IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48291

FILED

NOV 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus in a death penalty case. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Pedro Rodriguez and two other individuals set out to rob the victim, who was paralyzed and confined to a wheelchair, of a large sum of money that Rodriguez believed to be kept in a safe in her home. The three young men ingested methamphetamine for a number of hours and then drove to the victim's home. During the robbery, the victim was shot four times and killed. The evidence presented at trial indicated that Rodriguez knew the victim and provided the information regarding the location of her home but that the youngest member of the group, Robert Paul Servin, shot the victim after Rodriguez had left the home with the victim's safe. A jury convicted Rodriguez of first-degree murder and robbery, both with the use of a deadly weapon, and sentenced him to death after finding that six aggravating circumstances had been proved beyond a

reasonable doubt and that there were no mitigating circumstances sufficient to outweigh the aggravating circumstances. On appeal, after invalidating the home-invasion aggravating circumstance as duplicative of the burglary aggravating circumstance, this court upheld Rodriguez's convictions and death sentence. Rodriguez v. State, 117 Nev. 800, 32 P.3d 773 (2001).

Rodriguez filed a timely post-conviction petition for a writ of habeas corpus in the district court, which was supplemented by court-appointed post-conviction counsel. The district court conducted an evidentiary hearing that was focused on Rodriguez's claim that trial counsel provided ineffective assistance by failing to investigate and present to the jury mitigating evidence. The district court ultimately rejected all of Rodriguez's claims and denied the petition. This appeal followed. We deny Rodriguez's claims for relief as to the guilt phase, but we conclude that Rodriguez's trial counsel were ineffective at the penalty phase for failing to investigate and present to the jury mitigating evidence regarding Rodriguez's background. We therefore affirm in part, reverse in part, and remand for further proceedings.

Guilt-phase claims

Rodriguez challenges the district court's rejection of his claim that appellate counsel was ineffective for not challenging the

constitutionality of the Kazalyn[1] instruction defining premeditation. To succeed on this ineffective-assistance claim, Rodriguez was required to satisfy the two-prong Strickland test by showing that appellate counsel's performance was deficient and that the omitted issue had a reasonable probability of success on appeal. Strickland v. Washington, 466 U.S. 668, 694 (1984); see Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). We conclude that he failed to meet the second prong.

The Kazalyn instruction had been approved by this court and was an accepted instruction for defining premeditation until this court changed course with its decision in Byford v. State, 116 Nev. 215, 234-37, 994 P.2d 700, 713-15 (2000), providing an instruction for prospective use that defined willful, deliberate, and premeditated as individual components of the intent element of first-degree murder. As this court recently held in Nika v. State, 124 Nev. ___, ___, 198 P.3d 839, 850 (2008), cert. denied, 2009 WL 2524052 (U.S. Oct. 13, 2009) (No. 09-5928), Byford represents a change in state law that applies, as a matter of due process, to cases that were not yet final when it was decided. Because Rodriguez's direct appeal from the judgment of conviction was pending when Byford was decided, his conviction was not yet final. See Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002) (stating that "[a] conviction becomes final when judgment has been entered, the availability of appeal

---

[1]Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992), receded from by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired"). The decision in Byford therefore applies to Rodriguez and appellate counsel was deficient for failing to challenge the instruction.

Rodriguez, however, failed to demonstrate prejudice based on counsel's deficient performance. The jury was instructed on the alternative theories of felony murder and torture murder in addition to willful, deliberate, and premeditated murder. Overwhelming evidence supported the verdict of guilt under a theory of felony murder, including evidence establishing that Rodriguez and his codefendants entered the victim's home specifically to rob her. Because the jury also found Rodriguez guilty of robbery, the fact that the robbery resulted in the victim's death was all that was required for a conviction for first-degree murder under the felony-murder theory. See Payne v. State, 81 Nev. 503, 505-06, 406 P.2d 922, 924 (1965). Further, although the evidence supporting the torture-murder theory was less compelling, it sufficiently demonstrated that the murder was perpetrated by means of torture for purposes of NRS 200.030(1)(a). In particular, evidence was presented at trial demonstrating that the victim suffered an incised wound on the top of her head and two non-lethal gunshot wounds and that Rodriguez and his codefendants bragged that they had dipped the bullets in acid or mercury for the purpose of causing pain or suffering. Because overwhelming evidence supported the alternative theories for first-degree murder, we conclude that "the error complained of [with respect to the Kazalyn instruction] did not contribute to the verdict obtained" and therefore

would not have had a reasonable probability of success on appeal. Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 324 (2008) (stating that instructional error is subject to harmless-error review), cert. denied, 2009 WL 2566986 (U.S. Oct. 13, 2009) (No. 09-6028). The district court thus did not err in denying this ineffective-assistance claim.[2]

Rodriguez also challenges the denial of his claim that the prosecutor committed misconduct by allowing codefendant Brian Lee Allen to perjure himself at trial. This claim was raised on direct appeal and was rejected by this court. Rodriguez, 117 Nev. at 810-11, 32 P.3d at 780. This claim therefore is barred by the law-of-the-case doctrine, Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975). Because the claim was appropriate for review on direct appeal, it also is barred by NRS 34.810(1)(b)(2). Rodriguez has not demonstrated that this claim presents an instance in which this court should disregard the law of the case nor has he demonstrated good cause and prejudice to overcome the procedural bar set forth in NRS 34.810(1)(b)(2). We therefore conclude that the district court did not err in rejecting this claim.

Rodriguez's final guilt-phase claim challenges the torture-murder instruction. This claim was not raised in the petition or

---

[2]To the extent Rodriguez argues that the district court erred in giving the Kazalyn instruction, this claim could have been raised on direct appeal and therefore was procedurally barred absent a demonstration of good cause and prejudice. NRS 34.810(1)(b)(2). Because he failed to satisfy those requirements, we conclude that the district court did not err by denying this claim.

supplemental petition filed in the district court. Generally, this court declines to consider post-conviction claims that have not been raised in the district court, Hill v. State, 114 Nev. 169, 178-79, 953 P.2d 1077, 1084 (1998), and Rodriguez provides no persuasive reason for this court to consider this claim for the first time in this appeal. We therefore decline to do so.[3]

Penalty phase claims

Rodriguez raises three penalty phase claims: (1) all of the aggravating circumstances are invalid, (2) the death sentence is disproportionate to the crime and the sentences imposed against the codefendants, and (3) trial counsel provided ineffective assistance by failing to investigate and present to the jury mitigating evidence. Because we grant relief as to Rodriguez's ineffective-assistance claim, we do not reach his claims regarding the validity of the aggravating circumstances and the proportionality of the sentence.

Ineffective-assistance claims present a mixed question of law and fact, and therefore, our review is de novo. Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001); accord Strickland, 466 U.S. at 698 (explaining that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"). We will, however, give deference to the district court's purely factual findings so

[3]We note that this claim was appropriate for direct appeal and therefore will be procedurally barred absent a demonstration of good cause and prejudice. See NRS 34.810(1)(b)(2).

long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

To succeed on his claim of ineffective assistance of counsel under the two-prong test in Strickland, Rodriguez must demonstrate that (1) counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and (2) the deficiency prejudiced the defense. 466 U.S. at 687-88; Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996). Rodriguez bears the burden to "prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence," Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004), and to establish prejudice, Riley, 110 Nev. at 646, 878 P.2d at 278.

When it comes to preparing for the penalty phase of a capital case, trial counsel has a duty to conduct "a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000); see also Kirksey, 112 Nev. at 995, 923 P.2d at 1112 ("Generally, when a defendant is charged with first-degree murder, defense counsel must prepare for the eventuality that a guilty verdict may be returned."); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1(C) (1989) (providing that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating

evidence that may be introduced by the prosecutor").[4] "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

Having reviewed the record, we conclude that the scope of trial counsel's investigation in this case fell short of the prevailing professional standards at the time. Trial counsel hired two investigators to assist in the investigation, but only one of the investigators played a significant role in the investigation and this was his first death penalty case. The investigator and trial counsel met with Rodriguez to get his assistance in identifying possible witnesses for the penalty phase, but Rodriguez was not cooperative, providing some names but no addresses, directing counsel not to contact certain relatives, and generally indicating that he deserved the death penalty.[5] The investigator nonetheless interviewed Rodriguez's

---

[4]Although not controlling on the deficiency prong, "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." Strickland, 466 U.S. at 688.

[5]We acknowledge that "a defendant may waive the right to present mitigating evidence and defense counsel's acquiescence to such a waiver does not constitute ineffective assistance of counsel." Kirksey, 112 Nev. at 995, 923 P.2d at 1112. Here, the record indicates that Rodriguez was not cooperative when it came to counsel's efforts to investigate his background. The record does not, however, support a conclusion that Rodriguez waived his right to present mitigating evidence or refused to allow counsel to present any mitigating evidence at the penalty phase. The fact that Rodriguez provided some names and that counsel or the

continued on next page . . .

ex-girlfriend and traveled to Los Angeles to interview Rodriguez's uncle, Jesus Rodriguez, who ultimately provided the only mitigating testimony offered by the defense at the penalty phase. Despite Rodriguez's reluctance or inability to provide information to assist the defense team in investigating his background, trial counsel was aware of and had contact with at least one other family member, Rodriguez's uncle, Gerardo Oropesa. But neither trial counsel nor the investigator interviewed Oropesa regarding Rodriguez's background.[6]

. . . continued

investigator interviewed two people (Rodriguez's ex-girlfriend and his uncle, Jesus Rodriguez) undermines any suggestion that Rodriguez impeded the investigation. And Rodriguez's lack of cooperation did not eliminate counsel's duty to investigate. Hamilton v. Ayers, ___ F.3d ___, No. 06-99008, 2009 WL 2973231, at *16 (9th Cir. September 18, 2009) (citing 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.")).

[6]Trial counsel testified that he may have talked to Oropesa on the phone but did not recall the substance of any conversation and did not recall talking to Oropesa regarding Rodriguez's background. Trial counsel further indicated that the investigator spoke with Oropesa. The investigator, however, testified that he could not recall interviewing Oropesa, and Oropesa testified that he had two brief conversations with trial counsel, the investigator never contacted him, and he was never asked about Rodriguez's background. Although Oropesa left Reno before the trial, a supplemental witness list filed after his departure and shortly before the penalty hearing listed Oropesa with a California phone number,

continued on next page . . .

Although the district court expressed "serious concerns" during the evidentiary hearing about the quality of counsel's investigation, its written order states that it was persuaded by the evidence "that trial counsel looked into the possibility of using Mr. Oropesa as a mitigation witness but ultimately decided not to do so because Oropesa himself had been a gang member and counsel believed that Oropesa had a prior felony record." The record does not support that conclusion. While it could have been a reasonable strategic decision not to present testimony from a gang member with a prior felony record, such a strategic decision is only reasonable to the extent that it was preceded by a reasonable investigation or a reasonable decision that a particular investigation was unnecessary. Strickland, 466 U.S. at 690-91. Trial counsel, however, did not interview Oropesa regarding Rodriguez's background. With no information as to what Oropesa could say about Rodriguez's background, trial counsel could not make a reasonable choice not to present his testimony or to forego further investigation. See Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996) ("Without taking reasonable steps to investigate [the defendant's] family, [the defendant's] trial counsel could not discover whether their testimony would benefit his client. Without that knowledge, we conclude that trial counsel could not make a

---

. . . continued

thus indicating that counsel had a means of contacting Oropesa even after he left the area.

reasonable tactical decision whether [the defendant's] family members should testify at the penalty hearing."). Under the circumstances, we are convinced that trial counsel's investigation was deficient and that the district court's conclusion to the contrary is clearly erroneous.

The question then is whether Rodriguez was prejudiced by counsel's deficient performance. To demonstrate prejudice, Rodriguez "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In assessing prejudice in the circumstances presented in this case, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins v. Smith, 539 U.S. 510, 534 (2003). "Prejudice is established if 'there is a reasonable probability that at least one juror would have struck a different balance' between life and death." Belmontes v. Ayers, 529 F.3d 834, 863 (9th Cir. 2008) (quoting Wiggins, 539 U.S. at 537), petition for cert. filed, 77 U.S.L.W. 3596 (U.S. Mar. 30, 2009) (No. 08-1263); see also Jimenez v. State, 112 Nev. 610, 625, 918 P.2d 687, 696 (1996) (explaining that it is up to each juror individually to determine whether to give effect to mitigating evidence and to determine whether aggravating circumstances are outweighed by mitigating circumstances and that "[u]nanimity is required only in the verdict concerning the presence of aggravating circumstances and the fact that the mitigating circumstances, whatever they are, are not sufficient to outweigh the aggravating circumstances").

The jury found three valid aggravating circumstances: (1) the murder was committed to avoid or prevent a lawful arrest, (2) the murder involved torture and/or mutilation of the victim, and (3) Rodriguez had a prior conviction for a violent felony (sexual assault with the use of a deadly weapon).[7] These aggravators were proven by sufficient evidence and are compelling.

Only one witness testified in mitigation during the penalty hearing. Rodriguez's uncle, Jesus Rodriguez, testified about Rodriguez's childhood. He told the jury that Rodriguez's parents had separated when he was young and that his mother was often in jail, beat Rodriguez regularly, and had relationships with many different men, one of whom initiated Rodriguez's drug use. Jesus recounted a time when Rodriguez's mother brought Rodriguez to him and said that she did not want him anymore and for Jesus to keep him. And he recounted another time when

---

[7]The jury found three other aggravators: the murder was committed in the commission of the crimes of (1) robbery, (2) burglary, and (3) home invasion. This court invalidated the home-invasion aggravator on direct appeal. Rodriguez v. State, 117 Nev. 800, 815, 32 P.3d 773, 783 (2001). The burglary and robbery aggravators are invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004). See also Bejarano v. State 122 Nev. 1066, 1070, 146 P.3d 265, 268, 272 (2006) (holding that McConnell applies retroactively). Contrary to Rodriguez's claims, the torture aggravator, however, is not invalid under McConnell. See Hernandez v. State, 124 Nev. ___, ___, 194 P.3d 1235, 1237 (2008). The preventing-a-lawful-arrest aggravator also is valid as challenges similar to the one Rodriguez raises have been rejected by this court. See, e.g., Blake v. State, 121 Nev. 779, 793-95, 121 P.3d 567, 576-77 (2005).

Rodriguez's mother left Rodriguez and his siblings in a car while she stayed in the house using drugs. On cross-examination, Jesus acknowledged that he did not know about the criminal charges that Rodriguez faced in the 1990s and was surprised to hear about them.

During the evidentiary hearing, Oropesa testified to his first-hand knowledge[8] of the physical abuse that Rodriguez suffered as a child at the hands of his stepfather and mother and to the violent neighborhood in which Rodriguez grew up. In particular, Oropesa testified that Rodriguez's stepfather, Eddy, inflicted numerous beatings on Rodriguez and kicked him every day. According to Oropesa, Eddy was a "huge guy, big guy" and "everybody was scared of him." Eddy also forced Rodriguez to steal to support Eddy's drug habit. Not only did Eddy physically abuse Rodriguez but Rodriguez's mother, a drug addict, joined Eddy in beating him. Rodriguez's mother also locked Rodriguez and his siblings in a closet and did not feed the children for days at a time. Rodriguez was forced to kneel for hours at a time on the wood or tile floors. Oropesa further explained that Rodriguez lived in a dangerous area of Los Angeles and "everybody got beat, all the kids got beat because everybody was drug addicts in our neighborhood." However, compared to all the other children, Rodriguez "had it worst out of anybody on the block." Oropesa described Rodriguez's neighborhood as a place where "all you saw was

---

[8]Oropesa, who was a few years older than Rodriguez, lived with Rodriguez's family for approximately five years.

drug addicts and crack fiends and killings and robbings and shootings." He also explained that Rodriguez changed dramatically after the death of his younger brother and began using drugs.

Oropesa's testimony at the evidentiary hearing was compelling and painted a more detailed picture of Rodriguez's background, including the horrific physical abuse and deprivations that he suffered and the violent neighborhoods in which he grew up, than the minimal mitigating evidence that was presented during the penalty hearing. In comparison, Jesus had no first-hand knowledge of the abuse that Rodriguez had suffered as a child, had little contact with Rodriguez after he turned 13, and testified only generally during the penalty hearing regarding the abuse that Rodriguez had suffered. Jesus' testimony simply does not convey the nature or extent of Rodriguez's disturbing background. We conclude that reasonable counsel would have presented Oropesa's testimony to the jury. And when Oropesa's testimony, both the good and the bad,[9] is taken into consideration, our confidence in the outcome of the penalty hearing is undermined. Despite the compelling

[9]Oropesa testified that Rodriguez lived with him after moving to Reno but that he became afraid of Rodriguez when he began "praying to the devil and doing this crazy stuff, getting all these crazy tattoos," and eventually told Rodriguez to leave his home. Similar damaging information was already before the jury during the penalty phase. In particular, evidence regarding a prior conviction for harassment and disturbing the peace included testimony that Rodriguez screamed at arresting officers, "We worship the devil. 666." Rodriguez, 117 Nev. at 806, 32 P.3d at 777.

valid aggravators that remain, the totality of the mitigating evidence, including the dysfunctional family, drug use, physical abuse, Rodriguez's youth (he was 19 at the time of the murder), and evidence that Rodriguez was not the shooter,[10] creates a reasonable probability that at least one juror would have reached a different conclusion in weighing the aggravating and mitigating evidence for death eligibility. Rodriguez therefore demonstrated prejudice as the result of trial counsel's deficient investigation.[11]

Because we conclude that Rodriguez met both prongs of the Strickland test for ineffective-assistance of counsel with respect to his

---

[10]There is no doubt that this evidence is the sort of evidence typically presented by capital defendants and considered by juries to explain or mitigate a defendant's crime. See, e.g., Johnson v. State, 122 Nev. 1344, 1349-50; 148 P.3d 767, 771 (2006); Butler v. State, 120 Nev. 879, 888, 102 P.3d 71, 78 (2004); State v. Bennett, 119 Nev. 589, 594-95, 81 P.3d 1, 5 (2003); Sherman v. State, 114 Nev. 998, 1006, 965 P.2d 903, 909 (1998); accord Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (discussing "'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse'" (quoting California v. Brown, 479 U.S. 538, 545 (1987))), abrogated on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002).

[11]Given our decision based on the failure to investigate and present mitigating evidence from Oropesa, we need not address the claim that trial counsel also failed to adequately investigate and present mitigating evidence from other family members. And in light of our decision, we need not consider Rodriguez's challenges to the constitutionality of the death penalty.

claim that trial counsel failed to investigate his background, we reverse the district court's order to the extent that it rejected this claim of ineffective assistance and remand this matter for a new penalty hearing.

Having considered Rodriguez's arguments and for the reasons stated herein, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

HARDESTY, C.J., with whom PARRAGUIRRE and PICKERING, JJ., agree, concurring in part and dissenting in part:

I concur in the majority's decision to affirm the district court's denial of Rodriguez's claims related to the guilt phase. I dissent, however, from the majority's decision to reverse and remand for a new penalty hearing based on Rodriguez's claim that trial counsel were ineffective for failing to investigate and present mitigating evidence. And I conclude that Rodriguez's other claims related to the penalty phase similarly lack merit. I therefore would affirm the district court's decision in its entirety.

As the majority points out, because ineffective-assistance claims present a mixed question of law and fact, our review is de novo. However, significantly, this court must defer to the district court's factual findings made after an evidentiary hearing so long as they are supported by substantial evidence and not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Here, after a lengthy evidentiary hearing, which included the testimony of several witnesses, the district court entered a thorough order detailing its findings of fact and conclusions of law. I conclude that the district court's findings related to trial counsel's investigation and presentation of mitigating evidence are supported by substantial evidence and are not clearly wrong. Because Rodriguez did not make the required showing under Strickland—deficient performance and prejudice—the district court did not err by denying Rodriguez's claim that counsel were ineffective for not adequately investigating and presenting mitigating evidence.

Counsel's performance

Respecting the deficiency prong of Strickland, based on evidence adduced at the evidentiary hearing, the district court found that Rodriguez was uncooperative and reluctant to supply counsel with names and addresses of relatives and friends who could testify on his behalf. The district court also found that Rodriguez's family members, including Gerardo Oropesa, were transient and Rodriguez's claims that they could have been located were not credible. Further, trial counsel presented who they considered to be the one viable mitigation witness—Jesus Rodriguez, who was unable to provide the defense with the names of any other mitigation witness who would be helpful to Rodriguez's defense. Finally, the district court found that trial counsel's decision not to present certain known evidence was objectively reasonable because that evidence contained damaging information about Rodriguez, concluding that "the mitigating bits were offset by the prejudicial bits." In particular, the defense team interviewed Rodriguez's ex-girlfriend and rejected her as a potential mitigation witness because she portrayed Rodriguez in a negative light. The evidence also shows that counsel rejected Oropesa as a potential mitigation witness in part because of his past gang affiliation. And trial counsel declined to present the testimony of the defense expert psychiatrist in light of her conclusion that Rodriguez exhibited extreme sociopathic tendencies or had an antisocial personality disorder and because she could not say that he would not commit another crime of violence or that he was redeemable.

The district court's findings support the conclusion that counsel's investigation of mitigation evidence, including Oropesa, was objectively reasonable considering the difficulty in locating Rodriguez's transient family members, the constraints of an uncooperative client who was in the best position to provide counsel avenues of investigation, and the balance between positive and negative aspects of Rodriguez's character. Giving deference to the district court's factual findings, and recognizing that the district court judge presided over the trial and post-conviction proceedings, I conclude that the district court did not err by concluding that counsel's performance in this regard was not deficient.

Lack of prejudice

Even assuming that Rodriguez had satisfied the deficiency prong of Strickland, I conclude that he failed to demonstrate prejudice considering the compelling nature of the aggravators found.[12]

---

[12]I agree with the majority that Rodriguez's challenges to the torture and preventing-a-lawful-arrest aggravators lack merit but that the robbery and burglary aggravators are invalid under McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and that Rodriguez had good cause to raise this issue in the underlying petition as McConnell is retroactive. See Bejarano v. State, 122 Nev. 1066, 1079, 146 P.3d 265, 274 (2006). I conclude, however, that Rodriguez cannot demonstrate prejudice because, even after reweighing the remaining aggravators against the mitigating evidence presented to the jury, I am convinced that the jury would have found Rodriguez death eligible and would have selected death as the appropriate penalty.

The aggravators that remain are the most compelling. Although the preventing-a-lawful-arrest aggravator is sufficiently supported by the evidence and significant in that it shows that Fondy was likely killed because she recognized Rodriguez, the prior-violent-felony and torture aggravators in particular illustrate the brutality of the murder and Rodriguez's increasing penchant for violence. First, in support of the prior-violent-felony aggravator, the State presented evidence of Rodriguez's prior conviction for sexual assault of a 14-year-old girl. In particular, the victim testified that Rodriguez anally and vaginally raped her at knife-point. Second, in support of the torture aggravator, the evidence adduced at trial showed that Fondy was shot a total of four times, including non-lethal shots to the shoulder and to the leg. Although she was paralyzed below the waist, she would have suffered immensely from the shoulder wound. Additionally, she had a laceration to the head, and the defendants boasted that they had soaked the bullets in a solution in order to make death slow and painful. Rodriguez v. State, 117 Nev. 800, 813-14, 32 P.3d 773, 781-82 (2001).

While the mitigating testimony presented at the evidentiary hearing offered some additional details regarding Rodriguez's childhood, it is in the same vein as the evidence heard by the jury. The jury was also well aware that the evidence indicated Rodriguez was not the shooter. Although Rodriguez did not pull the trigger, he knew and selected the victim, orchestrating the robbery that led to her murder. Given the compelling aggravating circumstances and the fact that the new mitigating evidence is similar to the evidence presented at the trial and

had some less-than-mitigating characteristics, I am not convinced that there is a reasonable probability of a different outcome had trial counsel presented the additional mitigating evidence offered at the evidentiary hearing. I therefore would affirm the district court's denial of Rodriguez's post-conviction petition in all respects.[13]

_____, C.J.
Hardesty

We concur:

_____, J.
Parraguirre

_____, J.
Pickering

cc: Hon. Brent T. Adams, District Judge
Nathalie Huynh
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Federal Public Defender/Las Vegas
Washoe District Court Clerk

---

[13]Rodriguez's challenge to Nevada's lethal injection protocol is not cognizable in a post-conviction petition for a writ of habeas corpus. McConnell v. State, 125 Nev. ___, ___, 212 P.3d 307, 311 (2009). And his remaining challenges to the death sentence lack merit.