

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM P. CASTILLO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56176

FILED

NOV 22 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *T. Malone*
DEPUTY CLERK

ORDER DENYING REHEARING

Appellant William Castillo has filed a petition for rehearing of the court's order affirming the district court's denial of a post-conviction petition for a writ of habeas corpus in a death penalty case. *Castillo v. State*, Docket No. 56176 (Order of Affirmance, July 18, 2013). Although we deny rehearing, Castillo's claim that this court overlooked his argument that he was actually innocent of the death penalty warrants further discussion.

Castillo argues that two of the four aggravating circumstances found in the penalty phase were invalid based on *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and that if this court reweighed and considered all of the mitigation evidence that should have been presented to the jury, he would be actually innocent of the death penalty and his death sentence would be reversed. Castillo fails to demonstrate that he would be entitled to relief.

After striking the invalid aggravating circumstances, two remain—Castillo was previously convicted of a felony involving the use or threat of use of violence and he committed the murder to avoid lawful arrest. This court may uphold a death sentence based in part on an

invalid aggravating circumstance by reweighing the aggravating and mitigating evidence or conducting a harmless-error review. *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990); *Haberstroh*, 119 Nev. at 183, 69 P.3d at 682-82. Although Castillo argues that in reweighing or conducting a harmless-error review we must consider new mitigating evidence that was not presented to the trial jury, this court has reiterated time and again that reweighing is based on the trial record. See *Bejarano v. State*, 122 Nev. 1066, 1081, 146 P.3d 265, 276 (2006) (“Reweighing requires us to answer the following question: Is it clear beyond a reasonable doubt that absent the invalid aggravators the jury still would have imposed a sentence of death?”); *Rippo v. State*, 122 Nev. 1086, 1093-94, 146 P.3d 279, 284 (2006) (striking three *McConnell* aggravators and reweighing, looking only to the record for mitigating evidence); *Archanian v. State*, 122 Nev. 1019, 1040-41, 145 P.3d 1008, 1023 (same); *State v. Haberstroh*, 119 Nev. 173, 184 n.23, 69 P.3d 676, 683 n.23 (2003) (rew weighing does not involve factual findings “other than those of the jury at the original penalty hearing”); *Bridges v. State*, 116 Nev. 752, 766, 6 P.3d 1000, 1010 (2000) (this court reweighed based on a “review of the trial record”). The special verdict indicates that one or more jurors found the following mitigating circumstances: (1) Castillo’s youth at the time of the crime, (2) he committed the murder under the influence of extreme emotional distress or disturbance, and (3) “[a]ny other mitigating circumstances.” Based on the record, the “other mitigating circumstances” found by the trial jurors may have included that Castillo admitted guilt, demonstrated remorse, cooperated with police, did not plan the murder, and had a difficult childhood. Considering these mitigating circumstances and the remaining valid aggravating circumstances, we are confident that the jury would

have concluded that the mitigating circumstances did not outweigh the valid aggravating circumstances. We further conclude beyond a reasonable doubt that the jury would have returned a death sentence after considering the evidence as a whole, which reflects a particularly brutal murder: Castillo hit the sleeping elderly victim several times in the head with a tire iron, smothered her face with a pillow, and later returned to burn the house down. Accordingly, we deny the rehearing petition.

It is so ORDERED.¹

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

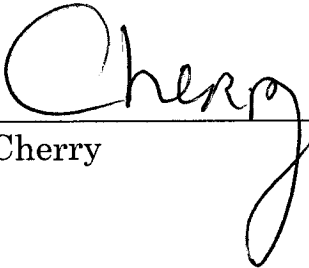
cc: Hon. David Barker, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

¹The Honorable Nancy Saitta voluntarily recused herself from participation in the decision of this matter.

CHERRY, J., dissenting:

I would not only grant rehearing, I would allow Castillo to have a new penalty hearing before a jury rather than have this court determine whether to impose the death penalty on a "cold record." My own experience in litigating death penalty cases tells me that there is a vast difference when a defendant is facing two aggravating circumstances rather than four aggravating circumstances.

I am seriously troubled by the majority's conclusion that beyond a reasonable doubt the jury would have returned a death sentence after considering the evidence as a whole. Certainly, almost every conviction for first degree murder with a death-eligible defendant is for a "brutal murder." However, what the majority overlooks is that the jury did in fact find mitigating circumstances and that a new penalty hearing would allow the new jury to weigh the remaining two aggravating circumstances with the mitigating circumstances to be provided by the defense. In light of the above, I would grant rehearing and encourage my colleagues to grant a new penalty hearing.

 J.
Cherry