

decision on the merits.³⁰

We concur: GIBBONS, C.J., MAPPIN,
PARRAGUIRRE, CHERRY, SAITTA, JJ.



The STATE of Nevada and Warden, Ely
State Prison, E.K. McDaniel,
Appellants,

v.

Shawn Russell HARTE, Respondent.

No. 50161.

Supreme Court of Nevada.

Oct. 30, 2008.

Background: After affirmance of capital murder conviction and death sentence, 116 Nev. 1054, 13 P.3d 420, and dismissal of appeal from denial of first petition for writ of habeas corpus, petitioner filed second petition for writ of habeas corpus. The Second Judicial District Court, Washoe County, Connie J. Steinheimer, J., granted the petition in part. State appealed.

Holding: The Supreme Court, Maupin, J., held that when an aggravating circumstance, which was the sole basis for imposition of the death penalty, is invalidated on appeal because the aggravating circumstance was based on the felony that was used to obtain a felony-murder conviction, a new penalty hearing, rather than a new trial, is the appropriate remedy.

Affirmed.

Hardesty, J., filed a concurring opinion, in which Parraguirre and Saitta, JJ., concurred.

30. We deny, at this stage, the Taxpayers' request for a writ directing the Washoe County Treasurer

1. Constitutional Law ⇨4744(1)

Sentencing and Punishment ⇨1625

The felony aggravator for first-degree murder, i.e., the murder was committed while the defendant was engaged in commission of, or in attempt to commit or flee after committing or attempting to commit, an enumerated felony, fails to genuinely narrow death eligibility in felony-murder prosecutions and fails to reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder, and thus, it is impermissible under federal and state constitutional provisions guaranteeing due process and banning cruel and unusual punishment to base an aggravating circumstance in a capital prosecution on the felony upon which a felony-murder is predicated. U.S.C.A. Const.Amends. 8, 14; West's NRSA Const. Art. 1, §§ 6, 8(5); West's NRSA 200.033(4).

2. Indictment and Information ⇨72

The State may proceed on alternate theories of criminal liability as long as there is evidence in support of those theories.

3. Sentencing and Punishment ⇨1788(11)

As a general rule, when an aggravating circumstance, as basis for imposition of death penalty, is invalidated on appeal, a new penalty hearing is the appropriate remedy unless it is clear beyond a reasonable doubt that absent the invalid aggravator, the jury still would have imposed a sentence of death. West's NRSA 200.033.

4. Sentencing and Punishment ⇨1788(11)

When an aggravating circumstance, which was the sole basis for imposition of death penalty, is invalidated on appeal because the aggravating circumstance was based on the felony that was used to obtain a felony-murder conviction, a new penalty hearing, rather than a new trial, is the appropriate remedy. West's NRSA 200.033(4).

Catherine Cortez Masto, Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy,

to comply with the County Board's equalization decision.

Deputy District Attorney, Washoe County, for Appellants.

Scott W. Edwards, Reno; Thomas L. Quails, Reno, for Respondent.

Before The Court En Banc.

OPINION

By the Court, MAUPIN, J.:

In this opinion, we consider the State's contention that *McConnell v. State*¹ was wrongly decided and its alternative argument that a new trial is an appropriate remedy when the sole aggravating circumstance in a death penalty case has been determined to be invalid under *McConnell* during post-conviction review. We reject the State's contention that *McConnell* was wrongly decided, and we conclude that a new penalty hearing is the proper remedy under the circumstances described by the State.

FACTS

Respondent Shawn Russell Harte and two codefendants, Latisha Babb and Weston Sirex, murdered a Reno cab driver during the course of a robbery. Harte subsequently admitted to sheriff's deputies that he shot the cab driver in the head. The State alleged that Harte committed willful, premeditated, and deliberate murder or, alternatively, felony murder. The jury was not asked to return a special verdict form indicating upon which murder theory it relied. The jury found Harte guilty of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

During the penalty phase of the trial, the jury found only one aggravating circumstance: the murder was committed during

the course of a robbery. Harte was sentenced to death. We affirmed the judgment of conviction.² Harte then filed a post-conviction petition for a writ of habeas corpus, which the district court denied. On appeal, we dismissed Harte's appeal as untimely and denied his subsequent petitions for rehearing and en banc reconsideration.³

Harte filed a second post-conviction petition for a writ of habeas corpus in the district court. In addition to his claims of ineffective assistance of counsel, Harte alleged that pursuant to *McConnell*, the aggravating circumstance found by the jury was invalid because it was improperly based on the felony used to obtain the first-degree murder conviction. Harte later filed a supplement to his petition.

The State filed a response to the petition and a motion for an order regarding the scope of relief. In the motion, the State acknowledged that Harte may be entitled to relief pursuant to *McConnell* and *Bejarano v. State*⁴ and that the appropriate remedy was a new trial rather than a new penalty hearing. Thereafter, Harte filed a notice in the district court that he was abandoning all claims that could result in a new trial and that his sole focus was obtaining a new penalty hearing.

The district court conducted a hearing on the State's motion and Harte's habeas petition and concluded that the appropriate remedy for a *McConnell* error was a new penalty hearing, not a new trial. The district court vacated the death sentence, affirmed the guilty verdict, and stayed further proceedings pending appellate review.⁵ This appeal followed.

DISCUSSION

The State argues that *McConnell* was wrongly decided and should be reversed. Al-

1. 120 Nev. 1043, 102 P.3d 606 (2004) (holding that it is unconstitutional to base aggravating circumstance in capital prosecution on felony that was used to obtain first-degree murder conviction), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005).

2. *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

3. *Harte v. State*, Docket No. 43877 (Order Dismissing Appeal, April 7, 2005), 121 Nev. 1132, 152 P.3d 773; *Harte v. State*, Docket No. 43877

(Order Denying Rehearing, May 19, 2005); *Harte v. State*, Docket No. 43877 (Order Denying En Banc Reconsideration, September 8, 2005).

4. 122 Nev. 1066, 146 P.3d 265 (2006) (holding that rule announced in *McConnell* applies retroactively).

5. The district court also allowed Harte to withdraw his claims of error relating to the trial and dismissed his claims of error relating to the penalty hearing as moot.

ternatively, the State argues that under the unique circumstances of this case, the district court erred by declaring that a new trial was not a permissible remedy.

McConnell was properly decided

The State contends that the district court's decision to partially grant Harte's second post-conviction petition for a writ of habeas corpus was erroneous because it was based on *McConnell* and *McConnell* was wrongly decided. The State specifically argues that *McConnell* should be revisited because it contains "three major flaws."

First, the State contends that our analysis in *McConnell* is flawed because it begins with the definition of first-degree murder instead of a "generic offense of felonious homicide,"⁶ the common-law definition of murder, or even the notion of felonious murder. The State claims that if the *McConnell* court's analysis had started with the common-law definition of murder or the notion of a felonious homicide, the court would have recognized that Nevada's statutory scheme genuinely narrows the class of individuals that are eligible for the death penalty.⁷

[1] In *McConnell*, we relied upon the analytical framework of *Lowenfield v. Phelps*⁸ to determine the constitutionality of basing an aggravating circumstance on the predicate felony in a capital prosecution of a felony murder.⁹ We noted that "a capital sentencing scheme 'must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a

more severe sentence on the defendant compared to others found guilty of murder'" to meet federal and state constitutional requirements.¹⁰ We observed that this narrowing function may be accomplished by narrowly drawn definitions of capital offenses or through aggravating circumstances found by a jury during the penalty phase of a trial.¹¹ We evaluated Nevada's capital sentencing scheme as it applies to felony murder, determined that Nevada broadly defines capital felony murder, and concluded that the felony aggravating circumstance set forth in NRS 200.033(4) did not genuinely narrow the class of felony murderers that are eligible for the death penalty.¹² Under these circumstances, the State has failed to demonstrate that our analysis in *McConnell* is flawed.

Second, the State contends that our analysis in *McConnell* is flawed because it is based on the question of whether the statutory aggravating circumstances "sufficiently" exclude an adequate number of murderers from the death penalty. The State claims that the proper question, as announced in *Lowenfield*, is whether the scheme "genuinely" narrows the class of murderers eligible for the death penalty. The State asserts that the term "genuine" calls for an objective determination of whether the statutory scheme narrows the class of murderers eligible for the death penalty.¹³

In *McConnell*, we began our discussion on aggravating circumstances by asking "in a case of felony murder does either of these two aggravators 'genuinely narrow the class

6. The State cites to *Mullaney v. Wilbur*, 421 U.S. 684, 688, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (describing Maine's various levels of homicide).

7. To the extent that the State argues that *McConnell* should have been decided based on consideration of Nevada's entire capital sentencing scheme, we note that this issue was raised on rehearing in *McConnell v. State*, 121 Nev. 25, 107 P.3d 1287 (2005), where we held that "[t]he pertinent issue in this case is whether felony aggravators constitutionally narrow death eligibility in a felony murder, not whether the statutory scheme in the abstract can withstand a general constitutional challenge." *Id.* at 30–31, 107 P.3d at 1291.

8. 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

9. 120 Nev. 1043, 1063, 102 P.3d 606, 620 (2004).

10. *Id.* at 1063, 102 P.3d at 620–21 (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)).

11. *Id.* at 1064, 102 P.3d at 621 (quoting *Lowenfield*, 484 U.S. at 246, 108 S.Ct. 546).

12. *Id.* at 1066–69, 102 P.3d at 622–24.

13. The State cites to *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) for the proposition that the legislature acts constitutionally if the aggravating circumstance does not apply to every murderer and if it is objective.

of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder?"¹⁴ In the analysis that followed, we determined that the felony and sexual-penetration aggravating circumstances reached all but four of the felonies contained in the felony-murder statute and that those four remaining felonies are less likely to involve death.¹⁵ We further determined that the felony aggravating circumstance's intent element did "little more than state the minimum constitutional requirement to impose death for felony murder."¹⁶ And we concluded that these aggravating circumstances may "theoretically" narrow the class of persons eligible for the death penalty, but they do not "genuinely" narrow that class, and therefore they do not meet constitutional muster.¹⁷ Under these circumstances, the State has failed to demonstrate that we used the wrong constitutional standard for analyzing the narrowing function of Nevada's murder statutes.

Third, the State contends that the *McConnell* court's analysis is flawed because it discounted the requirement that the felony aggravating circumstance must be accompanied by certain mental states.¹⁸ The State claims that Nevada's statutory scheme, by including an intent element with the felony aggravating circumstance, "has objectively excluded some first-degree murders from the death penalty."

In *McConnell*, we specifically addressed the felony aggravating circumstance intent element, noting that it (1) was different than the intent required for a felony-murder conviction, (2) largely mirrored the constitutional standard and did little to narrow the class of

persons eligible for the death penalty, (3) lacked the specificity of the capital felony-murder definition that met the constitutional narrowing requirement in *Lowenfield*, and (4) could be overlooked and not considered by the jury.¹⁹

We also discussed the felony aggravating circumstance intent element on rehearing, stating that it

"is narrower than felony murder, which in Nevada requires only the intent to commit the underlying felony. This notwithstanding, it is quite arguable that Nevada's felony murder aggravator, standing alone as a basis for seeking the death penalty, fails to genuinely narrow the death eligibility of felony murderers in Nevada."²⁰

Under these circumstances, the State has failed to demonstrate that our consideration of the felony aggravating circumstance intent element was inadequate.

Having carefully considered the State's arguments, we decline to overrule *McConnell* or contravene the district court's application of its holding in this instance.

A new penalty hearing is the remedy under the circumstances of this case

The State contends that the district court erred by concluding that the only remedy for a prejudicial *McConnell* error is a new penalty hearing. The State claims that this case is unique because there was only one aggravating circumstance and the State is willing to amend the charging document by removing the felony-murder theory. The State specifically argues that the *McConnell* error was a charging error and therefore a new

14. *McConnell*, 120 Nev. at 1067, 102 P.3d at 623 (quoting *Zant*, 462 U.S. at 877, 103 S.Ct. 2733) (emphasis added).

15. *Id.* at 1067, 102 P.3d at 623. The felony aggravator and the sexual-penetration aggravator do not reach sexual molestation of a child under the age of 14 years, child abuse, second-degree arson, and second-degree kidnapping. *Id.*

16. *Id.*

17. *Id.* at 1069, 102 P.3d at 624.

18. See NRS 200.033(4) (providing that first-degree murder is aggravated when it was committed while person was engaged in an enumerated felony "and the person charged: (a) Killed or attempted to kill the person murdered; or (b) Knew or had reason to know that life would be taken or lethal force used").

19. *McConnell*, 120 Nev. at 1067-68, 102 P.3d at 623-24.

20. *McConnell v. State*, 121 Nev. 25, 28, 107 P.3d 1287, 1289 (2005) (quoting *Leslie v. Warden*, 118 Nev. 773, 785, 59 P.3d 440, 448-49 (2002) (Mau-pin, J., concurring)).

trial is the appropriate remedy to restore the parties to status quo ante.

[2] We reject the State's contention that a *McConnell* error constitutes a charging error. "The State may proceed on alternate theories of liability as long as there is evidence in support of those theories."²¹ Here, the State exercised its discretion to charge Harte on alternative theories of murder. The State's exercise of discretion in this regard did not constitute a trial error. However, the State's decision to base an aggravating circumstance on the robbery that was also the basis for the felony-murder theory violated the rule in *McConnell* and resulted in a sentencing error. The State has offered no relevant authority or cogent bases upon which to conclude that striking a sole aggravating circumstance that violates *McConnell* mandates a new trial rather than a new penalty hearing.

[3, 4] As a general rule, when an aggravating circumstance is invalidated, a new penalty hearing is the appropriate remedy unless it is "clear beyond a reasonable doubt that absent the invalid aggravator[] the jury still would have imposed a sentence of death."²² The same analysis applies when an aggravating circumstance is invalidated under *McConnell*. Accordingly, we conclude that the district court did not err by striking the felony aggravating circumstance, determining that the error was prejudicial given that it was the only aggravating circumstance found by the jury, and concluding that the appropriate remedy was a new penalty hearing.²³

CONCLUSION

For the reasons discussed above, we reject the State's contention that *McConnell* was

wrongly decided and conclude that a new penalty hearing is the proper remedy in cases where the sole aggravating circumstance has been struck. We therefore affirm the district court's findings of fact, conclusions of law, and judgment.

We concur: GIBBONS, C.J., and DOUGLAS and CHERRY, JJ.

HARDESTY, J., with whom PARRAGUIRRE and SAITTA, JJ., agree, concurring:

I concur with the majority that a new trial is not the proper remedy when the only aggravating circumstance found by the jury is invalidated under this court's decision in *McConnell v. State*.¹ And although I agree with the result reached by the majority, I write separately to express my belief that this case reveals three fundamental flaws in *McConnell's* analytical framework.

First, the Legislature has adopted a statutory scheme to narrow the class of persons eligible for the death penalty, and I see no basis for this court to go beyond the Legislature's construct for narrowing Nevada's death penalty scheme. In particular, the Legislature set forth in NRS 200.030(1) the types of murder that compose first-degree murder, for which a defendant may be eligible for the death penalty. To further narrow the class of persons eligible for the death penalty, NRS 200.033 details 15 aggravating circumstances, including that the murder was committed during the perpetration of certain enumerated felonies. The decision to allow the dual use of certain felonies as the basis for a finding of first-degree murder and as an aggravating circumstance rests with the Legislature, and the Legislature has spoken in this regard. Nothing in the Nevada Con-

21. *Walker v. State*, 116 Nev. 670, 673, 6 P.3d 477, 479 (2000).

22. *Bejarano v. State*, 122 Nev. 1066, 1081, 146 P.3d 265, 275-76 (2006); see also *Archanian v. State*, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006), cert. denied, ___ U.S. ___, 127 S.Ct. 3005, 168 L.Ed.2d 733 (2007); *Browning v. State*, 120 Nev. 347, 363-64, 91 P.3d 39, 51 (2004); *State v. Bennett*, 119 Nev. 589, 604-05, 81 P.3d 1, 11-12 (2003); *Leslie*, 118 Nev. at 782-83, 59 P.3d at 446-47.

23. Without a comprehensive discussion of the analytics of *McConnell*, our concurring colleagues voice their concerns over this court's decision in that case. However, nothing in the concurrence either justifies retreat from *McConnell* or persuades us that the criminal justice system is less fair because of it.

1. 120 Nev. 1043, 102 P.3d 606 (2004).

stitution or in *Lowenfield v. Phelps*,² upon which this court relied in *McConnell*, calls into question the Legislature's determination of aggravators to support the death penalty. What the *McConnell* decision does is place this court in the position of performing the narrowing function when that function falls within the province of the Legislature. Moreover, the *McConnell* court supplanted the Legislature's narrowing prerogative without articulating any concrete standard for determining whether the Legislature has genuinely narrowed either in its definition of first-degree murder or in the aggravating circumstances that the jury may find at the penalty hearing.

Second, in my view, *McConnell* is flawed because, contrary to this court's conclusion, the Legislature has narrowly defined felony murder by limiting the felonies that subject a defendant to a first-degree murder conviction. These felonies of course involve crimes that are inherently dangerous. However, other inherently dangerous felonies—for example, felony DUI,³ battery with substantial bodily harm with the use of a deadly weapon,⁴ mayhem,⁵ and assault with a deadly weapon⁶—are excluded from those contemplated by the first-degree felony-murder statute. Therefore, the premise upon which *McConnell* rests—that felony murder is broadly defined in Nevada—is false.

Third, this court's problematic conclusion that felony murder is broadly defined is further compounded by this court's use of *Lowenfield* as a springboard to impose an element of specific intent in the felony-murder aggravator. In particular, this court's focus on the absence of a specific intent to kill in a felony-murder theory when addressing whether the felony-murder statute affords constitutional narrowing suggests that a specific intent to kill must accompany any aggravating circumstance even where intent has no bearing. Examples of such aggravating circumstances appear where the defendant has been convicted of another murder or felony

involving the use or threat of force or committed the subject murder while under a sentence of imprisonment.⁷ However, nothing in *Lowenfield* requires that specific intent be shown respecting any aggravator or that such a showing is required to satisfy the narrowing function required of a capital sentencing scheme. There is simply no constitutional, legislative, or jurisprudential basis to impose such a requirement for any aggravating circumstance.

In my view, *McConnell* does not limit the death penalty as the opinion purports, but rather functions to unnecessarily deprive the State of an aggravating circumstance when the State must use the act supporting it to prove a theory of murder. The legal underpinnings in *McConnell* will create problems not addressed by this court in that opinion when considering the issue of duality with other aggravating circumstances.

Despite my misgivings about *McConnell*, however, I do not advocate overruling that decision. The doctrine of stare decisis is an indispensable principle necessary to this court's jurisprudence and to the due administration of justice. That doctrine holds that "a question once deliberately examined and decided should be considered as settled."⁸ As *McConnell* is firmly entrenched in this court's jurisprudence and has been relied upon in providing relief to defendants who have received death sentences, overruling that decision would be detrimental to the administration of justice. I write separately merely to express my intellectual disagreement with the analysis in *McConnell*, as I was not a member of this court when the case was decided.

I concur: PARRAGUIRRE and SAITTA, JJ.



2. 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

3. NRS 484.3792(1)(c).

4. NRS 200.481(2)(e)(2).

5. NRS 200.280.

6. NRS 200.471(2)(b).

7. See NRS 200.033(1), (2).

8. *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (citation omitted).