

IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

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JUN 01 2005

SHAWN RUSSELL HARTE,

Appellant,

Case No. 43877

BY

J. Castillo
DEPUTY CLERK

vs.

THE STATE OF NEVADA,

Respondent.

PETITION FOR REHEARING EN BANC

COMES NOW, the Appellant, SHAWN RUSSELL HARTE, by and through his attorneys, DONALD YORK EVANS, ESQ. and THOMAS L. QUALLS, ESQ., and hereby Petitions this Court for rehearing *en banc* of its Order Dismissing Appeal filed April 7, 2005 and its Order Denying Rehearing filed May 19, 2005.

On March 19, 2004, the district court entered its Findings of Fact and Conclusions of Law denying Mr. Harte's post-conviction habeas petition. On March 26, 2004, Mr. Harte, filed his Motion for Relief from Order / Motion for Reconsideration. The district court denied Harte's Motion on August 12, 2004. On August 25, 2004, Harte filed his notice of appeal. (Each of these documents is attached to Harte's Answer to Order to Show Cause, Attached hereto as Exhibit B).

This Court filed an Order to Show Cause on October 26, 2004. (Exhibit A). On November 12, 2004, Harte filed his Answer to Order to Show Cause. (Exhibit B). On April 07, 2005, this Court entered its Order Dismissing Appeal. (Exhibit C). Harte filed a Petition for Rehearing pursuant to NRAP 40 on April 22, 2005. (Exhibit D). On May 19, 2005, the panel filed an Order Denying Rehearing, without any explanation, save for a cite to NRAP 40(c). (Exhibit E). This Petition for Rehearing En Banc follows.

This Petition is based on grounds that the proceedings at issue involve a substantial precedential, constitutional and/or public policy issue. The issue at hand regarding the dismissal without hearing the appeal involves the arguably arbitrary and capricious application of the Nevada Rules of Civil Procedure and the Nevada Rules of Appellate Procedure. Additionally, the issue at

1 hand involves the summary dismissal of a Death Penalty appeal based upon the arbitrary
2 application of the above rules in an inconsistent manner. Finally, the issue at hand involves a
3 violation of Due Process. It appears there is no clearly stated procedural rules upon which litigants
4 – particularly Capital Litigants – may confidently rely in pursuing appellate relief. The result is a
5 minefield in which even conscientious litigants such as Mr. Harte – who has attempted to properly
6 stay his time for appeal while disputing the proposed Findings of Fact and Conclusions of Law
7 from the district court's denial of his habeas petition – may find themselves at the mercy of an
8 inconsistency between the rules set forth by the Nevada Legislature, and the various applications
9 of those rules by this Court. Accordingly, the impact of the panel's decision in denying rehearing
10 in this case goes far beyond the litigants involved, subjecting numberless potential litigants in the
11 future to the same hazards. Further, there is considerable constitutional and public policy interest
12 in a clear and consistent articulation of procedural rules affecting Death Penalty litigants.

13 As set forth below, NRS 34.780(1) makes the Nevada Rules of Civil Procedure applicable
14 to post-conviction habeas cases. However, under the panel's interpretation, a post-conviction
15 litigant cannot rely upon that statute, but must instead make sense of inconsistent decisions from
16 the Nevada Supreme Court, *e.g.*, Matter of Application of Duong, 118 Nev. Adv. Rep. 93, 59 P.3d
17 1210 (2002); Hill v. Warden, 96 Nev. 38, 604 P.2d 807 (1980); and Klein v. Warden, 118 Nev.
18 305, 310, 43 P.3d 1029, 1033 (2002). The result appears to be a Catch-22 scenario that places
19 litigants in potential lose-lose situation and thus inevitably violates Due Process.

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

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1 In Hill v. Warden, 96 Nev. 38, 604 P.2d 807 (1980), the Nevada Supreme Court reasoned
2 that habeas corpus proceedings were “neither civil nor criminal for all purposes.” Hill, 96 Nev. at
3 40, 604 P.2d at 808. The Hill Court supported its conclusion by reasoning:

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

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

8 NRS 34.780(1) reads:

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

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

16 In Hill, the Court considered the issue of the effect of a premature notice of appeal in a post-
17 conviction habeas corpus case. The Court acknowledged that the “stakes” in a habeas case are
18 high, as the prisoner’s liberty is at risk. The Court looked to the facts that the prisoner’s intent to
19 timely file an appeal was sufficiently manifested to the State and that the State was not prejudiced
20 by the notice and thereby drafted an appropriate remedy, accepting jurisdiction. Hill, 96 Nev. at
21 40-41, 604 P.2d at 808.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 Additionally and alternatively, as verified by the Affidavit of Donald York Evans (attached
28 to the Petition for Rehearing), 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 record underlying 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.

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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 **Conclusion.**

11 The panel in its ODA does not adequately explain the reason for the distinction in the
12 treatment of collateral cases. (Exhibit C). Further, the panel's Order Denying Rehearing (Exhibit
13 E) gives no indication of the reason for denial, including no answer to the legal arguments
14 contained in the Petition for Rehearing. Surely Death Penalty cases require more weighty
15 reasoning.

16 Pursuant to decisions in Duong v. State, Hill v. State, and NRS 34.780, *supra*, the notice
17 of appeal was timely filed within 30 days of the district court's order denying Harte's motion for
18 relief or to amend the order.

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WHEREFORE, this Petition for Rehearing En Banc is based on grounds that the proceedings at issue involve a substantial precedential, constitutional and/or public policy issue. Mr. Harte incorporates his argument from the Petition for Rehearing that the panel either overlooked or misapprehended a material question of law set forth in his Answer to Order to Show Cause regarding the applicability of civil rules to the instant case and the instant appeal.

Moreover, the impact of the panel's decision in denying rehearing in this case goes far beyond the litigants involved, subjecting numberless potential litigants in the future to the same hazards. Finally, there is considerable constitutional and public policy interest in a clear and consistent articulation of procedural rules affecting Death Penalty litigants. Accordingly, it is respectfully requested that this En Banc Court find that it has jurisdiction to hear the appeal of the denial of Mr. Harte's Petition for Writ of Habeas Corpus at this time.

RESPECTFULLY SUBMITTED this 31 day of May, 2005.

[Handwritten signature] GBO

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CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an agent of the law offices of Thomas L. Qualls, Esq., and that on this date, I served the foregoing ***Petition for Rehearing En Banc*** on the party(ies) set forth below by:

X Placing an original or true copy thereof in a sealed envelope placed for collecting and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

 Personal delivery.

 Facsimile (FAX).

 Federal Express or other overnight delivery.

 Reno/Carson Messenger service.

addressed as follows:

Washoe County District Attorneys Office
75 Court Street
P.O. Box 30083
Reno, Nevada 89520

DATED this 31st day of May, 2005.

Kristen Schaefer

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EXHIBIT A

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