IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS BRADFORD,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 58238

FILED

JUN 22 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition challenges a district court order granting the State's pretrial motion to enforce discovery pursuant to NRS 174.245 concerning defense materials to be presented during the penalty hearing. Petitioner Julius Bradford is awaiting trial for capital murder, with the State seeking the death penalty. Bradford seeks a writ directing the district court to vacate its order granting the State's pretrial motion to enforce discovery pursuant to NRS 174.245 regarding penalty hearing evidence. See NRS 34.160; NRS 34.320; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981); see also State v. Dist. Ct. (Romano), 120 Nev. 613, 618, 97 P.3d 594, 597 (2004) (providing that writ of prohibition is appropriate remedy to prevent improper discovery), overruled on other grounds by Abbott v. State, 122 Nev. 715, 138 P.3d 462 (2006).

Prior to trial, Bradford filed a notice of intent to call Dr. Mark Cunningham to testify during the penalty phase but indicated that he would not provide details of Dr. Cunningham's testimony until after the conclusion of the guilt phase of trial. The State filed a motion to enforce discovery pursuant to NRS 174.245, which sought, among other evidence, materials to be presented during the mitigation portion of the penalty hearing. The district court granted the motion, and this petition for extraordinary relief followed.

Two discovery statutes are at issue in this matter: NRS 174.234, which provides for reciprocal discovery of witnesses and information related to expert testimony, and NRS 174.245, which requires the defendant, at the prosecutor's request, to permit the prosecuting attorney to inspect and to copy or photograph certain materials outlined in the statute that the defendant intends to present in his case in chief. Our decision in Floyd v. State, 118 Nev. 156, 168, 42 P.3d 249, 257 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008), addressed NRS 174.234 and NRS 174.245 and concluded that, for purposes of those statutes, the defendant's initial presentation of evidence during the penalty hearing is considered part of the defense's case in chief.

In his petition, Bradford argues that (1) Floyd should only be read to support reciprocal discovery where that discovery relates to guilt phase evidence; (2) if this court rejects that premise, then this court should reconsider Floyd in light of legislative history, Supreme Court Rule 250, and decisions from other jurisdictions; (3) this court's decision in Grey supports the conclusion that mitigation evidence is rebuttal evidence and therefore is not subject to reciprocal discovery; and (4) reciprocal discovery of mitigation evidence essentially forces the defendant to disclose potential

evidence rather than intended evidence. For the following reasons, we conclude that Bradford failed to demonstrate that the district court manifestly or arbitrarily and capriciously abused its discretion, see NRS 34.160; Ryan v. Dist. Ct., 123 Nev. 419, 425, 168 P.3d 703, 707 (2007), or exceeded its jurisdiction by granting the State's motion to enforce discovery, see NRS 34.320; State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Applicability of Floyd v. State

Bradford argues that this court's decision in Floyd should only be read to support disclosure where the defendant has already disclosed evidence in anticipation of its use at the guilt phase of trial. Amicus curiae the Federal Public Defender adds that Floyd forces a defendant to choose between forgoing possible mitigation evidence and waiving the privilege against self-incrimination, attorney-client privilege, and work-product privilege with regard to the guilt phase of trial. Bradford also contends that the penalty phase of trial is more similar to a sentencing hearing than a trial, and therefore, the discovery rules do not apply.

We conclude that these arguments lack merit. For purposes of reciprocal discovery, we specifically held in Floyd that the defendant's initial presentation of evidence during the penalty hearing is considered part of the defendant's case in chief. 118 Nev. at 168, 42 P.3d at 257. Bradford's argument ignores the fact that Floyd specifically addressed the use of disclosed evidence at the penalty phase. Id. at 167, 42 P.3d at 256-57. Moreover, the Floyd opinion also concluded that the reports were "discoverable as 'results or reports of physical or mental examinations' that Floyd originally intended to introduce in evidence" and that Floyd failed to demonstrate that they were "internal documents representing the

mental processes of defense counsel in analyzing and preparing Floyd's case." Id. at 168, 42 P.3d at 257 (alteration omitted) (quoting NRS 174.245(2)(a)). This holding acknowledges the tension described in the amicus curiae's argument and implicitly recognizes that, while Floyd failed to do so, another defendant may demonstrate that such evidence does indeed represent the mental process of defense counsel or contain privileged communications and thus is not discoverable. Lastly, Bradford's argument that a penalty hearing is more akin to a sentencing hearing and thus the discovery rules are inapplicable lacks merit as Floyd specifically held that the disclosure rules applied to penalty phase evidence. Id. at 169, 42 P.3d at 258.

Reconsideration of Floyd

Bradford contends that this court should reconsider Floyd in light of legislative history, Supreme Court Rule 250, and decisions from other jurisdictions. Bradford contends that the legislative history of both NRS 174.234 and NRS 174.245 does not reveal any discussion of the statutes' applicability to penalty phase proceedings and that neither statute indicates that the legislature contemplated that the parties could have multiple cases-in-chief or considered the defense's mitigation case to be a separate case-in-chief. He argues that this court's failure to address mitigation evidence in SCR 250(4)(f), which imposes duties regarding the production of evidence in aggravation, indicates that the defendant has no correlating duty to produce mitigating evidence prior to the hearing. Further, as the rule specifically addresses the disclosure of evidence related to the penalty phase of a death penalty trial and the statutes are silent as to that specific issue, then the statutes do not apply. Lastly, he contends that other jurisdictions have interpreted similar reciprocal

discovery statutes to preclude pretrial discovery of potential mitigation evidence and that this court should reconsider Floyd in light of this differing case law. In addition, amicus curiae the Federal Public Defender suggests that this court should adopt a prophylactic rule based on U.S. v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997), to prevent the pretrial disclosure of mitigation evidence. We decline Bradford's invitation to reconsider Floyd for three reasons.

First, in Floyd, we stated that "[i]t is clear that the statutes use the term 'case-in-chief' to refer to either party's initial presentation of evidence." 118 Nev. at 168, 42 P.3d at 257. Given this clarity, resorting to legislative history is unnecessary. See SIIS v. Miller, 112 Nev. 1112, 1120, 923 P.2d 577, 582 (1996) ("This court is not empowered to go beyond the face of an unambiguous statute to lend it construction contrary to its plain meaning and not apparent from the legislative history."). However, even if the legislative history is considered, it does not undermine Floyd's holding. The statutes specifically refer to the case-in-chief of the defense, see NRS 174.234; NRS 174.245, which is defined as the first opportunity by the defense to present evidence, see NRS 169.049. The legislature understood this to be the definition at the time it was amending the reciprocal discovery statutes to include this definition. See Hearing on A.B. 210 Before the Assembly Comm. on Judiciary, 69th Leg. (Nev., June 20, 1997). Further, at the time that the Legislature amended the statutes, the penalty phase of a first-degree murder trial was understood to be a separate proceeding. See Evans v. State, 112 Nev. 1172, 1198, 926 P.2d 265, 282 (1996) ("The guilt phase and the penalty phase in a capital case are separate proceedings." (citing NRS 175.552)). Moreover, Bradford's reading of the legislative history to exclude reciprocal discovery concerning

the penalty phase of trial because it was not specifically mentioned ignores the overriding concern discussed throughout the legislative history that broader discovery in advance of trial leads to more resolutions without a trial. See Hearing on A.B. 210 Before the Assembly Comm. on Judiciary, 69th Leg. (Nev., April 9, 1997).

Second, while SCR 250(4)(f) imposes additional notice requirements on the State in capital cases, it does not conflict with NRS 174.234 and NRS 174.245. Therefore, both the statutes and rule can apply. See State v. Dist. Ct., 116 Nev. 953, 958-59, 11 P.3d 1209, 1212-13 (2000) (holding that as SCR 250(4) and NRS 175.552(3) both apply to capital cases as they do not conflict).

Third, the cases upon which Bradford and amicus curiae rely in support of their argument that this court should reconsider its decision in Floyd are not binding on this court and do not support a defendant's right to withhold such evidence as the evidence in those cases had been disclosed to the court and filed under seal. See U.S. v. Edelin, 134 F. Supp. 2d 45, 55 (D. D.C. 2001); U.S. v. Beckford, 962 F. Supp. 748, 764 (E.D. Va. 1997). Notably, as pointed out in the real party in interest's response, Nevada has a similar procedure. NRS 174.275 provides that "[u]pon sufficient showing, the court may at any time order that discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, be denied, restricted or deferred, or make such other order as appropriate." The timing of any disclosure pursuant to the reciprocal discovery statutes is inherently in the district court's discretion. See NRS 174.234 (providing that disclosure may be "at such other time as the court directs"). Other jurisdictions similarly permit the trial court to the defer disclosure at its discretion. See U.S. v. Catalan Roman, 376 F. Supp. 2d 108, 117-18 (D.

P.R. 2005) (providing that district court has authority to defer disclosure of penalty phase evidence where necessary); People v. Superior Court (Mitchell), 859 P.2d 102, 109 (Cal. 1993) (recognizing district court's discretion to defer penalty phase discovery).

Applicability of Grey v. State

Bradford argues that Grey supports the contention that defense evidence is rebuttal evidence and therefore not subject to reciprocal discovery. We disagree. In Grey, we recognized that under Floyd's definition of case in chief, NRS 174.234, which imposes the general duty of disclosure that the State sought to enforce, does not encompass rebuttal evidence and therefore imposes no reciprocal duty regarding rebuttal evidence. 124 Nev. at 118, 178 P.3d at 160. We acknowledged that Floyd's interpretation of NRS 174.234 did "not give sufficient consideration to the essential nature of the defendant's case in a criminal trial." Id. In particular, as the criminal defendant normally has no burden of proof, any evidence he presents is essentially evidence in rebuttal to the State's case in chief. Id. Therefore, NRS 174.234(2) essentially requires a defendant to disclose evidence he intends to use to rebut the State's case, while no reciprocal duty is imposed on the State's rebuttal evidence. Id. This court concluded that such a scheme was unconstitutional under Wardius v. Oregon, 412 U.S. 470, 475 (1973). Id. Therefore to construe NRS 174.234 in a constitutional manner, see Mangarella v. State, 117 Nev. 130, 134-35, 17 P.3d 989, (2001) (observing that this court must interpret statutes to avoid conflicts with federal and state constitutions whenever possible), we imposed a duty on a party, who receives advance notice of an expert witness and is certain to require expert testimony to rebut the noticed witness, to provide a list of expert

rebuttal witnesses that it intends to call to challenge the noticed expert testimony. Id. at 119, 178 P.3d at 161. Bradford's argument, which relies solely on the observation that the defense's case-in-chief is essentially rebuttal evidence, is untenable as it ignores the context of our decision and the broader concerns addressed in Grey. Id. at 118, 178 P.3d at 160.

Uncertainty in potential mitigation witnesses

Bradford contends that he cannot necessarily decide who he intends to call as a mitigation witness until the guilt phase of trial is over and thus he is being forced to disclose potential evidence, not intended evidence. We disagree. In Grey, this court recognized that "when advance notice of the expected testimony of a party's expert is provided prior to trial, the need for expert rebuttal witnesses to be presented by the other party is not uncertain." Id. at 119, 178 P.3d at 161; see also Williams v. Florida, 399 U.S. 78, 85 (1970) ("Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself."). Similarly, when a defendant receives notice of the State's intent to seek the death penalty as well as the intended notice of aggravation, the evidence and testimony it considers necessary to introduce is also not necessarily uncertain.[1]

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[1]Bradford also argues that (1) requiring prior disclosure of mitigation evidence prior to the end of the guilt phase may violate his Fifth Amendment privilege against self-incrimination; (2) Nevada's discovery statutes contain no specific mandate on pretrial disclosure of mitigation evidence; (3) Floyd had a unique procedural context that should not be construed to extend to this case; (4) NRS 174.234(7) precludes

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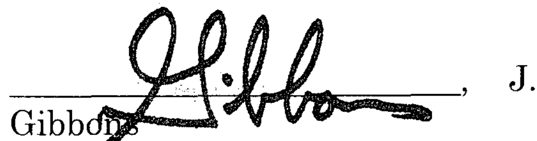
Having considered Bradford's contentions and concluded that they lack merit, we

ORDER the petition DENIED.[2]

_______________________, J.
Douglas



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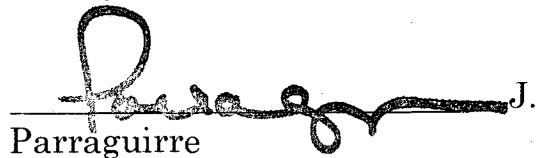
Gibbons



_______________________, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Lisa Rasmussen
Susan D. Burke
Attorney General/Carson City
Clark County District Attorney
Federal Public Defender/Las Vegas
Eighth District Court Clerk

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discovery of mitigation evidence until it is relevant, i.e., after the conclusion of the guilt phase; (5) disclosure of mitigation evidence prior to the conclusion of the guilt phase may be unnecessarily embarrassing for the defendant and his family; and (6) fairness requires that a person charged with a capital crime should not have to assist the State in obtaining a conviction. However, he fails to discuss any of these arguments further in his petition. See NRAP 21(a)(3)(D) (requiring petitions for extraordinary relief to set forth "points and legal authorities" for why a writ should issue).

[2]Petitioner's emergency motion for a stay, filed on June 21, 2012, is denied as moot.