IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ROBERT RIKER,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS SMITH, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 56590

ORDER DENYING PETITION

This is an original petition for a writ of mandamus or prohibition.

Petitioner David Robert Riker is awaiting a new penalty hearing after the district court, during post-conviction proceedings, struck the sole aggravator found at his original penalty hearing pursuant to McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), and vacated the death sentence. The real party in interest filed an amended notice of intent to seek the death penalty to include an aggravator based upon a murder conviction Riker sustained in California in 2005.

Riker seeks a writ of mandamus or prohibition directing the district court to strike the amended notice of intent to seek the death penalty on two grounds: (1) allowing the real party in interest to pursue an aggravator based on the California conviction would be fundamentally unfair and (2) the version of NRS 200.033(2) in existence at the time of his

original trial does not contemplate using the California conviction, which was sustained after the commission of the instant capital offense.

Riker first argues that it would be fundamentally unfair to allow the real party in interest to profit from the unconstitutional death sentence originally imposed and seek a death sentence by using the California conviction that was obtained after the unconstitutional sentence was imposed to support an aggravator. We disagree.

SCR 250(4)(d) provides that on a showing of good cause, the district court may permit a motion to file a late notice or an amended notice of intent to seek the death penalty alleging additional aggravating circumstances. Such a motion must be filed within 15 days after discovering the grounds for the late or amended notice. Here, on August 14, 2007, the district court granted Riker's post-conviction petition in part by striking the sole aggravator pursuant to McConnell and vacating the death sentence. Ten days later, the real party in interest alleged the California murder conviction as an aggravator. We conclude that a plain reading of SCR 250(4) allows the real party in interest to amend the notice to include the challenged aggravator. The real party in interest's motion is timely and good cause was shown because the conviction supporting the aggravator was not available at the time of the original penalty hearing. And except for Riker's protestation that the amended notice of intent is fundamentally unfair, he has not provided any persuasive authority to support that contention.[1] His reliance on Bennett v. District Court, 121

---

[1]To the extent Riker asserts that allowing the real party in interest to amend the notice of intent penalizes him for securing post-conviction

continued on next page . . .

Nev. 802, 121 P.3d 605 (2008), is misplaced. In Bennett, this court rejected the notion that "a fundamental change in death-penalty case law, i.e., McConnell, constitutes 'good cause'" under SCR 250(4)(d). 121 Nev. at 810, 121 P.3d at 610. Additionally, the Bennett court observed that the evidence supporting the newly alleged aggravators had existed since the defendant's original prosecution. Id. at 810-11, 121 P.3d at 611. Such is not the case here—the conviction underlying the new aggravator was not available at the time of the original penalty hearing.

Because SCR 250(4)(d) permits the real party in interest to amend the notice of intent in this manner and doing so does not violate the principles of fundamental fairness, we conclude that the district court did not manifestly abuse its discretion by denying Riker's motion to strike the amended notice of intent to seek the death penalty. Therefore, we conclude that our intervention by way of extraordinary writ is not warranted on this ground.

Riker next argues that the California conviction does not qualify as an aggravator under the version of NRS 200.033(2) in place during his original trial because that conviction did not precede the commission of the capital murder.[2] He acknowledges that this argument

---

. . . continued

habeas relief, nothing in the submissions suggests that the amended notice of intent was a product of vindictiveness.

[2]At the time of Riker's original penalty hearing, NRS 200.033(2) provided that first-degree murder may be aggravated if "[t]he murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another." 1993 Nev. Stat., ch. 44, § 1, at 76.

was rejected in Gallego v. State, 101 Nev. 782, 792-93, 711 P.2d 856, 863-64 (1985); see also Leonard v. State, 117 Nev. 53, 82, 17 P.3d 397, 415 (2001), but contends that this court failed to provide any statutory construction analysis, "including the application of the rule of lenity, which is constitutionally required." Riker also suggests that the Legislature's amendment of NRS 200.033(2) in 1997 indicates that an ambiguity existed in the statute before the amendment that must be resolved in his favor.[3] We disagree.

In rejecting the same argument Riker raises here, this court in Gallego observed that NRS 200.033(2) "was never intended to operate on the vagaries of conviction sequences." 101 Nev. at 792, 711 P.2d at 863. Rather, "the focal point [of the statute] is the time of sentencing," id., reasoning that the clear language supported a construction of the statute that did not "exclude convictions of murders or crimes of violence occurring after the primary offense but prior to the penalty phase of a defendant's trial." Id. at 792-93, 711 P.2d at 864. Nothing in Riker's arguments persuade us to revisit our holding or reasoning in Gallego. We perceive no ambiguity in the relevant version of NRS 200.033(2) that requires consideration of the rule of lenity or to otherwise construe the statute in favor of Riker. Nor do we interpret the 1997 amendment to suggest that an ambiguity existed in the statute. Therefore, we conclude

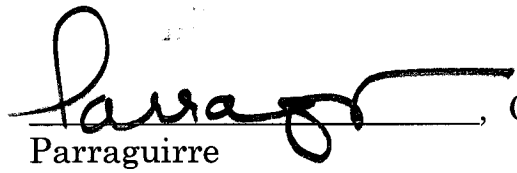
---

[3]The 1997 amendment to NRS 200.033(2) provided that first-degree murder may be aggravated if "[t]he murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of" certain offenses, including murder. 1997 Nev. Stat., ch. 356, § 1, at 1293.

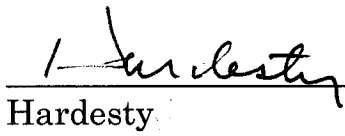
that our intervention by way of extraordinary writ is not warranted on this ground.

Accordingly, we

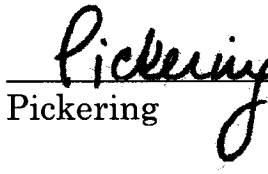
ORDER the petition DENIED.



Parraguirre, C. J.



Hardesty, J.



Pickering, J.

cc: Hon. Doug Smith, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk