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Fall 9-6-2019

### Menendez-Cordero v. State, 135 Nev. Adv. Op. 29 (Jul 25, 2019)

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#### Recommended Citation

Hagenkord, Nick, "Menendez-Cordero v. State, 135 Nev. Adv. Op. 29 (Jul 25, 2019)" (2019). *Nevada Supreme Court Summaries*. 1247.

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ANONYMOUS JURY, JURY INSTRUCTIONS, AND ADMISSION OF EVIDENCE

**Summary**

The Court concluded that (1) the empanelment of an anonymous jury does not, without actual prejudice, infringe on a defendant's constitutional rights and the district court satisfied the abuse-of-discretion standard adopted; (2) the district court need not instruct a jury that is responsible for imposing a sentence in a first-degree murder case under NRS 175.552 about the effects of a deadly weapon enhancement; and (3) there was no abuse of discretion in the district court's decision to admit Menendez-Cordero's threats as consciousness-of-guilt evidence.

**Background**

In 2010, Luis Alejandro Menendez-Cordero gathered with a group of friends and started playing cards. After the group started playing, Menendez-Cordero went outside and when he returned, shot Kevin Melendez and another guest before fleeing the crime scene. Both victims died from the gunshot wounds. The State learned that Menendez-Cordero was a member of MS-13 and a confidential informant told the State that he admitted to shooting the victims because one of them had disrespected MS-13.

At a pretrial hearing, a special agent from the Federal Bureau of Investigation informed the court about the significance of tattoos within the MS-13 culture and identified multiple tattoos on Menendez-Cordero's body that signify the commission of a crime. Before the trial, the district court also permitted into evidence two recorded conversations wherein Menendez-Cordero asked his associates to threaten a key witness.

Having assessed the violent nature of MS-13, Menendez-Cordero's attempt to obstruct justice, and the lengthy prison sentence he faced if convicted, the district court decided to empanel an anonymous jury and redact the jurors' names and addresses from the juror questionnaires. The district court explained to the prospective jurors it was doing so to protect their privacy during the trial. Both parties had the opportunity to examine the prospective jurors for any biases and nothing suggests the district court limited the scope of questioning during this process.

After a ten-day trial, the jury found Menendez-Cordero guilty on two counts of first-degree murder and found that he had used a deadly weapon in the commission of the crimes. During the penalty hearing, the district court instructed the jury that the sentence for the deadly weapon enhancement will be determined by the court at a later date. The jury sentenced Menendez-Cordero to life without parole on each count, and the district court sentenced him to a consecutive term of 20 years' imprisonment for the use of a deadly weapon on each count. A timely appeal followed on the issues of (1) whether the district court abused its discretion when it empaneled an anonymous jury by withholding the jurors' names and address from counsel; (2) whether the district court erred when it failed to instruct the jury on the effect of a deadly weapon enhancement at the penalty hearing; and (3) the admission of Menendez-Cordero's threats as consciousness-of-guilt evidence.

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<sup>1</sup> By Nick Hagenkord

## Discussion

### *Anonymous Jury*

The Court adopted an abuse-of-discretion standard when addressing the issue of anonymous juries and concluded, absent actual prejudice, the empanelment of an anonymous jury does not infringe on a defendant's constitutional rights. Yet, the Court is mindful that withholding certain biographical information may threaten a defendant's Sixth Amendment right to an impartial jury<sup>2</sup> or Fifth Amendment right to a presumption of innocence.<sup>3</sup> Therefore, the Court emphasized that empaneling an anonymous jury is an unusual measure and should only be employed after careful consideration of the following factors:

- (1) there is a strong reason for concluding that it is necessary to enable the jury to perform its factfinding function, or to ensure juror protection; and (2)
- reasonable safeguards are adopted by the trial court to minimize any risk of infringement upon the fundamental rights of the accused.

In doing so, the Court declined to use the more demanding balancing test adopted in *Stephens Media LLC v. Eighth Judicial District Court*, 125 Nev. 849, 862-63, 221 P.3d 1240, 1250 (2009), believing that withholding biographical information of jurors does not encumber public access to criminal trials in a way that precludes fair administration of justice. Underlying the holding in *Stephens Media* was the recognition of the First Amendment pertaining to matters relating to the functioning of government.<sup>4</sup> Menendez-Cordero's concerns are not of the same constitutional dimension. His concern that withholding information interferes with a defendant's ability to exercise peremptory challenges is not a constitutionally guaranteed right. As such, a defendant must show actual prejudice and Menendez-Cordero failed to do so. His second concern, that an anonymous jury threatens to erode a defendant's presumption of innocence is flawed because it does not necessarily imply guilt. Jurors may be given a variety of reasons as to why they will be assigned anonymity. For these reasons, the Court concluded that, absent actual prejudice, the empanelment of the anonymous jury did not infringe on the defendant's constitutional rights.

### *There was a strong reason justifying empaneling an anonymous jury*

Looking at the first part of the test, the Court considered:

- (1) The defendants' involvement with organized crime;
- (2) the defendants' participation in a group with the capacity to harm jurors;
- (3) the defendants' past attempts to interfere with the judicial process or witnesses;
- (4) the potential that the defendants will

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<sup>2</sup> *United States v. Barnes*, 604 F.2d 121, 142 (2d Cir. 1979)

<sup>3</sup> *United States v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003).

<sup>4</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980)

suffer a lengthy incarceration if convicted; and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

The Court does not view this list as exhaustive or dispositive, but merely instructive. The first factor is supported by the fact that Menendez-Cordero was involved with MS-13, a notoriously dangerous gang. As to the second factor, there is evidence that MS-13 has the capacity to harm jurors. Third, Menendez-Cordero interfered with the judicial process by asking his associates to intimidate a key witness and providing them with court documents. Fourth, Menendez-Cordero was charged with a double homicide and facing a lengthy prison sentence if convicted. And fifth, the local newspaper published a front-page article about the trial and its connection to MS-13. When combined, the Court concluded that there was a strong case-specific reason to believe the jurors and fact-finding process needed protection.

*The district court took reasonable precautions to ensure that juror anonymity did not infringe on Menendez-Cordero's fair trial rights.*

Courts have held that a defendant's right to an impartial jury is not infringed when it conducts a thorough voir dire designed to uncover bias. Additionally, a defendant's presumption of innocence is not violated when the district court gives jurors a plausible and nonprejudicial reason for not disclosing their identities. Although this is a sufficient precaution, it is not a necessary one in Nevada. Therefore, absent an abuse of discretion, the Court will defer to the district court's reasoning. Here, the Court concluded that the district court implemented reasonable safeguards by instructing the jurors that their anonymity was to protect them from public identification. Further, the district court only redacted the jurors' names and addresses, and even invited counsel to view the unredacted questionnaires. The district court used precaution to ensure a thorough voir dire by both parties. As such, the Court held the district court did not abuse its discretion.

*Jury instruction on Menendez-Cordero's deadly weapon enhancement*

The district court has broad discretion in settling jury instructions.<sup>5</sup> Accordingly, this matter was reviewed for abuse of discretion or judicial error. The Court found none.

A defendant is not entitled to a jury instruction on sentencing enhancements, even when the same jury that determined the defendant's guilt is responsible for imposing a sentence pursuant to NRS 175.552. Nevada law assigns this task to the district court and thus, there is no justification for mandating that the district court provide a jury instruction explaining the deadly weapon enhancement. In addition, the district court's decision was not arbitrary. After hearing arguments from both parties, the district court concluded that Menendez-Cordero's proposed jury instruction would be confusing. The Court held that while there is no statutory obligation to instruct a jury of the deadly weapon enhancement, it does not prohibit a district court from doing so.

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<sup>5</sup> *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

### *Admission of Menendez-Cordero's threats as consciousness-of-guilt evidence*

The Court concluded that the district court's decision to admit evidence of two recorded conversations where Menendez-Cordero asked his associates to threaten a key witness was not manifestly wrong. The district court did not abuse its discretion because it does not matter whether the threatening statement actually reached the party<sup>6</sup> and its admission was probative. Evidence that a defendant threatened a witness with violence is directly relevant to the question of guilt.<sup>7</sup> Moreover, there is nothing in the record to suggest that the district court abused its discretion in concluding that the probative value was not substantially outweighed by its cumulative nature. Because there was no manifest abuse of discretion, the Court deferred to the district court's decision to admit Menendez-Cordero's threats as consciousness-of-guilt evidence.

### **Conclusion**

Adopting the abuse-of-discretion standard, the Court held that the district court did not abuse its discretion when it empaneled an anonymous jury. There is also no statutory obligation for a district court to instruct a jury on a deadly enhancement penalty. Lastly, the district court did not manifestly abuse its discretion in admitting Menendez-Cordero's threats as consciousness-of-guilt evidence. For these reasons, the Court affirmed Menendez-Cordero's judgment of conviction.

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<sup>6</sup> *Abram v. State*, 95 Nev. 352, 356-57, 594 P.2d 1143, 1145 (1979).

<sup>7</sup> *Evans v. State*, 117 Nev. 609, 628 28 P.3d 498, 512 (2001).