

Case No. 77622

IN THE SUPREME COURT OF THE STATE OF NEVADA

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HIGH DESERT STATE PRISON; OFFENDER MANAGEMENT DIVISION,
STATE OF NEVADA,

Appellants,

v.

LUIS RICHARD SANCHEZ,

Respondent.

On Appeal from the Eighth Judicial
District Court of the State of Nevada
Case No. A-18-775677-W

APPELLANTS' OPENING BRIEF

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JURISDICTION

This is an appeal from an order granting a petition for writ of habeas corpus. The state district court entered its notice of entry of order granting the petition on November 28, 2018. Appellants, High Desert State Prison, Offender Management Division and the State of Nevada (collectively “Appellants”) filed a timely notice of appeal on December 11, 2018. The Nevada Supreme Court and Nevada Court of Appeals have jurisdiction under Section 4 of Article 6 of the Nevada Constitution and NRS 34.560(2).

ROUTING STATEMENT

This Court presumptively assigns appeals involving a post-conviction petition for writ of habeas corpus to the Court of Appeals under NRAP 17(b)(4). However, this is an issue of first impression with this Court involving a question of statewide importance. There is no published authority in Nevada addressing the issue presented in this case, and it will likely arise in future cases. *See* NRAP 17(a)(14). The outcome of this appeal will affect inmates who began their criminal conduct between July 17, 1997 and June 30, 2007, and continued the criminal conduct after the 2007 amendments to NRS 209.4465.

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STATEMENT OF ISSUE

Did the district court err in granting habeas relief to Respondent Luis Richard Sanchez (“Sanchez”) with respect to credit against his minimum parole eligibility date, when Sanchez began to sexually abuse the minor victims in 2006 and continued the criminal conduct until 2013.

STATEMENT OF CASE

Sanchez filed a petition for writ of habeas corpus alleging that the Nevada Department of Corrections (“NDOC”) was miscalculating his parole eligibility by not applying time-credits to his minimum term of imprisonment. Appellants’ Appendix (AA) 3-7. Appellants responded, asserting that Sanchez was not eligible for application of time-credits to his minimum term of imprisonment. AA 10-48. The state district court granted Sanchez’s petition. AA 49-53. Appellants appeal from the district court’s order granting Sanchez’s petition for writ of habeas corpus.

STATEMENT OF FACTS

On February 15, 2013, A.L.T. told her high school counselor that her stepfather, Sanchez, sexually abused her over a period of time, stopped as she grew older, and was worried that he turned his abuse to A.L.T.’s younger sister, P.T. AA 42-45. A.L.T. indicated that her stepfather, Sanchez, began sexually assaulting her in 2006, when she was around 12 years old. *Id.* at 1-2; 42-43. Once she grew older,

he stopped sexually abusing her. *Id.* at 42-43. She stated that she observed Sanchez acting inappropriately towards P.T., causing her to inform the school. *Id.*

Police arrested Sanchez and the State charged him with two counts of Attempted Lewdness with a Child Under the Age of 14. AA 1-2.¹ The Information indicated that Sanchez's criminal conduct happened between May 8, 2006, and January 31, 2013, and specifically included both A.L.T. and P.T.'s names on each attempted lewdness charge. *Id.* Sanchez ultimately plead guilty to both counts. AA 24-25. The district court sentenced Sanchez to two consecutive terms of 5 to 15 years in prison for the sexual abuse convictions. *Id.*

In 2018, Sanchez filed a petition for writ of habeas corpus ("Petition") alleging that NDOC should apply any good-time, work, and meritorious credit he earned to his parole eligibility or minimum sentence. AA 3-5.² Appellants argued that Sanchez was not entitled to credit against his minimum sentence under *Smith v. Baca*, ____ Nev. ____, 408 P.3d 548 (Dec. 14, 2017) (unpublished disposition) because his criminal conduct continued through the 2007 amendments to sentence

¹ Appellants provided a redacted copy of the Information as an exhibit to their Response to Sanchez's petition for writ of habeas corpus. AA 21-22. However, the entirety of the children's names were redacted inadvertently. For clarity, Appellants now provide another copy of the Information, with the children's initials provided and the remainder of their names redacted. AA 1-2.

² The issues of Sanchez's presentence credit, work credit, and meritorious credit are not the subject of the instant matter and Appellants do not address those issues.

calculation statutes in Chapter 209. AA 10-13. The 2007 amendments prohibit such application in cases involving felony sexual abuse. *See* NRS 209.4465(8)(b).

The district court ultimately granted Sanchez's Petition, in part, ordering NDOC to apply credits to Sanchez's minimum sentence because separating the range of dates would be a violation of the *Ex Post Facto* Clause. AA 49-51. Appellants timely appealed the district court's order.

SUMMARY OF ARGUMENT

NRS 209.4465 controls the calculation of inmate sentences. In 2007, the Legislature significantly amended the statute and precluded certain inmates from earning good-time credits towards their minimum terms of imprisonment. The district court erred in applying good-time credits to Sanchez's minimum term of imprisonment when his convictions for Attempted Lewdness with a Child Under 14 encompassed continuous sexual abuse of A.L.T. and P.T. from May 8, 2006 through January 31, 2013. Post 2007, inmates convicted of felony sex offenses cannot earn good-time credit towards their minimum terms.

This Court has concluded that child abuse and neglect violations, when based upon the cumulative effect of many acts over a period of time, are to be treated as continuing offenses for purposes of the statute of limitations. *Rimer v. State*, 131 Nev. Adv. Op. 36, ___, 351 P.3d 697, 707 (2015). The same logic in *Rimer* should extend to continuing acts of attempted lewdness with a child under 14. Like child

abuse and neglect, sexual abuse of a child “is typically a pattern of behavior” and “its effects are cumulative. The longer it continues, the more serious the damage.”

Id.

The charging document here described several acts of lewdness that Sanchez committed on A.L.T. and P.T. over a span of several years. AA 1-2. The cumulative effect of those abuses significantly impacted the minor victims over an extended period of time. Accordingly, the offense is a continuing offense subject to punishment under the laws in effect when the criminal behavior ends. Under this classification, the district court erred in applying the 2006 version of NRS 209.4465 to Sanchez’s sentence calculation. Rather than apply the 2006 version of the statute, based on when Sanchez’s conduct began, the district court should have evaluated the calculation of Sanchez’s minimum sentence based on NRS 209.4465 as it existed in 2013, when his criminal conduct ended. For these reasons, this Court should reverse the district court’s ruling granting Sanchez credit against his minimum sentence.

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, 197, 275 P.3d

91, 95 (2012). Questions of statutory interpretation are issues of law reviewed *de novo*. *Davis v. Beling*, 128 Nev. 301, 314, 278 P.3d 501, 510 (2012).

II. The District Court Erred in Granting Sanchez’s Request to Apply Good-Time Credit to his Minimum Sentence.

The district court erred in granting Sanchez good-time credit against his minimum sentence pursuant to *Williams v. State Dep’t of Corr.*, 33 Nev. Adv. Op. 75, 402 P.3d 1260 (2017). First, like child abuse and neglect, attempted lewdness with a child under 14 is a crime that can occur once, but more commonly occurs “through the cumulative effect of many acts over a period of time.” *Rimer*, 131 Nev. Adv. Op. at ___, 351 P.3d at 707. Second, Sanchez’s criminal conduct constituted a continuing offense from 2006 through 2013. Third, since Sanchez committed a continuing offense, and committed that offense before and after the 2007 amendments to NRS 209.4465, the district court should have applied NRS 209.4465(8)(b) and (d) and denied his petition. Lastly, no *ex post facto* violation occurs because Sanchez’s criminal conduct continued beyond the 2007 amendments to NRS 209.4465.

A. Attempted Lewdness with a Minor Under 14 is a Continuing Offense.

This Court indicated that, “the hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that each day brings a renewed threat of evil the Legislature sought to prevent...” *Rimer*, 131 Nev. Adv. Op. at ___, 351 P.3d

at 706 (internal quotations omitted). The proper standard for identifying a continuing offense is the legislative-intent test set forth in *Toussie v. United States*, 397 U.S. 112 (1970); *Rimer*, 131 Nev. Adv. Op. at ___, 351 P.3d at 706. Under this standard, an offense is continuing only when “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the Legislature] must assuredly have intended that it be treated as a continuing one.” *Id.* (quoting *Toussie*, 397 U.S. at 115).

Applying this standard, the *Rimer* Court held a conviction for child abuse under NRS 200.508 can constitute a continuing course of criminal conduct. 315 P.3d at 706. This Court noted that NRS 200.508 did not automatically compel the conclusion that child abuse was a continuing offense. *Rimer*, 131 Nev. Adv. Op. at ___, 351 P.3d at 707. Instead, it was the cumulative nature of the offense that triggered such a conclusion:

Child abuse and neglect “is damage to a child for which there is *no* reasonable explanation. Child abuse is usually not a single physical attack or a single act of *molestation* or deprivation. It is typically a pattern of behavior. Its effects are cumulative. The longer it continues, the more serious the damage.”

Id. (quoting Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 Chi.-Kent L. Rev. 641, 643 (1978)) (Emphasis added). This Court

reasoned that the Legislature intended for child abuse and neglect, when based upon the cumulative effect of many acts over a period of time, be treated as continuing offenses for purposes of the statute of limitations. *Id.* at 707.

This Court should apply its logic in *Rimer* to the instant matter. Lewdness with a minor, especially when perpetrated by a caregiver like here, subjects its victims to a pattern of behavior with cumulative and increasingly damaging effects. The definitions in Chapter 432B (Protection of Children from Abuse and Neglect) provide insight into the Legislature’s views on this issue. For example, NRS 432B.020 defines child “abuse or neglect” as:

- (a) Physical or mental injury of a non-accidental nature;
- (b) *sexual abuse*, sexual exploitation; or
- (c) negligent treatment or maltreatment as set forth in NRS 432B.140 of a child caused or allowed by a person responsible for the welfare of the child under circumstances which indicate that the child’s health or welfare is harmed or threatened with harm.³

(Emphasis added); *see also*, Fraser, *supra* at 643.⁴

³ At the time Sanchez committed his offense, NRS 200.508(4)(a) contained the same definition of “abuse or neglect” and NRS 432B.100 contained the same definition as “sexual abuse.”

⁴ “Each state defines child abuse differently. Although definitions vary, all are a combination of two or more of the following elements: a non-accidental physical injury; sexual molestation; emotional abuse or mental injury; and neglect.” (Internal citations omitted).

The definition of “sexual abuse” includes, among other things, acts upon a child constituting lewdness under NRS 201.230. *See* NRS 432B.100(2). By explicitly including sexual abuse within the definition of child abuse or neglect, and lewdness with a child within the definition of sexual abuse, the Nevada Legislature evidenced its intent to treat lewdness with a child as an ongoing offense.⁵ Like in *Rimer*, this Court should determine that lewdness, which the legislature has explicitly identified as a form of child abuse, is an act that can be continuing in nature.

Here, Sanchez committed the crime of lewdness with a minor, as evidenced by the facts set forth in the police report. AA 42-45. As a step-parent, Sanchez exhibited access and control over A.L.T. and used his position to continually abuse her. *Id.* As A.L.T. got older, he turned his attentions to P.T., A.L.T.’s younger sister. *Id.* He continued to sexually abuse P.T. through 2013. *Id.* at 1-2. The charging

⁵ Based on the longer statute of limitations, the Nevada Legislature recognizes the often ongoing nature of these kinds of offenses committed on children and their inability to escape the abuse, particularly in cases such as this one, involving a step-parent. NRS 171.095, at the time of Sanchez’s criminal conduct, extended the statute of limitations for any sexual abuse of a child as defined in NRS 432B.100 to before the victim turns 21, depending on whether the victim discovered or reasonably should have discovered by the date the victim reaches that age; or turns 28 if the victim did not discover and reasonably could not have discovered by the time the victim reaches 21 years of age. 2005 Nev. Stat., ch. 331, § 15, at 1209-10. In 2013, the Legislature increased these ages to 36 and 46. 2013 Nev. Stat., ch. 69, § 3, at 247.

document suggests Sanchez seamlessly transferred his abuse from A.L.T to P.T., evincing his desire to violate his position of trust and manipulate his easy access to the children. *Id.*

Sanchez's actions are the exact type the Legislature envisioned as presenting a risk for repeated, secret attacks. Sanchez abused his role as a caregiver in order to repeatedly victimize his step-daughters. The threat of evil did not stop for A.L.T. and P.T. Every day presented a new day Sanchez could inflict sexual abuse. Since this Court held acts that fall within the definition of child abuse or neglect can be continuing in nature, the lewdness Sanchez inflicted on A.L.T. and P.T. falls within the scope of NRS 432B.020's definition of child abuse or neglect, and Sanchez committed those acts over a period of time, he committed an offense continuing in nature. *Rimer*, 131 Nev. at ___, 315 P.3d at 706-07. For these reasons, this Court should hold that Lewdness is a crime that, by its nature, can be continuing.

B. Sanchez's Criminal Conduct Spanned a Seven Year Period.

Like the defendant's offense in *Rimer*, Sanchez's convictions for attempted lewdness on a child under 14 against A.L.T. and P.T. stemmed from the cumulative effect of Sanchez first abusing A.L.T. and then continuing his criminal conduct on P.T. Sanchez began his criminal conduct in 2006 on A.L.T. AA 42-45. When she got older, he transferred his abuse to P.T., her younger sister. *Id.*; AA 1-2.

The State charged this conduct in two counts of attempted lewdness with a minor under the age of 14 spanning from May 6, 2006 through January 31, 2013. AA 1-2. In each charge for attempted lewdness, the State charged Sanchez for the entirety of the time from 2006 through 2013 and included both children's names in each charge for that time period. *Id.* In doing so, the State recognized the cumulative effect of Sanchez's sexual abuse over time on his young step-daughters.

C. The 2013 Version of NRS 209.4465 Applies Because Sanchez Continued Committing his Offense through January of 2013.

Since Sanchez's offense was continuing in nature, and continued after the 2007 amendments to NRS 209.4465, the district court erred in applying the 2006 version of NRS 209.4465 to Sanchez's sentence. When Sanchez started sexually abusing A.L.T., NRS 209.4465 allowed offenders to earn good time credit towards their minimum term of imprisonment unless sentenced under a parole-eligibility statute. *See* 2003 Nev. Stat., ch. 426, § 8; *see also Williams*, 402 P.3d at 1265. In 2007, the Legislature significantly amended the statute and specifically prohibited application of such credits to the minimum term for certain types of crimes, including felony sex offenses and category A or B felonies. *See* NRS 209.4465(8).

In *Smith*, this Court ruled that an offense based on a continuing course of criminal conduct is subject to punishment under the statutes in existence when the conduct ended, not when the conduct began. 408 P.3d at 548. This Court concluded that because Smith committed child abuse and neglect, a continuing offense under

Rimer, from January 1, 2007, through December 21, 2011, the 2007 amendments to Chapter 209 controlled his sentence calculation. *Id.* This Court based its holding on the proposition that the public receives notice when a law changes, and therefore, are subject to punishment under those changes if their criminal conduct continues. *Id.*

Like the petitioner in *Smith*, Sanchez is not entitled to good-time credit against his minimum sentence as he continued his criminal conduct beyond the 2007 amendments to Chapter 209. Sanchez committed a continuing offense because he sexually abused A.L.T. and P.T. over the course of seven years, and lewdness with a child can be an offense continuing in nature similar to child abuse. Moreover, the State charged him with Attempt Lewdness with a Child Under the Age of 14 stemming from the cumulative effect of his actions from May 8, 2006 through January 31, 2013 on each count. AA 1-2. As a result, like in *Smith*, the 2013 version of NRS 209.4465 applies, and subsection (8)(b) and (d) prohibit application of good-time credit to reduce Sanchez's minimum term of imprisonment. *See* NRS 209.4465(8)(b) and (d) (good-time credit against the minimum term of imprisonment prohibited for felony sexual offense and a category B felony).

D. Applying the 2007 Amendments to Sanchez's Sentence does not Violate *Ex Post Facto* Principles.

The United States Supreme Court established a two-part test for addressing *ex post facto* claims. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). A law violates the *ex*

post facto clause if it is, (1) applied retroactively to events that occurred before its enactment; and (2) detrimental by producing a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Id.*

Here, an *ex post facto* violation would not occur if the district court applied the 2013 version of NRS 209.4465 because Sanchez continued his criminal conduct in 2013. *Smith*, 408 P.3d at 548. Thus, the 2013 version of NRS 209.4465 applies to preclude the application of good-time credit against Sanchez's minimum sentence. The district court erred in finding an *ex post facto* violation would occur if the district court did not grant Sanchez relief under the 2006 version of NRS 209.4465.

This Court should determine that Sanchez's conviction for Attempt Lewdness with a Minor Under the Age of 14, a category B felony, falls under NRS 209.4465(b) and (d) and is prohibited from receiving credit from the minimum sentence. Sanchez started sexually abusing A.L.T. and continued his conduct on P.T. from May 8, 2006 through January 31, 2013. AA 1-2. It is evident from the facts of this case that Sanchez committed his offenses years after the 2007 amendments to NRS 209.4465.

The Nevada Legislature specifically set forth offenses that are prohibited from receiving credit off their minimum sentence with the creation of NRS 209.4465(8), including felony sexual offenses and category B felonies. While Sanchez began his criminal conduct before the 2007 amendments, he continued the felony sexual offenses well beyond the operative changes. Thus, Sanchez had ample notice that

his continued sexual abuse of A.L.T. and P.T. would prevent him from receiving good-time credit towards any minimum term of imprisonment he might receive. To rule otherwise would allow inmates who commit continuing offenses to receive the benefit of credit off their minimum sentences when they continued to commit a crime long after the 2007 amendments to NRS 209.4465.

Because Sanchez continued continuously abused his step-daughters before and after the operative changes to NRS 209.4465, calculating his sentence under the amended NRS 209.4465(8) does not run afoul of *ex post facto* principles.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the judgment of the district court because NRS 209.4465(8)(b) and (d) apply and prohibit the application of good-time credit to Sanchez's minimum term of imprisonment and parole eligibility date.

RESPECTFULLY SUBMITTED this 24th day of April, 2019.

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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 2013, 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 3,267 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: April 24, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on April 24, 2019.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

I further certify that some of the participants in the case are not registered as electronic users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following participants:

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