

ALECK EUGENE RABY, Appellant, v. THE STATE OF NEVADA, Respondent
Supreme Court of Nevada
92 Nev. 30; 544 P.2d 896; 1976 Nev. LEXIS 507
No. 8184
January 23, 1976

Editorial Information: Prior History

Appeal from judgment entered upon jury verdict finding appellant guilty of five counts of robbery and five counts of use of a deadly weapon in commission of a crime; Eighth Judicial District Court, Clark County; Paul S. Goldman, Judge.

Disposition:

Robbery convictions affirmed; use of a deadly weapon in commission of a crime convictions annulled.

Counsel

Oshins, Brown & Singer, Chartered, and A. Bill Maupin, of Las Vegas, for Appellant.
George E. Holt, District Attorney, H. Leon Simon, and Rimantas A. Rukstale, Deputy District Attorneys, Clark County, for Respondent.

Opinion

Opinion by: PER CURIAM

Opinion

{92 Nev. 31}{544 P.2d 896} The information charged Raby with the commission of ten separate crimes -- five robberies on the same day and at the same place, and the use of a firearm in the commission of each robbery. The jury found him guilty of ten separate offenses and returned ten verdicts. Judgment of conviction was entered upon each verdict. He was sentenced to serve concurrent terms of ten years on each robbery conviction, and concurrent terms of ten years on each "use of firearm in the commission of a crime" conviction, with the provision, however, that the first ten-year sentence for use of a firearm in the commission of a crime was to run consecutively to the first ten-year sentence for robbery.

{92 Nev. 32} Since the use of a firearm or other deadly weapon in the commission of a crime [NRS 193.165] is not a separate criminal offense [Woolter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975)], the five convictions therefor must be and hereby are annulled. However, since the evidence is overwhelming that Raby did, indeed, commit the five robberies as charged, and that he used a firearm in the commission of each robbery, we shall treat the ten-year consecutive sentence imposed

EIGHT

for using such firearm as the enhanced penalty mandated by NRS 193.165.

Consequently, Raby shall serve concurrent terms of ten years on each robbery conviction, and a consecutive term of ten years for using a firearm in the commission of the robberies.

Other assigned errors are without merit.

Kristina this appears to contemplate a single 10 years for using a firearm?

None of this matches the J.O.C.



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**EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT**

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd FL.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D Grierson
Clerk of the Court

November 21, 2022

Patricia Adkisson
702-505-2861

Dear Sir or Madam:

Your copy request cannot be completed for the following reason(s):

- Case file is not available at this time.
- Incorrect case number was provided.
- Copy requests must be paid for in advance. See attached price list.
- Document(s) requested are not available.
- Request is not legible.
- Insufficient information was provided.
- Other: No Amended Judgment of Conviction filed in case C027622 as of 11/20/2022.

DO, Deputy Clerk

NINE

FILED

1 CASE NO. 27622

JAN 15 11 02 AM '75

LOUIE A. LOWMAN
CLERK

BY *J. C. ...*

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4
5 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6 IN AND FOR THE COUNTY OF CLARK.

7
8 THE STATE OF NEVADA,
9 Plaintiff,
10 vs.
11 ALECK EUGENE RABY,
12 Defendant.

JUDGMENT OF CONVICTION

13 WHEREAS, on the 8th day of April, 1974, Defendant ALECK
14 EUGENE RABY, entered a plea of not guilty to the crime of
15 ROBBERY (five counts) and USE OF A DEADLY WEAPON IN COMMISSION OF
16 A CRIME (five counts), NRS 200.380 and 193.165, and the matter
17 having been tried before a jury and Defendant found guilty of
18 the crime ROBBERY (five counts), and USE OF A DEADLY WEAPON IN
19 COMMISSION OF A CRIME (five counts), the above entitled Court
20 thereafter, on the 14th day of January, 1975, did adjudge
21 Defendant guilty of said crime of ROBBERY (five counts), and USE
22 OF A DEADLY WEAPON IN COMMISSION OF A CRIME (five counts), and
23 sentenced Defendant to serve a term of ten (10) years in the
24 Nevada State Prison, on Count I, with 329 days credit for time
25 served in the Clark County Jail; ten (10) years in the Nevada
26 State Prison, on Count VI, to run consecutively with Count I;
27 ten (10) years each in the Nevada State Prison, on Counts II, III,
28 IV & V, to run concurrently with sentence imposed in Count I, and
29 each other; and ten (10) years each in the Nevada State Prison,
30 on Counts VII, VIII, IX & X, to run concurrently with sentence
31 imposed in Count VI, and each other.

32 THEREFORE, the Clerk of the above entitled Court is hereby



1 directed to enter this Judgment of Conviction as part of the
2 record in the above entitled matter.

3 DATED this 16 day of January, 1975, in the City of
4 Las Vegas, County of Clark, State of Nevada.

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DISTRICT JUDGE

74-F-476/am
LVMPD DR# 74-5530

1 CASE NO. 27877
2 DEPT. X

FILED
JAN 25 10 37 AM '77

LORETTA BOWMAN
CLERK

3
4
5 IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6 IN AND FOR THE COUNTY OF CLARK.

7
8 THE STATE OF NEVADA,
9 Plaintiff,
10 -vs-
11 ALECK EUGENE RABY
12 Defendant.

A M E N D E D
J U D G M E N T O F C O N V I C T I O N

13 WHEREAS, on the 23rd day of May, 1975, Defendant
14 ALECK EUGENE RABY, entered a plea of guilty to the
15 crime of ROBBERY

16 _____, NRS 200.380,
17 the above entitled Court thereafter, on the 23rd day of June,
18 1975, did adjudge the Defendant guilty by reason of his plea
19 of guilty and sentenced Defendant to serve a term of fifteen
20 (15) years in the Nevada State Prison, to run concurrently with
21 second sentence imposed in Case No. 27622. Defendant is to
22 receive credit for time served in the Clark County Jail.

23
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27 THEREFORE, the Clerk of the above entitled Court is hereby
28 directed to enter this Judgment of Conviction as part of the
29 record in the above entitled matter.

30 DATED this 24 day of January, 19 77, in the
31 City of Las Vegas, County of Clark, State of Nevada.

32 74-F-564/dw
LVMPD DR#74-4875


DISTRICT JUDGE



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56

pg 3-5 sentence cant exceed statutory maximum of underlying crime
Min. Max. Death Sent only

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fourth Session
May 31, 2007**

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:16 a.m. on Thursday, May 31, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

- Senator Mark E. Amodei, Chair
- Senator Maurice E. Washington, Vice Chair
- Senator Mike McGinness
- Senator Valerie Wiener
- Senator Steven A. Horsford

COMMITTEE MEMBERS ABSENT:

- Senator Dennis Nolan (Excused)
- Senator Terry Care (Excused)

STAFF MEMBERS PRESENT:

- Linda J. Eissmann, Committee Policy Analyst
- Brad Wilkinson, Chief Deputy Legislative Counsel
- Gale Maynard, Committee Secretary

CHAIR AMODEI:

The work session is opened on Assembly Bill (A.B.) 510.

ASSEMBLY BILL 510 (2nd Reprint): Makes various changes concerning credits earned by offenders and the incarceration and supervision of offenders. (BDR 16-1377)

CHAIR AMODEI:

The Committee previously discussed the Open Meeting Law situation and in concept provided some charges to the Committee on criminal justice. The purpose of today's work session is to consider the enhancement language in

TEEN

Senate Committee on Judiciary
May 31, 2007
Page 2

A.B. 416 that revises the enhancement and provides discretion to sentencing judges.

ASSEMBLY BILL 416 (1st Reprint): Makes various changes to provisions concerning the Department of Corrections. (BDR 16-190)

The staff prepared a mock-up amendment in the context of A.B. 63 which set a range of 1 to 20 years for the enhancement.

ASSEMBLY BILL 63 (2nd Reprint): Revises provisions governing the additional penalty for the use of certain weapons in the commission of crime. (BDR 15-151)

The mock-up amendment (Exhibit C) requires sentencing judges to be more communicative regarding their discretion and provides the following language:

In determining the length of the additional penalty imposed, the court shall consider the following information:

- (a) The facts and circumstances of the crime;
- (b) The criminal history of the person;
- (c) The impact of the crime on any victim;
- (d) Any mitigating factors presented by the person; and
- (e) Any other relevant information.

The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

There is also cleanup language that says the enhancement cannot exceed the term for the underlying crime.

Sections taken out of A.B. 416 (Exhibit D) talked about a one- to ten-year range as an enhancement of various incendiary crimes which are committed:

- MR3.193.165 • With a deadly weapon or tear gas;
- With a handgun containing a metal-penetrating bullet;
- By adult with assistance of a child;
- RS.193.161 • On school property, at school-sponsored activity or on a school bus;
- In violation of an order for protection or to restrict conduct;
- Against older or vulnerable people;

MINUTES OF THE MEETING
OF THE
ASSEMBLY SELECT COMMITTEE ON CORRECTIONS, PAROLE, AND
PROBATION.

Seventy-Fourth Session
April 12, 2007

The Select Committee on Corrections, Parole, and Probation was called to order by Chair David R. Parks at 3:59 p.m., on Thursday, April 12, 2007, in Room 3161 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman David R. Parks, Chair
Assemblyman Bernie Anderson, Vice Chair
Assemblyman John C. Carpenter
Assemblyman William Horne
Assemblywoman Kathy McClain
Assemblywoman Valerie E. Weber

STAFF MEMBERS PRESENT:

Mark Stevens, Fiscal Analyst
Craig Hoffecker, Committee Policy Analyst
Matt Nichols, Committee Counsel
Deanna Duncan, Committee Manager
Brooke Bishop, Committee Secretary
Olivia Lloyd, Committee Assistant

Minutes ID: 872



Senate Committee on Judiciary
May 31, 2007
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- As hate crimes;
- To promote gang activities; and
- As an act of terrorism.

I informed Assemblyman David R. Parks the Committee has no objection to returning some discretion to sentencing judges in the context of the mock-up amendment. Rather than a 1- to 10-year range, we will do 1 to 20 years which covers all ranges up through Category B felonies, with underlying language the sentence cannot be enhanced more than the maximum. Therefore, judges' discretion will be the full range of the underlying sentence subject to the findings.

Even though it is 1 to 20 years, if the underlying crime has a maximum sentence of 10 years, then the maximum potential enhancement is 10 years. The 1- to 20-year range allows a range similar to the underlying crime.

What are the Committee members' thoughts on the discretionary piece or changing the A.B. 416 provisions from a range of 1 to 10 years to 1 to 20 years to cover Category B through Category E felonies?

SENATOR MCGINNESS:

I am comfortable the language will give judges more discretion. I was in the Legislature when the truth-in-sentencing law was passed and I do not want to see it unraveled. Part of the reason the truth-in-sentencing law passed was due to egregious cases that caused the public to demand it. I hope judges will use their discretion to help the correctional system make more realistic sentences for some offenders.

SENATOR WASHINGTON:

I support 1 to 20 years. We heard testimony on A.B. 416 and A.B. 510 from individuals whose loved ones have been incarcerated and subject to the State Board of Parole Commissioners. When we worked on truth in sentencing, we heard testimony from victims who were themselves violated or lost loved ones to heinous and devastating crimes. At that time, crime was the No. 1 issue. We created legislation that allowed judges discretion but never gave forthright answers to victims as to the length of time perpetrators would be incarcerated depending upon good time credits and time spent in local or county jail before transport to prison based on the judge's sentencing.



Amendment 26 deals with crime enhancement penalties. It amends Sections 26 through 34 to make sure the enhancement penalties do not exceed the penalty for the underlying crime.

Assemblyman Horne:

I am assuming those are when they are in aggregate. You can have an underlying crime and have multiple enhancements. Theoretically, if you had a two-to-five year penalty for an underlying crime, you could have a weapons enhancement and a gang enhancement, and then your enhancements would end up equaling more than the underlying penalty.

Matt Nichols:

This recommendation, from the way I read it, would require some language in each of these sections to specify that the maximum term of not more than ten years would not exceed the maximum term for the underlying offense. We can obviously change that to take into consideration Mr. Horne's concern about the aggregate amount of the enhanced penalties not exceeding the length of the underlying sentence if that is something you wish to do.

Assemblyman Horne:

My concern and, from my understanding, that of the Washoe County and the Clark County Public Defenders' offices, is in making the recommendation regarding enhancements so that an offender, for example, does not get a two-to-five year sentence and ends up, with enhancements, getting four-to-ten years instead.

Assemblyman Anderson:

I think Mr. Horne has clearly outlined what the choices are here. I would hate to endanger the bill by putting that particular element in there. While I think it is an important part of the overall bill, and I realize this is going to be an omnibus bill, are there not a couple of measures in Judiciary that we are trying to do this with?

Assemblyman Horne:

We have a bill in this committee tomorrow that deals with weapon enhancements.

Assemblyman Anderson:

I guess we can add that language here. I would support that because I think it is one of the overall issues that deal with the unintended consequences of the enhancements we passed. That has, in effect, ramped up the length of time people are staying incarcerated beyond what the primary offense was. If we had approached the primary offense with a realistic sentence, then these

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enhancements would not be so prevalent in the current district attorneys' choices. They take every enhancement they can use. As a result, they have overused them. Our problem is that we have moved so far to one side, moving to the other and finding middle ground will be very, very difficult. There is a middle ground that needs to be located. Leave it in, and we will see what happens.

Matt Nichols:

I just wanted to clarify for drafting purposes that not only will there be new language in each of these sections but the consecutive additional sentence will not exceed the length of the sentence for the underlying crime, and the aggregate amount of the consecutive sentences cannot exceed the length of the sentence for the underlying crime. Is that the intent?

Assemblyman Anderson:

Let me make sure I understand. If the judge finds an offender guilty of a category B or C felony, and the minimum/maximum is 2 to 20 years, and for the crime itself he gives the offender a sentence of ten years, then for each of the underlying enhancements he cites, they would not be able to extend it beyond 20 years in the cumulative because that was the maximum which is allowed under that particular statute.

Matt Nichols:

That is how I understand Mr. Horne's request.

Assemblyman Anderson:

I just want to make sure we all understand what the cumulative effect is. It is not going to be able to push a sentence out to 30 years if the maximum for that particular crime was 2 to 20 years. The maximum you could possibly get would be the 20 years. As an offender paroled out of each of those along the way it is possible he will be there, depending on the number of enhancements, the entire 20 years.

Assemblyman Horne:

I want to make sure that when we are talking about penalties, we are talking about the underlying sentence imposed by the judge. We are not referring to the penalty a particular crime carries by statute. We are going by what sentence was imposed. There are sentences where you can get up to a life sentence because its statutorily permissible, but an offender only ends up getting two to ten years; however, the enhancements can go on forever because what is on the books says "life." I do not think that is the intent of what we want. It should be what is imposed by the judge.

*MINOR
DISCRETIONARY
SENT RANGES
ONLY*

*Life Sentences ARE CATEGORY A AND
ARE EXCLUDED because there is NO RANGE*


April 12, 2007

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Matt Nichols:

Just to go over this one more time, to get it right. To go back to Mr. Anderson's example, if the defendant is sentenced to a term of 10 years for a crime where a sentence of 20 years could be imposed, the additional penalty would still be based on the ten years that was imposed by the judge. If you had two sentence enhancements, such as a firearm and a gang-related enhancement, those together could only equal ten years, which, in the aggregate, would match the sentence imposed for the underlying crime. If you only had a single enhancement it could be as long as ten years.

 **Chair Parks:**


The next recommendation is Amendment 27, which deals with administrative regulations. It amends the bill to remove the exemption of the Department of Corrections for most provisions of the Administrative Procedures Act.

 **Matt Nichols:**

Mr. Anderson touched on this briefly earlier when he mentioned that the regulations for Department of Corrections' facilities are not reviewed by the Legislative Commission. I think the intent here is to take the Department of Corrections out of that statute, which exempts them from the Administrative Procedures Act. There would be other ramifications as well, such as the Legislative Commission being in a position to approve the regulations adopted by the Department of Corrections. The reference is in NRS 233B.039 which reads in subsection 1, "The following agencies are entirely exempted from the requirements of this chapter," which is the Administrative Procedures Act. The entities involved would be the Governor, the Department of Corrections, the Nevada System of Higher Education, the Office of the Military, and the State Gaming Control Board. There are limited exceptions for other departments, as well.

 **Assemblyman Horne:**

I think at this juncture it might be a bit overreaching. I do not think we are there yet. We are trying to make some moves but I do not think we are able to start having them report to the Legislative Commission.

 **Chair Parks:**

We will pass on Amendment 27. We do not need to revisit Amendment 28. Amendment 29 deals with providing greater access to Casa Grande. As you are aware, we are only utilizing half of the housing facility at Casa Grande because of restrictions we imposed. This would remove those restrictions.

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ELEVEN

THE FOLLOWING FROM NCJIS CRIMINAL JUSTICE IS A RESULT OF YOUR SQCH INQUIRY ON:
NAM/ [REDACTED] DOB/ [REDACTED]

NCJIS BASE RECORD

NAME: [REDACTED]
DOB: [REDACTED]
RACE: WHITE SEX: M HEIGHT: 509 WEIGHT: 210
HAIR: RED OR AUBURN EYES: BROWN

ALIAS NAMES:
[REDACTED]
[REDACTED]

POB: CA

ADDRESS:
[REDACTED]
[REDACTED]

SID: [REDACTED]
FINGERPRINTS ARE AVAILABLE.

=====
CRIMINAL HISTORY RECORD PCN/ [REDACTED]
FINGERPRINT BASED RECORD

ARREST DATE: 2004-02-19
ARRESTING AGENCY: CLARK COUNTY DETENTION CENTER ORI: [REDACTED]
NAME USED: [REDACTED]
OCA: [REDACTED]

BOOKING AGENCY: CLARK COUNTY DETENTION CENTER ORI: [REDACTED]

ARREST OFFENSE
1: MURDER WITH A DEADLY WEAPON FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00093 NCIC: 0912

COURT/FINAL CHARGE
1: MURDER IN THE SECOND DEGREE FELONY
NEVADA STATUTE NRS 200.030 NV OFFENSE CODE: 00094 NCIC: 0999
EIGHTH JUDICIAL DISTRICT COURT ORI: [REDACTED]

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-12-06
CASE #: 04F03106X
NAME USED: [REDACTED]

SENTENCE DATE: 2004-12-06 FACILITY: NEVADA STATE PRISON
SENTENCE: LIFE WITH POSSIBILITY OF PAROLE

CREDIT TIME SERVED:

YEARS: MOS: DAYS: 252 HOURS:

SPECIAL CONDITIONS: YES

RECORD CREATED: 2004-02-19 07:02:46 LAST UPDATED: 2019-08-29 13:09:44

CRIMINAL HISTORY RECORD PCN/ [REDACTED]
FINGERPRINT BASED RECORD

ARREST DATE: 2001-08-21

ARRESTING AGENCY: LAS VEGAS METROPOLITAN POLICE ORI: [REDACTED]

NAME USED: [REDACTED]

OCA: [REDACTED]

ARREST OFFENSE

1: BATTERY/DOMESTIC VIOLENCE MISDEMEANOR
NEVADA STATUTE NRS 200.485 NV OFFENSE CODE: 02138 NCIC: 1399

COURT/FINAL CHARGE

1: BATTERY MISDEMEANOR
NEVADA STATUTE NRS 200.481 NV OFFENSE CODE: 00145 NCIC: 1399
LAS VEGAS MUNICIPAL COURT ORI: [REDACTED]

DISPOSITION: PLEAD GUILTY DISPOSITION DATE: 2004-01-20
CASE #: C-0497567-A
NAME USED: [REDACTED]

SENTENCE DATE: 2004-01-20
SPECIAL CONDITIONS: YES

RECORD CREATED: 2001-10-09 08:10:15 LAST UPDATED: 2018-04-08 15:54:46

WHEN AN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY.

IF FINGERPRINTS DID NOT ACCOMPANY THIS INQUIRY, THE NEVADA CRIMINAL HISTORY RECORDS REPOSITORY IS UNABLE TO GUARANTEE THAT THIS MATERIAL CONCERNS THE INDIVIDUAL IN WHOM YOU ARE INTERESTED.

IN REGARDS TO THE ABOVE NAMED SUBJECT, THIS DOES NOT PRECLUDE THE POSSIBLE EXISTENCE OF ADDITIONAL MATCHED RECORDS IN LOCAL OR FBI IDENTIFICATION DIVISION FILES WHICH ARE NOT INDEXED BY THE NEVADA STATE CRIMINAL HISTORY RECORDS REPOSITORY. THE USE OF THIS INFORMATION IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL USE AND MAY ONLY BE USED FOR THE PURPOSE REQUESTED. NEVADA AGENCIES - REFER TO NRS CHAPTER 179A.

***** END OF CRIMINAL HISTORY RECORD *****

20-7299
No. 7299

COPY

In the
Supreme Court of the United States

Michael Adkisson,
Petitioner,
v.
Nevada,
Respondent.

Supreme Court, U.S.
FILED
FEB 26 2021
OFFICE OF THE CLERK

TWELVE

On Petition for Writ of Certiorari
to the Nevada Supreme Court

Petition for Writ of Certiorari

Rene Valladares
Federal Public Defender,
District of Nevada
*Jonathan M. Kirshbaum
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*Counsel for Michael Adkisson

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether state prison officials violate an inmate's due process and jury trial rights when they hold an inmate in custody pursuant to an additional consecutive sentence imposed not as a result of the underlying conviction but pursuant to an ^{ANY} ~~unilateral~~ ^{adjudication of guilt} ~~separate statute~~ ^{N.R.S. 193.163} which, under the terms of that statute, does not create a separate offense?

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF RELATED PROCEEDINGS

State v. Adkisson, No. C200178 (8JDC Nev.) (Amended Judgment of Conviction, entered April 30, 2009).

State v. Adkisson, No. 44581 (Nev. Sup. Ct.) (Order of Affirmance, issued May 17, 2006).

Adkisson v. State, No. 64382 (Nev. Sup. Ct.) (Order of Affirmance, issued April 15, 2015).

Adkisson v. Neven, No. 2:14-cv-01934-APG-CWH (Dist. Nev.) (pending).

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I. The Nevada Department of Corrections is violating Mr. Adkisson’s rights to due process and a jury trial under the Fifth, Sixth and Fourteenth Amendments because they are holding him in custody pursuant to an additional consecutive sentence imposed not as a result of the underlying conviction but pursuant to a separate statute which, under the terms of that statute, does not create a separate offense..... 7

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TABLE OF AUTHORITIES

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Rippo v. Baker, 137 S. Ct. 905 (2017) 1

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28 U.S.C. § 1257 1

State Cases

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Other

Fourteenth Amendment to the United States Constitution 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Adkisson requests this Court grant his petition for writ of certiorari to review the order of affirmance of the Nevada Supreme Court. (See Appendix ("App.") B at 002.)

OPINIONS BELOW

The order of the Nevada Supreme Court, affirming the denial of Mr. Adkisson's state petition, is unreported and appears at App. B at 2.

JURISDICTION

The Nevada Supreme Court's order of affirmance was issued on July 16, 2020. (See App. B at 002.) The Nevada Supreme Court's order denying Mr. Adkisson's petition for rehearing was issued on October 1, 2020. (See App. A at 001.) This Court has statutory jurisdiction under 28 U.S.C. § 1257(a) because, by order issued March 19, 2020, this Court extended the deadline for filing petitions to 150 days from the lower court decision. This petition presents a federal constitutional question for this Court's review as the Nevada Supreme Court's decision did not invoke any state-law grounds "independent of the merits" of Mr. Adkisson's federal constitutional challenge. See *Rippo v. Baker*, 137 S. Ct. 905, 907 n.1 (2017); *Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016). The Nevada Supreme Court's procedural default ruling analyzed whether Mr. Adkisson's constitutional rights had been violated as part of its good cause and actual prejudice analysis. (See App. B at 005-006.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in pertinent part:

No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb; nor deprived of life, liberty or property, without due process of law. . . .

The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Michael Adkisson is currently being held in custody pursuant to a sentence for which there is no conviction. Adkisson was convicted of a single crime—second-degree murder pursuant to Nev. Rev. Stat. 200.030. Under that statute, he was sentenced to a term of 10 years to life.

However, the sentencing court imposed an additional consecutive sentence of 10 years to life under a separate statute, Nev. Rev. Stat. 193.165, based upon the use of a deadly weapon in the commission of the underlying crime. Both the Nevada Supreme Court and the statute itself state that this additional consecutive sentence under the weapon statute is not an offense. The Nevada Supreme Court's long-settled interpretation of the weapon statute makes clear that the additional consecutive sentence under the weapon statute is not the result of a separate conviction. The result of this interpretation of the statute is that the Nevada Department of

Corrections does not have the constitutional authority under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to hold an individual in custody on this type of additional consecutive sentence without an underlying conviction. To be constitutionally viable, ~~the additional consecutive sentence must be the result of a conviction on every fact~~

justifying the additional sentence. Because it is well-accepted that the additional sentence is not the result of a conviction under Nevada law, it is therefore unconstitutional as a matter of federal due process and the right to a jury trial for the Nevada Department of Corrections to continue to hold Mr. Adkisson in custody on a sentence without an underlying conviction.

Mr. Adkisson was charged in an information with murder and use of a deadly weapon under Nev. Rev. Stat. 200.010, 200.030, and 193.165 based on allegations he killed Steven Borgens on February 18, 2004 by shooting him with a firearm.

Nev. Rev. Stat. 200.010 provides the definition of murder. In relevant part, it states: "Murder is the unlawful killing of a human being [] with malice aforethought, either express or implied." Nev. Rev. Stat. 200.030 provides the different degrees of murder. This statute first provides the manners in which first-degree murder can be committed then states: "Murder of the second degree is all other kinds of murder." This statute also provides the penalties for murder. For second-degree murder, the penalty is either 10 years to life or 10 to 25 years.

Nev. Rev. Stat. 193.165 is entitled, "Additional penalty: Use of deadly weapon[.]" Subsection 1 of the version of the statute in existence at the time of Mr. Adkisson's criminal offense provided:

[A]ny person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall be punished by imprisonment in the state prison for a term equal to and in addition to the term of imprisonment prescribed by statute for the crime. ~~The sentence prescribed by this section runs consecutively with the sentence prescribed by statute for the crime.~~

Nev. Rev. Stat. 193.165(1) (2004). More important, subsection 2 of the statute made clear that this additional consecutive sentence is not connected to a separate offense. It stated, "This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact." Nev. Rev. Stat. 193.165(2) (2004).¹ The Nevada Supreme Court

Holding PURSUANT to Welford
has held that this statute does not create its own offense, so it does not violate double jeopardy for two sentences to be imposed. *See, e.g., Raby v. State*, 544 P.2d 895, 896 (Nev. 1976); *Woofter v. O'Donnell*, 542 P.2d 1396, 1399-1400 (Nev. 1975).
That Ex: District Criminal Statute Carries a Single Sentence

After a five-day jury trial, on September 14, 2004, the jury found Mr. Adkisson guilty of second-degree murder and that he used a deadly weapon in the commission of the crime.

At sentencing Mr. Adkisson was sentenced to a term of 10 years to life on the second-degree murder conviction. The court imposed an additional consecutive sentence of 10 years to life under Nev. Rev. Stat. 193.165. Judgment was entered

¹ The current version of the statute has a reduced penalty. It is no longer an equal and consecutive punishment but is a determinate sentence with a 20-year maximum. Subsection 2 remains in the statute but now appears as subsection 3. *See* Nev. Rev. Stat. 193.165 (2021).

reflecting these two sentences on December 27, 2004. (See App. E at 018-019.) The court later amended the judgment to include omitted days of credit for time served. (See App. D at 016-017.)

~~On November 1, 2016, the Nevada Board of Parole Commissioners (hereinafter~~
"Parole Board") granted Mr. Adkisson parole from his second-degree murder conviction.² Shortly thereafter, on January 20, 2017, Mr. Adkisson began administratively appealing his continued detention based on the theory that he cannot be held in custody after he was paroled from his only count of conviction.

On December 20, 2017, prison officials determined that Mr. Adkisson's grievance may not be taken to next administrative review level because it was intermixed with legal determinations that were outside the power of that agency to address.

Within a month of this final agency determination, on January 17, 2018, Adkisson filed a time calculation petition in the First Judicial District Court in Carson City, Nevada (the county in which Mr. Adkisson was being held) addressing his continued confinement after his parole grant. Under the relevant statute, Nev. Rev. Stat. 34.738, a petition raising a time computation challenge is filed in the county in which the petitioner is held. A petition challenging the underlying judgment

² Until recently, a Nevada inmate sentenced to an additional consecutive sentence under Nev. Rev. Stat. 193.165 would have to be paroled from the sentence on the underlying crime before beginning to serve the consecutive sentence. A 2019 change to the statute requires these sentences to be aggregated and allows inmates sentenced to a consecutive sentence under 193.165 prior to October 1, 2019, to choose whether to have them aggregated. See Nev. Rev. Stat. 176.035.

is filed in the county of conviction, here the Eighth Judicial District in Clark County, Nevada. This latter type of petition has strict procedural bars to prevent second petitions. However, a petitioner can overcome the bar through a showing of good cause and actual prejudice.

The First Judicial District Court did not decide the issue. Instead it determined that Mr. Adkisson's claim contains elements that attack both prison administration issues and the underlying legality of this judgment of conviction. Given its hybrid nature, the court transferred it to the court of conviction, the Eighth Judicial District.

On December 3, 2018, the district court held a hearing on the petition and denied it as being successive and untimely and hence procedurally defaulted. (See App. C at 008-018.)

Mr. Adkisson appealed to the Nevada Supreme Court. Adkisson argued that the petition was not a petition challenging the conviction but was a time-calculation petition for which the procedural bars do not apply. To the extent it was a petition challenging the judgment, Adkisson had good cause as the constitutional violation did not become ripe until the Nevada Department of Corrections paroled him onto the sentence related to the weapon.

The Nevada Supreme Court affirmed the denial of the petition. The court held that the petition was one challenging the judgment and was procedurally barred. It rejected Mr. Adkisson's cause argument, stating that the Nevada Department of Corrections had no discretion but to hold Adkisson on the equal and consecutive sentence. (App. B at 004-006.) In its discussion of actual prejudice, the panel