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### Summary of Nunnery v. State, 127 Nev. Adv. Op. 69

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*Nevada Law Journal*

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*Nunnery v. State*, 127 Nev. Adv. Op. 69 (October 27, 2011)<sup>1</sup>

## CRIMINAL LAW AND PROCEDURE – DEATH PENALTY

### **Summary**

The Court considers an appeal of a death penalty sentence for a first-degree murder conviction.

### **Disposition/Outcome**

The Court affirmed the judgment of conviction and held that no error existed that would warrant a new trial. Under Sup. Ct. R. 250(4)(f), the district court had good cause to allow a late filing of a notice of evidence in aggravation. The danger of prejudice to the defense in its preparation was a relevant factor in the good cause determination for untimely notice. Nev. Rev. Stat. 176.156 (2007) did not preclude admission of presentence investigation reports at penalty hearings.

### **Factual and Procedural History**

On September 22, 2006, Eugene Nunnery (“Nunnery”) and three other men, all armed with guns, approached five men in an apartment complex parking lot and demanded money. After one of the other men began to run, Nunnery shot one victim in the head at close range and another in the back of the head as he was fleeing. Nunnery’s companions also unsuccessfully shot at the other victims. The victim that Nunnery shot in the head at close range was the only fatality.

Nunnery was charged with open murder, two counts of attempted murder, conspiracy to commit robbery, robbery, and two counts of attempted robbery. The State sought the death penalty, and tried Nunnery and his codefendants separately. The jury returned a verdict of guilty on all counts. The district court bifurcated the penalty hearing.

In the first phase, the parties presented mitigating and aggravating evidence for the jury to weigh. Although the State is required to file a notice of evidence in aggravation at least fifteen days before the trial begins under Sup. Ct. R. 250(4)(f), the district court accepted the State’s filing twelve days before the trial began. The district court found good cause existed for the untimely notice because Nunnery’s case was supposed to be the last tried of the three cases against Nunnery and his codefendants. The district court also found a lack of prejudice to the defense to prepare to confront the evidence summarized in the notice because the State filed similar notices in the other two cases and the attorneys for all three cases were the same. The jury concluded that the mitigating circumstances did not outweigh the aggravating circumstances.

In the second phase, the state presented Nunnery’s criminal history and a victim-impact statement while Nunnery presented sociological and penological evidence. The jury sentenced Nunnery to death for the first-degree murder conviction. The district court sentenced Nunnery for the other charges in a separate hearing.

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<sup>1</sup> By Sabrina Dolson.

Nunnery alleged several claims arising out of the penalty hearing. Nunnery first challenged the district court's finding that the State had good cause for filing a late notice of evidence in aggravation and that he was not prejudiced. Nunnery alternatively claimed that lack of prejudice is not relevant to the district court's determination of good cause. Furthermore, Nunnery challenged the admission of presentence investigation reports at the penalty hearing and the instruction to the jury concerning mitigating and aggravating circumstances. Nunnery also made several guilt-phase hearing claims.

## **Discussion**

### **Penalty Phase Claims**

#### *Notice of Evidence in Aggravation under SCR 250(4)(f)*

Justice Cherry wrote for the unanimous Court, sitting en banc. The Court began its analysis by examining the notice requirements under Sup. Ct. R. 250(4)(f). Under this statute, the State must file a notice of evidence in aggravation, which includes a summary of the evidence the State plans to present, at least fifteen days before the penalty phase of trial is to begin in cases where the State seeks the death penalty. The court must not allow introduction of evidence not included in the notice unless the State can show good cause and the defense is permitted a continuance to prepare to confront the evidence.<sup>2</sup> The Court concluded that although Sup. Ct. R. 250(4)(f) only addresses the late introduction of evidence not summarized in the notice, it must similarly allow the late filing of a notice of evidence in aggravation in order to avoid discouraging the State from filing a late or amended notice.

To determine "good cause" under Sup. Ct. R. 250(4)(f), the Court found factors used in previous decisions regarding pretrial notice statutes persuasive. The Court recognized that "good cause" is a relative term and "its meaning must be determined not only by the verbal context of the statute in which the term is employed, but also by the context of the action and procedures involved and the type of case presented."<sup>3</sup> The Court declined to apply the definition of "good cause" used in Sup. Ct. R. 250(4)(d)<sup>4</sup> because although "good cause" appears in both Sup. Ct. R. 250(4)(d) and (f), the policies and purposes of the provisions differ and thus warrant different definitions of "good cause." The Court concluded that Sup. Ct. R. 250(4)(f) warrants the use of a broad definition of "good cause" that allows courts to consider multiple factors.

The purpose of Sup. Ct. R. 250(4)(f) is to provide the defendant with sufficient notice to prepare to confront evidence while taking into account reasons for the delay. When deciding whether "good cause" exists for a late notice filing, a court should therefore consider any relevant factors, such as "(1) the reason for the delay, including whether it was within the State's control, (2) whether the State acted in good faith, (3) the length of the delay, and (4) the danger of prejudice to the defendant," that are consistent with the purpose of Sup. Ct. R. 250(4)(f). The absence of prejudice alone is insufficient

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<sup>2</sup> SUP. CT. R. 250(4)(f).

<sup>3</sup> Wray v. Folsom, 166 F. Supp. 390, 394 (W.D. Ark. 1958).

<sup>4</sup> When notice is not served, "[g]ood cause requires a reason external to the prosecutor" (quoting State v. Dist. Ct. (Marshall), 116 Nev. 953, 968, 11 P.3d 1209, 1218 (2000)).

to show “good cause” for filing a late notice. The Court determined prejudice by considering the impact the evidence in aggravation had on the defendant’s preparation for confronting that evidence, not the impact the evidence had on the jury’s penalty verdict.

The Court applied the abuse-of-discretion standard, which is satisfied only if the district court acted “arbitrar[il]y or capricious[ly] or if it exceed[ed] the bounds of law or reason.”<sup>5</sup> The district court found good cause for filing a late notice of evidence of aggravation because the delay in filing was not significant, the State did not act in bad faith, the delay was only three days, there was sufficient opportunity for Nunnery to object to the admissibility of the evidence and for the court to address that objection, and no prejudice to the defense resulted from the late filing. The Court concluded that the district court did not abuse its discretion after considering these relevant factors.

### *Presentence Investigation Reports*

In response to Nunnery’s challenge to the admissibility of presentence investigation (PSI) reports at the penalty hearing, the Court concluded that PSI reports are admissible at penalty hearings pursuant to Nev. Rev. Stat. 176.156(2). Nunnery relied on *Herman v. State*,<sup>6</sup> in which the defendant was granted a new penalty hearing after the State read uncharged crimes, some of which were irrelevant to the crime charged, from a PSI report. The Court renounced *Herman*’s interpretation that admission of uncharged crimes in a PSI report is a violation of Nev. Rev. Stat. 176.156(5) because Nev. Rev. Stat. 176.156(2) states that law enforcement agencies may use PSI reports without limitation in public hearings. The Court concluded that disclosures permitted by Nev. Rev. Stat. 176.156(2) are not precluded by the rule that PSI reports are not to be part of the public record under Nev. Rev. Stat. 176.156(5).

The Court further renounced *Herman*’s conclusion that evidence of prior crimes is inadmissible if irrelevant to the crime charged at the penalty hearing. The Court concluded that evidence of uncharged crimes in PSI reports is admissible as “other matter” evidence regardless if the evidence supports the defendant’s guilt. The Court stated that “other matter” evidence is relevant because it allows the jury to determine its sentence after considering the defendant’s “character, record, and the circumstances of the offense.”<sup>7</sup> This type of evidence can also be excluded if it is “impalpable or highly suspect.”<sup>8</sup> The broad grant of power to the trial judge to determine which evidence should be admitted at the penalty hearing under Nev. Rev. Stat. 175.552 supports this conclusion.

The Court concluded that because Nunnery did not object to any of the information in the PSI report that was revealed to the jury at the penalty hearing, he would have to show plain error to receive relief. The Court found that Nunnery did not show any error because the PSI report preparer testified and was available for cross-examination, and arrests that did not lead to convictions were redacted from the PSI report.

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<sup>5</sup> Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

<sup>6</sup> 122 Nev. 199, 208-09, 128 P.3d 469, 474-75 (2006).

<sup>7</sup> Browning v. State, 124 Nev. 517, 526, 188 P.3d 60, 67 (2008).

<sup>8</sup> Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001).

### *Weighing Instruction*

Nunnery challenged the district court's refusal to issue a jury instruction that would require the jury to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. The Court found that the district court did not err in refusing to give the jury instruction.

Under Nev. Rev. Stat. 175.554(2)-(3), the jury must weigh mitigating and aggravating circumstances when the State pursues the death penalty. However, dicta in *Johnson v. State*<sup>9</sup> directly conflicted with the holding in *McConnell v. State*.<sup>10</sup> *Johnson* indicated that the jury's weighing determination of aggravating and mitigating circumstances in a capital case must be held to the beyond a reasonable doubt standard.<sup>11</sup> However, *McConnell* held that the State may impose the death penalty without the jury finding or the State proving that the mitigating circumstances outweighed the aggravating circumstances beyond a reasonable doubt. The Court reaffirmed *McConnell* and reversed *Johnson* to the extent it conflicted with the Court's holding that the beyond a reasonable doubt standard is not applicable because weighing mitigating and aggravating circumstances is not a factual determination.

The beyond a reasonable doubt standard is only applicable to the jury's determination that an aggravating circumstance exists, not to the weighing of aggravating or mitigating circumstances.<sup>12</sup> Once the jury finds that at least one aggravating circumstance exists, it must then determine whether there are sufficient mitigating circumstances to outweigh the aggravating circumstance(s).<sup>13</sup> In *Johnson*, the court found that the determination of whether sufficient mitigating circumstances exist and outweigh the aggravating circumstances is in part a factual determination and thus subject to the Sixth Amendment.<sup>14</sup> The Court held that the statement in *Johnson* was "correct to the extent that it refer[red] to the finding of mitigating circumstances," not the weighing of mitigating and aggravating circumstances.

The Court also found that Nevada's statutory scheme did not support the conclusion that the weighing determination involves a factual determination, but rather that the weighing determination is a purely judgmental process. The Court concluded that the Nevada Legislature's decision not to identify a burden of proof for the weighing determination or require the Court to consider the sufficiency of evidence with respect to the weighing determination in review of a death sentence supported its holding.<sup>15</sup> Out of the three statutory provisions that address the weighing determination,<sup>16</sup> only one uses the word "finds" when referring to the weighing determination.<sup>17</sup>

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<sup>9</sup> 118 Nev. 787, 59 P.3d 450 (2002).

<sup>10</sup> 125 Nev. 243, 254, 212 P.3d 307, 314-15 (2009).

<sup>11</sup> *Johnson v. State*, 118 Nev. 787, 802-03, 59 P.3d 450, 460 (2002).

<sup>12</sup> NEV. REV. STAT. 175.554(4) (2007).

<sup>13</sup> NEV. REV. STAT. 175.554(3) (2007); *Johnson*, 118 Nev. at 802, 59 P.3d at 460.

<sup>14</sup> *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that the Sixth Amendment gives defendants the right to have a jury determine whether aggravating circumstances exist to make a defendant eligible for the death penalty).

<sup>15</sup> See Nev. Rev. Stat. 177.055(2) (2007).

<sup>16</sup> Nev. Rev. Stat. 175.554(3) & (4); NEV. REV. STAT. 200.030(4)(a) (2007).

<sup>17</sup> Nev. Rev. Stat. 175.554(3).

The Court further stated that the definition of “fact” supported its holding. The Court defined a “fact” as “[a] thing done; an action performed or an incident transpiring; an event or circumstance,”<sup>18</sup> and concluded that the weighing determination requires a balancing of facts to reach a conclusion, not a finding of any facts.

Lastly, the Court held the district court did not err in refusing Nunnery’s requested jury instruction because it stated the incorrect standard. Nunnery requested a jury instruction that would require the jury to find that the aggravating circumstances outweighed the mitigating circumstances before giving the death penalty. However, under Nev. Rev. Stat. 175.554(3), (4), the death penalty is contingent on the jury finding sufficient mitigating circumstances to outweigh the aggravating circumstances.

### *The Great-Risk-of-Death-to-More-Than-One-Person Aggravator*

Nunnery challenged the district court’s decision permitting the State to seek the “great risk of death to more than one person” aggravator on four grounds. The Court held that the district court did not err on any of these grounds.

Nunnery first argued that the State did not provide timely notice of the aggravator because the notice of evidence in aggravation was filed three days late and the evidence used to support this aggravator was unique to this case. The Court held that the late notice of evidence did not prejudice Nunnery because the notice of intent to seek the death penalty, filed a year before trial, informed Nunnery of the evidentiary basis for the great-risk-of-death aggravator. Furthermore, this evidence was presented at the guilt phase of trial.

Second, Nunnery argued that the State changed its theory for the aggravator in the notice of intent to seek the death penalty to an accomplice theory in the notice of evidence because the State referred to Nunnery “and his codefendants” in the latter and not the former. Under Sup. Ct. R. 250(4)(c), the supporting facts of an aggravator should be in the notice so that the defendant can deduce the State’s theory for the aggravator. However, the Court held that the State did not change its theory to an accomplice theory because the State did not add the description of Nunnery’s codefendants in the notice of evidence to base the aggravator on their conduct, but rather to show that Nunnery acted as the leader of the crime, which placed several innocent people at risk of death.

Third, Nunnery argued that the notice of intent to seek the death penalty did not include evidence that others were present during the shooting and thus did not support a great-risk-of-death aggravator. The Court held that the statement in the notice of intent describing the location of the crime as public place with citizens located nearby was sufficient.

Fourth, Nunnery argued that there was insufficient evidence to support the aggravator. The Court held that a rational juror could find beyond a reasonable doubt that Nunnery knowingly created a great-risk-of-death under Nev. Rev. Stat. 200.033(3) (2007) because the State presented evidence that numerous people were near the crime scene that Nunnery specifically chose.

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<sup>18</sup> BLACK’S LAW DICTIONARY 531-32 (5<sup>th</sup> ed. 1979).

### *Evidence of Fetal Alcohol Syndrome*

Nunnery challenged the district court's refusal to admit testimony from Nunnery's cousin. Nunnery's cousin would have testified that Nunnery's mother drank alcohol while she was pregnant with Nunnery and Nunnery had health problems when he was born. However, the court may refuse to admit evidence that is "impalpable or highly suspect" during the penalty phase of trial.<sup>19</sup> The Court held that the record demonstrated that the testimony of Nunnery's cousin was highly suspect and the district court's refusal to admit the evidence because of it lacked credibility was not an abuse of discretion.

### *Juror Misconduct*

Nunnery challenged the district court's inquiry into juror misconduct as inadequate and its refusal to declare a mistrial based on that juror misconduct, which consisted of statements between jurors that an expert's testimony was long and boring. The Court held that the district court did not abuse its discretion in refusing to declare a mistrial because the district court conducted an adequate inquiry into the alleged misconduct and the juror misconduct allegations did not warrant a mistrial if proven.

### *Jury's Rejection of Mitigating Evidence*

Nunnery challenged his death sentence and claimed that the jury's rejection of mitigating circumstances supported by indisputable evidence was arbitrary and capricious. The Court held that Nevada law allows jurors to decide the extent that a mitigating circumstance decreases, if at all, the defendant's moral culpability regardless if the mitigating circumstance is supported by irrefutable evidence.

### *Constitutionality of the Death Penalty*

The Court held that Nunnery's claims that the death penalty is unconstitutional failed because Nevada's death penalty statutes do not violate the Eighth Amendment, do not foreclose executive clemency,<sup>20</sup> and provide a narrow class of persons eligible for the death penalty.<sup>21</sup>

### Guilty Phase Claims

#### *Jury Selection*

Nunnery challenged the district court's admission of a peremptory challenge of the only African-American potential juror. An equal protection challenge to the admission of a peremptory challenge requires the opponent to first prove a prima facie case of discrimination, the burden then shifts to the proponent who must offer a neutral explanation for the challenge, and finally the burden shifts back to the opponent who

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<sup>19</sup> Homick v. State, 108 Nev. 127, 138, 825 P.2d 600, 607 (1992).

<sup>20</sup> Colwell v. State, 112 Nev. 807, 812-15, 919 P.2d 403, 406-08 (1996).

<sup>21</sup> Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006).

must prove purposeful discrimination.<sup>22</sup> The Court held that the district court did not abuse its discretion in permitting the peremptory challenge because the State offered a neutral explanation, the juror's views on the death penalty, for the challenge and the defense did not argue that the State's explanation was mere pretext for discrimination. Had the defense challenged the State's explanation, the Court nevertheless would have held that purposeful discrimination did not exist.

Nunnery also challenged the district court's admission of three challenges for cause based on the jurors' death penalty views. The Court upheld the district court's ruling because rulings on challenges for cause are afforded great deference<sup>23</sup> and will not be overturned if a juror could not have adequately performed his duties because of his death penalty views,<sup>24</sup> which each of the three jurors indicated.

### *Motion for Mistrial*

Nunnery claimed that a detective's testimony alluded to Nunnery's involvement in other homicides and warranted the district court declaring a mistrial. A district court's denial of a motion for mistrial will only be overturned if a clear showing of abuse exists.<sup>25</sup> The Court held that a clear showing of abuse did not exist under the circumstances because the testimony Nunnery referred to was vague, brief, and did not allude to his involvement in other homicides.

### *Guilt-Phase Jury Instructions*

Nunnery challenged the validity of several jury instructions that he claimed lessened the State's burden of proof and did not specify the material elements of the crimes. Nunnery argued that each of the challenged jury instructions should have stated the State's burden to prove each element of the crime beyond a reasonable doubt. The Court held that the district court's jury instructions did not abuse its discretion because three other instructions contained the standard of proof and the Court has repeatedly upheld similar instructions.

### *Sufficiency of the Evidence*

Nunnery challenged the sufficiency of the evidence to support a finding that he had the requisite intent for the attempted murder charges because he did not shoot at the specific victims or encourage his codefendants to shoot at them. The Court reviewed the evidence in the light most favorable to the defendant and held that a rational juror could determine that sufficient evidence existed to prove each material element beyond a reasonable doubt. The Court held that the record indicated that Nunnery had the specific intent to kill the victims because in addition to shooting two of the victims, Nunnery planned the crime and directed his codefendants to bring guns.

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<sup>22</sup> Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006).

<sup>23</sup> Browning v. State, 124 Nev. 517, 530, 188 P.3d 60, 69 (2008).

<sup>24</sup> *Id.* at 531, 188 P.3d at 70.

<sup>25</sup> Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).



## Mandatory Review of the Death Sentence Pursuant to Nev. Rev. Stat. 177.055(2)

Every death sentence must be reviewed to (1) ensure that the evidence supports the finding of at least one aggravated circumstance, (2) the death sentence was not imposed as a result of passion, prejudice, or any arbitrary factor, and (3) the death sentence was not excessive in relation to the crime and the defendant.<sup>26</sup> The Court first concluded that sufficient evidence existed to find six aggravated circumstances based on the circumstances of the crime. Nunnery had four prior violent felonies convictions, created a great risk of death to more than one person, and committed the homicide during the commission of a robbery. Second, the Court held that the record did not indicate that the jury's death sentence was a result of passion, prejudice, or any arbitrary factor. Third, the Court held that the death sentence was not excessive because Nunnery's actions indicated he was a violent person who disregarded human life and did not have any remorse for his cold-blooded killings.

### **Conclusion**

Upon a showing of good cause, the district court has discretion to permit an untimely notice of evidence in aggravation. Relevant factors in determining good cause include the risk of prejudice to the defense in its preparation to confront the evidence. Second, Nev. Rev. Stat. 176.156 does not preclude the admission of presentence investigation reports at penalty hearings. Third, the weighing of mitigating and aggravating circumstances is not a factual determination and the proper inquiry to justify a death sentence is whether there are sufficient mitigating circumstances to outweigh aggravating circumstances, not whether aggravating circumstances outweigh mitigating circumstances.

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<sup>26</sup> NEV. REV. STAT. 177.055(2)(c)-(e) (2007).