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### Summary of Summers v. State, Nev. Adv. Op. No. 112

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***Summers v. State*, Nev. Adv. Op. No. 112 (Dec. 28, 2006)<sup>1</sup>**

**CRIMINAL LAW – CAPITAL PENALTY HEARING**

**Summary**

Appeal from a judgment of conviction, entered after jury verdict, for first-degree murder with the use of a deadly weapon, and assault with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and assault with the use of a deadly weapon, and from sentences of life in prison without the possibility of parole.

**Disposition/Outcome**

Affirmed. The confrontation clause of the Sixth Amendment of the United States Constitution and the United States Supreme Court Holdings in *Crawford v. Washington*<sup>2</sup> do not apply to evidence admitted during a capital penalty hearing. This and other issues raised on appeal do not warrant reversal of his conviction and sentence.

**Factual and Procedural History**

Summers was an illegal drug dealer. During 2003, Summers entered into an informal agreement with Fredrick Ameen (an addict who owed Summers money) to sell “crack” cocaine, and to pay for a motel room from which he could sell the drugs; Summers would of course receive the profits from the sales. On the night of December 28, Summers warned Ameen that only certain people were to be allowed in the motel room. Later that night, Ameen, his associate Albert Paige, a friend of Ameen and prostitute, Donna Thomas, and two others were in that room smoking crack cocaine. When Summers later arrived, accompanied by Andrew Bowman, he was upset about the number of people in the room. Ameen told everyone to leave; Paige and Thomas stayed behind.

Bowman briefly left the room, but he soon returned and handed Summers a .38 caliber handgun. Summers pulled out the handgun, pointed it at Thomas, and asked Ameen who she was. Ameen explained that she was a friend, and that he had told Thomas about Summers and had instructed her to come into the room. When Summers asked if Thomas knew who he was, she replied in the negative. Ameen reminded Thomas that he had previously told her about Summers, and when she began to speak Summers shot her.

Summers then pointed the gun at Paige and pulled the trigger, but the handgun misfired. Summers then pointed the gun at Ameen, but Ameen did not see Summers pull the trigger. Summers and Bowman left the room, and Thomas later died from the gunshot wound.

Summers was arrested and charged with several crimes, and the State sought a death sentence. After a four day trial, the jury found Summers guilty of the first degree murder of

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<sup>1</sup> By Jason Ray

<sup>2</sup> 541 U.S. 36 (2004).

Thomas with the use of a deadly weapon, the attempted murder of Paige with the use of a deadly weapon, and of assaulting Ameen with the use of a deadly weapon.

Prior to the penalty hearing, Summers moved to bifurcate the hearing into eligibility and selection phases. The district court denied the motion without explanation. The State introduced victim impact evidence, showing that Thomas was the mother of three children and had worked hard to support them before she moved to Las Vegas. The State then presented numerous witnesses who testified about Summer's juvenile and adult criminal history while both in and out of jail, as well as 835 pages of documents regarding the history. Several police officers testified of Summer's criminal past, including reaching into his waistband for a gun after being stopped by a police officer for jaywalking, gang affiliations, carjacking with the use of a deadly weapon, and problems while in jail.

Summers called several family members to testify on his behalf, stating that his mother and father were alcoholics, his parents beat him, and that he had an impoverished childhood. Summers had asked to be removed from the courtroom prior to the start of the hearing and did not make a statement in allocution.

The jury found four circumstances aggravated the murder and six mitigating circumstances. The jurors concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of life without the possibility of parole for Thomas' murder. The district court entered a judgment of conviction, sentencing Summers to more than two consecutive terms of life in prison without the possibility of parole.

## **Discussion**

### **Application of the Confrontation Clause and *Crawford v. Washington* to a capital penalty hearing**

Summers' first argument was that the Confrontation Clause and *Crawford*<sup>3</sup> apply to a capital penalty hearing and therefore the admission of nearly 835 pages of documentary exhibits containing testimonial hearsay violated his right to confrontation. The court disagreed. Neither the Confrontation Clause nor *Crawford* apply to evidence admitted at a capital penalty hearing and the decision in *Crawford* does not alter Nevada Law.

*Crawford*<sup>4</sup> states that the admission of testimonial hearsay statements violates the Confrontation clause unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. However, the Nevada Supreme Court has never fully addressed the relevance of the Confrontation Clause in a capital penalty hearing. In *Lord v. State* the Nevada Supreme Court ruled that the right to confrontation applies in capital penalty hearings in one respect: admitting a nontestifying codefendant's confession generally without confrontation violates a defendant's right to confrontation under *Bruton v. United States*.<sup>5</sup> *Lord*

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 68-69.

<sup>5</sup> *Lord v. State*, 107 Nev. 28, 43-44 (1991). *See also* *Bruton v. United States*, 391 U.S. 123, 137 (1968).

addressed only the *Bruton* question and did not otherwise explore the right to confrontation at a capital penalty hearing, thus limiting *Lord* to its facts.

Guiding this decision was the Supreme Court's ruling in *Williams v. New York*,<sup>6</sup> which stated, "most of the information now relied upon by judges to guide them in sentence[ing] would be unavailable if information were restricted to that given in open court by witnesses subject to cross examination."<sup>7</sup> The Court rejected the contention that a death sentence based on information from witnesses who were not cross examined violated the Due Process clause of the Fourteenth Amendment. *Williams* has since been relied upon to make the Confrontation Clause inapplicable to capital sentencing, despite the case's questionable viability. *Crawford* did not overrule *Williams*, the U.S. Supreme Court has not addressed whether *Crawford* has any bearing on any sentencing proceedings, no federal circuit court of appeals has extended *Crawford* to capital penalty hearings, and *Crawford* does not apply to a non-capital sentencing proceeding. Additionally, under NRS 175.552(3) hearsay is generally admissible<sup>8</sup> in a capital penalty hearing.<sup>9</sup>

#### Other claims raised by Summers on appeal

Summers raised additional claims on appeal of a biased juror, judicial misconduct, and cumulative error. The court concluded that Summers was not entitled to relief on any of these claims.

#### Concurring/Dissenting Opinions

Justice Rose, with whom Justices Maupin and Douglas agreed, filed an opinion concurring in part and dissenting in part. While J. Rose agreed that Summers was not entitled to relief, they opined that the Confrontation Clause and *Crawford* apply to capital sentencing hearings.

J. Rose explained that the two aspects of a capital penalty hearing treat evidence differently. The eligibility phase stresses the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment.<sup>10</sup> Thus, certain evidence is excluded in the eligibility phase<sup>11</sup> and allowed in the selection phase. J. Rose also opined that subsequent U.S. Supreme Court jurisprudence, which has recognized that death is different.<sup>12</sup> Additionally, in one Supreme Court case, certain testimony was admissible in a capital penalty hearing because evidence rules anticipate that underprivileged evidence should be admitted and left for the factfinder to rule on, who would have the benefit of cross-examination

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<sup>6</sup> 337 U.S. 241 (1949).

<sup>7</sup> *Id.* at 250.

<sup>8</sup> *See* *Hollaway v. State*, 116 Nev. 732, 746 (2000).

<sup>9</sup> *See* *Thomas v. State*, 114 Nev. 1127, 1147 (1998).

<sup>10</sup> *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

<sup>11</sup> NEV. REV. STAT. § 175.552(3) (2005).

<sup>12</sup> *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (stating that a bifurcated system addresses concerns that the death penalty not be imposed in an arbitrary or capricious manner). *Ring v. Arizona*, 536 U.S. 584 (2002) (The Sixth amendment requires a jury to find the facts rendering a defendant eligible for death).

and opposing evidence.<sup>13</sup> Since Summers' hearing was not bifurcated, the concerns of imposing the death sentence arbitrary or capricious manner Confrontation Clause and *Crawford* still exist. Accordingly, while capital penalty hearings may not necessarily need bifurcation, if the hearings are not bifurcated then the right to confrontation should apply throughout the entire hearing.

Despite these general concerns, the constitutional error of no right to confrontation was harmless because the verdict cannot be attributed to the error. The nature of Summers' criminal background, the nature of the murder in this case, and the sentence of a term of life in prison without the possibility of parole instead of a death sentence all indicate that leaving the testimony on record did not render the finding erroneous.

### **Conclusion**

Neither the Confrontation Clause, nor *Crawford* extend to evidence admitted during a capital penalty hearing. The reversal of Summers' sentence is not warranted. Affirmed

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<sup>13</sup> Barefoot v. Estelle, 463 U.S. 880, 898 (1983).