IN THE SUPREME COURT OF THE STATE OF NEVADA

ARMANDO CORTINAS, JR. A/K/A ARMANDO BENAVIDES CORTINAS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 43356

FILED

MAR 2 8 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of prohibition or mandamus. Petitioner Armando Cortinas, Jr., asserts that the State's notice of intent to seek death fails to specify any facts in support of the alleged aggravating circumstances and that the district court abused its discretion when it refused to strike the notice and the aggravating circumstances. Cortinas is correct that the State's notice is defective under SCR 250, and we therefore grant relief. We decline to address Cortinas's other contentions that the State was required to submit the alleged aggravators to the grand jury, that the evidence fails to support the alleged aggravators, and that Nevada's statutory death penalty scheme is unconstitutional.

Among the evidence presented to the grand jury was the following. On April 20, 2003, the body of a woman (eventually identified as Kathryn Kercher) was found in a remote area of the desert in Clark

County. The body had three stab wounds in the back. An autopsy revealed hemorrhages in the neck and tongue, and in the opinion of the medical examiner the cause of death was asphyxiation due to strangulation. The stab wounds appeared to be postmortem.

On April 21, 2003, Cortinas was at home in Las Vegas when he began threatening his mother and his brother and himself with a knife. His mother called the police. After LVMPD officers arrived and began questioning him, Cortinas told them that he had murdered a prostitute. Cortinas was taken to the homicide office, where Detective Thomas Thowsen advised him of his Miranda[1] rights. Cortinas agreed to talk. He told the detective that about a week before he had a prostitute, named Kathryn, come to his home one night and give him oral sex for $150.00. Afterwards Cortinas began to strangle her with a lanyard. Detective Thowsen stated: "He described choking her until she was unconscious and then he would let up the tension and when she started to breathe again he would choke her again until she was unconscious. And he indicated it went on for about an hour." Cortinas then put his arm around her neck "and tried to snap her neck." When she still seemed to be breathing, Cortinas duct taped her skirt around her head and mouth and duct taped her hands together. He then put her body in the trunk of her car and drove out to the desert. He dragged the body into the desert and stabbed it three times in the back—once in each lung and once in the spine. Cortinas admitted that he took property from the victim: the $150.00 he had paid her and two diamond earrings.

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

The record further shows that on June 12, 2003, the grand jury returned a true bill against Cortinas charging him with the murder and robbery of Kercher, both with the use of a deadly weapon. The next day the State filed an indictment charging Cortinas with first-degree murder with use of a deadly weapon and robbery with use of a deadly weapon. On June 26, 2003, the State filed a Notice of Intent to Seek Death Penalty. The notice alleged three aggravating circumstances but did not allege any supporting facts. In February 2004, the defense filed motions to strike the aggravating circumstances and the notice. On April 14, 2004, the district court heard argument on the motions and denied them without explanation in a ruling from the bench.

The Nevada Constitution grants this court the power to issue writs of mandamus and of prohibition.[2] This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse of or arbitrary or capricious exercise of discretion.[3] It may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction.[4] Neither writ issues where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.[5] This court considers whether judicial economy and sound

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[2]Nev. Const. art. 6, § 4.

[3]See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

[4]See NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

[5]See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338.

judicial administration militate for or against issuing either writ.[6] Mandamus and prohibition are extraordinary remedies, and the decision to entertain a petition lies within the discretion of this court.[7]

We conclude that extraordinary relief is appropriate here. As discussed below, the district court manifestly abused its discretion in denying Cortinas's motions to strike the aggravating circumstances and to strike the State's notice. Cortinas further contends that if he does not receive the death penalty, he will not have an adequate remedy at law because this court will likely never consider the issues he now raises. This court has concluded in two cases that defendants not sentenced to death did not suffer prejudice from errors relating to aggravating circumstances alleged by the State.[8] Nevertheless, Cortinas asserts two ways that he will be prejudiced even if he is not sentenced to death. One, the State will be able to prosecute him before a death-qualified jury, which is more likely to convict and to impose a harsher sentence. Two, he is less likely to receive a sentence allowing parole in a capital case, where the other sentencing options are death and life without parole, than in a noncapital case, where the other option is simply life without parole. The State disputes these assertions, but they are not without force. Finally, judicial economy and sound judicial administration militate for issuing a writ. SCR 250 imposes specific charging requirements on prosecutors in capital

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[6]See State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990).

[7]Hickey, 105 Nev. at 731, 782 P.2d at 1338.

[8]See Phenix v. State, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998); Schoels v. State, 114 Nev. 981, 990, 966 P.2d 735, 741 (1998).

cases, and Cortinas shows that the State has violated these pretrial requirements. It is more economical and just to remedy the violation now than to try to do so after a conviction, whether or not Cortinas receives a death penalty.

The State failed to comply with SCR 250(4)(c), which provides:

> No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.

The notice filed by the State in this case alleged three aggravating circumstances: "The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree and the person charged killed or attempted to kill the person murdered"; "The murder involved torture or mutilation of the victim"; and "The murder was committed upon one or more person[s] at random and without apparent motive." The notice alleged no supporting facts and did no more than track the statutory language in NRS 200.033(4), (8), and (9).

The State nevertheless claims that it "substantially complied" with SCR 250. It clearly did not: the notice failed entirely to "allege with specificity the facts on which the State will rely to prove each aggravating circumstance."[9] As with indictments or informations, phrasing a charged

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[9]SCR 250(4)(c) (emphasis added).

aggravator in conclusory statutory terms is inadequate.[10] The State also argues that Cortinas "had access to the grand jury transcript and was able to clearly ascertain on what facts the State was basing the death aggravators." We reject this as a remedy for a deficient notice of intent to seek death, just as we have rejected it as a remedy for an inadequate indictment.[11] The State additionally argues that Cortinas's "indictment already contained the charge of robbery and the necessary facts required to be included." This argument addresses only the robbery aggravator and falls short even there, since the notice enumerated five possible felonies and did not even limit the alleged felony aggravator to robbery.

Most important, Cortinas's challenge is sound and timely, and we will not disregard the standard for charging aggravators which is plainly required by this court's rules.[12] If the State's arguments justified noncompliance with SCR 250(4)(c), then that provision would have no real force at all.

The State also points out that it filed a second notice pursuant to SCR 250(4)(f) and claims that this second notice provided Cortinas a

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[10]Cf. Lemberes v. State, 97 Nev. 492, 497, 634 P.2d 1219, 1222 (1981), overruled on other grounds by Funches v. State, 113 Nev. 916, 922-23, 944 P.2d 775, 778 (1997); Sheriff v. Standal, 95 Nev. 914, 916-17, 604 P.2d 111, 112 (1979).

[11]Simpson v. District Court, 88 Nev. 654, 660-61, 503 P.2d 1225, 1229-30 (1972).

[12]Cf. Simpson, 88 Nev. at 661, 503 P.2d at 1230 ("[W]hen challenge [to an indictment] is timely, no basis exists for measuring the accused's rights by any standard other than that our legislature has established . . . ."); State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980) (stating that reduced standards apply to the sufficiency of indictments after trial).

summary of the relevant facts. But SCR 250(4)(f) sets forth an additional, independent notice requirement; it does not serve to rectify failure to provide proper notice under SCR 250(4)(c). Furthermore, the second notice filed here was itself deficient.

SCR 250(4)(f) requires the State to file "a notice of evidence in aggravation no later than 15 days before trial is to commence. The notice must summarize the evidence which the state intends to introduce at the penalty phase . . . and identify the witnesses, documents, or other means by which the evidence will be introduced." Here, the State's notice of evidence in aggravation stated that Cortinas was aware of the evidence that would be presented at the guilt phase based on sources like the grand jury evidence and discovery. It then stated that to prove the first aggravator, involving robbery,

> the State will rely on evidence presented during the guilt phase of the trial and/or the testimony of any police officers who will testify regarding the facts and circumstances of the robbery on April 15, 2003 and/or any and all diagrams, photographs or physical evidence related to the investigation of the crimes of murder and robbery on or about April 15, 2003.

The notice similarly described the evidence for the other two aggravators. In regard to evidence other than the three aggravating circumstances, the notice listed victim impact testimony by "two or more family members of Kathryn Kercher" and "photographs and memorabilia regarding [her] life." It also listed "[t]he testimony of the Custodian of Records of the Clark County Detention Center regarding the disciplinary record of the Defendant while in the care and custody of the [detention center] and/or certified copies of such records."

Thus, contrary to SCR 250(4)(f), the second notice did not summarize the substance of any of the intended evidence, and it failed to identify any specific witnesses, other than the Custodian of Records. Nor, with the exception of Cortinas's disciplinary record, did it clearly identify documents or items that would be used to introduce the evidence.

In addition to ensuring that defendants receive adequate notice, another purpose of requiring notice under SCR 250 is to ensure that prosecutors scrutinize each potential aggravating circumstance in light of the evidence before deciding to allege any particular aggravators and seek death. Questions arising in this case illustrate why SCR 250 requires specific factual allegations and clear description of the intended evidence. For example, the State contends that Cortinas misstates its notice of intent to seek death by implying that it only alleged torture. The State points out that it alleged mutilation as well and complains that Cortinas "does not even address why mutilation is inapplicable." But Cortinas has no burden to show that mutilation does not apply; rather, the State's notice should have alleged specific facts showing that mutilation does apply. The notice of intent also provided no facts in support of its charge of torture. The State's briefing to this court indicates that it believes the strangling of the victim amounted to torture. But the State had to allege facts showing that Cortinas intended to inflict pain beyond the killing itself.[13] The State apparently assumes that the detective's testimony about Cortinas's description of the strangulation reveals such

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[13]Domingues v. State, 112 Nev. 683, 702 & n.6, 917 P.2d 1364, 1377 & n.6 (1996) ("Torture involves a calculated intent to inflict pain for revenge, extortion, persuasion or for any sadistic purpose" and intent "to inflict pain beyond the killing itself.").

intent. But regardless of the soundness of this assumption, the point is that the notice failed to provide specific facts to support either mutilation or torture, leaving these matters open to conjecture.

Also, the State's notice of intent to seek death charged both a robbery aggravator and a random-and-without-apparent-motive aggravator. We have explained that to use the latter, the State must do more than show that "the defendant unnecessarily killed another in connection with a robbery. The aggravator only applies to situations in which the defendant selected his victim without a specific purpose or objective and his reasons for the killing are not obvious or easily understood."[14] The State acknowledges in its brief to this court that charging both these aggravators is problematic and admits that "it is too early to determine if this aggravator will be applicable." The State reasons that if a jury did not find Cortinas guilty of robbery or if it found him guilty of robbery but found that he did not form the intent to rob until after the murder, then this aggravator would be applicable. However, the theories underlying these two aggravators and their possibly alternative nature were not apparent in the notice of intent to seek death, nor did the notice allege facts to support any of these theories.

Both notices filed by the State in this case failed to comply with SCR 250(4), and the district court manifestly abused its discretion in denying Cortinas's motions to strike the State's notice of intent to seek death and the aggravating circumstances. Therefore, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

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[14]Leslie v. Warden, 118 Nev. 773, 781-82, 59 P.3d 440, 446 (2002).

district court to grant Cortinas's motions to strike the notice of intent to seek the death penalty and to strike the aggravating circumstances.[15]

_____, C.J.
Becker

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[15]We also vacate the stay imposed by our order of August 30, 2004.