ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MICHAEL RIPPO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 44094

FILED

DEC 11 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S PETITION FOR REHEARING

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
District Attorney
Nevada Bar No. 0002781
200 South Third Street
Las Vegas, Nevada 89101

GEORGE CHANOS
Nevada Attorney General
Nevada Bar No. 0005248
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

RECEIVED
DEC 11 2006
JANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

06-25217

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

MICHAEL RIPPO, Appellant, vs. THE STATE OF NEVADA, Respondent.	S.C. CASE NO. 44094

APPELLANT'S PETITION FOR REHEARING

COMES NOW, Christopher R. Oram, Esq., attorney for Appellant, MICHAEL RIPPO and submits the following as his Petition for Rehearing.

PROCEDURAL DISPOSITION

On November 16, 2006, this Court issued an opinion affirming the denial of Mr. Rippo's petition for a writ of habeas corpus. Counsel for Mr. Rippo requested an extension of time up until December 8, 2006, to file a petition for rehearing. This petition for rehearing follows. Mr. Rippo respectfully requests that this Court consider granting rehearing of it's opinion filed November 16, 2006. Mr. Rippo is petitioning this Court pursuant to NRAP rule 40.

///

///

///

///

///

///

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

PETITION FOR REHEARING

Nevada Rules of Appellate Procedure 40(a)(1) provides in pertinent part:

> Any claim that this Court has overlooked or misapprehended a material fact shall be supported by reference to the page of the transcript, appendix or record where the matter is to be found; any claim that this Court has overlooked or misapprehended a material question of law or has overlooked, misapplied or failed to consider controlling authority shall be supported by a reference to the page of the brief the petitioner has raised the issue.

ARGUMENT

I. MR. RIPPO SHOULD BE GRANTED REHEARING, HAVE HIS SENTENCE VACATED AND REMAND THE MATTER FOR A NEW SENTENCING HEARING.

Appellant Michael Rippo hereby petitions for rehearing, following this Court's decision affirming the denial of post-conviction habeas relief, filed on November 16, 2006. This petition is timely, NRAP 40(a)(1). Granting rehearing is necessary because this Court's decision "misapprehended... a material question of law in the case", NRAP 40 (c)(2)(i), and "overlooked, misapplied or failed to consider a...decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(ii). The issues raised in this petition could not be raised previously, because they arise from this Court's disposition of a constitutional claim that it raised and addressed sua sponte pursuant to NRS 177.055(2).

This Court's order of March 16, 2006, directed the parties to be prepared to address at oral argument the validity of instruction no. 7, given in the penalty phase of appellant's trial. That instruction told the jury "the entire jury must agree unanimously, however, as to whether the aggravating circumstances outweigh the mitigating circumstances or whether the mitigating circumstances outweigh the aggravating

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

circumstances." This Court's decision correctly concludes that the second clause of this sentence was inaccurate:

> The final sentence of this instruction should have read simply: "The entire jury must agree unanimously as to whether the aggravating circumstances outweigh the mitigating circumstances." The emphasized language implied that jurors had to agree unanimously that mitigating circumstances outweigh aggravating circumstances, when actually "a jury's finding of mitigating circumstances in a capital penalty hearing does not have to be unanimous."

On-line slip opn. at 4 (footnote omitted). But the decision proceeds to find the error harmless on the theory that "[i]t is extremely unlikely that the jurors were misled to believe that they could not give effect to a mitigating circumstance without the unanimous agreement of the other jurors." Id. This conclusion is unsupported. The implication that the jury would have construed this clause as requiring unanimity in the finding of individual mitigating circumstances is a straw man: there is no question that the instruction unequivocally told the jury that "any one juror can find a mitigating circumstance without the agreement of any other jurors."

The vice of the last clause is that it told the jury directly that it had to be unanimous in order to prevent a finding that the aggravating circumstances outweighed the mitigation.[1] The analogy would be an instruction on the element of the offense telling the jury that "the entire jury must agree unanimously that the element is proved beyond a

---

[1] The decision states that the second clause of the instruction only "implied that jurors had to argue unanimously that mitigating circumstances outweigh aggravating circumstances," on-line slip opn. at 4 (emphasis added), but this is simply wrong: the instruction told the jury directly that "the entire jury must agree unanimously as to . . .whether the mitigating circumstances outweigh the aggravating circumstances."

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

reasonable doubt or that the element is not proven"; and such an instruction would be recognized instantly as an impermissible reversal of the burden of proof. The fact that the erroneous burden of proof instruction was contradicted by another part of the same instruction that stated the correct rule did nothing to dispel its unconstitutionality, because rational jurors would have believed both parts of the instruction, that is, that while the finding that aggravation outweighed mitigation had to be found unanimously in order to establish death-eligibility, a finding that mitigation outweighed aggravation also had to be found unanimously in order to prevent death-eligibility which, as the decision acknowledges, is entirely wrong. In turn, this instruction did prevent the jurors from giving full effect to mitigating evidence, but not because it suggested that the jurors had to agree unanimously on the existence of any mitigating factor: rather, it erroneously prevented each individual juror from avoiding a finding of death eligibility by telling the jurors that a finding that mitigation outweighed aggravation had to be unanimous, rather than correctly informing them that any single juror could prevent a finding of death eligibility by finding that mitigation outweighed aggravation. This instruction thus did prevent individual jurors from giving full effect to the mitigation evidence that each of them found.

This issue is governed by Davis v. Mitchell, 314 F.3d 682, (6th Cir. 2003). There, an instruction told the jury that it must acquit a defendant of the element that the aggravating factors outweighed the mitigating factors before considering non-death sentences, in combination with a verdict form that provided only for a unanimous finding on that issue, was found unconstitutional. The court concluded that the combination of

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

the instruction and the verdict forms violated the Eighth Amendment because they "'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating circumstances. . ." 318 F.3d. at 689. This Court's decision simply does not address the actual error that arose from the instruction, which is that each juror was not informed that he or she individually could prevent a finding of the outweighing element.

The Court's decision regarding prejudice is also misdirected. Nevada's capital sentencing scheme allows any juror to reject imposition of a death sentence on any grounds, even in the absence of any mitigation, see Bennett v. State, 111 Nev. 1099, 1110, 901 P.3d 676 (1995), and gives each juror the unlimited right to give whatever weight to aggravation and mitigation he or she wishes to. Under these circumstances, there is no possibility of this Court conducting a rational review of prejudice based upon what a "reasonable" juror would have done, because it is precisely the subjective response of the individual jurors that is the key of the sentencing scheme.

This Court is aware of cases involving multiple murders of extraordinary brutality in which juries have not imposed the death penalty, e.g., Daniels v. State, 114 Nev. 261, 266, 956 P.2d 157 (1997); Ducksworth v. State, 113 Nev. 780, 789, 942 P.2d 157 (1997); and nothing in this Court's decision suggests that it considered the effect of mercy in its decision to uphold the death sentence. This Court has recognized that it is institutionally incapable of acting as an "appellant sentencing body," State v. Sims, 107 Nev. 438, 440,

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

814 P.2d 63 (1991), and this case demonstrated why that is so.[2]

Accordingly, this Court should grant rehearing, vacate the sentence and remand the matter for a new sentence hearing.

CONCLUSION

Based upon the foregoing reasons Mr. Rippo would respectfully request that this Court reconsider the arguments above pursuant to a petition for rehearing under NRAP 40.

DATED this 8 day of December, 2006.

Respectfully submitted by:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Appellant
MICHAEL RIPPO

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

---

[2] Further, this Court's "finding" that that the mitigating evidence was not "weighty," on-line slip opn. at 3, is a complete usurpation of the jury's role, in violation of our constitution's prohibition against finding facts on appeal in criminal cases. Nev. Const. Art. 6 § 4; N.R.S. 177.025; Bolden v. State, 97 Nev. 71, 73, 624 P.3d 20 (1981); State v. McKay, 63 Nev. 114, 154, 165 P.389 (1946); State of Nevada v. Mills, 112 Nev. 403, 406 (1877); see also Clemons v. State, 593 P.2d 1004, 1005-1006 (Miss. 1992). Appellate reweighing is fundamentally inconsistent with the right to jury trial on all elements of capital eligibility, which includes the "outweighing" element, Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450 (2002), under Ring v. Arizona, 536 U.S. 584, 604-608 (2002) and Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). These precedents, although not applicable retroactively in general, are part of the existing law that this Court must apply on appeal, see Slack v. McDaniel, 529 U.S. 473, 487 (2000) (appeal is "distinct step" in litigation to which net statutory rule applies).

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 8 day of December, 2006, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S PETITION FOR REHEARING**, addressed to:

David Roger
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155

George Chanos
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4714

Simone Mugrauto
An employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101