IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM KECK,
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. 61117

FILED

JUN 22 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition challenges a district court's order granting the State's pretrial request for reciprocal discovery pursuant to NRS 174.234 and NRS 174.245 concerning defense materials to be presented during the penalty hearing. Petitioner William Keck is awaiting trial for murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon resulting in substantial bodily harm, manslaughter, and burglary while in possession of a deadly weapon, with the State seeking the death penalty. Keck seeks a writ directing the district court to vacate its order granting the State's request 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, Keck filed a motion to compel the disclosure of exculpatory evidence. In its opposition to the motion, the State requested the disclosure of reciprocal discovery for the guilt and penalty phases of trial pursuant to NRS 174.234 and NRS 174.245. The district court granted the request, 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, Keck argues that (1) any reading of Floyd should be limited to its unique facts, (2) the legislative history of NRS 174.245 does not indicate that the legislature intended the statute to apply to the penalty phase of a death penalty trial, (3) the reciprocal discovery of mitigation evidence essentially forces him to disclose potential evidence rather than intended evidence, and (4) the compelled pretrial disclosure of mitigation evidence violates his privileges under the Fifth and Sixth Amendments. For the following reasons, we conclude that Keck 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

Keck 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. We disagree. 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 defense's case in chief. 118 Nev. at 168, 42 P.3d at 257. While Keck contends that Floyd should only be read to apply where evidence has been disclosed in anticipation of its use at the guilt phase of trial, he 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.

Legislative history

Keck 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 of those statutes 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 contends that other jurisdictions have interpreted similar reciprocal discovery statutes to preclude pretrial discovery of potential mitigation evidence or have used the term "case in chief" to only reference the guilt phase of trial.

We conclude that the legislative history does not support Keck's contention. 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, Keck'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).

We further conclude that case law from other jurisdictions does not support Keck's argument. U.S. v. Beckford, 962 F. Supp. 748, 764 (E.D. Va. 1997), the case upon which Keck relies in support of his

argument that "case in chief" refers only to the trial phase of the proceeding is not binding on this court and does not support a defendant's right to withhold such evidence, as the evidence at issue in Beckford had been disclosed to the court and filed under seal. Other jurisdictions similarly permit the trial court to defer the 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). Finally, Hightower v. Schofield, 365 F.3d 1008 (11th Cir. 2004), judgment vacated and remanded, 545 U.S. 1124 (2005), and Mercer v. Armontrout, 701 F. Supp. 1460, 1466 (W.D. Mo. 1988), which Keck cites as authority that some courts consider the defendant's penalty phase presentation of evidence separate from the defendant's case in chief, are not binding on this court and are unpersuasive as the language to which Keck refers are merely passing notations.

Uncertainty in potential mitigation witnesses

Keck 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 and 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." 124 Nev. 110, 119, 178 P.3d at 154, 161 (2008); 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.

Constitutional violation

Keck contends that requiring the pretrial disclosure of mitigation evidence violates his Fifth Amendment privilege against self-incrimination and Sixth Amendment work product privilege. We disagree. The timing and disclosure of evidence pursuant to the reciprocal discovery statutes is within the district court's discretion. See NRS 174.234 (providing that disclosure may be "at such other time as the court directs"). Moreover, 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."[1] The Floyd opinion even acknowledged the tension between discovery and constitutional privileges when it held that Floyd failed to demonstrate that the challenged evidence were "internal documents representing the mental processes of defense counsel in analyzing and preparing Floyd's case." 118 Nev. at 168, 42 P.3d at 257. Therefore, given the protections afforded by the statute to prevent the disclosure of constitutionally privileged

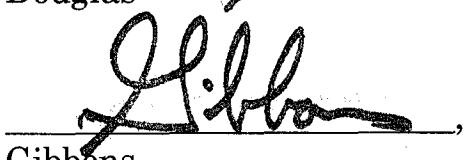
[1]If Keck believes that specific materials or documents are privileged, he must seek a protective order in the district court consistent with NRS 174.275.

material, Keck failed to demonstrate that pretrial disclosure of penalty phase evidence violated his constitutional rights.

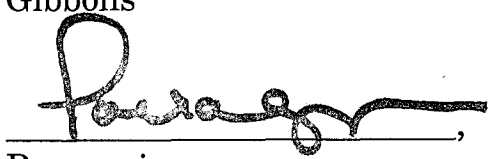
Having considered Keck's contentions and concluded that they lack merit, we

ORDER the petition DENIED.[2]

_____, J.
Douglas



_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[2]We deny the emergency motion for a stay filed on June 22, 2012, as moot.