

**FILED**  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

MICHAEL S. RICHIE  
CLERK

RODNEY EUGENE DORSEY,  
  
PETITIONER,

**P R - 2008 - 7997**

-vs.-

Case No. \_\_\_\_\_

THE HONORABLE  
WILLIAM KELLOUGH,  
DISTRICT JUDGE FOR TULSA COUNTY,  
STATE OF OKLAHOMA,

(TULSA COUNTY CASE NO.  
CF 2008-1601)

RESPONDENT.

**PETITION FOR WRIT OF PROHIBITION**

Petitioner, through counsel, Kevin Adams, requests an order from this Honorable Court prohibiting the Respondent, the Honorable William Kellough, District Judge for Tulsa County, from using a sentencing range of six (6) years to life for the Petitioner's simple possession of marijuana charge in violation of Title 63 O.S. 2-402 (B)(2). The behavior the Petitioner is charged with would be a misdemeanor if it were not for a previous marijuana conviction. In support of this petition, counsel for the Petitioner shows the Court the following:

**Statement of Facts**

The Petitioner is charged with violating Title 63 O.S. 2-402 (B)(2) by possessing marijuana, the Petitioner is not accused of possession with intent to distribute, only simple possession. The behavior the Petitioner is charged with would be a misdemeanor if it were not for a previous marijuana conviction.

On June 26, 2008 Counsel for the Petitioner filed a *Request for Clarification of Applicable Sentencing Range*. Counsel filed the request for applicable sentencing range

because it was Counsel's belief and understanding that second and subsequent simple possession of marijuana in violation of Title 63 O.S. 2-402 (B)(2) carried a sentence of from 2 years in Doc to 10 years in DOC. However, the attorney representing the state of Oklahoma in the Petitioner's case told counsel, that it was the position of the Tulsa County District Attorney's Office that this offense was subject to enhancement under the provisions of the habitual offender act and therefore carried a sentencing range of from 6 years to life for the Petitioner. Upon further inquiry counsel learned that the Respondent in this matter agreed with the Tulsa County District Attorney's Office and routinely advised defendants who appeared in front of him that were charged with violation of this statute that their offense was subject to enhancement under the habitual offender's act.

On July 24, 2008 after hearing arguments from the petitioner and the State of Oklahoma the Court indicated its intention to rule that the habitual offender's act applied to Title 63 O.S. 2-402 (B)(2). On August 20, 2008 the Court entered an order declaring that the Court had determined the Title 63 O.S. § 2-402 (B)(2) was subject to the enhancement provisions of the habitual offender act, Title 21 O.S. § 51.1, and the applicable sentencing guideline for the Petitioner was from 6 years to life; because of the Petitioner's two prior non-title 63 convictions.

### **Overview of the Legal Argument**

Title 63 O.S. § 2-402 (B) (2) provides that a first time possession of marijuana is a misdemeanor but that a second and subsequent offense is a felony punishable by two to ten years in prison.

In *Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022 the defendant was convicted of Larceny of Controlled Drugs, AFCF, in violation of Title 63 O.S. § 2-403 and sentenced under the Habitual Offender Act to 50 years in prison. The conviction was reversed and remanded to district court. In the *Faubion* case this Court cited Title 21 O.S. § 11 and determined that the specific provisions of Title 63 O.S. § 2-403 controlled and that statute provided the specific punishment range that was applicable for the defendant in that case.

In the present case the Petitioner is charged not under Title 63 O.S. § 2-403, but under Title 63 O.S. § 2-402. However, both statutes provide a specific punishment provision for second a subsequent offenses. In the *Faubion* case the statute provided a punishment range of;

A second or subsequent offense under this section is a [569 P.2d 1025] felony punishable by imprisonment for not less than four (4) nor more than twenty (20) years.

*Faubion v. State*, 1977 OK CR 302, 569 P.2d 1022, 1024.

In the present case the statute provides a specific punishment range of from 2 to 10 years. Under the reasoning of the *Faubion* case counsel believes that the present case carries a punishment range of from two to ten years.

Also in the *Clopton* case this Court cited Title 21 O.S. § 11 in determining that the specific punishment provision of the statute controlled over the general punishment provision of the Habitual Offender Act. Just as in the *Clopton* case the Petitioner stands accused of violating Title 63 O.S. § 2-402 after a prior Uniform Controlled Substance Act Conviction.

As stated by this Court in the *Jones* case; “Under such circumstances, the prosecution must make an election as to which enhancement it wishes to pursue.” *Jones v. State, 1990 OK CR 17, 789 P.2d 245, 247*. In the present case the state cannot choose to enhance under the Habitual Offender Act because if the state so chose, the offense the Petitioner is charged with would be a misdemeanor. The Respondent with his ruling has allowed the state to enhance the Petitioner’s punishment twice; once from a misdemeanor to a felony and a second time under the habitual offender act. The Respondent’s ruling allows the state to take an offense that would originally be a misdemeanor and enhance it to the point that the offense would carry a life sentence.

As described in Title 63 O.S. § 2-402 (B)(2):

Any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is guilty of a misdemeanor punishable by confinement for not more than one (1) year. A second or subsequent violation of this section with respect to any Schedule III, IV or V substance, marihuana, a substance included in subsection D of Section 2-206 of this title, or any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act is a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years.

(See Title 63 O.S. § 2-402 (B) (2))

First offense possession of marijuana is a misdemeanor, a second or subsequent violation or possession of marijuana is a felony. As stated in the *Jones* case “This Court has held that when both the predicate and the new offense are drug offense, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act”. *Jones v. State, 1990 OK CR 17, 789 P.2d 24, 247*. The predicate offense for felony possession of marijuana is a prior drug offense; therefore,

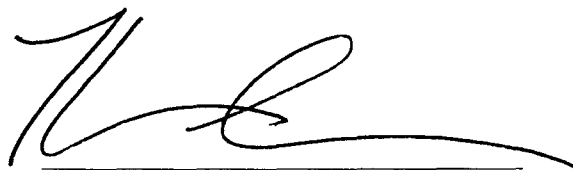
counsel believes that any enhancement must be made under the Uniform Controlled Substances Act. It is not permissible for the state to enhance under both Title 63 and Title 21. That is what the state would have to do to enhance a simple possession of marijuana charge under the Habitual Offender Act. The Respondent would have to allow the state of Oklahoma to enhance once to get the offense to a felony and then enhance a second time under Title 21 O.S. § 51.1 to get the punishment range to 6 years to life.

Petitioner submits that there is a legal basis for granting the Writ of Prohibition as set forth more particularly in the Brief in Support of Petition for Writ of Prohibition filed simultaneously with the Petition for a Writ of Prohibition. Attached to this Petition for a writ of prohibition, as exhibit A, is a certified copy of the adverse order as required by Oklahoma Court of Criminal Appeals Rule 10.5 (3).

Petitioner's Counsel states that this matter is ripe for this Court's review, and a writ is absolutely essential to avert prejudice to the Petitioner's fundamental rights, which no other remedy can suffice to protect. 22 O.S.1991, Ch. 18, App., Rule 10, Rules of the Court of Criminal Appeals; Cunningham v. District Court, 432 P.2d 992, 997 (Okl.Cr. 1967); Pate v. District Court, 414 P.2d 567, 569 (Okl.Cr. 1966). Petitioner's Counsel also states the trial court is about to exercise its judicial or quasi-judicial power in a manner that is unauthorized by law and because of the Court's exercising of its power in a manner unauthorized by law the Petitioner is deprived of his ability to make a knowing and voluntary decision regarding how to proceed with the charges against him. Counsel for the Petitioner cannot intelligently advise his client regarding the punishment that the Petitioner would be facing if he proceeded to jury trial or entered a plea to the offense charged until this issue is resolved.

Counsel for the Petitioner has filed a designation of record with the Tulsa County Court Clerk and will ensure the record is filed with this Court within 30 days of the date the trial court's order was signed in accordance with Rule of the Oklahoma Court of Criminal Appeals 10.1 (C). Counsel was informed by the Appeal clerk for the Tulsa County Court Clerk's Office that the record in this matter would be available for Counsel to check out and transmit to the Court sometime the week of August 25<sup>th</sup>. A certified of the Notice of Intent to Appeal and Designation of Record filed in the district court is attached to this petition as exhibit B.

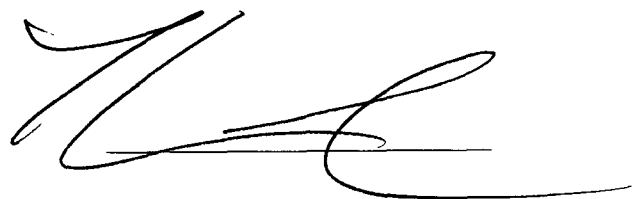
Respectfully submitted,



Kevin D. Adams, OBA# 18914  
406 S Boulder Ave, Suite 400  
Tulsa, OK 74103  
Office (918) 582-1313  
Facsimile (918) 582-6106

#### **CERTIFICATE OF MAILING**

This is to certify that on August 21, 2008, a copy of the foregoing Petition for Writ of Prohibition was mailed to Michael Richie, Clerk of the Oklahoma Court of Criminal Appeals, State Capitol Bldg., 2300 N. Lincoln, Room B-2, Oklahoma City, OK 73105 with sufficient postage thereon fully prepaid.



Kevin D. Adams

**CERTIFICATE OF DELIVERY**

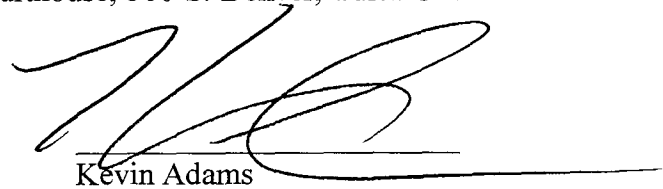
This is to certify that on the 21st day of August, 2008, a true and correct copy of the foregoing Petition for Writ of Prohibition was delivered to Respondent, the Honorable William Kellough, Tulsa County District Judge, Tulsa County Courthouse, 500 S. Denver, Tulsa OK 74103.



Kevin Adams

**CERTIFICATE OF DELIVERY**

This is to certify that on the 21st day of August, 2008, a true and correct copy of the foregoing Petition for Writ of Prohibition was delivered to Jack Thorp, Assistant District Attorney for Tulsa County, Tulsa County Courthouse, 500 S. Denver, Tulsa OK 74103.



Kevin Adams

# Exhibit A



DISTRICT COURT  
**FILED**

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY     AUG 21 2008  
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

Plaintiff,

v.

Case No. CF-2008-1601  
Judge William Kellough

RODNEY EUGENE DORSEY,  
Defendant.

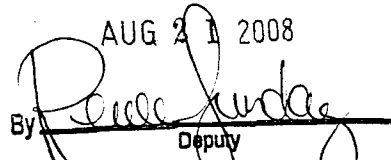
**ORDER DETERMINING SENTENCING GUIDELINE RANGE**

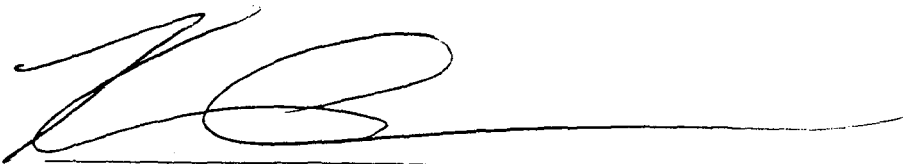
NOW ON this 20th day of August, 2008, this matter comes before me, the undersigned Judge of the District Court in and for Tulsa County, Tulsa, Oklahoma, by Motion of the attorney for the defendant, and the Court, after being fully advised, and after a previous hearing in which the Court heard the arguments of the parties and DENIES the request of the Defendant to determine that the appropriate guideline range for the defendant is two (2) to ten (10) years. Instead this Court finds that the appropriate sentencing range for the defendant is from six (6) years to life. The Court specifically finds that because the defendant has two or more prior non-drug-related offenses, then under Title 21 O.S. § 51.1, that the two (2) years to ten (10) years should be modified to two (2) years times three (3) as the minimum, which is six (6) years to life.

  
THE HONORABLE WILLIAM KELLOUGH

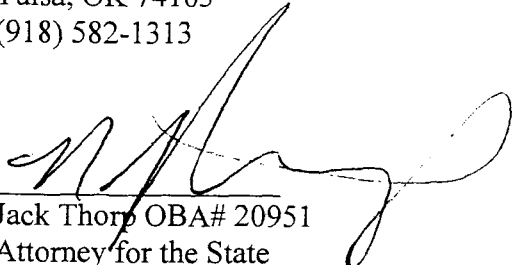
Approved as to form by:

I, Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this

AUG 21 2008  
By   
Deputy



Kevin D. Adams OBA#18914  
Attorney for the Defendant  
406 S Boulder Ave, Suite 400  
Tulsa, OK 74103  
(918) 582-1313



Jack Thorp OBA# 20951  
Attorney for the State  
500 S Denver Ave  
Tulsa, OK 74103

# Exhibit B

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

DISTRICT COURT  
**FILED**

Case No. CF-2008-1601  
Judge William Kellough

AUG 21 2008

RODNEY EUGENE DORSEY,

Defendant.  
SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

**NOTICE OF INTENT TO APPEAL AND DESIGNATION OF RECORD**

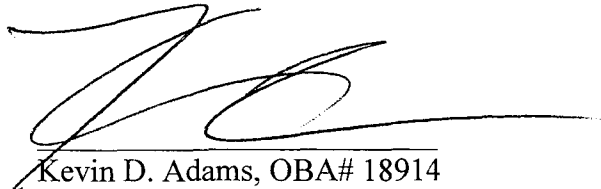
Comes Now, Rodney Dorsey, through his attorney, Kevin Adams, and gives notice of the defendant's intent to seek extraordinary relief, from the trial court's Order DETERMINING SENTENCING GUIDELINE RANGE entered on August 20, 2008, in the Oklahoma Court of Criminal Appeals in accordance with Rule 10 of the Oklahoma Court of Criminal Appeals. Furthermore, counsel for the Defendant makes the following designation of record in relation to the filing of this Writ of Prohibition:

1. A certified copy of all the Informations filed herein. (04/07/2008 Original Information and 05/08/2008 Amended Information)
2. A certified copy of the docket sheet filed herein.
3. A certified copy of the Defendant's Request for Clarification of Applicable Sentencing Range for Possession of Marijuana Second Offense filed June 26, 2008.
4. A certified copy of the Defendant's BRIEF CONCERNING REQUEST FOR CLARIFICATION OF APPLICABLE SENTENCING RANGE FOR POSSESSION OF MARIJUANA SECOND OFFENSE filed July 16, 2008.
5. A certified copy of the Defendant's SUPPLEMENTAL BRIEF CONCERNING REQUEST FOR CLARIFICATION OF APPLICABLE SENTENCING RANGE FOR POSSESSION OF MARIJUANA SECOND OFFENSE filed July 17, 2008.

6. A certified copy of the STATE'S RESPONSE TO DEFENDANT'S REQUEST FOR CLARIFICATION OF APPLICABLE SENTENCING RANGE FOR POSSESSION OF MAJIJUANA SECOND OFFENSE filed on July 22, 2008.
7. A transcript of the hearing held on July ~~22~~<sup>24<sup>th</sup></sup>, 2008.
8. A certified copy of the ORDER DETERMINING SENTENCING GUIDELINE RANGE filed August 21, 2008.

The Defendant hereby requests the District Court Clerk to assemble the partial record enumerated above and upon completion, to forward said partial record to the Court of Criminal Appeals in connection with the Defendant's writ seeking extraordinary relief.

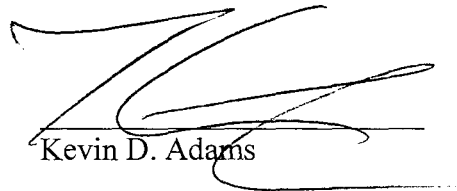
Respectfully submitted,



Kevin D. Adams, OBA# 18914  
406 S Boulder Ave, Suite 400  
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Facsimile (918) 582-6106

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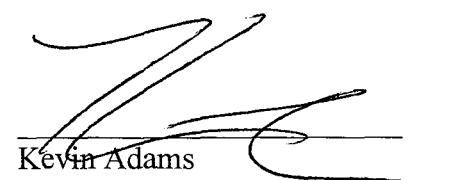
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Kevin D. Adams

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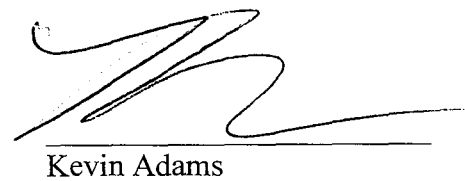
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Kevin Adams

**CERTIFICATE OF DELIVERY**

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Kevin Adams

*I, Sally Howe Smith, Court Clerk, for Tulsa County, Oklahoma, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out as appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this*

AUG 21 2008

By Lisa A. Walden  
Deputy