ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL RIPPO,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44094

JOHN BEJARANO a/k/a JUAN MUNOZ a/k/a JOHN BEJARNO

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44297

FILED

MAY 31 2006

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SUPPPLEMENTAL MEMORANDUM PER NRAP 31(d)

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SUPPLEMENTAL MEMORANDUM PER NRAP 31(d)

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through STEVEN S. OWENS, Chief Deputy District Attorney, and hereby submits a Supplemental Memorandum per NRAP 31(d). Oral Argument is set for June 13, 2006.

Dated this 26th day of May, 2006.

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM PER NRAP 31(d)

Per NRAP 31(d), any party may supplement the party's brief with supplemental authorities (but may not raise new points or issues) by filing and serving a supplemental memorandum not later than fifteen (15) days before the day set for oral argument. The present case has been set for oral argument on June 13, 2006, although a motion by Rippo's counsel to continue that date is pending.

Since the filing of the briefs in this case, the U.S. Supreme Court has pronounced new authority relevant to the issue raised in this case, namely whether an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process. See Brown v. Sanders, -- U.S. -- , 126 S.Ct. 884 (2006). In the present case, Defendant Rippo has argued that Nevada is a "weighing" state and that "it is constitutional error for the sentencer to give weight to an unconstitutional factor, even if other valid factors remain." See, Appellant's Supplemental Brief at p. 17. However, under the rationale of Brown v. Sanders, the "weighing" versus "non-weighing" dichotomy has been set aside in favor of a more direct and uniform harmless error analysis.

Sanders' jury found four special circumstances to be true: 1) that the murder was committed during a robbery, 2) that the murder was committed during a burglary, 3) that the victim was killed for the purpose of preventing her testimony in a criminal proceeding and 4) that the murder was especially heinous, atrocious, or cruel. Brown v. Sanders, 126 S.Ct. at 893. On appeal, the California Supreme Court set aside the burglary aggravator on state merger grounds and also invalidated the "heinous, atrocious, or cruel" aggravator as unconstitutionally vague. Id. However, the court upheld the death sentence on the basis of the two remaining valid aggravating circumstances, either one of which independently met Furman's narrowing requirement and rendered Sanders eligible for death. Id. at 894.

The U.S. Supreme Court agreed with California finding that the "[Furman] narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase." Id. at 889. The jury's consideration of subsequently invalidated aggravating circumstances in the weighing process does not produce constitutional error when the same facts and circumstances were admissible and properly considered under another valid sentencing factor:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables a sentencer to give aggravating weight to the same facts and circumstances.

Id. at 889-92. Thus, all the facts and circumstances admissible to establish the invalid burglary-murder and "heinous, atrocious, or cruel" aggravating circumstances were also properly adduced as facts bearing upon California's "circumstances of the crime" sentencing factor. Id. They were properly considered whether or not they bore upon the invalidated eligibility factors. Id. Any "skewing" resulting from the mis-labeling of such circumstances as eligibility factors had only an "inconsequential" impact not rising to the level of reversible constitutional error. Id; see also Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983).

In the instant case, the jury found six aggravating circumstances, 1) burglary, 2) robbery, 3) kidnapping, 4) under sentence of imprisonment, 5) prior violent felony, and 6) torture. Under McConnell, only the first three felony-aggravators have been found to fail to narrow death eligibility. Three valid aggravators remain, any one of which would have rendered Rippo death eligible and provided the requisite narrowing under Furman. Like California's "circumstances of the crime" sentencing factor, Nevada permits the consideration of "other matter" evidence in the penalty phase which would have permitted consideration of all the facts adduced in support of the felony-aggravators. NRS 175. 552 (3) ("During the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense,

More importantly, the facts and circumstances of the three felony-aggravators (burglary, robbery, and kidnapping) were actually heard in the guilt phase – no additional evidence was introduced concerning these aggravators in the penalty phase. Thus, no improper evidence was considered by the sentencing jury that would have tainted the verdict. Any alleged "skewing" of the weighing process due to the labeling of such evidence as an aggravating circumstance was inconsequential. Only where the jury could not have given aggravating weight to the same facts and circumstances under another valid sentencing factor, will unconstitutional skewing occur. Id.

As the Nevada Supreme Court has reasoned in the past, the reweighing or harmless error analysis of the evidence is permissible under the Nevada Constitution and does not entail impermissible fact-finding. Leslie v. Warden, 118 Nev. 773, 782, 59 P.3d 440, 447 (2002) (citing Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993)). This is especially true when the Court has invalidated a heretofore valid aggravating circumstance. Id; accord Browning v. State, 120 Nev. 347, 91 P.3d 39, 51 (2004) ("Once an aggravator is stricken, the court either reweighs the aggravating and mitigating circumstances or applies a harmless error analysis."). In State v. Haberstroh, 119 Nev. 173, 69 P.3d 676 (2003) the Court stated:

> The Supreme Court has held that the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review. It appears that either analysis is essentially the same and that either should achieve the same result. Harmless-error review requires this court to actually perform a new sentencing calculus to determine whether the error involving the invalid aggravator was harmless beyond a reasonable doubt. Reweighing involves disregarding the invalid aggravating circumstances and reweighing the remaining permissible aggravating and mitigating circumstances. Haberstroh, supra, at 682. (Internal quotation marks and citations omitted).

Under the reasoning of Brown v. Sanders, the second Colwell exception for retroactivity would not apply because confidence in the accuracy of the jury's death verdict is not seriously diminished and McConnell is not retroactive. Alternatively, even if McConnell were held to be retroactive, the jury's consideration of the felony-aggravators is harmless error and Rippo is not entitled to a new penalty hearing.

Dated this 26st day of May, 2006.

Respectfully submitted,

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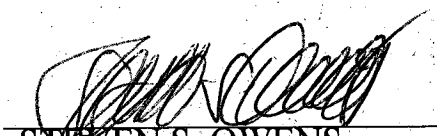
BY 
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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Supplemental Memorandum per NRAP 31(d) to the attorneys of record listed below on this 11th day of May, 2006.

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