IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 25 2021 11:26 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

JEFFREY BERNARD GERMAN,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-829136-W
Related Case C-14-300979-2
Docket No: 83300

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
JEFFREY GERMAN #92696,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-21-829136-W **Jeffrey German, Plaintiff(s)**
vs.
William Hutchings, Warden, Defendant(s)

I N D E X

Jeff German 92696
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

IN THE Eighth JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

A-21-829136-W
Dept. 24

Jeff German

Petitioner,

vs.

Williams Hutchings (warden),

Respondent(s).

Case No. C-14-300979-1

Dept. No. XXIII

Docket

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

Failure to raise all grounds I this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) If your petition challenges the validity of your conviction or sentence, the original and one copy must be filed with the clerk of the district court for the county in which the conviction occurred. Petitions raising any other claim must be filed with the clerk of the district court for the county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and who you are presently restrained of your liberty: Southern Desert Correctional Center (Clark county)

2. Name the location of court which entered the judgment of conviction under attack: 200 lewis Ave las Vegas, NV 89155; Eighth Judicial District Court of the State of Nevada Clark Co.

3. Date of judgment of conviction: May 11, 2015

4. Case number: C-14-300979-1.

5. (a) Length of sentence: 11 years to 35 years.

(b) If sentence is death, state any date upon which execution is scheduled: _____.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion:

Yes ____ No ✓ If "Yes", list crime, case number and sentence being served at this time: ____

_____.

7. Nature of offense involved in conviction being challenged: Deadly weapon enhancement Sentence

_____

_____.

8. What was your plea? (Check one)

(a) Not guilty ___

(b) Guilty ✓

(c) Nolo contendere ___

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details: ___

Verbal Guilty plea negotiated 5 years to 21 years and give the state the right to argue

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury N/A

(b) Judge without a jury N/A

11. Did you testify at trial? Yes ___ No ✓

12. Did you appeal from the judgment of conviction?

Yes ___ No ✓

13. If you did appeal, answer the following:

(a) Name of court:

(b) Case number or citation:

(c) Result:

(d) Date of appeal:

(Attach copy of order or decision, if available).

14.) If you did not appeal, explain briefly why you did not: _____

_____

_____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No ___

16. If your answer to No 15 was "Yes", give the following information:

(a) (1) Name of court: Eighth Judicial District Court

(2) Nature of proceedings: Writ of Habeaus Corpus (post-conviction)

(3) Grounds raised: Cruel and Unusual Punishment

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ✓ No ___

(5) Result: Denied

(6) Date of result: Jan 10 2018

(7) If known, citations of any written opinion or date of orders entered pursuant to each result: ___

(b) As to any second petition, application or motion, give the same information:

(1) Name of Court: Eighth Judicial District Court

(2) Nature of proceeding: Writ of Habeaus Corpus (post-conviction)

(3) Grounds raised: Cruel and Unusual Punishment

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ✓ No ___

(5) Result: Denied

(6) Date of result: June 27 2018

(7) If known, citations or any written opinion or date of orders entered pursuant to each result: ___

(c) As to any third or subsequent additional application or motions, give the same information as above, list them on a separate sheet and attach.

4

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes ____ No ✓

Citation or date of decision: _____.

(2) Second petition, application or motion?

Yes ____ No ✓

Citation or date of decision: _____.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You may relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion or application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: N/A _____

_____

(b) The proceedings in which these grounds were raised: _____

_____.

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). ____

_____

_____

5

18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). _____

_____.

19. Are you filing this petition more than one (1) year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length). A Ruling by the U.S. Supreme Court on June 24th 2019 Highly affects my case, Newly Discovered evidence also pursuant to NRS. 34.726

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ____ No ✓

If "Yes", state what court and the case number: _____

_____.

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Caesar Almase Esq.

_____

_____.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack?

Yes ✓ No ____ If "Yes", specify where and when it is to be served, if you know: ____

N/A Parole Eligibility date 06-30-2024.

6

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: moves this honorable Court to vacate the deadly weapon enhancement sentence given to the petitioner which the United States Supreme Court held section 924(c)(3)(B) unconstitutional (U.S. v. Davis case no 18-431), which violates Petitioners Constitutional Rights to be free from ex post facto law under Article 1 sec 10 US Const

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Petitioner was sentenced to two (2) counts Robbery with the use of a deadly weapon and Conspiracy to commit Robbery Petitioner has to do 5 to 15 years for the robbery and an additional 5 to 15 years as an additional sentence on the robbery with the use of a deadly weapon and 13 months to 60 months for the Conspiracy to commit robbery for a total of 11 years to 35 years in the Nevada Department of Corrections. April 17, 2019 it was ~~negotiated~~ argued to U.S Supreme court vs. Davis and decided on June 24th 2019 that under 18 U.S.C section 924(c) that anyone who was charged with a heightened criminal penalty for using, carrying, or possessing a firearm in connection with any "crime of violence or drug trafficking crime" be deemed unconstitutionally vague In our constitutional order a vague law is no law at all. Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of power See Dimaya, 584 U.S. Vague laws contravene the "first essential of due process of law" that Statutes must give people of common intelligence" fair notice of what the demands of them Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see Collins v. Kentucky 234 U.S. 634, 638 (1914) Vague laws also undermine the Constitutions Seperation of powers and the democratic self governance it aims to protect. Petitioner is entitled to the issuance of this writ of Habeas Corpus to compel the respondents to perform an act which the law especially enjoins as a duty Any other remedy is insufficient or unable to address this issue The respondents expost facto application of (U.S. v Davis case no 18-431) and failure to vacate this sentence as outlined in (U.S. v Davis case no 18-431) violates the petitioners

Continuation.

Constitutional Rights to be free from ex post facto law under Article 1 Sec 10 US Const. and his 14th Amendment rights to due process As such in order to protect the petitioners from further deprivation, the deadly weapon enhancements should be vacated

23. (b) GROUND TWO: Petitioners 14th Amendment rights are being violated (Article IV Sec 2 privilege and immunities) (Article XIV sec 1 Equal protection of the laws) violation of 9th Amendment VI violation of (Article VI of the U.S. Constitution)

23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law): According to Blacks law Dictionary it defines (privileges A special legal right exemption OR immunity granted to a person or class of person) an exception to a duty. According to (U.S Constitution Article IV sec 2 Cl 1 states that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (14th Amendment sec 1 states that "no state shall make or enforce any laws which shall abbridge the privileges or immunities of citizens of the United states; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") (The 9th Amendment states that "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people") the ruling in (U.S. vs Davis case no 13-431) for it not to apply to me are violations of my constitutional rights. The Supremacy clause says the clause in Article VI of the U.S. constitution declaring that "all laws made in furtherance of the Constitution and all treaties made under the authority of the United States are the "supreme law of the land" and enjoy legal Superiority over any conflicting provision of a state Constitution or law" (see Carter vs. Carter Coal Co. (1936) 298 U.S. 238, 80 led 1160, 56 Sct 855 motion or sub nom Helvering v. Carter (1936 U.S.) 17 AFTR 1, 344). Supremacy of Constitution as law is declared without qualification and is absolute) also see (Federal Constitution is "Supreme law of land." And upon State court Equally with court of union rest obligation to guard and enforce every right secured by constitution Dixon vs State (1946) 224 Ind 327, 67 NE 2d 133) see (Federal law are as much laws of land in any state as state laws are Claflin v. Houseman (1876) 93 U.S. 130, 23 L Ed 833)

23. (c) GROUND THREE: Petitioners 5th Amendments rights have been Violated and Petitioners Rights to have enhancements vacated under 11 U.S.C Sec 2244(b)(2) Rule 28, Cause of ruling in (U.S. vs Davis no 18-431)

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law): (the 5th Amendment States "no person be subjected for the same offense to be twice put in Jeopardy of life or limb without due process of law" Petitioner was charged and sentenced to Robbery with the use of a deadly weapon and was additionally sentenced to additional time for a deadly weapon Petitioner committed a violent crime felony in a non-violent way, see Taylor v United States 495 U.S. 575 (1990) and Nijhawan vs Holder 557 U.S. 29 (2009) under Rule 28 of FRAP 11 U.S.C. Sec 2244(b)(2) States that (A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the supreme court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. This ruling (U.S. vs. Davis no 18-431) has not been applied to MR Germany's violation of the petitioners rights must cease immediately Petitioner is being deprived of receiving a vacated ruling on the Deadly Weapon enhancement which will substantially lessen the time spent on the prison sentence, This deprivation is preventing the petitioner from the opportunity for a early parole possibility, and programs that would further lessen time spent; Petitioner has a subjected unlawfully to the ex post facto application of (U.S. vs Davis no 18-431) by the court; and due to the Constitutional deprivations, Petitioner is entitled to fair and just Compensation Petitioner orders that the appropriate compensation is to be paid for the Constitutional deprivation, suffered in accordance with NRS. 34.270

WHEREFORE, Jeff Coreman prays that the court grant Writ of Habeas Corpus relief to which he may be entitled in this proceeding.

EXECUTED at Southern Desert Correctional Center

on the ___ day of December, 2020.

Jeff Coreman
Signature of Petitioner

VERIFICATION

Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is the Petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true and correct of his own personal knowledge, except as to those matters based on information and belief, and to those matters, he believes them to be true.

Jeff Coreman
Signature of Petitioner

Atttorney for Petitioner

11

CERTFICATE OF SERVICE BY MAILING

I, Jeff Goreman, hereby certify, pursuant to NRCP 5(b), that on this ___ day of December, 2020, I mailed a true and correct copy of the foregoing, "writ of Habeaus Corpus."

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Nevada office of the Attorney General
555 Washington Ave # 3900
Las Vegas, Nevada 89101

Steven D. Grierson
Clerk of the Court
200 Lewis Avenue 3rd Floor
Las Vegas, Nevada 89155-1160

CC:FILE

DATED: this ___ day of December, 2020.

Jeff Goreman 92696
[redacted] #

/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

12

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Writ of Habeas Corpus (Post-Conviction)
(Title of Document)

filed in District Court Case number C-14-300979-1

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

[redacted] Jeff German 12-24-20
Signature Date

Jeff German
[redacted]
Print Name

ME
Title

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DAVIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18–431. Argued April 17, 2019—Decided June 24, 2019

Respondents Maurice Davis and Andre Glover were charged with multiple counts of Hobbs Act robbery and one count of conspiracy to commit Hobbs Act robbery. They were also charged under 18 U. S. C. §924(c), which authorizes heightened criminal penalties for using, carrying, or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." §924(c)(1)(A). "Crime of violence" is defined in two subparts: the elements clause, §924(c)(3)(A), and the residual clause, §924(c)(3)(B). The residual clause in turn defines a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Ibid.* A jury convicted the men on most of the underlying charges and on two separate §924(c) charges for brandishing a firearm in connection with their crimes. The Fifth Circuit initially rejected their argument that §924(c)'s residual clause is unconstitutionally vague, but on remand in light of *Sessions* v. *Dimaya*, 584 U. S. ___, the court reversed course and held §924(c)(3)(B) unconstitutional. It then held that Mr. Davis's and Mr. Glover's convictions on the §924(c) count charging robbery as the predicate crime of violence could be sustained under the elements clause, but that the other count—which charged conspiracy as a predicate crime of violence—could not be upheld because it depended on the residual clause.

Held: Section 924(c)(3)(B) is unconstitutionally vague. Pp. 4–25.

(a) In our constitutional order, a vague law is no law at all. The vagueness doctrine rests on the twin constitutional pillars of due process and separation of powers. This Court has recently applied the doctrine in two cases involving statutes that bear more than a pass-

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Syllabus

ing resemblance to §924(c)(3)(B)'s residual clause—*Johnson* v. *United States*, 576 U. S. ___, which addressed the residual clause of the Armed Career Criminal Act (ACCA), and *Sessions* v. *Dimaya*, which addressed the residual clause of 18 U. S. C. §16. The residual clause in each case required judges to use a "categorical approach" to determine whether an offense qualified as a violent felony or crime of violence. Judges had to disregard how the defendant actually committed the offense and instead imagine the degree of risk that would attend the idealized "'ordinary case'" of the offense. *Johnson*, 576 U. S., at ___. The Court held in each case that the imposition of criminal punishments cannot be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." The government and lower courts have long understood §924(c)(3)(B) to require the same categorical approach. Now, the government asks this Court to abandon the traditional categorical approach and hold that the statute commands a case-specific approach that would look at the defendant's actual conduct in the predicate crime. The government's case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya* and would not yield to the same practical and Sixth Amendment complications that a case-specific approach under the ACCA and §16 would, but this approach finds no support in §924(c)'s text, context, and history. Pp. 4–9.

(b) This Court has already read the nearly identical language of §16(b) to mandate a categorical approach. See *Leocal* v. *Ashcroft*, 543 U. S. 1, 7. And what is true of §16(b) seems at least as true of §924(c)(3)(B). The government claims that the singular term "offense" carries the "generic" meaning in connection with the elements clause but a "specific act" meaning in connection with the residual clause, but nothing in §924(c)(3)(B) rebuts the presumption that the single term "offense" bears a consistent meaning. This reading is reinforced by the language of the residual clause itself, which speaks of an offense that, "by its nature," involves a certain type of risk. Pp. 9–12.

(c) The categorical reading is also reinforced by §924(c)(3)(B)'s role in the broader context of the federal criminal code. Dozens of federal statutes use the phrase "crime of violence" to refer to presently charged conduct. Some cross-reference §924(c)(3)'s definition, while others are governed by the virtually identical definition in §16. The choice appears completely random. To hold that §16(b) requires the categorical approach while §924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code. Pp. 12–13.

(d) Section 924(c)(3)(B)'s history provides still further evidence that it carries the same categorical-approach command as §16(b). When

Jeffery German
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Syllabus

Congress enacted the definition of "crime of violence" in §16 in 1984, it also employed the term in numerous places in the Act, including §924(c). The two statutes, thus, were originally designed to be read together. And when Congress added a definition of "crime of violence" to §924(c) in 1986, it copied the definition from §16 without making any material changes to the language of the residual clause, which would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings. Moreover, §924(c) originally prohibited the use of a firearm in connection with *any* federal felony, before Congress narrowed §924(c) in 1984 by limiting its predicate offenses to "crimes of violence." The case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. Pp. 14–17.

(e) Relying on the canon of constitutional avoidance, the government insists that if the case-specific approach does not represent the best reading of the statute, it is nevertheless the Court's duty to adopt any "fairly possible" reading to save the statute from being unconstitutional. But it is doubtful the canon could play a proper role in this case even if the government's reading were "possible." This Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly, but it has not invoked the canon to *expand* the reach of a criminal statute in order to save it. To do so would risk offending the very same due process and separation of powers principles on which the vagueness doctrine itself rests and would sit uneasily with the rule of lenity's teaching that ambiguities about a criminal statute's breadth should be resolved in the defendant's favor. Pp. 17–19.

903 F. 3d 483, affirmed in part, vacated in part, and remanded.

GORSUCH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KAVANAUGH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, and in which ROBERTS, C. J., joined as to all but Part II–C.

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SUPREME COURT OF THE UNITED STATES

No. 18–431

UNITED STATES, PETITIONER *v.* MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER

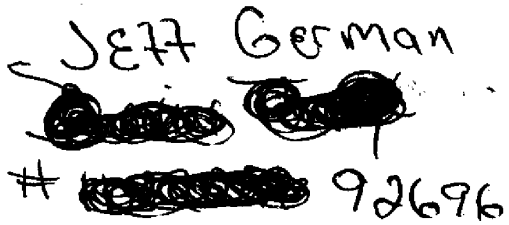
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2019]

JUSTICE GORSUCH delivered the opinion of the Court.

In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.

Today we apply these principles to 18 U. S. C. §924(c). That statute threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes. But *which* other federal crimes? The statute's residual clause points to those felonies "that by [their] nature, involv[e] a substantial risk that physical force



against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B). Even the government admits that this language, read in the way nearly everyone (including the government) has long understood it, provides no reliable way to determine which offenses qualify as crimes of violence and thus is unconstitutionally vague. So today the government attempts a new and alternative reading designed to save the residual clause. But this reading, it turns out, cannot be squared with the statute's text, context, and history. Were we to adopt it, we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted.

I

After Maurice Davis and Andre Glover committed a string of gas station robberies in Texas, a federal prosecutor charged both men with multiple counts of robbery affecting interstate commerce in violation of the Hobbs Act, 18 U. S. C. §1951(a), and one count of conspiracy to commit Hobbs Act robbery. The prosecutor also charged Mr. Davis with being a felon in possession of a firearm. In the end, a jury acquitted Mr. Davis of one robbery charge and otherwise found the men guilty on all counts. And these convictions, none of which are challenged here, authorized the court to impose prison sentences of up to 70 years for Mr. Davis and up to 100 years for Mr. Glover.

But that was not all. This appeal concerns *additional* charges the government pursued against the men under §924(c). That statute authorizes heightened criminal penalties for using or carrying a firearm "during and in relation to," or possessing a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." §924(c)(1)(A). The statute proceeds to define the term "crime of violence" in two subparts—the first known as the elements clause, and the second the residual clause.

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According to §924(c)(3), a crime of violence is "an offense that is a felony" and

> "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Violators of §924(c) face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime of violence or drug trafficking crime. The minimum sentence rises to 7 years if the defendant brandishes the firearm and 10 years if he discharges it. Certain types of weapons also trigger enhanced penalties—for example, a defendant who uses a short-barreled shotgun faces a minimum sentence of 10 years. And repeat violations of §924(c) carry a minimum sentence of 25 years.[1]

At trial, the government argued that Mr. Davis and Mr. Glover had each committed two separate §924(c) violations by brandishing a short-barreled shotgun in connection with their crimes. Here, too, the jury agreed. These convictions yielded a mandatory minimum sentence for each man of 35 years, which had to run consecutively to their other sentences. Adding the §924(c) mandatory minimums to its discretionary sentences for their other crimes, the district court ultimately sentenced Mr. Glover to more

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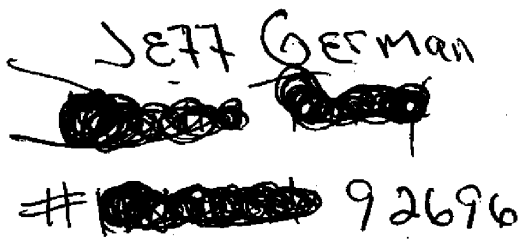
[1] When this case was tried, a defendant convicted of two §924(c) violations in a single prosecution faced a 25-year minimum for the second violation. See *Deal* v. *United States*, 508 U. S. 129, 132 (1993); §1(a)(1), 112 Stat. 3469. In 2018, Congress changed the law so that, going forward, only a second §924(c) violation committed "after a prior [§924(c)] conviction ... has become final" will trigger the 25-year minimum. Pub. L. 115–391, §403(a), 132 Stat. 5221.



than 41 years in prison and Mr. Davis to more than 50 years.

On appeal, both defendants argued that §924(c)'s residual clause is unconstitutionally vague. At first, the Fifth Circuit rejected the argument. *United States* v. *Davis*, 677 Fed. Appx. 933, 936 (2017) (*per curiam*). But after we vacated its judgment and remanded for further consideration in light of our decision in *Sessions* v. *Dimaya*, 584 U. S. ___ (2018), striking down a different, almost identically worded statute, the court reversed course and held §924(c)(3)(B) unconstitutional. 903 F. 3d 483, 486 (2018) (*per curiam*). It then held that Mr. Davis's and Mr. Glover's convictions on one of the two §924(c) counts, the one that charged *robbery* as a predicate crime of violence, could be sustained under the elements clause. But it held that the other count, which charged *conspiracy* as a predicate crime of violence, depended on the residual clause; and so it vacated the men's convictions and sentences on that count.

Because the Fifth Circuit's ruling deepened a dispute among the lower courts about the constitutionality of §924(c)'s residual clause, we granted certiorari to resolve the question. 586 U. S. ___ (2018).[2]

II

Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See *Dimaya*, 584 U. S., at ___–___ (plurality opinion) (slip op., at 4–5); *id.*, at ___–___

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[2] Compare *United States* v. *Simms*, 914 F. 3d 229, 236–246 (CA4 2019) (en banc), *United States* v. *Salas*, 889 F. 3d 681, 685–686 (CA10 2018), and *United States* v. *Eshetu*, 898 F. 3d 36, 37–38 (CADC 2018) (holding that §924(c)(3)(B) is vague), with *United States* v. *Douglas*, 907 F. 3d 1, 11–16 (CA1 2018), *Ovalles* v. *United States*, 905 F. 3d 1231, 1240–1252 (CA11 2018) (en banc), and *United States* v. *Barrett*, 903 F. 3d 166, 178–184 (CA2 2018) (taking the opposite view).

JE77 German

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(GORSUCH, J., concurring in part and concurring in judgment) (slip op., at 2–9). Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); see *Collins* v. *Kentucky*, 234 U. S. 634, 638 (1914). Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to "make an act a crime." *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide. See *Kolender* v. *Lawson*, 461 U. S. 352, 357–358, and n. 7 (1983); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89–91 (1921); *United States* v. *Reese*, 92 U. S. 214, 221 (1876).

In recent years, this Court has applied these principles to two statutes that bear more than a passing resemblance to §924(c)(3)(B)'s residual clause. In *Johnson* v. *United States*, 576 U. S. ___ (2015), the Court addressed the residual clause of the Armed Career Criminal Act (ACCA), which defined a "violent felony" to include offenses that presented a "serious potential risk of physical injury to another." §924(e)(2)(B)(ii). The ACCA's residual clause required judges to use a form of what we've called the "categorical approach" to determine whether an offense qualified as a violent felony. Following the categorical approach, judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized "'ordinary case'" of the defendant's crime and then guess whether a "'serious potential risk of physical injury to another'" would attend its commission. *Id.*, at ___ (slip op., at 4). *Johnson* held this

Jeff German
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judicial inquiry produced "more unpredictability and arbitrariness" when it comes to specifying unlawful conduct than the Constitution allows. *Id.*, at ___–___ (slip op., at 5–6).

Next, in *Sessions* v. *Dimaya*, we considered the residual clause of 18 U. S. C. §16, which defines a "crime of violence" for purposes of many federal statutes. Like §924(c)(3), §16 contains an elements clause and a residual clause. The only difference is that §16's elements clause, unlike §924(c)(3)'s elements clause, isn't limited to felonies; but there's no material difference in the language or scope of the statutes' residual clauses.[3] As with the ACCA, our precedent under §16's residual clause required courts to use the categorical approach to determine whether an offense qualified as a crime of violence. *Dimaya*, 584 U. S., at ___–___ (slip op., at 2–3); see *Leocal* v. *Ashcroft*, 543 U. S. 1, 7, 10 (2004). And, again as with the ACCA, we held that §16's residual clause was unconstitutionally vague because it required courts "to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk." *Dimaya*, 584 U. S., at ___ (slip op., at 11) (internal quotation marks omitted).

What do *Johnson* and *Dimaya* have to say about the statute before us? Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined "ordinary case." But does §924(c)(3)(B) require that sort of inquiry? The government and lower courts

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[3]Section 16 provides that the term "crime of violence" means "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Jeff German
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have long thought so. For years, almost everyone understood §924(c)(3)(B) to require exactly the same categorical approach that this Court found problematic in the residual clauses of the ACCA and §16.[4] Today, the government acknowledges that, if this understanding is correct, then §924(c)(3)(B) must be held unconstitutional too.

But the government thinks it has now found a way around the problem. In the aftermath of our decisions holding the residual clauses of the ACCA and §16(b) unconstitutionally vague, the government "abandon[ed] its longstanding position" that §924(c)(3)(B) requires a categorical analysis and began urging lower courts to "adopt a new 'case specific' method" that would look to "the 'defendant's actual conduct' in the predicate offense." 903 F. 3d, at 485. Now, the government tries the same strategy in this Court, asking us to abandon the traditional categorical approach and hold that the statute actually commands the government's new case-specific approach. So, while the consequences in this case may be of constitutional dimension, the real question before us turns out to be one of pure statutory interpretation.

In approaching the parties' dispute over the statute's meaning, we begin by acknowledging that the government

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[4]See, *e.g.*, *United States* v. *Acosta*, 470 F. 3d 132, 134–135 (CA2 2006); *United States* v. *Butler*, 496 Fed. Appx. 158, 161 (CA3 2012); *United States* v. *Fuertes*, 805 F. 3d 485, 498 (CA4 2015); *United States* v. *Williams*, 343 F. 3d 423, 431 (CA5 2003); *Evans* v. *Zych*, 644 F. 3d 447, 453 (CA6 2011); *United States* v. *Jackson*, 865 F. 3d 946, 952 (CA7 2017), vacated and remanded, 584 U. S. ___ (2018); *United States* v. *Moore*, 38 F. 3d 977, 979–980 (CA8 1994); *United States* v. *Amparo*, 68 F. 3d 1222, 1225–1226 (CA9 1995); *United States* v. *Munro*, 394 F. 3d 865, 870 (CA10 2005); *United States* v. *McGuire*, 706 F. 3d 1333, 1336–1337 (CA11 2013); *United States* v. *Kennedy*, 133 F. 3d 53, 56 (CADC 1998); see also *Ovalles* v. *United States*, 905 F. 3d 1231, 1295 (CA11 2018) (en banc) (J. Pryor, J., dissenting) ("For years, and even after *Johnson*, the government consistently has urged that we apply a categorical approach to §924(c)").

J. E77 German
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[redacted] 92696

is right about at least two things. First, a case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*. In those cases, we recognized that there would be no vagueness problem with asking a jury to decide whether a defendant's "'real-world conduct'" created a substantial risk of physical violence. *Dimaya*, 584 U. S., at ___–___ (slip op., at 10–11); see *Johnson*, 576 U. S., at ___, ___ (slip op., at 6, 12). Second, a case-specific approach wouldn't yield the same practical and Sixth Amendment complications under §924(c) that it would have under the ACCA or §16. Those other statutes, in at least some of their applications, required a *judge* to determine whether a defendant's *prior conviction* was for a "crime of violence" or "violent felony." In that context, a case-specific approach would have entailed "reconstruct[ing], long after the original conviction, the conduct underlying that conviction." *Id.*, at ___ (slip op., at 13). And having a judge, not a jury, make findings about that underlying conduct would have "raise[d] serious Sixth Amendment concerns." *Descamps* v. *United States*, 570 U. S. 254, 269–270 (2013). By contrast, a §924(c) prosecution focuses on the conduct with which the defendant is *currently charged*. The government already has to prove to a jury that the defendant committed all the acts necessary to punish him for the underlying crime of violence or drug trafficking crime. So it wouldn't be that difficult to ask the jury to make an additional finding about whether the defendant's conduct also created a substantial risk that force would be used.

But all this just tells us that it might have been a good idea for Congress to have written a residual clause for §924(c) using a case-specific approach. It doesn't tell us whether Congress actually wrote such a clause. To answer *that* question, we need to examine the statute's text, context, and history. And when we do that, it becomes clear that the statute simply cannot support the govern-

Jeff German
[redacted]
[redacted] 92696

ment's newly minted case-specific theory.

III

A

Right out of the gate, the government faces a challenge. This Court, in a unanimous opinion, has already read the nearly identical language of 18 U. S. C. §16(b) to mandate a categorical approach. And, importantly, the Court did so without so much as mentioning the practical and constitutional concerns described above. Instead, the Court got there based entirely on the text. In *Leocal*, the Court wrote:

> "In determining whether petitioner's conviction falls within the ambit of §16, the statute directs our focus to the 'offense' of conviction. See §16(a) (defining a crime of violence as '*an offense* that has *as an element* the use . . . of physical force against the person or property of another' (emphasis added)); §16(b) (defining the term as '*any other offense* that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense' (emphasis added)). This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." 543 U. S., at 7.

Leocal went on to suggest that burglary would always be a crime of violence under §16(b) "because burglary, *by its nature*, involves a substantial risk that the burglar will use force against a victim in completing the crime," regardless of how any *particular* burglar might act on a specific occasion. *Id.*, at 10 (emphasis added); see also *Dimaya*, 584 U. S., at ___ (slip op., at 14) (plurality opinion) (reaffirming that "§16(b)'s text . . . demands a categorical approach"). And what was true of §16(b) seems to us

J877 German

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at least as true of §924(c)(3)(B): It's not even close; the statutory text commands the categorical approach.

Consider the word "offense." It's true that "in ordinary speech," this word can carry at least two possible meanings. It can refer to "a generic crime, say, the crime of fraud or theft in general," or it can refer to "the specific acts in which an offender engaged on a specific occasion." *Nijhawan* v. *Holder*, 557 U. S. 29, 33–34 (2009). But the word "offense" appears just once in §924(c)(3), in the statute's prefatory language. And everyone agrees that, in connection with the elements clause, the term "offense" carries the first, "generic" meaning. Cf. *id.*, at 36 (similar language of the ACCA's elements clause "refers directly to generic crimes"). So reading this statute most naturally, we would expect "offense" to retain that same meaning in connection with the residual clause. After all, "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 587 U. S. ___, ___ (2019) (slip op., at 5).

To prevail, the government admits it must persuade us that the singular term "offense" bears a split personality in §924(c), carrying the "generic" meaning in connection with the elements clause but then taking on the "specific act" meaning in connection with the residual clause. And, the government suggests, this isn't quite as implausible as it may sound; sometimes the term "offense" *can* carry both meanings simultaneously. To illustrate its point, the government posits a statute defining a "youthful gun crime" as "an offense that has as an element the use of a gun and is committed by someone under the age of 21." Tr. of Oral Arg. 16. This statute, the government suggests, would leave us little choice but to understand the single word "offense" as encompassing both the generic crime and the manner of its commission on a specific occasion. To which we say: Fair enough. It's *possible* for

surrounding text to make clear that "offense" carries a double meaning. But absent evidence to the contrary, we presume the term is being used consistently. And nothing in §924(c)(3)(B) comes close to rebutting that presumption.

Just the opposite. The language of the residual clause itself reinforces the conclusion that the term "offense" carries the same "generic" meaning throughout the statute. Section 924(c)(3)(B), just like §16(b), speaks of an offense that, "by its nature," involves a certain type of risk. And that would be an exceedingly strange way of referring to the circumstances of a specific offender's conduct. As both sides agree, the "nature" of a thing typically denotes its "'normal and characteristic quality,'" *Dimaya*, 584 U. S., at ___ (slip op., at 14) (quoting Webster's Third New International Dictionary 1507 (2002)), or its "'basic or inherent features,'" *United States* v. *Barrett*, 903 F. 3d 166, 182 (CA2 2018) (quoting Oxford Dictionary of English 1183 (A. Stevenson ed., 3d ed. 2010)). So in plain English, when we speak of the nature of an offense, we're talking about "what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 584 U. S., at ___ (slip op., at 14); see *Leocal*, 543 U. S., at 7 (contrasting the "nature of the offense" with "the particular facts [of] petitioner's crime").[5]

Once again, the government asks us to overlook this obvious reading of the text in favor of a strained one. It suggests that the statute might be referring to the "na-

[5]The government's own regulations reflect this understanding of the ordinary meaning of "by its nature." A Department of Justice regulation provides that an inmate is not eligible for early release if he was convicted of an offense "that, by its nature *or conduct*, presents a serious potential risk of physical force." 28 CFR §550.55(b)(5)(iii) (2017) (emphasis added); see *Bush* v. *Pitzer*, 133 F. 3d 455, 458 (CA7 1997) (denying early release because "[c]onspiracy does not by its 'nature' present a serious risk; but Bush's 'conduct' did so").

Jeff German
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ture" of the defendant's conduct on a particular occasion. But while this reading may be linguistically feasible, we struggle to see why, if it had intended this meaning, Congress would have used the phrase "by its nature" at all. The government suggests that "by its nature" keeps the focus on the offender's *conduct* and excludes evidence about his *personality*, such as whether he has violent tendencies. But even without the words "by its nature," nothing in the statute remotely suggests that courts are allowed to consider character evidence—a type of evidence usually off-limits during the guilt phase of a criminal trial. Cf. Fed. Rule Evid. 404.

B

Things become clearer yet when we consider §924(c)(3)(B)'s role in the broader context of the federal criminal code. As we've explained, the language of §924(c)(3)(B) is almost identical to the language of §16(b), which this Court has read to mandate a categorical approach. And we normally presume that the same language in related statutes carries a consistent meaning. See, *e.g.*, *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990).

This case perfectly illustrates why we do that. There are dozens of federal statutes that use the phrase "crime of violence" to refer to presently charged conduct rather than a past conviction. Some of those statutes cross-reference the definition of "crime of violence" in §924(c)(3), while others are governed by the virtually identical definition in §16. The choice appears completely random. Reading the similar language in §924(c)(3)(B) and §16(b) similarly yields sensibly congruent applications across all these other statutes. But if we accepted the government's invitation to reinterpret §924(c)(3)(B) as alone endorsing a case-specific approach, we would produce a series of seemingly inexplicable results.

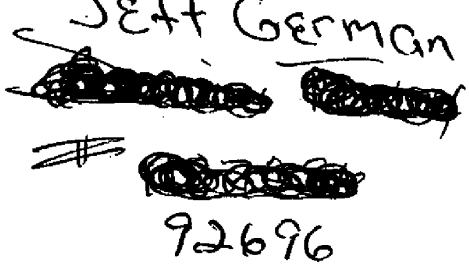
Take just a few examples. If the government were right,

Jeff German

[redacted] 92696

Congress would have mandated the case-specific approach in a prosecution for providing explosives to facilitate a crime of violence, 18 U. S. C. §844(*o*), but the (now-invalidated) categorical approach in a prosecution for providing *information about* explosives to facilitate a crime of violence, §842(p)(2). It would have mandated the case-specific approach in a prosecution for using false identification documents in connection with a crime of violence, §1028(b)(3)(B), but the categorical approach in a prosecution for using confidential phone records in connection with a crime of violence, §1039(e)(1). It would have mandated the case-specific approach in a prosecution for giving someone a firearm to use in a crime of violence, §924(h), but the categorical approach in a prosecution for giving a minor a handgun to use in a crime of violence, §924(a)(6)(B)(ii). It would have mandated the case-specific approach in a prosecution for traveling to another State to acquire a firearm for use in a crime of violence, §924(g), but the categorical approach in a prosecution for traveling to another State to *commit* a crime of violence, §1952(a)(2). And it would have mandated the case-specific approach in a prosecution for carrying armor-piercing ammunition in connection with a crime of violence, §924(c)(5), but the categorical approach in a prosecution for carrying a firearm while "in possession of armor piercing ammunition capable of being fired in that firearm" in connection with a crime of violence, §929(a)(1).

There would be no rhyme or reason to any of this. Nor does the government offer any plausible account why Congress would have wanted courts to take such dramatically different approaches to classifying offenses as crimes of violence in these various provisions. To hold, as the government urges, that §16(b) requires the categorical approach while §924(c)(3)(B) requires the case-specific approach would make a hash of the federal criminal code.



C

Section 924(c)(3)(B)'s history provides still further evidence that it carries the same categorical-approach command as §16(b). It's no accident that the language of the two laws is almost exactly the same. The statutory term "crime of violence" traces its origins to the Comprehensive Crime Control Act of 1984. There, Congress enacted the definition of "crime of violence" in §16. §1001(a), 98 Stat. 2136. It also "employed the term 'crime of violence' in numerous places in the Act," *Leocal*, 543 U. S., at 6, including in §924(c). §1005(a), 98 Stat. 2138. At that time, Congress didn't provide a separate definition of "crime of violence" in §924(c) but relied on §16's general definition. The two statutes, thus, were originally designed to be read together.

Admittedly, things changed a bit over time. Eventually, Congress expanded §924(c)'s predicate offenses to include drug trafficking crimes as well as crimes of violence. §§104(a)(2)(B)–(C), 100 Stat. 457. When it did so, Congress added a subsection-specific definition of "drug trafficking crime" in §924(c)(2)—and, perhaps thinking that both terms should be defined in the same place, it also added a subsection-specific definition of "crime of violence" in §924(c)(3). §104(a)(2)(F), *id.*, at 457. But even then, Congress didn't write a new definition of that term. Instead, it copied and pasted the definition from §16 without making any material changes to the language of the residual clause. The government suggests that, in doing so, Congress "intentionally separated" and "decoupled" the two definitions. Brief for United States 34, 37. But importing the residual clause from §16 into §924(c)(3) almost word for word would have been a bizarre way of suggesting that the two clauses should bear drastically different meanings. Usually when statutory language "'is obviously transplanted from . . . other legislation,'" we have reason to think "'it brings the old soil with it.'" *Sekhar* v. *United*

Jeff German

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92696

States, 570 U. S. 729, 733 (2013).

What's more, when Congress copied §16(b)'s language into §924(c) in 1986, it proceeded on the premise that the language *required* a categorical approach. By then courts had, as the government puts it, "beg[u]n to settle" on the view that §16(b) demanded a categorical analysis. Brief for United States 36–37. Of particular significance, the Second Circuit, along with a number of district courts, had relied on the categorical approach to hold that selling drugs could *never* qualify as a crime of violence because "[w]hile the traffic in drugs is often accompanied by violence," it can also be carried out through consensual sales and thus "does not *by its nature* involve substantial risk that physical violence will be used." *United States* v. *Diaz*, 778 F. 2d 86, 88 (1985). Congress moved quickly to abrogate those decisions. But, notably, it didn't do so by directing a case-specific approach or changing the language courts had read to require the categorical approach. Instead, it accepted the categorical approach as given and simply declared that certain drug trafficking crimes automatically trigger §924 penalties, regardless of the risk of violence that attends them. §§104(a)(2)(B)–(C), 100 Stat. 457.

The government's reply to this development misses the mark. The government argues that §16(b) had not acquired such a well-settled judicial construction by 1986 that the reenactment of its language in §924(c)(3)(B) should be presumed to have incorporated the same construction. We agree. See *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L. P. A.*, 559 U. S. 573, 590 (2010) (interpretations of three courts of appeals "may not have 'settled' the meaning" of a statute for purposes of the reenactment canon). But Congress in 1986 did more than just reenact language that a handful of courts had interpreted to require the categorical approach. It amended §924(c) specifically to abrogate the *results* of those deci-

sions, without making any attempt to overturn the categorical *reading* on which they were based. And *that* would have been an odd way of proceeding if Congress had thought the categorical reading erroneous.

There's yet one further and distinct way in which §924(c)'s history undermines the government's case-specific reading of the residual clause. As originally enacted in 1968, §924(c) prohibited the use of a firearm in connection with *any* federal felony. §102, 82 Stat. 1224. The 1984 amendments *narrowed* §924(c) by limiting its predicate offenses to "crimes of violence." But the case-specific reading would go a long way toward nullifying that limitation and restoring the statute's original breadth. After all, how many felonies don't involve a substantial risk of physical force when they're committed using a firearm—let alone when the defendant brandishes or discharges the firearm?

Recognizing this difficulty, the government assures us that a jury wouldn't be allowed to find a felony to be a crime of violence *solely* because the defendant used a firearm, although it could consider the firearm as a "factor." Tr. of Oral Arg. 8. But the government identifies no textual basis for this rule, and exactly how it would work in practice is anyone's guess. The government says, for example, that "selling counterfeit handbags" while carrying a gun wouldn't be a crime of violence under its approach. *Id.*, at 9. But why not? Because the counterfeit-handbag trade is so inherently peaceful that there's no substantial risk of a violent confrontation with dissatisfied customers, territorial competitors, or dogged police officers? And how are jurors supposed to determine that? The defendant presumably knew the risks of his trade, and he chose to arm himself. See *United States* v. *Simms*, 914 F. 3d 229, 247–248 (CA4 2019) (en banc) (refusing to "condem[n] jurors to such an ill-defined inquiry"). Even granting the government its handbag example, we suspect

Jeff German
[redacted]
92696

its approach would result in the vast majority of federal felonies becoming potential predicates for §924(c) charges, contrary to the limitation Congress deliberately imposed when it restricted the statute's application to crimes of violence.

D

With all this statutory evidence now arrayed against it, the government answers that it should prevail anyway because of the canon of constitutional avoidance. Maybe the case-specific approach doesn't represent the best reading of the statute—but, the government insists, it is our duty to adopt any "'fairly possible'" reading of a statute to save it from being held unconstitutional. Brief for United States 45.[6]

We doubt, however, the canon could play a proper role in this case even if the government's reading were "possible." True, when presented with two "fair alternatives," this Court has sometimes adopted the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. *United States* v. *Rumely*, 345 U. S. 41, 45, 47 (1953); see, *e.g.*, *Skilling* v. *United States*, 561 U. S. 358, 405–406, and n. 40 (2010); *United States* v. *Lanier*, 520 U. S. 259, 265–267, and n. 6 (1997). But no one before us has identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it. Yet that

[6]There are at least two different canons of construction that sometimes go by the name "constitutional avoidance." The one the government invokes here is perhaps better termed the presumption of constitutionality. Of long lineage, it holds that courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional, see, *e.g.*, *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.), and it is distinct from the more modern (and more debated) constitutional doubt canon, which suggests courts should construe ambiguous statutes to avoid the need even to address serious questions about their constitutionality, see *Rust* v. *Sullivan*, 500 U. S. 173, 190–191 (1991).

Jeff German

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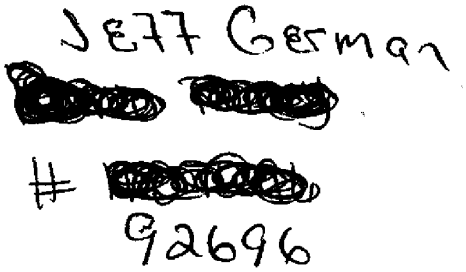
is exactly what the government seeks here. Its case-specific reading would cause §924(c)(3)(B)'s penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways. See *Simms*, 914 F. 3d, at 256–257 (Wynn, J., concurring).[7]

Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests. See *supra*, at 4–5. Everyone agrees that Mr. Davis and Mr. Glover did many things that Congress had declared to be crimes; and no matter how we rule today, they will face substantial prison sentences for those offenses. But does §924(c)(3)(B) require them to suffer additional punishment, on top of everything else? Even if you think it's *possible* to read the statute to impose such additional punishment, it's *impossible* to say that Congress surely intended that result, or that the law gave Mr. Davis and Mr. Glover fair warning that §924(c)'s mandatory penalties would apply to their conduct. Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trou-

[7]The government claims to have found cases invoking the canon to expand a statute's reach, but none actually stands for that proposition. Each simply remarks in passing that a construction the Court arrived at for other reasons had the additional benefit of avoiding vagueness concerns; none suggests that a narrower construction was available. See *United States* v. *Grace*, 461 U. S. 171, 176 (1983) (accepting government's construction, which was "not contested by appellees"); *United States* v. *Culbert*, 435 U. S. 371, 379 (1978) (finding statute clear and refusing to "manufacture ambiguity where none exists"); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 82–83 (1932) (finding statute unambiguous and construing it according to "the natural import of its terms"). And the dissent, despite compiling a page-long list of constitutional avoidance cases spanning "more than 200 years," *post*, at 25–26, has been unable to find any better examples. See *post*, at 29–30 (opinion of KAVANAUGH, J.).



ble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

Employing the canon as the government wishes would also sit uneasily with the rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Ibid.*; see *Lanier*, 520 U. S., at 265–266, and n. 5. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another.[8]

IV

What does the dissent have to say about all this? It starts by emphasizing that §924(c)(3)(B) has been used in "tens of thousands of federal prosecutions" since its enactment 33 years ago. *Post*, at 2 (opinion of KAVANAUGH, J.). And the dissent finds it "surprising" and "extraordinary" that, after all those prosecutions over all that time,

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[8] Admittedly, abandoning the categorical approach in favor of the case-specific approach would also have the effect of excluding from the statute's coverage defendants who commit categorically *violent* felonies in *nonviolent* ways, and in that respect would be more "lenient" for some defendants. Regardless, the constitutional principles underlying the rule of lenity counsel caution before invoking constitutional avoidance to construe the statute to punish conduct that it does not unambiguously proscribe.

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the statute could "suddenly" be deemed unconstitutional. *Post*, at 2–3. But the government *concedes* that §924(c)(3)(B) is unconstitutional if it means what everyone has understood it to mean in nearly all of those prosecutions over all those years. So the only way the statute can be saved is if we were "suddenly" to give it a new meaning different from the one it has borne for the last three decades. And if we could do *that*, it would indeed be "surprising" and "extraordinary."

The dissent defends giving this old law a new meaning by appealing to intuition. It suggests that a categorical reading of §924(c)(3)(B) is "unnatural" because "[i]f you were to ask John Q. Public whether a particular crime posed a substantial risk of violence, surely he would respond, 'Well, tell me how it went down—*what happened*?'" *Post*, at 13 (some internal quotation marks omitted). Maybe so. But the language in the statute before us isn't the language posited in the dissent's push poll. Section 924(c)(3)(B) doesn't ask about the risk that "a particular crime posed" but about the risk that an "offense . . . by its nature, involves." And a categorical reading of this categorical language seemed anything but "unnatural" to the unanimous Court in *Leocal* or the plurality in *Dimaya*.[9] Nor did the government think the categorical reading of §924(c)(3)(B) "unnatural" when it embraced that reading for decades. The dissent asks us to overlook the government's prior view, explaining that the government only defended a categorical reading of the statute "when it did not matter for constitutional vagueness purposes"—that is, before *Johnson* and *Dimaya* identified constitutional problems with the categorical approach. *Post*, at 34. But

[9]To be sure, the dissent suggests that *Leocal* and *Dimaya* adopted a categorical reading simply to avoid practical and constitutional problems. *Post*, at 15–16, 23, and n. 23. But, as we have seen, this too is mistaken. *Leocal* did not even mention those problems, and *Dimaya* held that the text demanded a categorical approach. See *supra*, at 9.

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isn't that exactly the point? Isn't it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of §924(c)(3)(B) demanded a categorical analysis?

If this line of attack won't work, the dissent tries another by telling us that we have "not fully account[ed] for the long tradition of substantial-risk criminal statutes." *Post*, at 34. The dissent proceeds to offer a lengthy bill of particulars, citing dozens of state and federal laws that do not use the categorical approach. *Post*, at 7–10, and nn. 4–17. But what does this prove? Most of the statutes the dissent cites impose penalties on whoever "creates," or "engages in conduct that creates," or acts under "circumstances that create" a substantial risk of harm; others employ similar language. Not a single one imposes penalties for committing certain acts during "an offense . . . that by its nature, involves" a substantial risk, or anything similar. Marching through the dissent's own catalog thus only winds up confirming that legislatures know how to write risk-based statutes that require a case-specific analysis—and that §924(c)(3)(B) is not a statute like that.

When the dissent finally turns to address the words Congress actually wrote in §924(c)(3)(B), its main argument seems to be that a categorical reading violates the canon against superfluity. On this account, reading "offense" generically in connection with the residual clause makes the residual clause "duplicate" the elements clause and leaves it with "virtually nothing" to do. *Post*, at 20. But that is a surprising assertion coming from the dissent, which devotes several pages to describing the "many" offenders who have been convicted under the residual clause using the categorical approach but who "might not" be prosecutable under the elements clause. *Post*, at 30–33. It is also wrong. As this Court has long understood, the residual clause, read categorically, "sweeps more broadly" than the elements clause—potentially reaching offenses,

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like burglary, that do not have violence as an *element* but that arguably create a substantial *risk* of violence. *Leocal*, 543 U. S., at 10. So even under the categorical reading, the residual clause is far from superfluous.

Without its misplaced reliance on the superfluity canon, there is little left of the dissent's textual analysis. The dissent asserts that the phrase "by its nature" must "focu[s] on the defendant's actual conduct"—but only because this "follows" from the dissent's earlier (and mistaken) superfluity argument. *Post*, at 21. Next, the dissent claims that "the word 'involves'" and "the phrase 'in the course of committing the offense'" both support a case-specific approach. *Post*, at 22. But these words do not favor either reading: It is just as natural to ask whether the offense of robbery *ordinarily* "involves" a substantial risk that violence will be used "in the course of committing the offense" as it is to ask whether a *particular* robbery "involved" a substantial risk that violence would be used "in the course of committing the offense." If anything, the statute's use of the present and not the past tense lends further support to the categorical reading.[10] The dissent thinks it significant, too, that the statute before us "does not use the term 'conviction,'" *post*, at 23; but that word is hardly a prerequisite for the categorical approach, as *Dimaya* makes clear. Remarkably, the dissent has noth-

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[10]The dissent claims that *Taylor* v. *United States*, 495 U. S. 575 (1990), and *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), pointed to "the *absence* of the word 'involved'" as one reason to adopt a categorical approach. *Post*, at 22. Not true. *Taylor* explained that the ACCA's elements clause requires a categorical approach in part because it refers to a crime "that 'has as an element'—not any crime that, in a particular case, involves—the use or threat of force." 495 U. S., at 600. All the work in that sentence was being done by the phrase "in a particular case," not by the word "involves." And *Nijhawan* noted that the Court had construed the ACCA's residual clause, which refers to crimes "that *'involv[e] conduct* that presents a serious potential risk of physical injury," to require the categorical approach. 557 U. S., at 36.

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ing at all to say about §924(c)(3)'s history or its relationship with other criminal statutes; it just ignores those arguments. And when it comes to the constitutional avoidance canon, the dissent does not even try to explain how using that canon to criminalize conduct that *isn't* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers. Instead, the dissent seems willing to consign "'thousands'" of defendants to prison for "years—potentially decades," not because it is certain or even likely that Congress ordained those penalties, but because it is merely "possible" Congress might have done so. *Post*, at 30, 33–34. In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.

In the end, the dissent is forced to argue that holding §924(c)(3)(B) unconstitutional would invite "bad" social policy consequences. *Post*, at 34. In fact, the dissent's legal analysis only comes sandwiched between a lengthy paean to laws that impose severe punishments for gun crimes and a rogue's gallery of offenses that may now be punished somewhat less severely. See *post*, at 1–2, 30–34. The dissent acknowledges that "the consequences cannot change our understanding of the law." *Post*, at 34. But what's the point of all this talk of "bad" consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals? Even taken on their own terms, too, the dissent's policy concerns are considerably overblown. While the dissent worries that our ruling may elicit challenges to past §924(c) convictions, *post*, at 33, the dissent's preferred approach—saving §924(c)(3)(B) by changing its meaning—would also call into question countless convictions premised on the categorical reading. And defendants whose §924(c) convictions are overturned by virtue of today's ruling will not even necessarily receive lighter sentences: As this Court has noted, when a defend-

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ant's §924(c) conviction is invalidated, courts of appeals "routinely" vacate the defendant's entire sentence on all counts "so that the district court may increase the sentences for any remaining counts" if such an increase is warranted. *Dean* v. *United States*, 581 U. S. ___, ___ (2017) (slip op., at 5).

Of course, too, Congress always remains free to adopt a case-specific approach to defining crimes of violence for purposes of §924(c)(3)(B) going forward. As Mr. Davis and Mr. Glover point out, one easy way of achieving that goal would be to amend the statute so it covers any felony that, "based on the facts underlying the offense, involved a substantial risk" that physical force against the person or property of another would be used in the course of committing the offense. Brief for Respondents 46 (quoting H. R. 7113, 115th Cong., 2d Sess. (2018); emphasis deleted); see also Tr. of Oral Arg. 19 (government's counsel agreeing that this language would offer "clearer" support for the case-specific approach than the current version of the statute does). The dissent's catalog of case-specific, risk-based criminal statutes supplies plenty of other models Congress could follow. Alternatively still, Congress might choose to retain the categorical approach but avoid vagueness in other ways, such as by defining crimes of violence to include certain enumerated offenses or offenses that carry certain minimum penalties. All these options and more are on the table. But these are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.

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We agree with the court of appeals' conclusion that §924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth

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Circuit vacated their convictions and sentences on one of the two §924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if §924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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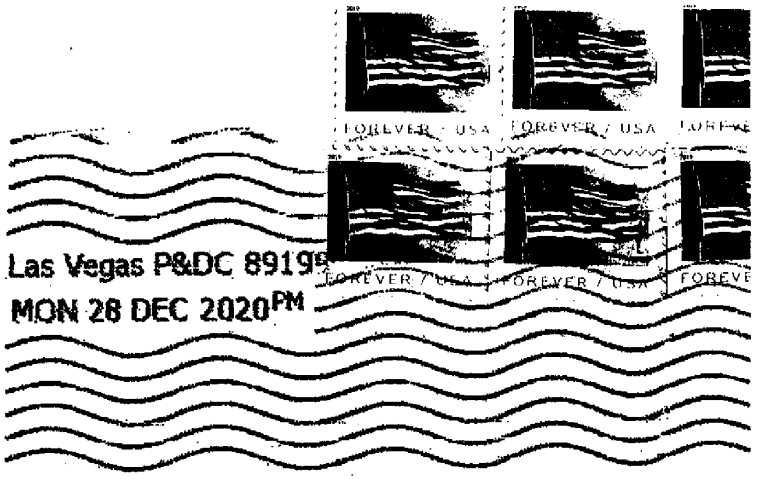
Jefferey German #92696
D.C.C.
P.O. Box 208
Indian Springs NV 89070



Steven D Grierson
Clerk of the Court
200 Lewis Avenue 3rd floor
Las Vegas NV 89155-1160

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DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German,

Petitioner,

vs.

William Hutchings, Warden,

Respondent,

Case No: A-21-829136-W
Department 24

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on February 09, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 5th day of April, 20 21, at the hour of 8:3 o'clock for further proceedings.

Dated this 9th day of February, 2021

289 205 B7E8 DA36
Erika Ballou
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-21-829136-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 2/10/2021

Jeffrey German
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P.O. Box 208
Indian Springs, NV, 89070

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
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JEFFREY GERMAN, PLAINTIFF(S) vs WILLIAM HUTCHINGS, WARDEN DEFENDANT (S)	Case No.: A-21-829136-W Department 24

NOTICE OF HEARING FOR PETITION FOR WRIT OF HABEAS CORPUS

PLEASE TAKE NOTICE that this matter is set before the **HONORABLE ERIKA BALLOU**, for **PETITION FOR WRIT OF HABEAS CORPUS** on **April 5th, 2021**, at the hour of 08:30 a.m., in District Court Department 24 in the Regional Justice Center, 200 Lewis Avenue, 12C Floor, Courtroom C, Las Vegas, Nevada. Your presence is required.

HONORABLE ERIKA BALLOU

/s/ Chapri Wright
By: Chapri Wright
Judicial Executive Assistant

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CLERK OF THE COURT

IN THE 8th JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE
COUNTY OF Clark

Jeff Coerman)
Petitioner,)
)
v.)
) Case No. A-21-829136-W ~~C-14-300794~~
)
State of NEVADA) Dept. No. XXIV ~~XVIII~~
)
Respondent.)
)

ORDER FOR TRANSPORTATION OF INMATE FOR COURT APPEARANCE OR, IN THE ALTERNATIVE, FOR APPEARANCE BY TELEPHONE OR VIDEO CONFERENCE

Based upon the above motion, I find that the presence of Jeffrey German is necessary for the hearing that is scheduled in this case on the 5th day of April, 8:30am, at _____.

THEREFOR, IT IS HEREBY ORDERED that,

☐ Pursuant to NRS 209.274, Warden Hutchinson of Southern Desert Correctional Center is hereby commanded to have Jeffrey German transported to appear before me at a hearing scheduled for April 5, 2021 at 8:30am at the Eighth Judicial District Court Clark County Courthouse. Upon completion of the hearing,

Jeffrey German is to be transported back to the above named institution.

☐ Pursuant to NRS 209.274(2)(a), Petitioner shall be made available for telephonic or video conference appearance by his or her institution. My clerk will contact _____ at _____ to make arrangements for the Court to initiate the telephone appearance for the hearing.

Dated this 16th day of March, 2021.

Dated this 16th day of March, 2021

Erika Ballou

District Court Judge

F18 85F DFD4 04A3
Erika Ballou
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German, Plaintiff(s)	CASE NO: A-21-829136-W
vs.	DEPT. NO. Department 24
William Hutchings, Warden, Defendant(s)	

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Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

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Jeffrey German	#92696 SDCC P.O. Box 208 Indian Springs, NV, 89070

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OPWH

DISTRICT COURT

CLARK COUNTY, NEVADA

JEFFREY GERMAN, Plaintiff(s) vs. WILLIAM HUTCHINGS, WARDEN, Defendant(s)	Case No.: A-21-829136-W Department XXIV

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petition filed for Writ of Habeas Corpus (Post-Conviction Relief) on February 9, 2021. The Court has review the Petition and has determined that a response would assist the Court in determining whether the Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore.

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on May 24 2021, in chambers in District Court Department XXIV.

Dated this 19th day of March, 2021

DB9 17E FD45 68F8
Erika Ballou
District Court Judge

ERIKA BALLOU
DISTRICT COURT JUDGE
DEPT XXIV
LAS VEGAS, NV 89155

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on the date of the filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Clark County DA's Office
Appellate Division
200 Lewis Avenue
Las Vegas, Nevada 89101

Chapri Wright
Judicial Executive Assistant

ERIKA BALLOU
DISTRICT COURT JUDGE
DEPT XXIV
LAS VEGAS, NV 89155

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-21-829136-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order for Petition for Writ of Habeas Corpus was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 3/19/2021

D A	motions@clarkcountyda.com
Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 3/22/2021

Jeffrey German	#92696 SDCC P.O. Box 208 Indian Springs, NV, 89070

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JEFFREY GERMAN,
Aka Jeffrey B. German #1602073,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-829136-W
C-14-300979-2
DEPT NO: XXIV

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 22, 2014, the State charged Jeffrey German (hereinafter "Petitioner") by way of Information with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 2 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 4 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 6 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 7 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 8 – Possession of Stolen Property (Category C Felony – NRS 205.275); Count 9 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690); and Count 10 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690).[1]

On March 16, 2015, the State filed an Amended Information charging Petitioner as follows: Count 1 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); and Count 2 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480). The same day, Petitioner pleaded guilty to the two counts and signed a Guilty Plea Agreement.

On May 6, 2015, the district court sentenced Petitioner as follows: Count 1 – a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, plus a consecutive term of a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months for the Use of a Deadly Weapon; and Count 2 – a maximum of sixty (60) months with a minimum parole eligibility of thirteen (13) months, consecutive with Count 1. The total aggregate sentence was a maximum of four hundred twenty (420) months and a minimum of one hundred thirty-three (133) months. Petitioner received three hundred nine (309) days credit for time served. The Judgment of Conviction

[1] Counts 3 and 5, omitted, only charged co-defendants.

was filed on May 12, 2015. On May 12, 2016, the district court filed an Amended Judgment of Conviction, removing the total aggregate sentence from the Judgment.

On August 17, 2016, Petitioner filed a Motion for Modification of Sentence. The State filed its Opposition on August 30, 2016. On August 7, 2016, the district court denied Petitioner's Motion. The Order was filed on October 12, 2016.

Petitioner filed a second Motion to Modify/Correct Illegal Sentence on June 1, 2020. The district court denied Petitioner's Motion on June 22, 2020. The Order was filed on July 7, 2020.

On February 9, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") and Motion for Appointment of Attorney. The State responds as follows.

ARGUMENT

I. THIS PETITION IS TIME-BARRED

Petitioner's instant Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

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The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner's Judgment of Conviction was filed on May 12, 2015. Petitioner's Amended Judgment of Conviction was filed on May 12, 2016. Petitioner filed the instant Petition on February 9, 2021 – five years since the Amended Judgment of Conviction. Thus, the instant Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition must be dismissed.

II. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The

procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

III. PETITIONER CANNOT ESTABLISH GOOD CAUSE

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default.*" Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'"

Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner fails to address good cause and does not explain why he is now raising these issues five years later. Because Petitioner cannot establish good cause to explain why his Petition was untimely, the Petition must be denied as time barred.

IV. PETITIONER'S CLAIMS ARE WAIVED AND OUTSIDE THE SCOPE OF A HABEAS PETITION BECAUSE PETITIONER PLED GUILTY

Petitioner's claims are waived because he failed to raise them on direct appeal. Petition, at 7-9; NRS 34.724(2)(a); NRS 34.810(1)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Further, these claims are outside the scope of habeas because Petitioner pleaded guilty. NRS 34.810(1)(a). His claims are limited to ineffective assistance of counsel at plea, or that his plea was not knowingly and voluntarily entered. NRS 34.810(1)(a). Thus, these claims are outside the scope of a Petition.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

A. Deadly Weapon Enhancement

Petitioner claims his deadly weapon enhancement is invalid. Petition, at 7-7a. In a misguided attempt to support this claim, Petitioner cites United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019). In Davis, the United States Supreme Court reviewed federal statute 18 U.S.C. § 924(c) and found it overly vague as to the wording "crime of violence." 139 S. Ct. at 2324. This holding is inapplicable to the instant case. Petitioner cites to no other authority to show his Deadly Weapon enhancement is invalid. Thus, this claim is entirely without support and must be dismissed.

B. 14th Amendment Rights

Petitioner claims his 14th and 9th amendment rights are being violated. Petition, at 8. In addition to these claims being waived, Petitioner fails to provide any cogent argument or specific facts to support this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added). Because Petitioner has failed to put forth more than a bare and naked claim, this claim must be dismissed.

C. Deadly Weapon Enhancement

Lastly, Petitioner claims that his Deadly Weapon enhancement was unconstitutional. Petition, at 9. In addition to being waived, this claim is meritless. The Nevada Supreme Court has repeatedly ruled that the deadly weapon enhancement does not violate double jeopardy. Woofter v. O'Donnell, 91 Nev. 756, 761–62, 542 P.2d 1396, 1399–400 (1975); Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 479–81, 745 P.2d 697, 698–99 (1987). Further, Petitioner agreed to the imposition of the deadly weapon enhancement in his guilty plea agreement. Therefore, this claim is also without merit, and the instant Petition should be dismissed.

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CONCLUSION

Based on the foregoing, Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) should be DENIED.

DATED this 23rd day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY /s/KAREN MISHLER
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 23rd day of March, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

JEFFREY GERMAN
SDCC
P.O BOX 208
INDIAN SPRINGS, NV 89070

BY
CELINA LOPEZ
Secretary for the District Attorney's Office

bs/L3

OPI
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #03202
200 Lewis Avenue
Las Vegas, Nevada, 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JEFFREY B. GERMAN, aka
Jeffery Bernard German, #1602073

Defendant.

CASE NO. A-21-829136-W and C-14-300979-2

DEPT NO. XXIV

ORDER FOR PRODUCTION OF INMATE
JEFFREY B. GERMAN, aka
Jeffery Bernard German, BAC #92696

DATE OF HEARING: May 24, 2021
TIME OF HEARING: 8:30 AM

TO: NEVADA DEPARTMENT OF CORRECTIONS; and

TO: JOSEPH LOMBARDO, Sheriff of Clark County, Nevada:

Upon the ex parte application of THE STATE OF NEVADA, Plaintiff, by STEVEN B. WOLFSON, District Attorney, through DAVID STANTON, Chief Deputy District Attorney, and good cause appearing therefor,

IT IS HEREBY ORDERED that NEVADA DEPARTMENT OF CORRECTIONS shall be, and is, hereby directed to produce JEFFREY B. GERMAN, aka Jeffery Bernard German, Defendant in Case Number C-14-300979-2, wherein THE STATE OF NEVADA is the Plaintiff, inasmuch as the said JEFFREY B. GERMAN, aka Jeffery Bernard German is currently incarcerated in the NEVADA DEPARTMENT OF CORRECTIONS located in

Clark County, Nevada, and his presence will be required in Las Vegas, Nevada, commencing on May 24, 2021, at the hour of 8:30 o'clock AM and continuing until completion of the prosecution's case against the said Defendant.

IT IS FURTHER ORDERED that JOSEPH LOMBARDO, Sheriff of Clark County, Nevada, shall accept and retain custody of the said JEFFREY B. GERMAN, aka Jeffery Bernard German in the Clark County Detention Center, Las Vegas, Nevada, pending completion of said matter in Clark County, or until the further Order of this Court; or in the alternative shall make all arrangements for the transportation of the said JEFFREY B. GERMAN, aka Jeffery Bernard German to and from the Nevada Department of Corrections facility which are necessary to insure the JEFFREY B. GERMAN, aka Jeffery Bernard German's appearance in Clark County pending completion of said matter, or until further Order of this Court.

DATED this _____ day of April, 2021.

Dated this 9th day of April, 2021

DISTRICT JUDGE

999 7A3 ECD5 E4CF
Erika Ballou
District Court Judge

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

BY _____
DAVID STANTON
Chief Deputy District Attorney
Nevada Bar #03202

cl/L3

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-14-300979-2
vs	DEPT. NO. Department 24
Jeffrey German	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JEFFREY GERMAN,
Aka Jeffrey B. German #1602073,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-829136-W
C-14-300979-2

DEPT NO: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30AM

THIS CAUSE having come on for hearing before the Honorable ERIKA BALLOU, District Judge, on the 24th day of Month, 2021, the Petitioner being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On September 22, 2014, the State charged Jeffrey German (hereinafter "Petitioner") by way of Information with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 2 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 4 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 6 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 7 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 8 – Possession of Stolen Property (Category C Felony – NRS 205.275); Count 9 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690); and Count 10 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690).[1]

On March 16, 2015, the State filed an Amended Information charging Petitioner as follows: Count 1 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); and Count 2 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480). The same day, Petitioner pleaded guilty to the two counts and signed a Guilty Plea Agreement.

On May 6, 2015, the district court sentenced Petitioner as follows: Count 1 – a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, plus a consecutive term of a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months for the Use of a Deadly Weapon; and Count 2 – a maximum of sixty (60) months with a minimum parole eligibility of thirteen (13) months, consecutive with Count 1. The total aggregate sentence was a maximum of four hundred twenty (420) months and a minimum of one hundred thirty-three (133) months. Petitioner received three hundred nine (309) days credit for time served. The Judgment of Conviction

[1] Counts 3 and 5, omitted, only charged co-defendants.

was filed on May 12, 2015. On May 12, 2016, the district court filed an Amended Judgment of Conviction, removing the total aggregate sentence from the Judgment.

On August 17, 2016, Petitioner filed a Motion for Modification of Sentence. The State filed its Opposition on August 30, 2016. On August 7, 2016, the district court denied Petitioner's Motion. The Order was filed on October 12, 2016.

Petitioner filed a second Motion to Modify/Correct Illegal Sentence on June 1, 2020. The district court denied Petitioner's Motion on June 22, 2020. The Order was filed on July 7, 2020.

On February 9, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") and Motion for Appointment of Attorney. The State filed its Response on March 23, 2021. Following a hearing on May 24, 2021, this Court finds and concludes as follows:

AUTHORITY

I. THIS PETITION IS TIME-BARRED

Petitioner's instant Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner's Judgment of Conviction was filed on May 12, 2015. Petitioner's Amended Judgment of Conviction was filed on May 12, 2016. Petitioner filed the instant Petition on February 9, 2021 – five years since the Amended Judgment of Conviction. Thus, the instant Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition is dismissed.

II. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23.

The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

III. PETITIONER CANNOT ESTABLISH GOOD CAUSE

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional

dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner fails to address good cause and does not explain why he is now raising these issues five years later. Because Petitioner cannot establish good cause to explain why his Petition was untimely, the Petition is denied as time barred.

IV. PETITIONER'S CLAIMS ARE WAIVED AND OUTSIDE THE SCOPE OF A HABEAS PETITION BECAUSE PETITIONER PLED GUILTY

Petitioner's claims are waived because he failed to raise them on direct appeal. Petition, at 7-9; NRS 34.724(2)(a); NRS 34.810(1)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Further, these claims are outside the scope of habeas because Petitioner pleaded guilty. NRS 34.810(1)(a). His claims are limited to ineffective assistance of counsel at plea, or that his plea was not knowingly and voluntarily entered. NRS 34.810(1)(a). Thus, these claims are outside the scope of a Petition.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).

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A. Deadly Weapon Enhancement

Petitioner claims his deadly weapon enhancement is invalid. Petition, at 7-7a. In a misguided attempt to support this claim, Petitioner cites United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019). In Davis, the United States Supreme Court reviewed federal statute 18 U.S.C. § 924(c) and found it overly vague as to the wording "crime of violence." 139 S. Ct. at 2324. This holding is inapplicable to the instant case. Petitioner cites to no other authority to show his Deadly Weapon enhancement is invalid. Thus, this claim is entirely without support and is dismissed.

B. 14th Amendment Rights

Petitioner claims his 14th and 9th amendment rights are being violated. Petition, at 8. In addition to these claims being waived, Petitioner fails to provide any cogent argument or specific facts to support this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added). Because Petitioner has failed to put forth more than a bare and naked claim, this claim is dismissed.

C. Deadly Weapon Enhancement

Lastly, Petitioner claims that his Deadly Weapon enhancement was unconstitutional. Petition, at 9. In addition to being waived, this claim is meritless. The Nevada Supreme Court has repeatedly ruled that the deadly weapon enhancement does not violate double jeopardy. Woofter v. O'Donnell, 91 Nev. 756, 761–62, 542 P.2d 1396, 1399–400 (1975); Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 479–81, 745 P.2d 697, 698–99 (1987). Further, Petitioner agreed to the imposition of the deadly weapon enhancement in his guilty plea agreement. Therefore, this claim is also without merit, and the instant Petition is dismissed.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 17 day of June, 2021.

Dated this 17th day of June, 2021

DISTRICT JUDGE

69B B94 E0F5 7E61
Erika Ballou
District Court Judge

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

BY _____ for #14741
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF SERVICE

I certify that on the 17th day of June, 2021, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

Jeffrey German, 92696
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

BY _____
Secretary for the District Attorney's Office

bs/clh/L3

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-21-829136-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/17/2021

D A	motions@clarkcountyda.com
Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

JEFFREY GERMAN,

Petitioner,

vs.

WILLIAM HUTCHINGS, WARDEN,

Respondent,

Case No: A-21-829136-W

Dept No: XXIV

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that on June 17, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on June 25, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 25 day of June 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Jeffrey German # 92696
P.O. Box 208
Indian Springs, NV 89070

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

JEFFREY GERMAN,
Aka Jeffrey B. German #1602073,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-829136-W
C-14-300979-2

DEPT NO: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: MAY 24, 2021
TIME OF HEARING: 8:30AM

THIS CAUSE having come on for hearing before the Honorable ERIKA BALLOU, District Judge, on the 24th day of Month, 2021, the Petitioner being present, PROCEEDING IN PROPER PERSON, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through SARAH OVERLY, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On September 22, 2014, the State charged Jeffrey German (hereinafter "Petitioner") by way of Information with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 2 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 4 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 6 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 7 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); Count 8 – Possession of Stolen Property (Category C Felony – NRS 205.275); Count 9 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690); and Count 10 – Possession of Credit or Debit Card Without Cardholder's Consent (Category D Felony – NRS 205.690).[1]

On March 16, 2015, the State filed an Amended Information charging Petitioner as follows: Count 1 – Robbery with Use of a Deadly Weapon (Category B Felony – NRS 100.380, 193.164); and Count 2 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480). The same day, Petitioner pleaded guilty to the two counts and signed a Guilty Plea Agreement.

On May 6, 2015, the district court sentenced Petitioner as follows: Count 1 – a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months, plus a consecutive term of a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months for the Use of a Deadly Weapon; and Count 2 – a maximum of sixty (60) months with a minimum parole eligibility of thirteen (13) months, consecutive with Count 1. The total aggregate sentence was a maximum of four hundred twenty (420) months and a minimum of one hundred thirty-three (133) months. Petitioner received three hundred nine (309) days credit for time served. The Judgment of Conviction

[1] Counts 3 and 5, omitted, only charged co-defendants.

was filed on May 12, 2015. On May 12, 2016, the district court filed an Amended Judgment of Conviction, removing the total aggregate sentence from the Judgment.

On August 17, 2016, Petitioner filed a Motion for Modification of Sentence. The State filed its Opposition on August 30, 2016. On August 7, 2016, the district court denied Petitioner's Motion. The Order was filed on October 12, 2016.

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AUTHORITY

I. THIS PETITION IS TIME-BARRED

Petitioner's instant Petition for Writ of Habeas Corpus was not filed within one year of the filing of the Judgment of Conviction. Thus, the Petition is time-barred. Pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and
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The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

In the instant case, Petitioner's Judgment of Conviction was filed on May 12, 2015. Petitioner's Amended Judgment of Conviction was filed on May 12, 2016. Petitioner filed the instant Petition on February 9, 2021 – five years since the Amended Judgment of Conviction. Thus, the instant Petition is time-barred. Absent a showing of good cause to excuse this delay, the instant Petition is dismissed.

II. APPLICATION OF THE PROCEDURAL BARS IS MANDATORY

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23.

The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, application of the procedural bars is mandatory.

III. PETITIONER CANNOT ESTABLISH GOOD CAUSE

A showing of good cause and prejudice may overcome procedural bars. However, Petitioner cannot demonstrate good cause to explain why his Petition was untimely.

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim *was not reasonably available at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Rather, to find good cause, there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506-07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Further, to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional

dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

In the instant case, Petitioner cannot demonstrate good cause to overcome the mandatory procedural bars because he cannot demonstrate that this claim was not reasonably available at the time of default. Clem, 119 Nev. at 621, 81 P.3d at 525. Petitioner fails to address good cause and does not explain why he is now raising these issues five years later. Because Petitioner cannot establish good cause to explain why his Petition was untimely, the Petition is denied as time barred.

IV. PETITIONER'S CLAIMS ARE WAIVED AND OUTSIDE THE SCOPE OF A HABEAS PETITION BECAUSE PETITIONER PLED GUILTY

Petitioner's claims are waived because he failed to raise them on direct appeal. Petition, at 7-9; NRS 34.724(2)(a); NRS 34.810(1)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Further, these claims are outside the scope of habeas because Petitioner pleaded guilty. NRS 34.810(1)(a). His claims are limited to ineffective assistance of counsel at plea, or that his plea was not knowingly and voluntarily entered. NRS 34.810(1)(a). Thus, these claims are outside the scope of a Petition.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).

"A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

A. Deadly Weapon Enhancement

Petitioner claims his deadly weapon enhancement is invalid. Petition, at 7-7a. In a misguided attempt to support this claim, Petitioner cites United States v. Davis, 588 U.S. ___, 139 S. Ct. 2319 (2019). In Davis, the United States Supreme Court reviewed federal statute 18 U.S.C. § 924(c) and found it overly vague as to the wording "crime of violence." 139 S. Ct. at 2324. This holding is inapplicable to the instant case. Petitioner cites to no other authority to show his Deadly Weapon enhancement is invalid. Thus, this claim is entirely without support and is dismissed.

B. 14th Amendment Rights

Petitioner claims his 14th and 9th amendment rights are being violated. Petition, at 8. In addition to these claims being waived, Petitioner fails to provide any cogent argument or specific facts to support this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added). Because Petitioner has failed to put forth more than a bare and naked claim, this claim is dismissed.

C. Deadly Weapon Enhancement

Lastly, Petitioner claims that his Deadly Weapon enhancement was unconstitutional. Petition, at 9. In addition to being waived, this claim is meritless. The Nevada Supreme Court has repeatedly ruled that the deadly weapon enhancement does not violate double jeopardy. Woofter v. O'Donnell, 91 Nev. 756, 761–62, 542 P.2d 1396, 1399–400 (1975); Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 479–81, 745 P.2d 697, 698–99 (1987). Further, Petitioner agreed to the imposition of the deadly weapon enhancement in his guilty plea agreement. Therefore, this claim is also without merit, and the instant Petition is dismissed.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

DATED this 17 day of June, 2021.

Dated this 17th day of June, 2021

DISTRICT JUDGE

69B B94 E0F5 7E61
Erika Ballou
District Court Judge

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

BY _____ for #14741
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF SERVICE

I certify that on the 17th day of June, 2021, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

Jeffrey German, 92696
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

BY _____
Secretary for the District Attorney's Office

bs/clh/L3

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jeffrey German, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-21-829136-W DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/17/2021

D A	motions@clarkcountyda.com
Dept 24 Law Clerk	dept24lc@clarkcountycourts.us
AG 1	rgarate@ag.nv.gov
AG 2	aherr@ag.nv.gov

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 24, 2021**

A-21-829136-W Jeffrey German, Plaintiff(s)
vs.
William Hutchings, Warden, Defendant(s)

May 24, 2021 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Ballou, Erika **COURTROOM:** RJC Courtroom 12C

COURT CLERK: Ro'Shell Hurtado

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

German, Jeffrey	Plaintiff
Overly, Sarah	Attorney

JOURNAL ENTRIES

- Sarah Overly, Esq. present via Bluejeans video conference. Deft. present in-custody via Bluejeans video conference.

Pursuant to NRS 34.726(1) Petitioner s Writ of Habeas Corpus filed on February 9, 2021, is hereby DENIED as it is procedurally time-barred. This Court finds that Petitioner had until May 12, 2017, to find this instant petition. This instant petition was filed 5 years after the one-year deadline. This Court further finds that Petitioner has failed to establish good cause for the untimely filing of his petitioner under NRS 34.726 and NRS 34.810(3). Accordingly, it is hereby ordered that Petitioner s Writ of Habeas Corpus is hereby DENIED.

CLERK'S NOTE: This Minute Order was mailed to Jeffrey German #92696, SDCC, P.O.Box 208, Indian Springs, NV, 89070.//05.25.2021rh

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated August 17, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 87.

JEFF GERMAN,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS, WARDEN,

Defendant(s),

Case No: A-21-829136-W
Related Case C-14-300979-2
Dept. No: XXIV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 25 day of August 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk