IN THE SUPREME COURT OF THE STATE OF MONTANA

CLOVIS GENO, Petitioner, v. FIFTEENTH JUDICIAL DISTRICT COURT FOR ROOSEVELT COUNTY, And THE HONORABLE DAVID CYBULSKI, Respondents.	Cause No. _____ Fifteenth Judicial District Court Cause No. DC-20-6

PETITION FOR WRIT OF SUPERVISORY CONTROL

****** CAPITAL CASE ******

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I. INTRODUCTION.

A writ is necessary to prevent the petitioner from being wrongfully prosecuted for capital murder. There are three core issues presented:

1. **Did the State timely meet the requirements of Rule 97-326(I)(1)(a) (hereafter "Standard I.1.a") for capital cases?**

2. **Did the State violate §46-1-401 when it refused to allege a specific aggravating fact in a capital Information?**

3. **Must an aggravating fact be supported by a showing of probable cause to support a capital prosecution?**

This case is pending trial. Defendant has twice moved to strike the death penalty as a sentencing option based on these disputes. Both motions have been denied. The most recent order was issued on July 28, 2020. The State still has not charged or made a probable cause showing for a specific aggravating fact in the Information.

II. FACTUAL BACKGROUND.

Defendant was charged with deliberate homicide on February 19, 2020, and incarcerated pending trial. Ex. 1; Ex. 2. The motion and affidavit of probable cause did not identify the case as a capital case, did not specify an aggravating factor, and did not provide any sworn evidence to support a specific aggravating factor. Ex. 3. The Information neither specified the aggravating factor at issue, nor set forth the aggravating fact. Ex. 1. The Information did contain a vague proviso: "Due to aggravating factors set forth in §§46-18-302, 46-18-303 and 46-18-305, the State

hereby seeks the death penalty in this case. If the Court does not impose a sentence of death and one of the aggravating circumstances listed in §46-18-303 exists, the Court may impose a sentence of imprisonment for life or for any term authorized by the Statute defining the offense." Ex. 1.

A. The First Motion To Strike.

Arraignment occurred March 11, 2020. Ex. 17. At arraignment, defense counsel filed notice of qualifications to serve as counsel by reference to Rule 97-326. Ex. 4, at 10-12. Defendant also filed a motion to strike the death penalty due to the insufficiency of the charging documents. Ex. 5. This motion argued that no aggravating factor was listed in the Information and that there was no aggravating factor supported by probable cause. Ex. 5.

The State responded by arguing that "Montana law does not require such aggravating circumstances be specifically pleaded, and in fact the defendant can point to no statute nor Montana Supreme Court case requiring such specific pleading of death penalty aggravating circumstances." Ex. 6, at 2. The State went on to assert that "[u]pon a guilty plea to or a jury conviction of Deliberate Homicide, the trial court must determine if any aggravating factors listed in Mont. Code. Ann. §46-18-303(1)(a) (2019) exist." Ex. 6, at 6. The State cited only case law that preexisted *numerous* modifications to statutes and rule, as well as the constitutional decisions in *Apprendi* and *Ring*. Ex. 7, at 1-2. The State went on to

concede that it could not support any specific aggravating circumstance at the time, and hence the State purposely chose not to list a specific circumstance. Ex. 6, at 6 ("Further, it is not yet possible nor feasible for the State to include in its charging documents specific information on the potential death penalty aggravating factors in this case.").

The court denied defendant's motion, relying on the State's argument that "[t]here is no requirement that the evidence or facts regarding aggravating circumstances must be in the Information." Ex. 8. Because of this strange conclusion, the same day the order was issued defendant urged the court to reconsider based on *Ring*. Ex. 15

B. The Second Motion To Strike.

Sixty-two days after arraignment, defendant filed a second motion to strike the death penalty because the State had neither adequately charged the matter nor provided a formal notice of intent to seek death. Ex. 9. The State responded by filing a formal "Notice of Evidence of Death Penalty Aggravating Factors" on May 13, sixty-four days after arraignment. Ex. 11. On May 22, the State changed course from its earlier positions, claiming that "[t]he enhancing act, omission, or fact for the legal justification for the death penalty was set forth in the Information as well as the penalty should the defendant be convicted of Homicide and the

death penalty imposed." Ex. 10, at 1. Defendant replied to those numerous arguments. Ex. 12.

The second motion to strike was briefly discussed on May 26, prior to an evidentiary hearing on defendant's motion to compel and request for sanctions. Defendant argued that the State's excuses were not legally sufficient. Ex. 13, at 3-4. Defendant also argued that even if those excuses were legally sufficient, the State had the burden to present sworn evidence to support the factual claims. Ex. 13, at 3-4. The State did not present such evidence at the hearing and has not done so since.

On July 28, the court issued an order denying the defendant's second motion to strike the death penalty. Ex. 14. The court reasoned as follows:

> The Information listed the death penalty as punishment. The Information also had a sentence saying "...the state hereby seeks the death penalty in this case." Defendant was given timely notice of the intent to seek the death penalty.
>
> Defendant's MOTION TO PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY: FAILURE TO MEET THE TIMELINES IN RULE 97-326(1)(a) is DENIED.

Ex. 14. The court did not provide any additional analysis regarding whether the State had complied with §46-1-401 or established probable cause for an aggravating factor. Ex. 14. Counsel infers that the court adopted its previous rationale on these issues set forth in Ex. 8.

C. No Recent Developments Have Occurred.

The State repeatedly claimed that lack of an autopsy report prevented it from adequately pleading an aggravating circumstance. Exs. 6 & 11. The State did not present evidence on this matter. Yet, it is worth noting that the Montana State Crime Laboratory served both parties an autopsy report on July 20. Ex. 19. Nevertheless, the State still has not filed an affidavit of probable cause containing sworn evidence to support a specific aggravating fact. Nor has the State filed an amended Information that pleads the specific aggravating fact and statute at issue.

III. A WRIT IS NECESSARY AND APPROPRIATE.

This Court has supervisory control over other courts. Mont. Const., Art. VII, §2(2); M.R.App.P. 17(a). That power can be exercised where "urgency or emergency factors [make] the normal appeal process inappropriate, when the case involves purely legal questions," and when other circumstances are present, such as where the lower court "is proceeding under a mistake of law and is causing a gross injustice" or where "[c]onstitutional issues of state-wide importance are involved." M.R.App.P 14(3)(a) & (b).

Petitions for supervisory control are appropriate to challenge a trial court's determination that the State has complied with Standard I.1.a. See *Miller v. Eighteenth Judicial Dist. Court*, 2007 MT 149, ¶¶15-20. Accordingly, jurisdiction over the first question presented is appropriate.

Miller also supports supervisory control over the statutory and constitutional questions. Just as non-compliance with Standard I.1.a would implicate an "entitlement to avoid being prosecuted" for capital murder, *Miller*, at ¶20, insufficiency of the charging document or lack of probable cause for an aggravating factor would also implicate an entitlement not to be charged. See, e g., *State v. Smith*, 2004 MT 191, ¶30 (charges must "state the necessary elements for the offense"). In fact, the sufficiency of the charging documents is an explicit consideration under Standard I.1.a because that rule requires the prosecutor to "comply with §46-1-401, MCA[.]" In turn, §46-1-401(1)(a) mandates that the "enhancing act, omission, or fact" be "charged in the information...with a reference to the statute or statutes containing the enhancing act, omission, or fact[.]" This includes aggravating circumstances. *Id.* at -401(3). One purpose of §46-1-401, and its inclusion in Standard I.1.a, was to ensure compliance with constitutional mandates. See, e.g., *State v. Garrymore*, 2006 MT 245, ¶36.

In short, Standard I.1.a, §46-1-401, the Montana Constitution, and the United States Constitution all include mechanisms to prevent unwarranted capital prosecutions. These mechanisms serve to mitigate injustices, including the impact that the prospect of execution has on the innocent person faced with plea negotiations. Supervisory control is appropriate to review non-compliance with the statutory and constitutional principles underlying Standard I.1.a. There are few, if

any, graver constitutional questions or injustices of state-wide importance than an impermissible capital prosecution. Review is appropriate under both M.R.App.P 14(3)(a) & (b).

IV. ARGUMENT.

Several interrelated legal issues are presented. Section IV(A) addresses Standard I.1.a and §46-1-401. Section IV(B) addresses constitutional probable cause requirements. Although they are separated for clarity, the constitutional matters also bear on timeliness and sufficiency of notice under Standard I.1.a.

The State has not met its obligations in this case. Therefore, the death penalty is no longer a possible punishment. The district court must be reversed.

A. The State Did Not Comply With Standard I.1.a Or §46-1-401.

Standard I.1.a requires the State to both comply with §46-1-401 MCA and file a notice seeking the death penalty within 60 days after arraignment:

> In any case in which death is a potential punishment, the prosecutor shall comply with § 46-1-401, MCA, and shall file with the district court, within 60 days after arraignment, and serve upon counsel of record a notice stating whether the prosecutor intends to seek the death penalty upon a conviction in the case.

Failure to satisfy either requirement removes the death penalty as an option. *Miller,* 2007 MT 149. May 11, 2020 was the deadline for meeting the sixty-day requirement. The State did not satisfy these requirements.

First, although the defendant requested compliance with §46-1-401 at arraignment, the State (and district court) took the position that the State is not required to plead a specific aggravating circumstance. Exs. 6 & 8. The State (but not the district court) later changed course and claimed that it had already adequately pled the aggravating circumstance. Ex. 10. Defendant disputes both the State's original position and its new position. The time has now lapsed for the State to come into compliance with §46-1-401(a) and Standard (I)(1)(a).

Second, the State did not timely file any independently sufficient notice of intent to seek death within the sixty-day period contemplated by Standard (I)(1)(a).

Each of these failures independently requires removal of the death penalty as an option in this case.

1. The State still has not sufficiently plead the specific aggravating circumstance.

The charging document in this case generally avers that death is being sought "[d]ue to aggravating factors set forth in §§46-18-302, 46-18-303 and 46-18-305[.]" Ex. 1. No more detail is provided, even with reference to the affidavit of probable cause. By comparison, §46-1-401(1)(a) requires that the charging document set forth both "the enhancing act, omission, or fact" and "a reference to the statute or statutes containing the enhancing act, omission, or fact[.]" Even assuming it is appropriate to refer to the affidavit of probable cause to augment the Information, the pleadings do not satisfy §46-1-401(1)(a).

Section §46-1-401 requires elements to be plead in the Information and supported by probable cause on every element. This reflects federal law. See, e.g., *Alleyne v. United States*, 570 U.S. 99, 114-15 (2013) ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment."). And Montana has held fast to that rule as a matter of state law even independently of these federal authorities. See *Smith*, 2004 MT 191 at ¶30. This reasoning applies to aggravating factors that support imposition of the death penalty. *Ring*, 536 U.S. at 609.

Accordingly, both the Montana legislature and this Court intended aggravating circumstances to be pled in the charging document. Section 46-1-401 was adopted by the Montana legislature in 2001. Later that year, this Court amended Standard I.1.a "in order to avoid conflict with the [the newly enacted §46-1-401]." Prior to 2001, the rule required the State to provide the specific aggravating factors it intended to prove and the evidence in support of the aggravating factors only upon request from defense counsel. This Court clearly interpreted this language to be at odds with the requirements of §46-1-401 because it struck all of that language to avoid a conflict. See Ex. 16: Montana Supreme Court Order No. 97-326 (July 16, 2002) ("By reason of the adoption of §46-1-401, MCA by the 2001 Legislature, it is necessary that Standard I be amended so as to

avoid conflict with the statute."); *id.* at Exhibit A (striking language that required the prosecutor to indicate in the notice whether s/he believed sufficient evidence exists to establish one or more aggravating factors, language stating that a prosecutor need not specify which aggravating factors were present, along with the supporting evidence, unless requested by defense counsel, and language that allowed for the prosecutor to file a notice after 60 days, with permission from the court, if it later acquired evidence relevant to aggravating factors).

In fact, in 2003 the Montana Legislature passed a bill amending the language of §46-1-401 and fortifying the requirement that aggravators be pled. That year, the legislature considered a bill that was entitled, in part,

> DEATH PENALTY – AGGRAVATING CIRCUMSTANCES – PLEADINGS
>
> AN ACT PROVIDING THAT A CIRCUMSTANCE OR FACT USED TO ENHANCE A PENALTY OR AN AGGRAVATING CIRCUMSTANCE USED TO IMPOSE A DEATH PENALTY MUST BE PLEADED…

Ex. 18, 2003 Montana Laws Ch. 154 (S.B. 68). The legislature ultimately amended the phrase "incarceration penalty" to say "penalty," added a provision relating to guilty pleas, and most importantly, added this clarification:

> Except as provided in subsection (4), the aggravating circumstances contained in 46–18–303 are enhancing acts, omissions, or facts.

See §46-1-401(3). The referenced statute, §46–18–303, governs aggravating circumstances in death penalty cases.

If §46-1-401 permitted the State to make broad reference to all 11 of the potential aggravating circumstances without providing any specificity or any supporting evidence whatsoever, as the State contends, there would have been no conflict between the language of §46-1-401 concerning the content of the charging documents and the prior language of Rule 97-326 concerning the content of the notice. Indeed, while this Court specifically stated the amendment was made to avoid a conflict with the statute, under the State's interpretation, the amendment would serve only to greatly diminish the defense's ability to receive fair notice of the aggravating factors and prepare an adequate defense. The Information merely declares that death will be pursued "due to aggravating factors" set out in those statutes. This is not sufficient to meet the requirements of §46-1-401(1)(a), which explicitly requires the prosecutor to allege "the enhancing act, omission, or fact...with a reference to the statute or statutes containing the enhancing act, omission, or fact[.]" Clearly, both the specific fact and the specific statute must be specifically identified.

Nevertheless, the district court relied on the State's arguments to make the sweeping declaration that

> There is to be found, however, no indication or requirement, in statute or case law, that such evidence or facts designated specifically as "sufficient facts to establish an aggravating factor", must be presented in the Information. Providing such evidence or facts is, therefore, not a "required element to seek the death penalty" in Montana, as claimed by the Defendant.

> ....There is no requirement that the evidence or facts regarding aggravating circumstances must be in the Information.

Ex. 8. The district court never even acknowledged Standard (I)(1)(a), the statutory text, or *Miller*.

Furthermore, the court overlooked the administrative burdens its approach would impose. Pleading an aggravating fact in the Information places the Office of the Public Defender and the trial court on notice that capital-qualified counsel is actually necessary. If the pleading requirement is jettisoned, OPD and the trial courts must henceforth treat every homicide case as a potential capital case from the outset. This will be necessary at least until sixty days after arraignment, when OPD will be able to determine whether the State has timely filed the other requirement of Standard (I)(1)(a): formal notice of intent to seek death. Among other things, Standard (I)(1)(a) was intended to forestall this unnecessary expenditure of limited state resources.

Finally, defendant's reading finds support in similar rules used by sister jurisdictions near in time to when Standard I.1.a was amended. At that time, several jurisdictions similarly required a notice to be accompanied by substantive content regarding the facts and law supporting an aggravator. See, e.g., *State v. Smallwood*, 141 N.M. 178 (2007) (under Rule 5-704(a), NMRA, "[t]he notice of intent shall specify the elements of the statutory aggravating circumstances upon

which the state will rely in seeking a sentence of death."); *United States v. McGriff*, 427 F. Supp. 2d 253 (E.D.N.Y. 2006) (18 U.S.C. § 3593(a)(2) requires the government's notice to "set[ ] forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death."); *Nevada v. Second Judicial Dist. Court*, 116 Nev. 953, 958 (Nev. 2000) (SCR 250(4)(c) requires the notice to "allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.").

2. *The State did not file a timely notice.*

Standard I.1.a also commands that a prosecutor "shall file with the district court, within 60 days after arraignment, and serve upon counsel of record, a notice stating whether the prosecutor intends to seek the death penalty upon a conviction in the case." We are now 149 days beyond arraignment. Even if Ex. 11 was determined to be substantively sufficient,[1] Ex. 11 was not filed until May 13, 2020 – 64 days after arraignment. Even a cursory review at the history behind Rule 97-326 demonstrates that timely notice was intended as an independent and necessary legal procedure. The State did not comply with this rule.

Although this Court significantly altered the parameters of the notice requirement to bring it into compliance with §46-1-401, it did not eliminate the

[1] The defendant does not concede that it is substantively sufficient.

notice requirement. While elimination of Section 1 and the notice requirement altogether would have *also* cured the conflict between the Rule and §46-1-401, the Court nevertheless maintained the rule that the prosecutor must file a notice, *after arraignment*, confirming whether or not the State will seek the death penalty.

The continued inclusion of the notice requirement should not be interpreted as a hyper-technicality; the Court clearly gave this procedure specific consideration when amending the Rule because it added a further requirement that the notice "be served upon defense counsel." That was not required prior to the 2001 amendment. This edit was unrelated to the conflict with §46-1-401, further indicating the deliberate inclusion (and the importance) of the notice as its own distinct legal procedure. This requirement that notice be filed and served upon counsel *after* arraignment also reflects the reality that, in Montana, capital defense counsel usually will not be appointed until after the charging decision has already been made. Section 46-8-101(1) (appointment of counsel addressed during the initial appearance).

Standard I.1.a therefore specifically contemplates a situation where the State pleads the applicable aggravating circumstance(s), as well as the possible penalty of death, as required by § 46-1-401(a), and then file a notice stating the intent to seek the death penalty after arraignment. The language of the rule is not ambiguous: both must occur for death to be a potential punishment. *Miller* is

instructive. 2007 MT 149. In *Miller*, the State did comply with §46-1-401 by alleging aggravating circumstances in the Information; however, the State failed to file a separate notice seeking the death penalty by the applicable deadline. *Miller*, at ¶ 6. Like the district court in this case, Ex. 14, the State argued that the defendant had actual notice of the possibility of the death penalty and of the State's intentions, and therefore was not prejudiced. *Miller*, at ¶ 8. And, like the prosecutor in this case, the State also expressed ambivalence regarding the death penalty because it had not reviewed all of the available evidence. *Miller*, at ¶ 10; Ex. 6, at 6. This Court held that Standard I.1.a's

> notice and timing requirements are mandatory, not discretionary or permissive....Most importantly, nothing in the plain language of the rule suggests that a lack of prejudice to the defendant or the defendant's knowledge that the case is a potential death penalty case can supplant the express requirement that the notice be filed within the 60-day timeframe.

Miller, at ¶ 39. The sixty-day deadline applies even if the State might be able to obtain additional evidence later in the proceedings. *Miller*, at ¶ 40 (noting that a 2002 act deleting such an exception from the rule "fortifies Petitioner's argument and our conclusion that the Standards do not contemplate an exception to Standard I.1.a's time prescription").

Here, the district court did not address these authorities. Rather, the court summarily concluded that the Information was sufficient notice under Standard (I)(1)(a). But *Miller* demonstrates that even where aggravating factors and the

death penalty are discussed in the Information, an independent notice of intent to seek death must be filed and served after arraignment. Among other things, this procedure prevents OPD and counsel from having to continue to devote substantial resources simply because the prosecutors hedge their bets in the Information – as was concededly what the prosecutor was doing in this case. Ex. 6, at 6 ("Further, it is not yet possible nor feasible for the State to include in its charging documents specific information on the potential death penalty aggravating factors in this case.").

B. The Affidavit And Information Violate The Constitutions.

The U.S. and Montana Constitutions independently require the specific aggravating circumstances to be pled in the charging documents and be subject to a probable cause determination because they are functional equivalents of elements of the offense of capital murder. *See Ring,* 536 U.S. at 609 (2002) (aggravating factors that enhance the potential penalty for murder to include the death penalty "operate as the functional equivalent of a greater offense"); *Schriro v. Summerlin,* 542 U.S. 348, 354 (2004) ("*Ring* held that, *because* Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements.") (emphasis in original). Thus, aggravators are subject to the general rule

that "[e]lements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." *United States v. O'Brien*, 560 U.S. 218, 224 (2010); see also *Smith*, 2004 MT 191 at ¶30 ("Count I retained by the plea agreement failed to state the necessary elements for the offense of assault with a weapon").

Despite these authorities, the district court erroneously ruled that proof of an aggravating factor is "not a 'required element to seek the death penalty' in Montana, as claimed by the Defendant." Ex. 8. This conclusion led the court to retain the death penalty even though no probable cause was supplied for an aggravating factor in the affidavit nor was an aggravating factor specified in the Information. The trial court abused its discretion. See *State v. Ziolkowski*, 2014 MT 58, ¶11 ("A court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.").

V. REQUEST FOR PERMISSION TO FILE REPLY BRIEF.

This Court does not routinely permit reply briefs supporting petitions. M.R.App. 7(a). Given the gravity of this case, and the shifting legal positions taken by the State throughout these proceedings (compare Ex. 6 with Ex. 10), defendant requests this Court's permission to file a reply brief under M.R.App. 7(a).

VI. CONCLUSION.

Accordingly, Petitioner requests the following relief:

(1) That the Court accept original jurisdiction;

(2) That the Court issue an order directing the lower court to strike the death penalty as a potential sentencing option.

Respectfully submitted on this 7th day of August, 2020.

Greg Rapkoch
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a Times New Roman, proportionately spaced typeface of 14 points, is double spaced except for footnotes and quoted and indented material, is less than 4,000 words (appx. 3,996) as counted by the attorney's word processing software, excluding table of contents, table of citations, certificate of service, exhibits, certificate of compliance and addendum, if any.

Dated this 7th day of August, 2020.

Greg Rapkoch
Counsel for Petitioner

INDEX OF EXHIBITS

Exhibit 11: Notice of Evidence of Death Penalty Aggravating Factors

Exhibit 12: Defendant's Reply in Support of Motion to Preclude the State from Seeking the Death Penalty: Failure to Meet the Timelines in Rule 97-326(I)(1)(a)

Exhibit 13: Transcript of May 26, 2020 Evidentiary Hearing

Exhibit 14: Order Denying Motion to Preclude the State from Seeking the Death Penalty: Failure to Meet the Timelines in Rule 97-326(I)(1)(a)

Exhibit 15: Notice of Additional Authority

Exhibit 16: Montana Supreme Court Order No. 97-326 (July 16, 2002)

Exhibit 17: Order to Appear at Arraignment & Minute Entry from Arraignment

Exhibit 18: 2003 Montana Laws Ch. 154 (S.B. 68) Montana Session Laws

Exhibit 19: Email from Montana State Crime Laboratory Employee Stacey Wilson

CERTIFICATE OF SERVICE

I, Gregory John Rapkoch, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-07-2020:

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