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### Summary of Hernandez v. State, 124 Nev. Adv. Op. 83

Julian R. Gregory  
*Nevada Law Journal*

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*Hernandez v. State*, 124 Nev. Adv. Op. 83 (Oct. 30, 2008)<sup>1</sup>

**CRIMINAL LAW – HABEAS CORPUS**

**Summary**

Appeal from a district court order denying Defendant's post-conviction petition for a writ of habeas corpus in a capital case.

**Disposition/Outcome**

Affirmed the district court order denying post-conviction relief.

**Factual and Procedural History**

On October 6, 1999, Las Vegas Metropolitan Police Officer David Swoboda pulled over Fernando Navarro Hernandez for speeding. Hernandez climbed out of his car, crying, and Officer Swoboda noticed that Hernandez had cuts on his hands and face. Hernandez's and Donna's daughter Ana was also in the car. When Officer Swoboda asked Hernandez what was wrong, Hernandez said he had been in a fight with his ex-wife. Officer Swoboda then learned that Hernandez's ex-wife, Donna, had taken out a protective order against Hernandez. Officer Swoboda requested officers be sent to Donna's home.

When officers arrived at Donna's home, they found Donna's body on the stairs. A later autopsy showed that Donna had been strangled to death, both by hand and by placing an object – a foot or a knife – against her throat. Donna also suffered from stab and slash wounds as well as blunt force head trauma. A dinner knife had been thrust into her vagina, perforating the vaginal wall and penetrating Donna's abdominal cavity, although this had apparently occurred postmortem. Officers found nearby a seven-inch serrated knife, its handle broken off. Hernandez's palm print was found on the broken knife. Hernandez's and Donna's DNA was found in the blood at the crime scene, as well as in the blood on Ana's pajamas when Hernandez was taken into custody, and on a ring Hernandez was wearing.

The district court convicted Hernandez of first-degree murder, burglary while in possession of a weapon, second-degree kidnapping, and unlawful sexual penetration of a dead body. The jury did not specify which theory or theories the jury relied on in finding Hernandez guilty of first-degree murder. The jury found three aggravating circumstances in support of a death sentence and seven mitigating circumstances. The aggravating circumstances were: (1) the nonconsensual sexual penetration, (2) commission of the crime during a burglary, and (3) that the murder involved torture or mutilation; the mitigating circumstances were (1) Hernandez's lack of a criminal history, (2) commission of the crime while under extreme mental or emotional disturbance, (3) Hernandez's accepting responsibility for the crime, (4) Hernandez's expression of remorse, (5) Hernandez's intoxication during commission of the crime, (6) Hernandez's constant employment throughout his adult life, and (7) that he had spared Ana's life even though he had threatened to kill her.

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<sup>1</sup> By Julian R. Gregory.

The Supreme Court of Nevada affirmed the judgment of conviction and sentence on direct appeal. Hernandez filed a post-conviction petition for a writ of habeas corpus, which the district court denied following an evidentiary hearing. This appeal followed.

## **Discussion**

### **Aggravating conditions**

Hernandez put forward the argument that *McConnell v. State*<sup>2</sup> invalidates the aggravating circumstances of burglary and torture. In *McConnell*, the Supreme Court of Nevada held unconstitutional any case where the court saw fit “to base an aggravating circumstances in a capital prosecution on the felony upon which a felony murder is predicated.”<sup>3</sup> In *Bejarano v. State*, the court applied *McConnell* retroactively.<sup>4</sup> The court, therefore, held that the burglary aggravating circumstance was invalidated by the *McConnell* rule.

The court came to the conclusion “that the United States and Nevada Constitutions require a capital sentencing scheme to ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’”<sup>5</sup> This may be done by the legislature in one of two ways: narrowing the definition of capital offenses, or broadly defining capital offenses and providing for narrowing by jury findings of aggravating circumstances at the penalty phase.<sup>6</sup> To that end, *McConnell* put forward a two-part test: “‘First, is Nevada’s definition of capital felony murder narrow enough that no further narrowing of death eligibility is needed once the defendant is convicted? Second, if not, does the felony aggravator sufficiently narrow death eligibility to reasonably justify the imposition of a death sentence on the defendant?’”<sup>7</sup>

Torture murder in Nevada includes only those defendants “who act with calculated intent to inflict pain for revenge, extortion, persuasion, or for any sadistic purpose and to inflict pain beyond the killing itself.”<sup>8</sup> The court here decided that Nevada’s definition of torture murder is sufficiently narrow as to avoid any unconstitutionality, and that no further narrowing of death eligibility is necessary. Furthermore, the court clarified its holding in *McConnell*: there, the court held that because Nevada’s felony-murder statute did not require a defendant to have intent to kill, the statute was too broad and did not provide sufficient narrowing.<sup>9</sup> Torture murder, the court reasons, includes an intent element in that malice must still be proven.<sup>10</sup>

The court chose to reweigh the aggravating and mitigating evidence, asking “whether it is ‘clear that absent the erroneous aggravator the jury would have imposed death.’”<sup>11</sup> The court

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<sup>2</sup> 120 Nev. 1043, 102 P.3d 606 (2004).

<sup>3</sup> *Id.* at 1069, 102 P.3d at 624.

<sup>4</sup> 122 Nev. 1066, 146 P.3d 265 (2006).

<sup>5</sup> *Hernandez v. State*, 124 Nev. Adv. Op. 83 at 5 (Oct. 30, 2008) (quoting *McConnell*, 120 Nev. at 1063, 102 P.3d at 620-21).

<sup>6</sup> *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

<sup>7</sup> *Hernandez*, 124 Nev. Adv. Op. 83 at 6 (quoting *McConnell*, 120 Nev. at 1065, 102 P.3d at 621-22).

<sup>8</sup> *Id.* (citing *Dominguez v. State*, 112 Nev. 683, 702 n.6, 917 P.2d 1364, 1377 n.6 (1996)).

<sup>9</sup> *McConnell v. State*, 120 Nev. 1043, 1065-66, 102 P.3d 606, 622 (2004).

<sup>10</sup> *See Collman v. State*, 116 Nev. 687, 714-15, 7 P.3d 426, 443-44 (2000); NEV. REV. STAT. § 200.020 (2007).

<sup>11</sup> *Browning v. State*, 120 Nev. 347, 364, 91 P.3d 39, 51 (2004).

determined that, even absent the aggravating condition of having committed the crime during a robbery, the jury would have found Hernandez eligible for the death penalty.<sup>12</sup>

### Ineffective assistance of counsel

Hernandez claimed that he had ineffective assistance of counsel, both trial and appellate. To determine ineffective assistance of counsel, the court relies on the two-prong test delineated in *Strickland v. Washington*.<sup>13</sup> The burden is on the petitioner to show by a preponderance of the evidence<sup>14</sup> that (1) counsel's performance was deficient to the point that it was not objectively reasonable, and (2) the petitioner was prejudiced because counsel's errors rendered the jury verdict unreliable.<sup>15</sup> Hernandez also argued that *United States v. Cronin*<sup>16</sup> created a presumption of prejudice, and that he need only show that counsel's performance was not reasonable.

In *Cronin*, the United States Supreme Court held that there is a presumption of prejudice when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."<sup>17</sup> The Nevada Supreme Court rejected Hernandez's argument because the record showed that Hernandez's counsel had filed several pretrial motions and that at least some of them were successful.

The court recognized that an ineffective assistance of counsel claim is a mixed question of fact and law subject in part to independent review, but gave deference to the purely factual findings of the district court.<sup>18</sup>

First, Hernandez claimed that his counsel were ineffective because they failed to address whether *Miranda v. Arizona*<sup>19</sup> barred admission of his statement to police officers when he was arrested.<sup>20</sup> The court held that this argument lacks merit because Hernandez was not in custody at the time he made those statements, and *Miranda* affects only statements made during "in-custody interrogation."<sup>21</sup>

Second, Hernandez claimed that his trial counsel was ineffective for conceding Hernandez's culpability without obtaining his consent. Hernandez relied on *Jones v. State*, where the Nevada Supreme Court decided that counsel was ineffective for conceding guilt during the penalty phase of a second-degree murder case without the defendant's consent.<sup>22</sup> The court in the case at bar noted that *Jones* applies only where counsel concedes guilt despite the client's testimonial denial of guilt during the guilt phase of the trial, and so determined that Hernandez's argument lacks merit.<sup>23</sup>

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<sup>12</sup> The court relied on the brutality of the murder, including the fact that Donna was strangled, the stab wounds near Donna's heart and in her neck, and the dinner knife found in Donna's vagina.

<sup>13</sup> 466 U.S. 668 (1984).

<sup>14</sup> *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

<sup>15</sup> *Strickland*, 466 U.S. at 687.

<sup>16</sup> 466 U.S. 648 (1984).

<sup>17</sup> *Id.* at 659.

<sup>18</sup> *Riley v. State*, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>19</sup> 384 U.S. 436 (1966).

<sup>20</sup> When Officer Swoboda pulled Hernandez over, he asked Hernandez what happened, to which Hernandez replied "I killed her" and "I killed them."

<sup>21</sup> *Miranda*, 384 U.S. at 445.

<sup>22</sup> 110 Nev. 730, 855 P.2d 1052 (1994).

<sup>23</sup> The court noted that Hernandez met with counsel in chambers, without the prosecution, to discuss counsel's decision to concede culpability to second-degree murder in attempt to avoid a first-degree murder charge, and that the trial judge twice asked Hernandez if he understood the ramifications of conceding to second-degree murder, and

Third, Hernandez argues “that counsel were ineffective for failing to adequately communicate with him and investigate his case.”<sup>24</sup> Hernandez claimed that counsel failed to consult experts and explore mitigation evidence, including Hernandez’s childhood and mental and psychological condition, and for not calling a neuropsychologist retained by the defense. Because Hernandez failed to explain how this evidence would have helped him, and because counsel testified that they had visit Hernandez and spent several hours with him, the court decided that the district court did not err in denying this claim.

Fourth, Hernandez alleges that counsel were ineffective for failure to challenge his competency to stand trial. Co-counsel testified that the neuropsychologist’s testimony would have been more harmful than helpful: while the expert opined that Hernandez was unable to reason properly and was suffering from profound emotional turmoil, Hernandez was also deceptive, denied culpability, and had no mental or psychological health issues. Because Hernandez could not show that he was “not of sufficient mentality to be able to understand the nature of the criminal charges against him,”<sup>25</sup> the court determined that the district court did not err in denying this claim.

Fifth, Hernandez claims that counsel were ineffective for failing to seek a change of venue in light of the publicity surrounding his case. Counsel testified that that the defense was able to seat twelve jurors who were not influenced by the publicity, and the record did not show that the publicity was so intense that the jury was impartial. Therefore, the court concluded, the district court did not err.

Sixth, Hernandez argues that the voluntary intoxication jury instruction was unconstitutionally overbroad, and that counsel was ineffective for not challenging it.<sup>26</sup> On direct appeal, the court determined that the instruction was not plainly erroneous, even if it was too broadly stated.<sup>27</sup> Because Hernandez failed to establish that this instruction was “intrinsically incorrect or unconstitutionally overbroad,”<sup>28</sup> the court determined that Hernandez failed to show ineffectiveness of counsel.

Seventh, Hernandez made several other claims of ineffective assistance of counsel:

. . . for failing to file motions to: (1) challenge the racial composition of the jury venire, (2) challenge matters related to the questioning of jurors during voir dire, (3) bifurcate the penalty hearing, (4) dismiss the notice of intent to seek the death penalty because probable cause for the aggravating circumstances was not established at the preliminary hearing and the aggravating circumstances were not charged in the information, (5) exclude evidence of uncharged misconduct, (6) seek exclusion of hearsay

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that each time Hernandez responded that he understood. This satisfies the requirements that the court adopted in this case: (1) the district court must canvass the defendant outside of the presence of the State, (2) the district court must ensure and make findings in the trial record that the defendant understands the strategy behind conceding guilt, and (3) the district court must inform the defendant that conceding guilt relieves the State of its burden to prove the offense.

<sup>24</sup> Hernandez v. State, 124 Nev. Adv. Op. 83 at 17 (Oct 30, 2008).

<sup>25</sup> Hill v. State, 114 Nev. 169, 176, 953 P.2d 1077, 1082 (1998) (internal quotation and citations omitted).

<sup>26</sup> The district court issued the instruction: “[i]f a person premeditates and deliberates upon the crime of Murder and forms a specific intent to commit that crime and thereafter becomes intoxicated, then such intoxication will not serve as a defense in order to reduce the degree of the murder.” Hernandez, 124 Nev. Adv. Op. 83 at 20-21.

<sup>27</sup> Hernandez v. State, 118 Nev. 513, 527, 50 P.3d 1100, 1110 (2002).

<sup>28</sup> Hernandez, 124 Nev. Adv. Op. 83 at 22.

statements, (7) compel compliance with *Brady v. Maryland*,<sup>29</sup> (8) prohibit the use of a vague deadly weapon enhancement instruction, . . . (9) dismiss the deadly weapon enhancement as unconstitutionally vague. . . . [(10)] dismiss the notice of intent to seek the death penalty because Nevada’s death penalty scheme does not narrow the class of persons eligible for the death penalty, [(11)] preclude prosecutorial misconduct, and [(12)] dismiss the kidnapping charge as legally and factually impossible.

Among these, Hernandez also argued that counsel failed to ensure proper recording of bench conferences and that the constitutional evidentiary standards and legal procedures regarding the admission of DNA evidence were adhered to. The court determined that Hernandez did not provide adequate facts or argument that Hernandez therefore failed to demonstrate prejudice, and categorically denied that the district court erred with regard to any of these claims.<sup>30</sup>

Eighth, Hernandez claimed that appellate counsel was ineffective for failing to raise issues that Hernandez had requested be raised. Because Hernandez neglected to specify additional issues he would have liked to have raised, and because appellate counsel testified that she excluded claims less likely to succeed in an effort to reduce page length, the court determined that the district court did not err in dismissing this claim.

### **Concurring or Dissenting Opinions**

#### **CHERRY, J., concurring in part and dissenting in part:**

Justice Cherry concurred that the burglary aggravating circumstance should be stricken in accordance with *McConnell v. State*, that the district court did not err in denying Hernandez’s post-conviction claims for relief, and that *McConnell* does not invalidate the torture aggravating circumstance. Justice Cherry departed from the majority because it was his opinion that the evidence in support of the remaining aggravated circumstances was not persuasive enough for the Justice to conclude that the jury would have found Hernandez eligible for the death penalty.

Based on the compelling mitigating evidence, including character testimony by friends and co-workers, Hernandez’s high blood alcohol level at the time of his arrest, and displays of remorse on the part of Hernandez, Justice Cherry would elect to vacate the death sentence and remand the case to the district court for a new penalty hearing.

### **Conclusion**

The Supreme Court of Nevada held “that Nevada’s definition of torture murder sufficiently narrows the class of persons eligible for the death penalty,”<sup>31</sup> and therefore is not invalidated by *McConnell*. However, the court decided that the burglary aggravating circumstance is not sufficiently narrow, and therefore the court was required to strike it. Despite the lack of one of the three aggravating circumstances, the court determined that the jury would

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<sup>29</sup> 373 U.S. 83 (1963).

<sup>30</sup> The court also noted that it concluded on direct appeal that the underlying issues in claims 10, 11 and 12 lacked merit. *Hernandez*, 118 Nev. at 524-26, 534-35, 50 P.3d at 1107-09, 1115.

<sup>31</sup> *Hernandez v. State*, 124 Nev. Adv. Op. 83 at 24 (Oct. 30, 2008).

have found Hernandez eligible for the death penalty and imposed a death sentence. Lastly, the court determined that the district court did not err in denying Hernandez's post-conviction ineffective assistance of counsel claims.