

IN THE SUPREME COURT OF THE STATE OF NEVADA

RIKKY WAYNE GUTIERREZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49517

**FILED**

AUG 22 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order revoking probation. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On April 6, 2005, the district court convicted appellant Rikky Wayne Gutierrez, pursuant to a guilty plea, of one count of aiming a firearm at a human being. The district court sentenced Gutierrez to 365 days flat time in the county jail,<sup>1</sup> suspended execution of the sentence, and

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<sup>1</sup>See Haney v. State, 124 Nev. \_\_\_, \_\_\_, 185 P.3d 350, 352 (2008) (“A flat time sentence is a form of determinate sentencing . . . whereby the offender must serve the exact penalty imposed without the ability to earn credits, while incarcerated, towards early release.”).

placed Gutierrez on probation for a period not to exceed three years. Gutierrez did not file a direct appeal.

On May 8, 2007, following a probation revocation hearing, the district court revoked Gutierrez's probation and imposed the original sentence with credit for time served. This timely appeal follows.

Gutierrez contends that the district court erred by sentencing him to 365 days flat time. Gutierrez argues that (1) no statute or rule allows for the imposition of a flat time sentence, and (2) the imposition of a flat time sentence is unconstitutional because it violates the separation of powers doctrine.

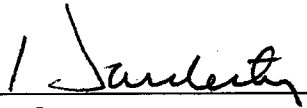
Gutierrez's contention is not appropriately raised in this appeal from an order revoking probation and, therefore, will not be addressed. We have repeatedly stated that "claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings."<sup>2</sup> Having concluded that

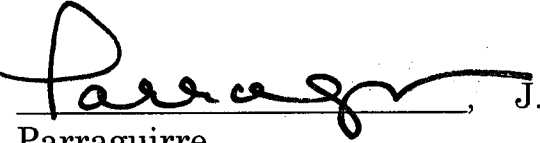
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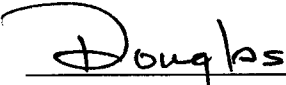
<sup>2</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Gutierrez waived his right to raise this issue by failing to pursue it in a direct appeal,<sup>3</sup> we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>3</sup>In Haney, this court stated that “there is no statutory basis for flat time sentencing” and noted that “the Legislature has clearly evinced its intention to confer authority upon the sheriff’s office to determine whether an individual inmate is eligible for good time [and work time] credits and that allowing flat time sentencing is contrary to that intent.” 124 Nev. at \_\_\_, \_\_\_, 185 P.3d at 352, 353. In Gutierrez’s case, a motion to correct an illegal sentence, filed in the district court, would be the appropriate vehicle for him to challenge the legality of his sentence. See NRS 176.555; Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

cc: Hon. Donald M. Mosley, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk  
Rikky Wayne Gutierrez