

penalty hearing and the subsequent deliberations of the three-judge panel.⁶

The circumstances present this court with a "no-win" situation. If the case is remanded for an evidentiary hearing on this issue, the questions concerning whether Judge Beko may have slumbered on occasion cannot be completely answered because only Judge Beko knows the answer. If we dismiss Paine's allegations, then the question of Judge Beko's alleged inattentiveness will forever taint this case. In the news story which aired locally on this matter, Judge Beko called Paine's allegations "outrageous" and explained that he has cataracts, which make his eyes extra sensitive to the lighting in the courtroom.

The most difficult problem regarding Paine's allegations of Judge Beko's inattentiveness is our concern with promoting "public confidence in the integrity and impartiality of the judiciary." NEV. CODE OF JUDICIAL CONDUCT Canon 2A (1977). We must avoid even the appearance of prejudice in order to maintain "the confidence of the thinking public in the administration of justice." *In re Inquiry Concerning a Judge*, 788 P.2d 716, 723 (Alaska 1990) (quoting *In the Matter of Bonin*, 375 Mass. 680, 378 N.E.2d 669, 682-683 (1978)).

We have great difficulty concluding that Judge Beko was not attentive. At one point during the hearing, Judge Beko requested a witness to speak louder and stated: "It's very important that we hear." Judge Beko was obviously concerned about hearing all of the testimony presented before the three-judge panel and, certainly, the closing of his eyes did not necessitate the closing of his ears. Nevertheless, we doubt that an evidentiary hearing at this time would bring this issue to a satisfactory conclusion.

Therefore, we conclude that Paine's death sentence must be vacated and this case remanded for a new sentencing hearing before a panel of three new judges. In

6. Judge Pavlikowski stated to Paine's defense counsel:

[A]fter we recessed we considered the penalty. Judge Beko was very alert. He put forth certain comments on what the penalty should

so holding, we do not impute any wrongdoing on the part of Judge Beko. Instead, we are reluctantly exercising an abundance of caution in an effort to resolve this matter equitably. The circumstances surrounding this issue are extraordinary. Consequently, our holding today will not be expanded beyond these extraordinary circumstances. Had an evidentiary hearing been held immediately after the penalty hearing, we may have arrived at a different result.

We have considered Paine's other arguments on appeal, including his claim of prejudice resulting from the ten minute deliberation of the three-judge panel, and conclude that they lack merit. Accordingly, we vacate the sentence of death imposed by the district court, and we remand this matter to the district court for a new penalty hearing by a three-judge panel.



**Frank Salvatore D'AGOSTINO, aka
Frank Caruso, Appellant,**

v.

The STATE of Nevada, Respondent.

No. 21861.

Supreme Court of Nevada.

Dec. 30, 1991.

Rehearing Denied March 3, 1992.

Defendant was convicted in the Eighth Judicial District Court, Clark County, Jack Lehman, J., of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon and first-degree arson, and sentenced to death. Defendant appealed. The Supreme Court held that: (1) issues raised with respect to guilt phase

be and what it shouldn't be. And with that in mind I have no reason to believe that Judge Beko was sleeping whatsoever. So, therefore, your motion for evidentiary hearing is denied.

lacked merit, but (2) penalty hearing was contaminated by testimony of fellow prisoner of defendant that defendant had admitted to him several unrelated killings.

Affirmed in part, reversed in part and remanded.

1. Homicide \Rightarrow 343, 358(1)

Penalty hearing in capital murder case was contaminated by testimony of fellow prisoner of defendant that defendant had admitted to him several unrelated killings; absent any details as to time, place and victim, these unverifiable accusations prejudiced defendant.

2. Homicide \Rightarrow 358(1)

Testimony in penalty hearing relating to supposed admissions by convict as to past homicidal criminal conduct may not be heard by the jury unless trial judge first determines that details of the admissions supply sufficient indicia of reliability or there is some credible evidence other than admission itself to justify conclusion that inmate committed crimes which are the subject of the admission.

Morgan D. Harris, Public Defender, Thomas W. Rigsby and Stephen J. Dahl, Deputy Public Defenders, Clark County, Las Vegas, for appellant.

Frankie Sue Del Papa, Atty. Gen., Carson City, Rex Bell, Dist. Atty., James Tufteland, Chief Deputy Dist. Atty., and Robert L. Langford, Deputy Dist. Atty., Clark County, Las Vegas, for respondent.

OPINION

PER CURIAM:

This case involves the robbery and murder of a woman in Las Vegas. Appellant, Frank D'Agostino, was convicted of the murder and sentenced to death by a jury. Appellant raises numerous issues on appeal, challenging both his conviction and sentence of death.

With respect to the guilt phase of his trial, appellant raises many issues. Upon a thorough review of those issues we con-

clude that each of appellant's contentions lacks merit. Accordingly, we affirm appellant's convictions. We do, however, find error with respect to appellant's penalty hearing. Thus, we reverse appellant's sentence of death and remand the case to the district court for a new penalty hearing.

[1] The penalty hearing was contaminated by the testimony of one Michael Gaines, a prisoner who shared a cell with D'Agostino. The prosecution called Gaines as a witness to testify, over objection, that D'Agostino had admitted to Gaines several killings unrelated to the present case. According to Gaines' testimony, D'Agostino, while Gaines and D'Agostino were in jail, admitted killing some unidentified man at some unspecified time and place in New York. Gaines also testified that D'Agostino told him, while they were jailmates, that D'Agostino cut a woman's throat and threw her body off of a cruise ship.

There is, of course, no way that D'Agostino could have defended himself against these kinds of unverifiable accusations. Gaines might just as well have told the jury that D'Agostino had admitted to him a number of serial, chain-saw massacres. Absent any details as to time, place and victim, an accused who must face this kind of incriminating testimony is seriously and unfairly prejudiced when the jury comes together to deliberate as to whether he should live or die.

By reason of Gaines' testimony, D'Agostino went before the penalty jury as a two-time murderer. A legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to "cooperate" with the state and to say anything that is "helpful" to the state's case. It is up to the trial judge to see that there are sufficient assurances of reliability prior to admitting the kind of amorphous testimony presented to keep this kind of unreliable evidence out of the hands of the jury, especially when the supposedly admitted crimes of the accused cannot be reasonably described in terms of where, when, against whom (other than "some old man in New York") and the circumstances under which the crimes were

committed. More and more frequently, it seems, we are confronted with cases in which a jailbird comes forward to testify that the accused admitted to him that he not only committed the crime that he is accused of but also several other assorted crimes. We think it is time that this practice is examined more carefully.

We are not suggesting any impropriety or collusion on the part of prosecutors; but, it appears to us that a jail-house incrimination is now available in a fairly large number of homicide cases. Some limitations ought to be placed on this practice. Protections against this kind of unreliable evidence are afforded by our case law relating to proof of other crimes,¹ but it should be remembered that in death cases the proof of other crimes is intended not to show the guilt of the accused but, rather, to display the character of the convict and to show culpability and just deserts on the party of the homicidal convict. Past criminal activity is one of the most critical factors in the process of assessing punishment, for whatever purpose punishment might be inflicted. Past misconduct relates to the criminal's blameworthiness for the charged homicide and relates, as well, to whether the jury deems it necessary for public safety to impose an irrevocable, permanent quarantine upon the murderer. The point is that past homicidal conduct of the subject of a death penalty hearing goes to the very heart of the jury's decision-making process. Improperly admitted evidence of past criminal conduct is even more damaging in a penalty hearing than it is in a guilt-determining proceeding because the past conduct goes to the substance of whether the murder should or should not be punished by death.

While past murders are relevant, even vital, to the penalty hearing when properly called to the jury's attention, unreliably demonstrated past killings are harmful in the extreme and simply cannot be overlooked by a reviewing court.

1. See *Berner v. State*, 104 Nev. 695, 765 P.2d 1144 (1988); *Shults v. State*, 96 Nev. 742, 616

[2] Based on the foregoing considerations, we now hold that testimony in a penalty hearing relating to supposed admissions by the convict as to past homicidal criminal conduct may not be heard by the jury unless the trial judge first determines that the details of the admissions supply a sufficient indicia of reliability or there is some credible evidence other than the admission itself to justify the conclusion that the convict committed the crimes which are the subject of the admission. Absent either criteria in the instant penalty hearing, we reverse the judgment of execution and remand to the trial court for a new penalty hearing.



Linda J. NARDOZZI, Appellant,

v.

CLARK COUNTY SCHOOL DISTRICT,
a Political Subdivision of the State of
Nevada, Clark County, Respondent.

No. 21727.

Supreme Court of Nevada.

Jan. 2, 1992.

Rehearing Denied Feb. 11, 1992.

Plaintiff who slipped and fell at entrance of elementary school brought personal injury action against school district, alleging that it negligently failed to take safety precautions by keeping floor dry on a rainy day. The Eighth Judicial District Court, Clark County, John S. McGroarty, J., granted district's motion for summary judgment, and plaintiff appealed. The Supreme Court, Rose, J., held that: (1) fact that plaintiff filed notice of appeal before district court entered order denying rehearing did not render appeal void; (2) school