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### Summary of Thomas v. State, 122 Nev. Adv. Op. 114, 148 P.3d 727

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## CRIMINAL LAW – DEATH SENTENCE APPEAL

### Summary

Appeal from a death sentence following a second penalty hearing conducted pursuant to a remand by the Nevada Supreme Court.

### Disposition/Outcome

Appellant's arguments failed to establish reversible error and the Nevada Supreme Court affirmed his death sentence.

### Factual and Procedural History

Appellant Marlo Thomas and Kenya Hall, were charged with two counts of first-degree murder with the use of a deadly weapon and several other crimes. The charges stemmed from an early morning robbery of a restaurant where Thomas stabbed two employees to death. Thomas, Hall, and Thomas's wife were arrested later that day.

After their arrest, Hall was interviewed by Officer Bailey, a Nevada Highway Patrol Officer. Hall confessed to his role in the crimes, implicated Thomas, and agreed to plead guilty to lesser charges in exchange for testifying against Thomas. Hall testified at Thomas's preliminary hearing but refused to testify further. Hall's preliminary hearing testimony was read into the record at Thomas's trial, where a jury convicted Thomas on two counts of first-degree murder with the use of a deadly weapon and several other crimes. After a penalty hearing, the jury returned two death verdicts for the murders and life in prison without parole for the remaining convictions.

On direct appeal, the Nevada Supreme Court affirmed Thomas's conviction and sentence.<sup>2</sup> Subsequently, Thomas filed a petition for a writ of habeas corpus, which the district court denied. Thomas appealed that denial to the Nevada Supreme Court, which found that Thomas's trial counsel were ineffective for failing to object to an improper penalty phase jury instruction on the possibility of sentence commutation. The Court remanded the case for a new penalty hearing.<sup>3</sup>

On remand, the district court bifurcated the penalty hearing into an eligibility phase and selection phase. During the eligibility phase, the State alleged four aggravators: (1) Thomas had a prior conviction for a felony involving violence or threat of violence;<sup>4</sup> (2) Thomas had a second such conviction; (3) the murders were committed to avoid or prevent a lawful arrest;<sup>5</sup> and (4) Thomas was convicted in the instant proceeding of more than one murder.<sup>6</sup> In support of the

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<sup>1</sup> By James Robertson

<sup>2</sup> *Thomas v. State*, 114 Nev. 1127, 967 P.2d 1111 (1998).

<sup>3</sup> *Thomas v. State*, 120 Nev. 37, 83 P.3d 818 (2004).

<sup>4</sup> NEV. REV. STAT. § 200.033(2)(b) (2005).

<sup>5</sup> § 200.033(5).

<sup>6</sup> § 200.033(12).

alleged aggravators the State presented Hall's preliminary testimony that read into the record by Officer Bailey. In addition, the State admitted the details of Thomas's 1990 conviction for attempted robbery, and Thomas's 1996 conviction for battery with substantial bodily harm.

After deliberating on death eligibility, the jury found all four aggravators, and based on testimony from Thomas's family members, the jury found seven mitigators: (1) Thomas accepted responsibility for the crimes; (2) cooperated with the investigation but diverted the truth; (3) demonstrated remorse; (4) counseled others against criminal acts; (5) suffered learning and emotional disabilities; (6) found religion; (7) and had been denied by his father. The jury determined that the aggravators outweighed the mitigators, and the hearing proceeded to the selection phase.

During the selection phase, the State called a records supervisor for the Division of Parole and Probation, who authenticated 25 juvenile court petitions charging Thomas with several crimes, as well as a juvenile court order listing Thomas's entire juvenile history and certifying 17 year old Thomas as in adult in his 1990 robbery case. In addition, ten correctional officers testified about Thomas's behavior while in prison and authenticated prison discipline documents.

The selection phase also included victim-impact testimony from the fathers of the two restaurant stabbing victims. One of the fathers, Mr. Dixon, referred to Thomas as "the lowest for of social sewage" and was immediately interrupted by an objection from Thomas's counsel. The district court advised Mr. Dixon to limit his testimony to the impact of his son's death on his family, but the court did not formally sustain the objection. Thomas called five fellow inmates, the warden of his present institution, and his mother to testify on his behalf. Finally, Thomas gave a statement in allocution, in which he expressed remorse. After deliberating, the jury returned two verdicts of death, which Thomas appealed in the present case.

## **Discussion**

The Court reviewed Thomas's appeal of his death sentence en banc, Justice Hardesty delivered the opinion of the Court.

### 1. Application of Crawford v. Washington and the Confrontation Clause

Thomas argued that the district court violated his right to confrontation<sup>7</sup>, as interpreted in *Crawford v. Washington*<sup>8</sup>, during the eligibility phase by allowing Officer Bailey to testify about Hall's statements during questioning and by admitting the transcript of the questioning. Thomas also argued that the district court violated the same right, during the selection phase, by admitting evidence of his juvenile criminal history and behavior while in prison. The Court rejected these arguments, citing *Summers v. State*<sup>9</sup>, in which it held that Crawford and the Confrontation Clause do not apply during a capital penalty hearing.

### 2. Admission of "Other Matter" Evidence at the Eligibility Phase

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<sup>7</sup> U.S. CONST. amend. VI.

<sup>8</sup> 541 U.S. 36 (2004) (holding that the Confrontation Clause bars admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination).

<sup>9</sup> 122 Nev. \_\_\_, 148 P.3d 727(Adv. Op. No. 112, Dec. 28, 2006).

Thomas argued that the district court erred by allowing the State the present “other matter” evidence during the eligibility phase. There are three proper purposes for which the State may introduce evidence at a capital penalty hearing: “to prove an enumerated aggravator, to rebut specific mitigating evidence, or to aid the jury in determining the appropriate sentence after any enumerated aggravating circumstance have been weighed against any mitigating circumstance.”<sup>10</sup> The Court referred to the evidence submitted for the third purpose as “other matter,” which is “not admissible for use by the jury in determining the existence of aggravating circumstance or weighing them against mitigating circumstances.”<sup>11</sup> Evidence presented to rebut specific mitigating evidence is not “other matter” and it is permissible during the eligibility phase if the rebuttal is targeted toward *specific* mitigation evidence, if not the evidence is other matter which the State can only present during the selection phase.<sup>12</sup> In mitigation, Thomas called his mother to testify that Thomas’s childhood was good until she had a baby and started ignoring him and beat him. On cross-examination, the State produced the juvenile court order pertaining to Thomas’s 1990 robbery charge, which contained statements purportedly by Ms. Thomas. The State asked Ms. Thomas if, in 1990, she said Thomas was spoiled and that her control of him had been fair, which she could not recall. The Court found that these questions were proper rebuttal given Ms. Thomas’s specific testimony that she had ignored and beaten Thomas.

The State also asked Ms. Thomas if she had said that Thomas was “becoming more dangerous” or “would get into drugs or do things for quick money.” The Court found that the use of these statements was improper because they were not true rebuttal; Ms. Thomas never testified on direct examination that Thomas was not dangerous or violent, did not use drugs, or committed crimes. In fact she testified that she knew he got in fights, committed crimes, and used drugs. The Court reasoned that because these prior statements were not used to prove an aggravator or rebut specific mitigating evidence, they were “other matter” evidence not proper at the eligibility phase. However, the Court concluded that the error was minimal and did not affect his substantial rights.<sup>13</sup>

### 3. Causation Between Mitigating Evidence and the Crime

Thomas also argued that the district court erred by allowing the State to argue, in its eligibility phase closing, that there has to be “some causation, connection” between the mitigating circumstances that occur in a person’s life and the crime before the occurrences become a mitigating circumstance. The Court agreed that the State’s argument was improper, but concluded that the impropriety was not prejudicial because the jury instructions expressly permitted the jury to consider the mitigating circumstance as factors in determining moral culpability and correctly required no causation between the factors presented and the crime.

### 4. Cumulative Bad Acts Testimony and an Improper Victim Impact Statement

Thomas argued that cumulative bad acts testimony and an improper victim impact statement rendered his penalty hearing fundamentally unfair. Relevant evidence “may be

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<sup>10</sup> *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *See* NEV. REV. STAT. § 178.602 (2005).

excluded if its probative value is substantially outweighed by...needless presentation of cumulative evidence.”<sup>14</sup> Applying an abuse of discretion standard,<sup>15</sup> the Court concluded that the evidence presented by the ten correctional officers was not excessively cumulative because very little testimony repeated previous evidence, the jury was entitled to learn of Thomas’s disciplinary record and criminal history, and each incident presented revealed Thomas’s capacity for threatening and potentially dangerous behavior.

Thomas also challenged Mr. Dixon’s statement, in his victim-impact testimony, that Thomas was “the lowest from of social sewage.” The Court agreed that this statement was improper, but ruled that the statement did not require reversal. The Court based this ruling on the fact that the district court properly admonished Mr. Dixon, the jury presumably expected Mr. Dixon to abhor Thomas, and Mr. Dixon never expressed his views about sentencing.

## 5. Mitigating Evidence and Instructions at the Selection Phase

### *a. Lack of Premeditation*

Thomas argued that the district court erred during the selection phase by limiting his presentation of mitigating evidence and refusing a mitigation instruction. The district court refused Thomas’s request that the jury be instructed that “the homicide occurred during a confrontation and as such there was no premeditated intent to cause the death.” NRS 175.554(1) requires the district court to instruct on “alleged mitigators upon which evidence has been presented and does not restrict such instruction to the enumerated statutory mitigators.”<sup>16</sup> Evidence that Thomas lacked premeditation was admitted into the record through his interrogation, in which he made a claim that the killings were done in self-defense. Thus, the Court found that Thomas was entitled to an instruction that he was alleging lack of premeditation as a mitigating circumstance. However, the Court also found that Thomas’s proposed instruction was worded as a theory of law and was therefore improper.<sup>17</sup> In addition, Thomas failed to establish authority for the proposition that premeditation cannot, as a matter of law, be formed during a confrontation. Finally, the jury was instructed that it could find “any other mitigating circumstances” and Thomas had argued to the jury that the killings were not premeditated.

### *b. The Role of an Uncharged Participant*

Thomas argued that he should have been permitted to argue that his wife’s involvement in the crimes and the State’s failure to charge her, for her involvement, were mitigating circumstances. In rejecting this argument, the Court pointed to NRS 175.552(3) which provides that mitigating circumstances must relate to “the offense, defendant, or victim and on any other matter which the court deems relevant to sentence.” The Court found that Thomas failed to show how the State’s decision not to prosecute his wife was relevant to his sentence.

## 6. The Constitutionality of Nevada’s Death Penalty Scheme

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<sup>14</sup> NEV. REV. STAT. § 48.035(2) (2005).

<sup>15</sup> Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004).

<sup>16</sup> Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000).

<sup>17</sup> See NEV. REV. STAT. § 175.554(1) (2005).

Finally, Thomas argued that the Nevada death penalty scheme is unconstitutional, in part, because it prevents a defendant from participating in the decision to seek death the death penalty. The Court, relying on its own precedent, stated that matters of prosecution in any criminal case are within the entire control of the district attorney absent any unconstitutional discrimination.<sup>18</sup>

#### 7. Mandatory Death Sentence Review

Pursuant to NRS 177.055(2)(c)-(e), the Court reviewed Thomas's death sentence. The Court determined that the evidence supported the findings of aggravating circumstances, the sentence was not imposed under the influence of passion, prejudice, or any arbitrary factor, and the sentence was not excessive, considering the crime and the defendant.

#### Concurring/Dissenting Opinions

Justice Rose, with whom Justices Maupin and Douglas agreed, delivered a concurring opinion stating his belief that in a bifurcated capital penalty hearing the right to confront the declarant of testimonial hearsay only extends to evidence admitted during the eligibility phase. Here Officer Bailey's testimonial hearsay about Hall's statements was admitted during the eligibility phase, but because Hall was not available to testify and because Thomas had an opportunity to cross-examine him during the preliminary hearing it was not error to admit that evidence.

#### Conclusion

While it was found that Thomas's penalty hearing was not free of error, the Court concluded that the sentence was fair and none of Thomas's arguments established reversible error.

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<sup>18</sup> Cairns v. Sheriff, 89 Nev. 113, 508 P.2d 1015, 1017 (1973).