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### Summary of Mitchell v. State, 122 Nev. Adv. Op. No. 107

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***Mitchell v. State*, 122 Nev. Adv. Op. No. 107 (Dec. 21, 2006)<sup>1</sup>**

**CRIMINAL LAW—HABEAS CORPUS**

**Summary**

Appeal from the denial of a post-conviction petition for a writ of habeas corpus in a criminal case.

**Disposition/Outcome**

Affirmed in part and reversed in part the district court's order dismissing appellant's petition. The court remanded to the district court with instructions to vacate appellant's conviction for attempted murder with the use of a deadly weapon.

**Factual and Procedural History**

In 1993, four men, including appellant Johnnie Mitchell, participated in the armed robbery of a casino. The men were inside the casino when Keel, an unarmed security guard, asked them for identification because he thought they looked underage. Keel began escorting the men out of the casino when they failed to produce identification.

Smith was one of the four men. As they were walking, Smith pulled a gun and pointed it at Keel's head. A struggle ensued when Keel attempted to grab the weapon from Smith. During the struggle, Smith was shot in the leg and fell to the ground. Keel dropped his radio during the struggle and ran toward the security office to get another radio. Smith fired two shots at Keel, but neither shot struck him.

Meanwhile, two of the four men jumped into the casino's cashier counter and took money from the cash registers. At least one of the two men was armed. The fourth man stayed outside the cashier's cage, which one cashier occupied at the time of the robbery. There was conflicting trial testimony regarding whether Mitchell was the unarmed fourth man, or whether he was armed and jumped into the cashier cage. After acquiring the money, all four men fled the scene.

Mitchell was charged with aiding and abetting attempted murder with the use of a deadly weapon, aiding and abetting robbery with the use of a deadly weapon, burglary while in possession of a firearm, possession of a firearm by an ex-felon, and conspiracy to commit robbery. A jury convicted Mitchell of all charges except the charge of possession of a firearm by an ex-felon.

On direct appeal, the Nevada Supreme Court affirmed Mitchell's conviction.<sup>2</sup> Mitchell then filed a post-conviction petition for a writ of habeas corpus, which the district court denied. The state supreme court affirmed the district court's denial of that petition.<sup>3</sup> Mitchell then came

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<sup>1</sup> By Aubree Nielsen

<sup>2</sup> *Mitchell v. State*, 114 Nev. 1417, 971 P.2d 813 (1998), *overruled in part by* *Sharma v. State*, 118 Nev. 648 56 P.3d 868 (2002).

<sup>3</sup> *Mitchell v. State*, Docket No. 38359 (Order of Affirmance, July 11, 2002).

before the state supreme court on appeal of the district court's dismissal of his second post-conviction for a writ of habeas corpus.

Mitchell argued that the district court erred in rejecting claims presented in his post-conviction petition for a writ of habeas corpus. Mitchell alleged, in part, that his conviction for attempted murder with the use of a deadly weapon as an aider and abettor should be vacated in light of the court's decision in *Sharma v. State*,<sup>4</sup> which was issued after Mitchell's conviction became final. The court considered as a matter of first impression whether *Sharma* applied to convictions that became final before the court decided *Sharma*.

## **Discussion**

Mitchell filed an untimely petition more than five years after the court issued a remitter in his direct appeal. The petition was also successive because Mitchell had already sought relief for a writ of habeas corpus. Further, the elapsed time between Mitchell's conviction and the filing of his petition presumably prejudiced the State in its ability to conduct a retrial.

However, the court recognized that Mitchell could demonstrate a fundamental injustice sufficient to overcome the procedural bars to the untimely or successive petition because he was actually innocent of aiding or abetting attempted murder with the use of a deadly weapon.

### **Attempted murder with the use of a deadly weapon**

Mitchell claimed that his conviction of aiding or abetting attempted murder was improper because he did not have the specific intent that Keel be killed and thus was actually innocent of the charge. Mitchell had already raised this argument on direct appeal, therefore making that decision the law of the case. However, *Sharma* specifically overruled the decision in Mitchell's direct appeal. Therefore, the court declined to apply the law of the case doctrine to Mitchell's attempted murder claim because it would have been unfair to apply the law to Mitchell's case when it had already been expressly overruled.

The court noted that Nevada's aiding and abetting statute<sup>5</sup> does not specify what mental state is required to be convicted as an aider and abettor. However, the court looked at two Nevada cases<sup>6</sup> and concluded that Mitchell could have only been guilty of attempted murder if he specifically intended to aid Smith in killing Keel and if he specifically intended that Keel be killed.

Nevertheless, the court adopted the "natural and probable consequences" doctrine in deciding Mitchell's direct appeal and held that "a conviction for attempted murder will lie even if the defendant did not have the specific intent to kill provided the attempted murder was the natural and probable consequence of the aider and abettor's target crime."<sup>7</sup> However, four years later the court specifically "disapproved and overruled" *Mitchell* in *Sharma* to the extent it endorsed the natural and probable consequences doctrine.<sup>8</sup>

The court agreed that Mitchell was entitled to the vacatur of his attempted murder conviction pursuant to *Sharma* if the decision applied retroactively to cases that were final when

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<sup>4</sup> 118 Nev. 648, 56 P.3d 868 (2002).

<sup>5</sup> NEV. REV. STAT. § 195.020 (2005).

<sup>6</sup> *Tanksley v. State*, 113 Nev. 844, 944 P.2d 240 (1997); *Keys v. State*, 104 Nev. 736, 766 P.2d 270 (1988).

<sup>7</sup> *Mitchell*, 114 Nev. at 1427, 971 P.2d at 820.

<sup>8</sup> *Sharma*, 118 Nev. at 655, 56 P.3d at 872.

the court decided *Sharma*. The court began by looking at whether *Sharma* announced a new rule or merely clarified the law, which the court assessed using the guidelines set forth in *Colwell v. State*.<sup>9</sup> The court concluded that *Sharma* was a clarification of the law, not a new rule, and therefore applied to Mitchell.

Accordingly, the court held that under *Sharma*, the jury should not have convicted Mitchell of attempted murder as an aider or abettor unless he, not just Smith, had the specific intent that Keel be killed. In its closing argument to the jury, the prosecutor acknowledged that Mitchell did not have the specific intent to kill. Therefore, the court concluded that Mitchell was actually innocent of attempted murder with the use of a deadly weapon and thus vacated his conviction of that charge.

#### Deadly weapon enhancement to the robbery charge

Although Mitchell claimed he was actually innocent of the weapon enhancement to the robbery charge, the court noted that Mitchell failed to demonstrate that its prior holding affirming the charge was clearly erroneous. Unlike Mitchell's attempted murder claim, *Sharma* had no bearing on the prior holding regarding this charge. Thus, the court concluded the claim was barred.

#### *Sua sponte* jury instruction

Mitchell also claimed the trial court erred by failing to *sua sponte* give a jury instruction defining the "use" of a deadly weapon. However, the court concluded that Mitchell waived this claim by failing to argue it in his direct appeal. Furthermore, he failed to demonstrate just cause and prejudice sufficient to overcome this waiver.

#### Concurrence/Dissent

##### BECKER, J., concurring in part and dissenting in part:

Justice Becker concurred with the majority's holding that *Sharma* represented a clarification of the law and therefore applied retroactively. Becker also concurred that Mitchell did not intend to aid and abet in a murder or attempted murder so the court was correct in vacating his conviction for attempted murder.

However, Justice Becker dissented from the language in the opinion that suggested one must have the specific intent to kill, rather than the language from *Sharma* wherein one must have the specific intent to aid and abet in the crime.

#### Conclusion

The court concluded that *Sharma* clarified the law and therefore applied retroactively to cases that were final before the court decided it. The court also found that the holding in *Sharma* required the court to vacate Mitchell's conviction for attempted murder with the use of a deadly weapon, in light of the State's concession at trial that Mitchell lacked the specific intent to kill. Further, the court concluded that Mitchell's claim that he was actually innocent of the deadly

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<sup>9</sup> 188 Nev. 807, 819-20, 59 P.3d 463, 472 (2002).

weapon enhancement to the robbery conviction was barred by the law of the case and his claim that the district court erred by failing to *sua sponte* instruct the jury on the definition of the use of a deadly weapon is procedurally barred. Therefore, the court affirmed in part and reversed in part the district court's order dismissing Mitchell's petition, and remanded to the district court with instructions to vacate Mitchell's conviction for attempted murder with the use of a deadly weapon.