

NO. 77767-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HACHENEY,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 29965-8-II
Kitsap County Superior Court No. 01-1-01311-2

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ANSWER TO BRIEF OF AMICUS CURIAE WACDL

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I. ARGUMENT

The State feels that Amicus' primary arguments have been adequately addressed in its supplemental brief. To the extent that it feels further response is needed, the State will follow roughly the same organizational format as that presented by amicus, for the ease of the reader.

A. THE LEGISLATURE IS PRESUMED TO BE AWARE OF JUDICIAL CONSTRUCTION OF STATUTORY TERMS.

Amicus asserts that the Court of Appeals reading of the arson aggravating circumstance is contrary to principles of statutory construction. Amicus fails to acknowledge that that Court applied long-standing precedent of this Court, or that that precedent has been specifically endorsed by the Legislature.

This Court has traditionally applied the same analysis to the felony-commission aggravating factors as it has to the felony murder statute. *E.g.*, *State v. Brown*, 132 Wn.2d 529, 608, 940 P.2d 546 (1997). That construction includes the res gestae or intimate connection tests set forth in *State v. Leech*, 114 Wn.2d 700, 706, 790 P.2d 160 (1990), for determining whether the factor or felony murder should apply.

As amicus notes, the Legislature is deemed to be familiar with the prior judicial construction of statutory terms. *State v. Ritchie*, 126 Wn.2d

388, 393, 894 P.2d 1308 (1995). Further, “[l]egislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence in that construction.”⁴ *Ritchie*, 126 Wn.2d at 393 quoting *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993)). In its holding in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), this Court specifically reaffirmed its holding in *Leech*. When the Legislature swiftly amended the felony-murder statute in response to *Andress*, it did nothing to alter the construction placed on the statute by *Leech*. To the contrary, the Legislature explicitly endorsed the Court’s prior interpretations of the “in furtherance of” language.

This legislature reaffirms that original intent and further *intends to honor and reinforce the court’s decisions over the past twenty-eight years interpreting “in furtherance of” as requiring the death to be sufficiently close in time and proximity to the predicate felony.*

Laws of 2003, ch. 3, § 1. Thus, contrary to being a strained statutory construction, it is apparent that the Court of Appeals’ interpretation carries out the express intent of the Legislature.

B. THIS COURT’S CONSTRUCTION OF THE FELONY-RELATED AGGRAVATING CIRCUMSTANCES IS SUFFICIENTLY NARROW TO SATISFY THE EIGHTH AMENDMENT.

Amicus next essentially claims that the Court of Appeals construction

would render Washington's death-penalty statute unconstitutional. This claim should not be considered because it is raised for the first time by amicus, and because, this not being a capital case, the issue is not ripe. Moreover, the contention lacks merit.

This court generally declines to consider arguments raised in an amicus brief because the defendant did not brief the issue: "this court does not consider arguments raised first and only by an amicus." *State v. Clarke*, 156 Wn.2d 880, 894, 134 P.3d 188 (2006) (declining to consider a state constitutional claim raised for the first time in an amicus brief); *see also Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993) ("We do not consider issues raised first and only by amicus"); *Cummins v. Lewis County*, 156 Wn.2d 844, 850 n.4, 133 P.3d 458 (2006) ("Under case law from this court, we address only claims made by a petitioner, and not those made solely by amici"); *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (declining to address several "novel" arguments raised only by amicus curiae and holding, "we will not address arguments raised only by amicus"); *Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1*, 140 Wn.2d 403, 413, 997 P.2d 915 (2000) ("This court will not address arguments raised only by amici."); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) ("It is further well established that appellate courts will not

enter into the discussion of points raised only by amici curiae”). This issue was not raised below, in the petition for review, or in any explicit form in the petitioner’s supplement brief.¹ The Court should not now consider it.

Moreover, this court generally does not issue declaratory opinions: “We choose instead to adhere to the long-standing rule that this court is not authorized under the declaratory judgments act to render advisory opinions or pronouncements upon abstract or speculative questions.” *Walker v. Munro*, 124 Wn.2d 402, 418, 879 P.2d 920 (1994). The State sought, and Hachenev received, a sentence of life imprisonment, not death. Yet “[d]eath is indeed different, ... ‘the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.’” *State v. Elmore*, 139 Wn.2d 250, *315, 985 P.2d 289 (1999) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976)); see also *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996) (death penalty jurisprudence barring

¹ The closest petitioner came to the issue was a few sentences, unsupported by authority and not further explored: “[T]his court’s constual ... does not serve to expand the cause of death-eligible defendants. To the contrary the ruling of the trial court and opinion of the Court of Appeals does expand the class.” Supp. Br. of Pet. at 4.

that penalty from being imposed on 15-year-old did not apply to sentence of life without parole). Because the jurisprudence amicus seeks to apply does not apply to Hachenev, amicus seeks an advisory opinion, which this court should refrain from issuing.

Finally, even if the Court were to consider this claim it would be without merit. As amicus itself notes, an aggravating circumstance may be sufficiently narrowed by judicial construction. *State v. Bartholomew*, 98 Wn.2d 173, 189, 654 P.2d 1170 (1982). As discussed, this Court *has* given a clear construction to felony aggravating circumstances. The felony must be intimately connected with the murder, part of its *res gestae* to meet the definition. This clearly narrows the class of death-eligible defendants, as demonstrated by the cases where the connection has been deemed too tenuous.

C. AS IN *BROWN*, HACHENEV POSSESSED THE INTENT TO KILL HIS WIFE CONTEMPORANEOUSLY WITH THE COMMENCEMENT OF THE ARSON AND VICE VERSA.

Amicus' third argument is essentially the same as that presented by Hachenev and discussed in the supplemental brief of respondent. The State will limit itself therefore to pointing out that amicus' argument appears to be based in part on a false premise: that the arson was an afterthought. To the

contrary the most reasonable inference from the evidence is that the arson and murder were planned together, the preparations for both crimes were taken *before* the murder occurred, and that the two crimes were integral parts of one scheme. As such, amicus' reliance on cases, such as *State v. Golladay*, 78 Wn.2d 121, 132, 470 P.2d 191 (1970), in which the felony was a mere afterthought of the killing, is inapt. Here, as in *Brown*, the intent to commit each crime was fully formed before either was committed. *Brown*, 132 Wn.2d at 450.

D. THE RES GESTAE AND INTIMATE CONNECTION TESTS ARE NOT DIFFICULT TO APPLY.

Amicus argues that the res gestae or intimate connection formulation of the felony murder rule is too vague or difficult to apply. That this is a strawman argument should be obvious from amicus' apparent inability to locate or cite any case in which the application of these principles has proven difficult. Amicus also, again, premises its argument on the theory, not present in this case, that the intent to commit the felony was formed after the murder was completed. Contrary to amicus' claims, these terms have not been difficult to understand or apply, as demonstrated in the cases cited by both parties in which they have been applied. Indeed, the test is simple and straight-forward: if the two crimes are essentially part of one cohesive

transaction, they are within the res gestae or intimately connected, and the aggravator or felony-murder applies; if they are not, as in amicus' "afterthought" scenarios, they do not apply.

E. THE STATE PROVED THE CONNECTION BETWEEN THE MURDER AND THE ARSON.

Amicus next argues, for the first time in this appeal, that by using the term "causal connection" in the definitional instruction for the aggravating circumstance, the State assumed the burden of proving that the arson was the proximate cause of the murder. This contention raised for the first time in the amicus brief, should not be considered, and further, is without merit.

As discussed previously, this Court does not consider issues raised solely by amici. The Court should therefore decline to address this contention.

Further, the contention lacks merit because definitional instructions do not create "elements," and because in the context of the definition given, the term "causal connection" does not require a finding of proximate causation.

First the law of the case doctrine only applies to crimes. Sentence enhancements are not crimes, *see State v. Brown*, 36 Wn. App. 549, 554, 676 P.2d 525 (1984), and the doctrine therefore does not apply. Further, even if it

did, the State has located no case that applied the doctrine enunciated in *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998), to anything but the “to-convict” instruction. This is logical, as elements are found in the to-convict instruction, not in definitional instructions.

Here, the court instructed the jury regarding what the State needed to prove to establish the aggravating circumstance:

If you find the defendant guilty of premeditated murder in the first degree as defined in Instruction No. 7, you must then determine whether the following aggravating circumstance exists:

The murder was committed in the course of arson in the first degree.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt, In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

CP 1352 (Instruction 11). Nothing in this instruction, which the equivalent of the “to-convict” instruction for a substantive crime, remotely suggests that the State need prove that the arson proximately caused the murder. The language *amicus* cites appears only in the definitional instruction:

To establish that the killing occurred “in the course of” another crime, there must be an intimate connection between the killing and the other crime. The killing and the other crime must be in close proximity in terms of time and distance. However, more than a mere coincidence of time and place is necessary: A causal connection must clearly be established between the two crimes.

CP 1353 (Instruction 12).

Further, even if the Court were to hold for the first time that a definitional instruction could establish an element, nothing in Instruction 12 requires that the arson have proximately caused the murder. In context the definitional merely makes clear that the two crimes have to be part of the same *res gestae* or intimately connected. A “causal connection” in everyday language could mean that the arson cause the death, but it could also mean that the both crimes were connected in their causation: Hachenev’s motive to kill his wife and hide the crime, or that the arson was caused by Hachenev’s desire to conceal the murder. The evidence amply meets these definitions.

Finally, to the extent that amicus’ prayer for relief can be read as asking for the vacation of the entire premeditated first-degree murder charge, it is incorrect. Error relating to aggravating circumstances results in vacation only of the aggravating circumstance, not of the underlying murder conviction. *See, e.g., State v. Thomas*, 150 Wn.2d 821, *876, 83 P.3d 970 (2004).

F. AGAIN, HACHENEV DID NOT FORM THE INTENT TO COMMIT ARSON AFTER THE MURDER WAS COMMITTED.

Amicus finally purports to support its position by citation to numerous cases from other jurisdictions that hold that aggravating circumstances or

felony murder may not lie where the felony was a mere afterthought of the murder. As previously discussed this argument is based on a false premise: that the arson was an afterthought of Hachenev's murder of his wife. Because the evidence showed that the arson was undoubtedly part and parcel of the murder plot, these case shed no light on the issue presented.

II. CONCLUSION

For the foregoing reasons, and for those set forth in the respondent's supplemental brief, Hachenev's conviction and sentence should be affirmed.

DATED October 12, 2006.

Respectfully submitted,

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