

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

BRIAN KERRY O'KEEFE,) SCN Case No. 85610
 Appellant,) COA Case No. 85610-COA
 -VS-) (MATTER OF FIRST IMPRESSION)
 THE STATE OF NEVADA, et al.)
 Respondent)

FILED

MAY 04 2023

ELIZABETH A. BROWN
 CLERK OF SUPREME COURT
 By M. J. J. J.
 DEPUTY CLERK

PETITION FOR REVIEW (RULE 40B) OF THE
 COURT OF APPEALS AFFIRMANCE UNDER RULE 36
 THAT IMPROPERLY RECHARACTERIZED CLAIM OF
 FACIALLY ILLEGAL SENTENCE AS NOT WITHIN SCOPE
 WHICH CONFLICTS WITH PRIOR DECISION OF THIS COURT
 AND BECOMES A MATTER-OF-FIRST-IMPRESSION (Rule 40B(a)(1))

COMES NOW, Brian O'Keefe, Appellant pro per, who moves this Honorable Court
 for an Order granting Petition for Review where Appellant's title of his action
 "MOTION TO VACATE FACIALLY ILLEGAL SENTENCE OF DEADLY WEAPON ENHANCEMENT
 (NRS 193.165) BASED ON CONSTITUTIONAL CHANGE IN LAW ANNOUNCED JUNE 10, 2021
 EFFECTING SUBSTANTIVE LAW" - alone manifests claim is within scope and

Appellant will demonstrate contents embodied in Motion before Order, filed 4/21/23.

This Petition for Review is warranted on Rule 40B(2) where their Order Affirming
 conflicts with related case WHITE vs. THE STATE OF NEVADA, 427 P. 3d 1044, 2018
 Nev. Unpub. LEXIS 919; 124 Nev. 1032 No. 71929, No. 73822 October 9, 2018 FILED,
 (SEN "unpublished disposition") which set the law of the case and purpose
 of NRS 208.165 is to permit correction at any time of an illegal sentence.

RECEIVED
 MAY 04 2023
 28 Dated May 1, 2023 pursuant NRS 208.165 by:
 ELIZABETH A. BROWN
 CLERK OF SUPREME COURT
 DEPUTY CLERK

Brian Kerry O'Keefe
 Brian Kerry O'Keefe

23-14114

QUESTION(S) PRESENTED

RULE 40B(2)

Whether this Honorable Court will exercise an equitable review of order¹ in which afterwaid an obvious conclusion will render that Appellant's motion² was within scope and sole purpose was manifested by title of motion satisfying NRCIV 8(a)³ which resulted in State's Opposition⁴ recognizing claim premised on Borden⁵, where COA decision ultimately conflicts with decision of this Court!

1 The Court of Appeals decision attached as Exhibit "A", erroneously upholds the district court as a rubber stamp misrepresenting claim truly raised by Appellant's caption page - 1, Jurisdiction, section I - page 2, Good Cause to VACATE PROVIDED BY BORDEN, section III, and Conclusion, section IV, page 5. The lower courts and state relied solely on SECTION 2 of Appellant's motion, POINTS AND AUTHORITIES - (Points 4) to 6)) which were nothing but a Statement of Facts.

• (see RoA, Vol. 33, 6542 - 6550) (MOTION FILED 6/27/22)

2 Title of motion did not challenge judgment of conviction for reckless crime.

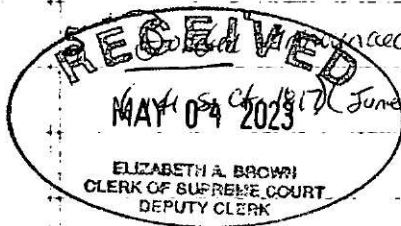
• (see RoA, Vol. 33, 6542) (Caption Page of Motion)

3 Requires only a short plain statement for claim under NRS 176.555.

4 State recognized Appellant's pleading is premised on Borden v. United States, 141 S.Ct. 1817 (2021)

• (see RoA, Vol. 33, 6573 - 6577) (STATE'S OPPOSITION 9/27/22)

5 Court announced new substantive rule making NRS 193.165 sentence illegal - MAY 04 2023 (June 10, 2021) (reckless conduct does not qualify for enhancement).



STATEMENT OF THE CASE

The Court of Appeals issued a decision on April 21, 2023 that truly only rubber stamped what the lower district court concluded who omitted O'Keefe's claim that only the weapon enhancement was now illegal based on Borden v. United States, *supra*, and misrepresented the "STATEMENT" of: POINTS AND AUTHORITIES - (POINTS a.) to f.)) as challenged alleged errors in the proceedings that occurred prior to the imposition of sentence. • (see RUA, Vol. 33 at page 6544) (Appellant's motion at page 2)

However, this Court should keenly recognize that the ORDER AFFIRMING IN PART AND DISMISSING IN PART (EXHIBIT A, attached) recognizes on page one that O'Keefe appeals from an order denying a motion to correct an illegal sentence filed on June 27, 2022'. Footnote 1 spells out the title of the motion where it becomes absolute plain error, made by the Court of Appeals, to say Appellant was challenging alleged errors in the proceedings that occurred prior to imposition of sentence when Appellant was - as by title of motion - filing a collateral motion to vacate facially illegal sentence of deadly weapon enhancement (NRS 193.165) based on constitutional sudden change in law announced June 10, 2021 affecting substantive law. The Order by the Court of Appeals attached fails to observe that O'Keefe's motion presents that until "Borden", the factual or legal basis for claim was not previously available. The court's purport and misrepresent that O'Keefe challenged his judgment when this is untrue!

REASONS FOR GRANTING THE PETITION

- 1) To achieve justice, "Borden" now holds that general intent crimes with a mens rea of reckless does not then amount to a violent felony warranting enhancement for criminal statutes.
- 2) Appellant's motion at page one, caption page, lines 23-26 read, "This action is based on 'good cause' where actual innocence is demonstrated where the illegal sentence under NRS 193.165 becomes contrary to "Borden", ...". • (see RA, Vol. 33, page 6542)
- 3) Appellant's motion at page two, Jurisdiction, lines 1-10, read, "NRS 176.555, Motion can be filed at any time. Under common-law of Nevada, Edwards v. State of Nevada, 112 Nev. 704, 708, the power § 112 Nev. 708 of the district court to correct an illegal sentence is inherent. • Passani, 108 Nev. at 321, 831 P.2d at 1372. This naturally would include a motion to vacate a sentence, that is illegal where it is at variance with the controlling sentence statute or illegal in the sense that the court goes beyond its authority by acting without jurisdiction." • (see RA, Vol. 33, page 6543)
- 4) This Court must recognize the State's Opposition obviously is put on notice and recognized that Appellant's pleading is premised on Borden v. United States, 1418 Ct. 1817 (2021) which solely concerns reckless crimes improperly enhanced. The enhancement error is so obvious it constitutes plain error / for any officer of the court to pretend they don't understand. • (see RA, Vol. 33, pg. 6575)

5. This Court holds inherent authority to recognize O'Keefe had two (2) sentences imposed on unintentional crime. A 10 to 25 year sentence for reckless crime and the now challenged illegal additional deadly weapon enhancement of 8 to 20 years. A motion to correct an illegal sentence presupposes a valid conviction where Appellant nowhere challenged the judgment of conviction for the reckless crime convicted of in his motion whatsoever.

- (see RoA, Vol. 23, pages 4659-4660) (Judgment of Conviction, case C250630)

6. This Court's decision in "WHITE" supra becomes the law of the case for related cases and supports Appellant's pro per motion to correct an illegal sentence whose function is to permit correction at any time of an illegal sentence under NRS 176.558.

7. Nevada has adopted a more liberal version of Teague v. Lane, 489 U.S. 288 (1989) where new substantive rules apply retroactively to state cases on collateral review (NRS 176.555) based on 14th Amendment - fundamental fairness and accuracy of the criminal proceedings.

- see Burnham v. Bort, 134 Nev. 814, 434 P.3d 313 (2018) citing Welch, 136 S.Ct. 1257.

8. Nev. Const., art. 1 § 2 (Paramount Allegiance to the United States) binds this court to all SCOTUS authorities, Dalgar v. USP, 87 Nev. 303 (1971)

9. Manifest injustice would result should this Court fail to resolve this miscarriage of justice where the deadly weapon enhancement is formally now an illegal additional sentence under Borden v. United States, supra, not previously available under the law.

10. This Court cannot allow the unfounded procedural bar to shadow the fact that my independent motion raised nothing but the illegal sentence determined now by "Borden".

Where Appellant's In Formal Brief raised additional statements of facts that truly occurred in the records and had nothing still to do with the individual argument premised solely now based on "Borden".

O'Keefe's pro per argument for double jeopardy was to be directed at the deadly weapon enhancement charge under NRS 193.165. On page 5 of the Informal Brief, the second error was NRS 176.555 to then go to page 6 where Appellant states - Third, that the district court completely disavowed the law of the first appeal. • (see Informal Brief filed 1/4/23, case 85610) Appellant - pro per - should be afforded liberal drafting of documents under Flannery v. Kerner, 404 U.S. 519, 520 (1972).

Ultimately, Appellant's motion was within scope of NRS 176.555 as dictated by this Court and Appellant invokes his inalienable rights for due process of law.

CONCLUSION

(GRANT PETITION FOR REVIEW) (Remand to district court)

Based on the foregoing, Appellant prays that this Honorable Court will ORDER a response from the State on the merits and announce - as a case of first impression - how Borden v. United States, *supra* effects cases based on the new substantive rule of Constitutional law applicable by the 14th Const. Amendment.

EXHIBIT "A"

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85610-COA

FILED

APR 21 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER AFFIRMING IN PART AND DISMISSING IN PART

Brian Kerry O'Keefe appeals from an order of the district court denying a motion to correct an illegal sentence and from a purported order of the district court denying a motion for judgment on the pleadings. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Motion to correct an illegal sentence

O'Keefe appeals from an order denying a motion to correct an illegal sentence filed on June 27, 2022.¹ In his motion, O'Keefe claimed his sentence is illegal because the deadly weapon enhancement should not have been imposed. Specifically, he claimed he was convicted of a reckless crime and Nevada law requires that the person receiving the deadly weapon enhancement must have used the weapon in conscious furtherance of a criminal objective. Further, he claimed he was actually innocent.

¹O'Keefe filed a "motion to vacate facially illegal sentence of deadly weapon enhancement (NRS 193.165) based on constitution sudden change in law announced June 10, 2021, effecting substantive law; hearing requested." The district court construed it as a motion to correct illegal sentence, and O'Keefe does not challenge this on appeal.

RECEIVED

MAY 8 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

COURT OF APPEALS
OF
NEVADA

10-1947B

FILED ORDER ON SEPT. 27, 2022

NOT JUNE.

EXHIBIT "A"
23-12594

A motion to correct an illegal sentence may only challenge the facial legality of the sentence: either the district court was without jurisdiction to impose a sentence or the sentence was imposed in excess of the statutory maximum. *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). "A motion to correct an illegal sentence presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occur prior to the imposition of sentence." *Id.* (internal quotation marks omitted).

X O'Keefe's claims challenged alleged errors in the proceedings that occurred prior to the imposition of sentence; therefore, his claims were outside the scope of a motion to correct an illegal sentence. Thus, we conclude the district court did not err by denying the motion. X

On appeal, O'Keefe argues that his conviction violates the Double Jeopardy Clause and the district court lacked jurisdiction to impose sentence. These claims were not raised below, and we decline to consider them on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

O'Keefe also argues the district court erred by considering the State's response to his motion. He contends that the State filed an untimely response to his motion and did not address all of the claims raised in his motion. The State received an extension of time from the district court to file a late response, and the response was sufficient to address the claims raised in the motion. Further, even assuming it was error to allow the State to file a late response, given that O'Keefe's claims were outside the scope of a motion to correct an illegal sentence, O'Keefe failed to demonstrate the alleged error affected his substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall

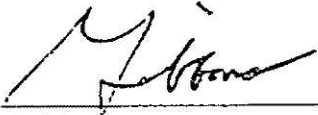
be disregarded.”). Accordingly, we conclude the district court did not err in denying O’Keefe’s motion.

Motion for judgment on the pleadings

O’Keefe also appeals from a purported order denying a motion for judgment on the pleadings. O’Keefe claims the motion was “mailed – filed 9/15/2022.” Our review of this portion of the appeal reveals a jurisdictional defect. The record on appeal reveals that no such motion has been filed in the district court, and consequently, no order exists in this case. Because O’Keefe has failed to designate an appealable order, we lack jurisdiction to consider this portion of his appeal, and it must be dismissed.

For the reasons discussed above, we

ORDER the judgment of the district court AFFIRMED and we order the appeal DISMISSED IN PART.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

²We have reviewed all documents O’Keefe has filed in this matter, and we conclude no relief based upon those submissions is warranted. To the extent O’Keefe attempts to present claims or facts in those submissions that were not previously presented in the proceedings below, we decline to consider them in the first instance. *See McNelton*, 115 Nev. at 415-16, 990 P.2d at 1275-76.

cc: Hon. Jacqueline M. Bluth, District Judge
Brian Kerry O'Keefe
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR REVIEW (Rule 40B) 1... to the below address(es) on this 1st day of May, 2023, by placing same in the U.S. Mail via prison law library staff, pursuant to NRCP 5(b):

Original: Clerk of Court
2018 Carson St.
Ste. # 201
Carson City, NV.
89701

Clerk County District Att.
200 Lewis Ave.
175 Vegas, NV. 89155

Brian K. O'Kall
Brian K. O'Kall # 90244
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

Petitioner In Pro Se

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Petition for Review... filed in Supreme Court Case No. ES610 does not contain the social security number of any person.

Dated this 1st day of May, 2023

Brian K. O'Kall
Brian K. O'Kall
Petitioner In Pro Se