

Case No. 75001

IN THE SUPREME COURT OF THE STATE OF NEVADA

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GERARDO PEREZ,

Appellant,

v.

BRIAN WILLIAMS, WARDEN,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. A-17-753832-W

RESPONDENT'S ANSWERING BRIEF

ADAM PAUL LAXALT
Attorney General
Nevada Bar No. 12426
JESSICA PERLICK
Deputy Attorney General
Nevada Bar No. 13218
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, Nevada 89101
(702) 486-3825
jperlick@ag.nv.gov
Attorneys for Respondents

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ISSUE PRESENTED

The district court correctly declined to apply good-time credits to Gerardo Perez's minimum term on the deadly weapon enhancement associated with his conviction for Second Degree Murder. Where the primary offense specifies a minimum sentence that must be served before an offender becomes eligible for parole, the sentence for the associated deadly weapon enhancement is equal to the statutory term prescribed for the primary offense.

STATEMENT OF THE CASE

Perez filed a petition for a writ of habeas corpus (post-conviction) seeking the application of good-time credit against the minimum term of the deadly weapon enhancement portion of his sentence for Second Degree Murder with Use of a Deadly Weapon. Appellant's Appendix ("AA") 1-15. The district court denied the petition, reasoning that Perez was convicted of a category A felony with a specified parole eligibility date, and NRS 209.4465(7)(b) therefore precludes the deduction of credits from his minimum term. AA 56-60 at 3:13-17. Perez appealed the district court's decision. AA 67-69. Respondent ("Warden") now files this Answering Brief.

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STATEMENT OF FACTS

I. Perez's Underlying Criminal Case

On March 31, 2004, the State of Nevada charged Perez in Case No. C200133 with one count of Second Degree Murder with Use of a Deadly Weapon, arising out of criminal acts he committed on November 30, 2003. AA 34-35.

On April 7, 2005, the Eighth Judicial District Court adjudicated Perez guilty of one count of Second Degree Murder with Use of a Deadly Weapon, a category A felony. AA 37-38. The district court sentenced Perez to a maximum term of twenty-five (25) years, with a minimum parole eligibility of ten (10) years, plus an equal and consecutive term for the deadly weapon enhancement. *Id.*

II. The Petition for Writ of Habeas Corpus Challenging Time Credits

On October 27, 2016, Perez filed a Petition in the Eighth Judicial District Court alleging that he had been improperly deprived of the application of good time credit against his minimum sentence. AA 1-15. When Perez filed his Petition, he was on institutional parole from the Murder portion of his sentence, and actively serving his sentence for the Deadly Weapon Enhancement. AA 42 (showing "Status" as "A," or active, for the enhancement).

On June 7, 2017, the district court ordered the Warden to respond to Perez's Petition. AA 16-17. The Warden filed a response to the petition on September 26, 2017, asserting, in relevant part, that Perez was not entitled to credit against his

minimum sentence pursuant to NRS 209.4465(7)(b). AA 19-29. The court issued a minute order on September 28, 2017, denying Perez's Petition. AA 55. The district court filed its final order denying Perez's Petition on January 4, 2018, and its Notice of Entry on January 9, 2018. AA56-61.

On January 25, 2018, Perez appealed to the Nevada Supreme Court. AA 67-68. Perez filed his Opening Brief on August 6, 2018. The Warden now files this Answering Brief.

SUMMARY OF ARGUMENT

As this Court recently concluded, in an unpublished order, an inmate is not eligible to deduct good time credits from his minimum term if he is serving a sentence on a deadly weapon enhancement associated with an underlying offense that defines parole eligibility.

All inmates in Nevada have the opportunity to earn good time credits during their terms of incarceration, which apply to reduce their maximum sentences. Only offenders who were sentenced under a statute that does not specify a minimum sentence that must be served prior to becoming eligible for parole qualify to also have those credits deducted from their minimum sentence per NRS 209.4465(7). Perez does not fall into this category.

When Perez committed his offense in 2003, the deadly weapon enhancement codified at NRS 193.165 mandated a sentence that was "equal to" the sentence for

the underlying offense. Because Perez's underlying offense of Second Degree Murder mandated that he serve a minimum sentence before being eligible for parole, his sentence for the deadly weapon enhancement must be interpreted to have the same mandate. Nevada law requires that his deadly weapon enhancement sentence be identical in character to that for his underlying offense. Perez presents nothing that would support this Court reaching a different conclusion. This Court should affirm the ruling of the district court.

ARGUMENT

I. Standard of Review

This Court gives deference to factual findings of the district court, but it reviews legal conclusions *de novo*. *State v. Huebler*, 128 Nev. 192, 275 P.3d 91, 95 (2012). Questions of statutory interpretation are issues of law reviewed *de novo*. *See Davis v. Beling*, 128 Nev. 301, 278 P.3d 501, 510 (2012).

II. NRS 209.4465(7)(b) Prohibits Perez from Deducting Credits from His Parole Eligibility.

Inmates in Nevada have the opportunity to earn time credits through good behavior, program participation, or prison employment. NRS 209.4465(1-5). Offenders can have these good-time credits deducted from the maximum term of their sentences. NRS 209.4465(7)(a). But because these credits can result in a substantially earlier opportunity for parole if applied to their minimum term, only

certain offenders also qualify to have those credits deducted from their minimum term, or parole eligibility.

Specifically, if the inmate was sentenced pursuant to a statute that does not specify a term that must be served before parole eligibility, they are entitled to deduct good time credits from their minimum term. *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017).¹ However, if the inmate was sentenced “pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole,” the statutory good time credits do not apply to their minimum term. NRS 209.4465(7)(b); *see also, Williams*, 402 P.3d at 1263.

A. Perez Was Sentenced Pursuant to a Statute Which Specifies a Minimum Term that Must Be Served Before a Person Is Eligible for Parole.

It is well established that the proper penalty is the penalty in effect at the time of the offense. *State v. Second Judicial Dist. Court*, 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). This includes not just the language of the statute governing the primary offense, but that of the deadly weapon enhancement. *Id.* Therefore, this Court should look at the language of NRS 193.165, the deadly weapon enhancement, as it read when Perez committed his offense.

¹ Because the Nevada Legislature amended NRS Chapter 209 in 2007, this Court restricted the *Williams* analysis to those inmates who committed their offense between July 17, 1997 and June 30, 2007. 402 P.3d at 1265 n.7.

In 2003, the deadly weapon enhancement statute mandated that an offender who used a deadly weapon during 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 the statute for the crime.**” NRS 193.165(1) (1995) (emphasis added). In other words, the sentencing statute for the primary offense dictated the “equal” sentence to be imposed for the deadly weapon enhancement. Thus, the language of the sentencing statute for the primary offense serves as the sentencing language for the deadly weapon enhancement.

As Perez concedes, the sentencing statute for Second Degree Murder, Perez’s primary offense, mandates a minimum term that must be served before Perez would become eligible for parole. *See* NRS 200.030(5)(b) (1999) (providing for a definite term of 25 years, with parole eligibility beginning when a minimum of 10 years has been served). Because NRS 200.030(5) required a minimum term prior to parole eligibility, NRS 209.4465(7)(b) precluded Perez from deducting good time credits from the minimum term of his sentence for Second Degree Murder.²

The same language mandating a minimum term prior to parole eligibility also applies to Perez’s deadly weapon enhancement because NRS 193.165 required a term “equal to” the imprisonment “prescribed by the statute” for the primary offense.

² Even if Perez had not conceded this point, he would not be entitled to relief because he appeared before the Parole Board and is already on institutional parole for the murder portion of his sentence. *Williams*, 402 P.3d at 1265 n.7.

This means that NRS 193.165, as it read in 2003, required that Perez serve a definite term of 25 years, with his eligibility for parole beginning when he served a minimum of 10 years. Because the sentencing statute for the deadly weapon enhancement adopted the character of the sentencing statute for murder, the enhancement statute specifies a minimum term that Perez must serve before he becomes eligible for parole.

NRS 209.4465(7)(b) prohibits Perez from deducting his statutory good time credits from the minimum term of his sentence for the deadly weapon enhancement because he was sentenced “pursuant to a statute which specifies a minimum sentence that must be served before a person becomes eligible for parole.” The Court should affirm the district court’s decision.

B. This Court’s Unpublished Order Provides Persuasive Authority Supporting the Warden’s Position.

In a case where the primary offense mandated a minimum sentence to be served prior to parole eligibility, this Court rejected the claim that good time credits should be deducted from the minimum term of the associated deadly weapon enhancement. *Garcia v. Williams*, 2017 WL 5034469 *1 (Nev. Nov. 1, 2017), Docket No. 71374 (unpublished disposition).³ In *Garcia*, the inmate was serving an aggregated sentence that included the enhancement portion of a sentence for First

³ Cited for its persuasive authority pursuant to NRAP 36(3).

Degree Kidnapping with Use of a Deadly Weapon. *Id.* The inmate committed the offense between July 17, 1997 and June 30, 2007. *Id.*; *see also Williams*, 402 P.3d at 1265 n.7. This Court concluded,

Garcia would not be entitled to have the credits he has earned applied to his parole eligibility on that weapon-enhancement sentence because it was imposed pursuant to a statute that required that he serve a minimum of 5 years before he is eligible for parole. *See* NRS 193.165 (1995) (providing sentence for weapon enhancement based on sentence for primary offense); NRS 200.320(2) (setting forth sentencing range for first-degree kidnapping where victim suffered no substantial bodily harm).

Id. Perez provides no reason for this Court to reach a different conclusion here.

Like the inmate in *Garcia*, Perez is not entitled to deduct good time credits from the minimum term of his deadly weapon enhancement because it was imposed pursuant to a statute that required he serve a minimum term before he is eligible for parole. As in *Garcia*, the deadly weapon enhancement adopted the language of the sentencing statute for his primary offense, requiring a sentence “equal to and in addition to the term of imprisonment prescribed by the statute for the crime...” NRS 193.165(1) (1995). Because NRS 200.030(5), the sentencing statute for his primary offense of Second Degree Murder, requires Perez serve a minimum term prior to becoming eligible for parole, the same restriction applies to his deadly weapon

enhancement. Accordingly, NRS 209.4465(7)(b) prohibits Perez from applying his good time credits to his minimum term of imprisonment.⁴

Perez urges this Court to reject its own reasoning, relying upon a decision involving an inmate whose primary offense did not specify a minimum term that must be served before parole eligibility. *Garcia v. Baca*, 2017 WL 4950044 *1 (Nev. Oct. 30, 2017), Docket No. 70874 (unpublished disposition). Perez's reliance on *Garcia v. Baca* fails for two reasons.

First, in *Garcia v. Baca*, the sentencing statute for the inmate's primary offense did not specify a minimum term that must be served prior to becoming eligible for parole. *See* NRS 193.330(1)(a)(1) (setting a sentencing range of a minimum term of not less than 2 years and maximum term of not more than 20 years). In contrast, the sentencing statute for Perez's offense of Second Degree Murder does set a required minimum term prior to parole eligibility.

Second, this Court reached its conclusion in *Garcia v. Baca* by analyzing the deadly weapon enhancement in the same manner Perez urges this Court to reject – by adopting the specific language of the sentencing statute for the primary offense. 2017 WL 4950044 at *1. The different outcomes in *Garcia v. Williams* and *Garcia*

⁴ The Warden notes that the Nevada Court of Appeals affirmed district court denials based upon this rationale on at least three separate occasions in cases involving inmates with offenses identical to Perez. The Warden can provide these cases should the Court wish to review them. NRAP 36(c)(3).

v. Baca are based solely on the sentencing language of the primary offenses for each inmate. The Court's analysis contradicts Perez's claim that the weapon enhancement does not incorporate the parole eligibility language. Appellant's Br. 2-3. Perez fails to provide any support for that conclusion, and this Court's own analysis rejects his position.

The sentencing language of Perez's primary offense controls his sentence for the deadly weapon enhancement, ultimately precluding him from applying his good time credits to the minimum term of imprisonment.

CONCLUSION

For the foregoing reasons, the Warden respectfully requests that this Court affirm the judgment of the district court denying Perez's Petition.

RESPECTFULLY SUBMITTED this 5th day of September, 2018.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jessica Perlick
Jessica Perlick (Bar No. 13218)
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14 pt. Times New Roman type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,166 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 5, 2018.

ADAM PAUL LAXALT
Attorney General

By: /s/ Jessica Perlick
Jessica Perlick (Bar No. 13218)
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Respondent's Answering Brief* in accordance with this Court's electronic filing system and consistent with NEFCR 9 on September 5, 2018.

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Bret O. Whipple, Esq.
JUSTICE LAW CENTER
1100 South 10th Street
Las Vegas, NV 89104
ATTORNEY FOR APPELLANT

/s/ R. Carreau

An employee of the Office of the Attorney General