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## Criminal Law; Probation Prohibited Where Deadly Weapon Used to Commit Specified Crimes

Noreen M. Evans

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trained judge is available.<sup>7</sup> The inference to be drawn from North is that a trial before a lay judge, when a right to appeal with a trial de novo before an attorney judge is unavailable, would be an unconstitutional denial of due process under the Fourteenth Amendment. If this inference is valid and since Chapter 659 permits appeal from the justice court on the record only, defendants committed by a non-attorney justice of the peace after January 1, 1980 may be granted habeas corpus when the legality of the conviction is challenged on the constitutional ground of lack of procedural due process.<sup>8</sup>

Darlynn Cassaday

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#### FOOTNOTES

1. 1979 Nev. Stats. ch. 659 §12.
2. Id. §6 (amending NRS 1.020).
3. Id. §9 (amending NRS 189.030).
4. NRS 4.370(3).
5. NRS 4.010.
6. 427 U.S. 328 (1976).
7. Id. at 339,
8. See Shum v. Fogliani, 82 Nev. 156, 158, 413 P.2d 495, 496 (1966) (remedy of habeas corpus is appropriate to test the legality of a conviction which is challenged on constitutional grounds).

#### CRIMINAL LAW; PROBATION PROHIBITED WHERE DEADLY WEAPON USED TO COMMIT SPECIFIED CRIMES

Amends NRS 193.165

SB 192 (Committee on Judiciary); STATS 1979, Ch 160

Chapter 160 amends NRS 193.165 to prohibit probation for the use of a deadly weapon in the commission of specified crimes. Chapter 160 works in conjunction with related criminal law statutes.

NRS 176.185 prohibits probation for murder, first degree kidnapping, sexual assault, and any other crimes for which probation is expressly forbidden.<sup>1</sup> NRS 176.185 applies even where the crime is not committed with a deadly weapon.<sup>2</sup>

NRS 193.165 is an enhancement law whereby a defendant committing a crime with a deadly weapon will be punished by imprisonment for term equal to and in addition to the term prescribed by law for the primary crime.<sup>3</sup>

Chapter 160 amends NRS 193.165 to be a "use a gun, go to prison" law.<sup>4</sup> For the use of a deadly weapon in the commission of any of four enumerated crimes, a defendant will not be granted probation.<sup>5</sup> The crimes Chapter 160 enumerates are murder, kidnapping, sexual assault, and robbery,<sup>6</sup> basically, the same crimes enumerated by NRS 176.185(1), with the exception of robbery.

Thus, the major effect of Chapter 160 is upon the crime of robbery. For example, if the robbery is committed without a deadly weapon, the robber can be granted probation under both NRS 176.185<sup>7</sup> and 193.165.<sup>8</sup> The enhancement provision of NRS 193.165 does not apply.<sup>9</sup> However, if the robbery is committed with a deadly weapon, the robber cannot be granted probation;<sup>10</sup> if the use of a deadly weapon is a primary element of the crime, the robber's sentence will not be enhanced.<sup>11</sup> If the robbery itself is committed without a deadly weapon, but the robber uses a deadly weapon in the getaway, for example, the robber cannot be granted probation<sup>12</sup> and the robber's prison sentence will be enhanced.<sup>13</sup>

A question often arises as to what constitutes a deadly weapon: an item may not ordinarily be deadly, but could be used in a deadly manner. "Deadly weapon" as used in NRS 193.165 is not defined. It may be left up to the jury to decide, under proper instructions, what constitutes a deadly weapon.<sup>14</sup> However, by the use of the words "firearm or other deadly weapon," the legislature has declared that a firearm is a deadly weapon; proof of its deadly capabilities is not required.<sup>15</sup>

NRS 193.165 does not create a separate offense for the use of a deadly weapon,<sup>16</sup> but provides for the mandatory<sup>17</sup> enhancement of the penalty imposed for the crime in which a deadly weapon was used. The additional penalty may be applied to each count for which the defendant is convicted.<sup>18</sup>

The Nevada Supreme Court has upheld NRS 193.165 as constitutional on several grounds. In Woofter v. O'Donnell<sup>19</sup> the law was challenged as placing the defendant in double jeopardy. However, the court found that the defendant is punished for only one crime and the statute merely provides an additional penalty for the primary offense. In the same case, the court held that the statute was not unconstitutionally

vague, because it defined the proscribed conduct.<sup>20</sup> The question of whether the legislature has usurped judicial power in making imprisonment mandatory for the use of a deadly weapon in certain crimes was addressed in Creps v. State.<sup>21</sup> There the court said that "the power to suspend sentence and grant probation springs from legislative grant rather than from the inherent powers of the court."<sup>22</sup> The amendment to NRS 193.165 removing the court's discretion to grant probation or suspend a sentence for the use of a deadly in the commission of certain crimes was thus not an abuse of legislative power.

Noreen M. Evans

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#### FOOTNOTES

1. NRS 176.185(1).
2. Id.
3. NRS 193.165(1).
4. See also CAL. PENAL CODE §§12022 and 12022.5 and FLA. STAT. §775.057 for similar laws in other jurisdictions and Simpson v. U.S., 435 U.S. 6 (1978), upholding multiple penalties for a single criminal transaction.
5. 1979 Nev. Stats. ch. 160 (hereinafter "Ch. 160") §1 (adding NRS 193.165(4)).
6. Id.
7. NRS 176.185(1).
8. Ch. 160 §1 (adding NRS 193.165(4)).
9. NRS 193.165(2) (as amended by Ch. 160 §1).
10. Ch. 160 §1 (adding NRS 193.165(4)).
11. Ch. 160 §1 (adding NRS 193.165(4)).
13. NRS 193.165(2) (as amended by Ch. 160 §1).
14. State v. McNeil, 53 Nev. 428, 436, 4 P.2d 889, 890 (1931); State v. Levigne, 17 Nev. 435, 443, 30 P.1084, 1086 (1883).
15. McRoy v. State, 92 Nev. 758, 760, 557 P.2d 1151, 1153 (1976); Stalley v. State, 91 Nev. 671 676, 541 P.2d 658, 661-662 (1975).
16. NRS 193.165(2); Raby v. State, 92 Nev. 30, 32, 544 P.2d 895, 896 (1976); Woofter v. O'Donnel, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).
17. Woofter v. O'Donnel, 91 Nev. at 762, 542 P.2d at 1400 (the word "shall" makes the application of the statute mandatory).

18. Franko v. State, 94 Nev. Adv. Op. 171, 584 P.2d 678, 680 (1978); Morrell v. State, 93 Nev. 449, 451 567 P.2d 60, 61 (1977).
19. 91 Nev. at 762, 542 P.2d at 1400.
20. Id.
21. 94 Nev. Adv. Op. 101, 581 P.2d 842 (1978).
22. Id., 581 P.2d at 848.

### CRIMINAL LAW; OBSCENITY

Adds to NRS Chapter 201

Amends NRS 201.250

AB 143 (Stewart); STATS 1979, Ch 267

Chapter 267 amends and restructures Nevada's law on obscenity by amending NRS 201.250 and adding several new sections to NRS Chapter 201.

#### Standards of Obscenity

In response to the United States Supreme Court's decision in Miller v. California,<sup>1</sup> NRS 201.250 has been amended.<sup>2</sup> Prior law<sup>3</sup> applied the tests created in Roth v. U.S.<sup>4</sup> and Memoirs v. Massachusetts.<sup>5</sup> Chapter 267 discards the Roth-Memoirs tests and incorporates the Miller standards.<sup>6</sup> Now obscenity is defined as that which, taken as a whole, appeals to prurient interests and lacks serious literary, artistic, political, or scientific value.<sup>7</sup> This standard is measured by the average person applying contemporary community standards.<sup>8</sup>

Chapter 267 further incorporates the examples of obscenity suggested in Miller<sup>9</sup> and in Ward v. Illinois.<sup>10</sup> Material is obscene if it lewdly exhibits the genitals<sup>11</sup> or depicts in a patently offensive way a) ultimate sexual acts;<sup>12</sup> b) masturbation or excretory functions;<sup>13</sup> or c) sadism or masochism.<sup>14</sup>

#### Procedure

Chapter 267 adds several provisions to NRS Chapter 201. Those new sections provide both civil and criminal procedures for the prosecution of obscenity.