

No. _____

**In the
Supreme Court of the United States**

Michael Adkisson,

Petitioner,

v.

Nevada,

Respondent.

On Petition for Writ of Certiorari
to the Nevada Supreme Court

Petition for Writ of Certiorari

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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 a separate statute 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, 2008).

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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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 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).

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 008-013.)

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

acknowledged that its review of prejudice would implicate a claim's merits. (App. B at 005-006.) The court acknowledged Adkisson had raised a constitutional violation under *Apprendi* and determined that *Apprendi* did not undermine that court's prior decisions finding the weapon statute did not violate double jeopardy. (*Id.*)

REASONS FOR GRANTING THE PETITION

- 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**

Adkisson is currently confined pursuant to an equal and consecutive sentence of 10 years to life that was imposed under the use of a deadly weapon statute, Nev. Rev. Stat. 193.165, in existence at the time of the crime. That statute specifically provided the additional penalty did not "create any separate offense but provides an additional penalty for the primary offense." Nev. Rev. Stat. § 193.165(2) (2006).

Under long-standing precedent, the Nevada Supreme Court held the deadly weapon statute did not create a separate conviction. First, in *Woofter v. O'Donnell*, 542 P.2d 1396, 1399-1400 (Nev. 1975), the Nevada Supreme Court addressed whether a sentence imposed under the deadly weapon statute violated the Double Jeopardy Clause. To avoid any double jeopardy implications under the *Blockberger* test, the court adopted the reasoning that the weapon penalty was not a separate conviction but represented just an additional punishment for a single crime. *Id.*

Then, in *Raby v. State*, the Nevada Supreme Court held in more explicit terms that “the use of a firearm or other deadly weapon in the commission of a crime (NRS 193.165) is not a separate criminal offense.” 544 P.2d 895, 896 (Nev. 1976).

Raby and *Woofter* were then reaffirmed in *Nevada Dep’t of Prisons v. Bowen*, 745 P.2d 697, 699 (Nev. 1987).

However, regardless of the validity of that court’s prior analysis, the constitutional landscape has shifted significantly since those decisions. After *Bowen*, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* held that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 490. The constitutional import of *Apprendi* was that it converted additional penalty provisions into elements of a crime. *See Alleyne v. United States*, 570 U.S. 99, 106 (2013). Put another way, any additional sentence beyond the prescribed statutory range must be imposed pursuant to the equivalent of a conviction that comports with due process and the right to a jury trial.

This intervening precedent establishes that Mr. Adkisson’s current custody violates due process and the right to a jury trial. The Nevada Supreme Court adhered to its prior precedent in *Woofter* and *Raby* and maintained its holding that the deadly weapon statute did not create a separate offense. But this simply has no legal foundation after *Apprendi*. If the sentence is not imposed pursuant to a conviction, as the Nevada Supreme Court continues to hold, then Mr. Adkisson is not being held

pursuant to a sentence based on a conviction. In this way, the Nevada Department of Corrections is unlawfully detaining him.

This is a novel and important issue for this Court to address as the Nevada Supreme Court acknowledged it has been percolating in other state courts. *See* App. B at 006 (citing *State v. Stevens*, No. 1 CA-CR 14-0642, 2015 WL 8475986 (Ariz. Ct. App. Dec. 10, 2015), and *State v. Kelley*, 226 P.3d 773 (Wash. 2010)). Fundamental principles of due process and the right to jury trial demand that imprisonment be predicated upon conviction for an actual offense. Under *Apprendi*'s due process jurisprudence, it is clear that Mr. Adkisson's sole conviction is that of having committed a second-degree murder. There is no, and can be no, second crime of conviction. Both the statute and this Court have made that abundantly clear.

It must be emphasized that Nev. Rev. Stat. 193.165 does not work as a typical sentencing enhancement. In general, such an enhancement would increase the sentence imposed on the underlying conviction. That is not what occurs under this statute. Rather, an *additional* consecutive sentence is being imposed. That is what creates the constitutional problem here. That additional sentence must be imposed pursuant to a conviction under *Apprendi*. But the statute itself says that it is not a separate offense. And the Nevada Supreme Court has repeatedly agreed that it is not.

As such, the Nevada Supreme Court's decision here upholding that prior precedent has exacerbated a constitutional tug of war between *Apprendi* and double jeopardy principles. Indeed, the lower court's adherence to its prior precedent in *Woofter*, *Raby*, and *Bowen* has now created an unavoidable conflict that needs to be

addressed by this Court. The weapon statute cannot be viewed as not a separate offense for double jeopardy purposes, but then also a conviction in order to satisfy *Apprendi*. It has to be one or the other. Either it is a conviction or it is not. The Nevada Supreme Court continues to maintain that the weapon statute does not establish a separate conviction. But without a conviction, then Mr. Adkisson is not being held pursuant to a constitutionally valid sentence. Continuing to hold Adkisson in custody means the Department of Corrections is unconstitutionally detaining him.

Put another way, the Nevada Supreme Court's conclusion that there is no conviction under Nev. Rev. Stat. 193.165 means that there is no constitutional justification for the additional consecutive sentence.

And, even if the Nevada Supreme Court is wrong in concluding that there is no conviction under the weapon statute, Mr. Adkisson's current custody remains unconstitutional. Once again, under *Apprendi*, the imposition of the additional consecutive sentence has to be the result of a conviction. However, this conviction creates a clear double jeopardy violation. Second-degree murder is obviously a lesser included offense of second-degree murder with the use of a deadly weapon. Indeed, any "conviction" under the weapon statute is nothing more than the underlying crime plus a finding a weapon was used. Under the *Blockburger*³ test, the lesser included conviction has to be dismissed under the Double Jeopardy Clause. *See Kelley v. State*, 371 P.3d 1052, 1053-54 (Nev. 2016) (acknowledging that under the federal Double

³ *Blockburger v. United States*, 284 U.S. 299 (1932).

Jeopardy Clause a conviction on a lesser included count must be dismissed). Because the underlying murder conviction has to be dismissed, the sentence imposed under Nev. Rev. Stat. 200.030 must be vacated. If Nev. Rev. Stat. 193.165 is a conviction, the only constitutional sentence that can stand is the one imposed under that statute, namely a single sentence of 10 to life.

Apprendi has brought into clear focus the constitutional problems with Nevada's weapon statute. No matter whether the weapon statute creates a conviction or is not considered a conviction enforcement of a sentence pursuant to the statute will run into constitutional problems.

At bottom, characterizing the deadly weapon statute as not a separate offense may have been necessary to spare it from constitutional problems under the Double Jeopardy Clause, but this characterization runs afoul of *Apprendi*. Mr. Adkisson should not be serving a sentence for which there is no underlying conviction. The Department of Corrections does not have the authority to hold him in custody.

This Court should review this important constitutional issue, which was squarely presented and decided in the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated February 25, 2021

Respectfully submitted,

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