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### Johnson v. State, 133 Nev. Adv. Op. 73 (Oct. 5, 2017) (en banc)

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CRIMINAL APPEALS: DEATH PENALTY

**Summary**

When the Court reverses a death sentence on direct appeal and remands for a new penalty hearing, there is no longer a final judgment that triggers the one-year period set forth in NRS 34.726(1) for filing a post-conviction petition for a writ of habeas corpus.

**Background**

In 1998, a jury convicted Donte Johnson of numerous felonies, including four counts of first-degree murder. After a second penalty hearing, a three-judge panel imposed four death sentences for each murder. On direct appeal, the Court found the three-judge panel procedure unconstitutional, and vacated all death sentences.<sup>2</sup> After a third penalty hearing, a jury unanimously imposed death sentences for each murder. The Court affirmed the four sentences on direct appeal from the newly imposed judgment of conviction.<sup>3</sup>

Johnson filed his post-conviction petition for writ of habeas corpus within one year after remittitur from *Johnson II*. Johnson challenged counsel's performance during the 2000 trial and the 2005 penalty remand, as well as the appeals in *Johnson I* and *Johnson II*. The State contended that NRS 34.726(1)<sup>4</sup> barred claims of ineffective-assistance of counsel relating to the 2000 trial and *Johnson I* because Johnson did not raise them within one year after remittitur issued from *Johnson I*. The district court concluded that the one-year period in NRS 34.726(1) did not begin until Johnson's judgment of conviction became final after this Court affirmed his death sentences from the direct appeal in *Johnson II*. This appeal followed.

**Discussion**

*Nevada's postconviction scheme contemplates filing one petition from a final judgment of conviction*

NRS 34.726(1) states that a post-conviction petition for a writ of habeas corpus "must be filed within 1 year after entry of the judgment of conviction or, if an appeal had been taken from the judgment, within 1 year after the appellate court . . . issues remittitur."<sup>5</sup> The Court has previously held that this statute requires a final judgment to prompt the one-year period.<sup>6</sup> Here, parties disputed when Johnson's conviction became final for the purposes of the statute. The Court agreed with Johnson's position that the statutory and legislative intent behind the post-conviction scheme calls for a single petition challenging convictions and sentences. Because Johnson's judgment of conviction was not final until settlement of sentences on remand (*Johnson I*), the one-

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<sup>1</sup> By Ebeth Rocio Palafox.

<sup>2</sup> *Johnson v. State*, 118 Nev. 787, 799, 59 P.3d 450, 458 (2002) (*Johnson I*).

<sup>3</sup> *Johnson v. State*, 122 Nev. 1344, 1360, 148 P.3d 767, 778 (2006) (*Johnson II*).

<sup>4</sup> NEV. REV. STAT. §§ 34.726(1) (2015).

<sup>5</sup> *Id.*

<sup>6</sup> *See Whitehead v. State*, 128 Nev. 259, 285 P.3d 1053 (2012).

year period did not begin until remittitur issued from *Johnson II*. The Court additionally relied on *Whitehead*,<sup>7</sup> to address policy concerns such as endorsing a rule that would undermine the legislative intent of post-conviction habeas provisions.

Thus, the Court agreed with the district court that NRS 34.726(1) did not bar Johnson's ineffective assistance of counsel claims relating to his 2000 and 2005 trials or the direct appeals from those convictions.<sup>8</sup>

*The district court correctly denied the claims raised in Johnson's petition*

To determine whether the district court correctly denied Johnson's claim, the Court relied on the two-part test established by *Strickland v. Washington*, which requires "a petitioner demonstrate that counsel's performance fell below an objective standard of reasonableness (deficient performance) and a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different (prejudice)." <sup>9</sup> If a petitioner demonstrates sufficient probability to weaken confidence in the outcome, reasonable probability is established.<sup>10</sup> The *Strickland* test is additionally applicable to appellate-counsel claims,<sup>11</sup> though it considers the restraints of the appellate process that require counsel to make decisions as to which claims will be argued and which are ignored.

*Johnson failed to demonstrate that he received ineffective assistance of counsel at the 2000 jury trial or in the related appeal (Johnson I)*

*Jury selection*

Johnson argued that his appellate counsel should have raised several challenges to the jury selection process. However, the Court concluded that he failed to show deficient performance and prejudice because he did not establish that issues ignored by counsel were clearly stronger than others raised, or that they had a reasonable probability of success on appeal.

*Unrecorded bench conferences*

Johnson contended that trial counsel should have ensured the recording of all bench conferences or maintained better documentation of unrecorded conferences. The Court rejected this because even if an objectively reasonable attorney would have taken these actions, he provided no explanation how the trial result would have differed but for counsel's performance.

*Admission of evidence*

Johnson argued that counsel should have challenged various evidentiary decisions, including the trial court's: 1) decision to admit autopsy photographs; 2) ruling precluding him from questioning a witness's bias; 3) admittance of testimony that he sold drugs and; 4) admittance of

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

<sup>8</sup> NEV. REV. STAT. §§ 34.726(1) (2015).

<sup>9</sup> 466 U.S. 668 (1984).

<sup>10</sup> *Strickland*, 466 U.S. at 694.

<sup>11</sup> *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

testimony that he heard another witness tell the police “we knew who did it.” The Court concluded that Johnson failed to establish a reasonable probability that these issues would succeed on appeal, or how they were clearly stronger in comparison to other issues raised by appellate counsel.

#### *Prosecutorial misconduct*

The Court concluded that the district court did not err in denying Johnson’s ineffective counsel claim. Johnson argued appellate counsel should have contemplated prosecutorial misconduct, but he failed to show deficient performance or prejudice. Johnson also did not explain why a reasonable attorney would have raised the specific issues he emphasized, instead of others. Moreover, none of these issues had a reasonable probability of success on appeal.

#### *Kidnapping offenses*

The Court rejected Johnson’s contention because he failed to explain how counsel should have challenged the kidnapping charges as incidental to the robbery charges. Again, Johnson failed to show deficient performance or prejudice. Further, the facts of the present case did not allow for a reasonable probability that counsel could have successfully disputed the kidnapping charges.<sup>12</sup>

#### *Improper defense comments*

The Court additionally rejected Johnson’s contention that counsel provided ineffective assistance by referring to the victims as kids during closing argument. The Court had previously held that describing them as such is not improper given their youth,<sup>13</sup> even in light of the trial court’s granting of counsel’s motion in limine to prohibit the use of the term.

#### *Jury instructions*

Johnson argued that counsel should have challenged the coconspirator liability instruction, and the premeditation and reasonable doubt instructions. He further argued that trial counsel should have offered an additional instruction on express and implied malice. The Court concluded that Johnson failed to demonstrate deficient performance.

With respect to the coconspirator instruction, Johnson did not receive a coconspirator charge; thus, the instruction was not necessary to instruct the jury of the intent required to find him guilty of kidnapping. The premeditation and reasonable doubt instructions acted in accordance to the law,<sup>14</sup> therefore appellate counsel had no basis to challenge.

Lastly, in consideration of the overwhelming evidence showing Johnson was guilty of first-degree murder pursuant to NRS 200.030(1),<sup>15</sup> he failed to demonstrate a reasonable probability that had the jury received different instructions, they would return a different verdict.

#### *Johnson failed to demonstrate that he received ineffective assistance of counsel during the 2005 penalty hearing and related appeal (Johnson II)*

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<sup>12</sup> See *Hutchins v. State*, 110 Nev. 103, 108, 867 P.2d 1136, 1139–40 (1994).

<sup>13</sup> *Johnson II*, 122 Nev. at 1356, 148 P.3d at 776.

<sup>14</sup> See NEV. REV. STAT. §§ 175.211 (1991); *Byford v. State*, 116 Nev. 215, 237, 994 P.2d 700, 714–15 (2000).

<sup>15</sup> NEV. REV. STAT. §§ 200.030(1) (2013).

### *Bifurcation of the 2005 penalty hearing*

Johnson failed to show deficient performance of counsel when he argued that counsel should not have made a request for a bifurcated penalty hearing. Though trial counsel testified that the request was a strategic decision, Johnson did not demonstrate that counsel's strategy fell below an objective standard of reasonableness.<sup>16</sup> Further, he did not demonstrate a reasonable probability of a different outcome but for counsel's successful strategy.

### *Additional mitigating evidence*

Johnson argued that trial counsel inadequately investigated and should have presented additional mitigating evidence with respect to other circumstances in his social history. Under *Strickland*, "counsel has the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."<sup>17</sup> Here, testimony at the evidentiary hearing supported the reasonableness of counsel's decisions with respect to their investigation and presented evidence. Because Johnson failed to identify what testimony counsel should have presented at the hearing,<sup>18</sup> he further failed to demonstrate deficient performance and prejudice.

### *Evidence of codefendants' sentences*

Johnson failed to prove that there is a reasonable probability that his sentence would differ had the jury heard of his co-conspirators lesser sentences. Though he argued that trial counsel should have raised this evidence, a reasonable attorney may have similarly ignored presenting this evidence to avoid reinforcing the State's argument that Johnson was deserving of a harsher sentence because of his heightened role in the crimes.<sup>19</sup>

### *First penalty hearing mitigating circumstances*

Johnson failed to show deficient performance and prejudice when he argued that trial counsel should have provided the jury at his 2005 penalty hearing with all mitigating circumstances presented at his first penalty hearing. Johnson did not demonstrate that this instruction was proper given that the jurors at the 2005 penalty hearing heard evidence of the most concerning mitigating circumstances. Further, the judge instructed the jury as to their ability to find any other mitigation, including circumstances not specifically listed. Jurors at the 2005 penalty hearing had the duty to decide what mitigation existed and the weight given to the mitigation evidence presented.<sup>20</sup>

### *Impeachment of defense witnesses*

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<sup>16</sup> See *Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004); see also *Strickland*, 466 U.S. at 690–91.

<sup>17</sup> *Strickland*, 466 U.S. at 691.

<sup>18</sup> See *Molina v. State*, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

<sup>19</sup> See *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

<sup>20</sup> See *Kansas v. Carr*, \_\_\_ U.S. \_\_\_, \_\_\_ 136 S.Ct. 633, 642 (2016).

Trial counsel has an obligation to make a reasonable investigation into mitigating evidence or a reasonable decision that renders an investigation unnecessary.<sup>21</sup> In the present case, Johnson's argument that trial counsel should not have caused the mitigation expert to prepare a report, and that both counsel should have challenged the State's use of the expert's report to impeach a defense mental health expert, failed. The Court concluded that decision by counsel was not unreasonable. Further, the State has the right to investigate an expert's opinion;<sup>22</sup> here, Johnson failed to identify any basis on which counsel could have challenged the report's use.

Johnson also argued that appellate counsel should have challenged the prosecutor's impeachment of a defense witness by inquiring about a misdemeanor conviction. However, the trial court relieved any prejudice by sustaining a defense objection and instructing the jury to disregard the exchange;<sup>23</sup> thus, the Court rejected this argument.

#### *Disagreement between trial counsel*

Here, with respect to his complaint that counsel contradicted each other in closing argument, the Court concluded that Johnson again failed to demonstrate ineffective counsel. Counsel explained at the evidentiary hearing that she sought to preserve the defense's credibility by challenging co-counsel's statement. Additionally, Johnson did not show prejudice because it was unlikely that a more consistent argument by counsel would have changed the result.

#### *Jury instruction*

The Court concluded that Johnson failed to show deficient performance and prejudice when he argued that trial counsel should have requested an instruction advising the jury that one juror may find a mitigating circumstance. Here, instructions and special verdict forms made this point clear. Trial counsel's failure to request an additional instruction did not fall below an objective standard of reasonableness. Further, because there is no clear probability that the jurors did not comprehend that they could make an individual determination, there was no reasonable probability of a different outcome at the penalty phase but for failure to request an additional instruction.<sup>24</sup>

### **Conclusion**

The Court affirmed the district court's decision, and concluded it did not err in denying Johnson's petition, predicated on the district court's consideration and denial of Johnson's post-conviction petition for a writ of habeas corpus on the merits in his death penalty case.

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<sup>21</sup> Strickland, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 520–23 (2003).

<sup>22</sup> See NEV. REV. STAT. §§ 50.305 (1971); Blake v State, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005).

<sup>23</sup> See Pantano v. State, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006); Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005).

<sup>24</sup> See Boyde v. California, 494 U.S. 370, 380–81 (1990).