

ORIGINAL

FILED

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUL 18 2014

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

D'VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 64983

Dist Ct. Case. CR12-1160

---

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE PATRICK FLANAGAN

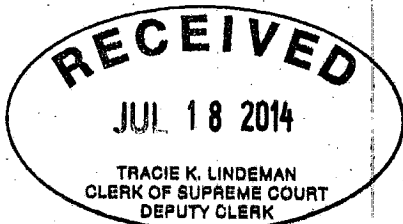
SECOND JUDICIAL DISTRICT COURT

---

APPELLANT'S OPENING BRIEF

KARLA K. BUTKO, Esq.  
Attorney for Appellant  
P. O. BOX 1249  
Verdi, Nevada 89439  
(775) 786-7118  
State Bar #: 3307

RICHARD A. GAMMICK  
Washoe County District Attorney  
Attorney for Respondent  
Box 11130  
Reno, Nevada 89520  
(775) 328-3200  
TERRENCE P MCCARTHY, ESQ.



14-23384

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 64983

Dist Ct. Case. CR12-1160

---

APPEAL FROM JUDGMENT OF THE HONORABLE JUDGE PATRICK FLANAGAN

SECOND JUDICIAL DISTRICT COURT

---

**APPELLANT'S OPENING BRIEF**

KARLA K. BUTKO, Esq.  
Attorney for Appellant  
P. O. BOX 1249  
Verdi, Nevada 89439  
(775) 786-7118  
State Bar #: 3307

RICHARD A. GAMMICK  
Washoe County District Attorney  
Attorney for Respondent  
Box 11130  
Reno, Nevada 89520  
(775) 328-3200  
TERRENCE P MCCARTHY, ESQ.

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS & AUTHORITIES .....	i-iv
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE .....	2-4
STATEMENT OF FACTS .....	4-8
LEGAL ARGUMENT .....	8-19
 <b>I. THE STATE BREACHED THE SPIRIT OF THE PLEA BARGAIN IN VIOLATION OF THE FIFTH &amp; FOURTEENTH AMENDMENTS. A NEW SENTENCING HEARING IS WARRANTED.</b>	 <b>9-11</b>
 <b>II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT MR. KING WOULD SERVE HIS NEVADA PRISON TIME CONSECUTIVELY WITH HIS CALIFORNIA PRISON TIME. THE DISTRICT COURT IMPROPERLY RELIED UPON SUSPECT EVIDENCE IN IMPOSITION OF SENTENCE.</b>	       <b>11-15</b>
 <b>III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO AN ADDITIONAL 53-240 MONTH SENTENCE FOR THE USE OF A DEADLY WEAPON. GIVEN THE MITIGATING FACTORS IN THIS CASE, A LOWER SENTENCE SHOULD HAVE BEEN IMPOSED BY THE COURT.</b>	          <b>15-18</b>

## TABLE OF CONTENTS

	<u>PAGE</u>
<b>IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO A PERIOD OF TIME SEVERELY DISPROPORTIONATE TO THE TIME STATED IN THE PLEA BARGAIN.</b>	<b>18-19</b>
CONCLUSION .....	19
CERTIFICATE OF COMPLIANCE .....	20
CERTIFICATE OF SERVICE .....	21

## TABLE OF AUTHORITIES

<u>CASE NAME</u>	<u>PAGE</u>
<i>Citti v. State</i> , 107 Nev. 89, 91, 807 P.2d 724, 726 (1991)	10
<i>Doane v. State</i> , 98 Nev. 75, 639 P.2d 1175 (1982)	10
<i>Echeverria v. State</i> , 119 Nev. 41, 62 P.3d 743 (2003)	19,10
<i>Gall v. United States</i> , 128 S. Ct. 586 (2007)	14
<i>Harmelin v. Michigan</i> , 501 U.S. 957, 1000-01 (1991)	17
<i>Herman v. State</i> , 122 Nev. 199, 204, 128 P.3d 469, 472 (2006)	8
<i>Lloyd v. State</i> , 94 Nev. 167, 576 P.2d 740 (1978)	17
<i>McKenna v. State</i> , 114 Nev. 1044, 968 P.2d 739 (1998)	8
<i>Nunnery v. State</i> , 127 Nev. Adv. Op. 69 (decided October 27, 2011)	9
<i>Rita v. United States</i> , 127 S. Ct. 2456, 2469 (2007)	14,15
<i>Santobello v. New York</i> , 404 U.S. 257, 262 (1971)	9,10
<i>Silks v. State</i> , 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)	9,14
<i>United States v. Cantrell</i> , 433 F.3d 1269, 1279 (9th Cir. 2006)	15
<i>United States v. Vasquez-Landaver</i> , 527 F.3d 798, 804-05 (9th Cir. 2008)	14
<i>Wolf v. State</i> , 106 Nev. 426, 794 P.2d 721 (1990)	10

## **TABLE OF AUTHORITIES**

<b><u>CONSTITUTIONAL AMENDMENTS</u></b>	<b><u>PAGE</u></b>
Fifth Amendment .....	1,9,14,19
Eighth Amendment .....	17,19
Fourteenth Amendment .....	1,9,19

## **TABLE OF AUTHORITIES**

<b><u>NEVADA REVISED STATUTES</u></b>	<b><u>PAGE</u></b>
NRS 176.045 .....	11
NRS 193.165.....	2,3,8,15,16
NRS 200.010 & 200.030 .....	2,3

## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over the direct appeal from the judgment of conviction which entered after a judgment of guilt pursuant to a negotiated guilty plea. NRAP 4 (b). The judgment of conviction entered on January 23, 2014. AA 46-47. The notice of appeal was filed January 31, 2014. AA92.

## **STATEMENT OF THE ISSUES**

- I. THE STATE BREACHED THE SPIRIT OF THE PLEA BARGAIN IN VIOLATION OF THE FIFTH & FOURTEENTH AMENDMENTS. A NEW SENTENCING HEARING IS WARRANTED.**
- II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT MR. KING WOULD SERVE HIS NEVADA PRISON TIME CONSECUTIVELY WITH HIS CALIFORNIA PRISON TIME. THE DISTRICT COURT IMPROPERLY RELIED UPON SUSPECT EVIDENCE IN IMPOSITION OF SENTENCE.**
- III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO AN ADDITIONAL 53-240 MONTH SENTENCE FOR THE USE OF A DEADLY WEAPON. GIVEN THE MITIGATING FACTORS IN THIS CASE, A LOWER SENTENCE SHOULD HAVE BEEN IMPOSED BY THE COURT.**
- IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO A PERIOD OF TIME SEVERELY DISPROPORTIONATE TO THE TIME STATED IN THE PLEA BARGAIN.**

## STATEMENT OF THE CASE

A criminal complaint was filed against Mr. King charging him with one count of open murder with the use of a deadly weapon with alternative theories for first degree murder. Mr. King, as a tactical decision, chose not to appear at his preliminary hearing on July 19, 2012. AA 2.

Following the preliminary hearing, on July 23, 2012, an Information was filed against Mr. King charging him with violations of NRS §§ 193.165, 200.010, 200.030; murder with a deadly weapon enhancement. AA 3-5. At his arraignment on August 22, 2012, Mr. King pled not guilty to all charges. Given the extensive pre-trial discovery (69 CDs), a three week trial was requested and set for August 12, 2013.

However, before trial, the lawyer-client relationship between Mr. King and Mr. Molezzo, his then attorney, broke down. After Mr. King's handwritten motion to relieve counsel, the court held two status hearings concerning Mr. Molezzo's representation of Mr. King. The court granted Mr. King's motion on May 13, 2013, and replaced Mr. Molezzo with John Ohlson, Esq., court-appointed counsel through the Robert Bell administration for indigent defense in Washoe County.

After a final Status Hearing on May 22, 2013, trial was set for January 22, 2014. On November 22, 2013, an Amended Information was filed removing the



open murder charge and charging one count of second degree murder, a violation of NRS 200.010 & 200.030, along with the deadly weapon enhancement under NRS 193.165. AA 159. The Amended Information came about as the result of plea negotiations by which the District Attorney's office agreed to change the open murder charge to second degree murder with a deadly weapon and drop pending witness tampering charges in exchange for a guilty plea to a second degree murder charge enhanced by deadly weapon use. AA 10-15. The State agreed not to seek a term of more than 2-6 years in prison on the deadly weapon enhancement. Both Parties were free to argue whether the sentences should run concurrently to a related California charge or consecutive to that case. AA 12.

With that in mind, Mr. King changed his plea to guilty in conformance with the amended information. AA 16-32. A pre-sentence investigation report was generated in preparation of sentencing. Mr. King filed a pre-sentence memorandum noting his points of contention. AA 33-45.

The case proceeded to sentencing. The Honorable Judge Patrick Flanagan sentenced Mr. King to a term of life in prison with parole eligibility at ten (10) years for the second degree murder charge and to a consecutive term of 53 months minimum/240 months maximum in prison on the deadly weapon enhancement. AA 46-47; 90.

Mr. King filed a timely in proper person notice of appeal. AA 92. On appeal, John Ohlson was removed as counsel and Karla K. Butko was appointed to the case. The instant appeal follows.

### STATEMENT OF FACTS

On November 5th, 2010, D’Vaughn Keithan King (“Mr. King”) and Henry Lee Toy, (“Toy”), broke into the home of Tommy Young. During this entry, Tommy Young was shot and killed. Mr. King took responsibility for his part in the crime and pled guilty. AA 16-32. At sentencing Mr. King expressed sincere regret for his actions, stating:

“I have a great deal of sadness and empathy for the families involved in this case, especially the Young family, Karen, Kianna, Evelyn, Shaniqua. . . I am deeply sorry for your loss” AA 53

Mr. King, unlike most prisoners, embraced the rehabilitative arm of our penal system. At sentencing, he said:

“Your Honor, as I ponder my legacy I will leave, I decided that 100 years from now that I want to be known as somebody who brought out the best in people, somebody who left the world a better place. Material accomplishments will soon be forgotten. The only thing that lasts is the investment we make in other people's lives.” *Id.*

However, actions speak louder than words. While incarcerated, Mr. King completed and passed a number of courses including: Domestic Violence I and II; Parenting the Adolescent and the Teenager; 23 weekly domestic

violence groups with American Comprehensive Counseling Services ("ACCS"); 8 weekly Substance Abuse Classes are the Washoe County Sheriff's Office; and a glowing review from Dan Lemaire with ACCS citing 60 attendances at a weekly Domestic Violence group. AA 33-44.

In fact, a short excerpt from the letter is appropriate:

"Mr. King is a learner, always interested in going a little deeper than most into any given subject. He is interested in what others bring to the group, and typically is attentive to whatever is being discussed. He does not monopolize a discussion, but will be sure to give his input if he has an opinion. He seems to be well respected by others, and is certainly respectful towards everyone else in the room as I have experienced him. He speaks fondly of his children and family, and his concerns for them seem to be consistent and authentic." AA 44.

Despite, or perhaps because of, his prior criminal history, with convictions for Transportation of Marijuana, Battery Causing Substantial Bodily Harm, and Possession of a Controlled Substance, when Mr. King leaves prison, he wants to use his past experience as a beacon of how not to behave. He wants to counsel wayward youths in situations similar to his own and prevent them from walking down the wrong path. AA 79-80. This desire appears to be genuine; his wife confirmed his intentions without reservation. AA 57-58. The change in Mr. King's behavior and religious conversion convinced the mother of the victim to forgive him at sentencing. AA 86.

It is also clear that Mr. King has a family that supports and believes in him. At sentencing, his mother and brother came in from California and his father came

all the way from Mississippi to attend the hearing. AA 58. While in prison, he has been in continual communication with his wife, Nancy King. She wants to be reunited with her husband and has noted the change in her husband:

“Yes. He's gone to counseling sessions and I see that he's found a purpose in life now that he has, I want to say the gift, but he knows how to reach people and I believe that he wants to help people not follow in his same footsteps and try to keep them from making the same horrible decisions he's had.” AA 57.

During the sentencing hearing, the State presented a lengthy argument coupled with the testimony of Detective Gallop from the Sparks Police Department. Remember, the plea bargain called for the State to not seek more than 2-6 years in prison on the deadly weapon enhancement. Bruce Hahn, Chief Deputy District Attorney stated that his presentation of evidence was intended to be related to whether the Nevada term should run concurrently with the California case and told the Court the States “respects and intends to honor the plea agreement”. AA 59. However, the argument by the State and presentation of witness evidence relating to the guilt or innocence of Mr. King versus Mr. Toy went beyond that necessary to deal with concurrent versus consecutive sentences and netted Mr. King a maximum term on the deadly weapon enhancement.

Mr. Ohlson objected timely to the State's argument on the guilt or innocence of his client, as Mr. King had pled guilty and accepted responsibility by entry of the plea. AA 63. The District Court allowed the evidence under the guise of the

federal sentencing guidelines, which find that role in the offense is a factor to take into consideration. AA 63. Mr. Hahn advised the Court that he disagreed with the Defendant's representations and perspective of his involvement in the crime. AA 64. After that, Mr. Hahn called witness Gallop to testify about the 'Penlink' report (Exhibit 1) which was based upon cell phone data and created a chart. Mr. Ohlson reminded the Court that he did not wish to relitigate "who done what". AA 63.

Detective Gallop admitted that using the cell phone data of two phones used by victim Tommy Young did not net a primary suspect on the case. AA 65. Mr. King was in possession of a cell phone at the time of his arrest in California and the police gained information from his cell phone which tied Mr. King to speaking to the victim four weeks before the incident. AA 66. Police interviewed Mr. Toy and determined that his initial statements to police were false. AA 67. Mr. King's friend, Hanna Malatu's cell phone was traced to Mr. King. AA 68.

Information was entered by the State at sentencing that Eric King was a middle man who facilitated drug deals between the victim and Mr. King. AA 69. Evidence about Ms. Mitchell's presence when the victim was shot, that Mr. Toy dropped his gun and that Mr. Toy was shot in the legs was admitted at the sentencing. AA 70.

Mr. Hahn did not stop there. In his quest to maximize the sentence imposed upon Mr. King, Mr. Hahn admitted evidence of drug charges in California, the

location of the drugs, the quantity of drugs, location of another storage unit which did not contain contraband, and the location and confiscation of a gun that was not involved in this case. AA 71-74. During the argument stage of the sentencing, Mr. Hahn reminded the Court with one sentence that the State recommended 24-72 months on the enhancement but then went on for an entire typed page as to the drug involvement in the fact setting. AA 76-77. In reality, Mr. King's drug conviction in California related to drugs found at a residence and all charges about the storage units were dismissed by California. AA 78.

When imposing sentence, the District Court made a perfunctory comment that it considered the factors found in NRS 193.165 by stating what those factors were but not by relating any factual support to its enhancement decision. AA 89. At that point, the District Court imposed a term of life in prison with parole eligibility at ten years, a consecutive enhancement for the weapon of 53-240 months, and ordered the sentence to be served consecutively to the California related case. AA 90. This appeal follows.

## **ARGUMENT**

### **Standard of Review:**

A defendant must show actual prejudice to warrant a new sentencing hearing based on an alleged due process violation. *McKenna v. State*, 114 Nev. 1044, 968 P.2d 739 (1998) and *Herman v. State*, 122 Nev. 199, 204, 128 P.3d 469,

472 (2006), overruled on other grounds by *Nunnery v. State*, 127 Nev. Adv. Op. 69 (decided October 27, 2011). The district court is afforded wide discretion in its sentencing decisions and the Supreme Court has refrained from interfering with the sentence imposed when “the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

**I. THE STATE BREACHED THE SPIRIT OF THE PLEA BARGAIN IN VIOLATION OF THE FIFTH & FOURTEENTH AMENDMENTS. A NEW SENTENCING HEARING IS WARRANTED.**

**Standard of Review:**

Since *Santobello v. New York*, 404 U.S. 257, 262 (1971), this Court has stated that the State's violation of a plea agreement “‘requires reversal.’” Our case law has implicitly rejects harmless-error analysis in the event of a breach of a plea agreement, and a new sentencing must be heard before a new judge. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003).

**Argument:**

The United States Supreme Court has held that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”

*Santobello v. New York*, 404 U.S. 257, 262 (1971). This court has held that when the state enters a plea agreement, it is held to the most meticulous standards of both promise and performance. *Citti v. State*, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991). Violation of either the terms or the spirit of the agreement requires reversal. *Id.*

This court also ordered resentencing in *Wolf v. State*, 106 Nev. 426, 794 P.2d 721 (1990), where the prosecutor acknowledged that he could not argue for a sentence of more than five years, but after detailing the defendant's criminal history implicitly argued for the presentence report's recommendation of nine years, and in *Doane v. State*, 98 Nev. 75, 639 P.2d 1175 (1982), where the prosecution violated an agreement to stand silent at sentencing when it asked the court if the sentences for multiple counts were consecutive. The State's violation of a plea agreement requires reversal and is not subjected to harmless error review. When the State breaches a plea agreement, the case must be reassigned to a different sentencing judge for resentencing. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003).

The argument of the State, coupled with admission of Exhibit 1, the Penlink chart, and the testimony of Detective Gallop violated the spirit of the plea bargain. The reality of the State's argument was to seek imposition of maximum consecutive sentences upon Mr. King and it worked. Judge Flanagan failed to even note on the record that he was disregarding the plea bargain of the Parties or



why he found the plea bargain to be inappropriate. This, after Mr. King spent 651 days in custody before accepting a plea bargain. A new sentencing before a new judge is the proper remedy.

**II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RULED THAT MR. KING WOULD SERVE HIS NEVADA PRISON TIME CONSECUTIVELY WITH HIS CALIFORNIA PRISON TIME. THE DISTRICT COURT IMPROPERLY RELIED UPON SUSPECT EVIDENCE IN IMPOSITION OF SENTENCE.**

NRS 176.045 grants the District Court the discretion to choose whether or not a sentence from another jurisdiction against the defendant will be run concurrently or consecutively with the Nevada offense. While case law dealing with NRS 176.045 is scarce, nonetheless, courts have entertained appeals pursuant to an abuse of discretion.

The District Court abused its discretion when it chose to impose Mr. King's Nevada penalties consecutively with his California penalties. The California case for which Mr. King was incarcerated arose out of the Nevada investigation. As such, the charges that arose in California are effectively "collateral damage" resulting from the crime committed in Nevada. The parity between the two investigations is clear, and serving time in Nevada for the greater crime should have been sufficient to accomplish the retributive and rehabilitative goals of incarceration.

Further, the additional time would serve no legitimate punitive purpose. Generally speaking, the three punitive purposes are retribution, rehabilitation, and removal. The crime for which Mr. King was imprisoned in Nevada, second degree murder with a deadly weapon, was addressed at the sentencing hearing. Punishing him further for drug possession in California does not further serve Nevada's interests in punishing him for crimes committed in Nevada.

The additional time also does not serve a rehabilitative purpose. Mr. King's conduct in prison and at sentencing show that he, in a few short years, is already a radically different person. He attended a number of classes while in prison: Domestic Violence I and II; Parenting the Adolescent and the Teenager; 23 weekly domestic violence groups with American Comprehensive Counseling Services ("ACCS"); 8 weekly Substance Abuse Classes at the Washoe County Sheriff's Office; and a glowing review from Dan Lemaire with ACCS citing 60 attendances at a weekly Domestic Violence group. AA 121-126. Not only has he attended these classes, he appears to have also incorporated their teachings into his life. The letter written by Dan Lemaire shows that Mr. King is doing more than simply vegetating at the classes:

"Mr. King is a learner, always interested in going a little deeper than most into any given subject. He is interested in what others bring to the group, and typically is attentive to whatever is being discussed. He does not monopolize a discussion, but will be sure to give his input if he has an opinion. He seems to be well respected by others, and is certainly respectful towards everyone else in the room as I have experienced him. He speaks

fondly of his children and family, and his concerns for them seem to be consistent and authentic." AA 126.

Further, it's clear that Mr. King has learned from his prison experience and wants to change the purpose and effect of his life. As Mr. King said at sentencing: "Your Honor, as I ponder my legacy I will leave, I decided that 100 years from now that I want to be known as somebody who brought out the best in people, somebody who left the world a better place. Material accomplishments will soon be forgotten. The only thing that lasts is the investment we make in other people's lives." *Id.*

Additional prison time from a California conviction will not serve to rehabilitate him any further.

Finally, the ultimate purpose behind incarceration is to remove a threat from the people and keep it safely locked behind closed doors. The clear change in Mr. King's demeanor, outlook, and purpose in life makes it clear that he is no longer a threat to the community. Keeping him in prison longer will not serve to protect the public. In fact, further incarceration of Mr. King could harm the public by depriving it of his new purpose in life—helping at-risk kids to make the right choices.

The Court improperly admitted Exhibit 1, over defense objection, and the State's argument on the facts and evidence in California. The Detective testified that the Penlink did not show a connection between Mr. King and the victim on the victim's phone. The evidence was that one of Mr. King's phone which was taken into evidence upon his arrest in California, had calls from the victim four weeks prior to the incident. The Penlink chart was put together with a computer program

and was suspect evidence at best. Sentencing decisions based upon “impalpable or highly suspect evidence” warrant a new sentencing hearing. *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Admission of sentencing evidence is bound by constitutional constraints. Admission of the Penlink chart violated the spirit of the plea bargain and interposed highly suspect evidence into this sentencing proceeding, in violation of the Fifth Amendment and due process rights of Mr. King.

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. *Gall v. United States*, 128 S. Ct. 586 (2007) and *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007).

The Federal and Nevada Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5).

A substantively reasonable sentence is one that is “sufficient, but not greater than necessary” to accomplish § 3553(a)(2)’s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008). This sentence was in excess of that needed for society’s interests. *See Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007). This Court

must proceed to review the reasonableness of the available sentence. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). Sentencing schemes in Nevada are not blind to rehabilitative interests and the Court is required to consider the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Because the California case was a direct result of his Nevada conviction, and because further incarceration of Mr. King does not serve any further punitive purposes, the District Court erred when it increased the amount of his prison term by running the Nevada and California punishments consecutively.

**III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO AN ADDITIONAL 53-240 MONTH SENTENCE FOR THE USE OF A DEADLY WEAPON. GIVEN THE MITIGATING FACTORS IN THIS CASE, A LOWER SENTENCE SHOULD HAVE BEEN IMPOSED BY THE COURT.**

NRS 193.165 provides an additional penalty for using a deadly weapon during the commission of a crime. The statute provides the judge with discretion to add an additional sentence of a one year minimum and twenty year maximum. However, the statute requires that the judge consider five factors and state that he/she has considered these factors on the record. A careful consideration of the NRS 193.165(1) factors demonstrates that the imposition of a 4.5 year minimum and 20 year maximum was an abuse of discretion by the court. The factors are:

- (a) The facts and circumstances of the crime;
- (b) The criminal history of the person;
- (c) The impact of the crime on any victim;
- (d) Any mitigating factors presented by the person; and
- (e) Any other relevant information.

The defendant will admit that the facts and circumstance of the crime do not weigh in his favor. His criminal history consists of convictions for Transportation of Marijuana, Battery Causing Substantial Bodily Harm, and Possession of a Controlled Substance. In effect, his prior criminal history consisted of two drug crimes and a single violent crime. His criminal history is not the best, but it is also, assuredly, not the worst criminal history that this Court has seen. As such, it is at worst a neutral factor.

The third factor, impact of the crime on the victims is an interesting factor. Clearly, the biggest impact was on Tommy Young, who died. Such a result, however, is a necessary consequence of the crime and does not make Mr. King's crime unique. At sentencing, three victim impact statements were given, one from Tommy's sister, Evelyn Young, one from Tommy's younger sister, Kianna Pride, and one from Tommy's mother, Karen Jones. Evelyn Young gave a short statement summarizing her loss and remorse. AA 32-33. Kianna Pride gave a clear statement that she was still feeling bitter and angry towards Mr. King. AA 82. Tommy's mother, Karen Jones, on the other hand, forgave him for his crime. AA 86. Clearly, as with any murder, there was a distinct negative impact.

Nonetheless, Mr. King's change and remorse was so significant and genuine that it convinced the mother of the victim to forgive him. The court did not address Mr. King's reformation, and its failure to do so was an abuse of discretion.

The mandatory consecutive prison term of 20 years for the weapons enhancement was excessive and constituted cruel and unusual punishment under the Eighth Amendment. See *Lloyd v. State*, 94 Nev. 167, 576 P.2d 740 (1978) and *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

The court, in its discussion before declaring sentence, never discussed how Mr. King's clear mitigating factors influenced its decision. The Court delivered a significant and intelligent lecture concerning murder in the abstract, but failed to note the clear changes in Mr. King's person. The Court's failure to address his reformation coupled with its clear distaste of any murder implies that the court did not sentence this case specifically, but rather punished the crime of murder in the abstract. As such, because it failed to address relevant information (such as forgiveness from the mother of the deceased) and focused too heavily on the crime in general, the 4.5 to 20 year sentence given for the deadly weapon enhancement was an abuse of discretion. The Court was advised that Mr. King somehow was tied to a gun which was not involved in this case. This evidence was suspect and inadmissible. A new sentencing is warranted.

**IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SENTENCED MR. KING TO A PERIOD OF TIME SEVERELY DISPROPORTIONATE TO THE TIME STATED IN THE PLEA BARGAIN.**

Lastly, although it must be admitted that the court possesses the power at sentencing to differ from the terms of a plea bargain, a severe departure from the terms of the plea bargain begin to undermine the intelligence and voluntariness of a defendant's plea. Put in simple terms, if a defendant enters into a plea bargain expecting that the State, his adversary, will argue for a deadly weapon enhancement of 2-6 years, he/she reasonably expects that the court will not order much more than that. If the court, instead, orders an enhancement of 4.5-20 years, such a departure from what was expected assuredly undermines the reasonable expectation of the defendant. Had he/she known that the court would depart so radically from the State's recommendation, he/she would likely not have accepted the bargain.

The above hypothetical is not a hypothetical. It represents the undisputed facts of this case. Mr. King accepted a guilty plea knowing, yes, that the court could depart from the terms. AA 14, 29. The question remains, did he have actual knowledge that the court would depart so radically from the terms of the plea? If such a situation arose in a civil contract matter, the court would assuredly be offended at the degree of difference. Because the court differed so radically on the deadly weapon enhancement from what the plea bargain stated, Mr. King's assent

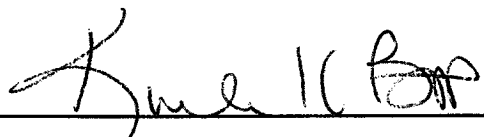


to the bargain cannot be construed as knowing or voluntary. At no time did the Court express its reasons for determining that the plea bargain entered into between the parties was improper in any way. A new sentencing should be granted.

### CONCLUSION

Mr. King's rights under the 5th and 14th Amendments to due process under the law were violated. The sentence is excessive under the 8th Amendment. This judgment of conviction should be vacated and the case should be remanded for a new sentencing hearing ordered to be conducted before a court that has not been involved in the case to date.

DATED this 17<sup>th</sup> day of July, 2014.

By: 

KARLA K. BUTKO, ESQ.

ATTORNEY FOR APPELLANT  
P. O. Box 1249

Verdi, NV 89439

(775) 786-7118

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING BRIEF," and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure. There are 19 pages in this brief, excluding certification pages. The Brief has been prepared in Word, 14 point Times New Roman font.

DATED this 17 day of July, 2014.

By. 

KARLA K. BUTKO, ESQ.

ATTORNEY FOR APPELLANT

P. O. Box 1249

Verdi, NV 89439

(775) 786-7118

Nevada State Bar No. 3307

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

\_\_\_\_\_ placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service, Reno, Nevada.

\_\_\_\_\_ personal delivery

\_\_\_\_\_ Facsimile (FAX)

\_\_\_\_\_ Federal Express or other overnight delivery

X \_\_\_\_\_ Reno/Carson Messenger Service

addressed as follows:

RICHARD GAMMICK

Washoe County District Attorney's Office

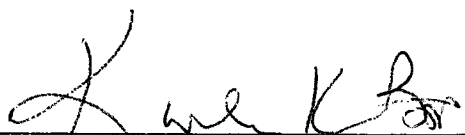
1 South Sierra St., Fourth Floor

P. O. Box 30083

Reno, NV 89501

ATTN: Terrence P. McCarthy, Esq.

DATED this 17<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
KARLA K, BUTKO, ESQ.

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

D'VAUGHN KEITHAN KING,

Docket No. 64983

Appellant,

Dist. Ct. Case No. CR12-1160

vs.

THE STATE OF NEVADA,

Respondent.

DISCLOSURE STATEMENT BY COUNSEL

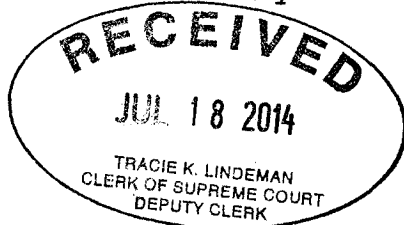
**1. Name of appellant filing this case disclosure statement:**

D'VAUGHN KEITHAN KING.

**2. Name/ associations of KARLA K. BUTKO, ESQ.**

KARLA K. BUTKO, ESQ., is an employee of KARLA K. BUTKO, LTD. KARLA K. BUTKO, LTD. is a Nevada professional corporation duly licensed to conduct business in the State of Nevada and is owned entirely by Karla K. Butko. At this point in time, there is no reasonable belief that other counsel will appear on behalf of Mr. King in this appellate litigation.

**3. Identity of all parties to the proceedings in the district court:** Richard Gammick, Esq., District Attorney for Washoe County represented the State of

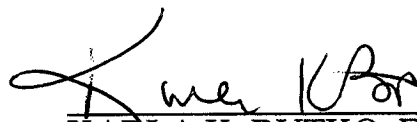


Nevada by and through Bruce Hahn, Esq., Washoe County District Attorney's Office at the trial stage; John Ohlson, Court-appointed counsel through the Robert Bell Indigent Defense Contract in Washoe County; former counsel was Richard Molezzo, Esq., Court-appointed counsel through the Robert Bell Indigent Defense Contract in Washoe County; Terrence P. McCarthy, Esq., Chief Deputy District Attorney for Washoe County represents the State of Nevada on this appeal. Karla K. Butko was court appointed to represent Mr. King on his direct appeal in Docket 64983.

4. D'Vaughn Keithan King, Appellant, has used various spelling changes on this name, has an AKA of Preschool, and has used the names Dee and Vaughn King.

5. The victim's name is Tommy Young. The Co-defendant was Henry Lee Toy.

Dated this 17 day of July, 2014.

  
KARLA K. BUTKO, ESQ.  
State Bar No. 3307  
P. O. Box 1249  
Verdi, NV 89439  
(775) 786-7118

**CERTIFICATE OF SERVICE**

I, Karla K. Butko, Esq., hereby certify that on this date I caused to be personally delivered by Reno Carson Messenger Service, the foregoing document, addressed to the following:

**Richard A. Gammick  
District Attorney for Washoe County  
1 South Sierra Street, Fourth Floor  
Reno, NV 89501  
ATTN: Appellate Division  
Terrence P. McCarthy, Esq.**

DATED this 17<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
KARLA K. BUTKO, ESQ.