

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

JASON RICHARD LOFTHOUSE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

## E-File

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

///

///

///

1           This Motion is based upon the attached declaration of counsel and  
2 Points and Authorities and exhibits and appendix on file.  
3

4                       DATED this 16th day of June, 2017.

5                               PHILIP J. KOHN  
6                               CLARK COUNTY PUBLIC DEFENDER

7  
8                               By           /s/ William M. Waters            
9                                       WILLIAM M. WATERS, #9456  
10                                      Deputy Public Defender  
11                                      309 So. Third Street, Suite #226  
12                                      Las Vegas, Nevada 89155-2610  
13                                      (702) 455-4576  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

27  
28

1 Between June 14, 2016, and February 27, 2017, the Clark County  
2 Public Defender requested three extensions of time to file LOFTHOUSE's  
3 opening brief in this Court. Each request was based upon missing  
4 transcripts of the district court proceedings. When this Court granted the  
5 third extension on March 6, 2017, it indicated the Opening Brief would be  
6 due on May 2, 2017.  
7

8  
9 District court department 20's court reporter filed the remaining  
10 transcripts on April 7, 2017. Once these transcripts were filed Appellate  
11 counsel had less than one month to visit LOFTHOUSE at High Desert  
12 State Prison to discuss his appeal<sup>2</sup>, research all meritorious legal issues,  
13 and write the opening brief.  
14

15  
16 Ultimately given the late receipt of transcripts Appellate counsel  
17 could not provide LOFTHOUSE with constitutionally adequate appellate  
18 representation and still file an Opening Brief by May 2, 2017. Prior to  
19 May 2, 2017, the Clark County Public Defender submitted a final request  
20 for extension of time to file the Opening Brief with a requested due date of  
21 July 3, 2017. The good cause supporting the request was: (1) late receipt  
22 of transcripts; and (2) Appellate Counsel's wedding scheduled for May 26,  
23 2017, in Los Angeles, CA.  
24  
25  
26  
27  
28

---

<sup>2</sup> LOFTHOUSE's is only allowed visitation on Mondays. Appellate counsel eventually visited LOFTHOUSE at High Desert State Prison for 3 hours on Monday May 8, 2017.

1        On May 9, 2017, the Public Defender received Notice from the  
2 district court NDOC had requested a hearing in the district court on May  
3 18, 2017 for "clarification of sentence." NDOC sought clarification  
4 regarding the aggregation of LOFTHOUSE's sentence. In preparation for  
5 this hearing, Appellate Counsel researched the aggregation issue. While  
6 doing so, Counsel also noticed a potential problem with the district court's  
7 imposition of lifetime supervision. Appellate Counsel researched the  
8 lifetime supervision statute and believed LOFTHOUSE's alleged crimes  
9 did not subject him to lifetime supervision per NRS 176.0931.  
10

11        On May 15, 2017 this Court denied Appellate Counsel's request to  
12 extend the deadline to file the opening brief until July 3, 2017. Instead, the  
13 Court ordered Appellate Counsel to file the Opening Brief no later than  
14 May 30, 2017. Appellate Counsel filed a Motion to Reconsider noting his  
15 wedding on May 26, 2017 would prevent him from being able to file the  
16 opening brief by May 30, 2017. Additionally, Counsel asked this Court to  
17 suspend briefing to allow the district court to consider a Motion to Correct  
18 Illegal sentence which Counsel anticipated filing in open court at the May  
19 18, 2017 hearing regarding NDOC's request for sentence clarification.  
20

21        At the hearing on May 18, 2017 the district court indicated it would  
22 not alter LOFTHOUSE's aggregate sentence. Additionally, the court  
23 denied LOFTHOUSE's Motion to Correct Illegal sentence regarding  
24  
25  
26  
27  
28

1 lifetime supervision. However, the court indicated should this Court grant  
2 LOFTHOUSE's emergency Motion to suspend briefing, the district court  
3 would allow LOFTHOUSE to re-file his Motion to Correct Illegal  
4 Sentence.  
5

6  
7 Later that afternoon, this Court entered an Order granting  
8 LOFTHOUSE's emergency motion in part. The Court suspended briefing to  
9 allow the district court to entertain LOFTHOUSE's Motion to Correct  
10 Illegal Sentence. Additionally, this Court gave Counsel 30 days to comply  
11 with the procedure outlined in Foster v. Dingwall, 126 Nev. 49, 52-53, 228  
12 P.3d 453, 454-56 (2010). Pursuant to Foster, if the district court is inclined  
13 to grant LOFTHOUSE's Motion to Correct Illegal Sentence it must certify  
14 its intent to do so. Thereafter, LOFTHOUSE must file a Motion for Limited  
15 Remand in this Court with the district court's certification attached. This  
16 Court can then remand the case to the district court so the district court can  
17 modify the Judgement of Conviction.  
18  
19  
20  
21

22 After receiving this Court's May 18, 2017 Order, LOFTHOUSE re-  
23 filed his Motion to Correct Illegal Sentence in the district court with a June  
24 8, 2017, hearing date. In his Motion LOFTHOUSE only addressed his  
25 contention that the imposition of lifetime supervision was illegal.  
26 LOFTHOUSE did not address the supposed aggregation error. The State  
27 filed a Response to LOFTHOUSE's motion conceding the imposition of  
28

1 lifetime supervision was illegal. However, the State also asked the district  
2 court to correct the aggregate sentence and effectively re-sentence  
3 LOFTHOUSE to an additional 4 years in prison. LOFTHOUSE filed a  
4 Reply arguing his aggregate sentence was not properly before the court  
5 because the court clearly ruled on this issue at the May 18, 2017 hearing and  
6 LOFTHOUSE did not address his sentence aggregation in his Motion to  
7 Correct Illegal Sentence.

8  
9  
10  
11 At the June 8, 2017 hearing the district court indicated it was inclined  
12 to grant LOFTHOUSE's Motion to Correct Illegal Sentence to remove the  
13 imposition of lifetime supervision. The district court also indicated it  
14 wanted to address LOFTHOUSE's aggregate sentence. LOFTHOUSE  
15 objected arguing he did not raise that issue in his Motion. However, to the  
16 extent the district court wanted to re-consider the aggregate sentence,  
17 LOFTHOUSE argued pursuant to Miranda v. State, 114 Nev. 385, 387, 956  
18 P.2d 1377, 1378 (1998), the court cannot increase his maximum sentence to  
19 fix the aggregation error but instead must decrease his minimum sentence.  
20  
21 The court indicated it did not want to increase LOFTHOUSE's maximum  
22 sentence nor decrease LOFTHOUSE's minimum sentence but instead  
23 wanted to figure out how to legally impose a 72 to 180 month sentence. The  
24 court continued LOFTHOUSE's case until June 22, 2017 to further address  
25 the aggregation issue.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

26  
27  
28

111



1           **I. The District Court has Certified its Intent to Grant**  
2           **LOFTHOUSE's Motion because LOFTHOUSE's Sentence**  
3           **is Illegal.**

4           A judgment of conviction must set forth: (1) the plea; (2) the verdict  
5           or finding; and (3) the adjudication and sentence including "a reference to  
6           the statute under which the defendant is sentenced[.]" NRS 176.015(1)(a)-  
7           (c). An "illegal" sentence is "one 'at variance with the controlling  
8           sentencing statute,' or 'illegal' in the sense that the court goes beyond its  
9           authority by acting without jurisdiction or imposing a sentence in excess of  
10          the statutory maximum provided...." Edwards v. State, 112 Nev. 704, 708,  
11          918 P.2d 321, 324 (1996) (citing Allen v. United States, 495 A.2d 1145,  
12          1149 (D.C. 1985)).

13                   A.   **Sexual Conduct between Certain Employees or**  
14                   **Volunteers of School and Pupil (NRS 201.540).**

15           As noted above, at LOFTHOUSE's sentencing the district court  
16           imposed a condition of lifetime supervision pursuant to NRS 176.0931  
17           based upon LOFTHOUSE's convictions for Sexual Conduct Between  
18           Certain Employees or Volunteers of School and Pupil. LOFTHOUSE's  
19           retained attorney did not object to this at the time of sentencing. After the  
20           district court appointed the Clark County Public Defender to represent  
21           LOFTHOUSE on direct appeal, the Public Defender realized the court  
22           incorrectly imposed lifetime supervision.

1 The lifetime supervision statute, NRS 176.0931(1), currently states:  
2 “If a defendant is convicted of a sexual offense, the court shall include in  
3 sentencing, in addition to any other penalties provided by law, a special  
4 sentence of lifetime supervision.” Additionally, NRS 176.0931(5)(c)(1)  
5 states:  
6

7  
8 As used in this section:

9 “Sexual offense” means:

10  
11 A violation of NRS 200.366, subsection 4 of  
12 NRS 200.400, NRS 200.710, 200.720,  
13 subsection 2 of NRS 200.730, NRS 201.180,  
14 201.230, 201.450, 201.540<sup>3</sup> or 201.550 or  
15 paragraph (a) or (b) of subsection 4 or paragraph  
16 (a) or (b) of subsection 5 of NRS 201.560.

(emphasis added).

17 However, prior to 2015, NRS 176.0931(1),(5)(c)(1) stated:

18 If a defendant is convicted of a sexual offense,  
19 the court shall include in sentencing, in addition  
20 to any other penalties provided by law, a special  
21 sentence of lifetime supervision.

22 As used in this section:

23 Sexual offense means:

24  
25 A violation of NRS 200.366, subsection 4 of  
26 NRS 200.400, NRS 200.710, 200.720,  
27 subsection 2 of NRS 200.730, NRS 201.180,  
28 201.230 or 201.450 or paragraph (a) or (b) of

---

<sup>3</sup> NRS 201.540 is the statutory prohibition against sexual conduct between certain employees or volunteers of school and pupil.

1 subsection 4 or paragraph (a) or (b) of subsection  
2 5 of NRS 201.560[.]

3 NRS 176.0931 (2013)

4 Clearly, the 2013 version of NRS 176.0931(5)(c)(1) did not include  
5 NRS 201.540 within the list of “sexual offenses” subject to lifetime  
6 supervision. While the Legislature amended NRS 176.0931 in 2015 to add  
7 NRS 201.540 to the list of sexual offenses which subject a defendant to  
8 lifetime supervision upon conviction and sentencing, the 2015 amendment  
9 to NRS 176.0931 was only applicable to offenses which occurred “on or  
10 after October 1, 2015.” See 2015 Nevada Laws Ch. 287 (S.B. 192).

14 Here, LOFTHOUSE’s offenses involving Sexual Conduct between  
15 Certain Employees or Volunteers of School and Pupil occurred in May  
16 2015 and thus before October 1, 2015. Therefore, NRS 176.0931 does not  
17 apply to LOFTHOUSE’s convictions for Sexual Conduct between Certain  
18 Employees or Volunteers of School and Pupil. Accordingly,  
19 LOFTHOUSE’s sentence of lifetime supervision as it pertains to his  
20 conviction for Sexual Conduct between Certain Employees or Volunteers  
21 of School and Pupil is illegal as it is “at variance with the controlling  
22 sentencing statute” which is the pre-2015 version of NRS 176.0931.  
23  
24  
25  
26  
27  
28

1                   B. First Degree Kidnapping (NRS 200.310)  
2

3           Although LOFTHOUSE's convictions for Sexual Conduct between  
4 Certain Employees or Volunteers of School and Pupil do not subject him  
5 to lifetime supervision, at the hearing on May 18, 2017, the State  
6 suggested LOFTHOUSE's conviction for First Degree Kidnapping would  
7 subject him to lifetime supervision because the kidnapping was committed  
8 with the intent to commit a sex crime.  
9  
10

11  
12           According to NRS 176.0931(5)(c)(3):  
13

14                   5. As used in this section:  
15

16                   ...

17                   (c) "Sexual offense" means:  
18

19                   ...

20                   (3) An act of murder in the first or second degree, kidnapping  
21 in the first or second degree, false imprisonment, burglary or  
22 invasion of the home if the act is determined to be sexually  
23 motivated at a hearing conducted pursuant to NRS  
24 175.547.

25           Thus, a conviction for First Degree Kidnapping could *potentially* subject a  
26 defendant to lifetime supervision if the court conducts a hearing pursuant  
27 to NRS 175.547 and finds the kidnapping was sexually motivated.  
28

          NRS 175.547 states:

1 1. In any case in which a defendant pleads or is  
2 found guilty or guilty but mentally ill of murder  
3 in the first or second degree, kidnapping in the  
4 first or second degree, false imprisonment,  
5 burglary or invasion of the home, the court shall,  
6 at the request of the prosecuting attorney,  
7 conduct a separate hearing to determine whether  
8 the offense was sexually motivated. A request  
9 for such a hearing may not be submitted to the  
10 court unless the prosecuting attorney, before the  
11 commencement of the trial, files and serves  
12 upon the defendant a written notice of the  
13 prosecuting attorney's intention to request such a  
14 hearing.

15 2. A hearing requested pursuant to subsection 1  
16 must be conducted before:

17 (a) The court imposes its sentence; or

18 (b) A separate penalty hearing is conducted.

19 3. At the hearing, only evidence concerning the  
20 question of whether the offense was sexually  
21 motivated may be presented. The prosecuting  
22 attorney must prove beyond a reasonable doubt  
23 that the offense was sexually motivated.

24 4. The court shall enter its finding in the record.

25 5. For the purposes of this section, an offense is  
26 "sexually motivated" if one of the purposes for  
27 which the person committed the offense was the  
28 person's sexual gratification.

Thus, a court cannot impose lifetime supervision as a condition of a sentence  
for First Degree Kidnapping unless the State files written notice of its intent  
to request a hearing **BEFORE** trial and upon conviction the court conducts a  
hearing and finds the offense was sexually motivated. Here, the State did

1 not file a written request before trial for a hearing to determine whether  
2 LOFTHOUSE's alleged kidnapping was sexually motivated and therefore,  
3  
4 obviously, no hearing actually occurred. Accordingly, the imposition of  
5 lifetime supervision as it potentially pertained to LOFTHOUSE's conviction  
6  
7 for First Degree Kidnapping is illegal because this portion of the sentence is  
8 at variance with NRS 173.0931 and NRS 175.547 and additionally, the court  
9  
10 lacked jurisdiction in imposing lifetime supervision as a condition of  
11 LOFTHOUSE's sentence. See Edwards, 112 Nev. at 708, 918 P.2d at 324.

## 12 CONCLUSION

13  
14 Based upon the foregoing arguments, LOFTHOUSE respectfully  
15 requests this Court grant his Motion for a limited remand to the district court  
16  
17 so that the district court may correct LOFTHOUSE's illegal sentence.

18 DATED this 16th day of June, 2017.

19 PHILIP J. KOHN  
20 CLARK COUNTY PUBLIC DEFENDER

21 By /s/ William M. Waters  
22 WILLIAM M. WATERS, #9456  
23 Deputy Public Defender  
24 309 So. Third Street, Suite #226  
25 Las Vegas, Nevada 89155-2610  
26 (702) 455-4576  
27  
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

ADAM LAXALT  
STEVEN S. OWENS

WILLIAM M. WATERS  
HOWARD S. BROOKS

JASON RICHARD LOFTHOUSE  
NDOC No: 1159974  
c/o High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89070

15

1 ORDR  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 WILLIAM M. WATERS, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 9456  
6 PUBLIC DEFENDERS OFFICE  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-2799  
10 Facsimile: (702) 455-5112  
11 waterswm@clarkcountynv.gov  
12 *Attorneys for Defendant*

13 DISTRICT COURT  
14 CLARK COUNTY, NEVADA

15 THE STATE OF NEVADA, )  
16 )  
17 Plaintiff, )  
18 )  
19 v. )  
20 )  
21 JASON RICHARD LOFTHOUSE, )  
22 )  
23 Defendant, )  
24 )  
25 )  
26 )  
27 )  
28 )

CASE NO. C-15-307937-1  
DEPT. NO. XX

29 CERTIFICATION

30 THIS MATTER having come before the Court on Thursday, June 8, 2017, and based  
31 on argument, motions and pleading filed herein, and good cause appearing:

32 The Court certifies intent to grant Defendant's Motion to Correct Illegal Sentence  
33 upon limited remand from the Nevada Supreme court pursuant to Foster v. Dingwall, 126 Nev. 49,  
34 52-53, 228 P.3d 453, 454-56 (2010).

35 The Court finds State did not oppose Defendant's motion on the merits. The Court  
36 further finds that LOFTHOUSE is not subject to lifetime supervision pursuant to NRS 176.0931  
37 because his alleged offense dates for violating NRS 200.540 predate the effective date of NRS  
38 176.0931's 2015 amendments. The Court further finds LOFTHOUSE is not subject to lifetime  
39 supervision by virtue of his conviction for violating NRS 200.310, because the State did not proceed  
40 under NRS 175.547.

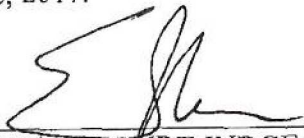
41 Based upon the aforementioned, this Court believes a limited remand is necessary for  
42 the Court to grant LOFTHOUSE's requested relief.

43 ///






DATED 15 day of June, 2017.

  
DISTRICT COURT JUDGE  
ERIC JOHNSON

Submitted by:

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By   
WILLIAM M. WATERS, #9456  
Chief Deputy Public Defender

1                                    CERTIFICATE OF ELECTRONIC FILING

2                    I hereby certify that service of the above and foregoing  
3 was made this 16<sup>th</sup> day of June, 2017, by Electronic Filing to:

4                                    District Attorneys Office  
5                                    E-Mail Address:

6                                    PDMotions@clarkcountyda.com

7                                    Jennifer.Garcia@clarkcountyda.com

8                                    Eileen.Davis@clarkcountyda.com

9  
10  
11                                    /s/ Carrie M. Connolly  
12                                    Secretary for the  
13                                    Public Defender's Office  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28