

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS WESLEY,

Appellant,

Vs.

THE STATE OF NEVADA,

Respondent

Case No.: 82690

Electronically Filed
Sep 24 2021 09:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX VOL. 6

(Appeal from Judgment of Conviction)

ATTORNEY FOR APPELLANT

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APPENDIX VOL. 6

2020-12-18 Response to Habeas Petition.....	001251-001253
2021-01-14 Minute Order.....	001254-001254
2021-05-11 Recorder's Transcript of Hearing Habeas Petition.....	001255-01257
2021-01-26 Reply in Support of Habeas Petition.....	001258-001265
2021-03-24 Notice of Appeal.....	001267-001268

DATED this 24th day of September, 2021.

/s/ BRET O. WHIPPLE, ESQ.
Bar No. 6168

1 a legal excuse.” Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting
2 Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

3 Moreover, claims asserted in a petition for post-conviction relief must be supported
4 with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove,
5 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked” allegations are not
6 sufficient, nor are those belied and repelled by the record. Id.

7 Here, Petitioner failed to make any claim that there is good cause to overcome the
8 procedural time bars, nor can he manufacture good cause. The factual and legal basis of his
9 claims were always reasonably available to him since the filing of the Amended Judgment of
10 Conviction. Additionally, Petitioner cannot demonstrate actual prejudice as there were no
11 errors based upon the following reasons:

12 First, Petitioner claims that there was insufficient evidence to support a finding that a
13 firearm was used in the commission of the crimes charged. Petition at 1-2. Specifically,
14 Petitioner claims that “the State failed to establish that the object portrayed as a gun that was
15 not produced at trial could fire a projectile by force of an explosion or combustion...” Petition
16 at 2. Second, Petitioner claimed that the District Court erred by instructing the jury that: “a
17 firearm is a deadly weapon and proof of its deadly capabilities is not required.” Petition at 3-
18 4. Petitioner’s claims are meritless.

19 According to NRS 193.165, a deadly weapon is:

20 (a) Any instrument which, if used in the ordinary manner contemplated by its
21 design and construction, will or is likely to cause substantial bodily harm or
22 death;

23 (b) Any weapon, device, instrument, material or substance which, under the
24 circumstances in which it is used, attempted to be used or threatened to be used,
25 is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255,
202.265, 202.290, 202.320 or 202.350.

26 Here, the statute is clear that the State needed to only show one (1) of the three (3)
27 lineated definitions of a deadly weapon. Regardless, Nevada case law is clear that a firearm is
28 a deadly weapon. According to Stalley v. State,

1 By the words 'firearm or other deadly weapon,' the legislature has declared that
2 a firearm is a deadly weapon within the contemplation of the statute. *Proof of its*
3 *deadly capabilities is not required.* To require such proof would frustrate the
4 legislative purpose to deter crime by providing a greater penalty when a firearm
5 is used in the commission of a public offense.

6 91 Nev. 671, 676, 541 P.2d 658, 661-62 (1975) (emphasis added). Moreover, "whether the
7 gun was actually loaded and capable of firing bullets in a deadly fashion is of no consequence
8 in determining whether it is a deadly weapon." Barnhart v. State, 122 Nev. 301, 304-05, 130
9 P.3d 650, 652 (2006). To the extent that Petitioner is claiming that there was no proof that a
10 firearm was used in this case, his claim also fails. The victims testified repeatedly that
11 Petitioner had a gun and even threatened to shoot them. See e.g., Transcript of Proceedings-
12 Jury Trial, April 9, 10, and 11 2008 at 650-51, 657-58, 668, 726. For these reasons, Petitioner
13 cannot establish prejudice as there was no error.

14 CONCLUSION

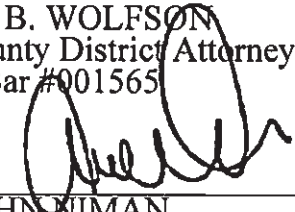
15 For the foregoing reasons, the State respectfully requests Defendant's Petition for Writ
16 of Habeas Corpus Challenging the Erroneous Jury Instruction Pursuant to NRS 193.165 and
17 NRS 34.360 be DENIED.

18 DATED this 18th day of December, 2020.

19 Respectfully submitted,

20 STEVEN B. WOLFSON
21 Clark County District Attorney
22 Nevada Bar #001565

23 BY

24 
25 JOHN NIMAN
26 Deputy District Attorney
27 Nevada Bar #014408

28 #10539 For

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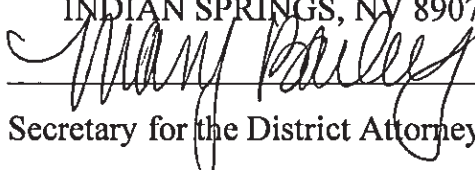
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CERTIFICATE OF MAILING

I hereby certify that service of STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS CHALLENGING THE ERRONEOUS JURY INSTRUCTION PURSUANT TO NRS 193.165 AND NRS 34.360, was made this 18th day of December, 2020, by mailing to:

NARCUS WESLEY
BAC #1022289
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070


Secretary for the District Attorney's Office

07FH0317X/NM/mlb/SVU

A-20-824615-W Narcus Wesley, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

January 14, 2021 01:30 PM Petition for Writ of Habeas Corpus

HEARD BY: Clark Newberry, Tara COURTROOM: RJC Courtroom 16C

COURT CLERK: Natali, Andrea

RECORDER: Page, Robin

REPORTER:

PARTIES PRESENT:

Hetty O. Wong Attorney for Defendant

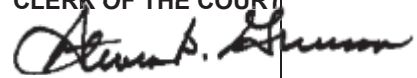
JOURNAL ENTRIES

Deft. not present, incarcerated in the Nevada Dept. of Corrections.

COURT ADVISED, no argument would be allowed and FINDS, the State's response was compelling, it agreed the Petitioner should have submitted all the arguments at the time the original writ was filed; therefore, ORDERED, petition for writ DENIED; DIRECTED, the State to prepare the order.

CLERK'S NOTE: The foregoing minutes were distributed via general mail to the following party:

Narcus Wesley #1022289
PO Box 650
Indian Springs, NV 89070
(1/21/21 amn).



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,
9 Plaintiff,

CASE NO: A-20-824615-W
DEPT. XXI

10 vs.

11 NARCUS WESLEY,
12 Defendant.

13
14 BEFORE THE HONORABLE TARA CLARK NEWBERRY,
15 DISTRICT COURT JUDGE
16 THURSDAY, JANUARY 14, 2021

17 **RECORDER'S TRANSCRIPT OF HEARING RE:**
18 **PETITION FOR WRIT OF HABEAS CORPUS**

19 APPEARANCES BY VIDEOCONFERENCE:

20 For the State: HETTY O. WONG, ESQ.

21
22 For the Defendant: Pro Per - Not Present

23
24
25 RECORDED BY: ROBIN PAGE, COURT RECORDER

1 **Las Vegas, Nevada; Thursday, January 14, 2021**

2 * * * * *

3 [Proceeding commenced at 2:39 p.m.]

4 THE CLERK: Page 7. A824615, and that's Marcus Wesley
5 versus State of Nevada. And the defendant's in NDC, I believe.

6 THE COURT: Is he appearing via telephone or is he
7 transported?

8 THE CLERK: I don't --

9 THE CORRECTIONS OFFICER: Your Honor, he's not here.

10 THE COURT: Okay. Thank you, sir.

11 THE CORRECTIONS OFFICER: Thank you.

12 THE COURT: Do we have counsel on this -- or he's pro per.

13 State, do you want to go ahead and state your appearance.

14 THE CLERK: He's in pro per and I don't see in the order to
15 transport and I don't see anything filed by the opposing party.

16 MS. WONG: Your Honor, normally on these cases, the Court
17 just makes a ruling on the pleadings without taking arguments from
18 either parties because usually the defendants are not transported from --

19 THE COURT: Right.

20 MS. WONG: -- the Nevada Department of Corrections. The
21 State did file a response. It was filed --

22 THE COURT: I did see the response. I read the response
23 dated --

24 MS. WONG: Okay.

25 THE COURT: -- 15 of 20.

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MS. WONG: Yes.

THE COURT: So I've reviewed the pleadings in this. We'll go on the record. Note that Ms. Wong is here on behalf of the State. Mr. Wesley is not present; he's in custody of NDOC and was not transported.

The Court has reviewed the pleadings in this case; it will not take argument from the State. And based on the pleadings, I find that the State's response is compelling. I agree that Mr. Wesley should have submitted all the arguments in this writ when his initial writ was filed. And so this petition will be denied by the Court.

Could I have the State prepare the order --

MS. WONG: Yes, Your Honor.

THE COURT: -- with regards to the arguments. The Court adopts all of the arguments of the State of Nevada.

THE CLERK: Okay, Your Honor, I will mail the -- I'll mail the minutes to the inmate.

THE COURT: Thank you.

THE CLERK: We usually do that for those cases.

THE COURT: Okay. Thank you so much.

[Proceeding concluded at 2:42 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Robin Page
Court Recorder/Transcriber

Heather S. Finner
CLERK OF THE COURT

1 NARCUS WESLEY # 1022289
2 P.O. Box 650
3 Indian Springs, Nev. 89070
4 Pro. Se.

5
6 DISTRICT COURT
7 CLARK COUNTY, NEVADA
8

9 NARCUS WESLEY
10 Petitioner,

CASE No: A-20-824615-W
DEPT No: XXIV
DATE OF HEARING: 1-14-2021
TIME OF HEARING: 9:00 AM,

11 vs-
12 THE STATE OF NEVADA
13 Respondents.

14 PETITIONER'S REPLY TO STATE'S RESPONSE TO DEFENDANT'S
15 PETITION FOR WRIT OF HABEAS CORPUS CHALLENGING THE
16 ERRONEOUS JURY INSTRUCTION PURSUANT TO NRS
17 193.165 AND NRS. 34.360
18

19 COMES NOW, Petitioner, Narcus Wesley in Pro. Se and hereby
20 submits the Attached Points and Authorities in Reply to the
21 States Response to Defendant's Petition For Writ Of Habeas
22 Corpus Challenging the Erroneous Jury Instruction Pursuant
23 to NRS. 193.165 and NRS. 34.360.

24 This reply is made and based upon all the papers and plead
25 ings on file herein, the attached Points and Authorities in support
26 of, and oral argumen at the time of hearing, if deemed necessary
27 by this Honorable Court.
28

AA 001258

RECEIVED
JAN 11 2021
CLERK OF THE COURT

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Petitioner adopts the Statement of the Case presented by the State in its Response.

ARGUMENT

I. PETITIONER'S PETITION IS NOT PROCEDURALLY BARRED PURSUANT TO THE APPLICABLE STATUTE PRESENTED

The writ of Habeas Corpus will seldom issue; but it will issue, and ought to issue, in every case for the discharge of persons accused of crimes, when it is clear or undisputed that the acts for which they are held are not such as are made criminal. *Ex Parte Smith*, 35 Nev. 80, 126 P. 655, 1912 Nev. LEXIS 6 (1912).; *Garnick v. Miller*, 81 Nev. 372, 403 P.2d. 850, 1965 Nev. LEXIS 245 (Nev. 1965).; *Orsborn v. Foglicini*, 82 Nev. 300, 417 P.2d. 148, 1966 Nev. LEXIS 235 (Nev. 1966).

Notwithstanding the fact that this section gives post-convictions jurisdiction to the convicting district, traditional habeas corpus brought in the district court wherein the petitioner is incarcerated is still an available remedy. *Chauncy v. Warden, Nev. State Prison*, 89 Nev. 24, 505 P.2d. 292, 1973 Nev. LEXIS 408 (Nev. 1973).

Petition for habeas corpus, and not for post-conviction relief are not subject to the time requirement for filing set forth in the section. *Dromick v. Warden, Nev. State Prison*, 96 Nev. 269, 607 P.2d 1145, 1980 Nev. LEXIS 516 (1980 Nev.).

A. THE INSTANT PETITION IS NOT UNTIMELY

AA 001259

1 The instant petition was filed based upon a ruling that
2 was decided by the Supreme Court of Nevada clearing stand-
3 ing whether the State produced sufficient evidence to support
4 charges that the defendant (Robert Guerrina) used or possessed
5 a "deadly weapon" during the underlying facts. Because there
6 was insufficient evidence that Guerrina's "weapon" satisfied
7 an applicable definition of deadly weapon, we vacate and
8 reverse his deadly weapon sentencing enhancements.
9 *Guerrina v. State*, 419 P.3d 705; 2018 Nev. LEXIS 46; 134 Nev. Adv.
10 Rep. 45.; *Berry v. State*, 125 Nev. at 271, 212 P3d. at 1089 (requiring
11 the State to prove the weapon "is a 'deadly weapon' as de-
12 fined in N.R.S. 193.165(4)").

13 Successive Petitions. A court need not consider successive
14 petition for habeas corpus which contains grounds for relief
15 which could have been raised in a prior petition. *Dromiack v.*
16 *Warden, Nev. State Prison*, 97 Nev. 348, 630 P2d 751, 1981 Nev.
17 LEXIS 528 (Nev. 1981).

18 The ruling decided in the Guerrina case was not readily
19 available when the Petitioner filed his initial petition in April
20 of 2011. This ruling was available in 2018, June 7th, some
21 eight (8) years later.

22 The State argues that the Petitioner's claims are meritless
23 based upon the definition of N.R.S 193.165.

24 According to NRS 193.165, a deadly weapon is (notice the
25 language used by legislation).

26 (a) Any instrument which "IF" used in the ordinary
27 manner contemplated by its design and construction, will or is
28 likely to cause substantial bodily harm or death, AA1001260

1 meaning that "if" the object used in the instant case (being an alleged
2 firearm) by its design or construction, will or is likely to cause substan-
3 tial bodily harm or death. The record does not provide that any of the
4 victims sustained any injuries or death by this alleged firearm that
5 the State failed to produce as proof of evidence at trial to substantiate
6 the deadly weapon enhancement.

7 (b). Any weapon, device, instrument, material, or substance which under
8 the circumstances in which it is used, attempted to be used or
9 threatened to be used, is READILY CAPABLE of causing substantial
10 bodily harm or death; or

11 Clarifying that the alleged firearm had to be "readily capable"
12 (the capacity or ability) of causing substantial bodily harm or death.
13 The State nor the victims never held or examined the alleged firearm
14 to factually state that this alleged firearm to be a deadly weapon.
15 No one was beaten or shot by this firearm.

16 (c). A dangerous or deadly weapon specifically described in NRS
17 202.255, 202.265, 202.290, 202.320, or 202.350.

18 The State failed at trial to prove that this alleged firearm meets
19 any of the needed criterias for the definitions of a deadly weapon
20 for this alleged firearm to be deemed a deadly weapon.

21 On page 7 lines 26 and 27, the State provides this statement as
22 follows: "Here, the statute is clear that the State needed to only show
23 one (1) of the three (3) linedated definitions of a deadly weapon."

24 However, the State failed to show in their argument one (1) of
25 the definitions that's on the record that meets any of the linedated
26 definitions of a deadly weapon, because it cannot be shown.

27 The State further argues that "By the words 'firearm or other
28 deadly weapon', the legislature has declared that a firearm is a deadly

1 within the contemplation of the statute. Proof of its deadly capabilities
2 is not required. To require such proof would frustrate the legislative
3 purpose to deter crime by providing a greater penalty when a firearm
4 is used in the commission of a public offense.

5 The Supreme Court of the State Of Nevada clarified in *Berry v.*
6 *State*, 125 Nev. at 271, 212 P.3d at 1089 (requiring the State to prove the
7 weapon "is a deadly weapon as defined in NRS 193.165(6)"). In order
8 to meet its burden of proof, the State had to establish that the
9 alleged firearm that co-defendant Wilson possessed during and used
10 in the commission of the crimes was indeed a "deadly weapon" under
11 NRS 193.165. According to the applicable statutes, the alleged firearm
12 would have been a deadly weapon if it was (1) designed to cause
13 substantial bodily harm or death, NRS 193.165(6)(a). No proof be-
14 cause no one was injured, beaten, shot, attempted to be shot where
15 the alleged firearm was discharged or attempted be discharged or
16 killed; (2) used in a manner which, under the circumstances, could
17 cause substantial bodily harm or death pursuant to NRS 193.165
18 (6)(b); (3) capable of expelling a metal projectile by use of spring,
19 gas, air, or other force pursuant to NRS 202.265(5)(b); or (4) designed
20 to expel a projectile by the force of an explosion pursuant to NRS
21 202.263(2).

22 In the *Berry* case the record reflected that *Berry* threatened
23 the victim (*Armstrong*) with the toy pellet gun, that someone would
24 shoot her otherwise. Just the mere threat to shoot someone does
25 not satisfy that standards of a deadly weapon lineated in NRS 193.165
26 (6). The State failed to establish that the alleged firearm could cause
27 substantial bodily harm or death as the applicable statute requires,
28 pursuant to NRS 193.165(6).

1 (D). THE COURT ERRED BY INSTRUCTING THE JURY THAT
2 PROOF OF THE FIREARM CAPABILITIES IS NOT REQUIRED
3 AS A MATTER OF LAW
4

5 In its jury instruction, the district court defined 'deadly
6 weapon' as follows:

7 "Deadly weapon" means any which, if used in the ordinary
8 manner contemplated by its design and construction, will or is
9 likely to cause substantial bodily harm or death; or any weapon,
10 device, instrument, material or substance which under the
11 circumstances in which it is used, attempted to be used, or
12 threatened to be used is readily capable of causing substantial
13 bodily harm or death".

14 "You are instructed that a firearm is a deadly weapon
15 and proof of its deadly capabilities is not required."

16 A firearm is a deadly weapon pursuant to NRS. 193.165(6);
17 202.265; 202.320; and 202.350, as a matter of law. However,
18 the district court erred by instructing the jury that "proof of
19 its deadly capabilities is not required" is an incorrect state-
20 ment of law.

21 This line or sentence of the instruction erroneously informs
22 the jury that they don't have to consider the language indicating
23 "will or likely cause substantial bodily harm or death or is
24 readily capable of causing substantial bodily harm or death,"
25 envisaging the law and contradicting in furtherance.

26 The actions of the district Court lessened the burden of
27 proof for the prosecution, that a deadly weapon was indeed used
28 in the commission of said crimes. This alleged firearm was

1 never recovered to be examined to be deemed as a deadly weapon,
2 nor does the record reflect that the alleged firearm was discharged,
3 attempted to be discharged, or used in a manner that caused injury
4 to any of the victims. The State provided no sufficient evidence
5 to substantiate deadly accounts for the deadly weapon pursuant
6 to any of the applicable statutes. The court's erroneous instruction
7 that "PROOF OF ITS DEADLY CAPABILITIES IS NOT REQUIRED" removed from
8 the jury's consideration the factual issue of whether the alleged
9 firearm constituted a deadly weapon.

10 Because the use of a deadly weapon is a required factual find-
11 ing for the deadly weapon enhancement to the crimes charged the
12 determination as to whether the alleged firearm was a deadly
13 weapon should have been submitted to the jury. For it was plain error
14 for this district court to instruct the jury that "Proof of its deadly
15 capabilities is not required as a matter of law, which clearly
16 contravenes the applicable laws correctly applied. This error clearly
17 affected Wesley's substantial right. (See Brown v. State, 2016 Nev
18 Unpub LEXIS 488 (Nev. Feb. 12, 2016)). The State offered no other
19 proof evidence to substantiate that a deadly weapon was used
20 other than the witnesses accounts that also could not defini-
21 tively attest that the object used (the alleged firearm) was in fact
22 a deadly weapon that could cause substantial bodily harm or
23 death. (See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

24 Furthermore, neither of the applicable statutes provide as a
25 matter of law that Proof of a deadly weapon's deadly capabilities
26 is not required. As a matter of law the language contravenes this
27 erroneous instruction handed to the jury for consideration.

CONCLUSION

Based on the Supreme Court Of The State Of Nevada rulings the Petitioner respectfully request that the Petition For Writ Of Habeas Corpus Challenging the Erroneous Jury Instruction pursuant to NRS.193.165 and NRS.34.360 be granted in the form that the deadly weapon enhancement sentences be vacated or at the least an evidentiary hearing be held to address the errors in search of a resolution.

DATED this 4th day of January, 2021.

Respectfully Submitted,

By  x
MARCOB WESLEY #1022289
P.O. Box 650
Indian Springs, Nev. 89070
In Pro. Se

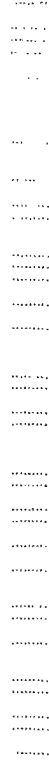
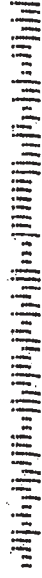
NARCUS WESLEY #1022289
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

LAS VEGAS NV 89101
5 JAN 2021 PM:4

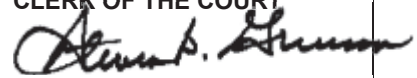
STEVEN D. GRIERSON,
CLERK OF THE COURT
200 LEWIS AVENUE, 3rd FLOOR
LAS VEGAS, NV 89155-1160

LEGAL MAIL

89101-830000



AA 001266



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Nevada Bar No.: 6168
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admin@justice-law-center.com
Attorney for Narcus Wesley

DISTRICT COURT
CLARK COUNTY NEVDA

NARCUS WESLEY,	)	Case No.: A-20-824615-W
	)	
Petitioner,	)	Department No.: XXI
	)	
v.	)	
	)	
STATE OF NEVADA,	)	NOTICE OF APPEAL
	)	
Respondent.	)	

TO: THE STATE OF NEVADA,
TO: THE CLARK COUNTY DISTRICT ATTORNEY, and to the EIGHTH
JUDICIAL DSITRICT COURT, COUNTY OF CLARK, STATE OF NEVADA.

NOTICE IS HEREBY GIVEN that NARCUS WESLEY, above named Petitioner, hereby
appeals to the SUPREME COURT OF NEVADA from this Court's Findings of Fact and
Conclusions of Law and Order, filed February 23, 2021 and served February 24, 2021, which
denied WESLEY relief on his Post-Conviction Petition for Writ of Habeas Corpus and
associated briefs in support of that Petition.

DATED on this 24th day of March, 2021.

JUSTICE LAW CENTER

/s/ Bret O. Whipple
BRET O. WHIPPLE, ESQ.
Nevada Bar #6168

DECLARAITON OF MAILING

I, an employee of JUSTICE LAW CENTER hereby declares that the above document was mailed, via deposit in the United States mail at Las Vegas Nevada, a copy of the above Notice of Appeal, with postage prepaid to:

CLARK COUNTY DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas Nevada 89155

AARON D. FORD
Nevada Attorney General
100 N Carson Street
Carson City, Nevada 89701

DATED on this 24th day of March, 2021.

JUSTICE LAW CENTER

/s/ Bret O. Whipple
BRET O. WHIPPLE, ESQ.
Nevada Bar #6168