IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERICK LAVELLE PAINE,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DOUGLAS SMITH, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 56595

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition.

Petitioner Frederick Lavelle Paine is awaiting a new penalty hearing after this court struck, during post-conviction review, the sole two aggravating circumstances found at his penalty hearing.

Paine seeks a writ of mandamus or prohibition challenging a district court order granting a motion to amend a notice of intent to seek the death penalty that alleges five new aggravating circumstances, all of which stem from the crimes that gave rise to the capital prosecution.[1] Paine argues that the district court erred by granting the State's motion to

[1]Paine and an accomplice twice hired taxicabs and robbed the drivers. In the first instance, Paine shot the cab driver in the head. The cab driver survived. In the second incident, Paine shot the cab driver, killing him. Paine pleaded guilty to first-degree murder, attempted murder, and two counts of robbery with the use of a deadly weapon.

amend the notice of intent because the State was obligated to allege the new aggravators in its original notice of intent and the factual allegations supporting the new aggravators were known at the time the original notice of intent was filed. Therefore, according to Paine, the State did not establish good cause under SCR 250(4)(d) to justify amending the notice of intent.

Paine relies on our decision in Bennett v. District Court, 121 Nev. 802, 121 P.3d 605 (2005). In that case, Bennett contended that the district court erred in determining that McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004), which rendered two aggravators invalid, constituted good cause under SCR 250(4)(d) to allow an amended notice of intent alleging additional aggravators. We agreed, concluding that "an opinion by this court in itself does not provide the State with good cause pursuant to SCR 250(4)(d) to file an amended notice alleging new aggravating circumstances against a defendant. . . . Good cause requires something more." Bennett, 121 Nev. at 811, 121 P.3d at 611. Our decision was also influenced by the fact that the evidence supporting the new aggravators existed at the time of Bennett's original prosecution. Id.

Here, a three-judge panel found two circumstances aggravated the murder—(1) the murder occurred during the commission of a robbery and (2) the murder was at random and without apparent motive. During Paine's post-conviction appeal, we concluded that the felony aggravator was invalid pursuant to McConnell and the at-random aggravator was invalid under Leslie v. Warden, 118 Nev. 773, 781, 59 P.3d 440, 445-46 (2002) (concluding that the at-random aggravator was intended for "situations where a killer selects his victim without specific purpose or objective and his reasons for the killing are not obvious or easily understood," not "unnecessary killings in the course of a robbery"). As in Bennett, the impetus giving rise to the State's amended notice of intent is

a decision of this court, which we held in Bennett to be insufficient to establish good cause under SCR 250(4)(d). That is, the decisions in McConnell and Leslie, which invalidated the sole aggravators in Paine's case, do not serve as good cause to justify an amended notice of intent. Moreover, as in Bennett, the factual underpinnings of the aggravators alleged in the amended notice of intent existed at the time of Paine's original prosecution.[2] Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF mandamus instructing the district court to strike the amended notice of intent to seek the death penalty.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

[2]We reject as a justification for not alleging the new aggravators previously the State's contention that the version of SCR 250 in existence at the time of Paine's original trial did not expressly require the State to allege all known aggravators in the notice of intent. We also consider unpersuasive the State's argument that it was precluded from alleging the prior-violent-felony aggravators based on the capital crime in the original notice because the law was unsettled concerning whether prior-violent-felony aggravators could be based on the crimes that were the subject of the capital prosecution. Although we had not explicitly addressed that issue at the time of Paine's original prosecution in April 1990, we had explained five year earlier, in Gallego v. State, 101 Nev. 782, 792, 711 P.2d 856, 863 (1985), that NRS 200.033(2) "was never intended to operate on the vagaries of conviction sequences. Instead, the focal point is the time of sentencing."

cc: Hon. Doug Smith, District Judge
Attorney General/Carson City
Clark County District Attorney
Special Public Defender
Eighth District Court Clerk