

***McConnell v. State*, 121 Nev. Adv. Op. 5 (2005)¹**
[MCCONNELL II]

CRIMINAL LAW – PROCEDURE – SENTENCING AND PUNISHMENT

Summary

Robert McConnell was charged with the murder of Brian Pierce. McConnell shot and killed Pierce, who was living with McConnell's ex-girlfriend, after breaking into the couples' apartment. McConnell pled guilty to first-degree murder and admitted during his testimony that the murder was premeditated. He then presented a case for mitigation at his penalty hearing in an effort to avoid the death penalty. However, the jury found the requisite aggravating circumstances were present and determined that any mitigating circumstances did not outweigh the aggravating circumstances. Accordingly, McConnell was sentenced to death. He appealed the sentence, challenging the propriety of his sentence on several grounds.

On appeal, the Nevada Supreme Court affirmed the trial court's judgment of conviction and sentence of death.² Although McConnell was not convicted on the basis of felony murder, in its opinion the court considered the question of whether a felony can be used both as an element of a conviction for felony murder and as an aggravating circumstance for capital murder status. The court ultimately held that "a felony may not be used both to establish first-degree murder and to aggravate the murder to capital status."³

The court based its decision on the following rationale: (1) prohibitions of cruel and unusual punishment in both the United States and Nevada Constitutions mandate that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty. In *Lowenfield*⁴, the United States Supreme Court concluded that this narrowing function can be provided either by a narrowing of the definition of capital offenses by the state legislature, or where the legislature defines capital offenses broadly, by requiring the jury to find aggravating circumstances at the penalty phase. (2) Because the Nevada legislature defines capital felony murder broadly, its capital sentencing scheme must narrow death eligibility at the penalty phase by the jury's finding of aggravating circumstances. (3) Although they "can theoretically eliminate death eligibility in a few cases of felony murder," Nevada's felony aggravators (NRS 200.033(4) & NRS 200.033(13)) do not adequately narrow death penalty eligibility in the case of felony murder.⁵ (4) Thus it is "impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated."⁶

The State filed a motion for rehearing, challenging this ruling on the basis that, in reaching its decision, the court improperly decided the issue when the State did not brief the issue, and that the court misconstrued and misapplied several precedent cases including *Lowenfield*. The Clark County District Attorney filed amicus brief in support of the State's position.

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² *McConnell v. State*, 120 Nev. ___, 102 P.3d 606, 627 (2004) [hereinafter *McConnell I*].

³ *Id.*

⁴ *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

⁵ *McConnell I*, 120 Nev. ___, 102 P.3d at 623-24.

⁶ *Id.* at 120 Nev. ___, 102 P.3d 624.

Issues and Disposition

Issue

In deciding that “a felony murder may not be used both to establish first-degree murder and to aggravate the murder to capital status,” did the Nevada Supreme Court overlook or misapprehend any material points of law or fact, thereby mandating a rehearing?

Sub-Issues

- (1) Did the court reach its conclusion (that an underlying felony in a felony-murder conviction cannot be used as an aggravating factor for capital murder status) without giving proper notice to the State to brief the issue?
- (2) Did the court wrongly criticize counsel for the State for not responding to the U.S. Supreme Court’s decision in *Lowenfield*?
- (3) Did the court’s decision conflict with the U.S. Supreme Court’s decision in *Schad v. Arizona*?
- (4) Did the court misconstrue the constitutional narrowing requirement outlined in *Zant v. Stephens* and apply an incorrect standard?
- (5) Did the court misconstrue *State v. Middlebrooks* and *Engberg v. Meyer*?
- (6) Did the court misconstrue and/or misapply *Lowenfield*?
- (7) Was the court’s conclusion that Nevada’s definition of felony murder does not provide constitutionally required narrowing properly based?
- (8) Was the court’s conclusion that the narrowing capacity of the Nevada felony aggravators is largely theoretical properly based?

Disposition

Pursuant to Nev. R. App. P. 40 the Nevada Supreme Court denied the State’s petition for rehearing because the court did not overlook or misapprehend any material points of law or fact in reaching its decision. The court reasserted its conclusion that a felony cannot be used both as an element of a conviction for felony murder and as an aggravating circumstance for capital murder status in Nevada.

Commentary

State of the Law Before *McConnell v. State*

In *Petrocelli v. State*, the Nevada Supreme Court first considered whether the underlying felony in a felony murder conviction can be considered as an aggravating circumstance for capital murder status—and ruled that it can.⁷ The court based this decision on earlier U.S. Supreme Court decisions that “*implicitly*” approved the use of the underlying felony as an aggravating circumstance.⁸ Thus, prior to the court’s decision in *McConnell*—and its

⁷ 101 Nev. 46, 53-54, 692 P.2d 503, 509 (1985).

⁸ *Id.*

consideration of *Lowenfield*—a prosecutor and a jury could use the same felony as an element of felony murder and as an aggravating circumstance to determine capital murder status.

Other Jurisdictions

Both the Third Circuit⁹ and the Eighth Circuit¹⁰ considered this issue subsequent to the U.S. Supreme Court’s decision in *Lowenfield*, and both held that a felony can properly be used as an element of felony murder and as an aggravating circumstance for felony murder status. Other courts had reached the opposite conclusion.¹¹

Effect of *McConnell v. State* on Current Law

Because the Nevada Supreme Court denied the State’s petition for rehearing, its conclusion that a felony cannot be used both as an element of felony murder and as an aggravating circumstance for capital murder status stands. This rule has no effect in cases where the State gains a conviction of first-degree murder by relying on a theory of deliberate and premeditated murder; in such situations the State can use felonies committed by the defendant as aggravators as permissible by NRS 200.033(4) and NRS 200.033(13). However, when the State gains a first-degree murder conviction in whole or part on the theory of felony murder, it must prove an aggravator separate from the one that the felony murder is predicated upon in order to pursue a death sentence. Thus, “if one or more jurors decide to convict based only on a finding of felony murder, then prosecutors cannot use the underlying felony as an aggravator in the penalty phase.”¹² Based on this reasoning, the court stated that when the State posits alternative theories of first-degree murder, jurors should be given special verdict forms on which to indicate the theory they used to reach a murder conviction. Without having these forms to show that the jury did not base a first-degree murder conviction on felony murder, the “State cannot use aggravators based on felonies which could support the felony murder.”¹³

Unanswered Questions

(1) The court did not determine whether its ruling regarding the use of felony aggravators was retroactive. The court noted that it did not overlook the issue, but preferred to “await the appropriate post-conviction case that presents and briefs the issue.”¹⁴

(2) The court further pointed out that it did not address whether a jury can use the underlying felony in a felony murder as an aggravating circumstance if the “jurors find unanimously that a murder was deliberate and premeditated but also find that it was felony murder.”¹⁵

⁹ *Deputy v. Taylor*, 19 F.3d 1485, 1500-02 (3rd Cir. 1994)

¹⁰ *Perry v. Lockhart*, 871 F.2d 1384, 1392-93 (8th Cir. 1989)

¹¹ *State v. Middlebrooks*, 840 S.W.2d 317, 341-47 (Tenn. 1992); *Engberg v. Meyer*, 820 P.2d 70, 86-92 (Wyo. 1991).

¹² 121 Nev. Adv. Op. 5, 11-12 (2005).

¹³ *Id.* at 10-11.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 12.

Conclusion

McConnell firmly establishes that a felony cannot be used both as an element of felony murder and as an aggravating circumstance to elevate the murder to capital status. This conclusion results because: (1) Nevada's definition of felony murder is broad, and consequently, to comply with requirements of the Nevada and U.S. Constitutions, its capital sentencing scheme must narrow death eligibility at the penalty phase by the jury's finding of aggravating circumstances; and (2) Nevada's felony aggravators do not adequately narrow death penalty eligibility in the case of felony murder.

This rule requires the State to use an aggravator separate from the felony that a felony murder is predicated upon in order to pursue a death sentence. In cases where the State advances multiple theories of first-degree murder, it must provide special verdict forms to the jury designed to ascertain the theory upon what the conviction is based in order to use the felony as an aggravating circumstance.