELE**: Well, your honor, we want to do what's right. This is one possibility, this this much, however, is clear to our office. Number 1, it's our position that we have to plead, what we intend to prove, and if we intend to prove that a deadly weapon was used, then I submit we have to plead that. **JUDGE**: Well can't you plead that in one count? **MR. RUKSTELE**: Well, I believe we can plead that in one count. **JUDGE:** Can't you sight the two statutes that have been bound over so the defendants put on adequate notice and due process has been had, like they do in Washoe County? **MR. RUKSTELE**: That can be done. **JUDGE:** Can't you then try him on that count? Can't you instruct the jury that you may return, find the defendant guilty of robbery, given (give him) that verdict, the jury, that verdict or another verdict guilty the robbery with the use of a firearm. **MR. RUKSTELE:** Does the court suggest that two instructions be given to the jury? **JUDGE:** Well, I understand that process is followed, I'm not suggesting anything. Just uh I understand that is followed as strict news, weather as a reasonable way to handle it, but I'm not speaking for the court. **MR. RUKSTELE**: I see, well your honor, here is the danger that I perceive and it again it's a possibility, I don't know. First of all, this court we're faced with problems that not all of the trial judges in the Eighth Judicial District Court, they're not consistent with what they expect and what they demand there are some judges in the Eighth judicial District Court who believe that it should be two counts and there are other judges who believe that it should be one count. **JUDGE**: We had hopes that we had hopes that, that we'd at least resolve that now. **MR.RUKSTELE**: I'd hoped, I would like to think so your honor, yes. However, I'm sure you know this case came up quite some time ago. When this case was tried, that problem was still in Las Vegas. The only problem that I can see that pleading this in one count is that it perhaps would confuse the jury and when I say confuse the jury, the jury may find itself in a situation where it says; well, I believe that this man perpetrated a robbery, however, I do not believe that the weapon he used was a deadly weapon, therefore I'm gonna vote for not guilty. **JUDGE**: Well, uh Justice Mowbray suggests that under the Washoe County practice they would have, they would have an alternative verdict to use that didn't incorporate reference to a deadly weapon and that the wanted simply to find him guilty of robbery, but robbery without the use of a deadly weapon, they would use that verdict form. **MR. RUKSTELE**: I see, however, your honor, my point is, however it's pled its gotta go to the jury. It's still...Whether or not... **JUDGE**: Well now that's news to me. Uh, uh If you, if you have uh a case that involves a lesser included offense, you give them, do you give the jury verdicts that enable them to bring in a less, a finding of guilty on a lesser included offense. **MR. RUKSTELE**: That's. **JUDGE**: Don't you? **MR. RUKSTELE**: Yes, sir. **JUDGE**: So, if you, if you uh plead uh robbery in the normal form, and then go on uh with an allegation that it was done with a deadly weapon, can't you, uh can't you give them a verdict for the uh principal offense and a verdict that would encompass the enhanced offense, as Justice Mowbray suggests? I mean, uh in fact, it seems to me that uh under our holding in Woofter v O'Donnell where we say that uh it's to be pled in one count that, that would be about the only way you could do it, idnt it? Give them two verdict forms? **MR. RUKSTELE**: I agree, your honor. **JUDGE**: Idn't, now you suggest a special finding, but actually isn't that just a form of special verdict, another verdict form? **MR.**

RUKSTELE: It is another verdict form, however the, that specific question, I believe whether or not a deadly weapon was used, should be pled, and the jury has to decide that. **JUDGE**: I don't think, I don't think there's anyone here uh that's in disagreement with that, I think that everybody agrees that uh due process requires that the, the enhancement aspect of the uh crime, if you're going to rely on it to be pled so that the defendant will have due process uh notice of, of the fact that your seeking an enhanced penalty and uh I think everybody is in agreement that uh you gotta submit the issue to the jury by some kind of uh form. **MR.RUKSTELE**: Very well your honor, and I guess my point in this discussion is this, we tried to submit it to the jury, we did it by separate count, the, the end result is the same uh I guess what this issue deals with... **JUDGE**: Can you suggest a simple way that the uh the defendant's claim that his rap sheet may one day prejudice him, can be obviated? **MR. RUKSTELE**: Well, I don't believe that counts 6 through 10 that conviction of these counts would ever appear on a rap sheet because they're not conviction for criminal offenses. It is impossible, we can't, it is impossible to charge a person one count for use of a deadly weapon in the commission of a crime, uh I don't believe you can charge that count, charge a defendant with that offense without having a substantive offense... robbery, burglary, rape, etc. attached to it. I don't think that can be done. Ergo... its NOT a crime, its merely, as we all know uh an enhancement penalty, it's not in the penal section, its in the preliminary provision section. Quite simply, it is NOT a crime. Therefore, it should not appear on the rap sheet. **JUDGE:** It probably will. It's a judgement of conviction. **MR. RUKSTELE**: It's a...Your honor, it's a judgment of... **JUDGE**: One of the things that appear on the rap sheet that (chuckling)... **MR. RUKSTELE**: the that's right. **JUDGE**: is convictions. **MR. RUKSTELE**: A lot of things appear on rap sheets, that shouldn't appear. Perhaps this may be one of them uh **JUDGE**: Well, we can't solve the biologic, when you get back uh to your office, why don't you get a copy of his rap sheet and send it to us. **MR. RUKSTELE**: Oh, I'd be delighted to. **JUDGE**: Alright. **MR. RUKSTELE:** (inaudible) Your honor, may it please the court, I have nothing more to, to say regarding these issues. If there are any questions that this court may have. Thank you very much.(MR.RUKSTELE ENDS AT 53:59) **JUDGE:** Thank you Mr. Rukstele. Mr. Maupin. Send council a copy of that, if you would. **MR. RUKSTELE**: Yes sir. (MR.MAUPIN'S REBUTTAL STARTS AT 54:10) **Mr. Maupin**: Thank you your honor. I can actually take issue with the some of the basic assertions councils' made about the deadly weapon statute. In the first place, the pleading of this, of this, of this particular statute in one count would not confuse the jury, and if it did, it would be the fault of the attorneys involved. This is a matter that the attorneys have to resolve in terms of their instructions and the forms of verdict that they submit to the jury. Now I've been involved in a couple of these trials myself and I can tell you from hard experience, that they weren't confused. It's pled in one count, and in one instance a special verdict was used, the jury was instructed on the on the doctrine of reasonable doubt, on the elements of the charge. They were to, they were to find if they felt the evidence was sufficient, that the defendant was guilty of robbery, and if they so found, then they were to make another finding, that finding, being whether or not there was sufficient proof to believe that a deadly weapon was used in the Commission of the crime. It's not a confusing situation at all. It should be pled in that form. The problem is, is that it should

not be pled in the form that it sounds in a felony, and that's what it, that's what this particular situation involves. It was pled as a felony, and therefore his record, when you search his record, down in the County Courthouse, it will show that he has been convicted of not 5 robberies, but he has been convicted twice for each of those 5 robberies, therefore 10 convictions. The state argues in its brief, that the forms of verdict did nothing more than allow the jury to so find, that they believe the evidence showed such a fact referring to the existence of a deadly weapon. That is NOT what these verdicts did, these verdicts found him guilty of what appears on the record, in terms of the verdict, the information, and the judgment of conviction, shows that he (stuttered) committed five other felonies. These are not crimes. They also show that he's been convicted twice for each offense. (Minute 56:38 on audio). I am also gratified by the solicitude that council shows toward individuals accused with crime when he speaks about the motion to suppress, he was, he said that it was, he would "think it was very unfortunate if an innocent man was brought to jail and arrested...What else could the police do in this situation". Well, there's one thing they could have done, they could have taken him down to the jail, held a lineup, incarcerated him, and at that time, had a full corporeal lineup with all the victims present. But they didn't do that, and I submit to you that the part, that it's a much worse situation that an innocent man is brought through an unduly suggestive procedure, and then convicted when he could have been detained for a relatively short period of time, during which they had a line up, which would either exonerate or relief or, or would implicate him. Terms of subjectivity in this case, council has in essence argued the motion to suppress here before this court, I don't think that is necessarily proper in this tribunal, because this issue was never heard before the trial court. And one issue that he, that he gulled on was that Mr. Spawn was the one man who didn't have a confrontation, he didn't see a lineup, he didn't, he wasn't present at the two man, at the one man show up. He was the only one who was equivocal in his identification, the other persons were dead sure, and that to me is a clue, that there is a, there is an issue that should have been resolved on the motion to suppress, because there is a possibility once that, once the type of cross examination that would be undertaken at the motion to suppress was had, there is a possibility that it could have been shown to be unduly, suggestive, and to have improperly tainted the in court (?) identification. What I'm saying is that the 15-day rule can be used to prevent the airing of constitutional issues, issues that are not, that cannot be prevented from being heard by this court, and the trial court should not be able to, to utilize the 15-day rule to refuse to hear this issue. He speculates on why the judge did not uh hear this motion, oh, I think the record is quite clear on that, he felt there was a waiver, there's no waiver, he felt that there was no points and authorities in the file, but in fact, there were. And he felt that it was not filed in compliance within NRS 174.125 which again, I suggest to this court should that be used, to be able, too far for the airing of constitutional issues of trial. Thank you. **JUDGE**: Thank you, Mr. Maupin. The case will be, will stand submitted upon the delivery of the copy of the rap sheet as previously mentioned. Uh, the court will be in recess until 25 minutes of the hour.