IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN RUSSELL HARTE, No. 67519

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
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Appeal from a Judgment of Conviction in CR98-0774A
The Second Judicial District Court of the State of Nevada
Honorable Connie J. Steinheimer, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment on February 2, 2015. 1JA 81[1] Appellant, Shawn Russell Harte (Mr. Harte), filed a notice of appeal from that judgment on March 1, 2015. 1JA 83. This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

Although this appeal is a "direct appeal from a judgment of conviction that challenges only the sentence imposed," and presumptively assigned to the Court of Appeals under Rule 17(b)(1) of the Nevada Rules of Appellate Procedure, it involves category A felonies where one of the principle issues appears to be of first impression, while another one suggests that the Court should revisit a previous case allowing a jury to consider co-defendant sentences in determining a defendant's sentence, both of which command the Nevada Supreme Court's attention under Rule 17(a)(13) & (14) of the Nevada Rules of

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[1] "JA" in this Opening Brief stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1).

Appellate Procedure. Thus, the Nevada Supreme Court should keep this appeal.

III. STATEMENT OF THE LEGAL ISSUES PRESENTED

Did Judge Steinheimer commit error by admitting Mr. Harte's co-defendants' sentences as evidence at his penalty hearing?

Did Judge Steinheimer commit error by allowing the State to give two closing arguments at the penalty hearing?

Whether this sentence of life without the possibility of parole is excessive?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a new penalty hearing. On March 25, 1998, the State charged Mr. Harte with murder with the use of a deadly weapon, and robbery with the use of a firearm. 1JA 1-5 (Indictment). Almost one year later a jury convicted Mr. Harte of both counts. 1JA 6, 8 (Verdicts). That jury recommended a death sentence for the murder and on May 7, 1999, Judge Steinheimer entered a judgment to that effect. 1JA 9 (Judgment). The Nevada Supreme Court upheld Mr. Harte's conviction and death sentence on direct appeal. *Harte v. State*, 116 Nev. 1054, 13 P.3d 420 (2000).

Eight years later however, the Court upheld—in an appeal taken by the State—the district court's order granting a petition for writ of

habeas corpus vacating Mr. Harte's death penalty and ordering a new penalty hearing. *State v. Harte*, 124 Nev. 969, 194 P.3d 1263 (2008). There the Supreme Court noted that "[d]uring the penalty phase of [Harte's] trial, the jury found only one aggravating circumstance: the murder was committed during the course of a robbery." 124 Nev. at 971, 194 P.3d at 1264. Under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), such an aggravating circumstance is invalid, and thus Mr. Harte was not eligible for the death penalty at the time it was imposed. Had *McConnell* been decided prior to Mr. Harte's trial in 1999, his may not have been a death penalty case.

A new penalty hearing took place before a jury in late January and early February 2015. (See volumes 3 through 7 of the Joint Appendix.) That jury returned a penalty verdict of life without the possibility of parole. 1JA 80 (Verdict on Penalty); 7JA 1001 (Transcript of Proceedings: Penalty Phase).

Judge Steinheimer sentenced Mr. Harte for murder to a term of life in the Nevada Department of Corrections without the possibility of parole and credited him 6,293 days for time served, with a consecutive like term for the use of a deadly weapon. For robbery, Judge

Steinheimer sentenced Mr. Harte to a concurrent term of 72 to 180 months in the Nevada Department of Corrections with a like consecutive term for the use of a firearm. Finally, Judge Steinheimer ordered Mr. Harte to pay required fines, fees and assessments and to reimburse Washoe County for legal expenses. 1JA 81-82 (Judgment).

V. STATEMENT OF THE FACTS

Pre-penalty hearing motions and order

Prior to the penalty hearing the parties simultaneously filed motions in limine regarding whether the penalty that Mr. Harte's co-defendant's had received—both Ms. Babb and Mr. Sirex received enhanced life without the possibility of parole sentences by the same jury that sentenced Mr. Harte to death—should be told to Mr. Harte's new penalty jury. See 1JA 11 (State's "Motion in Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase"), and 1JA 17 (Defendant's "Motion in Limine Regarding Individualized Sentencing") (both filed on September 18, 2014). On January 21, 2015, following briefing and argument[2] by the parties, Judge Steinheimer filed an order granting the State's motion and denying Mr. Harte's

[2] See 2JA 185-93.

motion. 1JA 46 (Order Granting Motion in Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase & Denying Defendant's Motion in Limine).

At the penalty hearing former Washoe Sheriff Detective James Beltron, over objection, told the jury that both Ms. Babb and Mr. Sirex received a sentence of life without the possibility of parole plus a like consecutive sentencing enhancement for the murder of John Castro. 4JA 580-81.[3]

Penalty hearing

The State's Case

Mr. Harte's conviction for murder and robbery with the use of a firearm was not contested. Still at the penalty jury heard the underlying evidence of crimes involving events, close in time, which occurred in Washoe and Churchill counties. At Mr. Harte's request, Judge Steinheimer instructed the jury that "evidence regarding circumstances which occurred in Churchill County before the offense in

[3] Judge Steinheimer instructed the jury: "In reaching your verdict, you may consider the sentences imposed upon Weston Sirex and Latisha Babb, previously convicted and sentenced for the murder and robbery of John Castro, Jr. However, you should impose whatever sentence for Shawn Harte that you feel is appropriate for him" 1JA 74 (Penalty Instruction No. 15).

this case" could be considered only "for the purpose of gaining a fuller assessment of the defendant's life, health, habit, conduct and mental qualities," and that it must not punish him "for that crime or any crime other than the murder" charged in this case. 3JA 359-60.[4]

Washoe County

In the early morning of October 26, 1997, Washoe County Sheriff Deputy Kandi Payne-Davis was dispatched to 17865 Cold Springs Drive (in Washoe County) on a report of a missing cab. 3JA 311-12. When she arrived she saw a cab blocking the majority of the travel lane on Cold Springs Drive. No lights were on, the cab was not running, and the windows were fogged over because of the early morning hour. 3JA 312. She approached the driver's side window and looked into the cab. She saw the cab driver (John Castro) sitting in the driver's seat slumped over. 3JA 313, 314-15. And she noticed "an excessive amount of blood coming from his nose and mouth area." 3JA 313. He was breathing "raspedly." 3JA 314. She opened the door and tapped him on the shoulder but he did not respond. 3JA 315. Mr. Castro had been shot in

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[4] See 3JA 268-71 (discussing instruction and the timing of the reading of the instruction), and 1JA 56-57 (Special Jury Instruction Read Prior to Testimony Being Presented of Witness Abraham Lee).

the back of his head. 3JA 321, 325; 4JA 536, 540, 546 (Dr. David Palosaari, who performed Mr. Castro's autopsy, concluding that Mr. Castro died of a gunshot wound to the head).

Jerome Vaughn, the road boss for the Reno-Sparks Cab Company in 1997, testified that he learned that Mr. Castro and his cab had not been heard from since around midnight of October 25th-26th. 3JA 337-38, 340-41. Around five in the morning of the 26th, Mr. Vaughn started a search for Mr. Castro. 3JA 341-43. He determined that Mr. Castro's last call was to a Speedy Mart convenience store at the corner of Neil Road and Pecham Lane in Reno. 3JA 341. Around 7:00 that morning Mr. Vaughn learned that Mr. Castro's cab had been located on Cold Springs Drive. 3JA 343-44.

In 1997 Charles Lowe was a forensic investigator for the Washoe County Crime Lab. 3JA 489. On October 26th he was sent to the Cold Springs Drive crime scene. 3JA 491-92. He searched the cabin of the cab and found an expended bullet casing. 3JA 492-93, 494. (This bullet casing was linked to a .22-caliber automatic that was later found in Mr. Harte's car. 3JA 499-502, 511-12 and 515; 4JA 562.) No wallet or money

was found on Mr. Castro's person or in the cab. 4JA 563. Approximately eighty-nine dollars was taken from Mr. Castro. 4JA 564.

Churchill County

Approximately two weeks earlier, around 11:30 p.m. on October 14, 1997, Abraham Lee and a friend were driving in Mr. Lee's Jeep Cherokee on Highway 95 near Fallon, Nevada, when they were shot at (though not hit) by unknown person or persons. 3JA 360, 362-69. Mr. Lee "gunned" the jeep and stopped in Fallon at the Sheriff's Office. 3JA 367-70. Jim Steuart, a sergeant in the Churchill County Sheriff's Office, met with Mr. Lee and his friend. 3JA 389-93. He counted "a total of five bullet type holes in the vehicle and in the glass." 3JA 393. Two days later, he and another investigator (Bill Coleman) checked the highway where the shooting had occurred. 3JA 394, 423-24. They found nine expended shell casings (7.62 caliber) and a portable type scanner lying on the dirt embankment of the highway. 3JA 395, 424. They also found body impressions in the soft soil,[5] a shoe impression, and unique tire

[5] Investigator Coleman testified that the impressions "appeared to be consistent with someone in a prone position or [lying] down in a prone position." And that "[t]here were actually two impressions side by side." 3JA 425.

tracks. 3JA 395. Out of four tires tracks there was three different types of tire tread. 3JA 396, 428.

About a month later Mr. Harte's car was parked in front of the Radio Shack store located in the Frontier Plaza in Fallon. 3JA 397-99, 433. (The tire tread on his car's tires was consistent with the tire tracks left at the scooting scene noted above. 3JA 397, 400-01.) On November 12, 1997, after obtaining search warrants, 3JA 401-02, Sergeant Steuart had other deputies initiate a traffic stop of Mr. Harte. With him in his car were Latisha Babb and a small infant child. 3JA 404-05, 436. Mr. Harte had a .22 pistol in between the front driver and front passenger seats of his car. 3JA 406.[6] Mr. Harte was cooperative and voluntarily accompanied the deputies to the Sherriff's office. 3JA 407-08. Mr. Harte spoke with the deputies for about three and a half to four hours, 3JA 410, and was arrested for the Churchill shooting incident. 3JA 414-15, 486.[7] During that interview Mr. Harte admitted to

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[6] During a search of Latisha Babb's residence (where Mr. Harte was staying), Investigator Coleman found two rifles in Mr. Harte's closet: a Stevens model .22-caliber rifle, and a SKS semi-automatic rifle. 3JA 436-38. Also found were publications titled "Assassination, Elimination, Ambushing." 3JA 444.

[7] No charges were ever brought regarding the Churchill shooting. 3JA 415.

participating in the Churchill County shooting with Weston Sirex. Also mentioned was Ms. Babb. 3JA 412-13, 485. Because Latisha Babb also noted Mr. Sirex's time with her and Mr. Harte in her conversations with Churchill County investigators, 3JA 453, 476, other investigators drove to Reno to speak with him. 3JA 453-54.

Churchill County Investigator Mark Joseph and Sergeant Wood drove to Reno to speak with Mr. Sirex. 3JA 461-63, 476-77. They met him at the Whittlesea Cab Company where he was working. 3JA 477. He appeared shaky and upset, and when asked about the shooting in Churchill County he "starting talking about the taxi cab shooting" in Reno. 3JA 477-78; 4JA 557. Mr. Sirex volunteered to go to the Washoe County Sheriff's Office for an interview. 3JA 478. Based on that interview officers searched Mr. Sirex's trailer and found Mr. Castro's wallet, and other items. 3JA 480-81; 4JA 559.[8]

State's other evidence

The State's last witness[9] was Lanette Anderson (*nee* Bagby), who once dated Mr. Harte. 4JA 590. In May 1998 she received a letter from

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[8] A gun—a Lorcin .22-caliber pistol—found in a box under Mr. Sirex's bed was not the murder weapon. 4JA 560, 562.

[9] Actually, Mr. Anthony Castro spoke last giving his victim impact

Mr. Harte. 4JA 592, 593. That letter was read into the record by Ms. Anderson. 4JA 594-601. In it, among other things, Mr. Harte expressed the view that "there are 3 major things fucked up with this country and only two of them can be fixed purely by violence. These problems are over population of lesser races, drugs[,] and the extension of the family." 4JA 595 (all internal quotation marks omitted in this and following quotations). Also that he had "always known I had a special purpose in life. I've always known I was different." 4JA 595. Mr. Harte admitted to the shooting in Churchill County: "Blue Jeep Cherokee. I scored 17 hits on that fucker." 4JA 598.[10] And he admitted shooting Mr. Castro:

> So this cab driver is just spurting off mouth how he got ripped off of $1,000 cash earlier, blah, blah, blah. Now what could that all have been about? Drugs. Fuck this piece of shit. It's because of people like him that I don't have a son or daughter. Fuck him. I chambered a round, a CCI Stinger. .22-caliber hyper-velocity, hollow-pointed, lubaloy 40 grain slug fired out of my Smith & Wesson semi-auto with 4 inch barrel. Point blank. An inch above the ear and two behind.

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statement seeking the maximum sentence. 6JA 889-901.

[10] An exaggeration in light of the physical evidence described by Sergeant Steuart—counting *five* bullet-type holes "in the vehicle and in the glass." 3JA 393.

> Boom. That simple. That easy. No remorse. Honestly. I jumped up front and let the cab coast right in front of a drug dealer's house in Cold Springs. Perfect. Windows were up, so it was noiseless (except that ringing in my ears). Dark neighborhood. Dark car. Latisha waiting about 300 feet ahead. We left, went to Circus, Circus, played some games, gambled. Continued our good time. Went to Taco Bell, (Latisha's choice, not mine.) And ate. Went home. Simple. Nothing to do it. Just another chore like taking out the trash except easier and funner.

4JA 599.

Mr. Harte wrote that on the night he got pulled over by law enforcement officers in Churchill County, there could not be a "shoot-out" because "Latisha's kid was in the back" of the car. He wrote that because Ms. Babb and Mr. Sirex talked to the police, he did too: "I'm not a liar." 4JA 599-600. And, in that 1998 letter he told her that prison was "a whole new opportunity," and that he did not expect "automatic respect." 4JA 600.

The Defense Case

Shawn Russell Harte

Mr. Harte told the jury that he was now 37 years old and that he had been 20 years old in 1997. 4JA 604. Mr. Harte acknowledged with regret writing the letter to Ms. Anderson. 4JA 606-07. He wrote it when

he was in the Washoe County Jail. He wrote it because he was "naïve about incarceration" and attempted to fit into a new role by portraying a new persona that fit into the prison atmosphere. 4JA 607-11, 645-46. He characterized the letter as a "bit of fantasy" written by a very scared 20 year old—who had never been in jail or a juvenile facility—and who didn't know what to do about this new environment. 4JA 611-12. Thus some of the statements in the letter—for example, comparing Mr. Casto's murder to just another chore—were prompted by his environment and his need to fit in. 4JA 613. Mr. Harte admitted that in 1998 he was unable to feel empathy for anyone. 4JA 614. He started to realize this emotional deficiency in 2001 and begun to study "a lot of psychology." 4JA 615-16.

Mr. Harte talked about his childhood—describing a "sick environment in the family"—and "chaos." 4JA 617-19, 621-23, 624-25, 631-32.[11] He noted the pathological attachment his mother had on him

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[11] One telling story concerned an elderly woman at a grocery store who unknowingly dropped a $100.00 bill while in a checkout line. Mr. Harte's mother picked the money up and kept it, leaving the elderly woman without sufficient cash to make her complete purchases (which Mr. Harte's mother and Mr. Harte, at the time, found funny). Later Mr. Harte's mother split the money with her son. 4JA 627-29. A second story concerned a fight between Mr. Harte and his mother's live-in

and the psychosomatic, gastrointestinal issues he experienced in his anxious states. 4JA 618-20. He told the jury that he had attended eleven schools in eleven years, eventually dropping out of school in the 11th grade. 4JA 620-21. (Between 1991 and 1994 Mr. Harte was receiving primarily Cs, Ds, and Fs as grades. 4JA 635.)

At 17, Mr. Harte moved into a residence with his then 30-year-old girlfriend. 4JA 638-39. She purchased for him the gun he later used to shoot Mr. Castro. 4JA 639-40.

In 1995 to get away from the violence and chaos he was experiencing, Mr. Harte joined the Army. 4JA 640. He met Ms. Anderson before joining the Army, and they had a relationship. 4JA 640-41. When he was stationed in Ft. Campbell, Kentucky, Ms. Anderson announced that she was pregnant with his child. Mr. Harte decided he should leave the Army because he did not want to be an absent military father like his father had been. 4JA 641-42. But Ms. Anderson miscarried, and Mr. Harte was now out of the Army. 4JA 642-43. Mr. Harte was angry. He explained why:

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boyfriend that led to Mr. Harte's placement in a group home. 4JA 631-33.

> I felt that, I felt that I had just drastically altered my life. I didn't want to be career military, but at the time, I think at the time it was working for me. It was very well structured. It was an escape from the toxicity of my family life, all the toxic relationships I was in. So it was something healthy. The people in the military are generally healthy. They keep you out of trouble. It was a good environment for me, and I sacrificed that to come home to a miscarriage.

4JA 643.

By late 1997 Mr. Harte was angry with the world. He hated his life. He hated pretty much everyone around him. He thought of suicide. He did not value life (his or others'). 4JA 644-45, 646-50. At that time Mr. Harte assumed that everyone else was "just as miserable" as he was. 4JA 651.

Once in prison Mr. Harte woke up to the fact that his life had been a mess. 4JA 659. He started to effect change by getting his high school diploma, earning A and A- grades. 4JA 660-61. Next he enrolled in college courses and did well. 4JA 661-64. He paid for these courses himself. 5JA 662-63. Around 2003 Mr. Harte was radically, but positively, altered by the movie Goodwill Hunting. 4JA 665, 667-68. After watching this film Mr. Harte began to read philosophy, psychology, and religious studies. 5JA 686. Mr. Harte began to write,

and has been published. 5JA 687-88. He also began participating in productive programs—for example, starting in 2006 he sponsored three children in India through a company called World Vision, and then participated in micro-lending programs to help finance qualifying people, 5JA 689-703—and he has helped other prisoners. 5JA 711-20.

Mr. Harte told the jury that he is currently in one of the least restrictive units in the Ely State Prison. And that he is allowed visitors who he can meet in a visiting room without barriers. 5JA 705-06. He told the jury that while in prison has not hurt other inmates or guards. 5JA 707-08. In sum, because of Mr. Harte's personal growth over the past 17 years, the man he is today is not who he was in his twenties. 5JA 720-22, 730-32 (noting differences and explaining he is not the who he was).

Dr. Melissa Piasecki, M.D.

Dr. Piasecki is a medical doctor specializing in forensic psychiatry. 6JA 836-37. She interviewed Mr. Harte at the Ely State Prison and reviewed various documents and reports in order to form an expert opinion. 6JA 838-42. Dr. Piasecki testified that Mr. Harte's family background was "a pretty dysfunctional family situation [that]

promoted dysfunctional ways of thinking and dysfunctional ways of behaving, especially toward other people." 6JA 842. But she saw that while in prison Mr. Harte has "made a very deliberate and conscious effort to learn different ways of responding to other people and different ways of thinking including different ways of thinking about himself." That is, he has identified "more progressive or functional approaches to life and had made a conscious decision to change away from the dysfunctional patterns that he had learned in his family." 6JA 842-43.

Dr. Piasecki testified that people mature differently. "If you look at an eighteen year old and nineteen year old, it is actually not a fully mature brain even at that time." 6JA 845-46. Dr. Piasecki noted that adolescent brain development process finishes "in general, in early twenties." In Mr. Harte's case while he had some intellectual maturity, it appeared that he had delays in moral judgment. Dr. Piasecki testified that he had "sort of a developmental catch up in that area in his mid twenties." 6JA 846.

In Dr. Piasecki expert opinion Mr. Harte's development in prison and resulting protective factors—factors such as increasing his education, increasing his skills in terms of interpersonal functioning,

and building and sustaining relationships with other people[12]—are factors that are not environmentally based. Specifically, she said, "I don't think that all of the maturation that he has had goes away in a different environment." Thus, in her view, he could maintain appropriate behavior in something other than a custodial setting. 6JA 849-50.

Dr. Piasecki acknowledged the horrific violence in this case but noted it was episodic (or the two events (one occurring in Churchill County, the other in Washoe County) formed a "cluster effect"). And did not involve "a history of sustained aggression and violence towards another over a long period of time." 6JA 854. Regarding the infamous letter, Dr. Piasecki concluded that it was written by a person "trying to position himself as somebody who would well in prison." 6JA 855-56. In her word, his letter was full of "bravado." 6JA 855.

Post-penalty hearing motion and ruling

Off-the-record (and in chambers), the court and the parties discussed closing argument. 6JA 919-20. Back on the record, Judge

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[12] Ms. Janine Marshall testified that she met Mr. Harte through a prison correspondence program and was inspired by what she read about him. They are now engaged. 5JA 726-29 (Mr. Harte), 803-11 (Ms. Marshall).

Steinheimer ruled that the State would present an opening and closing sentencing argument and the defense would be limited to one closing argument. 6JA 919-20. Mr. Harte's counsel, Ms. Bond, objected and made her record. Ms. Bond noted that there had been "extensive discussions" during the pre-penalty hearing motion work on whether the State had a sentencing burden or not.[13] Ultimately, it was concluded that State did not have a burden of proof. Because the State had no burden beyond persuasion, Ms. Bond requested that the order of argument presentation be that "the State argue and the defense argue and there be no rebuttal by the State because that would be a fair and equal shot for both parties of what they are requesting." She explained

> [b]ecause the State has no burden that the defense doesn't have here, neither side has a specific burden, we both simply have a need to persuade, not, certainly not a burden by any legal standard, that is exactly the same for both parties, they should not get to have primacy and recency.

6JA 920-21. She requested the Court to allow the State to present its "full argument," allow the defense to argue, and "end the proceedings

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[13] See for example 2JA 200 ("The Court: Why is there a burden on the State to prove to a jury this burden of proof if there is no burden on the judge [at] sentencing?"); 2JA 202-03 (State's argument that it has no sentencing burden).

there and send the jury out. 6JA 921. The State acknowledged that there was no controlling authority on point. 6JA 921-22. Nonetheless, over a continuing objection, Judge Steinheimer ruled that she would let argument go "the regular course." 6JA 927. And consistent with Judge Steinheimer's ruling the State presented an opening argument and then, after the defense argument was completed, a closing argument. See 7JA 933-94.

VI. SUMMARY OF ARGUMENT

There are three reasons that, either independently or collectively, require Mr. Harte's sentence of life without the possibility of parole be vacated and a new sentencing hearing held. First, Judge Steinheimer erred in allowing the State to present evidence of the sentences imposed on Mr. Harte's co-defendants. Those sentences—life without the possibility of parole plus a like consecutive sentence for the use of a firearm—were imposed by the same jury that originally sentenced Mr. Harte to death. In fact, *that* jury could have sentenced Mr. Harte's co-defendants to death but did not. Of course, a death qualified jury increases the likelihood that a jury will return, by way of a compromise, the next most severe verdict of life without the possibility of parole,

which is what appears to have happened. We now know that Mr. Harte's case was not a death penalty case. The sentences received by Mr. Harte's co-defendants cannot be divorced from the improper penalty Mr. Harte received. The upshot is that *this* jury was allowed to consider co-defendants' sentences that were in turn influenced by the death penalty Mr. Harte received. This Court should reject this type of sentencing feedback loop. Had Mr. Harte and his co-defendants not faced the death penalty it is possible that life sentences with the possibility of parole would have been imposed. Thus, it was improper to admit evidence of co-defendant sentences in this case. And, now is the time to revisit *Flanagan v. State*, which Judge Steinheimer used to support her ruling allowing this evidence.

Second, Judge Steinheimer erred in allowing the State two closing arguments where, as here, in a penalty hearing the State carries no burden other than persuasion—a burden shared by the defense.

Finally, third, this sentence of life without the possibility of parole plus a like consecutive sentence for use of a firearm is excessive. This Court has observed that a sentence of life without the possibility of parole is reserved for all but the "deadliest and most unsalvageable of

prisoners." The evidence presented at the penalty hearing clearly established that Mr. Harte did not fit within that class set. Those prisoners outside that set "have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits *consideration* of some adjustment of their sentences." Mr. Harte's sentence denies him this opportunity and was not supported by the evidence (and in fact, was probably influenced by the evidence on co-defendants' sentences). Mr. Harte is entitled to a new sentencing hearing.

VII. ARGUMENT

Judge Steinheimer erred in admitting Mr. Harte's co-defendants' sentences as evidence at his sentencing hearing

Standard of Review and Discussion

"The decision to admit evidence at a penalty hearing is left to the discretion of the trial judge." *Nunnery v. State*, 127 Nev. ____, ____, & n. 7, 263 P.3d 235, 249 & n. 7 (2011), cert. denied, 132 S.Ct. 2774 (2012). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998 (2001)).

In Nevada "sentencing is an individualized process; [and] no rule of law requires a court to sentence codefendants to identical terms." *Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990). Nonetheless, Judge Steinheimer allowed the State to present evidence of Mr. Harte's co-defendants' sentences of life without the possibility of parole that were enhanced by like consecutive sentences due to the use of a firearm. Judge Steinheimer reasoned that NRS 175.552(3), which allows a court to admit evidence it "deems relevant to the sentence," provided a basis for the admission of this evidence. Specifically, Judge Steinheimer said,

> [t]he evidence is admissible under NRS 175.552 as "any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible." The State has alleged the co-defendants' sentences are relevant because all three defendants were invested in the criminal enterprise, but it was Harte who actually shot the victim. The co-defendants have all been convicted in this Court for murder in regard to the same homicide for which Harte has been convicted. Circumstances of the offense for which Harte has been convicted involve unequal participation between the co-defendants and Harte. Thus, the sentences of the unequally culpable co-defendants are relevant, proper and helpful for the jury in considering the circumstances of the offense for which Harte has been convicted.

1JA 51 (Order Granting Motion in Limine to Admit Evidence of Co-Defendants' Sentences During Penalty Phase & Denying Defendant's Motion in Limine) (Order). But this reasoning is suspect.

Both Ms. Babb and Mr. Sirex received sentences of life without the possibility of parole by the same jury that sentenced Mr. Harte to death, See *Harte v. State*, 116 Nev. 1054, 1061 & n. 2, 13 P.3d 420, 425 & n. 2 (2000), but all three of them faced the death penalty at trial. The fact that Ms. Babb and Mr. Sirex received life without sentences cannot be divorced from the improper death penalty that Mr. Harte received. *Cf. Schoels v. State*, 114 Nev. 981, 992, 966 P.2d 735, 742 (1998) (Springer, J. dissenting) (noting that a "death qualified" jury increases "the likelihood that the jury will return, by way of a compromise, the next most severe verdict, life without the possibility of parole."). We know now that under the standards announced by this Court in *McConnell* this should never have been a death penalty case. Suppose the three had gone to trial in a non-capital case. It is possible that the jury would have returned sentences of life without the possibility of parole, but it is also possible that the jury would have returned sentences of life with the possibility of parole for all three defendants.

That possibility was foreclosed by the fact that they faced a "death qualified" jury. The upshot is that this jury got to consider the co-defendants' sentences of life without the possibility of parole when, in turn, *those* sentences were driven by the death penalty Mr. Harte had received. This Court should reject this type of sentencing feedback loop. Mr. Harte's penalty jury should have rendered a penalty verdict based on the evidence it had a right to consider and should never have heard about the co-defendants' sentences. Thus, Mr. Harte should be given a new penalty hearing that excludes the presentation—directly or indirectly—of this evidence.

Judge Steinheimer also rested her decision in part on *Flanagan v. State*, 112 Nev. 1409, 930 P.2d 691 (1996)—citing this case for the proposition that "[a] court may admit evidence of co-defendant sentences, if the court finds such evidence proper and helpful to the jury." 1JA 50 (Order). But this aspect of *Flanagan* was not a merits decision, it was a result dictated by the doctrine of law of the case. See 112 Nev. at 1422, 930 P.2d at 699 (declining to revisit the issue whether it was proper for the jury to "consider punishments imposed on co-

defendants" under the doctrine of the law of the case). But that doctrine does not apply here and this Court should revisit the issue.

In *Flanagan v. State*, 107 Nev. 243, 247-48, 810 P.2d 759, 762 (1991), vacated, 503 U.S. 930 (1992), *citing State v. McKinney*, 687 P.2d 570 (Idaho 1984), Justice Young, writing for the majority, concluded that "it was proper and helpful to the jury to consider the punishments imposed on the co-defendants." But this conclusion was not unanimous. Justice Springer dissented and joined Justice Rose's contrary analysis. 107 Nev. at 254, 810 P.2d at 766. Justice Rose concurred in the judgment but said "[t]he sentences imposed on the other participants in these matters should not have been received in evidence[.]" 107 Nev. at 250, 810 P.2d at 763.

Justice Rose noted that a "majority of the courts that have considered the issue have determined that the sentence imposed on a co-defendant is not admissible at a murder penalty hearing of a defendant." 107 Nev. at 252-53, 810 P.2d at 765 (collecting cases). Illustrative is *Coulter v. State*, 438 So.2d 336, 345-46 (Ala. Crim. App. 1982), stating:

> In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death

> penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him. Simply put, an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense.

107 Nev. at 253, 810 P.2d at 765. The cases cited by Justice Rose dealt with "a defendant's attempt to introduce the penalty assessed against other defendants." 107 Nev. at 253-54, 810 P.2d at 767. But Justice Rose thought this rule, as a rule of general application, to be a better one than the one adopted by Justice Young. "I do not believe the rule established by the majority is the better one or the one that will best serve prosecutors in the future." 107 Nev. at 254, 810 P.2d at 765.

To illustrate, Justice Rose first observed that the "sentence a co-defendant receives at a murder penalty hearing may have little relation to his culpability or involvement in the crime." He noted, for example, that a prosecutor "may offer an attractive deal to one of several defendants to secure critically necessary testimony," or a jury might "assess the least penalty because of a defendant's age or low IQ," or a jury might "impose the greatest penalty on a defendant ... because of that defendant's substantial prior criminal penalty," and so forth. 107

Nev. at 253, 810 P.2d at 765.[14] In Justice Rose's view these types of reasons "renders the penalty assessed against other defendants of only marginal relevance and it inserts a secondary issue into the penalty hearing that detracts from the task at hand—determining the individualized penalty of [the] defendant." *Id.* See also *Cf. People v. Emerson*, 727 N.E.2d 302, 338 (Ill. 2000) (noting that the sentence received by a co-defendant is not a relevant mitigating factor, and that a defendant "does not have a right to present the sentencing jury with evidence of a codefendant's sentence").[15]

Respectfully, Justice Rose had it right. This Court, on revisiting this issue here should disapprove the conclusion reached by Justice Young in *Flanagan*, and approve Justice Rose's analysis for this and future cases.

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[14] And we should not forget that a "death qualified" jury increases "the likelihood that the jury will return, by way of a compromise, the next most severe verdict, life without the possibility of parole." *Schoels v. State*, 114 Nev. 981, 992, 966 P.2d 735, 742 (1998) (Springer, J. dissenting).

[15] One wonders (but not for long) what position the State would have taken had Mr. Harte's co-defendants received sentences of life with the possibility of parole that Mr. Harte wished to present to his penalty jury.

Judge Steinheimer erred in allowing the State to give two closing arguments at the penalty hearing

Standard of Review and Discussion

The Court should review for abuse of discretion. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582 (2005) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998 (2001)).

As noted above Mr. Harte's counsel argued that each side should be allowed to make one closing argument before the matter was submitted to the penalty jury. She reasoned that since the court and the parties agreed that the State no specific burden of proof, but only a goal of persuasion—a goal shared by the defense—it would be fair and just to limit argument as she requested. The State answered that though there was "no case law or statute directly on point," the court should apply NRS 175.141 and the reasoning in *Schoels v. State*, 114 Nev. 981, 966 P.2d 735 (1998), to give it two arguments: an opening close and a closing close. 6JA 921-23. But neither the statute nor the *Schoels* case apply.

First, NRS 171.141 covers the order of trial and commands (by the use of the word "shall"—because the word "shall" is mandatory "and does not denote judicial discretion," *Johnson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 249-50, 182 P.3d 94, 97 (2008)—that certain procedures be followed during a felony jury trial. So for example, at trial the State "must open the cause," but the defense "may" make an opening statement or reserve it; the State "must offer its evidence in support of the charge," but the defense "may" offer evidence in defense; and when closing argument is given the State "must open and conclude the argument." NRS 171.141(1)-(3, (5). This statute recognizes the truism that in criminal jury cases the State carries the burden of proof as to guilt. This statute has no application to penalty hearings where, as agreed to by the court and the parties, the State carries no burden beyond persuasion.

Second, *Schoels* is inapposite. *Schoels* was, at its inception, a death penalty case. In that context the Nevada Supreme Court concluded that NRS 175.141(5) "mandate[d] that the State argue last during the penalty phase *where the death penalty is involved.* 114 Nev. at 989-90, 966 P.2d at 741 (italics added, citation omitted). This makes

sense because during a death penalty sentencing the State carries the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. See *Nunnery v. State*, 127 Nev. ___, ___ n. 9. 263 P.3d 235, 251 n. 9 (2011), cert. denied, 132 S.Ct. 2774 (2012) (recognizing that the United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584 (2002) held "that capital defendants have a Sixth Amendment right to a jury determination that the aggravating circumstances have been proven beyond a reasonable doubt"). See also NRS 175.554(2)(a) (requiring death penalty jury to determine whether an aggravating circumstance or circumstances exist).

Finally, NRS 175.552(4), which is controlling in non-death penalty hearings for first degree murder only requires the jury to determine a sentence of life with or without parole, it does not grant the State dual arguments.

Accordingly, where the State had no burden beyond persuasion it was error for Judge Steinheimer to permit the State to give opening and concluding arguments at Mr. Harte's penalty hearing. Mr. Harte should get a new penalty hearing where each side has one chance to persuade the penalty jury.

Life without the possibility of parole is an excessive sentence and for this additional reason it must be reversed

In *Naovarath v. State*, 105 Nev. 525, 779 P.2d 944 (1989), the Nevada Supreme Court contemplated the meaning of a sentence of without the possibility of parole. The Court observed that "[a]ll but the *deadliest* and *most unsalvageable* of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences." 105 Nev. at 526, 779 P.2d at 944 (italics added). Denial of this "vital opportunity," the Court said, "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and the spirit of [the prisoner], he will remain in prison for the rest of his days." *Id.* (footnote omitted). *Naovarath* dealt with a sentence of life without the possibility of parole for a 13-year-old first-degree murder defendant. While the Court's observation was particularly poignant there, it is no less prescient in the context of this case. To be sure Mr. Harte was convicted of serious offenses, but it begs credulity to say that, because of these convictions, he is among "the deadliest and most unsalvageable" of human beings.

And in fact, he has shown otherwise. Mr. Harte's constructive and positive steps in prison to improve his mind and heart must be acknowledged. As Dr. Piasecki testified, Mr. Harte has "made a deliberate and conscious effort to learn different ways of responding to other people ... [and has identified] ... more progressive or functional approaches to life and has made a conscious decision to change away from the dysfunctional patterns that he had learned in his family." 6JA 842-43.

It is impossible to read this record and not appreciate the fact that 37-year-old Shawn Harte is a far different human being than he was at 20 years of age. Yet the jury—unaware of *Naovarath*'s powerful language —placed him in a category set he does not belong. And in doing so, it sentenced him to a life without hope. This was error. Time, like privacy, can let us "escape the suffocating weight of ... missteps, to reinvent ourselves and be judged as the people we [now] are, not the individuals we once were." *Cf.* Laurence Tribe and Joshua Matz, Uncertain Justice: The Roberts Court and the Constitution 224 (2014). Mr. Harte has changed dramatically and should not be denied the opportunity to one day present his bettered self to the parole board.

VIII. CONCLUSION

In this case, the dual sentence of life without the possibility of parole must be reversed. This Court should vacate and remand for a new sentencing hearing where evidence of the co-defendants' sentences is not allowed, and where both sides have only once side to persuade the sentencing jury.

DATED this 28th day of August 2015.

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CERTIFICATE OF COMPLIANCE

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of August 2015.

/s/ John Reese Petty
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of August 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Washoe County District Attorney

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