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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 \* \* \*

4 SHAWN RUSSELL HARTE,

5 Appellant,

6 Case No. 43877

7 vs.

8 THE STATE OF NEVADA,

9 Respondent.

**FILED**

**APR 25 2005**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

10 **PETITION FOR REHEARING**

11 COMES NOW, the Appellant, SHAWN RUSSELL HARTE, by and through his attorneys,  
12 DONALD YORK EVANS, ESQ. and THOMAS L. QUALLS, ESQ., and hereby Petitions this  
13 Court for rehearing of its Order Dismissing Appeal filed April 7, 2005.

14 In its Order Dismissing Appeal (ODA), this Court ruled that Harte's reliance upon the case  
15 of Matter of Application of Duong, 118 Nev. Adv. Rep. 93, 59 P.3d 1210 (2002) was misplaced.  
16 The Court reasoned that Mr. Harte's situation was different from Duong's in that Duong involved  
17 a collateral civil proceeding in which the appellant sought to seal his criminal records. (ODA at  
18 2). Of course, Harte's case involves a collateral civil proceeding challenging his prior criminal  
19 proceedings. Accordingly, it is respectfully argued that the distinction is arbitrary and capricious.

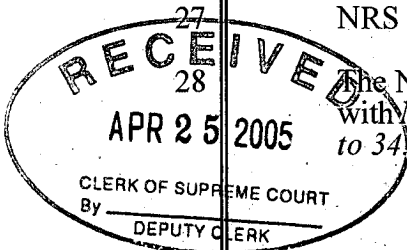
20 In Hill v. Warden, 96 Nev. 38, 604 P.2d 807 (1980), the Nevada Supreme Court reasoned  
21 that habeas corpus proceedings were "neither civil nor criminal for all purposes." Hill, 96 Nev. at  
22 40, 604 P.2d at 808. The Hill Court supported its conclusion by reasoning:

23 While our legislature has specifically provided for the application of the Nevada  
24 Rules of Civil Procedure in cases involving writs of certiorari and mandamus, *there*  
*is no similar provision for writs of habeas corpus.*

25 Id (emphasis added). However, since 1980 when Hill was decided, the Nevada Legislature  
26 apparently answered the call of the Hill Court by enacting NRS 34.780 in 1985.

27 NRS 34.780(1) reads:

28 The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent  
with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720  
to 34.830, inclusive.



05-08100

1 The Nevada Legislature's subsequent enactment of a statute to guide future decisions of the  
2 courts regarding the applicability of civil rules to habeas proceedings greatly loosens the prior  
3 constraints of the Hill Court. But Hill is not left wholly without merit or weight where the instant  
4 case is concerned. Indeed, this Court is encouraged to adopt to spirit of the Hill Court in fashioning  
5 an appropriate remedy for Mr. Harte.

6 In Hill, the Court considered the issue of the effect of a premature notice of appeal in a post-  
7 conviction habeas corpus case. The Court acknowledged that the "stakes" in a habeas case are  
8 high, as the prisoner's liberty is at risk. The Court looked to the facts that the prisoner's intent to  
9 timely file an appeal was sufficiently manifested to the State and that the State was not prejudiced  
10 by the notice and thereby drafted an appropriate remedy, accepting jurisdiction. Hill, 96 Nev. at  
11 40-41, 604 P.2d at 808.

12 Moreover, this Court should look to Passanisi v. State, 108 Nev. 318, 831 P.2d 1371  
13 (1992). In Passanisi, the court considered whether it had jurisdiction to entertain an appeal from  
14 an order of the district court denying a post-conviction motion to modify a sentence. As recognized  
15 by this Court:

16 [I]n timing and in scope, a motion to modify a sentence is essentially the same as  
17 a motion for a new trial: both constitute direct attacks on the district court's decision  
18 and the district court's authority to consider such motions is incident to the trial  
19 court proceedings. This court concluded that "a motion to modify a sentence is the  
functional equivalent of a motion for a new trial." *Id. at 321, 831 P.2d at 1373.*  
Because an order granting or refusing a new trial is independently appealable, this  
court concluded that it had jurisdiction to entertain the appeal.

20 Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035, 1038-39 (1993), *citing Passanisi*, 108 Nev. at 322,  
21 831 P.2d at 1373. Accordingly, this situation is again strikingly similar to Harte's and this Court  
22 should find that it has jurisdiction to entertain the instant appeal.

23 This is a death penalty case. Surely this Court recognizes that the "stakes" are even higher  
24 than in the general habeas case. *Death is different* remains a well-recognized maxim of capital  
25 litigation. :

26 **It is the universal experience in the administration of criminal justice that**  
27 **those charged with capital offenses are granted special considerations.**

28 William v. Florida, 399 U.S. 78 at 103, 90 S.Ct. 1893 at 1907, 26 L.Ed.2d 446 (1970).

1           **This Court, too, almost always treats death cases as a class apart.**

2 Justice Brennan, Furman v. Georgia, 92 S.Ct. at 2751:

3           **The only explanation for the uniqueness of death is its extreme severity. Death**  
4           **is today an unusually severe punishment, unusual in its pain, in its finality, and**  
5           **in its enormity. No other existing punishment is comparable to death in terms**  
6           **of physical and mental suffering. Although our information is not conclusive,**  
7           **it appears that there is no method available that guarantees and immediate**  
8           **and painless death.**

9 Justice Brennan, Furman v. Georgia, 92 S.Ct. at 2751 (1972).

10           **That life is at stake is of course another important factor in creating the**  
11           **extraordinary situation. The difference between capital and non-capital**  
12           **offenses is the basis of differentiation in law in diverse ways in which the**  
13           **distinction become relevant.**

14 Williams v. Georgia, 349 U.S. 375, 391, 75 S.Ct. 814, 99 L. Ed. 1161 (1955) (Frankfurter, J.).

15           **When the penalty is death, we, like state court judges, are tempted to strain the**  
16           **evidence and even, in close cases, the law in order to give a doubtfully**  
17           **condemned man another chance.**

18 Stein v. New York, 346 U.S. 156, 196, 73 S.Ct. 1077, 1099, 97 L. Ed. 1522 (1953).

19           **Mr. Justice Harlan expressed the point strongly: I do not concede that**  
20           **whatever process is 'due' an offender faced with a fine or a prison sentence**  
21           **necessarily satisfies the requirements of the Constitution in a capital case. The**  
22           **distinction is by no means novel, . . . nor is it negligible, being literally that**  
23           **between life and death.**

24 Reid v. Covert, 354 U.S. 1, 77, 77 S.Ct. 1222, 1262, 1 L. Ed. 2d 1148 (1957) (concurring in result).

25           **In death cases doubts such as those presented here should be resolved in favor**  
26           **of the accused.**

27 Andres v. United States, 333 U.S. 740, 752, 68 S.Ct. 880, 886, 92 L. Ed. 1055 (1948).

28           Additionally and alternatively, as verified by the attached Affidavit of Donald York Evans,  
the primary reason for the motion pursuant to NRCP 59 -- which should have tolled the appeal time  
-- was to correct the fact that Evans was not given an opportunity to review the proposed order  
denying habeas relief prior to the order being filed. Surely Harte's counsel's good-faith attempts  
to properly exhaust his remedies at the district court before bringing the matter to this court's  
jurisdiction, and the fact that counsel cited to NRCP provisions which should toll the time to  
appeal, amount to sufficient cause in a death penalty case to vest jurisdiction with this Court.

///

1 Finally, Mr. Harte's appeal is meritorious, as his case falls under the authority of this  
2 Court's recent decision in McConnell v. State, 120 Nev. Adv. No. 105, 102 P.3d 606 (2004),  
3 *affirmed*, 121 Nev. Adv. No. 5, 107 P.3d 1287 (2005). In McConnell, this Court held:

4 **We therefore deem it impermissible under the United States and Nevada**  
5 **Constitutions to base an aggravating circumstance in a capital prosecution on**  
**the felony upon which a felony murder is predicated.**

6 McConnell, 102 P.3d at 624 (emphasis added). In Mr. Harte's case, the jury found only one  
7 aggravating circumstance: "that the murder was committed in the course of a robbery". Harte v.  
8 State, 116 Nev. 1054, 1061, 13 P.3d 420, 425 (2000). This aggravating circumstance having been  
9 invalidated by McConnell, Harte's sentence of death is illegal and must be reversed.

10  
11 **Conclusion.**

12 The Court in its ODA does not explain the reason for the distinction except to state that it  
13 has "consistently and repeatedly" held accordingly. (ODA at 2). Respectfully, the Court should  
14 not allow itself the luxury to fall back upon the "this is the way we've always done it" excuse in  
15 this case in which the ultimate punishment of death is at stake. Surely the matter requires more  
16 weighty reasoning. Should a death penalty case be so casually dismissed upon what is at most the  
17 slightest of all technicalities. Hopefully the question is rhetorical.

18 Pursuant to decisions in Duong v. State and Hill v. State, *supra*, the notice of appeal was  
19 timely filed within 30 days of the district court's order denying HARTE's motion for relief or to  
20 amend the order.

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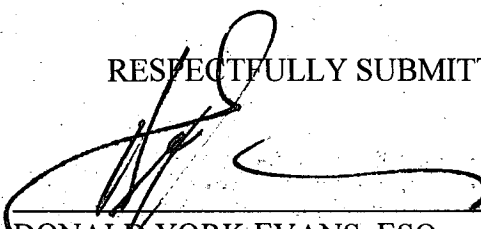
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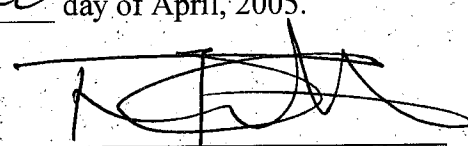
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1        WHEREFORE, Mr. Harte argues that the Court either overlooked or misapprehended a  
2 material question of law set forth in his Answer to Order to Show Cause regarding the applicability  
3 of civil rules to the instant case and the instant appeal. Accordingly, it is respectfully requested that  
4 this Court find that it has jurisdiction to hear the appeal of the denial of his Petition for Writ of  
5 Habeas Corpus at this time.

6  
7        RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of April, 2005.

8  
9   
10 DONALD YORK EVANS, ESQ.  
11 Nevada State Bar No. 1070  
12 313 Flint Street  
13 Reno, Nevada 89509  
14 (775) 348.7400  
15 Attorney for Appellant/Petitioner,  
16 Shawn Russell Harte

7   
8 THOMAS L. QUALLS, ESQ.  
9 Nevada State Bar No. 8623  
10 216 East Liberty Street  
11 Reno, Nevada 89509  
12 (775) 333.6633  
13 Attorney for Appellant/Petitioner,  
14 Shawn Russell Harte

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7 v.

District Court No. CR980074

8 THE STATE OF NEVADA,

9 Respondent.  
10

11 **AFFIDAVIT IN SUPPORT OF PETITION**  
12 **FOR REHEARING**

13 STATE OF NEVADA )  
14 COUNTY OF WASHOE ) :ss.

15 I, DONALD YORK EVANS, LTD., being first duly sworn, under penalty of perjury,  
16 depose and say:

17 1. I am an attorney duly licensed to practice law before all the Courts of the State  
18 of Nevada, with offices at 313 Flint Street, Reno, NV 89504, and a mailing address of P.O. Box  
19 864, Reno, NV 89504;

20 2. I am appointed counsel for SHAWN RUSSELL HARTE, the Appellant in this  
21 matter;

22 3. When I was provided with a copy of the District Attorney's Proposed Order in the  
23 case, I was waiting delivery of the transcripts to me to review prior to filing my formal written  
24 objections to the State's Proposed Order;

25 4. Unfortunately, I was never provided with the transcripts in a timely fashion, and  
26 the matter was submitted to Judge Steinheimer without any objections being filed by the  
27 Appellant;

28 //

DONALD YORK EVANS  
ATTORNEY AT LAW

P.O. Box 864

RENO, NEVADA 89504

775/348-7400 FAX 775/348-4604

1 5. I contacted the Judge's office regarding the difficulties in obtaining my transcripts  
2 after the Order had been signed;

3 6. I was advised by Judge Steinheimer that she would not consider the Order a final  
4 order until I had a chance to lodge my formal objections and that she would entertain the  
5 Motions for Relief from Judgment in that regard;

6 7. Upon her finally deciding that her original Order would stand, I timely filed a  
7 Notice of Appeal in this case, thereby conferring, at least in my opinion, jurisdiction in this  
8 matter to the Supreme Court.

9 This Affidavit is offered in support of the Petition for Rehearing filed herewith.

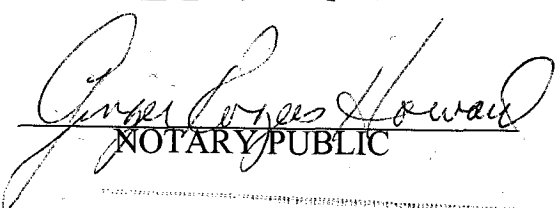
10 Further Affiant Sayeth ~~Naught~~.

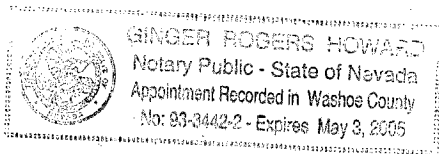
11 DATED: This 28<sup>th</sup> day of April, 2005.

12  
13  
14   
DONALD YORK EVANS, LTD.

15 Subscribed and Sworn to before me

16 this 25<sup>th</sup> day of April, 2005.

17  
18   
19 NOTARY PUBLIC



DONALD YORK EVANS  
ATTORNEY AT LAW  
P.O. BOX 864  
RENO, NEVADA 89504  
775 / 348-7400 FAX 775 / 348-4604

CERTIFICATE OF SERVICE

I certify that I am an employee of DONALD YORK EVANS, ESQ., and that on this date

I

       deposited for mailing, via U.S. mail

       caused to be delivered, via Reno-Carson Messenger Service

       delivered via facsimile machine

       personally delivered

a true and correct copy of the foregoing document, addressed to:

Washoe County District Attorney's Office  
P.O. Box 30083  
Reno, NV 89520

DATED this 25, day of April, 2004.

  
GINGER ROGERS HOWARD