IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

SHAWN RUSSELL HARTE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 43877

FILED

NOV 12 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ANSWER TO ORDER TO SHOW CAUSE

COMES NOW, the Appellant, SHAWN RUSSELL HARTE, by and through his attorneys, DONALD YORK EVANS, ESQ. and THOMAS L. QUALLS, ESQ., and hereby Answers this Court's Order to Show Cause filed October 26, 2004.

As this Court correctly noted, on March 19, 2004, the district court entered a written order containing findings of fact and conclusions of law denying Mr. HARTE's post-conviction habeas petition. (*Please see* Exhibit A, attached). On March 26, 2004, Mr. HARTE, by and through his appointed counsel, DONALD YORK EVANS, filed a motion entitled "Motion for Relief from Order / Motion for Reconsideration." (Hereinafter "Motion") (*Please see* Exhibit B, attached). Also as noted by this Court, the district court entered an Order denying HARTE's Motion on August 12, 2004 and on August 25, 2004, HARTE filed his notice of appeal in this matter. (*Please see* Exhibits C and D, respectively).

In the Order to Show Cause, this Court cited to Klein v. Warden, 118 Nev. 305, 310, 43 P.3d 1029, 1033 (2002) and Phelps v. State, 111 Nev. 1021, 900 P.2d 344 (1995), for the propositions that: (1) civil tolling provisions do not apply to post-conviction habeas petitions; and (2) an order denying a motion for reconsideration is not an appealable determination. Accordingly, this Court Ordered counsel for Mr. HARTE to show cause why the instant appeal should not be dismissed. The Court granted counsel 20 days from October 26, 2004 in which to provide this Answer. The Answer is timely filed.

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NOV 12 2004
CLERK OF SUPREME COURT
By
DEPUTY CLERK

In the Phelps decision, this Court expressly rejected the appellant's argument that a motion for reconsideration tolled the time period for filing an appeal. Phelps, 111 Nev. at 1022-23, 900 P.2d at 345. However, more on point is the case of Duong v. State, 118 Nev. Adv. Rep. 93, 59 P.3d 1210 (2002)(*In re Duong*). In Duong, this Court considered a situation virtually identical to the instant case.

Appellant Duong filed a motion for reconsideration of the district court's denial of his case. Like the decision in Phelps, this Court found that the motion for reconsideration did not toll the time for filing a notice of appeal. Duong, 59 P.3d at 1211. However, Duong also moved the district court -- in the alternative -- "to amend or make additional findings of fact or to alter or amend the judgment." Id. This Court ruled that those motions did in fact toll the time for filing a notice of appeal. Id.

Specifically, the Duong court found that:

> **Duong's alternative motions to amend or make additional findings of fact under NRCP 52(b) or to alter or amend the judgment under NRCP 59 were tolling motions.**

Duong, 59 P.3d at 1212. Duong appropriately filed a notice of appeal within 30 days of the resolution of these motions. Accordingly, this Court held that it had jurisdiction to hear the appeal.

Moreover, it appears that the alternative motions may have been filed as one document. As this Court explained in the decision:

> On April 2, 2002, Duong moved the court to reconsider its order, or to clarify it and enter more specific findings and conclusions, or to alter or amend the judgment.

Duong, 59 P.3d at 1211.

Likewise, in the instant case, Mr. HARTE moved in the alternative for the district court to reconsider its order denying his petition, or for the court to amend its decision pursuant to NRCP 59, or for relief from the order pursuant to NRCP 60. (*Please see* Exhibit B, p.4; Exhibit E (Petitioner's Response), pp. 2-3). Indeed, this Court acknowledged in its October 26, 2004 Order to Show Cause that Mr. HARTE's Motion was a "motion to modify." (Order to Show Cause, p.1).

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Therefore, pursuant to this Court's decision in Duong v. State, the notice of appeal was timely filed within 30 days of the district court's order denying HARTE's motion for relief or to amend the order.

WHEREFORE, it is respectfully requested that this Court find that HARTE's Motion filed March 26, 2004 did effectively toll the time period for filing the notice of appeal;

That the notice of appeal was thereafter timely filed;

And that this Court has jurisdiction to hear the instant appeal.

RESPECTFULLY SUBMITTED this 10th day of November, 2004.

DONALD YORK EVANS, ESQ.
State Bar No. 1070
313 Flint Street
Reno, Nevada 89509
(775) 348.7400
THOMAS L. QUALLS, ESQ.
Nevada State Bar No. 8623
443 Marsh Avenue
Reno, Nevada 89509
(775) 333.6633

Attorneys for Appellant,
SHAWN RUSSEL HARTE

CERTIFICATE OF SERVICE:

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the law offices of Donald York Evans, Esq., and that on this date, I served the foregoing ***Answer to Order to Show Cause*** on the party(ies) set forth below by:

✓ 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 12th day of Nov, 2004.

Ginger Rogers Howard

EXHIBIT A

A

CODE: 2540

FILED

2004 MAR 19 PM 1:47

RONALD A. LONGTON, JR.

BY _____ DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

***

SHAWN RUSSELL HARTE,

Petitioner,

VS.

STATE OF NEVADA,

Respondent,

_____/

CASE NO: CR98P0074A

DEPT. NO.: 4

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on March 19, 2004, the Court entered a decision or Order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of the Court. If you wish to appeal, you must file a notice of appeal with the Clerk of this Court within thirty-Three (33) days, after the date this notice is mailed to you. This notice was mail on March 19, 2004.

RONALD A. LONGTON, JR.

Clerk of the Court

By _____

Deputy Clerk

ORIGINAL

FILED

2004 MAR 19 AM 11:05

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

SHAWN RUSSELL HARTE,

Petitioner,

v. Case No. CR98P0074A

E.K. McDANIEL, WARDEN, Dept. No. 4

Respondent.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause is before the court upon a petition for writ of habeas corpus (post-conviction). Petitioner Harte was charged with murder and robbery stemming from his participation in the killing of taxi driver John Castro. The State proved at trial that Harte conspired with two others, Babb and Sirex, to rob and kill a cab driver. Babb was outfitted with a radio receiver when the two others got in the taxi, outfitted with a transmitter. She followed the taxi in a car until the driver was murdered on Cold Springs Road. Harte shot the driver and them climbed over the seat and gathered money and property belonging to the driver. He

gave that property to Sirex and then the trio departed in the car driven by Babb.

The three were tried and sentenced jointly. Harte, the person who pulled the trigger and killed Mr. Castro, was sentenced to death. Babb and Sirex were both sentenced to life without the possibility of parole plus the weapons enhancement and an additional term, enhanced, for the robbery with the use of a deadly weapon. Babb and Sirex appealed but the judgment was affirmed. Babb and Sirex v. State, Docket No. 34195, Order of Affirmance (July 10, 2001). Harte also appealed and his judgment was also affirmed. Harte v. State, 116 Nev. 1054, 13 P.3d 420 (2000).

Harte then filed a petition for writ of habeas corpus raising a variety of claims of ineffective assistance of counsel. The court appointed counsel who filed a supplemental petition. After discovery, the cause was set for a hearing. The court took testimony from several witnesses and these findings are based on the court's evaluation of the credibility of those witnesses.

The primary claim was that trial counsel rendered ineffective assistance by failing to present the sentencing jury with expert testimony regarding the mental state of Harte. The court finds as a matter of fact that trial counsel, John Ohlson and John Springgate, together made a reasonable tactical decision to refrain from presenting such evidence. Ohlson testified that his own evaluation led him to believe that he could obtain expert testimony to the effect that Harte suffered from such things as

anti-social personality disorder. He had the benefit of an initial evaluation by a psychiatrist that revealed no evidence of insanity or incompetence. He testified credibly that he decided not to present such evidence to the jury for valid reasons. He testified credibly that his own anecdotal experience, garnered over 30 years of an outstanding criminal defense practice, led him to believe that such weak mitigation tends to damn the client or, at best, to damn with faint praise. He also testified, credibly, that his anecdotal experience was bolstered by information received in a reputable seminar to the effect that jurors tend to pay little heed to such testimony from paid professionals. The court finds that those two items, Ohlson's own experience and the validation from other professionals, led Ohlson to make a reasonable tactical decision to focus his sentencing efforts elsewhere.

John Springgate testified credibly that he and Ohlson worked together on all aspects of the case. He concurred with Ohlson's evaluation that an additional psychiatric evaluation would probably show only that Harte lacked empathy for others. He further concurred with Ohlson's decision not to seek or present such evidence because he, like Ohlson, believed that such evidence would be more harmful than helpful. When two experienced trial lawyers consult with each other and concur that certain type of evidence would be harmful to the client, the court finds as a matter of fact that it is not unreasonable to decline to seek out or to present such evidence.

The court also finds that if Ohlson had arranged an evaluation, and if an evaluation at that time would have produced evidence such as was adduced at the habeas corpus hearing, Ohlson would have declined to present such evidence because he reasonably believed that presenting such evidence would do more harm than good. That type of decision, the decision on whether to present a certain witness, is a tactical decision reserved to counsel. Therefore, to the extent that the claim is ineffective assistance in failing to investigate, in failing to garner evidence, the court finds that Harte has not been prejudiced because additional investigation would not have altered the outcome of the litigation because the product of the additional investigation would not have been presented to the jury. Even if it had been presented, the court has evaluated the persuasive force of the evidence and is confident that the jury would have returned the same verdict.

Although local attorney Dennis Widdis testified that prevailing professional norms required counsel to seek out all possible forms of mitigating evidence, the court finds that testimony unpersuasive. The court concludes that even in a capital case, counsel is charged with exercising his professional skills and training on behalf of the client and that counsel may make a reasonable tactical decision to decline to gather and present certain types of evidence. No attorney has unlimited time and resources to expend on gathering information that will never be presented to the jury and the court finds that reasonable counsel will expend their time and resources in defending their

client, not in gathering evidence that counsel expects would be of no value. While counsel's decision to investigate must be reasonable, a decision not to investigate can be seen as reasonable where the decision on how to expend available resources is itself a product of a reasonable professional judgment. In this case, the decision to refrain from seeking psychiatric or psychological testimony to present at sentencing was the product of reasonable professional judgment that such evidence would likely show a personality disorder and that such evidence, if presented, would do nothing to help the defendant. Accordingly, the court finds as a matter of fact that counsel's decision not to seek that type of mitigating evidence was reasonable.

The court also finds that the new evidence presented in the habeas corpus hearing could hardly be described as mitigating. Dr. Mortilaro testified, for instance, that Harte suffered from various conditions such as narcissism and anti-social personality disorder. Those conditions, he stated, were enduring conditions that would allow Harte to continue to kill without remorse. The court finds that no reasonable attorney would have presented such information to a jury. In fact, the court questions whether presenting a jury with such damning evidence of future dangerousness might itself fall below the standard of reasonableness.

In Wiggins v. Smith, ___U.S. ___, 123 S.Ct. 2527 (2003), the Court held that where additional mitigating evidence is presented in a habeas corpus hearing, then the process of

evaluating whether the defendant was prejudiced by the failure of counsel to gather or present that evidence, requires the trial court to evaluate the new mitigating evidence and to weigh it against all the evidence that was originally presented in the trial in order to determine if it is reasonably likely that the jury would have imposed a different sentence. As an example, in Wiggins, the available evidence showed: "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case." The Court went on to note that this type of evidence is generally recognized as being mitigating: "Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." 123 S.Ct. at 2542. The Court commented that prior decisions have recognized that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than those who have no such excuse. In contrast, in this case, the additional psychological evidence essentially showed that Harte is a killer without conscience, without empathy and without any internal limits on his violent behavior. That is not the type of evidence that is generally recognized as mitigating. Instead, the main function of such evidence would be to prove future dangerousness, to increase the likelihood of a death

sentence.[1] Accordingly, the court finds as a matter of fact that Harte was not prejudiced by trial counsel's decision not to present the type of psychological and psychiatric testimony that was presented in the habeas corpus hearing.

Dr. Bittker's testimony did not change the analysis. Dr. Bittker testified to the effect that Harte suffered some form of mental trauma from the frequent moves by his military family, and from the sense of emotional abandonment by his father upon the divorce of his parents. This evidence does not seem remarkable. The court notes that there are some 1.4 million persons presently serving in the U.S. military and the figures on the frequency of divorce in modern times are astounding. None of the evidence was based on the proposition that Harte had suffered any actual abuse as a child. In fact, in totality, his childhood and formative years seem little different than millions of others, except for the testimony that even as a child Harte felt no empathy for others. Indeed Dr. Bittker testified that even years after the event, Harte displayed no remorse for his crime. Again, that hardly seems mitigating at all, let alone the type of evidence that would alter a verdict from a properly instructed jury diligently discharging its duties. On the contrary, the

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[1]The mental health professionals also suggested that Harte's condition might lead him to be less dangerous in prison than would other inmates. The court finds that testimony would have been summarily rejected by any reasonable trier of fact unless it were supported by empirical data. The court notes the absence of any evidence of such data and thus has no reason to believe that any rational jury would put any stock in the supposition that a prison full of conscious-less killers is safer than an ordinary prison.

conclusion that Harte lacked empathy is and was quite obvious from the letter he wrote that was presented to the jury. The net effect of that letter and of the evidence offered by the mental health experts would not be to persuade the jury to spare Harte's life, but instead would make a jury all the more likely to impose the ultimate sanction.

The court finds that counsel's failure to obtain evidence that Harte suffered from extreme narcissism, a malignant personality disorder and the inability to empathize with others was not prejudicial because counsel would have declined, reasonably, to present such evidence to the jury. Furthermore, if counsel had presented such evidence the court is confident that the result would not have been different because the evidence is such that a reasonable, conscientious, properly instructed jury would have found the evidence to have no mitigating value. Furthermore, the jury did not need expert testimony to come to the conclusion that Harte was narcissistic and suffered a personality disorder. That conclusion was virtually inescapable by virtue of the other evidence presented, including the letter drafted by Harte in which he compared the murder to taking out the trash, but declared that the murder was more fun.

The other evidence suffers from similar flaws. Most of the witnesses at the habeas corpus hearing were indeed contacted by counsel or by an investigator, but counsel made a considered decision not to present the evidence in the penalty phase of the trial.

As an example, the testimony at the habeas corpus hearing included testimony from petitioner's maternal grandmother, Earline Penrod, who indicated that she had barely known the petitioner. If the object was to show only that the grandmother would rather that her grandson not be executed, the court finds that evidence is not so mitigating as to have any likelihood of altering the verdict. Jurors (and society) naturally assume that the relatives of even the most monstrous killers would prefer that their relative not be executed. Supporting that assumption with evidence would not have any significant effect on the jury.

Ms. Penrod conceded that she had discussed the case with an investigator for the defense team. Mr. Ohlson and Mr. Springgate testified credibly that they evaluated the relative risks and benefits of the proposed testimony and determined not to present the testimony. The court finds that decision is not unreasonable.

Petitioner also presented the testimony of Patricia Tashma, who indicated that she was the mother of some childhood friends of the petitioner, and a friend to petitioner's paternal grandmother. She testified that petitioner and her sons were friends for a relatively short time and that she had no contact at all with Harte for several years preceding the murder. The court finds no reason to believe that the investigation required of reasonable counsel would have led to the mother of some childhood friends. The court further has no reason to believe that reasonable counsel would have presented the jury with evidence

showing, essentially, an unremarkable childhood.

Petitioner also called Robyn Topp, the sister of petitioner's mother. This witness testified that for the most part her contact with her nephew consisted of brief telephone conversations that took place when petitioner would answer the phone as she was calling for her sister. This witness testified that she had discussed the case with trial counsel and offered to testify. The court concludes that counsel made a reasonable tactical or strategic decision to decline to offer the testimony of this witness.

Petitioner also called his father, William Harte. This witness testified that he and petitioner's mother separated in 1989 or 1990 and divorced during the 1991 Gulf War. Subsequently, petitioner stayed with his father for several months during his high school years. Mr. Harte testified that in retrospect he realizes that he was depressed at times and that may have contributed to petitioner's lack of empathy. He testified that he was indeed contacted by an investigator for the defense team. The court finds that counsel made a reasonable decision to decline to present such evidence. The court also notes that the supposition that Mr. Harte's depression led to the personality disorders is contradicted by the opinion of the professionals that Shawn Harte's disorders manifested themselves well before the divorce.

Petitioner also called his mother as a witness. She had indeed testified in the original penalty phase. In the habeas hearing she confirmed that the strategy of the defense team was to

humanize the petitioner. The court finds no evidence supporting the conclusion that some objective standard of reasonableness required trial counsel to ask this witness any specific different questions. If the object was to show that different testimony was available, that the witness could have testified that Harte's childhood was not perfect, the court finds that no objective standard required counsel to present that evidence. Furthermore, the testimony of Mrs. Harte did not establish anything extraordinary about petitioner Harte. She testified that during his teen years he sometimes acted out and disregarded house rules and curfews. The court notes that he was a teenager at the time and such acts of rebellion are not at all unusual. In fact, the court would be inclined to think that Mrs. Harte added virtually nothing to the mix of the evidence.

The normalcy of petitioner's teenage years was also confirmed by another witness called by petitioner. Mindi Eldridge testified that she and Harte had dated as teenagers. She described nothing remarkable about Harte. She also testified that she talked with an investigator for the defense team and so to the extent that the claim is failure to investigate and uncover the existence or thoughts of Ms. Eldridge, the court finds that claim is untrue. The court also finds that the addition of such innocuous testimony would not have altered the outcome of the trial.

In accordance with Wiggins, supra, the court has examined the additional evidence presented at the habeas corpus

hearing. The court finds as a matter of fact that no additional bit of evidence individually nor the collective additional evidence would have had any likelihood of resulting in a different verdict if it had been presented to the jury. The court further finds that petitioner has failed in his burden of persuading the court that counsel's performance fell below an objective standard of reasonableness. While some testimony that was critical of trial counsel's performance was presented, it was not sufficient to persuade the court that Ohlson and Springgate performed deficiently. Accordingly, the petition for writ of habeas corpus (post-conviction) is denied.

DATED this 15 day of March, 2004.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Washoe County District Attorney's Office and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Donald York Evans, Esq.
P.O. Box 864
Reno, NV 89504

Shawn Russell Harte #61390
Ely State Prison
P.O. Box 1989
Ely, NV 89301

DATED: March 19, 2004.

Shelly McCord

CERTIFICATE OF MAILING

Pursuant to NRCP 5 (b), I hereby certify that I am an employee of The Second Judicial District Court and that, on this date, I deposited for mailing through the U.S. Mail Service at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

WASHOE COUNTY DISTRICT
ATTORNEY'S OFFICE
APPELLATE DIVISION
(Inter-office mail)

ATTORNEY GENERAL'S OFFICE
100 N. CARSON STREET
CARSON CITY, NV 89701-4717

DONALD YORK EVANS, ESQ.
P.O. BOX 864
RENO, NV 89504

SHAWN RUSSELL HARTE, #61390
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

GEORGE D. VELARDE
CRIMINAL CLERK
March 19, 2004.

EXHIBIT B

B

CODE: 2175
DONALD YORK EVANS, ESQ.
State Bar No. 1070
P.O. Box 864
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(775) 348-7400

Attorney For Petitioner

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE,

Petitioner, CASE NO. CR98P0074A

v. DEPT. NO. 4

THE STATE OF NEVADA,

Respondent.

/

MOTION FOR RELIEF FROM ORDER/

MOTION FOR RECONSIDERATION

COMES NOW Petitioner above-named, by and through his undersigned counsel, DONALD YORK EVANS, LTD., and hereby moves the above-entitled Court for relief from the Order entered on March 19, 2004, or in the alternative, for reconsideration of said Order.

This Motion is based upon the following verified memorandum of points and authorities and all pleadings and papers on file herein, and any evidence which may be adduced at any hearing.

DATED: This 26th day of March, 2004.

DONALD YORK EVANS, ESQ.
P.O. Box 864
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(775) 348-7400

Attorney For Petitioner

DONALD YORK EVANS
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

This is a case involving a post-conviction writ of habeas corpus in a death penalty case.

A hearing was conducted on the Petition on September 19th and 22nd, 2003. Approximately 2 to 4 weeks later, the Judge advised counsel for the respective parties that she was going to deny the Petition and asked counsel for the State to prepare an Order.

Both counsel for the State and counsel for Petitioner agreed that until the transcripts were ready, it would be impossible to prepare the order.

At no time before the 13th day of February, which was the date the original proposed order was sent to counsel for Petitioner, did Petitioner receive any transcripts from the hearing.

Finally, on the 13th day of February, 2004, approximately 5 months after the hearing, September, 2003 counsel for Petitioner received the proposed order from counsel for the State. Immediately, counsel for Petitioner called counsel for the State and advised him that he had not received any of the transcripts and that he would be unable to review the proposed order until the transcripts were provided.

Immediately subsequent thereto, counsel made inquiry of Sunshine Reporting Serviceas to the whereabouts of the transcripts and why he had not previously been provided with them as was counsel for the State. No satisfactory answer was received from Sunshine Reporting. However, they insisted that they would send the transcripts post-haste.

Unfortunately, Sunshine Reporting did not fulfill their promise and obligation to counsel for Petitioner, nor the Court, and did not forward any of the 2 volume transcript to Petitioner's counsel as promised.

Sometime thereafter, counsel for Petitioner this time called Cindy Lee Brown, the Sunshine Reporting employee who was the court reporter for the first day of the hearing. Ms. Brown immediately expressed dismay that the transcript had not been forwarded to me, but graciously and promptly forwarded a copy of the transcript the very next business day.

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Counsel for Petitioner once again waited for Sunshine to prepare the second day's transcript as promised. No second day transcript was forthcoming. Finally, on the 11th day of March, 2004, counsel for Petitioner once again contacted Sunshine Reporting and demanded to know the whereabouts of the transcript. At that time Sunshine Reporting claimed that they had previously forwarded the transcript, which was not true. No transcript had ever been received by counsel for Petitioner up to that time, save and except the one forwarded by Ms. Brown.

Counsel for Petitioner and his staff, although 100 percent confident they had not received the transcript, nonetheless conducted a thorough search of counsel's office in an attempt to locate the second day's transcript. No transcript was found.

Finally, on or about the 15th day of March, 2004, counsel for Petitioner received the second volume of the transcript.

ON March 18, 2004, counsel for Petitioner faxed a letter to this Court explaining the transcript problem and asking for an extension of time until April 5, 2004 to respond to and lodge objections to the State's proposed order. Unfortunately, that letter arrived at the Judge's office the day before the order was actually entered by the Court. A copy of that letter is attached as Exhibit "A".

Up to this juncture, counsel for Petitioner has been denied the right to review the transcript in a meaningful and thorough manner to itemize and specifically delineate his objections to the State's proposed order.

It was with great shock and dismay that counsel received, on March 23, 2004 the Notice of Entry of Order of the proposed Judgment and Findings of Fact filed March 19, 2004.

By this pleading, Petitioner moves the Court to either amend the Judgment or to alternatively amend the Judgment to allow Petitioner to lodge his specific objections to the proposed order, or to reconsider the Judgment and Order to give counsel for Petitioner until April 23, 2004, 30 days after receipt of the transcript, to lodge his objections to the proposed order.

//

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II.

STATUTORY AUTHORITIES

NRCP 59 reads in pertinent part, as follows:

Rule 59. New trials; amendment of judgments.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial;

* * *

NRCP 60(b) reads in pertinent part, as follows:

Rule 60. Relief from judgment or order.

Mistakes; inadvertence; excusable neglect; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect;

* * *

III.

DISCUSSION

Counsel for the State had approximately 5 months in which to review the transcript and prepare his order. Due to the delay in providing Petitioner's counsel with the transcript, which has yet to be satisfactorily explained by Sunshine Reporting, counsel for Petitioner has been denied any meaningful opportunity to review the proposed order against the transcript and lodge specific and delineated objections accordingly.

As this is a death penalty case, Petitioner is absolutely entitled to due process at every stage of the proceedings, and given that the State had approximately 5 months to review the transcripts and prepare the proposed order, it is entirely appropriate that this Court either amend the Order, grant relief from the Order, or otherwise reconsider the Order until April 23, 2004

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to give Petitioner's counsel's time to conduct a thorough and meaningful review of the transcripts and lodge specific objections to the proposed order. Petitioner specifically so requests.

DATED: This 26th day of March, 2004.

DONALD YORK EVANS, ESQ.
P.O. Box 864
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(775) 348-7400

Attorney For Petitioner

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AFFIDAVIT OF ACKNOWLEDGMENT AND VERIFICATION

STATE OF NEVADA)
:ss.
COUNTY OF WASHOE)

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

Affiant is counsel for Plaintiff in the above-referenced matter, he has read and hereby acknowledges the Motion For Relief From Order/Motion For Reconsideration, and that he understands said document and that said document is true and correct to the best of his knowledge, except those matters based on information and belief, and as to those matters Affiant reasonably believes those matters to be true.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED: This 26th day of March, 2004

DONALD YORK EVANS, LTD.

Subscribed and Sworn to before me
this 26th day of March, 2004.

NOTARY PUBLIC

GINGER ROGERS HOWARD
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 93-3442-2 - Expires May 3, 2005

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:

Terrence McCarthy, Esq.
Appellate Division
P.O. Box 30083
Reno, NV 89520

DATED this 26, day of March, 2004.

GINGER ROGERS HOWARD

DONALD YORK EVANS
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A

Donald York Evans, Ltd.
Counselor at Law
P.O. BOX 864
RENO, NEVADA 89504-0864
(775) 348-7400
FAX (775) 348-4060

March 18, 2004

VIA FAX 328-3821 and U.S. Mail

The Honorable Connie Steinheimer
P.O. Box 30083
Reno, NV 89520

RE: State v. Shawn Harte

Dear Judge Steinheimer:

I am in receipt of a copy of a letter from Terry McCarthy to you regarding the above-matter, dated March 11, 2004, along with a copy of his proposed Findings of Fact, Conclusions of Law and Judgment. In that regard, please note the following:

While Mr. McCarthy is correct when he states I was provided with a copy of it on approximately February 13, 2004, I only just received today Volume II of the Transcript of the Hearing against which to check the factual accuracy of Mr. McCarthy's factual conclusions, etc. While Sunshine Reporting insists that they sent me a copy of Volume II, neither myself nor my staff received anything other than Volume I, until today. Therefore, I am only now beginning my review of the transcript against McCarthy's proposed Order.

I would therefore respectfully request to and including Monday April 5, 2004, to respond with any objections, suggestions, etc., I might have to the proposed Judgment.

If you can see fit to grant this request, no further communication is necessary and I will have my response to Mr. McCarthy's proposed Judgment by that date. If you disagree with my request, please so advise.

Your time and attention to this matter is sincerely appreciated.

Yours very truly,

DONALD YORK EVANS, ESQ.

DYE:grh

cc: Terry McCarthy, Esq.
Mr. Shawn Harte

EXHIBIT C

C

CODE: 2840

FILED
AUG 12 2004
RONALD A. LONGTIN, JR., CLERK
By S. Schueller
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE,

Petitioner,

vs.

E.K. McDANIEL, WARDEN,

Respondent.

/

Case No. CR98P0074A

Dept. No. 4

ORDER

On March 19, 2004 a Findings of Fact, Conclusions Of Law And Judgment was filed regarding above petitioner's Petition For Writ Of Habeas Corpus (Post Conviction). On April 26, 2004 Petitioner filed Objections To Findings Of Fact, Conclusions Of Law And Judgment. On May 4, 2004 Respondent filed a Response To Objections To Findings Of Fact, Conclusions Of Law And Judgment. On July 20, 2004 a Request For Submission was filed asking this Court for a decision regarding the above matter.

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This Court having considered petitioner's request to modify the previously entered order hereby,

DENIES Motion to Modify the Finding Of Fact, Conclusions Of Law and Judgment entered May 4, 2004.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF Mailing

I certify that I am an employee of JUDGE CONNIE STEINHEIMER; that on the 12th day of August, 2004, I deposited in the county mailing system a true copy of the order regarding petitioners objections to finding of fact, conclusions of law and judgment, addressed to:

Terrence McCarthy, D.D.A.
Appellate Division,
via: Interoffice Mail

Don Evans, Esq.
PO Box 864
Reno NV 89504

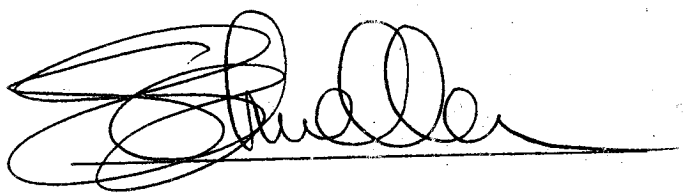

EXHIBIT D

D

CODE: 2505
DONALD YORK EVANS, ESQ.
State Bar No. 1070
P.O. Box 864
Reno, NV 89504
(775) 348-7400

Attorney For Petitioner

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.
_____/

CASE NO. CR98P0074A

DEPT. NO. 4

NOTICE OF APPEAL

Notice is hereby given that Petitioner in the above-named case, hereby appeals to the Supreme Court of the State of Nevada from the Court's Order entered in this action on the 12th day of August, 2004

DATED: This 24 day of August, 2004.

DONALD YORK EVANS, ESQ.
Nevada State Bar No. 1070
P.O. Box 864
Reno, NV 89504
(775) 348-7400

Attorney For Petitioner

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:

Terrence McCarthy, Esq.
Appellate Division
P.O. Box 30083
Reno, NV 89520

DATED this 24, day of August, 2004.

GINGER ROGERS HOWARD

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

EXHIBIT E

E

CODE: 3885
DONALD YORK EVANS, ESQ.
State Bar No. 1070
P.O. Box 864
Reno, NV 89504
(775) 348-7400

Attorney For Petitioner

FILE COPY

FILED
2004 APR 13 PM 4:06
RONALD A. LONGTIN, JR.
BY _____
DEPUTY G. Velarde

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SHAWN RUSSELL HARTE,

Petitioner, CASE NO. CR98P0074A

v. DEPT. NO. 4

THE STATE OF NEVADA,

Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S OPPOSITION TO MOTION FOR RELIEF FROM ORDER/ MOTION FOR RECONSIDERATION

Petitioner offers this his Response to Respondent's Opposition to his Motion for Relief from Order/Motion for Reconsideration, as follows:

Initially, counsel for Petitioner takes issue with counsel McCarthy's statement that "Mr. Evans never asked for an indefinite delay in submitting the proposed order." What counsel Evans I did ask for was a two week extension from the time he received the transcript, which counsel Evans had still not seen on the day of the conversation. Unfortunately, as previously outlined, Sunshine Reporting never timely forwarded the transcripts to counsel Evans in a timely fashion to allow him to review Respondent's proposed order.

Further, it was never counsel's intention and reference to Exhibit "A" that "McCarthy's factual conclusions" to be insulting to the Court. Rather, counsel for Petitioner seeks the opportunity to review the transcript to determine whether in fact the "factual conclusions"

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established by the order were in fact so established, including reference to the record where the proof exists.

There has been no showing whatsoever that the Court reviewed the findings as proposed by the State, and the fact that the findings were signed exactly as drafted by the State directly implies that there was no review made by the Court relative to the alleged factual conclusions and their place in the record.

Finally, Respondent's reliance on *Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981) is misplaced. In this case, and since a petition for writ of habeas corpus is in fact a civil proceeding, Petitioner sought relief from the judgment and the order based upon a mistake, inadvertence and inexcusable neglect, namely the failure of the court reporter to timely provide counsel for the Petitioner with a copy of the transcript in order to properly review that the State's proposed conclusions of law, etc. This clearly constitutes the relief contemplated under both Rule 59 and Rule 60, neither of which require that the motion be filed prior to the entry of judgment. There is simply no rule in the Rules of Civil Procedure which require that a motion be made prior to the entry of the judgment.

Neither Rule 59 nor Rule 60 cited in Petitioner's original Motion contained any reference requiring motions to be filed prior to written entry of judgment. In fact, Rule 59 specifically says that a motion for a new trial/or amendment of judgment shall be served not later than 10 days after service of written notice of the entry of judgment. This clearly contemplates that a motion to amend the judgment can be filed after a written notice of entry of the judgment has been filed.

Further, NRCP 60(b) states that "the motion shall be made within a reasonable time, and for reasons (1) and (2) [mistake, inadvertence, surprise and excusable neglect . . .], not more than six months after the judgment order or proceeding was entered or taken. Again, this clearly contemplates the motion for relief from an order to amend a judgment is applicable and permissible after written notice of entry of judgment.

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NRS 34.780[1], also clearly states that 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." Again, none of those statutes appear to be in conflict with NRCP 59 and 60, and therefore, post entry of judgment relief is appropriate and Petitioner respectfully so requests.

CONCLUSION

Counsel for the State had approximately 5 months in which to review the transcript and prepare his order. Due to the delay of providing Petitioner's counsel with the transcript, which has yet to be satisfactorily explained by Sunshine Reporting, counsel for Petitioner has been denied any meaningful opportunity to review the proposed order against the transcript and lodge specific and delineated objections accordingly.

As this is a death penalty case, Petitioner is absolutely entitled to due process at every stage of the proceedings, and given that the State had approximately 5 months to review the transcripts and prepare the proposed order, it is entirely appropriate that this Court either amend the Order, grant relief from the Order, or otherwise reconsider the Order until April 26, 2004 to give Petitioner's counsel time to conduct a thorough and meaningful review of the transcripts and lodge specific objections to the proposed Order. Petitioner respectfully so requests.

DATED: This 13th day of April, 2004.

DONALD YORK EVANS, ESQ.
P.O. Box 864
Reno, NV 89504
(775) 348-7400
Attorney For Petitioner

DONALD YORK EVANS
ATTORNEY AT LAW
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[1]. **NRS 34.780. Applicability of Nevada Rules of Civil Procedure; discovery**, reads in pertinent part:

1. 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.

* * *

AFFIDAVIT OF ACKNOWLEDGMENT AND VERIFICATION

STATE OF NEVADA)
:ss.
COUNTY OF WASHOE)

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

Affiant is counsel for Petitioner in the above-referenced matter, he has read and hereby acknowledges the Petitioner's Response to Respondent's Opposition to Motion for Relief from Order/Motin for Consideration, and that he understands said document and that said document is true and correct to the best of his knowledge, except those matters based on information and belief, and as to those matters Affiant reasonably believes those matters to be true.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED: This 13th day of April, 2004.

DONALD YORK EVANS, ESQ.

Subscribed and Sworn to before me
this ____ day of April, 2004.

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

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_____ delivered via facsimile machine

_____ personally delivered

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

Terrence McCarthy, Esq.
Appellate Division
P.O. Box 30083
Reno, NV 89520

DATED this 13th, day of April, 2004.

Ginger Rogers Howard

GINGER ROGERS HOWARD

DONALD YORK EVANS
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